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1996 CAMPAIGN FINANCE INVESTIGATIONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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THE 1996 CAMPAIGN FINANCE INVESTIGATIONS

WEDNESDAY, MAY 24, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:22 a.m. in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senators Grassley, Sessions, Torricelli, and Schumer.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. The Senate Judiciary Subcommittee on Oversight will now proceed. The purpose of this hearing is on the Attorney General's decision not to appoint independent counsel.

At the outset, I note that it is regrettable that this inquiry comes in the midst of a presidential election, but it should be noted for the record that strenuous efforts have been made for a long time to answer the questions which we are inquiring into today.

I first broached some of those questions with the Attorney General in this room on April 30, 1997, followed up with a detailed letter the next day on May 1, on the issue of advocacy ads. A memorandum was prepared by Director Louis Freeh of the FBI on November 24, 1997, recommending the appointment of independent counsel, and the Attorney General was requested by letter of December 2, 1997, to make that memorandum available and she declined. The memorandum from Charles La Bella was submitted on July 17, 1998, and 1 week later the Attorney General was requested to make that memorandum available and again she declined.

So the timing is not a matter for this subcommittee, and the three memoranda and other documents have only been produced in response to subpoenas, and then beyond subpoenas to the preparation of a resolution to seek a contempt citation against the people who have not produced the records.

We have heard from Charles La Bella and his recommendation. We will hear today from Mr. Parkinson, General Counsel to the FBI. We will hear today from Mr. Lee Radek, Chief of the Public Integrity Section. We will hear today from Mr. Neil Gallagher, who is Assistant Director for the FBI National Security Division. Re-

grettably, Mr. Esposito cannot be present because of personal matters.

Our inquiry will pick up the details on the Attorney General's decision not to seek independent counsel. The determination stated by the Attorney General on declining independent counsel as to the President and the Vice President, which she did on December 8, 1998, turned on the finding, "the President and Vice President were advised that the issue advertising campaign was lawful and that lawyers were reviewing every advertisement to ensure full compliance with the law."

We will be inquiring into that with reference to a number of witnesses, specifically Mr. Parkinson, who in his memorandum pointed out that there was no advice directly from attorneys for either the President or the Vice President, and both of the attorneys had a specific interest, one being the attorney for the Democratic National Committee and the other being the attorney for the Clinton-Gore campaign. And even one of those attorneys had expressed that advice of counsel defense with substantial reservations.

When the Attorney General declined the appointment of independent counsel as to the Vice President, she did so with the essential conclusion being, "the Government would have to prove beyond a reasonable doubt that at the time he made the telephone calls that were at issue in the 1997 investigation, the Vice President actually knew that the media campaign had a hard money component." Those words and that articulation really sounds in prosecutorial discretion, as opposed to the statutory standard of a reasonable basis to proceed with an investigation, not whether there is the evidence for conviction.

Similarly, key findings of the Attorney General again sound in prosecutorial discretion, "I find the evidence fails to provide any reasonable support for the conclusion that the Vice President may have lied." Further, a little later on, "I conclude that there is no reasonable prospect that these facts could support a successful prosecution," again sounding in prosecutorial discretion as opposed to a statutory standard of a reasonable basis to proceed with an investigation.

The finding on December 8 as to the President and the Vice President did contain language of the Attorney General that she found clear and convincing evidence that the President and the Vice President lacked the requisite specific intent to violate the law. That issue will be a detailed question for this subcommittee's inquiry.

When the Attorney General declined to appoint independent counsel as to the Vice President on November 24, 1998, there was not even that finding made, although it seems to be indispensable in order not to proceed with the appointment of independent counsel, although a real question would exist had the finding been made if there was any basis for that finding.

The Congress amended the independent counsel statute in 1987 to erect what was thought to be a very high barrier for the Attorney General to decline the appointment of independent counsel on the basis of lack of criminal intent. That reason had been used by Attorney General Meese in quite a number of matters, one of the most celebrated involving Edward Smultz. So the Congress went

out of its way to say that was not a basis, unless it was, "clear and convincing evidence." And to repeat, the Attorney General found that in the December 8 finding, but did not find it as to the Vice President on November 24 on the issues of the telephone calls and the criminal intent.

We are going to be starting today's hearing focusing on a memorandum which was written by FBI Director Freeh to Mr. Esposito dated December 9, 1996, which was turned over to the subcommittee last Thursday, May 18. In my legal opinion, this memorandum should have been turned over much, much sooner, and it was turned over only after a resolution had been prepared for a contempt citation.

I saw this memorandum for the first time last Thursday, on the 18. Then it appears in the New York Times and the Washington Post on an Associated Press story the next day, on May 19. And it is very troublesome, this kind of a public disclosure, before this subcommittee even has an opportunity to review the memo and to conduct an inquiry, and it may be a preemptive disclosure to soften the blow.

We intend to pursue that question because there is a certain amount of contempt shown for the Congress, the Senate, the Judiciary Committee, this subcommittee, when a memorandum is not produced for 3½ years and then the day the subcommittee finally gets it, there is a contemporaneous release, or perhaps an earlier release to the news media.

As I said earlier, Mr. Esposito cannot be here today because of personal reasons, and we are going to start the hearing today with an inquiry on this memorandum and then move to a broader subject. And we are going to start here because Mr. Gallagher, who was present at the meeting with Mr. Radek, has commitments to leave the country and has to be out of here at a reasonably early time.

We are handling these documents under the most extraordinary limitations imaginable. It seems as if the Judiciary Committee can't have access to the documents that the newspapers have access to. And these documents could be reviewed only in S–407, which is a rather tortuous process. The room that I spent the last 2 days in is about the size of a telephone booth, and there were four people in it at one time.

And we got these documents released this morning, after 8 a.m., and they still aren't going to be released publicly, although I would like to have them released to the public. I think the public has a right to know what these documents are. But in a convoluted series of proceedings, we do have the authority to use these documents in the hearing, something we didn't even have in the La Bella hearing, questioning him on the basis of a 100-page document without having the document present.

I am going to take a minute or two to read this document because it can't be released otherwise unless it is read at the hearing. To Mr. Esposito from Director of the FBI, dated 12/9/96, subject, Democratic national campaign matter: "As I related to you this morning, I met with the Attorney General on Friday, 12/6/96, to discuss the above-captioned matter. I stated that DOJ had not yet referred the matter to the FBI to conduct a full criminal investiga-

tion. It was my recommendation that this referral take place as soon as possible. I also told the Attorney General that since she had declined to refer the matter to an independent counsel, it was my recommendation that she select a first-rate DOJ legal team from outside Main Justice to conduct the inquiry. In fact, I said that these prosecutions should be 'junkyard dogs,' and that in my view, PIS, "Public Integrity Section," was not capable of conducting the thorough, aggressive kind of investigation which was required. I also advised the Attorney General of Lee Radek's comment to you that there was a lot of 'pressure' on him and PIS regarding this case because the Attorney General's job might hang in the balance, (or words to that effect.) I stated that those comments would be enough for me to take him and the Criminal Division off the case completely. I also stated that it didn't make sense for PIS," Public Integrity Section, "to call the FBI the 'lead agency' in this matter while operating a 'task force' with DOC IG's," referring to Department of Commerce Inspectors General, "who were conducting interviews of key witnesses without the knowledge or participation of the FBI. I strongly recommend that the FBI and hand-picked DOJ attorneys from outside Main Justice run this case, as we would any matter of such importance and complexity. We left the conversation on Friday with arrangements to discuss the matter again on Monday. The Attorney General and I spoke today and asked for a meeting to discuss the 'investigative team' and hear our recommendations. The meeting is now scheduled for Wednesday, 12/11/96, which you and Bob Litt will also attend. I intend to repeat my recommendation from Friday's meeting. We should present all of our recommendations for setting up the investigation, both AUSAs," Assistant U.S. Attorneys, "and other resources. You and I should also discuss and consider whether, on the basis of all the facts and circumstances, including Huang's recently released letters to the President, as well as Radek's comments, I should recommend that the Attorney General reconsider referral to an independent counsel. It was unfortunate that DOJ declined to allow the FBI to play any role in the independent counsel referral deliberations. I agree with you that, based on DOJ's experience with the Cisneros matter, which was only referred to an independent counsel because the FBI and I intervened directly with the Attorney General, it was decided to exclude us from this decisionmaking process. Nevertheless, based on information recently reviewed from PIS/DOC," Public Integrity Section/Department of Commerce, "we should determine whether or not an independent counsel referral should be made at this time. If so, I will make a recommendation to the Attorney General. The Attorney General has been quoted as saying that she did not remember being told by Mr. Freeh that she and Mr. Radek should recuse themselves after he complained of pressure to scuttle the probe. She said she talked with Mr. Freeh about Public Integrity on a continuing basis, but did not remember comments concerning pressure on her or the Department."

We will need to have, obviously, the Attorney General's testimony at a later stage on a wide range of issues, and specifically this conversation, at least as reported in this memorandum. And Director Freeh has forcefully stated his desire not to testify even with a subpoena, and I have just as forcefully replied that I

thought he was an indispensable witness. That was before this memorandum came to light, and in view of the Attorney General's contradiction or disagreement with the Director's memorandum, there is no doubt in my mind, at least, that he will have to testify about that point.

We have Mr. Radek and Mr. Gallagher here. Mr. Radek was quoted as well in the press, but he is here and can speak for himself. And I have asked the FBI to make Mr. Esposito available during the week of June 5. We have a recess next week—preferably on the 7, which is a Wednesday; if not, on a Tuesday. We will have to coordinate that schedule with the ranking member and the full committee on their schedule.

Senator Torricelli.

Senator TORRICELLI. I would like to yield to Senator Schumer at this time, if I could, Mr. Chairman.

Senator SPECTER. Well, Senator Schumer is entitled to his own time, but so be it.

Senator SCHUMER. I have a scheduling problem.

Senator SPECTER. Well, let the record show Mr. Schumer was waiting here a while. He must have something to say.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you. I appreciate it, Mr. Chairman, and I appreciate my friend from New Jersey's courtesy in yielding. I do want to say something today that has been gnawing at me for some time, and it is time I just came forward and said it.

What I want to say is simply this, that I believe in the integrity of Janet Reno. I have gotten to know the Attorney General over the last 7 years. I have listened to her testify countless times. I have sat across the table from her in negotiating sessions, sometimes as an ally and sometimes not. I have looked her dead in the eye and I have debated with her. We have agreed and sometimes we have disagreed.

Right now, we are in a pretty vociferous dispute on Indian land claims litigation in upstate New York. But through all of this, whether we have agreed or not, she has always been honest. She has always made her decision on the merits of every issue that faced her, at least the best I can tell.

Now, I could go into the substantive proof of the Attorney General's integrity—the large number of independent counsels she has appointed, the many times she has come and testified on the myriad of issues that Congress has asked her to explain and done so in a straightforward manner, the straightforward way in which she handles the sometimes politically unpopular positions she takes because she thinks that, on the merits, these are the right positions.

But I will say this instead. Beyond all of the issues and all of the partisan wrangling and all the hearings and legislative scuffles we have had over the last 7 years, all of the "who is right" and "who is wrong," all of the finger-pointing and laying blame—beyond all this, in quieter moments, I think we all make judgments about an individual's character based largely on instinct. We make gut decisions about people, and that is why I came today.

In my gut, I believe in Attorney General Janet Reno's integrity. She is one of the most honest and straight-shooting people I have ever dealt with in more than 25 years in politics. It is not my opinion alone. To quote the FBI Director, Louis Freeh, on this issue he said, "I have tremendous respect for our Attorney General. I have tremendous affection for our Attorney General. I do not believe for one moment that any of her decisions, but particularly her decisions in this matter, have been motivated by anything other than the facts and the law which she is obligated to follow. If I thought anything differently, I wouldn't be sitting here as FBI Director."

I know that this hearing, Mr. Chairman, is not directly about the Attorney General. It is about differences of opinion between the FBI and DOJ. I have great respect for both. I have great respect for Louis Freeh, who is my fellow New Yorker and a friend.

Senator TORRICELLI. Jersey City.

Senator SCHUMER. Mr. Torricelli says Jersey City, which is sort of New York.

But in any case, the differences here about the opinions between the FBI and DOJ on complicated legal issues related to the appointment of independent counsels in 1996 and 1997 are a legitimate matter for this subcommittee to look into, no question about it. But at the end of the day, I dare say some will agree and some will disagree and some will say, wow, it is a tough decision, there is a big gray area there.

And once again, the Attorney General will either be in favor with the administration or out of favor with the administration. There have been lots of ups and downs of that over the last while, and the same can be said of my colleagues on the other side of the aisle. At times in her career, they have praised her as a person of integrity who stands up to the administration. Other times, they have attacked her.

But whatever the members of this committee ultimately conclude, I hope I can convince this committee that the Attorney General's decision was based on her very best evaluation of the law and the facts. That is the way she makes all of her decisions, with integrity, with honesty, on the merits, and nothing else. And sometimes it pleases one side and sometimes it pleases the other.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Schumer.

Senator Torricelli.

STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator TORRICELLI. Thank you, Mr. Chairman, very much. Mr. Chairman, I have believed that this committee in holding hearings with regard to Wen Ho Lee and Peter Lee and a variety of other matters has provided a very useful service. There clearly were problems with the administration of justice and there were, in my judgment, some compromises in the national interest.

I am less certain that this review of the enforcement of the campaign finance laws and the investigation of the 1996 campaign is serving a useful purpose. It has been 4 years since the Clinton-Gore campaign commenced and then concluded operations. That campaign has been the subject of extensive congressional hearings

and prolonged Justice Department investigations through a variety of avenues in a number of venues.

The central difficulty remains that the campaign finance laws of the United States are in a virtual state of collapse. As much or more than any member on this panel or perhaps in this institution, I am involved in those campaign finance laws as the Chairman of the Democratic Senatorial Campaign Committee.

A series of court decisions, actions by the Justice Department, and both action and inaction by this Congress have for all practical purposes left the United States without a comprehensive or comprehendible system of campaign finance laws. It is not therefore surprising that the Clinton-Gore campaign and the Republican National Committee and the Democratic National Committee at times find themselves in some conflicts of interpretation.

What remains before the Justice Department, however, is whether there were some actions by central participants, including the President and Vice President, or a conspiracy at any level to evade those laws which remain clear and comprehensible. I believe that the evidence is overwhelming that that simply did not take place.

Mr. Radek's memo of November 20, 1998, I think is central to our discussions, "The evidence is clear and convincing that the President and the Vice President lacked any intent to violate the law in connection with the DNC issue ad campaign and reasonably believed that an ad campaign was lawful, and that the DNC and Clinton-Gore counsel reviewed every ad to ensure compliance with the law."

Indeed, I believe, in support of Mr. Radek's conclusion, the actions of the Clinton-Gore campaign, while not meeting the model of what many of us would like the campaign finance laws to be, indeed were acting within current interpretations of the political culture of the country and on the best advice of counsel. Their actions indeed would not be atypical with what was taking place in the Republican or the Democratic National Committee, or any other campaigns being conducted on a large scale at that time.

The question then turns on whether or not the Justice Department approached this issue itself with the proper integrity and with a dispassionate review. I believe the best evidence on that fact comes from that famous citizen of Jersey City, Mr. Freeh, who, as was quoted earlier by Senator Schumer, said, "The FBI is not being impeded in any way in conducting our investigation. No investigative avenues have been closed and nothing has changed as a result of the decision last Tuesday not to seek an independent counsel. The task force was formed last December. Their marching orders are to go wherever the evidence may lead."

Mr. Lantos had asked, "Do you have any doubts about Ms. Reno's integrity?" Mr. Freeh: "No, sir." Mr. Freeh then went on to say that she meets the standard, and exceeds it, of an Attorney General. Mr. Lantos then asked, "If the Attorney General declined to appoint independent counsel, did the ongoing investigation come to a grinding halt?" Mr. Freeh: "No, sir, it did not impede it at all."

Finally, on August 4, 1998, Mr. Freeh said, "I do not believe for one moment that any of her," speaking of the Attorney General, "decisions, but particularly her decisions in this matter, have been

motivated by anything other than the facts and the law which she is obliged to follow."

I believe that is overwhelming, it is strong, and it is conclusive. Reasonable people could differ, but what remains central is that an investigation occurred professionally, apparently properly staffed and funded, and has been ongoing. It has not yet come to a conclusion 4 years later.

We are now in the midst of another national election. The campaign finance laws are not only not clear, they are worse—new court decisions, new interpretations, and even less actions by the Congress has corrected this myriad of laws. I do not believe we are serving any great national purpose. The time of this Congress should be spent in rewriting these campaign finance laws and giving clear guidance to those of us who must live and operate under them.

I have reviewed many of these memoranda, admittedly not as many as Senator Specter. I will conclude by giving my own views about having reviewed Mr. La Bella's. Mr. La Bella may be an accomplished prosecutor. He may have a good command of the law. I found his analysis of the White House operations and the Clinton-Gore campaign to be sophomoric and remarkably lacking in understanding of the American political culture at this point in our history. He was expressing shock at things which most interns in political campaigns would find a normal course of events, not in legal violations, but in organization and operation of campaigns.

I do not know Mr. Radek and I hold no brief for Ms. Reno. I have been among those in this institution, which includes almost everyone, who has criticized her when she didn't agree with me and praised her when she did. I have more often than most of my colleagues disagreed with her. Having read all these items over numerous hours, I cannot conclude anything but that she was vigilant, defended the public interest, was aided enormously by Mr. Freeh; that there were reasonable differences of opinion with the Department of Justice and the FBI, but that each of the participants seems to respect the judgment of the other and generally seem to be content that justice was done.

If it were otherwise, I would say so. I did with Peter Lee, I did with Wen Ho Lee. I do not think the Department of Justice or the FBI properly represented the interests of the American people in those cases. In this instance, I believe there are problems. There are problems with the law, there are problems in the political culture.

But I cannot conclude that any of the central participants themselves engaged in anything other than what Mr. Radek has outlined in his memorandum, not to suggest as Mr. Freeh did in his own memorandum that there were not a myriad of what he simply concluded were opportunists who violated laws that were clear and brought embarrassment to the President and the Vice President and the political system.

Mr. Chairman, I do, however, look forward to the hearing and the testimony and hearing from our witnesses.

Thank you.

Senator SPECTER. Thank you, Senator Torricelli.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I recall the old maxim that justice grinds slow, but exceedingly fine. I do not agree that this was a well-run investigation. It was fitfully conducted with interruptions repeatedly from the Public Integrity Section and the FBI. And Mr. La Bella, who was brought into this case to be the person to provide some integrity and leadership, was being demeaned, not even being allowed to ask the Vice President questions on one occasion, and not even being in the room another time that he was interviewed.

This has not been a good investigation, and it is shocking and surprising to me, and disappointing to me really, to see that the FBI Director went to the extent, and had to go to the extent, and rightly so, to ask that the Public Integrity Chief and the Attorney General recuse themselves from this investigation because he indicated they could not do their job. In fact, their job was on the line if they were to proceed with an investigation aggressively. That is a stunning, stunning event that ought to shock all of us.

If there is any doubt about the integrity of Public Integrity, who can we trust in the Department of Justice? So I feel real strongly about that and find this to be an unacceptable way this investigation has been conducted. And I am glad that you are finally producing some of the documents that are establishing what has gone on here.

I would say this, that the truth is going to show, in my view, that there were interferences with this investigation by the Public Integrity Section that stopped the investigation of the FBI and others from proceeding in a normal course, stopped the U.S. attorney's office in California from proceeding in a normal course. All the time, we were being promised that they were steadfastly seeking to get the truth in this matter. So, Mr. Chairman, I would express my appreciation for your leadership. It is a thankless task. It is nothing that gives any of us any pleasure.

I will add one more thing about the Attorney General. I remember 2 years ago, I believe, in this room, maybe 3 years ago, and I reminded her when we were raising the question of the need for an independent counsel that she served at the pleasure of the President of the United States. That angered her and she did not like that, but that is a plain fact.

The Attorney General was called upon to investigate the person who could remove her from office just like that, and that is why an independent counsel should have been appointed. That is why the chairman of the Judiciary Committee repeatedly called on her to do so. That is why the FBI Director did so, and that is why his memorandum supported it.

It is not a light and trivial matter. It was a very big deal. In terms of the cases where independent counsels were appointed, I think it was trivial compared to this one. This was the mother lode, this was the big deal, and this was the one she refused to give up. And now we have this mess. Now, we have a mess, in an election cycle, a matter that should have been cleared up by an independent evaluation by an independent truth organization that could have

clarified the issues and have it over now. But it is not going away. We are going to get to the truth of this matter.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Sessions.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I commend you for your persistence. You are always running into road blocks. You seem to have a way of, one way or another, getting around these road blocks. The obstacles keep coming, but you are very persistent in pursuing the constitutional mandate of oversight of the executive branch.

Today's oversight activities require the answer to a simple question: who in the Justice Department makes decisions about the merits of cases involving allegations of misconduct by senior public officials? The question arises because of the recommendations made by Mr. La Bella. He wanted to appoint an independent counsel. Unfortunately, the big wheels at the Justice Department overruled the merits of the case. They ignored the wisdom of career prosecutors. Some career prosecutors were so disgusted by these decisions that they quit.

It looks like the Public Integrity Section at the Justice Department just dropped the ball. It looks like Public Integrity ignored all the facts. It ignored the evidence, it ignored the advice of experts, it ignored the recommendations of career prosecutors and the FBI.

This subcommittee has examined documents on Mr. Radek's decision. These documents suggest that Mr. Radek may have decided that the La Bella memo posed a threat to Attorney General Reno's tenure. Mr. Radek's concerns were also reported in the media, and I hope that this issue gets the scrutiny it deserves.

It seems like the Public Integrity Section needs a wake-up call. It is supposed to be staffed by civil servants, not partisan politicians. In the past, I have dealt with the Public Integrity Section and its Chief, Mr. Radek. I am pleased that Mr. Radek is here today.

On May 1, 1997, I referred campaign finance-raising matters to Justice. It concerned Mr. William Brandt, the head of a company in Chicago. The company invited banking institutions to a September 17, 1996, $10,000-per-couple Democratic fundraising reception and dinner. It was held in Mr. Brandt's home. The invitation listed the Chairman of the National Bankruptcy Review Commission as the guest of honor. Mr. Clinton attended this fundraiser.

My staff received numerous calls from banking institutions. These were the complaints: the callers objected to the suggestion that attendance was an opportunity to influence the chairman's decisionmaking on pending issues. To their credit, some of the bankers declined the invitation. They declined on ethical grounds.

I, too, became very concerned about the propriety of this event. It is illegal to link campaign contributions to pending legislation. It doesn't matter which political party is sponsoring the event; it is not right and it is illegal.

There are stark contradictions in Mr. Brandt's explanation of this event. He told the subcommittee one thing and he told his banking associates something entirely different. The difference in the two stories is like night and day. My staff has documents that prove Mr. Brandt attempted to exert inappropriate pressure. He exerted pressure by requiring attendance in exchange for support on bankruptcy issues. Those same issues were about to be considered by the Bankruptcy Review Commission.

My staff provided Public Integrity solid evidence that Mr. Brandt may have made false statements to Congress in violation of Federal law. The evidence given to Mr. Radek was backed up with exhibits and witness statements supporting the allegations. It took 2 years and 4 months to get an answer, and that answer, Mr. Chairman, was a non-answer. The non-answer is contained in a letter dated August 9, 1999.

According to press reports, this letter came 2 weeks after Mr. Brandt's company donated $20,000 to the Democratic National Committee. The Justice Department's response was not only long overdue, it was also unresponsive, and it may have been tainted by campaign monies. The two-paragraph response from Mr. Radek simply said the allegations had no merit. Mr. Radek apparently came to this conclusion with no evidence. He didn't interview important witnesses, he didn't interview attendees at fundraisers. It looks like Mr. Radek dropped the ball.

For the record, on March 22, 2000, I referred another case to Mr. Radek for investigation. This one involves the current Director of the Defense Criminal Investigations Service, Mr. John Keenan. Mr. Keenan directs a Federal law enforcement agency; he is a Federal law enforcement officer. Official records indicate that he personally returned 11 confiscated handguns to a convicted felon who was on supervised probation.

Mr. Keenan's actions were in direct violation of a Federal court order. They may have violated Federal statutory law. Worst of all, they put a U.S. probation officer in harm's way. These allegations were also referred to Mr. Radek's office by the Chief of the Criminal Division of the U.S. Attorney's office, Eastern District of Virginia.

I hope that Mr. Radek's response in that case will be uncharacteristic of our previous dealings. I expect to receive a prompt response and I expect a thorough examination of all the facts. I hope that the response is not dismissive of the facts referred by the U.S. Attorney, as they apparently were in the case of the La Bella memo. I also hope that a response from Public Integrity is not influenced by campaign money or political considerations. I hope that Mr. Radek doesn't drop the ball this time.

Senator Specter, my staff is in regular contact with line attorneys and with the inspector general community. These contacts pertain to numerous issues of misconduct involving high-ranking Government officials. They feel, as I do, that the Public Integrity Section at Justice does not have a good reputation. It has a reputation for ignoring the facts and disregarding evidence.

Like the U.S. Office of Special Counsel, it has become a burial ground for allegations of misconduct by senior officials. This reputation, by the way, pre-dates the Clinton administration. The mis-

sion of the Public Integrity Section should be rigorous, impartial oversight, regardless of which party is in power. Politics have no place in the Public Integrity Section.

So, Senator Specter, I thank you for your time and look forward to exercising oversight of the Public Integrity Section at Justice.

Senator SPECTER. Thanks very much, Senator Grassley.

By way of just a comment or two as to what Senator Torricelli has said, that he is, "less certain that we are serving a useful purpose here," and we are not serving any great national purpose—we should be doing legislating—I agree that we ought to be doing legislating, and I have introduced a statute on campaign finance reform myself, and supported McCain-Feingold. There is plenty of time to do legislating and to do oversight.

When Senator Torricelli characterizes the Attorney General as vigilant, I am prepared to reserve judgment on that until we examine the details of these oversight proceedings. Speaking for myself, I am not prepared to make a conclusion about that.

When Senator Torricelli says that Mr. La Bella was sophomoric, I have to disagree with him, having had some experience as a prosecutor. I am sorry that that document is not in the public domain so that the American people can draw their own conclusions about the quality of his investigation. I would say that his report was cum laude, maybe magna cum laude. But that is something which is going to have to be judged in a broader context than by this subcommittee, and only the public disclosure of that memorandum will be able to accomplish that.

The issue of the Attorney General's integrity is not one which I personally challenge. The issue as to whether there was an appropriate judgment on independent counsel is the principal concern. The Director's memorandum does raise the integrity issue, but it is a memorandum of a conversation involving Mr. Radek, not the Attorney General. And we can't really review that until we hear from the Attorney General, and that we will do.

Mr. Radek, would you step forward, please, and raise your right hand? Do you solemnly swear that the testimony you will present to this subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. RADEK. I do.

Senator SPECTER. Mr. Radek, please be seated. You have a prepared statement. You may proceed at this time as you choose.

STATEMENT OF LEE J. RADEK, CHIEF, PUBLIC INTEGRITY SECTION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. RADEK. Thank you, Senator. I apologize for the format of my printed statement, Mr. Chairman. It was prepared late. I also apologize for the way I am going to read it because I didn't have time to put it into geezer print for myself, so if you will bear with me just a moment, please.

Good morning, Mr. Chairman and members of the subcommittee. I am here today in response to your request to testify about matters relating to the Independent Counsel Act and its application to campaign finance matters. Before we get into the substance of those matters, I would like to correct some of the misstatements

that have been made about who I am and what my role is within the Department of Justice.

I am and always have been a non-political career prosecutor. Including my military service, I have more than 30 years of service in the Federal Government, spanning six administrations and 10 Attorneys General. I joined the Justice Department in 1971 through the Attorney General's Honors Program. For 5 years, I served as a trial attorney in the Criminal Division, dealing with labor racketeering and legislation.

In 1976, I was selected to assist in the formation of the Public Integrity Section, where I served as a line prosecutor for 2 years. In 1978, I was selected to become Deputy Chief of the Public Integrity Section, a position I held for 14 years. In 1989, I was detailed to be part of the prosecution team that handled the Ill Wind investigation into Defense procurement fraud and corruption. As part of that assignment, I became a Special Assistant U.S. Attorney in the Eastern District of Virginia. In 1992, I was selected to be the Director of the Asset Forfeiture Office in the Criminal Division, and in 1994 I returned to Public Integrity as Chief, where I have served for 6 years.

As Chief of the Public Integrity Section, I have supervised the investigation and prosecution of public officials at the local and State levels for the commission of Federal crimes, and of officials in the judicial, legislative, and executive branches of the Federal Government.

Historically, the Public Integrity Section was also charged with the primary responsibility for conducting the necessary preliminary investigations under the Independent Counsel Act, and providing the Attorney General with the necessary facts to permit her to make the decisions entrusted to her under the Act.

With respect to matters that involved campaign financing in the course of the 1996 election, the Section discharged that responsibility jointly with the Campaign Finance Task Force. It was also the practice of the Attorney General to seek out the views and recommendations of a variety of advisers concerning key decisions under the Act. I routinely provided her with my recommendations in the course of that process at her request.

With respect to the recent independent counsel decisions involving campaign finance, I was one of many people who gave the Attorney General recommendations. Sometimes she followed my advice, sometimes she didn't. At the end of the day, it was the Attorney General who made those decisions, as is required by the statute. And the reasons for her decisions are set forth on each of these specific investigations in detailed, formal filings made with the court, some of which you read from this morning, Mr. Chairman.

The Department has obtained permission from the court to have those filings unsealed and disclosed to the public, and a complete set of the filings has been provided to this subcommittee. Any concerns the subcommittee might have as to whether the Independent Counsel was properly applied in these matters should focus on the analysis and reasoning relied upon by the Attorney General and set out in those findings.

It has been widely known for some time that there were internal disagreements among various officials on a number of independent

counsel issues, particularly with respect to issues raised in the so-called La Bella memo. This, of course, is hardly surprising and certainly not new. Internal disagreements among Department of Justice officials about various aspects of the Independent Counsel Act date back to its passage over 20 years ago.

What is new is the determination of some to delve into those confidential discussions and disagreements that were intended as an honest and frank exchange of views between the Attorney General and her various advisers. I disagreed with some of Mr. La Bella's recommendations, and you have copies of my memoranda in which I set forth my disagreements and the reasons therefor. But I also agreed with Mr. La Bella on many occasions during the time that we worked together. We were both non-political career prosecutors. We had different interpretations of some aspects of the Independent Counsel Act, but I certainly agree with his recent statement that the internal debate within the Department was never about politics and that nobody at the Department was politically protecting anybody.

Similarly, with Director Freeh, I may not have always agreed with him on legal issues, but I agree with his congressional testimony where he said, "I do not believe for one moment that the Attorney General's decision, particularly her decision in this matter, may have been motivated by anything other than the facts and the law which she is obligated to follow."

Finally, I think it is important that although I am willing to answer your questions about my internal recommendations on independent counsel matters, I do so reluctantly because I believe that the public airing of confidential deliberations relating to sensitive criminal investigations will inevitably chill frank and candid advice, especially from non-political career prosecutors and supervisors.

When career officials avoid making unpopular recommendations for fear of being publicly criticized in a political arena, the administration of justice suffers. While Congress no doubt has legitimate oversight interests in connection with the Independent Counsel Act, I hope that as much as possible this subcommittee will focus on departmental policies and the actual decisions that were made by the Attorney General and not the internal details of who gave what advice on any particular matter.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Mr. Radek. The subcommittee is sensitive to the issue of internal deliberations. We are able to exercise our oversight responsibilities only if we do look at the reasons behind what the Attorney General has decided, and that involves a careful analysis of voluminous documents, and that also involves a supplementing of those analyses by talking to people have been a party to those recommendations, and really a part to those decisions.

And we have been circumspect in limiting our inquiries on so-called line attorneys only where indispensable, and the objection has been made by the Attorney General to line attorneys, but not to people in other categories, such as yourself. And the precedents are clear that the Congress has oversight authority on matters of this sort, matters which are closed, and even as to pending crimi-

nal investigations because of our responsibility to see to it that the laws are faithfully executed. But we are sensitive to the concerns which you have expressed, and we are also sensitive to our own responsibilities.

Mr. Radek, you were in the hearing room and heard me read the memorandum from Director Freeh to Mr. Esposito. What did occur on the conversation between you and Mr. Esposito where Mr. Gallagher was present, if you would set the time frame as best you can, the locale?

Mr. RADEK. I can say that the date of this memorandum and the date that it attributes to the conversation was very early on, before the task force really had any form.

Senator SPECTER. Do you have a copy of the memorandum before you?

Mr. RADEK. I do, yes, Mr. Chairman.

Senator SPECTER. Fine.

Mr. RADEK. I can say that I have no recollection of the conversation, so it is very difficult for me to discuss what words I may have said or what I may not have said. And that may be one reason why the quotation of mine which you referred to is so contorted. It is very hard to say you didn't say something in a conversation——

Senator SPECTER. The quotation was so what?

Mr. RADEK. Contorted in the press, the fact that I—what it said was I have no recollection, but I wouldn't have said it because it has no basis in fact. That is because I don't recall——

Senator SPECTER. I didn't refer to your comment as contorted.

Mr. RADEK. No. I was referring to it as contorted. I said——

Senator SPECTER. I didn't refer to your comment at all because you are here and you ought to have the benefit of expressing yourself without any characterization from me or anyone else until you have commented.

Mr. RADEK. Not to bicker, Mr. Chairman, you said I had a quote in the paper.

Senator SPECTER. Yes.

Mr. RADEK. And I was saying that that quote was contorted. I was characterizing it and I was not accusing you of characterizing it.

The quote, which is accurate--it is what I said, but it is contorted because I don't remember a conversation on this subject with Mr. Esposito at all. And now I have learned that Mr. Gallagher was supposedly present, and it still does not refresh my recollection as to having any conversation with the two of them on this subject.

I may well have had discussions with them on this subject. I simply don't recall this conversation. I can tell you that the statements attributed to me in the press were certainly not said by me because I never would have said that there was pressure on me not to go forward with the investigation, which is something that the press carried that is not in this memorandum, a phrase "not to go forward." And I can tell you that I would never, and I am sure I never did link up the Attorney General's job status with the pressure that was on the Public Integrity Section.

Senator SPECTER. Mr. Radek, at the time of this memorandum, early December 1996, the Attorney General had not yet been re-

appointed, and it was the talk of the town that there was an issue as to whether she was to be reappointed, correct?

Mr. RADEK. That is correct.

Senator SPECTER. And a good bit of that conversation turned on how she would treat the President and other ranking administration officials with respect to appointment of independent counsel.

Mr. RADEK. I recall press speculation that the possibility of her being the Attorney General into the second term might be being held up because the White House was concerned about the way she was doing her job, including this campaign finance investigation. I recall press speculation to that effect, Mr. Chairman.

Senator SPECTER. Well, was there anything that was of concern to the White House in the press speculation besides the campaign finance matters?

Mr. RADEK. I think there may have been any number of things. I think the press usually referred to it as independent counsel issues, but——

Senator SPECTER. There may have been any number of things. Can you recollect any?

Mr. RADEK. No, I can't. Again, it seemed to me that the discussion included campaign finance, but wasn't limited to that. I am trying to recall what was in the paper 4 years ago, so I don't have a clear recollection of it.

Senator SPECTER. Well, you do recall the discussion about the campaign finance investigation and the issue of whether independent counsel would be appointed to investigate the President or the Vice President?

Mr. RADEK. Yes, sir.

Senator SPECTER. And you don't recall anything specific about any other issue, but you think there may have been, was the word you used?

Mr. RADEK. I think that there was—again, I am trying to recall what was in the paper 4 years ago, so forgive any inaccuracy. But my best recollection is that there was speculation in the press that any number of independent counsel decisions that the Attorney General may have been engaged in were unpopular with the White House. But, again, it was press speculation. There was no official word coming out of anywhere.

Senator SPECTER. You say that you have no recollection of this conversation which Mr. Esposito had reported to FBI Director Freeh, according to the Director's memorandum, correct?

Mr. RADEK. That is correct, sir.

Senator SPECTER. Well, in the face of this contemporaneous memorandum, would you deny that such a conversation occurred where the word "pressure" was used?

Mr. RADEK. To the contrary, I would undoubtedly, in conversations with Mr. Esposito, talk about pressure on the Public Integrity Section at frequent occasions whenever he and I would talk.

Senator SPECTER. What kind of pressure on the Public Integrity Section would you discuss with Mr. Esposito?

Mr. RADEK. Thank you for the opportunity to answer that, Mr. Chairman. It was pressure to do the job, and do it well.

Senator SPECTER. Well, we are going to give you every opportunity to answer a great many questions——

Mr. RADEK. I appreciate it.

Senator SPECTER. [continuing.] And an opportunity to speak to subjects on which there are no questions, so that you have the full opportunity to state your position.

Mr. RADEK. Let me say it again, to do the job, to do it vigorously, and to do it well.

Senator SPECTER. Well, you say that there were other conversations relating to pressure on the Public Integrity Section?

Mr. RADEK. At this particular time, and later, I was quite willing to describe the situation in the campaign finance investigation as being a pressure cooker on the Public Integrity Section. We were being scrutinized by the Congress, by the media, and by the Attorney General all to do a good job, and it was a lot of pressure. It was an unusual situation.

Senator SPECTER. Well, what pressure did you get from the Attorney General?

Mr. RADEK. I got pressure to do a good job, and to do it well. One of our greatest fears was that the Attorney General or the media would find a fact before our investigators did, and then we would have to explain why we hadn't found it. And so were scrambling around to learn as much as we could as fast as we could.

Senator SPECTER. The media is pretty good at finding facts?

Mr. RADEK. They are.

Senator SPECTER. Pretty good at finding memoranda?

Mr. RADEK. They seem to be, yes.

Senator SPECTER. Do you know, speaking of that, how the media got a hold of this memorandum before the subcommittee did?

Mr. RADEK. Absolutely not. It certainly wasn't from me.

Senator SPECTER. So when this memorandum refers to the word "pressure," that is a word that you might well have used in the context of lots of pressure on the Public Integrity Section?

Mr. RADEK. Yes, sir.

Senator SPECTER. And how about the reference in this memorandum to the Attorney General's job might hang in the balance, or words to that effect?

Mr. RADEK. Again, I do not recall the conversation. These are not words that I would use. I can't think of a time when I was concerned or discussing whether the Attorney General's job was hanging in the balance, and it is certainly not with relation to the pressure on the Public Integrity Section. The "because" in this memo is a mischaracterization. And I don't know whether it is Mr. Esposito's mischaracterization or Mr. Freeh's mischaracterization, but in no way would I have ever said, again not remembering the conversation, that the pressure on the Public Integrity Section was related to her job status. I didn't feel that. I don't believe it. It would have been false, and I wasn't in the habit of lying to Mr. Esposito or Mr. Gallagher.

Senator SPECTER. Not in the habit of what?

Mr. RADEK. Lying to Mr. Esposito or Mr. Gallagher.

Senator SPECTER. Lying?

Mr. RADEK. Yes, because it would be a lie if I said that the two were related.

Senator SPECTER. It would be a lie?

Mr. RADEK. Yes, sir.

Senator SPECTER. If you said the Attorney General's job was on your mind at all with respect to the pressure on the Public Integrity Section?

Mr. RADEK. It would be a lie if I said there was pressure on the Public Integrity Section because the Attorney General's job hanged in the balance, which is what this memo quotes me as saying.

Senator SPECTER. Well, so what you are saying, Mr. Radek, is that even though you do not have a specific recollection of the conversation and you have a contemporaneous memorandum which is very specific on the Attorney General's job being on the line, you never said anything to that effect?

Mr. RADEK. Mr. Chairman, there is a reason for hearsay rules. I have a memorandum prepared by a person to the person who had the conversation with me which characterizes my words in a way that I believe are inaccurate.

Senator SPECTER. Well, this is a hearsay memorandum. That is true. Mr. Gallagher is about to testify in support of it, and Mr. Esposito is due to be a witness and there is every reason to expect that he will testify in support of it as well.

Let me come back to my question which I don't think you directly answered, and that is in the face of your not recollecting the conversation and in the face of a contemporaneous memorandum that the Attorney General's job might hang in the balance, or words to that effect, are you denying that any such statement was made by you?

Mr. RADEK. I am not sure, Mr. Chairman, and I don't want to quibble, that you characterize this memorandum accurately. So let me say what I deny, and that is what is contained in this memorandum. I am certain, although I have no recollection, that I never said that there was a lot of pressure on me and the Public Integrity Section regarding this case because the Attorney General's job might hang in the balance, or words to that effect, which is a direct quote from the memorandum.

Now, I may have said that we were under a lot of pressure and I may well have said that her job status was questionable because both of those things were true. What I never would have done was to relate them and to say that her job was in jeopardy because of—or that I was under pressure because her job was in jeopardy. It just is not something I would have said.

Senator SPECTER. Well, let's explore your statement just now that you might have said that her job status might have been in jeopardy. Did you make a comment to that effect?

Mr. RADEK. I don't recall the conversation at all, but as you and I have just discussed, it is true that at the time she was waiting to hear whether she was going to be into the second term of this administration, be the Attorney General, and so that subject may well have been discussed. What would not have been said by me was that that was the cause of the pressure on me.

Senator SPECTER. All right. So you are saying that the subject may well have been discussed that the Attorney General's job was in jeopardy?

Mr. RADEK. It may well have. Again, I don't recall.

Senator SPECTER. May well have discussed that the Attorney General's job was in jeopardy?

Mr. RADEK. It may well have. I don't recall. The words "hangs in the balance" do not sound like anything I would say.

Senator SPECTER. Well, the memorandum says "words to that effect." But you are saying that there may have been a discussion that the Attorney General's job may be—you said at that time the Attorney General's job may be in jeopardy?

Mr. RADEK. That is possible, yes.

Senator SPECTER. Possible. And you do believe that there may well have been a discussion about pressure on the Public Integrity Section?

Mr. RADEK. Yes, sir.

Senator SPECTER. So your narrow line of denial is a connection. Is that accurate?

Mr. RADEK. This is not a narrow line of denial, Senator. I am trying to describe to you what my thoughts were and what I might have said.

Senator SPECTER. Well, let's take out the word "narrow." The line of denial is that although you may have said that there was pressure on Public Integrity and you may have said the Attorney General's job may be in jeopardy, you did not connect the two.

Mr. RADEK. That is correct.

Senator SPECTER. Senator Torricelli.

Senator Torricelli. Thank you, Mr. Chairman, very much.

Mr. Radek, there is at least the suggestion that as the head of the Public Integrity Section, you might have been complicit in action or silence to the political benefit of President Clinton or Vice President Gore and the Democratic National Committee.

You were appointed to your position by President Clinton?

Mr. RADEK. No, sir. I was selected for my position by a Senior Executive Service merit board, and on their recommendation I was appointed, I believe, by——

Senator TORRICELLI. Which appointments have you received from President Clinton?

Mr. RADEK. None, sir. I have never sought or received political office.

Senator TORRICELLI. And you have just started in the Justice Department under a Democratic administration?

Mr. RADEK. I started under the Nixon administration.

Senator TORRICELLI. You have served in Democratic and Republican administrations for how many years?

Mr. RADEK. Twenty-nine.

Senator TORRICELLI. Was this suggestion made about the role you have played because of a longstanding relationship you have with the President?

Mr. RADEK. I have no relationship with the President, sir.

Senator TORRICELLI. Could it be because you have had an active involvement in Democratic Party politics?

Mr. RADEK. I have certainly never been involved in Democratic Party politics.

Senator TORRICELLI. Do you have any reason to suggest why, given your longstanding service to the U.S. Government, your reputation, and your commitment to the law, based on your involvements and relationships, anyone would suggest that you would ex-

ercise anything other than the proper judgment or act with integrity in this instance?

Mr. RADEK. I am sorry, sir. I lost the beginning of the question. I can speculate as to why people might make such accusations, but the fact is I believe——

Senator TORRICELLI. But you cannot think of anything based on your background or association with the administration, your political involvements, why anyone having looked at your record and professional reputation would think that you would look at an issue like this with anything other than integrity?

Mr. RADEK. No, sir, except that they disagree with my final recommendations.

Senator TORRICELLI. How many independent counsels has Attorney General Reno named during her tenure?

Mr. RADEK. I have lost track, sir.

Senator TORRICELLI. Eleven?

Mr. RADEK. Seven, sir.

Senator TORRICELLI. Seven. In those seven instances, has there ever been a disagreement with senior officials of the FBI, the Justice Department, the Attorney General's staff on whether or not any of those seven independent counsels should be made?

Mr. RADEK. There clearly has, Senator.

Senator TORRICELLI. Is it unusual that there be such a disagreement?

Mr. RADEK. To the contrary, it is a difficult statute to administer, it is a difficult statute to apply, and there are strong feelings about such matters and there are certain cautions that people are concerned with. And so this Attorney General more than any I have seen certainly encourages vigorous debate on all sides of the issue and sometimes those——

Senator TORRICELLI. Have you witnessed the decision on all seven of these from some perspective or another in Justice?

Mr. RADEK. Not Ken Starr in Whitewater and his first appointment, although some of the later——

Senator TORRICELLI. That is to your credit. But in the other six, you have at least been a witness to the judgment being made?

Mr. RADEK. Yes, sir.

Senator TORRICELLI. So would you characterize for the committee that for one of the Attorney General's assistants, a senior official in Justice or in the FBI to be giving different advice in tone or substance—would you characterize this as unusual or something that would be expected during the course of deliberations?

Mr. RADEK. It was much more common to have a disagreement than unanimous agreement.

Senator TORRICELLI. You have been fairly unequivocal in making clear your belief that there was no political pressure on the Attorney General or any suggestion that her tenure would be jeopardized by appointing an independent counsel. In addition to the quotes in these memoranda, is there anything the committee should know that would in any way suggest, to your knowledge, that indeed there was any pressure put on the Attorney General on this issue whatsoever?

Mr. RADEK. No. I am aware of no pressure being put on her, and what I was recounting about pressure was all press speculation as

to why she wasn't being named for the second term. If she was under such pressure, I can say that she never conveyed it and never in any way apparent to me reacted to it.

Senator TORRICELLI. Indeed, wouldn't it probably be a fair conclusion that in naming Mr. Starr, to cite the most obvious, and each of the other seven independent counsels, it would be logical to assume that the White House would have preferred that none of those independent counsels be named——

Mr. RADEK. That would be fair, yes.

Senator TORRICELLI [continuing.] And probably was not pleased by her judgment?

Mr. RADEK. I believe that would be accurate, yes.

Senator TORRICELLI. But, indeed, despite naming Mr. Starr and each of these independent counsels on seven instances, including people closest to the President and members of his own Cabinet, up to and including the time of this decision, you never heard any suggestions from her or any comments indicating that her position was in jeopardy or her continuing as Attorney General would be dependent upon any of those instances?

Mr. RADEK. That is correct, I never did.

Senator TORRICELLI. The judgment then remained about whether or not this investigation would be better done at Main Justice or by bringing in personnel from the field or in the form of this independent counsel. Was it your judgment that at Main Justice, given the complexities of the campaign finance laws and the limited number of people who actually have experience with these laws, that the case might be pursued more vigorously and professionally if you were to rely upon people at Main Justice?

Mr. RADEK. Yes, sir, it was my perception. You know, I have heard criticism from former U.S. attorneys and others, and there always is a sort of friendly rivalry between U.S. attorneys' offices and Main Justice. But the fact is that most of the expertise for election crimes is contained in the Public Integrity Section.

Senator TORRICELLI. Indeed, wouldn't it be fair to say that overwhelmingly, U.S. attorneys' offices around the country, most of them, have never dealt with the campaign finance issue or have dealt with very few of those cases?

Mr. RADEK. Some are better than others. I mean, some particular problem, districts get into it very heavily and their expertise is probably equal to ours. Generally, it is not a primary target of enforcement of the Department of Justice.

Senator TORRICELLI. So if there were a dispassionate judgment about where there was the most prosecutorial experience and knowledge of this law, all other considerations aside, the judgment would be that Main Justice had the expertise to pursue these cases?

Mr. RADEK. I thought so, yes.

Senator TORRICELLI. Let me ask you more directly—Senator Specter, I think, ably came to the question from a variety of ways about whether or not you had any recollection of that specific, unfortunate quote about tying the Attorney General's judgment to pressure. I want to do so as well on the question of the threshold, specifically the independent counsel law.

Do you have any special and credible information for any person covered under the Act that, in your judgment, even at this late date, would require the appointment of an independent counsel?

Mr. RADEK. I do not, if the statute were still in effect.

Senator TORRICELLI. Do you have any information regarding activities of the President of the United States or the Vice President of the United States indicating that anything that they did or said might suggest specific and credible information that would require the appointment of independent counsel?

Mr. RADEK. No.

Senator TORRICELLI. On September 25, 1998, you wrote a memorandum, "The issues in the Republican National Committee investigation are largely identical to the issues in the Democratic National Committee investigation. The principal difference between the two investigations is that the facts of the RNC media project have not been fleshed out as much."

In reviewing the political culture in 1996 and the ways in which the Democratic and Republican parties approached campaign finance laws using the campaign committees and the two respective party committees and soft and hard money allocations, do you, from this perspective in time, see any principal difference in how the parties designed their campaigns and operated within the campaign finance laws? I am not asking you to cite specific instances, but your general impression having watched the investigation to date.

Mr. RADEK. Here is my general impression. The use of soft money to buy issue ads, as they were referred, seems to have been a Republican invention that the Democrats perfected beyond what most would imagine to be possible. The Colorado GOP case basically brought this, what I think is a clear loophole in the campaign laws, into the area of the light and legitimacy. And the White House and the DNC in the 1996 election took advantage of that as far as they possibly could.

Senator TORRICELLI. Indeed, to take this further, the issue advocacy ads and the soft money expenditures from the RNC being perfected and duplicated by the DNC also then involved similar actions by State parties with Federal and soft money in many States in the Nation——

Mr. RADEK. That is correct, yes.

Senator TORRICELLI [continuing]. And the Republican Senatorial Campaign Committee and even the Democratic Senatorial Campaign Committee, despite its extraordinary compliance with the law.

Mr. RADEK. That is correct. But back to your original question, I think that in the 1996 presidential election the volume on the Democrat side in these issues ads was much, much greater than the Republicans.

Senator TORRICELLI. Well, indeed, which may be because there was an incumbent administration that was more successful in raising the funds. But this is not a question of degree of compliance or violation of the law. It is whether or not the principle stands, and the principle seems to have been universally shared.

Mr. RADEK. The principle—the loophole was taken advantage of by both sides, but as I say, much more so, I thought, on the Democrat side.

Senator TORRICELLI. Could you quantify for us, since the campaign finance investigations began in reaction to the allegations regarding the President and the Vice President, the DNC and the RNC, approximately the commitment of resources that were given either in Assistant U.S. Attorneys or in FBI resources?

Mr. RADEK. I am sorry. I do not have those. The number of agents approached, I believe, 100 at one time, but I could stand to be corrected on that. Attorneys—we had, I think, at a max maybe 15 attorneys assigned to the task force. In the early days when I was running it out of the Public Integrity Section, we set it up with 4 to 5 attorneys, and there were probably 25 to 30 agents. Then there was a squad of agents assigned——

Senator TORRICELLI. Well, the number I have heard is 100, so you are basically confirming that number.

Mr. RADEK. Somewhere around——

Senator TORRICELLI. A hundred FBI agents and 15 line attorneys were involved in this. Now, to give some assurance to people about the level of commitment of the Justice Department, that, for example, significantly exceeds what Mr. Specter and I have found was involved by the Department of Justice in prosecuting cases or seeking evidence in the theft of nuclear secrets from Los Alamos and Chinese espionage.

If you were to rate the commitment of the Justice Department toward these instances, some of which are misdemeanors, some of which are felonies, this nevertheless would rank as one of the larger commitment of resources, would it not, by the Justice Department?

Mr. RADEK. Of which I am aware, yes, Senator.

Senator TORRICELLI. OK. Mr. Chairman, thank you for the time. Mr. Radek, thank you for your responses.

Senator SPECTER. Thank you, Senator Torricelli.

Senator Sessions, to the extent possible, we would like to focus Mr. Radek now on the memorandum because Mr. Gallagher needs to leave. He is going to testify. Mr. Radek is going to testify in a second section, but I know that Senator Torricelli has other commitments and might have to leave. So if you do, too, or Senator Grassley does, I want to provide some flexibility as to how we handle it. But if you are able to stay, we would like to get Mr. Gallagher on and off as soon as we could.

Senator Sessions.

Senator SESSIONS. I will have an opportunity later to ask some questions about the conduct of the investigation?

Senator SPECTER. Exactly.

Senator SESSIONS. I have just got a few questions in that regard.

Senator SPECTER. The subcommittee will pursue that, but to the extent we can limit it now to get Mr. Gallagher on his way to Ireland, it would be appreciated.

Senator SESSIONS. All right. I would note Senator Torricelli suggests there is legal expertise on election matters in the Department of Justice. And that is true, but there also is investigative and prosecutorial expertise in attorneys who are in court regularly, and

they are able, in my view, to get the truth better. I mean, that is what we are involved in here, I think, is an opportunity to get the truth and find out what the facts were or were not.

Well, I am troubled, Mr. Radek. You have taken an oath this morning, I believe.

Mr. RADEK. Yes, sir.

Senator SESSIONS. And I notice that when you make your comments that you would not have said this or would not have said this, you add each time "but I don't remember the conversation."

Mr. RADEK. That is true.

Senator SESSIONS. So it is hard for me to take real seriously your denial that you said something that you say you don't recall. Do you understand that difficulty that I would have?

Mr. RADEK. I understand it perfectly, Senator, but if I could recall it, of course, I would. I just simply can't.

Senator SESSIONS. Let me ask you, were you aware that the FBI Director had talked to the Attorney General about this statement that you allegedly made shortly after it was allegedly made?

Mr. RADEK. I was never aware of it until I saw this memorandum the week before last.

Senator SESSIONS. She never inquired of you about that?

Mr. RADEK. No.

Senator SPECTER. You say you saw the memorandum the week before last?

Mr. RADEK. Week before last.

Senator SPECTER. Precisely when?

Mr. RADEK. It was faxed to me on May 4.

Senator SPECTER. Excuse me, Senator Sessions.

Senator SESSIONS. No. That is fine.

That was the internal FBI memorandum?

Mr. RADEK. Yes, sir.

Senator SESSIONS. But you are now aware, are you not, that at or about that time the Director of the FBI personally talked with the Attorney General about this situation?

Mr. RADEK. No, sir.

Senator SESSIONS. Are you aware of it now?

Mr. RADEK. Yes, sir. I don't know. I am aware of it from the memorandum, but the Director said he was going to or did talk to her.

Senator SESSIONS. And despite the fact that the FBI Director shared with her that you made the statement that there was pressure involved and the Attorney General's job may be on the line, and he believed and interpreted that to mean that there was pressure not to vigorously investigate the case, she never asked you about it?

Mr. RADEK. She never asked me about it. As far as all your prefatory facts, I don't know whether they are true or false. I don't know that they had the discussion. I know that he says they did.

Senator SESSIONS. Well, I think the prefatory facts were well founded. You don't dispute any of them, do you?

Mr. RADEK. I don't know, Senator.

Senator SESSIONS. You chair the Public Integrity Section?

Mr. RADEK. I am its Chief, yes, sir.

Senator SESSIONS. Its Chief, and you are appointed by the Attorney General, are you not?

Mr. RADEK. I am not. I was appointed by the Assistant Attorney General for the Criminal Division, who was JoAnn Harris, who was also mostly a career prosecutor. Now, I do have a certificate on my wall that looks very nice that is signed by Janet Reno, but as far as I know, Janet Reno didn't know my name when I became Chief of the Public Integrity Section. And all your implications and the La Bella testimony to the contrary, I am not in any way subject to the political appointment process. I am Senior Executive Service, career.

Senator SESSIONS. But the chiefs of sections are appointed by the Attorney General, are they not?

Mr. RADEK. They are not. They are Senior Executive Service. They are appointed by Merit Systems Protection Board—I mean merit systems boards.

Senator SESSIONS. Well, you have merit protection. I understand that.

Mr. RADEK. But the appointment comes from the Assistant Attorney General for the Criminal Division.

Senator SESSIONS. Well, the Assistant Attorney General for the Criminal Division is appointed by who?

Mr. RADEK. By the Attorney General, and she is appointed by the President, but that doesn't mean——

Senator SESSIONS. That is exactly right.

Mr. RADEK [continuing]. That the President appointed me. I am a career prosecutor, sir.

Senator SESSIONS. You held a position at the pleasure of the Attorney General, did you not?

Mr. RADEK. Everyone in the Department of Justice does that, Senator.

Senator SESSIONS. That is correct.

Mr. RADEK. So does Mr. La Bella, or so did Mr. La Bella. I mean, that is not——

Senator SESSIONS. Well, let's suggest an independent agency appointed you. The Attorney General approved your appointment and could have removed you, isn't that correct?

Mr. RADEK. The Attorney General can fire me for cause, sir.

Senator SESSIONS. I don't mean fire; remove you from the position as Chief of Public Integrity without cause.

Mr. RADEK. Sure, the Attorney General can do that to anyone in the Justice Department.

Senator SESSIONS. That is correct. I don't know why we had an argument over that.

Mr. RADEK. Except for the U.S. Attorneys. That would take the President.

Senator SESSIONS. I think I will pass to the next subject.

Senator SPECTER. Thank you, Senator——

Senator SESSIONS. Do you recall a conversation in which Mr. Gallagher and Mr. Esposito were present on or about the time referred to in the memorandum?

Mr. RADEK. I can't place it in time. I recall one conversation with Mr. Esposito and Mr. Gallagher in Mr. Esposito's office in which

we were discussing a certain case in Cleveland. I don't recall the topic of campaign finance coming up at all.

Senator SESSIONS. If those individuals say you said words to the effect that are referred to in the memorandum, you dispute that only on the fact that you weren't likely to have said that, but you are not able to deny it categorically?

Mr. RADEK. I am able to deny that I would have said such a thing. I have no recollection of having said these words at all, Senator, or anything to their effect.

Senator SESSIONS. So the answer is you have no recollection of having said these words?

Mr. RADEK. My answer, as discussed with the chairman, is that I would never have said this, yes.

Senator SESSIONS. But you have no recollection of having said them?

Mr. RADEK. That is correct.

Senator SESSIONS. And do you deny—well, we will let the other witnesses testify.

Thank you.

Senator SPECTER. Thank you, Senator Sessions.

Senator Grassley.

Senator GRASSLEY. So you can hurry on, Mr. Chairman, I won't ask any questions, but let me make just a couple of comments here in a minute-and-a-half.

The memo from Director Freeh suggests that he told the Attorney General that both she and Mr. Radek should remove themselves from the decisionmaking process in regard to deciding on an independent counsel. I think, Mr. Chairman, that when the Director of the FBI brings such a charge to the Attorney General, the Attorney General is obligated to act. She did not.

The result, in my view, is at least a perception problem now for the Attorney General. The Freeh memo calls into question the Attorney General's judgment. Since she did not understand the potential conflicts both for her and for Mr. Radek, in my view, she has put her judgment on this issue at risk and the criticism is warranted.

I am not prepared to question whether or not the Attorney General's decision on the independent counsel was politically motivated, but I do think that it looks bad. First, when you have a hand-picked career prosecutor vehemently calling for an independent counsel—that was Charles La Bella—when you have an FBI Director calling for an independent counsel, when you have career prosecutors resigning on principle over this issue, and, four, not quite as clear, but when you have a chief antagonist who is head of an office, the Public Integrity Section, which office has a reputation, as I have already spoken to, for never seeing a case it really wanted to prosecute, this is really a bad combination.

Thank you.

Senator SPECTER. Thank you very much, Senator Grassley.

Mr. Radek, do you know why the Director Freeh memorandum of December 9, 1996, was not turned over to the subcommittee sooner than May 18, since you say you saw it on May 4?

Mr. RADEK. No, sir, I do not. I was informed that the Director had found it on or about that date.

Senator SPECTER. Who informed you of that?

Mr. RADEK. The Deputy Attorney General.

Senator SPECTER. And what were the circumstances for Mr. Eric Holder telling you that?

Mr. RADEK. He called me and asked me whether I recalled the conversation, and I asked him—I informed him that I did not, and he said that the Director had just found a memo which was being prepared to be turned over to Congress and he wanted——

Senator SPECTER. And he said the Director had just found this memo?

Mr. RADEK. That is what he told me, yes, sir.

Senator SPECTER. Did Mr. Holder tell you when he first saw this memo?

Mr. RADEK. No, he did not, and then I asked——

Senator SPECTER. Are you aware of the fact that there had been a subpoena issued which required the production of this memorandum returnable on April 20?

Mr. RADEK. No, I am not aware of that. I am not surprised by it. I am just not aware of it specifically.

Senator SPECTER. What else did Mr. Holder tell you with respect to this issue?

Mr. RADEK. Not much, except that he sort of quoted from it, and I asked him to fax it to me and he did.

Senator SPECTER. He sort of quoted from it and you asked him what?

Mr. RADEK. To fax it to me, which he did.

Senator SPECTER. And what did you do next by way of, say, making a denial of the substance of the memo to any of your supervisors?

Mr. RADEK. I read the memo and called the Deputy Attorney General back and told him that I had many remarks about the memo, but I told him that I——

Senator SPECTER. You said you had many remarks about it?

Mr. RADEK. Many remarks about the memo.

Senator SPECTER. What were your remarks about the memo?

Mr. RADEK. Well, I was sort of revisiting the dismissal of Ms. Ingersoll from the task force and the fact that Director Freeh seemed to have pre-judged the issues before the task force was even in place.

Senator SPECTER. What issue did Mr. Freeh pre-judge?

Mr. RADEK. The issue of whether or not the Public Integrity Section should be involved in the task force.

Senator SPECTER. Well, if Mr. Freeh heard from Mr. Esposito that the Public Integrity Section was under pressure because the Attorney General's job was held in the balance, wasn't that a sufficient reason to rule out the Public Integrity Section if, in fact, Mr. Esposito was telling Director Freeh the truth?

Mr. RADEK. It might have been if it were true, sir, but more specifically I was referring to the fact that he seemed to still be holding a grudge about the Cisneros independent counsel matter.

Senator SPECTER. But on the issue of the sufficiency to remove the Public Integrity Section, if the Chief of the Public Integrity Section said that the Section was under pressure on campaign finance cases because the Attorney General's job was in the balance, and

if Director Freeh accepted the veracity of Mr. Esposito's statement, wouldn't that be sufficient to call for the removal of the Public Integrity Section, or at least the Chief?

Mr. RADEK. If, in fact, the Chief of the Public Integrity Section had said such a thing, certainly some inquiry should have been made as to whether or not such a thing was said.

Senator SPECTER. Do you think Director Freeh should not accept what Mr. Esposito tells him?

Mr. RADEK. I think Mr. Freeh was under some obligation to make further inquiry.

Senator SPECTER. To talk to you about it?

Mr. RADEK. I mean, we are talking again about a memo Director Freeh directed to the person who had the conversation.

Senator SPECTER. We are well aware of that. The question——

Mr. RADEK. Talk to me about it, talk to the Attorney General about it.

Senator SPECTER. Well, he did talk to the Attorney General about it——

Mr. RADEK. He says he did. She doesn't——

Senator SPECTER [continuing]. According to what Director Freeh says in the memo.

Mr. RADEK. I am sorry to talk at the same time you were, but he says he did. She says she doesn't recall it, to my knowledge.

Senator SPECTER. Well, we have a sequence of affirmative statements by one side memorialized in a document and no recollection by others, you and the Attorney General.

Mr. RADEK. That is correct.

Senator SPECTER. If Director Freeh is accurate, truthful, in what he has put in this memorandum that he told the Attorney General that Mr. Radek said the Public Integrity Section was under a lot of pressure and that her job held in the balance, shouldn't she have talked to you about it?

Mr. RADEK. I am certain that had this been conveyed to her that she would have conducted some inquiry, yes, sir.

Senator SPECTER. So are you saying that you doubt that this was conveyed to her?

Mr. RADEK. I doubt it, yes, sir, but I have no independent knowledge.

Senator SPECTER. But you doubt the truthfulness of Mr. Esposito's report to Director Freeh——

Mr. RADEK. You know——

Senator SPECTER. Wait a minute, wait a minute. We won't talk together if you wait until I finish the question.

Mr. RADEK. I am sorry.

Senator SPECTER. So you doubt the truthfulness of Mr. Esposito's statement to Director Freeh that Mr. Radek said that the Public Integrity Section was under a lot of pressure and the Attorney General's job was in the balance, and the truthfulness of Director Freeh's statement as recorded in this memorandum by him that he told that to the Attorney General?

Mr. RADEK. You left out the word "because," Senator. I doubt the truthfulness of any statement attributed to me that the Public Integrity Section was under pressure because the Attorney General's job hung in the balance.

Senator SPECTER. I wasn't revisiting what you said, although I may well do that. I was on a very separate subject, and the separate subject was that if Director Freeh told the Attorney General what he says he told her in this memo that the Chief of the Public Integrity Section had said that the Public Integrity Section was under a lot of pressure and the Attorney General's job was in the balance—if Director Freeh is honest and forthright and truthful about that statement and he told her that, as this memorandum says, whether she should have then questioned you about it.

Mr. RADEK. She should have questioned me about it, and the fact that she didn't is what makes me doubt that it was effectively communicated to her.

Senator SPECTER. Effectively communicated?

Mr. RADEK. Yes.

Senator SPECTER. What Director Freeh says he told the Attorney General, he didn't really do, right?

Mr. RADEK. If he had, I am sure she would have talked to me about it, and she didn't.

Senator SPECTER. Would you sit back, Mr. Radek? We are going to call you back on other matters. As I have said, we are going to try to get Mr. Gallagher in and out. It is too late now to get Mr. Gallagher in and out in a hurry, but we will get him in and out as fast as we can.

Mr. Gallagher, will you raise your right hand, please? Do you solemnly swear that the testimony that you will give before this subcommittee of the Judiciary Committee of the U.S. Senate will be truth, the whole truth, and nothing but the truth, so help you God?

Mr. GALLAGHER. I do.

Senator SPECTER. Mr. Gallagher, do you care to make any opening statement?

STATEMENT OF NEIL GALLAGHER, ASSISTANT DIRECTOR, NATIONAL SECURITY DIVISION, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. GALLAGHER. No, Senator. I am prepared to answer questions.

Senator SPECTER. Mr. Gallagher, were you present at a conversation which involved Mr. Radek and Mr. Esposito?

Mr. GALLAGHER. Yes, Senator, I was.

Senator SPECTER. Can you place that conversation in a time frame when it occurred?

Mr. GALLAGHER. It was in early December 1996.

Senator SPECTER. And where did the conversation occur?

Mr. GALLAGHER. In Mr. Esposito's office at FBI headquarters.

Senator SPECTER. And what were the circumstances that led to that conversation?

Mr. GALLAGHER. Well, first of all, let me put it in perspective. At the time, Mr. Esposito was the assistant director in charge of the FBI's Criminal Investigative Division. I was his principal deputy assistant director. Mr. Esposito is in an adjacent—was at the time in an adjacent office to mine. He stopped in and asked me if I would join him in a meeting with Lee Radek. The purpose of the meeting was the beginning of the process of the FBI becoming di-

rectly involved in what would become campaign financing investigations.

Senator SPECTER. And what conversation then occurred?

Mr. GALLAGHER. We discussed two particular aspects. One was Mr. Radek reviewed some of the analysis that had been going on for a period of time by the Public Integrity Section. We also discussed the investigative efforts that had been conducted by Department of Commerce inspectors general regarding the activities of John Huang while at the Department of Commerce.

During this discussion, there was a statement made by Mr. Radek that, as reflected in the memorandum, that there was a lot of pressure on him and on the Public Integrity Section, and this was attributed to the fact that the Attorney General's job may hang in the balance.

Senator SPECTER. Are you sure that conversation occurred?

Mr. GALLAGHER. I am certain of the conversation. The only addition that I would make to the statement of pressure, that it was a general statement of pressure not only on Lee Radek, on the Public Integrity Section, but for that matter on the FBI, and that it impacted upon the decisions that would be made in these early days of the investigation.

My sense and my reaction to the statements that I heard Lee Radek make that day was that this would be a very sensitive, very critical investigation, and I felt a sense of urgency on behalf of the FBI that we would have to put together an investigative team to get moving forward with the investigation.

Senator SPECTER. Well, was there a specific statement about pressure on the FBI?

Mr. GALLAGHER. It is my recollection that there was a statement. I have a specific recollection of Mr. Radek, who I have dealt with extensively during this same time period on other investigative matters, talk about a sense of pressure that he and the Public Integrity Section felt. But I have a less specific but general recollection that there may have been some reference to pressure on the FBI, and walked away from the meeting with a sense, again, that this would be a very sensitive and critical investigation.

Senator SPECTER. Well, as of that time, the Attorney General had already turned down a request for independent counsel, correct?

Mr. GALLAGHER. It is my understanding, Senator, that that is accurate.

Senator SPECTER. And you are sure the conversation occurred where Mr. Radek used the language pressure on the Public Integrity Section because the Attorney General's job was in the balance?

Mr. RADEK. Yes, Senator, and——

Senator SPECTER. Are you sure of that?

Mr. GALLAGHER. I am positive, and at the same time there may have been some general discussion as to the fact that the Attorney General had not yet been selected by the President to continue in his Cabinet. We had discussions around that issue, but again I did not walk away with anything but a sense of urgency to move forward with the investigation.

Senator SPECTER. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman.

Just briefly, Mr. Gallagher, where did this conversation take place where you were——

Mr. GALLAGHER. In Mr. Esposito's office.

Senator TORRICELLI. And what was the date of this meeting?

Mr. GALLAGHER. I recall it being early December 1996. This was the very first meeting between Lee Radek, myself, and Bill Esposito to begin the process of the FBI taking a more active—not a more active—an active role in the investigation that would become the campaign financing——

Senator TORRICELLI. Were you the only people in the room?

Mr. GALLAGHER. I would have to defer, now that I have described the meeting, to Lee Radek. It may be that his—one of his deputies, Joe Gagloff, was in the room. If he did, he did not play an active part in the discussion. If it will help Lee Radek, I was sitting on the sofa in Bill Esposito's office. Bill Esposito was in the wing chair to my left. Lee Radek was in the wing chair to my right. The three of us were the primary participants in the discussion, but I have a vague recollection that he may have had a deputy off to the side.

Senator TORRICELLI. You recognize, Mr. Gallagher, that the allegations you are making are contradicting a sworn statement by the head of the Public Integrity Section of the U.S. Justice Department. If indeed Mr. Radek were not testifying truthfully, this would have extraordinary consequences. Yet, he has been rather strong in his testimony.

But you do not remember the date of the meeting or even who was in the room. You do have a memory of the seating arrangement, but not knowing the date of the meeting or who was present, you can understand, would in some people's minds raise questions about how specifically you could otherwise remember exactly what was said, and I think would make it difficult for many to conclude that Mr. Radek's statement would not then be taken at face value, and he believes this didn't happen.

Mr. GALLAGHER. Senator, I can only respond that it was the very first meeting between Lee Radek and the FBI on what would become the transformation of the investigation. I have specific recollection of where the meeting occurred. Yes, I cannot speak to the exact date, but I know it was in early December 1996.

Senator TORRICELLI. But you don't remember who was in the room?

Mr. GALLAGHER. I remember Lee Radek, myself, Bill Esposito.

Senator TORRICELLI. But not whether there were any others?

Mr. GALLAGHER. At most, there was a fourth person. If it was, he sat off to the side and did not actively participate in the discussion. So I give you his name in complete candor as to who could possibly have been in the room. That is the only other person who may have been in the room.

Senator TORRICELLI. Finally, I think this is necessary for the record and I do not do this to challenge either your integrity or your credibility. But it should be pointed out to my colleagues that you did testify before the Governmental Affairs Committee, of which I am also a member, and there were circumstances after that in which you needed to clarify or change the context of your testimony.

Could you explain to the committee, since obviously your testimony is in conflict with Mr. Radek's and any nuance of credibility is extremely important to the committee, what led to your clarifying your previous testimony to the committee?

Mr. GALLAGHER. In the unrelated matter before the Governmental Affairs Committee?

Senator TORRICELLI. Yes.

Mr. GALLAGHER. I became aware of information which at the time that I testified I was not cognizant of. Once I became aware of that information, I felt an obligation——

Senator TORRICELLI. You then corrected the record and changed your testimony?

Mr. Gallagher [continuing]. To correct the record and submitted a letter to that effect.

Senator TORRICELLI. Mr. Chairman, I have no further questions.

Senator SPECTER. Thank you, Senator Torricelli.

Senator Grassley.

Senator GRASSLEY. I won't ask any questions.

Senator SPECTER. Thank you very much, Senator Grassley.

Mr. Gallagher, were there any other written memoranda relating to this meeting or arising from this meeting, to your knowledge?

Mr. GALLAGHER. I am unaware of any, Senator. I was not—and maybe as a clarification, I did not participate in the subsequent discussion between Mr. Esposito and the Director. My only recollections are to the actual meeting. I may have seen this document, but I don't have a specific recollection of it.

Senator SPECTER. Thank you very much, Mr. Gallagher. The final question for you: will you make your plane?

Mr. GALLAGHER. I will make my plane, and I appreciate your consideration, Senator.

Senator SPECTER. You are excused.

Mr. GALLAGHER. Thank you.

Senator SPECTER. Mr. Parkinson, will you step forward, please? Will you raise your right hand? Do you solemnly swear that the testimony that you will give before this subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. PARKINSON. I do.

Senator SPECTER. Thank you, Mr. Parkinson. Would you state your position, please?

STATEMENT OF LARRY PARKINSON, GENERAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. PARKINSON. My position is General Counsel with the FBI.

Senator SPECTER. And how long have you held that position?

Mr. PARKINSON. I have held that position since August 1997.

Senator SPECTER. And before that, you were——

Mr. PARKINSON. Before that, I was the Deputy General Counsel at the FBI, dating back to December 1995.

Senator SPECTER. Mr. Parkinson, did you have occasion to write a memorandum to Assistant Attorney General Robinson of the Criminal Division dated November 20, 1998?

Mr. PARKINSON. Yes, sir.

Senator SPECTER. Would you tell us the circumstances that led you to write that memorandum?

Mr. PARKINSON. At the time, we were reaching the end of the preliminary inquiries with respect to Vice President Gore and Harold Ickes. The Attorney General was having to reach a final decision as to whether to seek an appointment of an independent counsel. We were having internally within the Department of Justice a number of discussions about what we had learned during the preliminary inquiry and discussions about where we go from here.

The views of those participants were solicited by the Attorney General. A memo was invited from the FBI, and consequently I wrote this memo which referred to the two preliminary inquiries.

Senator SPECTER. And had Director Freeh written an earlier memorandum recommending the appointment of independent counsel in campaign finance matters?

Mr. PARKINSON. Yes.

Senator SPECTER. Do you know the date of that memorandum?

Mr. PARKINSON. November 24, 1997. There had been a previous memo in May 1997 which he also gave to the Attorney General, and you have that as well.

Senator SPECTER. Mr. Parkinson, who was the first individual that you took up an analysis on evidence in the memorandum of November 20, 1998?

Mr. PARKINSON. In the November 20, 1998, memo it refers primarily to the preliminary inquiry involving Vice President Gore. There is a very brief position taken with respect to Mr. Ickes at the end of the memo. It is not a lengthy analysis because there had been a previous analysis by the Department of Justice that we agreed with and I didn't feel the need to go into an extensive analysis with respect to Mr. Ickes.

Senator SPECTER. And did you believe that independent counsel should have been appointed as to Vice President Gore?

Mr. PARKINSON. Yes, and that was our recommendation.

Senator SPECTER. Is your recommendation characterized in conclusory form by the first paragraph on page 4 under "Sufficiency of the Evidence?"

Mr. PARKINSON. Yes. I mean, that begins the analysis with respect to the Vice President.

Senator SPECTER. And would you read that conclusion, please?

Mr. PARKINSON. Do you want me to begin with the first sentence, "Is there?"

Senator SPECTER. Correct.

Mr. PARKINSON. OK. "Is there sufficient evidence as a matter of law to prove that Vice President Gore made a false statement when he told the investigators on November 11, 1997, that he believed the media fund was composed solely of soft money? We believe the answer to this first question is clearly yes. The Radek-Visinanzo memorandum concludes that the falsity element of the offense has not been established. This conclusion rests principally on an opinion that there is in insufficient evidence that the Vice President was ever aware of a hard money component to the media fund. However, the memorandum falls short in two respects. First, it fails to give sufficient weight to the inculpatory evidence surrounding the November 21, 1995, meeting. Second, it focuses al-

most exclusively on that single meeting without taking into account the wide range of other relevant evidence."

Senator SPECTER. What was the evidence with respect to the people who were present at the meeting who gave evidence relevant to the issue or to the discussion of a hard money component to the fundraising which the Vice President was undertaking?

Mr. PARKINSON. It is set out in my memo, and then attached to the memo is an investigative summary prepared by the investigators which goes into more detail. But in a nutshell, there were a number of participants in the meeting, four of which recalled the discussion of a hard money component to the media fund during that 1995 meeting.

Senator SPECTER. And who were those witnesses and what did they say?

Mr. PARKINSON. Those four witnesses were David Strauss, Leon Panetta, Bradley Marshall, and Brian Bailey. They vary slightly on their recollections, and I am not sure I could, without spending considerable time going through this investigative summary, be extraordinarily precise. But in a nutshell, all of those four—each of those four witnesses indicated that they were present at the meeting, that the Vice President was present at the meeting, and that there was some discussion about a hard money component to the media fund.

Senator SPECTER. In the Attorney General's declination to appoint independent counsel on November 24, 1998, she says at the bottom of page 3, "Only two attendees of the meeting even recall the topic of a hard money component to the media fund being raised during the meeting." Is that accurate?

Mr. PARKINSON. I don't believe it is accurate. I didn't recall that from the notification itself, and as the investigative summary points out in more detail, there were four people who had that recollection.

Senator SPECTER. And was the recollection of Mr. Strauss confirmed in a written document?

Mr. PARKINSON. Yes. There was what became known as the Strauss memo, and that is also discussed. There is a memo that describes some portions of the meeting that was written by David Strauss.

Senator SPECTER. And what does that memo say with respect to the hard money component?

Mr. PARKINSON. It has references in the margins about a 65 soft and 35–65 percent soft, 35 percent hard, component. Let me try to be precise, and this is referred to on page 4 of the supplement, but the handwritten notes on the documents were 65 percent soft, 35 percent hard, corporate or anything over 20K from an individual. And he identified those as notes that he took during the November 21, 1995, meeting.

Senator SPECTER. And for the record, would you briefly state what the significance is of the hard versus the soft money components of fundraising?

Mr. PARKINSON. Well, obviously in this context it was very significant in this sense because what we were focused on in that preliminary inquiry in the fall 1998 was the Vice President's statement that he made a year previously that he was not aware of a

hard money component to the media fund. And the purpose of the November 21, 1995, meeting was a discussion of the media fund, and this was evidence that there was clearly—it seems to be clear that there was a discussion of a hard money component in a meeting that the Vice President attended.

Senator SPECTER. And if the Vice President had known that there was a hard money component to the money he was raising, what would the legal consequence of that have been?

Mr. PARKINSON. The potential legal consequence is that he would have made a false statement when he was interviewed by the investigators a year previously in November 1997 in connection with the first preliminary inquiry that related to him.

Senator SPECTER. One of the individuals who testified about the Vice President's attendance at the meeting where hard money was discussed was Mr. Leon Panetta?

Mr. PARKINSON. That is correct.

Senator SPECTER. And essentially what did Mr. Panetta say?

Mr. PARKINSON. Essentially, and again in a nutshell—it is laid out in significantly more detail in the attachment, but he did not recall specifically the November 21, 1995, meeting, but he did recall attending several meetings in the Map Room in which these budget issues were discussed. And he does recall a meeting in which the hard money/soft money components of the media fund were discussed, and it was his memory that the Vice President was in attendance. He recalls the Vice President being there for all of these discussions as part of gearing up for the reelection campaign.

Senator SPECTER. And did Mr. Panetta say with respect to the purpose, quote—or that the purpose of the meeting with respect to the attendance of the Vice President and the President was to, "make sure they knew what the hell was going on?"

Mr. PARKINSON. I don't have that precisely in front of me, Mr. Chairman.

Senator SPECTER. Well, take a look at your memo. You will find it.

Mr. PARKINSON. Oh, it is in my memo?

Senator SPECTER. Correct.

Mr. PARKINSON. If you can direct me to the page, I am sure I can find it quickly.

Senator SPECTER. If I direct you to the page, you can find it quickly? Try 0150, for starters. I can understand, Mr. Parkinson, why at this point I know more about your memorandum than you do.

Mr. PARKINSON. I am sorry, Mr. Chairman. I don't find it. I don't find that quote.

Senator SPECTER. Take a look at the next page. It continues on to 0151. And talking about Panetta, quote——

Mr. PARKINSON. I am sorry, Mr. Chairman. I was looking at my memo, as opposed to the attachment to my memo. I do see that and it concludes——

Senator SPECTER. Well, these are attachments to your memo.

Mr. PARKINSON. That is correct, and it concludes by saying he emphasizes the purpose of the meeting was to, "make sure they knew what the hell was going on."

Senator SPECTER. And two other witnesses testified that the Vice President was present at the time hard money was discussed?

Mr. PARKINSON. That is correct.

Senator SPECTER. And who were those witnesses?

Mr. PARKINSON. Those witnesses were Bradley Marshall and Brian Bailey.

Senator SPECTER. Was all this information conveyed to the Attorney General, Mr. Parkinson?

Mr. PARKINSON. To my knowledge, it was. I don't have personal knowledge of what actually went to the Attorney General, but certainly these discussions and these memos were being generated for her final decision.

Senator SPECTER. But these memos went from you to the Assistant Attorney General of the Criminal Division, Mr. Robinson?

Mr. PARKINSON. That is correct.

Senator SPECTER. For the purpose of being forwarded to the Attorney General?

Mr. PARKINSON. Yes, that was——

Senator SPECTER. Do you have any idea why in her formal statement she would only know of two witnesses who testified about the Vice President being present when hard money was discussed?

Mr. PARKINSON. I do not know the answer to that question.

Senator SPECTER. Now, you have referred also to documents which were provided to the Vice President. In the appendix to your memorandum, there are 13 memoranda sent by Mr. Ickes to the Vice President, correct?

Mr. PARKINSON. That is correct.

Senator SPECTER. And what is the import of those 13 memoranda?

Mr. PARKINSON. Well, the memoranda are—there are a couple of significant pieces. What these memoranda are, at least in the investigators' mind—and I agree with them—these are indications of discussions between the time period of August 1995 and July 1996 that referred to a hard money component of the media fund, which was the central issue in the preliminary inquiry.

And as set forth in the description of those 13 memos, there were a number of references to that hard money component, and these were memos that, based on the evidence, went to the Vice President. And they were also—the second piece of that that I would note is that they were—most of them were crafted as a series of bullets or short summaries designed for a busy person to absorb fairly quickly.

Senator SPECTER. The Attorney General's declination emphasizes the Vice President's statement that he did not read the memos. But he made other relevant comments, as you have noted, as being—did you put it inculpatory of the Vice President as to what he said?

Mr. PARKINSON. Yes. That was the term that I used in the memo, yes, "inculpatory."

Senator SPECTER. And if you turn to the addendum marked 147, it reads, "The Vice President has remarked in two interviews that he did not read these memos, as he did not as a general rule read memos authored by Harold Ickes on DNC budgetary matters." He nonetheless said that, "the subject matter of the memorandums

would have already been discussed in his and the President's presence."

Mr. PARKINSON. Right.

Senator SPECTER. Is that an accurate summary of that particular issue?

Mr. PARKINSON. Yes, I believe it is.

Senator SPECTER. What reliance, if any, in your recommendation for independent counsel did you place on the Vice President's statement that even though he hadn't read the memoranda, the subject matter had already been discussed with him and the President?

Mr. PARKINSON. I took some issue with the statement that he said he didn't read the memos, and I have a section in my memo saying at least we ought to critically examine that.

Senator SPECTER. Why did you take issue with his statement to that effect?

Mr. PARKINSON. These were issues—a couple of reasons. These memos, as I said before, were designed, many of them, as bullets designed to be read by him. And it was my view that at least we ought to devote some significant investigative effort to figuring out whether a blanket statement that "I didn't read Harold Ickes' memos" would stand up.

In my view, this was an extraordinarily important issue for those running for office, including the Vice President. The question at hand, and that is whether or not there was a hard money component to the media fund, was not, in my view, a down in the weeds kind of issue; it was kind of fundamental. And Harold Ickes was the person at the White House who was essentially running much of the campaign, and it struck me as something that at least we ought to investigate further, whether or not we could simply rely on a statement that he said "I didn't read Ickes' memos."

Senator SPECTER. Well, all of this is in the context of the issue of criminal intent being not subject to the decision by the Attorney General on appointing independent counsel unless there was, "clear and convincing evidence," under the independent counsel statute of the state of mind or lack of criminal intent.

And how did those factors, all the memoranda and the four witnesses, impact on your consideration as to whether somebody could reasonably say that there was clear and convincing evidence that he didn't know anything about the hard money component?

Mr. PARKINSON. In my view—and, again, it is set forth in my memo on pages 7 and 8—in my view, the clear and convincing standard was intended to be a very high threshold. I referred at some length in my memorandum about—I referred at some length from the legislative history in 1987, in which Congress made clear that they intended this to be a high threshold, and they criticized the Department at that time for a disturbing practice of dismissing or failing to seek an independent counsel based on state of mind, and so they intentionally set a high threshold.

They made clear that it would be a rare case—and I have quoted the legislative history in that respect—"a rare case in which the Attorney General will be able to meet the clear and convincing standard and in which such evidence would be clear on its face. It would be unusual for the Attorney General to compile sufficient

evidence at that point in the process." That was a quote from the legislative history.

And I concluded that section by simply asking the question about whether or not this was indeed such a rare case. And my conclusion, at least, was that based on all of the evidence, the witnesses, as well as the documentary evidence, that this was hardly one of those rare cases.

Senator SPECTER. Hardly?

Mr. PARKINSON. Correct.

Senator SPECTER. Clear-cut, not to be classified as one of those rare cases?

Mr. PARKINSON. I didn't think this one was very close.

Senator SPECTER. With respect to what you characterized as inculpatory statements, if you turn to page 0149 of the attachments, the first full paragraph, second sentence, "pointed out"—this is the Vice President speaking, "pointed out that he had been a candidate for 16 years and thought he had a good understanding of the hard/soft money."

What impact did that statement of the Vice President have on your consideration of the clear and convincing standard for ruling out mens rea, state of mind, or criminal intent?

Mr. PARKINSON. Well, I think when we were focusing on state of mind, it seemed critical to me that we focus not only on the events at hand, but whatever historical knowledge the person might have had. And I believed then and believe now that that prior experience and his activity in campaigns was a relevant factor.

Senator SPECTER. Referring back to Leon Panetta, at 0150, with respect to this November 21, 1995, meeting, Mr. Panetta said that the, "hard/soft money breakdown of media fund discussed at all three meetings. There was always a discussion and examination of the overall DNC budget and, at a minimum, a reference to the hard/soft breakdown of the media fund. Recalls gearing up for the reelection campaign. Meetings were structured around making presentations to POTUS," President of the United States, "and VPOTUS," Vice President of the United States. "Both were provided with whatever documents were being discussed, and both always had something to say. Going on, "POTUS and VPOTUS would comment on what was being presented to them. Media fund was the focus of the 11/21/95 meeting, and the purpose was to make sure POTUS and VPOTUS were aware of what was going on with the media fund."

What impact does that have on the state of mind issue?

Mr. PARKINSON. I thought it was very significant.

Senator SPECTER. Why?

Mr. PARKINSON. Obviously, this was not just one meeting. There were a series of discussions. This was a critical piece of the campaign strategy. This was an indication from someone of very significant stature and placement of that process, Mr. Panetta, who indicated that the President and the Vice President were personally engaged in these discussions.

Senator SPECTER. What did the Vice President say about leaving the meetings?

Mr. PARKINSON. The Vice President said a couple of things, that he may have left the meeting. He said that he drank a lot of iced

tea during meetings and it may have caused him to leave the room. He also indicated that there were——

Senator SPECTER. Drank a lot of iced tea, so he might have left the room?

Mr. PARKINSON. Correct, and may not have been present when the critical words were said. He also indicated, as I recall, that there were frequently interruptions to these meetings.

Senator SPECTER. Well, he says in the addendum at 0148, a statement to the Vice President and then 10 lines down, "does not know if he left the meeting while it was going on, for any reason." So according to his statement, he was unsure.

Mr. PARKINSON. Correct.

Senator SPECTER. So he postulates drinking a lot of iced tea and possibly leaving the meetings for a restroom break?

Mr. PARKINSON. That is the way we understood it.

Senator SPECTER. How did you weigh that in the state of mind issue?

Mr. PARKINSON. I didn't personally find that very compelling.

Senator SPECTER. Why not?

Mr. PARKINSON. For one thing, if this was just one meeting in which this was a one-sentence statement, I may have found it more compelling. But as I indicated, this was—the evidence indicated that there was a series of meetings, and to me it would be quite a coincidence to have missed all of the references to a hard money component, for that reason.

Senator SPECTER. When the Attorney General declined to appoint independent counsel as to the Vice President, she used language which I referred to before which is really prosecutorial discretionary language. But there was no finding that there was clear and convincing evidence that the Vice President did not knowingly violate the law.

Wouldn't that finding be indispensable if she were to accept the Vice President's assertion that he didn't know there was a hard money component, in the face of the statements of the four witnesses who were at the November 21 meeting, the 13 memoranda, and the Vice President's own statements about his experience as a candidate, and the substance of the Ickes memos having been discussed in his presence and the presence of the President? Wouldn't she have had to make that finding as an indispensable basis for declining?

Mr. PARKINSON. As I recall—and I am sure Mr. Radek can add to this, but as I recall, in the end she concluded that she did not have to get to that issue about clear and convincing because she had agreed with Mr. Radek and Visinanzo's memorandum that the falsity element of the offense had not been satisfied, and therefore she did not have to get to that issue.

Senator SPECTER. Well, the falsity element turned indispensably on the state of mind, didn't it? There was no doubt that he had raised hard money from witnesses who were questioned by the FBI, correct?

Mr. PARKINSON. Correct.

Senator SPECTER. How many witnesses questioned by the FBI whom the Vice President had raised money from testified that he had raised hard money from them?

Mr. PARKINSON. I don't—I can't give you a precise number. There were some, but there were any number of people that were solicited who had no idea whether they were talking about hard money or soft money. So, that number gets a little bit hard to——

Senator SPECTER. Well, there were people who testified that he raised hard money from them.

Mr. PARKINSON. Correct.

Senator SPECTER. There were some, and weren't there also some who were surprised that their contributions had been allocated to the hard money account because they were limited to $25,000 total annually on hard money and they later found out that when the allocations were made to the hard money account that they had exceeded the Federal limit on hard money?

Mr. PARKINSON. That is correct.

Senator SPECTER. And that was money raised by the Vice President?

Mr. PARKINSON. Yes. There is, Senator—just on the clear and convincing issue, the last footnote of her notification of November 24 does refer to it. It concludes with one sentence that says, "If the clear and convincing evidence were applicable to this determination, I would find by clear and convincing evidence that the Vice President did not lie," though she did something in the alternative.

Senator SPECTER. But that was not a matter discussed at all in the lengthy statement of declination, except for a footnote, you say?

Mr. PARKINSON. The best I can recall, that is correct, because she didn't find that the fundamental elements of the offense had been satisfied.

Senator SPECTER. But how could there be a finding that the fundamental elements of the offense were not satisfied in the absence of finding clear and convincing evidence of no criminal intent?

Mr. PARKINSON. We had a lot of discussions about a fairly nuanced legal point, and that was that in false statement and perjury charges, at what point does the clear and convincing standard apply and how does that relate to the falsity element of a false statement charge. We had lots of discussions about how that applied, and it was the conclusion, at least of the Attorney General, that they were separate and distinct issues. And while you certainly were focusing on state of mind in assessing whether the falsity element was satisfied, it was not the same question that you would reach if you had to get to the clear and convincing standard under the statute.

Senator SPECTER. Well, let's focus on that for just a minute. The question was, did the Vice President know that he was raising hard money, and here you have his denial and an explanation about iced tea. And on the other side, you have four witnesses and the fact that some of the people he raised money from did contribute hard money, and others where there wasn't an express raising of hard money had it allocated to hard money, and 13 memoranda which showed that he was supposed to raise hard money, and his statement about being experienced, 16 years as a candidate, and that even if he didn't read the memoranda, these were matters discussed with him and the President.

Now, the question is did he know that he had raised hard money, because if he did, there would have been a false statement. Now,

that requires an analysis as to his state of mind as to whether he knew he was raising hard money. Wouldn't that conclusively involve the question as to whether, on the totality of that evidence, there was clear and convincing evidence that he did not know he was raising hard money?

Mr. PARKINSON. The clear and convincing evidence standard is, as you well know, the part of the independent counsel statute which comes into play, and this was the analysis that we ended up with within the Department only after you find that the elements of the offense have been satisfied. And then the question is, having satisfied the elements of the offense, focusing on the individual's state of mind, is there clear and convincing evidence that he did not have the requisite state of mind.

At a certain point, I think the issues do tend to collapse and you are looking at the same fundamental question, and that is what was his state of mind. But they are two separate issues. First, you figure out whether or not the elements of the offense are satisfied, and then if you do, then you get to the statutory piece relating to clear and convincing evidence.

Senator SPECTER. But the determination as to whether the elements of the offense occurred are identical, to wit did he know he was raising hard money.

Mr. PARKINSON. I think, at bottom, they are essentially identical. The standards are slightly different. Clear and convincing is intended under the statute to be a higher threshold before you choose not to seek an independent counsel.

Senator SPECTER. But if the issue is independent counsel and the question is whether he knew he was raising hard money, it seems to me to be an inevitable conclusion that the clear and convincing evidence standard had to be met.

She did find that as to the President and the Vice President on her December finding, and that was essentially based, as I had read into the record before, on the advice of counsel argument. You analyzed that in your memorandum of December 4, and what were your findings as to that?

Mr. PARKINSON. I concluded—and it is set forth in the memo from December 4 as well as the Director's memo to me of December 8—that the advice of counsel defense was fairly strong in this case, but in my view it was not strong enough to satisfy the clear and convincing evidence standard under the statute. And I set forth a number of reasons why I thought this was not that compelling, and I took some issue with the Department of Justice memorandum that said this was one of the strongest cases for advice of counsel defense that they had seen.

Senator SPECTER. And the advice of counsel defense is essentially in the nature of an affirmative defense, isn't it, Mr. Parkinson?

Mr. PARKINSON. Yes.

Senator SPECTER. And the reasons you set forth were, number one, that the advice had never been given directly to the President and Vice President?

Mr. PARKINSON. There was no direct contact between the lawyers that they are relying on for the advice of counsel defense and the principals.

Senator SPECTER. Well, how can you have an advice of counsel defense if the advice is not given by counsel directly?

Mr. PARKINSON. It is certainly legally possible to have an advice of counsel defense, notwithstanding the fact that the advice filtered through someone else, which is the case in this matter.

Senator SPECTER. But you found that was a reason not to accept it?

Mr. PARKINSON. That was a reason for me to conclude that the advice of counsel defense was not as strong as I thought others were.

Senator SPECTER. And a second reason you have in your memo, to try to boil it down and wrap it up a little sooner here, is that both of these lawyers had substantial interests in terms of their representing the Democratic National Committee and the Clinton-Gore campaign?

Mr. PARKINSON. That is correct. I mean, a fundamental strength of an advice of counsel defense is that the attorneys who are giving the advice are disinterested. And in our view, they were not disinterested in this case.

Senator SPECTER. And one of them even had some qualifications as to the advice of counsel defense?

Mr. PARKINSON. That is correct.

Senator SPECTER. And what was that qualification?

Mr. PARKINSON. It wasn't so much a qualification as it was, as a I recall, the difference between—there was a question about electioneering message versus express advocacy which was a critical issue in this case, and one of the attorney's advice was—it appeared to us to be miscommunicated to the principals, which raised some question about the viability of relying on an advice of counsel defense.

Senator SPECTER. What was miscommunicated to the principals?

Mr. PARKINSON. I note on page 4 of my memo there is an indication that the legal advice of Sandler and Utrecht may not have been getting through. Sandler and Utrecht stated that they had consistently applied the electioneering message legal standard, not the express advocacy standard, when they reviewed the content of the DNC ads. Yet, virtually every other witness recalled Sandler and Utrecht's advice in terms of express advocacy.

And I conclude saying, while the DOJ memo concludes this inconsistency is not significant, certainly it raises some question about whether the attorneys' advice was being heard and heeded.

Senator SPECTER. Especially in the context that neither the President nor the Vice President dealt directly with those attorneys?

Mr. PARKINSON. That is correct.

Senator SPECTER. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Mr. Parkinson, do you see the FBI's role in this process as advisory to the Attorney General?

Mr. PARKINSON. That is correct, Senator.

Senator TORRICELLI. Is it unusual for the FBI to give advice to the Attorney General in such an instance?

Mr. PARKINSON. It certainly wasn't in the last several years, no.

Senator TORRICELLI. Do you consider the Attorney General to be bound by your advice?

Mr. PARKINSON. No.

Senator TORRICELLI. Was it unusual for the Attorney General to solicit advice from the head of the Criminal Division or Public Integrity, her principal aides, and the FBI, and where there was conflicting advice she made her own judgment?

Mr. PARKINSON. Not unusual at all. It was typical.

Senator TORRICELLI. Do you in your mind believe that there is any question about the integrity of Janet Reno or her operating in the national interest in having solicited independent advice and then having, to the best of her abilities, made a judgment?

Mr. PARKINSON. No, I do not.

Senator TORRICELLI. Do you have any information indicating that the Attorney General was not acting with integrity, consistent with her responsibilities?

Mr. PARKINSON. No.

Senator TORRICELLI. Indeed, given the imprecise standards of the campaign finance laws and some of the conflicting interpretations and facts, wouldn't it be understandable that the Attorney General might be receiving different conclusions and different advice from her assistants and other prominent officials in the Justice Department and the FBI?

Mr. PARKINSON. That would certainly be expected.

Senator TORRICELLI. It would be expected. So, indeed, as this evolved is really what one might have anticipated?

Mr. PARKINSON. I think that is correct in terms of differences of opinion and advice.

Senator TORRICELLI. Is there any reason to believe that Mr. Radek in writing his memorandum was not adhering to the highest professional standards and acting with integrity in reaching his own conclusions based on law?

Mr. PARKINSON. No, I do not, Senator.

Senator TORRICELLI. Indeed, while you might disagree with Mr. Radek's conclusions, as an attorney, having read them, I find them plausible. If I do not agree with them in each instance, I can understand how a well-reasoned person operating in good faith could reach these conclusions even if I don't agree with all of them. Do you find yourself in the same position that I find myself?

Mr. PARKINSON. I often found myself in that position.

Senator TORRICELLI. I think there are several of Mr. Radek's points that bear being read into the record. Respond to them if you find them appropriate. Responding to Mr. La Bella's report, Mr. Radek writes, "The report leaps to the outrageous conclusion that the Public Integrity Section has engaged in a results-oriented analysis to protect the White House when it asserts that different standards have been applied to the various campaign finance matters that have arisen under the Act."

Do you have any reason to believe that different standards are being applied to different people who were being evaluated under the provisions of the Act or, Mr. Parkinson, do you think that the standard would seem to be fairly evenly applied, even if you do not agree with all of the interpretations of the Department?

Mr. PARKINSON. Generally, I thought they were evenly applied. I did have quibbles occasionally along the way.

Senator TORRICELLI. As we all would. But, in fact, anyone asserting that there was a results-oriented analysis, that would indeed be outrageous, given the integrity of the people involved and by your own statement that this seemed to be evenly applied.

Mr. PARKINSON. I never concluded that this was results-oriented.

Senator TORRICELLI. No, I am not suggesting that you did. I am simply soliciting your help.

Mr. Radek goes on to cite, referring to the La Bella report, that "There is absolutely no specific and credible information suggesting that the President committed a crime with respect to any of these matters. The report identifies none, but rather lists a series of provocative and speculative, hypothetical questions it asserts should be answered." Clearly, hypothetical questions are not a standard under the Act for reaching any conclusion.

With, I think, reference to the Vice President, Mr. Radek concluded that the report was so superficial that he was at a loss as to how to respond. I might point out that had I been writing the report, that is exactly the word that I would have used, "superficial."

Now, let me get to the question of these meetings and the Vice President. Being a fair man, I am certain you put this into some context before reaching your own conclusions. For the committee's purposes, what is the volume of memoranda the Vice President receives on a weekly, monthly, or annual basis?

Mr. PARKINSON. I don't know the answer to that, but I would assume that it is enormous.

Senator TORRICELLI. You are the committee suggesting your own belief that it is credible to assume that the Vice President did read a specific memorandum. Presumably, if the Vice President were receiving two memoranda a week as opposed to 2,000, or 500 memoranda a year as opposed to 10,000, it would have some bearing on the credibility of whether he read an individual memorandum.

Mr. PARKINSON. I think there is no question about that, and I want to correct one thing that you said, Senator Torricelli, and that is that I was not saying that I found—that I concluded that he read a particular memorandum or didn't read a particular memorandum. The issue on the table was whether or not there was reason for further investigation. I don't think we were in a position at that time, nor should we have been in a position to reach ultimate conclusions as to what he saw and what he didn't see.

Senator TORRICELLI. But if indeed it could be concluded that the Vice President, having received an enormous number of memoranda, could not possibly have read them all and was likely to have only read a portion of them, that would go to the question of whether or not there was credible information that the Vice President knew about the hard/soft money combinations.

Mr. PARKINSON. No question about it.

Senator TORRICELLI. And indeed we are unable in the committee today to establish the context and the volume of this material and how likely it was.

Would it surprise you to know that as the Chairman of the Democratic Senatorial Campaign Committee, memoranda have

been prepared for me about every State in the Union that has a senatorial election this year? I would assume that I am much more involved in the daily events of the management of those campaigns than the Vice President, who has other responsibilities in his own campaign.

Would it surprise you to know that I could not cite for you a single formula of hard/soft money or the determination to use such in any State in the Nation, although such memoranda have been prepared for me as late as yesterday?

Mr. PARKINSON. No, it would not.

Senator TORRICELLI. The meeting that was held where allegedly this hard/soft split was discussed in the presence of the Vice President, how many people were in that meeting?

Mr. PARKINSON. It appears that there were approximately 15 people in that meeting.

Senator TORRICELLI. Fifteen. Now, unaided by access to contemporaneous statements or other written material, how many of those people were able to recollect whether there was a specific discussion of hard/soft money-raising?

Mr. PARKINSON. Four.

Senator TORRICELLI. And they were?

Mr. PARKINSON. They were the ones that I mentioned before—David Strauss, Leon Panetta, Bradley Marshall, and Brian Bailey.

Senator TORRICELLI. Well, indeed my information is Mr. Strauss only remembered this after having seen contemporaneous writings.

Mr. PARKINSON. I believe that is correct, but he did——

Senator TORRICELLI. So now we are down to three. Mr. Marshall apparently later recalled making the statement, but initially when asked did not do so. Is my information accurate on that count?

Mr. PARKINSON. I think that is accurate. I would have to double-check the investigative summary.

Senator TORRICELLI. OK, now we are down to two. I am aware of Mr. Panetta. Who was the other one?

Mr. PARKINSON. Brian Bailey.

Senator TORRICELLI. Are you certain of that, Mr. Parkinson? That is not consistent with what I have.

Mr. PARKINSON. Well, that is what is set forth in the investigative summary, and I have no——

Senator TORRICELLI. Well, you know what? I will give you the benefit of it, but we have now established that there were 15 people in the room. I am aware of specific information that one person, Mr. Panetta, remembered a discussion of hard and soft money, and he remembered it only in the second conversation. When initially asked, he didn't recall it either.

So now we are being asked to believe that the Vice President, arguably the second busiest person in the room with the most other things under consideration, remembered a hard/soft money discussion, although people specifically involved in the campaign with specific responsibilities for hard/soft money did not remember this discussion. Some of those directly involved in the question did not remember the discussion until seeing contemporaneous statements written and presented to them. The Vice President remembered this, but none of the others did, with the exception of Mr. Panetta, who only remembered it upon the second time being asked. It ap-

pears to me the Vice President is not being held to an unusual standard; he is being held to a unique standard that strains credibility.

Mr. PARKINSON. My response is simply as I said——

Senator TORRICELLI. Well, it is not required, but if you want to make a response.

Mr. PARKINSON. No, that is fine. I think my assessment is laid out in the memo.

Senator TORRICELLI. In your memorandum, in fairness to the Vice President, while I recognize this is not the standard for appointment of the counsel, nevertheless I think it should be said the following is written, "There appears to be a consensus that the facts as known would not warrant prosecution." This is in reference to a false statement.

Is that indeed the conclusion that is in your report?

Mr. PARKINSON. That is correct.

Senator TORRICELLI. Mr. Parkinson, I take it as a member of this committee that this hearing is of considerable importance and that you would do the same.

Mr. PARKINSON. Absolutely.

Senator TORRICELLI. And you have paid considerable attention to this meeting?

Mr. PARKINSON. When you say "this meeting," what are you referring to?

Senator TORRICELLI. This hearing.

Mr. PARKINSON. Sure.

Senator TORRICELLI. During the course of this hearing, are there three elements that must be reached in the appointment of an independent counsel?

Mr. PARKINSON. Well, it comes in different stages, but to trigger an independent counsel preliminary inquiry, there are three.

Senator TORRICELLI. OK, and in my questions to Mr. Radek and yourself, how many of the three have I referred to? Do you know?

Mr. PARKINSON. You certainly have referred to specific information. And I may be missing the thrust of your question, Senator.

Senator TORRICELLI. Here is my point, Mr. Parkinson. It is not to embarrass you. The Vice President of the United States was asked some years after attending a meeting in which, based on my political experience, he probably was there to show interest in the campaign, encouragement to people who were working on the campaign by exercising some interest, but feigning considerable other interest, about a specific piece of information.

Although there were 15 people in the room, we can establish with certainty that one person, upon being asked on a second instance, recalls the issue at question. You have been in this room considerably less time with considerably greater knowledge, I think greater interest, and yet are unable to recall two of the three specific elements required for the offense being discussed that I made reference to them during this meeting.

I am not raising that because I believe it is a failure of you to take this hearing seriously or of your recollection, but to put in some context of fairness what it is the Vice President of the United States is being expected to recall. Indeed, I believe you were correct when you wrote on the issue of false statements, whether or not

the Vice President could be expected not only to remember the conversation but ever to have read these memoranda, that no prosecution credibly ever could have been obtained, and in my judgment never should have been pursued.

Thank you, Mr. Parkinson, for your time. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Torricelli.

Senator Sessions.

Senator SESSIONS. Mr. Chairman, I will just ask a couple of questions.

With regard to the decision on independent counsel, you and Director Freeh did not agree with the Attorney General's decision, is that correct?

Mr. PARKINSON. That is correct. There were several occasions. I don't know which——

Senator SESSIONS. And it is your testimony today that you have no evidence of improper influence or motivation on behalf of the Attorney General?

Mr. PARKINSON. That is correct.

Senator SESSIONS. And you don't know what went on and who she has talked to or anybody else?

Mr. PARKINSON. No, other than I know who she talked to within the Department when she was present at a meeting.

Senator SESSIONS. But you don't know if she was talking to Charles Ruff or the White House or the President or the Vice President or his counsel or anybody else about these matters?

Mr. PARKINSON. No.

Senator SESSIONS. You just don't know?

Mr. PARKINSON. Don't know.

Senator SESSIONS. How long have you been with the FBI?

Mr. PARKINSON. I have been with the FBI almost 5 years.

Senator SESSIONS. That is all I have.

Senator SPECTER. Mr. Parkinson, when you take up the issue Senator Torricelli did that a conviction is unlikely to occur, is that in any way a standard which is to be used to determine whether there ought to be an investigation by independent counsel?

Mr. PARKINSON. No, it is not, Mr. Chairman, and the last sentence after the sentence that he referred to says, "But that is not the issue before us," and I think——

Senator SPECTER. That was the sentence that Senator Torricelli left off?

Mr. PARKINSON. Well, that was the concluding sentence after the one that he mentions, and I think that is critical. I mean, this is not—we are not discussing whether or not we were at a point of making any prosecutable case. That is not the issue; it wasn't the issue then.

Senator SPECTER. On a preliminary inquiry, you don't have access to a grand jury. You don't have access to subpoenas. The investigative scope is very limited.

Mr. PARKINSON. That is correct.

Senator SPECTER. And it is very limited because there is a statutory intent by Congress of an approach that there ought to be very little investigation done by the Department of Justice before an independent counsel comes in.

Mr. PARKINSON. That is precisely why the statute withholds some of the most fundamental investigative tools during preliminary inquiries.

Senator SPECTER. So that it is hardly to a consideration by the Attorney General on following the statute and appointing independent counsel as to what the ultimate outcome is going to be. That is entirely speculative, but in any event not an appropriate standard for the Attorney General's consideration.

Mr. PARKINSON. Right. That, in my view, is an exercise of prosecutorial discretion, and the statute and certainly the legislative history makes absolutely clear that that is not appropriate.

Senator SPECTER. Mr. Parkinson, when Senator Torricelli tried to reduce your witnesses from four to I don't know how many, if Mr. Strauss has his recollection refreshed by a written memorandum, then as a matter of law doesn't he have a recollection?

Mr. PARKINSON. In my view, that becomes quite compelling. He not only has a recollection, but he has a contemporaneous notation that describes it.

Senator SPECTER. Well, focusing just on the recollection, never mind your view or my view, the law is that if a witness refreshes a recollection from a document, then he has a recollection.

Mr. PARKINSON. That is correct.

Senator SPECTER. And when you talk about Bailey and Marshall, unless your reports are wrong, Bailey, "recalls individuals discussing hard and soft money at the meeting." That appears on page 0149. And Leon Panetta, quote, "hard and soft money breakdown in the media fund was discussed at all three meetings," at 0150. And Bradley Marshall said that the spending side of the DNC media campaign was involved, which was 35 percent Federal hard money.

Mr. PARKINSON. That is correct, and I believe the investigative summary is accurate.

Senator SPECTER. So there were four witnesses who testified about hard money being discussed in the presence of the Vice President.

Mr. PARKINSON. That is correct.

Senator SPECTER. Mr. Parkinson, when you come to your conclusion that reasonable people can draw different judgments as a vast generalization, that is pretty hard to disagree with. We are about to question Mr. Radek on a number of the specifics, and where the statute calls for a preliminary inquiry based on information and he substitutes "evidence," that is a pretty big distinction, isn't it?

Mr. PARKINSON. It potentially is. I obviously have read the exchange with Mr. La Bella and Mr. Radek. In this case, I think when Mr. Radek says he was using the terms interchangeably, I think he is accurate that sometimes that was done.

Senator SPECTER. It is sometimes done to interchange "evidence" with "information?"

Mr. PARKINSON. It is important, obviously, to interpret the statute as written, and the statute refers to information.

Senator SPECTER. Well, there is a tremendous difference between evidence and information. Evidence is material which comes into a court of law to make a determination of fact. Information may or may not have that level of reliability.

Couldn't reasonable people disagree about using a standard of information, which the statute specifies, as opposed to a much higher standard of evidence?

Mr. PARKINSON. I think the bottom line is that when the standard was applied, I think everybody understood what the statute required. But, yes, there is a significant difference between information and evidence. I don't question that at all.

Senator SPECTER. And when Mr. Radek's memorandum picks up the issue of, on looking at a preliminary inquiry, that conduct could not have been willful violation of the law and thus could not be prosecuted criminally, and the memorandum is submitted by Mr. Robinson, his superior, to the Attorney General saying that is a wrong standard—you don't consider state of mind on a preliminary inquiry—can reasonable minds differ on that that the statute specifically excludes state of mind to determine whether there is a preliminary inquiry?

Mr. PARKINSON. I guess I am not sure how to answer whether reasonable minds can differ. I think there were a lot of reasonable minds engaged in this, but I think Mr. Robinson had the standard correct.

Senator SPECTER. Well, there is a standard of if reasonable people disagree, and if no reasonable person would disagree as a matter of law if a case is thrown out, not a matter for the jury—you don't let a jury speculate if reasonable people would not disagree. And Senator Torricelli was asking you if Mr. Radek was reasonable, and I am not contending he is not reasonable, but I am looking at a series of factors that he made critical decisions here which were patently unreasonable; that reasonable people could not disagree; that evidence is different from information; that the statute calls for state of mind not to be considered on the determination of a preliminary inquiry.

That is correct, isn't it?

Mr. PARKINSON. That is correct.

Senator SPECTER. And that when you take up the subject of state of mind, there has to be clear and convincing evidence, not the exercise of prosecutorial discretion saying never mind. The prosecutor may decide not to pursue it for a lot of reasons, but that is not the same as finding clear and convincing evidence that there is no criminal intent, right?

Mr. PARKINSON. That is correct.

Senator SPECTER. OK, thank you very much, Mr. Parkinson. It was nice talking to a real lawyer. Thank you.

Mr. PARKINSON. Thank you, Mr. Chairman.

Senator SPECTER. Mr. Radek, would you come back, please?

Mr. Radek, you have a very distinguished career as a public servant, and I don't think it makes any difference who appointed you or whose pleasure you serve at. The question really is on a line-by-line analysis of a lot of tough legal concepts what is an appropriate judgment here. Was there an appropriate exercise of discretion as a matter of congressional oversight? If you have a motivation to succumb to pressure if the Attorney General's job may be in the balance, that is a factor of objectivity of judgment, if that is going to be a consideration.

You were quoted in the New York Times on July 6, 1997. I will read you the paragraph. "Radek, a bluff, cheerful man of 54, was unwilling to discuss details of the ongoing investigation when I spoke to him, but he was happy to defend the Justice Department's ability to investigate the executive branch. 'The independent counsel statute is an insult,' Radek said. 'It is a clear enunciation of the legislative branch that we cannot be trusted on certain species of cases.'"

Is that an accurate quotation?

Mr. RADEK. Yes, sir.

Senator SPECTER. As a generalization, you don't think very much of the independent counsel statute, to put it mildly.

Mr. RADEK. I was very happy to see its demise, Mr. Chairman.

Senator SPECTER. And before its demise, what did you think of it?

Mr. RADEK. I didn't like the statute. The fact that it was an insult was not as important to me as the damage I thought it did to our system of Government.

Senator SPECTER. Why?

Mr. RADEK. Well, it set up a pseudo fourth branch of Government, one that was not responsible to the body politic.

Senator SPECTER. What do you think of the media?

Mr. RADEK. What do I think of the media?

Senator SPECTER. Yes. They are the fourth branch of Government, I thought.

Mr. RADEK. Oh, I am sorry. Let's make this one the fifth.

Senator SPECTER. This would be the fifth branch of Government.

Mr. RADEK. You are absolutely right, Mr. Chairman.

Senator SPECTER. The media was there before the independent counsel statute.

Mr. RADEK. You are absolutely right, and I apologize to my friends in the media.

The fact is that it set up a system in which the checks and balances set up by the Founding Fathers simply did not work, and it was to the disadvantage of the investigators. Everybody was subject to political criticism and no one was responsible to the body politic, and I thought that for that reason the law was just a real bad concept, and I think I had a lot of agreement in this body.

Senator SPECTER. But you took an oath to uphold the law, Mr. Radek.

Mr. RADEK. Yes, sir, I did, and I——

Senator SPECTER. Not to make the law, not to disagree with the law, but to uphold the law.

Mr. RADEK. That is absolutely right, and I did the very best I could at all times. And I think I administered that law about as well as it could be administered. I know you disagree with that.

Senator SPECTER. Well, you started off with a pretty negative view of the law, as you have just said.

Mr. RADEK. Yes, sir, and can I point out——

Senator SPECTER. Usurpation of power, Founding Fathers. If you were sitting here in a confirmation proceeding, you might not pass. You are making law, not interpreting law, judge.

Mr. RADEK. I don't think we have to worry about my being here for a confirmation proceeding, Mr. Chairman.

Senator SPECTER. I don't know about that, but I think you are right. We don't have to worry about it. We will just await the events and see what happens.

Mr. Radek, when you use a standard of—the statute talks about credible information, you use a standard of evidence. Isn't that a very far reach, information and evidence being very, very different?

Mr. RADEK. They aren't, Senator, in the context of the independent counsel statute, because you have to take the phrase as a whole. I mean, what the statute says is specific information from a credible source. Specific information from a credible source is evidence. Now, the fact that I may have said at times specific evidence, specific and credible evidence, credible evidence, is simply a redundancy.

What the statute says and what I have consistently applied—and I think you will find no one to dispute this—is that we have to base the information on—or the independent counsel statute has to be triggered by information that is more than rumor, innuendo, speculation. It has got to be facts, and facts generally can be referred to as evidence because they have to be in some way provable or not. And your interpretation that I meant admissible evidence just couldn't be further from the way it was, Mr. Chairman.

Senator SPECTER. But, Mr. Radek, evidence means admissible. That is what evidence means.

Mr. RADEK. No, it doesn't, because then what would inadmissible evidence be?

Senator SPECTER. Evidence which doesn't come in.

Mr. RADEK. You just called it evidence, Mr. Chairman. That is what it is. Evidence is facts. Some of it is admissible, some of it isn't.

Senator SPECTER. Do you think that when the Congress wrote the language of the specificity of the information received and the credibility of the source of information that those words were used unadvisedly?

Mr. RADEK. No, I don't. I think actually that was a pretty good standard. If you are going to have an independent counsel act to be triggered by something, it seems to me that that was a pretty solid and well-thought-out limitation.

Senator SPECTER. When you start to talk about inadmissible evidence, you are really talking about a non-sequitur. Once it is concluded to be inadmissible, it is not evidence, although it could be evidence and be excessively prejudicial, so that there is some evidence which is not admissible, inadmissible evidence, even though it does qualify as evidence.

Mr. RADEK. Mr. Chairman, let me respond by saying I have spent a good deal of professional life inside Federal grand juries. Every fact that we present to that grand jury we consider to be evidence. Some of it is blatant hearsay, some of it is less than substantiated, but it is information that the grand jury needs to know. That is evidence. It is information; it is information that is based upon fact.

And the only reason I use the word "evidence" instead of "information" in some instances, besides the fact that it is wordsmithing and I don't want to be too repetitious, is to connote that what we mean here is facts and not just speculation and innuendo.

Senator SPECTER. Well, Mr. Radek, with all due respect, you are not accurately citing what is presented to grand juries. Grand juries get a lot of materials which are not evidence, a lot of hearsay, a lot of material which would not come into a court.

Mr. RADEK. We simply disagree on the definition, Senator. But I can assure you, please believe that from the beginning to the end, the standard that was applied—and Mr. Parkinson just said the same thing—the standard we applied was the statutory standard, specific information from a credible source.

Senator SPECTER. Well, Mr. Radek, I do not accept that. I do not accept that at all. I do not accept that when you talk about evidence instead of information, but I am interested to hear what you were doing. I am interested to hear what the Chief of the Public Integrity Section was doing requiring evidence instead of information. That is a big distinction to me. And we may disagree on it, and I have my rule and you have yours.

Turning to your memorandum to Mr. Robinson dated August 5, on page 18 where you say, "That conduct could not have been a willful violation of the law and thus could not be prosecuted criminally"—and Mr. Robinson picks that up in his memorandum to the Attorney General dated August 25 at page 4 and says, "In Public Integrity's version of the 'may have violated the law' standard, in my view, issues of 'state of mind required for violation of criminal law involved' that any violation could not have been a willful violation"—and then he says a little further down, "considerations of this matter are prohibited by the Independent Counsel Act until such time as a preliminary investigation has been commenced. Under section," et cetera, "state of mind considerations are not even to be considered."

Is Mr. Robinson correct about the appropriate legal standard?

Mr. RADEK. Yes, he is, because state of mind considerations are not to be considered during the preliminary analysis, only after a preliminary investigation.

Senator SPECTER. So you were corrected on that?

Mr. RADEK. Yes, sir, to the extent that my remark may have based a decision or recommendation on state of mind. But I am unable to find it in my memo. You said it was page 19?

Senator SPECTER. Page 18 in your memo and page 4 in his memo.

Mr. RADEK. I am sorry.

Senator SPECTER. Mr. Radek, you gave considerable weight to the advice of counsel defense. What is your view as to the testimony of Mr. Parkinson on that point?

Mr. RADEK. Well, I agree with Mr. Parkinson that the problem of the lack of total neutrality of the attorneys somewhat weakens the state of—or I mean the advice of counsel defense. And, in fact, that was an integral part of my memorandum.

But you have to understand, Mr. Chairman, that I didn't think this was a crime. I mean, I didn't think that we had a criminal violation here, and so all of the other issues that were sort of involved in that—it was sort of intuitive to me that there couldn't be criminal intent in a case where I didn't believe anybody could understand that this would be a crime.

Senator SPECTER. Well, how about the false statement issue for the Vice President?

Mr. RADEK. Well, the false statement issue for the Vice President was something else, but that didn't involve advice of counsel.

Senator SPECTER. So you thought essentially the advice of counsel point was an irrelevancy because there was no crime to begin with, so advice of counsel wasn't necessary?

Mr. RADEK. Well, it is not irrelevant because there were clearly those who disagreed with me, including the Attorney General, that there might be a potential crime here.

Senator SPECTER. But so far as you were concerned, if you start out with a conclusion that there is no criminal conduct here in any event, that is the beginning and end. Wouldn't that be a short memorandum to the Attorney General, no crime involved?

Mr. RADEK. My view is expressed early and often as to—and we are speaking merely about the Common Cause allegation here that the use of soft money to buy the issue ads was never going to be a crime until the Federal Election Commission ruled on the issue and said that it was going to be a crime; that it would be no only impossible for anyone to form criminal intent, but until the FEC said it was a crime, it wouldn't be. That was my position and I expressed it whenever asked.

Now, what flows from that is the fact that I believed that no one could possibly form criminal intent because the law was so unclear that there was no real prohibition. And the fact of a—or the element of a knowing violation of the law was necessary to get a conviction in an FEC case.

Senator SPECTER. What did you think of the conclusion of Mr. Robert Litt, Principal Associate Deputy Attorney General, in concluding that the evidence did not meet the clear and convincing standard of the Act to decide that the Vice President did not knowingly make a false statement?

Mr. RADEK. I disagreed with it, but I respected it, like many other opinions of Mr. Litt's and others in the discussions.

Senator SPECTER. Senator Torricelli asked questions about other independent counsel appointments. Were you involved in the appointment of independent counsel for Secretary of Labor Alexis Herman?

Mr. RADEK. I was.

Senator SPECTER. I questioned the Attorney General about this in this room at some length and found it really an inexplicable appointment. In her statement appointing an independent counsel, she says this among other things: "While I cannot conclusively determine at this time that any of these allegations are credible, much of the detail of the story he has told has been corroborated, though none of it clearly inculpates Herman." And she goes on, "Although our investigation has developed no evidence clearly demonstrating Secretary Herman's involvement in these matters and substantial evidence suggesting that she may not have been involved, a great deal of Yene's story has been corroborated. We are thus unable to conclude that he is not credible."

With those findings that the evidence against Secretary Herman was not credible, how in the world was it justified to appoint independent counsel as to her?

Mr. RADEK. The discussion that you are talking about there, Senator, is one part of the information, and that is Mr. Yene. He made certain allegations and there was much debate about whether or not he was believable, he was a credible source of information.

Senator SPECTER. Well, what was his role? He was the person who is supposed to have provided the money?

Mr. RADEK. He was a person who was involved in many of the transactions. He was more a witness to the transactions than deeply involved in any of them. But he told a story, and most of our preliminary investigation involved whether or not we could corroborate his story. And his story, to the extent we could investigate it, was corroborated, not to the extent that we still believed he was totally credible, but not to any extent that we could dismiss what he said. And so we were left in a situation where further investigation was required.

Senator SPECTER. Well, I took a look at the Herman matter and it seems to me incredible. She was exonerated by independent counsel, which, of course, is not the standard. But to have the principal antagonist here and make findings that there could not be a determination that Yene's allegations are credible, not just him but the allegations, and though none of it clearly implicates Herman, and then substantial evidence suggesting that she may not have been involved—the Herman independent counsel looks to me like a make-weight to start to build up a record. Look at all these people the Attorney General has found independent counsel for. Independent counsel Ray made a finding as to Mr. Nussbaum that there was hardly any basis for independent counsel having been appointed.

And I only mention it tangentially and briefly because I don't think it makes a point that because seven independent counsels had been appointed that this is a rigorous standard on the appointment of an independent counsel.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Well, Mr. Radek, you had no doubt, regardless of everything else we have said, that this was a major issue of importance to the Nation. This fundraising issue had been part of the last-minute campaign issue and important to the newly elected President and Vice President.

Mr. RADEK. No doubt whatsoever.

Senator SESSIONS. And you are aware that that called for—well, I would agree with the Chairman and the FBI Directors and many others that you were compelled to require an independent counsel. But assuming you were not and it was just discretionary as to whether or not to have an independent counsel, if the Department were to be able to keep the case, it was going to have to conduct it with the highest degree of professionalism, objectivity, and aggressiveness consistent with the law. Wouldn't you agree?

Mr. RADEK. I agree.

Senator SESSIONS. So you decided to keep the case?

Mr. Radek. I didn't decide to keep the case.

Senator SESSIONS. You didn't give it to the independent counsel. The Attorney General, at your recommendation, decided to keep it in the Department.

Mr. RADEK. It is not within my discretion to give things to an independent counsel. It is not necessarily within the Attorney General's discretion, although she could have a regulatory independent counsel. The statute requires certain things to have or not to have an independent counsel.

Senator SESSIONS. Well, the Attorney General——

Mr. RADEK. Senator, I am sorry to interrupt, but again I made recommendations on allegations as they came up. I did not have a discussion with the Attorney General talking generally about who should investigate this. It came to me initially.

Senator SESSIONS. And you supervised the investigation and still do?

Mr. RADEK. No, sir. I haven't been involved in the supervision of that since shortly after Mr. La Bella arrived.

Senator SESSIONS. Who is running it now?

Mr. RADEK. Well, her current head of the task force is Mr. Conrad, and he is supervised by Mr. Gerschel, a deputy assistant attorney general, and Mr. Robinson, the Assistant Attorney General.

Senator SESSIONS. But if he wanted to interview lawyers and ask them questions about the case——

Mr. RADEK. That requires certain approvals within the Department.

Senator SESSIONS. Are you totally out of the investigation?

Mr. RADEK. I am informed——

Senator SESSIONS. At least the Public Integrity task force?

Mr. RADEK. I am informed of the agenda for their weekly meetings with the Attorney General, and Mr. Conrad calls me for advice from time to time, as did Mr. Visinanzo.

Senator SESSIONS. Do they work for the Public Integrity Section?

Mr. RADEK. No.

Senator SESSIONS. They are not part of the Public Integrity Section now?

Mr. RADEK. I believe they are on my rolls as a detail, but they are not part of—they are not responsible to the management of the Public Integrity Section.

Senator SESSIONS. Well, let me just run over some things and see. Originally, when this matter broke about the Buddhist Temple controversy, the U.S. attorney's office in Los Angeles commenced an investigation, did it not?

Mr. RADEK. It did—it did not. I am sorry.

Senator SESSIONS. Well, it developed a plan to do the investigation, didn't it?

Mr. RADEK. It requested permission from the Public Integrity Section to open an investigation, and that permission was given.

Senator SESSIONS. And how long did they—they developed a plan of investigation after it was given to them?

Mr. RADEK. I don't know.

Senator SESSIONS. Well, do you recall stopping that investigation?

Mr. RADEK. I recall calling Mr. Ziperstein, the first assistant out there at the time, and telling him that the matter should be transferred to the campaign finance task force.

Senator SESSIONS. Do you recall a November 1, 1996, letter to that office that states the Public Integrity Section—that is you—responsible for all independent counsel matters, has been assigned to examine all of the allegations to determine whether further investigation is warranted?

Mr. RADEK. I recall that well.

Senator SESSIONS. Signed by who?

Mr. RADEK. Me.

Senator SESSIONS. Well, you don't assign it to yourself, do you?

Mr. RADEK. Sure.

Senator SESSIONS. You are the Chief of the Public Integrity Section?

Mr. RADEK. Yes, sir.

Senator Sessions. And you wrote them and said you had been assigned to examine these allegations, not by the Attorney General? She didn't have anything to do with this?

Mr. RADEK. I don't know whether she did or not. I was assigned by Mr. Litt.

Senator SESSIONS. Mr. Litt?

Mr. RADEK. Yes.

Senator SESSIONS. So you were assigned by Mr. Litt, not yourself——

Mr. RADEK. Yes.

Senator SESSIONS [contining]. To determine whether further investigation is warranted and whether the appointment of an independent counsel might be appropriate. "As it would be necessary in any matter with potential independent counsel ramifications, your office should take no steps to investigate these matters at this time."

Mr. RADEK. That is correct.

Senator SESSIONS. So you stopped it there in Los Angeles?

Mr. RADEK. I stopped it—well, actually, I didn't stop it because they never got started. And, in fact, when I asked them for all their evidence, they had none. They cited lack of agent resources for not having conducted any investigation during the several weeks that they had it.

Senator SESSIONS. Well, on November 30—that was November 1—the Attorney General made her decision not to appoint an independent counsel. Do you recall that?

Mr. RADEK. In response to a letter from Congress, I believe, yes. I don't know the——

Senator SESSIONS. Did you advise her on that?

Mr. RADEK. Yes, I am sure I did.

Senator SESSIONS. Well, let me ask you, between the time you stopped the Los Angeles attorney's office and the time 30 days later she made this decision to not go forward, what was done in the investigation?

Mr. RADEK. Well, first of all, Senator, there was no decision ever made not to go forward. In fact, the Hsi Lai Temple matter to which you refer was investigated vigorously and eventually resulted in the conviction of Maria Hsia.

Senator SESSIONS. Well, between the time of this 30 days and the time you indicated she made her decision that she was not going to appoint an independent counsel at your recommendation, what

evidence was gathered? You said none had been done by the U.S. attorney's office.

Mr. RADEK. My understanding is that subpoenas and interviews began immediately upon the receipt of that thing to the task force.

Senator SESSIONS. Well, was the FBI involved in it then?

Mr. RADEK. About then, yes.

Senator SESSIONS. During this 30-day period when you made the decision and the recommendation, had the FBI participated in this investigation at all? And I will advise you I understand they did not.

Mr. RADEK. I understood from Mr. Gallagher's testimony earlier that the meeting he says happened in December was to get the FBI involved. My impression was they were involved before that, but he may be right. I just don't recall.

Senator SESSIONS. Were witnesses from the Temple interviewed? Did you review their reports of interview, the FBI 302's?

Mr. RADEK. During that 30 days, I am sure I did not, no, Senator. But eventually, of course, they were interviewed and Ms. Maria Hsia was prosecuted for the——

Senator SESSIONS. Some were interviewed, but some had fled the country by then, had they not?

Mr. RADEK. I don't know that they fled the country before they were interviewed. Clearly, there were witnesses who fled the country before the Hsia trial, and we tried to get them back, "we" being the Department of Justice.

Senator SESSIONS. Well, I want to go back and ask you to be explicit. You are in charge of one of the most important investigations in the country involving the President and Vice President of the United States. You advised the Attorney General not to appoint an independent counsel. She formally declined on November 30, 1996. I would like to know what interviews and investigation had been done prior to you advising her of that specifically.

Mr. RADEK. Senator, the November 1996 response was a response to a letter from Congress. It was about the allegations made in a letter from Congress. It had little or nothing to do with what we were investigating in the task force, except to the extent that it set forth the same things.

And so when you ask me what was done on the Hsi Lai Temple investigation, I will be glad to tell you that everything was done and it ended in a prosecution. If you ask me what was done during that first 30 days that caused a letter to say no independent counsel, I can say nothing because the two were not related closely.

Senator SESSIONS. Well, I want to talk about the process here, is what I am talking about. And I am talking about whether or not we should have had an independent counsel, which I think the facts in this brouhaha and spasm we are now in is absolute proof of why we should have had one. And I would like to know at the time she made that opinion whether or not any witnesses had been interviewed, and I would like for you to name who they were.

Mr. RADEK. I cannot name, and I guess I have to answer I don't know just based on my recollection, Senator.

Senator SESSIONS. Were John Huang or any Democratic National Committee officials interviewed?

Mr. RADEK. I brought John Huang and his counsel in very early, but I think it was probably after this.

Senator SESSIONS. Now, there was a video of this event, was there not?

Mr. RADEK. I believe there was.

Senator SESSIONS. How soon did anyone inquire about that video and where it was?

Mr. RADEK. I don't know.

Senator SESSIONS. The video would have shown exactly what the Vice President knew and did and said if it had been—or least what he said and did.

Mr. RADEK. And did, yes.

Senator SESSIONS. Wouldn't it?

Mr. RADEK. Yes, it would.

Senator SESSIONS. It would have been valuable evidence.

Mr. RADEK. It is valuable evidence.

Senator SESSIONS. Where is it?

Mr. RADEK. I don't know.

Senator SESSIONS. Do you think it may have been recovered had the agents moved immediately and perhaps the Los Angeles U.S. Attorney's office hadn't been stopped?

Mr. RADEK. I think that the task force moved more quickly than the U.S. attorney's office would have, but that is my opinion.

Senator SESSIONS. Well, let's just say it this way. In that 30 days of November after you stopped them and it was under your supervision, this investigation was under your supervision, what did you do to investigate?

Mr. RADEK. It is more accurate to say that we took the case from them. It is not accurate to say we stopped them. But that aside, this case was handled as a task force matter. It was investigated, and it was investigated vigorously. I can't recount for you what was done in the first 30 days of that investigation. I am sorry.

Senator SESSIONS. Well, my information is nothing was done of significance. Witnesses fled, the video disappeared, records were shredded. You don't dispute that, do you?

Mr. RADEK. Actually, I do. I don't know that there is any evidence that there were records shredded in the Hsi Lai Temple case, and I don't think there were any witnesses who fled during those first weeks. But that is my best recollection.

Senator SESSIONS. Well, in 1997 we had had a basic view by the Vice President, and I think the Attorney General, that this was soft money and it wasn't covered by the law. Isn't that correct?

Mr. RADEK. Are we talking about the Hsi Lai Temple?

Senator SESSIONS. Yes.

Mr. RADEK. The soft money had nothing really to do with that, except as it might have caused us a problem with respect to foreign contributions. The real problem in the Hsi Lai Temple case was conduit contributions, a concept I know you are familiar with.

Senator SESSIONS. Well, I know that. But at any rate, in September of 1997 the Washington Post reported $120,000 of money solicited by Vice President was, in fact, deposited in hard money accounts. And you were in charge of conducting a 30-day review of that with the task force, is that correct?

Mr. RADEK. That is not related to the Hsi Lai Temple matter, unless I am confused, Senator.

Senator SESSIONS. Well, I am just going through all the matters here.

Mr. RADEK. If you would—the hard money/soft money mixup, and I will call it a mix-up and I will explain why I will call it a mix-up, occurred with relation to the Vice President and President's phone calls from Federal properties, potential violations of 607, the Pendleton Act. It was——

Senator SESSIONS. I am familiar with that, but I guess my point to you is in 1997, we had this shake-up, this blow-up, when we found out that the excuse on the phone call money was not valid. There was hard money involved, isn't that correct, and La Bella was appointed?

Mr. RADEK. La Bella came in as a result of the press finding out before the task force and the FBI that those contributions that had been—some contributions that had been solicited by the Vice President and possibly the President had been converted from soft money accounts to hard money accounts by the DNC.

Senator SESSIONS. And that had to be a source of embarrassment.

Mr. RADEK. Absolutely.

Senator SESSIONS. Well, how was it that the press finds out what you are supposed to be investigating?

Mr. RADEK. My understanding is that the information was contained in documents that the FBI had in its possession, but that they had not had a chance to review because there were technical problems with the document software that the FBI had and the attorneys were unaware of it.

Senator SESSIONS. Now, was Mr. La Bella—when he was brought in to head the investigation, was that part of Public Integrity or was that part of an independent Department of Justice task force?

Mr. RADEK. Well, it evolved. When Mr. La Bella was appointed——

Senator SESSIONS. What was he told that he was going to do?

Mr. RADEK. Well, I can tell you what he told me he was told and I can tell you what I was told. Mr. Litt, who was primarily giving instructions as to management issues at this time, told me that I was to supervise Mr. La Bella. He told Mr. La Bella that he was not to be supervised by me. You can see where this might have caused some misunderstandings and didn't get Chuck and I off on the right foot. Eventually——

Senator SESSIONS. Not a good step if you are trying to maintain public confidence in your Department of Justice investigation of your ultimate supervisors.

Mr. RADEK. I don't think it really hurt the investigation any, but it sure caused some misunderstandings between Mr. La Bella and I.

Senator SESSIONS. Well, it hurt public perception. I will just tell you why. Let's note a few things. On September 9, 1997, your Public Integrity Section attorneys that were investigating the matter sent a letter to Vice President Gore's chief legal counsel and they solicited his opinions about whether or not the law had been violated. Isn't that right?

Mr. RADEK. In independent counsel matters, we invariably do that, Senator.

Senator SESSIONS. And they affirmatively sought out whether or not there had been, "any contemporaneous advice of counsel concerning the solicitation of contributions on Federal property," among other things you asked.

Mr. RADEK. Yes, we would do that routinely in an independent counsel matter. We are reliant upon the subjects because we have no compulsory process.

Senator SESSIONS. And then on September 29, 20 days later, you advised the Attorney General to proceed to a preliminary inquiry before deciding the independent counsel issue. And as part of this, you cite a footnote of your letter that Vice President Gore's personal counsel had urged the same process to negate any, "appearance," in reaching a conclusion prior to having such investigation.

Mr. RADEK. I am sorry?

Senator SESSIONS. You noted in your footnote that Vice President Gore's counsel joined with you in the recommendation to the Attorney General that there be a preliminary inquiry. Is that right?

Mr. RADEK. I guess so. I wouldn't have said it if it wasn't true.

Senator SESSIONS. So then on October 2, a few days later, you drafted another memo to Mr. Robinson, who was the Chief of the Criminal Division, regarding the matter. And on page 2 of that memo you stated, "We have discovered evidence from which it can be inferred that the Vice President may have known at the time he made his fundraising telephone calls that the DNC needed hard money to keep its message on the airwaves." Does that sound right?

Mr. RADEK. Yes, sir.

Senator SESSIONS. But you later recommended no independent counsel be appointed. Did you discover any other specific information to refute this evidence?

Mr. RADEK. Oh, sure, we discovered a lot. We did a preliminary investigation, and you have the memorandum that sets for the details.

Senator SESSIONS. I am not sure it is as strong as you would suggest. On November 30, a month later, a month-and-a-half later perhaps, Mr. La Bella wrote a letter to the Attorney General through Mark Richard and stated that his task force—were you operating another investigation, in addition to his task force?

Mr. RADEK. No, sir.

Senator SESSIONS. Well, he wrote to Mr. Richard that his task force was requested by you to halt their own investigation into these matters, and that as of the same date the "investigation remains on hold at the request of Public Integrity." Why did you ask Mr. La Bella to back off, especially when the Attorney General brought him on board on September 16 to lead this aggressive investigation?

Mr. RADEK. I am not familiar with that document, Senator. Can you tell me what I was asking him to back off of?

Senator SESSIONS. On November 30, Mr. La Bella wrote, through Richard, that his task force was requested by you to halt their investigation of these matters, suspend them. This is a quote from his letter of November 30, "On November 21, I received the first

draft of Public Integrity's memorandum on VPOTUS," Vice President of the United States, "calls." I am quoting now: "This is the first write-up I have seen regarding the facts developed by Integrity's inquiry. As structured, I have no role in the preliminary investigation of the President's calls from the White House, except for my attendance at his interview on November 11, 1997. Nor have I been provided copies of the key documents referenced in Public Integrity's memorandum. Thus my analysis, such as it is, and reaction to Public Integrity's memorandum is very limited. I must give deference to the instincts and judgments of prosecutors and investigators who conducted and participated in the preliminary inquiry."

Then in footnote 7 he quotes the suggestion on page 11, footnote 10, of the Public Integrity draft that the task force is continuing to look at the Democratic National Committee's allocation practice is somewhat inaccurate. "The task force was halted at the request of Public Integrity because they feared it might chill those who were talking voluntarily with POTUS and VPOTUS investigators. The investigation was halted at the time when the task force was attempting to interview high-level DNC employees, the very people who might have shed some light on the contact with the White House and the essence of the Common Cause investigations. This investigation remains on hold at the request of Public Integrity."

So did you stop that investigation, and if so why?

Mr. RADEK. I stopped it because during the early course of our preliminary investigations on the President and the Vice President, witnesses expressed reluctance to talk because they felt they were subjects of the Common Cause allegation investigation. But they were willing to talk on the preliminary investigation which had a 90-day window as long as that investigation was not moving forward.

There was also a resource issue with respect to needing attorneys and agents to conduct the preliminary investigation within a certain window of time. But I assure you that window of time was short and they went back to what they were doing shortly thereafter.

Senator SESSIONS. Well, this is the second incident of you, I would suggest, stopping an ongoing investigation. And I find it strange and disingenuous that the person the public had all been told was conducting the investigation was stopped and not allowed to pursue the investigation.

Mr. RADEK. Well, the person who was conducting the investigation was never stopped from thoroughly investigating any allegation, and I believe he so testified, Senator Sessions. But to the extent that there was a temporary halt, I admit that it was done, but I thought it was necessary.

Senator SESSIONS. So you stepped in and took over and started making decisions, contrary to the opinion of the attorney the American public had been told was going to conduct this investigation.

Mr. RADEK. I don't know that it was contrary to his opinion, but the Attorney General left the determination of independent counsel matters with the Section because of our experience with it.

Senator SESSIONS. Well, I will just read you again what he said. "The task force"—that is La Bella's group—"was halted at the time

when the task force was attempting to interview high-level Democratic National Committee employees, the very people who might have some light to shed on contact with the White House, the essence of the Common Cause allegations." Do you disagree that he was not happy?

Mr. RADEK. Oh, no.

Senator SESSIONS. It doesn't sound like he was happy to me.

Mr. RADEK. No. I am sure he wanted to do this job because that is what he did, and I would have been unhappy if I were him, too. But I can assure you it was a temporary halt.

Senator SESSIONS. Well, as far as I knew and as far as any American knew, Mr. La Bella was going to conduct this investigation according to his best judgment as a professional career attorney. And now we find out that a high-level appointee of the Attorney General is intervening and stopping it, isn't that correct?

Mr. RADEK. I am not an appointee of the Attorney General, Senator, and I didn't stop him for very long.

Senator SESSIONS. Well, you stopped him and he was not happy about it. In 1998, the investigation began to focus on whether the Vice President lied to investigators during the November 11, 1997, interview, and this issue was brought to the forefront by La Bella's July 16, 1998, report to the Attorney General reviewing his strong recommendations that an independent counsel be appointed.

The key point I would like to focus on with you is the follow-up investigation was conducted not by a task force attorney, but by one of your assistants, Mr. Ainesworth, wasn't it?

Mr. RADEK. Mr. Ainesworth was detailed to the task force, Senator.

Senator SESSIONS. Who detailed him to it?

Mr. RADEK. I did. I hired him onto the task force. Many of the task force attorneys are detailed from Public Integrity.

Senator SESSIONS. Usually, a task force attorney gets to decide who his own attorneys are, doesn't he?

Mr. RADEK. At the time I hired him, I was in charge of the task force.

Senator, let me correct one thing that you have said, and that is the fact that the Vice President may have made false statements to the FBI. That information came from the Vice President through his counsel, Jim Neil. It was not investigated because it was brought to anyone's attention in the La Bella memorandum.

Senator SESSIONS. Well, regardless, that was the investigation.

Let me ask you this. During the follow-up interview of the Vice President himself, it was not done by Mr. La Bella or any other attorney from the task force. It was done by Mr. Ainesworth, isn't that correct?

Mr. RADEK. Mr. Ainesworth was on the task force. And, in fact, all of the independent counsel matters that were conducted during this investigation were conducted jointly by the task force and the Public Integrity Section.

Senator SESSIONS. Well, who was the head of the task force?

Mr. RADEK. I believe by that time it was Mr. Visinanzo.

Senator SESSIONS. He wasn't in on the interview?

Mr. RADEK. No, and neither was I. It was determined to let the trial attorneys do it.

Senator SESSIONS. Who determined that?

Mr. RADEK. I think Mr. Visinanzo.

Senator SESSIONS. He didn't even appear himself at the interview?

Mr. RADEK. No, and to the extent that Mr. La Bella and I attended the early interviews, it wasn't all that useful either. The trial attorneys and the agents should have been conducting these interviews and that is the way it went.

Senator SESSIONS. And back at the first interview of the Vice President, you issued directions about what subjects would be covered and what were not, isn't that correct?

Mr. RADEK. I issued no limitations, except that it was agreed generally that we would confine ourselves at that time to the independent counsel issues.

Senator SESSIONS. Didn't you direct that there be no further inquiries into the Temple matter at that time?

Mr. RADEK. Not that I recall. Do you have something to refresh my recollection?

Senator SESSIONS. That is my understanding.

Mr. RADEK. I don't believe that I did. If I did, it would have simply been to expedite the independent counsel matter. Again, the rules of that interview were not set too firmly, but it was clearly our intention simply to conduct the preliminary investigation under the independent counsel statute at that time and to conduct other interviews later. And I think Mr. La Bella testified we weren't ready to do the whole panoply of questions on the President or the Vice President or a whole lot of other people at that time.

Senator SESSIONS. Well, I would just say, Mr. Chairman, that I believe at best this was a herky-jerky, uncoordinated investigation that should have been placed in the hands—if it were kept in the Department of Justice, which I think was wrong, but if it had been it ought to have been placed in the hands of a top-flight professional prosecutor who should have been allowed to do this job to pursue the facts.

Ultimately, the Attorney General and the Public Integrity Chief would be involved in any decision to charge, but the question and concern I have is that the management of the investigation, the gathering of the facts, was systematically frustrated and not proceeded with effectively. And I think that was wrong. I think it has embarrassed the Department of Justice, and I think it should embarrass Mr. Radek.

Senator SPECTER. Thank you very much, Senator Sessions.

We will continue the matter. We still have the memorandum of FBI Director Freeh to get into, the memorandum of Director Freeh recommending independent counsel and the memorandum of Director Freeh regarding the conversation between Messrs. Radek and Esposito, and the conversation between the Attorney General and the Director of the FBI. And we hope to move into those matters shortly after we come back from recess in 10 days.

Mr. Radek, we may want you to come back, depending on the testimony of Mr. Esposito.

Senator SESSIONS. Mr. Chairman, I would note one more matter that frustrated——

Senator SPECTER. Before you do, I just want Mr. Radek's statement as to his willingness to come back.

Mr. RADEK. I will not say that I am happy, Mr. Chairman, but of course I will come back.

Senator SPECTER. Thank you.

Mr. RADEK. And I will answer any questions.

Senator SESSIONS. I will pass on that.

Senator SPECTER. That concludes our hearing.

Mr. RADEK. Thank you.

Senator SPECTER. Before we conclude, the statements of Chairman Hatch and Senator Thurmond will be included in the record.

[The prepared statements of Senators Hatch and Thurmond follow:]

PREPARED STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The Judiciary Committee has long been interested in the issues surrounding the application of the Ethics in Government Act—the Independent Counsel statute—and in particular, how that Act has been applied to the fundraising abuses which occurred during the 1996 presidential elections. The application of the Independent Counsel statute raises very serious issues of public confidence in the enforcement of our laws and in our institutions of government. As such, they are an important area for Judiciary Committee oversight.

This Committee, in fact, was the first Committee to formally call for the appointment of an Independent Counsel for the 1996 campaign finance scandal, having done so back in 1997. We held several hearings on the issues underlying the debate and explored the critical questions of whether the Attorney General was required to appoint an independent counsel under the *mandatory* provisions of the Act, and the related question of whether, in any case, she should appoint an independent counsel under the *discretionary* provisions of the Act due to inherent conflicts of interest.

During my questioning of the Attorney General, I made it clear that she was inherently conflicted in investigating the President and Vice President. Now, evidence uncovered by this Committee, under the joint efforts of myself, Senator Specter, Senator Grassley and others, demonstrate that Senate Republicans were not the only ones who felt the Attorney General was conflicted and should appoint an independent counsel.

We know now that the FBI Director, the hand-picked lead prosecutor for the Department of Justice Task Force, Charles La Bella, and other senior members of the Justice Department and the FBI were arguing in favor of the appointment of an independent counsel, but to no avail. Documents grudgingly turned over to the Justice Department reveal that senior members of the Justice Department—such as Robert Litt and the Chief of the Criminal Division, James Robinson, argued in favor of the appointment of an independent counsel as to at least one or more of the fundraising related allegations. Veteran, career prosecutors assigned to the Task Force felt the same way. Despite this, and despite the strongly held views of the FBI that an independent counsel was necessary, the Attorney General refused to appoint one. Indeed, Attorney General Reno has persistently suggested that the law *prohibited* her from appointing an independent counsel.

We will try to get to the bottom of that decision. Part of the problem appears to be an overly narrow and constricted interpretation of how to proceed under the statute and a failure to analyze the facts as a whole.

There is also evidence that considerations besides the facts and the law may have influenced—consciously or unconsciously—the analysis of the Justice Department. Documents uncovered by the Committee include a memorandum from the FBI Director to his Deputy Director, Mr. Esposito, dated December 9, 1996, which reflects the fact that Mr. Radek—Attorney General Reno's preferred lead investigator—made comments that there was a lot of pressure on him because the Attorney General's job may hang in the balance or words to that effect. Such comments are profoundly disturbing. As difficult as it may be, the Attorney General and her staff must put justice and the fair, impartial application and enforcement of the law ahead of their personal careers. The fact that senior officials within the Justice Department felt pressure only underscores the inherent conflict of interest she and the

Justice Department had in investigating allegations against the President and Vice President.

The documents are also disturbing in that they reflect a seeming inability of the Justice Department to reassess their early conclusions in light of new facts. The documents confirm what I have been saying for years—that rather than apply the law, Reno's inner circle saw it as their mission to search for new reasons not to appoint an independent counsel even when additional facts call into question past rationales for not appointing one. For example, new evidence surfaced in the investigation of potential false statements by Vice President Gore that could not be ignored by some senior members of the Justice Department—yet still the Attorney General did not appoint an independent counsel. The witnesses may address this in more detail, but the discovery of additional notes of meetings, memos to the Vice President and witness testimony provided compelling evidence that further investigation was necessary into whether the Vice President made false statements when he told the Justice Department task force that he was not aware of the hard money component of the media fund.

Not only did the Attorney General reject the views of Mr. Parkinson, the FBI Director, and Mr. La Bella on this score, but senior members of the Justice Department also concluded that an independent counsel was appropriate on this issue.

In a November 22, 1998 memorandum to the Attorney General, Mr. Robert Litt advised that, whether or not there was ultimately an indictable case, he could not conclude on the existing evidence that there was clear and convincing evidence that Vice President Gore did not possess the requisite intent to be guilty of making a false statement.

At this critical stage in applying the Independent Counsel statute, it was incumbent upon the Attorney General to focus on the facts—and not simply prefer one set of inferences over another.

There are serious questions to be answered here concerning whether, in the end, the Justice Department and the Attorney General did their jobs. I commend Senator Specter and the other members of the subcommittee for their diligence.

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman: I am pleased that we are holding this oversight hearing today regarding the 1996 campaign finance investigations. We have with us two men who have been actively involved in the details of the investigation and of the debate within the Administration over whether to seek an Independent Counsel.

From the beginning, F.B.I. under Director Freeh was convinced that this investigation of 1996 fundraising irregularities should not be handled within the Department and that an Independent Counsel must be appointed. He made this clear to the Attorney General in meetings and in memoranda that the Department has made every effort to prevent from becoming public.

The conclusion he reached was based on a straightforward approach to the law and the facts. The primary reason for the Independent Counsel statute was to have an outside prosecutor investigate potential wrongdoing by top Executive Branch officials when the Attorney General would have a conflict of interest. The standard was clearly met. For example, it was reported in the media this past weekend that Mr. Radek told the F.B.I. very early in the investigation that the Attorney General's job may hang in the balance. This is a classic example of a conflict of interest that makes the need for a special counsel more clear.

The investigation has gone forward within the Justice Department, but it has never been aggressive or effective. For example, John Huang, who funneled at least $1.6 million of illegal contributions to the Democratic Party in 1996, received probation, which only covered charges that predated the 1996 campaign.

I find it particularly unfortunate that the Chief of the Public Integrity Section, who is here today, has always been a major impediment to the appointment of an independent counsel. Of all people, he should understand how critical it is to maintain the people's confidence in the fairness and impartiality of our system of justice. It is clear that the only way to restore public trust in this investigation is to appoint a special counsel, and I again urge the Attorney General to do so.

Senator SPECTER. That concludes the hearing.

[Whereupon, at 12:53 p.m., the subcommittee was adjourned.]

THE 1996 CAMPAIGN FINANCE INVESTIGATIONS

TUESDAY, JUNE 6, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 11:08 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senators Grassley, Sessions, Smith, and Torricelli.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. The Senate Judiciary subcommittee on Department of Justice oversight will now proceed. We had scheduled this hearing at 11 a.m. to accommodate the schedule of the ranking Democrat, whom I am advised is due to be here shortly. But in view of the limited time available, with witnesses having other commitments this afternoon, and the parties having their caucus luncheons, we are going to proceed now with opening statements, with the expectation that Senator Torricelli will arrive before we call our first witness.

This hearing today is going to pursue the question of the relationship between the Department of Justice generally and the FBI specifically on campaign finance investigations, with particular focus on the memorandum from Director Freeh to Mr. Esposito which was the subject of our hearing on May 24.

We are going to be pursuing the matter further because Mr. Esposito is present today, and in the interim we have found that Mr. Esposito's notes reflected the presence of Mr. Gangloff at the meeting, of the Department of Justice. So we have sought all the participants of the meeting—Mr. Radek, Mr. Gangloff, Mr. Esposito, and Mr. Gallagher—to testify on this matter.

This is an important memorandum which has many ramifications. The report of the General Accounting Office which came out just yesterday comments about, as they put it, "bitterness," between the Department and the Bureau. There is no doubt that the relationship was poisoned between the Bureau and the Department, and the extent of the effect of this memorandum is a key factor to be considered by the subcommittee.

You have the GAO report commenting that the FBI agents and the Department of Justice lawyers had feuds and had to be kept

on separate floors. We have the later turn-down of the Department of the request by the FBI for a search warrant as to Charlie Trie.

You had the extraordinary event less than a year ago where the U.S. Marshals went into the FBI quarters at Quantico to get materials related to Waco. And a question which the subcommittee will explore is whether the application by the FBI on the very important warrant for Wen Ho Lee under the Foreign Intelligence Surveillance Act was affected by this kind of disagreement.

A second critical ramification which this committee is looking at is the issue of the duty of the FBI, and specifically Director Freeh, to turn over the memorandum of December 9, 1996, to the oversight group. It may well be that there was a duty, even in the absence of subpoena, for Director Freeh and the FBI to turn over that memorandum because of its serious import both to the Judiciary Committee and to the Governmental Affairs Committee, which was conducting a detailed investigation on these precise subjects all during 1997.

There is no doubt that Director Freeh and the FBI had a duty to turn over the memorandum as of April 20, the return date on the subpoena. It was not made available to the subcommittee until late in the evening of May 17, and this follows a pattern of documents being turned over very, very late. And those are issues which we will consider very carefully.

There is no doubt that Director Freeh had a very difficult position in terms of reporting for oversight the information that Mr. Esposito provided that Mr. Radek had said that there was pressure on Public Integrity on campaign finance investigations because the Attorney General's job was in the balance.

But the Congress gave the FBI Director a 10-year term especially to insulate him from that kind of pressure. We had the situation with FBI Director L. Patrick Gray and the pressure put on by the executive branch, and the Director of the FBI has been given unusual tenure by the Congress, with the expectation that the tenure will give him the status and stature to turn over information for this committee on oversight. And that is something we intend to pursue very, very vigorously.

If Mr. Esposito and Mr. Gallagher are correct as to what Mr. Radek said about pressure and the Attorney General's job being on the line, that may well explain why independent counsel was not appointed. That may well explain the extraordinary finding by the Attorney General of clear and convincing evidence of no criminal intent by the President and Vice President on exceeding Federal spending limits. That may account for the Attorney General's disregarding evidence of the Vice President raising hard money and knowing that he was raising hard money. And those are issues which we shall pursue.

We have requested the appearance of the Attorney General, who has agreed to come before the subcommittee. We are now working on a specific date, and we are pushing to have that earlier rather than later because we believe this matter ought to be concluded as early as possible.

It was not the timing of this subcommittee to have the matter come as close to a presidential election, but there is a record of pursuit on the Freeh memorandum recommending independent coun-

sel within a few days after he had sent it to the Attorney General in 1997. And there is a record of pursuit of the La Bella memorandum within 1 week after he submitted it to the Attorney General in July 1998.

And we have been very diligent in pressing this matter so that there is no delay here and no effort to have this come in the midst of any sort of a campaign season. But we intend to pursue, as I say, all the way, and that includes the testimony of Director Freeh.

Let me yield at this time to our distinguished chairman of the full subcommittee, again with my thanks for his cooperation on this particular aspect of the subcommittee's work.

I would like to place into the record a statement from Senator Strom Thurmond.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman: I am pleased that we are holding this oversight hearing today regarding the 1996 campaign finance investigations.

These hearings are reaffirming that an Independent Counsel clearly should have been appointed years ago to investigate the illegal fundraising activities of the 1996 Clinton-Gore Reelection Campaign. Memoranda from F.B.I. Director Freeh discussing the need for an Independent Counsel, which has recently been quoted in the press, provides additional proof.

In fact, a Freeh memorandum first revealed a key meeting between the F.B.I. and Mr. Lee Radek, the Chief of the Public Integrity Section, where Mr. Radek connected the pressure that was being placed on them to appoint an Independent Counsel to the fact that the Attorney General's job may hang in the balance. Mr. Radek denies this, but the F.B.I. had no reason to say something that was not true. I believe the F.B.I.

This meeting is critical because it shows that the Attorney General had an absolute, obvious conflict of interest. If she appointed an Independent Counsel, she may not be reappointed as Attorney General for a second term. This is the exact type of situation the Independent Counsel statute was designed to avoid. Mr. Radek understood her conflict of interest and all of the facts, but he joined with her in opposing the appointment of an Independent Counsel.

I find it particularly unfortunate that the Chief of the Public Integrity Section has always been a major impediment to the appointment of an Independent Counsel. Of all people, he should understand how critical it is to maintain the people's confidence in the fairness and impartiality of our system of justice. The people have no confidence in the way this investigation has been handled within the Justice Department, and the recent revelations only reaffirm this.

The only way to restore public trust in this matter is to appoint a special counsel, and I again urge the Attorney General to do so.

Senator SPECTOR. Senator GRASSLEY.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, thank you, Mr. Chairman, for your very hard work for the last 8 months as you have been pursuing this. I guess you have been pursuing it for 3 or 4 years, but through this subcommittee and with the full committee and with the leadership, trying to get more attention brought to this issue and finally having it done through this subcommittee.

The purpose behind today's hearing is to determine why the Attorney General turned down the advice of high-level Justice Department officials in campaign finance investigations. The advice was to request that an independent counsel be appointed. From the documents we have read, the entire FBI from top to bottom favored

such an appointment. So did the Attorney General's own handpicked lead attorney and his subordinates. All vehemently supported such an appointment.

The primary opponent of the appointment was Mr. Radek. He is head of the Public Integrity Section of the Justice Department. His office for many years has had a reputation as a black hole for referred cases. The vast majority of cases referred are declined. This, I think, has earned Mr. Radek the nickname of Dr. No.

I think it is fair to reiterate the point made at our last hearing that Mr. Radek was no fan of the independent counsel law. He may not have wanted his power to be usurped by an independent counsel. This may be why he fought so hard against those arguing for the appointment of an independent counsel.

I think it is highly instructive that the inspector general community and the U.S. attorney community from all around the country share the view that Mr. Radek's shop is a black hole of case referrals. In fact, at a recent monthly meeting of inspectors general, a very interesting and telling thing happened.

A discussion occurred about how Public Integrity never prosecutes cases. The frustration was shared by a prominent U.S. attorney who happened to be present. That U.S. attorney offered to serve as an alternative office for the IG community for prosecuting cases, since Public Integrity is such a black hole. Now, this is an enormously significant issue, in my view.

We have heard the same thing from the U.S. attorney community. No one will deal with Public Integrity because all the hard work that goes into referral is for naught. It is an extraordinary step, in my opinion, for a U.S. attorney to tell inspectors general that Public Integrity is so bad that you can come to me instead for prosecution. That is a very incredible situation to be in.

I say this to provide the context for this hearing. When so many high-level officials within the Department of Justice were advocating the appointment of an independent counsel, Dr. No was saying no. It was a very adamant "no." The question is why did the Attorney General choose Mr. Radek's advice over that of Mr. Freeh and Mr. La Bella and other career prosecutors.

A second question also arises. Prior to August 1998, the Attorney General used the argument that raising soft money from the White House was not illegal. After an FEC audit, in August 1998, undermined that argument, the Attorney General suddenly changed to an advice of counsel argument. This switch suggests that the important thing for the Attorney General was to protect the President and the Vice President at all costs.

So, Mr. Chairman, it seems to me there is good circumstantial evidence that the Attorney General succumbed to political pressure in not appointing an independent counsel. Listening to the advice of Dr. No might have been expedient at the time, but it has become quite clear in hindsight, and in oversight, that it might have been the very wrong decision.

Thank you.

Senator SPECTER. Thank you very much, Senator Grassley.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, for your determined efforts to produce the facts in this matter. It is a matter of great importance. We are talking about an investigation that involved the sitting Vice President of the United States. It was in the national newspapers. The matter we are talking about today broke on the eve of the election and was a remarkable event.

The meeting at issue that we will be talking about today, troubling to me, is that it was the first meeting between high-level FBI and DOJ officials to investigate campaign finance violations. Yet, Mr. Radek, who was in charge of that, has difficulty remembering the details of that meeting. I think it was a very important meeting.

After that meeting, and after Mr. Esposito shared his results with the Director of the FBI, Mr. Freeh, Mr. Freeh was extraordinarily concerned. In very short order, he asked for and went to see the Attorney General of the United States. And as I review the memorandum that he made of that meeting, directed to Mr. Esposito who was in charge of this investigation, apparently, I become even more troubled, Mr. Chairman, than I have been before.

The language he used to the Attorney General was forceful and significant. I would suggest he had no misunderstanding of what he was doing. Mr. Freeh has been around a long time. He understands the prosecution of important cases, and he said some things that I think ought to be reviewed by us all.

He said, quote—and this is a quote from his memorandum—"In fact, I said"—this is Mr. Freeh to Attorney General Reno—"that these prosecutors should be 'junkyard dogs.'" Now, that is a phrase that is used to refer not to an unfair prosecutor, but a prosecutor of skill and determination who is going to be facing a defense team that is going to obstruct and resist all the way. And you have got to be aggressive to pursue, to get the documents, to use the grand jury, to use subpoenas, to use court orders and contempt citations, if necessary, to get the truth. And that is what Mr. Freeh told her. She understood, I trust, precisely what he meant by that.

Then he went on to say in this memorandum of his conversation with the Attorney General of the United States, "And in my view, the Public Integrity Section was not capable of conducting the thorough, aggressive kind of investigation that was required." He went on to say, "I also advised the Attorney General of Lee Radek's comments to you," Mr. Esposito, "that there was a lot of pressure on him and Public Integrity regarding this case because 'the Attorney General's job might hang in the balance' (or words to that effect). I stated that these comments would be enough for me to take him and the Criminal Division off the case completely."

And I would agree. Anybody who is in charge of this investigation who feels pressure and who feels like they can't do the job, or suggest it in any way, should not be in charge of an investigation like this.

He also went on to note, "I also stated that it didn't make sense for the Public Integrity Section to call the FBI the lead agency in the matter, while operating a task force with Department of Commerce inspectors general." That is also a troubling thing to me, Mr.

Chairman, because based on my experience with the Department of Justice, when you have a matter of this significance, you want not the inspector general of the Department of Commerce, an agency that would have generally less skill in these kinds of matters, and also be more subject to political pressure. But you would want the FBI, which is the lead agency for corruption and fraud in the country, and also an agency, as you noted, that has a Director that is not subject to removal.

So Mr. Freeh was expressing some legitimate concern here. They are saying that the FBI is doing this, but we are not. The people who are doing the interviews are Department of Commerce inspectors general. He went on to note, "These inspectors general are conducting interviews of key witnesses without the knowledge or participation of the FBI. I strongly recommend that the FBI and handpicked DOJ attorneys from outside Main Justice run this case, as we would any matter of such importance and complexity."

Mr. Chairman, the fact that Mr. Radek stopped the work of the U.S. attorney's office who initially began to prepare to investigate this matter, and apparently did little or no investigation of the facts of the case before advising the Attorney General not to have an independent counsel, is very troubling to me. I just cannot understand how that could happen.

The Attorney General had to know that this was a matter of great national importance. And if she was not going to appoint an independent counsel, she had to know that there was every demand on her, if she were going to defend the rule of law and justice in America, to make sure the prosecutors that she selected in the Department of Justice were independent, experienced and tough, and willing to take on the challenge. And I feel very sad about it.

It would have been so much better to have an independent counsel, as you recommended, and Senator Hatch and others recommended. And if you don't, you have really got to carry the ball aggressively. That was not done, in my view, and as a result we have the American people rightly concerned about whether justice has been done.

Frankly, we ought not to overlook the fact that the ultimate problem here was the President of the United States, and perhaps the Vice President who was to be investigated, putting pressure on the Attorney General, actually holding perhaps her job at bay over this very decision. And I think that is a matter that ought not to be lost on the American people, and we have a duty in this Congress to try to make sure that the Justice Department operates with integrity above all else.

Thank you for your effort.

Senator SPECTER. Thank you, Senator Sessions.

Senator Torricelli, do you care to make an opening statement?

Senator TORRICELLI. Mr. Chairman, I would rather we proceeded to the witnesses. I have views on this matter, but I prefer to express them during the questioning.

Senator SPECTER. Fine. Thank you very much, Senator Torricelli.

The scope of this hearing is going to be limited to this memorandum and the meetings relating to the memorandum. We have been requested to limit to that subject because the witnesses have other obligations today, and there will be a follow-up hearing next

week where we will be looking into specific cases where Public Integrity had picked up the cases and what they done with them.

At this time, Mr. Gangloff, would you step forward, please? Would you raise your right hand?

Do you solemnly swear that the testimony that you will give before this subcommittee of the Committee on the Judiciary of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GANGLOFF. I do.

Senator SPECTER. You may be seated. Thank you for joining us, Mr. Gangloff.

Since the hearing on May 24, we had been informed that you were present at the meeting with Mr. Radek, Mr. Esposito, and Mr. Gallagher, since your name appeared on the calendar of Mr. Esposito. And as soon as we determined that, we made the request of the Department of Justice that you be present for today's hearing, and we thank you for joining us.

Do you recollect a meeting on Wednesday, November 20, involving——

STATEMENT OF JOSEPH GANGLOFF, PRINCIPAL DEPUTY CHIEF, PUBLIC INTEGRITY SECTION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. GANGLOFF. Senator, I do not recollect a meeting on that specific date.

Senator SPECTER. Let me finish the question—involving Mr. Radek, Mr. Esposito, Mr. Gallagher, and yourself?

Mr. GANGLOFF. Senator, I do not recollect a meeting on that specific date. The only——

Senator SPECTER. Do you recollect a meeting among the four of you on any date?

Mr. GANGLOFF. I am sure that the four of us met on many dates. Whether there were other people present at the time or not, I can't really say.

Senator, I would like to be helpful to you, so if you would let me just put it into context, I would certainly be happy——

Senator SPECTER. Well, that is fine. You may proceed as you wish, of course.

Mr. GANGLOFF. Thank you.

Because the problem that I have is in trying to recollect this meeting, I have looked at the text of this memorandum and tried to recollect a meeting where this conversation would have occurred. And the fact is I can't recollect any meeting where these issues were presented in this particular way.

So that sort of is my quandary. I am looking back 3½ years and basically trying to find something that is not a unique incident in terms of meetings. Mr. Esposito, I dealt with quite frequently in my capacity as legal adviser to the Integrity Committee of the President's Council on Integrity and Efficiency, which is made up of the inspectors general. And I also dealt quite frequently with Mr. Gallagher.

Senator SPECTER. Well, when you say you cannot recollect any meeting where the issues were presented in this particular way——

Mr. GANGLOFF. Right.

Senator SPECTER [continuing]. Can you recollect any meeting where there was a generalized discussion, for example, on pressure on the Public Integrity Section?

Mr. GANGLOFF. Well, not in those words. And, in fact, I would go so far as to say that were those type of words used, I think I would have recollected the incident. Pressure in the Public Integrity is, I think, much like atmospheric pressure. It is always present. You might notice if it were absent, but otherwise you don't notice it.

Even as I read this memorandum, I am somewhat perplexed because not really knowing the—I don't know—I haven't followed the testimony in this matter. I didn't know until yesterday afternoon that my presence would be required. But even in reviewing this, the fact that there is pressure—there is always pressure to do a good job, and I would see it that way.

The characterization that there was some thought that the Attorney General's job would be held in the balance seems totally foreign to any actual conclusion we could have drawn at the time in any event, because our conversations even in the hallways would have been much more consistent with the observation that, as it often is in the Public Integrity Section, you can't tell what the consequences of a particular action would be.

In other words, would the appointment of an independent counsel help the Attorney General or others politically, or would it, in fact, have the exact opposite effect? And I have been in the Public Integrity Section since January 1981, and I must say that my experience has been that I can't recall in that time, under any administration, where there has been pressure to reach a particular result in any particular case.

Senator SPECTER. With respect to your only finding out about this yesterday afternoon, that is a little surprising because Mr. McArthur advises me that the request was made for you last Thursday evening, just as soon as we had received a fax of Mr. Esposito's diary which showed your name.

Mr. GANGLOFF. Well, that could be. I was out of the office all day Friday and I had physician's appointments on Monday morning.

Senator SPECTER. Well, I would think that in a matter of this sort they would have let you know early, but let's move beyond to the substance.

When you say that it would be indeterminate as to whether appointment of independent counsel would be interpreted one way or another, let's examine that for just a minute. In late November, about the time a meeting is reflected in Mr. Esposito's notes, there was considerable public discussion about whether Attorney General Reno would be retained for a second term.

May the record show a nod in the affirmative on that?

Mr. GANGLOFF. Yes, I recall that.

Senator SPECTER. And there was considerable talk in the public domain about a concern which the President had about the frequency of the appointment of independent counsel to investigate the executive branch, and specifically the independent counsel investigation run by Mr. Starr. Isn't that a factor of general knowledge?

Mr. GANGLOFF. I don't have a specific recollection of the President having said that. I know there was certainly discussion of the number of appointments.

Senator SPECTER. Well, then moving beyond whether you recollect the President's having said it, wasn't it pretty clearly in the public domain that there was concern by the President, by the executive branch, of the Attorney General's having appointed these independent counsels?

Mr. GANGLOFF. Senator, I will take your word on that. The fact is—and it may come as some surprise, but working in the Public Integrity Section, I really don't follow from day to day the discussions as to whether people agree with or disagree with the policies of the Department at the higher level.

Basically, at the section level what we are charged with doing is analyzing allegations, trying to get facts together, and making recommendations. And the insulation is so great, quite frankly, that there is no profit—it is not worth the time to read every editorial, et cetera.

At the Attorney General's level, and perhaps at Mr. Radek's level, it is necessary because people will often question you about those things. But for someone at my level, specifically, who is involved in the operational aspect of it, I don't want to know and I don't care who says we should do one thing or another.

The two points that come to mind, and I think I really should make a note of, are, first, we had, as a matter of fact—I was acting chief at the time—made an independent counsel, or as close as we could, appointment with respect to the Whitewater matter. So that is by one way of background.

I also would point out that, as you want to marshall the facts as to what would cut one way, one of the consequences of appointing an independent counsel, of course, would be to totally preclude the use of a grand jury, the issuance of subpoenas, or the use of search warrants. So the effect——

Senator SPECTER. When independent counsel is appointed——

Mr. GANGLOFF. No, no, at the time the decision was made, because at that time if the Department launched into a preliminary investigation, and when we were waiting for who knows how much time for a court to make an appointment, the Department, pursuant to the statute, would have been prohibited from engaging in this more vigorous type of investigation. So someone could certainly argue that the appointment of an independent counsel would have that positive effect from the standpoint of the President's position.

Senator SPECTER. Well, that would be outside the scope of argument because the Congress had already decided that if the President was to be involved, or the Vice President or certain category of officials, that the Department of Justice would not make the investigation.

So you have a preliminary inquiry and you have a very abbreviated timetable during which the Department of Justice would not be authorized to have grand jury subpoenas for the specific purpose of not getting the Department of Justice very much involved——

Mr. GANGLOFF. Well, you are talking about——

Senator SPECTER. Well, excuse me. Let me finish—but just to make a very preliminary decision as to whether further investiga-

tion is necessary, where Congress had set a very low standard to keep the Department of Justice out.

And when you refer to a time lag on the court appointing independent counsel, that is not factually correct. The court had been very prompt. But whatever time it took, this was the law of the land——

Mr. GANGLOFF. Senator, you are talking about——

Senator SPECTER. Just a minute—had been decided by the Congress. So the question really is in pursuing your awareness of it that this was not a casual matter. It had been on the front pages and network television in October about the allegations raised about both Republicans and Democrats exceeding the spending limits.

Had those matters not crossed your attention?

Mr. GANGLOFF. Senator, you have raised two completely different issues in your question. The first issue has to do with your response to my observation that it would be difficult to decide on which way of a balance it would fall to launch an investigation or not. And I simply was pointing out by explaining the independent counsel procedures, with the same allusion, the fact that it certainly could be argued that if, in fact, the decisions were not being made for proper purposes but for political advantage, one could argue that there was a political advantage that would occur from either course.

The second issue that you raise is——

Senator SPECTER. Would you explain that? What would the political advantage be to the President to have independent counsel appointed?

Mr. GANGLOFF. Well, remember, we are not just talking about an advantage to the President, but also to the Attorney General, because that is the focus of your inquiry. But the advantage to the President, it seems to me, at least arguably, would be that by its very nature the first thing that the Department could do without criticism would be run into a 60-day period and a 90-day period of review. During that period of time, it certainly could be argued that witnesses could get together, orchestrate their stories, et cetera.

Then an appointment would be made to a court, which, as a matter of fact, does not have a reputation for making prompt appointments. During that period of time, as well as during the previous 120 days, and possibly with an extension inserted, there would have been no authority with respect to the Department of Justice to issue grand jury subpoenas, to conduct searches, or to hold grand jury proceedings.

So that is what I am suggesting. I am not suggesting in any way that it is dispositive. All I am saying is to hear that the Attorney General's job was in the balance, depending on a particular decision, I am simply telling you that it would be difficult to even speculate as to which would have the political advantage.

As to the second——

Senator SPECTER. Well, Mr.——

Mr. GANGLOFF. Excuse me, Senator.

Senator SPECTER. Go ahead.

Mr. GANGLOFF. As to the second issue that you raised, the legal requirements concerning the appointment of an independent counsel, I would recall that when the independent counsel statute that is at issue was reauthorized, the Department actually urged that reauthorization be permitted on the basis of consideration of a, "matter," as opposed to focusing the statute on a consideration of allegations against specific individuals.

Congress rejected that approach and instead decided that what should occur should be that the independent counsel mandatory provisions would only become implicated upon the reaching of the "credible and specific" standard with respect to individuals. So when the analysis is done with respect to mandatory appointment, the first requirement is that we analyze on the basis of allegations against the individuals.

Senator SPECTER. Well, that is true, and that is what the Congress had decided. And the statutory framework had been decided in accordance with establishing the laws of the United States, which left the Department of Justice out of investigating people like the President on a charge of exceeding the campaign expenditures, and limiting the role of the Department of Justice very severely not to go to the grand jury, but to look to independent counsel if there were to be a further investigation.

But let's come to the core issues here, Mr. Gangloff, to see if this will refresh your recollection. The memorandum has already been read by Senator Sessions, and the key language here relating to what Mr. Esposito told Director Freeh that, "Lee Radek's comments"—"there was a lot of 'pressure' on him and PIS regarding this case because 'the Attorney General's job might hang in the balance' (or words to that effect)."

When Mr. Radek testified on the 24, he was asked by me—and this appears at page 20 of the transcript—"So when this memorandum refers to the word 'pressure,' that is a word you might well have used in the context of lots of pressure on the Public Integrity Section?" Mr. Radek: "Yes, sir."

Then on page 22, my question: "All right, so you are saying that the subject may well have been discussed that the Attorney General's job was in jeopardy?" Mr. Radek: "It may well have." My question: "Well, may well have discussed the Attorney General's job was in jeopardy?" Mr. Radek: "It may well have. I don't recall. The words 'hangs in the balance' do not sound like anything I would say."

And my follow-up: "Well, the memorandum says 'words to that effect,' but you are saying that there may have been a discussion that the Attorney General's job may have been—may be—you said at that time the Attorney General's job may be in jeopardy." Mr. Radek: "That is possible, yes."

And then we had a little discussion about what was a narrow line of disagreement, and continuing on page 23 I said, "The line of denial is that although you may have said that there was pressure on Public Integrity, and you may have said the Attorney General's job may be in jeopardy, you did not connect the two." Mr. Radek: "That is correct."

Two questions. Does that refresh your recollection when you hear Mr. Radek having testified that there may have been language

about pressure and may have been language about the Attorney General's job hanging in the balance, but no connection between the two? Do you think that you might have been present when such a conversation occurred?

Mr. GANGLOFF. Senator, let me at least make this, again, observation. This memorandum is dated December 9, 1996, and I see that Mr. Freeh is reporting his best recollection of something that he heard a good 2½ weeks earlier. So it is quite possible that there has been some evolution of the language, I will say.

With respect to being at a specific meeting with Mr. Esposito and raising these specific points, I don't have a specific recollection. The fact is the conversation we would have had on an almost daily basis in our own hallways—to back up just for a second and to give you some context, I was in Europe when these allegations first came in, and Lee called me there and said that the allegations had come in and that it was a serious matter and that when I came home, you know, that would be the first attention that I should pay to something, would be to this particular matter.

Certainly, we recognized that with respect to this matter and half a dozen other, or maybe a dozen other matters, there are implications at a political level. And the Attorney General's job, I suppose, in some respects is always, "in jeopardy." But to tie two things together and say that the outcome or the specific structure of the work done at the Public Integrity Section is somehow tied to that is not only something that I don't remember, but is something so foreign to my experience that I would suspect that I would remember.

The other problem that I have even in seeing this memorandum is a few things that I'd like to note. First, junkyard dogs are not known for having any judgment. A junkyard dog, when the gates are closed, eats up whatever comes inside that gate. And I also want to mention that within the 20 years I have been in the Public Integrity Section, I have never heard Mr. Radek referred to as Dr. No.

So the number of assumptions that are being made here are, in my—you know, having reviewed this for only a day, are in some respects off the chart. I can't really reconcile, for example, the sentence in this memorandum which says "it was my recommendation that the referral take place as soon as possible" with the statement which is in paragraph five that says "it didn't make sense for PIS to call the FBI the lead agency in the matter."

One expresses a view that it seems that there has been no referral. The other seems to say that the Department is tagging the FBI with a leadership role. My suspicion is that whatever transpired that resulted in the writing of this memorandum is that facts that occurred after—and I am assuming that some meeting occurred on or about the 20 of November, which is the date that we focus on—that some facts occurred during that period of time between then and the 9 which are flavored here, and in some ways assumptions are being made that they were facts as known on the 20, but, in fact, they developed over time.

And, finally, in terms of putting it in context, I checked my records this morning and I see—which may also explain some of the distraction of this—that I was also out of the country for a

week ending on December 12. So whatever happened between that meeting, assuming that it occurred, and it very well might have, and the issuance of this memorandum, I am simply suggesting this would have been a moving matter and that it would be very surprising to me if Mr. Freeh was not receiving information not only from Mr. Esposito and not only from the Attorney General, but other information.

And a careful reading of this memorandum doesn't actually tell you when particular conclusions were reached by Mr. Freeh, whether they were before or after this meeting, et cetera. The same with Mr. Esposito. I would be very surprised to learn that Mr. Esposito didn't discuss this matter with Mr. Freeh between the 20 and the 9.

Senator SPECTER. Mr. Gangloff, all of that may be true or it may not be true.

Mr. GANGLOFF. Right.

Senator SPECTER. But the question is a very narrow one which does not make any of that relevant, at least as I see it. And the narrow question is what Mr. Radek said to Mr. Esposito. Mr. Esposito is here to testify to that, as Mr. Gallagher testified. And I won't take the time to read you his testimony where he was positive that Mr. Radek made the comment about pressure on the Public Integrity Section, and that pressure was exerted because the Attorney General's job was on the line, that there was a connection. So, that is the context.

And however you may define junkyard dogs, or whatever you may think about Dr. No or Mr. No, those can all be a subject of extended discourse. But the point at issue is what was said by Mr. Radek to Mr. Esposito, and what was the context, which was well known at that time, that there was speculation that the Attorney General may not be reappointed, and that there was speculation and a lot of talk on the front pages and on network news that it was because independent counsel had been appointed in Whitewater and other matters, and that was to the President's displeasure.

Now, if those aren't matters which were brought to your attention or within your purview so that it would have some effect of perhaps stimulating your recollection, or stimulating your recollection when you heard what Mr. Radek said, so be it.

Mr. GANGLOFF. Well, I certainly was aware of the context, and I appreciate your efforts to refresh my recollection. But it is true that, as I stated at the beginning, I don't have a specific recollection of this conversation. And having reviewed it, though, I do go the extra step of saying had I heard a conversation that contained the suggestion that you are now putting on this—I don't even know that it is really present in the memorandum, frankly, but that had this nexus suggested and that had this flavor of animosity in terms of our work with the Bureau at this time, I would be surprised even 3½ years later to have totally forgotten that.

Senator SPECTER. Well, but there is some apparent recollection on the part of Mr. Radek at least somewhere down that identical road. So we will pursue it.

Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Mr. Gangloff, I don't believe that we know each other.

Mr. GANGLOFF. Correct.

Senator TORRICELLI. The questions raised by this panel go to the professionalism of your office and the integrity of Mr. Radek, so they are of some substantial importance. So I would like for just a moment to lay a foundation here so the committee understands who we are talking to and what perspective you bring to the Senate on this issue.

When is it that you joined the Department of Justice?

Mr. GANGLOFF. I joined the Department of Justice in 1977 as part of the Honors Law program. I was graduated from the University of Pennsylvania Law School.

Senator TORRICELLI. So you have served under two Democratic and two Republican administrations?

Mr. GANGLOFF. Yes.

Senator TORRICELLI. And when did you join Public Integrity in a senior position?

Mr. GANGLOFF. Well, I joined the Public Integrity Section in 1981. In approximately 1987, I became the Director of the Conflicts of Interest Crimes Branch, and then in about 1992 I began to serve as an acting deputy and then in a period of time——

Senator TORRICELLI. So you obtained two senior positions in the Reagan and Bush administrations?

Mr. GANGLOFF. Senator, I am embarrassed to say it exactly this way, but I never associated——

Senator TORRICELLI. I am not holding it against you.

Mr. GANGLOFF. I never associated the political powers with what was happening in my career.

Senator TORRICELLI. No. I am developing a time line here.

Mr. GANGLOFF. Oh, right.

Senator TORRICELLI. Work with me.

Mr. GANGLOFF. And then in 1993, I became Acting Chief during about a one-year period and——

Senator TORRICELLI. So, in fact, in the advancement of your career, the political affiliation of the Attorney General has had no impact on your career and is of no particular moment?

Mr. GANGLOFF. None that I am aware of.

Senator TORRICELLI. Indeed, regardless of whether if Attorney General Reno had stayed or left last January, you were staying in Public Integrity in a senior position?

Mr. GANGLOFF. That is absolutely true.

Senator TORRICELLI. During your experience at the Department of Justice, could you cite for me which Attorney General you have worked with who has actually named more independent counsels than Janet Reno?

Mr. GANGLOFF. Well, no, certainly not.

Senator TORRICELLI. Indeed, wouldn't it be fair to say that Janet Reno has appointed more independent counsels than all of her predecessors combined?

Mr. GANGLOFF. That is my recollection.

Senator TORRICELLI. In your experience, in past decisions to name independent counsels, were all of the Attorneys General, advisers, the FBI, and other people involved in the decision-making process all of one mind as to whether or not a particular inde-

pendent counsel should be named or have you witnessed division in the past?

Mr. GANGLOFF. Well, actually, up until this point I wasn't really aware of the FBI playing a role with respect to the recommendation on appointment because, as I think I indicated earlier in my testimony, many of us have a passing understanding—certainly, you have more than that here, but many people have a passing understanding of what the independent counsel statute required.

But the fact is that it was a very technical statute and that very frequently the judgment that was being made was one that simply looked at legal requirements and stacked information against that to determine whether it was specific, whether it was credible, et cetera. So my recollection is, and specifically with respect, for example, to the Whitewater matter, that the FBI did not play any role, certainly, vis-a-vis the——

Senator TORRICELLI. Typically, the Attorney General would get advice from her own staff and from senior department heads within Justice that might be relevant to a case?

Mr. GANGLOFF. Right.

Senator TORRICELLI. But not necessarily the FBI?

Mr. GANGLOFF. Well, not at—not mixing it in at the section level. So far as I know, there was no kind of preliminary——

Senator TORRICELLI. But Mr. Freeh's memo actually refers to the fact that he had provided advice with regard to the Cisneros matter.

Mr. GANGLOFF. That may be true.

Senator TORRICELLI. Do you know whether or not he provided advice with regard to the Espy matter?

Mr. GANGLOFF. I don't know that, I don't know that.

Senator TORRICELLI. And the outcome of the Cisneros matter was what?

Mr. GANGLOFF. Well, there was an appointment made.

Senator TORRICELLI. And what was the outcome of the case

Mr. GANGLOFF. It was prosecuted.

Senator TORRICELLI. To what end?

Mr. GANGLOFF. I don't know where you want to take me on this.

Senator TORRICELLI. Well, I will get you there directly. Attorney General Reno has not only appointed more independent counsels than any of her predecessors, but some have been remarkably unsuccessful. And some of us would be of the mind that there has been a tendency to name independent counsels when they were not required and perhaps never should have been named.

Mr. Cisneros, for example, had an independent counsel that consumed millions of dollars of the taxpayers' money, compromised individuals' reputations, destroyed a public career, and he pled to a misdemeanor and a $10,000 fine. Mr. Espy went through a similar process, consuming millions of dollars, destroying a great public career, interrupting the work of this Government and this administration, and was acquitted.

This would appear to me to be an Attorney General who was not naming independent counsels with the greatest reservation, but indeed used the law to its fullest extent. I would argue to excess. Perhaps the bar had not been high enough. In light of this history and her past use of the statute, it is incredible that anyone would argue

that indeed it should have been used more than it has already been, since in some cases where it probably was questionable to do the statute was employed.

Would you like to respond to that?

Mr. GANGLOFF. Well, as you noted, I have served under Democratic and Republican administrations, and I will tell you that there always was at least some point OK amusement at the level of conversation about the statute because traditionally the Republicans were not in favor of the independent counsel statute. And certainly under Republican administrations, there were fewer appointments.

And one of the ironies of that were that those of us who were familiar with the statute certainly were aware that if you took the thing and lowered the threshold and basically did not do some kind of a comprehensive initial investigation, you would ultimately make so many referrals that the system would collapse. And as a matter of fact, when the reauthorization was being discussed, one of the things that we discussed was the irony of the fact that the way to undo that statute was actually to use it the way that it was really written because it didn't make any sense.

Senator TORRICELLI. Well, indeed, that ultimately is what happened. I have never discussed it with the Attorney General, and I do not pretend to speak for her, but I would assume that someone in the Attorney General's position, having named seven independent counsels, several of which resulted in no recommendation for prosecution would think carefully before doing so again.

The Attorney General might have been thinking that in approaching yet another one of these judgments, she wanted to be sure, to a higher degree of certainty, that the facts and the law actually warranted an independent counsel. Indeed she might have wanted to be sure that there was at least a chance that that independent counsel's investigation would result in a successful action by the Department of Justice because the record to date had not been very good in justifying the public expenditure and the allocation of the Department's resources.

Mr. GANGLOFF. Well, if I could just make this point without reflecting whether those of us involved in the law thought it was a good idea or not, the fact is that when the Attorney General initially took office, she was a strong proponent of the independent counsel statute. And the fact is that her proposal would have actually broadened the reach of this statute, as I had mentioned earlier, with respect to covering matters as well.

And I think the fact also is that had the statute covered matters as opposed to individuals, it would have been much less—the threshold, the standard, whatever you want to call it, would have been much less, and there would have been, I think, a very much stronger argument that could be made that an independent counsel was required if, in fact, you were focused on matters, which is what she advocated initially.

Senator TORRICELLI. Now, let's turn our attention to the day of this meeting where this discussion took place that has resulted in these unfortunate allegations.

How many people were in the room on that day, and could you identify them?

Mr. GANGLOFF. See, I can't because I don't know the specific meeting. I know that I have had meetings with those individuals. And as I said, one of the problems is I was dealing with Mr. Esposito on a frequent basis on other matters as well.

In fact, when I first learned that I was at this meeting with Mr. Radek, or it was suggested that I might be, I was surprised when it showed up in his calendar because my recollection was that if I had been there with Mr. Radek, I probably had met him over there or been there on other business and that we just walked in.

Senator TORRICELLI. Well, I believe the allegation is that Mr. Esposito, Mr. Gallagher, Mr. Radek, and yourself were in this meeting.

Mr. GANGLOFF. Right, but they may—for example, if I had had such a meeting, I would have a difficult time in my own mind recalling whether their general counsel was present.

Senator TORRICELLI. You cannot say with any certainty that you were there.

Mr. GANGLOFF. Right.

Senator TORRICELLI. If you were there, given the nature of the conversation that is alleged, you will testify to a certainty you would have remembered it because it would have been so extraordinary and out of your experience?

Mr. GANGLOFF. Well, the only reservation I want to take with that is the conversation as it has been reported in other people's testimony is not something I am familiar with. What I am familiar with is this memorandum and the way that it has been purported to read.

Senator TORRICELLI. I understand.

Mr. GANGLOFF. And what I am saying is the nexus between one statement and another that appears——

Senator TORRICELLI. You would have recalled it?

Mr. GANGLOFF. I would recall it.

Senator TORRICELLI. So you do not have a specific memory of being at the meeting, but if you had, you would have recalled it because of the alleged nexus between the two comments?

Mr. GANGLOFF. I think that is true.

Senator TORRICELLI. Mr. Radek does not remember the comment at all, and Mr. Gallagher remembers it in a different context and seems to attribute to it a different meaning then that now being suggested. So we have four professional people allegedly in the same room listening to the same conversation, and only one of them—albeit Mr. Esposito—who has been a fine public servant whom I actually know personally and think is a fine man—only one of the four has the recollection to which the majority of this committee is now attaching such a great importance, as opposed to three of you have who have either a different interpretation, no interpretation, or even no memory.

Mr. GANGLOFF. Well, I just want to say I have worked with Mr. Esposito for a long time and I respect him very much.

Senator TORRICELLI. Well, I do, too. This is not an attack on Mr. Esposito. I am simply pointing out that we have very conflicting information here.

Mr. GANGLOFF. Well, the additional point that I would go to, though, is I don't know, frankly, whether he has made direct statements to the committee, and so what I am saying is——

Senator TORRICELLI. Well, we haven't heard from him yet.

Mr. GANGLOFF. Right, and what I see in this memo—I would just again issue the caveat, the careful way we tend to deal with things, which is he is not the one who wrote this.

Senator TORRICELLI. I think that is a good and a fair point.

In the heart of the matter, having now read many of these memoranda over the course of recent weeks, the statement has been clearly made by some of your colleagues that in looking at the people specifically covered by the Act and the allegations made that the threshold was not reached.

Do you as a professional in the Department continue to share the judgment that the threshold requirement, as the Attorney General determined, was not reached as required by the Act?

Mr. GANGLOFF. Yes, I think that that is true. In fact, to the extent that I do try to pay attention to these things, I still—to maybe take the risk of going beyond things, what I have always seen as sort of the point of misunderstanding with respect to the views of the Bureau and ourselves and those who think of appointment and not is the difference between actually reading the statute and applying it consistently and looking for the specific allegations, the credible allegations against specific individuals, and the other approach which is simply to say this is a hot potato and I think in my gut that xyz is true and xyz is false.

The fact is there is a difference traditionally, I think, certainly in my experience, between the way that investigators and prosecutors view cases. Investigators are supposed to act from the gut, pursue the leads, ask the questions, and basically push.

The prosecutor is the one who basically has to say is the evidence there to support a particular conclusion.

Senator TORRICELLI. Is that one of the reasons why indeed throughout the history of the Independent Counsel Act in both Democratic and Republican administrations, the FBI as a matter of routine—the investigators were not in the process, but ultimately decisions through various administrations of both the interpretation was left to prosecutors or senior Justice Department officials because they had to apply the law to the facts as they appeared?

Mr. GANGLOFF. Well, I don't—I am not in charge of making those decisions, but that is certainly——

Senator TORRICELLI. I am asking you your experience.

Mr. GANGLOFF. I would think that that certainly is my experience. And, in fact, my experience and my frustration myself in being involved with this particularly at the early levels is just as I think I have expressed, but it was really discussions about two separate things.

Prosecutors—and I have heard this citation to, you know, career prosecutors who came out a different way. But the fact is I am not aware—even including some analysis that was done by our own appellate division in trying to assess the specificity of these allegations, et cetera, I am not aware of any career prosecutor who had

familiarity with the statute reaching a conclusion contrary to the one that was ultimately reached. And, in fact, as I say, the——

Senator TORRICELLI. In Mr. Radek's memo, he used the word "consensus" of opinion with regard at least to the Vice President. So indeed, in your experience, you were really independently coming to the same conclusion. You are unaware—it is your testimony—of no prosecutor who held a different judgment.

Mr. GANGLOFF. No, that is not true. It is not any prosecutor. The fact is there were two sets of prosecutors who were involved, those who had worked with the statute before and were analyzing something, as I saw it at least, under the statutory requirements. Then there was another group of prosecutors who really didn't have any familiarity with the statute at all.

The first day that I ever met Mr. La Bella was in Mr. Radek's office, and I do recall it because it was one of those kind of conversations you tend to recall where he came and said—I made some remark about the complexity of the matter and he said, well, I will be gone in 90 days because we will make the appointment. And I said, welcome to Washington, you will spend 90 days walking back across the street because there is going to be a lot of meetings on this thing.

Senator TORRICELLI. All right. So to narrow the issue, then, your judgment of this consensus then is that you do not know of a contrary view in the Department from people who knew and had worked with the statute and applied the facts with regard to the election allegations who reached a different conclusion than yourself or Mr. Radek.

Mr. GANGLOFF. Well, again, I want to be precise on this. There are two standards under the statute. One is mandatory, one is discretionary. The Attorney General or others may have been getting advice that said, as a discretionary matter, this is a hot potato, you should get rid of it, or whatever.

But, certainly, under the mandatory provisions what I saw as the point of frustration in dealing with it was that the people who were unfamiliar with the statute were arguing from a non-statutory standard. Basically, this is a mess, it is at a high level, et cetera, et cetera. And I believe it is true unanimously—certainly, in my recollection it is—that those who had worked with the statute and understood that we were applying a very specific statutory test were constantly asking the specific question, which is with respect to an individual——

Senator TORRICELLI. And they unanimously came to the same judgment Mr. Radek came to that the facts and the application of the statute based on their familiarity with it did not, on a mandatory basis, require the naming of an independent counsel.

Mr. GANGLOFF. That is my recollection.

Senator TORRICELLI. Thank you very much for your testimony.

Senator SPECTER. Before yielding to Senator Sessions, just a comment or two. We will come back in my questioning, if Senator Sessions doesn't pick it up, about the competency of Director Freeh as an attorney, as a judge; Mr. Litt having recommended independent counsel as to Vice President Gore; Mr. Robinson having recommended preliminary inquiries on a couple of those situations.

And with respect to only one of the four witnesses, Mr. Esposito, we really haven't heard from him. We have his hearsay document, but I think Mr. Gallagher testified very positively about Mr. Radek having made the comments, with the connection. And you have Mr. Radek's own testimony about the subject, having said both things, but disagreeing on the connection, and your own testimony as to lack of recollection.

With respect to all of these independent counsel, I went at some length the last hearing to point out that independent counsel were appointed in some cases totally unjustifiably, the Alexis Herman case being a really remarkable example where the Attorney General's own finding cites lack of credible information, which I questioned her about in this room—she wouldn't answer the questions—and then the appointment of Starr to pick up the Lewinsky charges. I said publicly at the time in about January 1998 that with all the public talk about a vendetta, what questionable judgment in bringing Starr into the case.

But all of these prior independent counsels—and this subcommittee is going to examine them one by one, even the one that we had gratuitously offered to us about an independent counsel consideration as to Director Freeh on some testimony he gave before a House committee. We hadn't asked for that, but we got that.

We haven't gotten all the information on many of the other independent counsels, but we intend to, to probe the question as to whether there was a pattern of appointing all these independent counsels without real justification so that Senators could later say, look how she appointed all these independent counsels; she didn't under-use the statute.

Senator Sessions.

Senator SESSIONS. Thank you. Well, there are a lot of questions I would like to ask, but I will just focus primarily on the issue at hand here.

It was in October 1996, Mr. Gangloff, that the stories broke and the L.A. field office, the U.S. attorney's office there, commenced some effort to develop an investigation of the Buddhist Temple fundraiser. It became big news in the newspapers.

You were aware of it, were you not?

Mr. GANGLOFF. Yes.

Senator SESSIONS. This was, what, a month before the election, the presidential election?

Mr. GANGLOFF. Well, if it is October, that is right.

Senator SESSIONS. A big deal, right? You remember that, don't you?

Mr. GANGLOFF. Well, I don't remember the timing specifically, but I remember——

Senator SESSIONS. And you remember this thing broke within a month of the election?

Mr. GANGLOFF. Elections are—Senator, I don't mean to be impertinent, but elections are in November and you just told me the other event happened in October.

Senator SESSIONS. October, right.

Mr. GANGLOFF. How many times can I say that they are close to each other in time?

Senator SESSIONS. I just want you to admit that it was a big deal.

Mr. GANGLOFF. I admit that October and November are a month apart, Senator. I am sorry to push it this way, but I admit that.

Senator SESSIONS. I agree, it is a month apart. So here we are on November 20—well, on October 31, Mr. Radek stops the investigation by the U.S. attorney's office and commences the 30-day review. Is that correct?

Mr. GANGLOFF. I don't know the specific date, but that would be consistent with my recollection.

Senator SESSIONS. At the request of Senator John McCain and a group of Congressmen from the House who asked for an independent counsel review, and he took over the case—Public Integrity did, and presumably commenced an investigation.

In the press, it was being suggested that the FBI was involved in that. That obviously offended Mr. Freeh and he put it in his memorandum. Department of Commerce inspectors general were doing it. His people weren't involved. He would have a reason to be somewhat concerned about that, would he not?

Mr. GANGLOFF. What is reported in the newspaper, I don't know whether it is accurate or not.

Senator SESSIONS. Well, it wasn't accurate. The newspaper said, for whatever reason, that he was involved in it and he wasn't. He felt like he should be, or he wanted to clear the air. So we have this meeting on November 20, not long after this election, and you don't remember being there?

Mr. GANGLOFF. Well, let me say this. First——

Senator SESSIONS. No. I just asked you, do you remember being in this meeting?

Mr. GANGLOFF. No.

Senator SESSIONS. Well, Mr. Gallagher was here and he said where everybody sat in the room, and detailed some of the conversation.

Mr. GANGLOFF. Excuse me, Senator. Did he say where I sat in the room?

Senator SESSIONS. I don't recall. He said where people sat in the room, as I recall. But you don't remember even being there?

Mr. GANGLOFF. Excuse me. As best I know—and, again, I didn't review the testimony, but the reason I didn't expect even to be called was because my understanding was that Mr. Gallagher didn't even recall whether I was there or not.

Senator SESSIONS. Well, let me ask you this. Are you saying you do not recall and you do not believe you were there?

Mr. GANGLOFF. I am saying I don't have a specific recollection of a meeting held on that date.

Senator SESSIONS. Well, that is a good lawyer word, "don't have a specific recollection." I am asking you your best judgment here before this body. Were you there or were you not?

Mr. GANGLOFF. Senator, my best judgment and my best answer is that where I was 3½ years ago for a meeting that would have been a routine meeting during the course of my duties—I don't have a specific recollection as to whether I attended that meeting.

Senator SESSIONS. Well, am I wrong to suggest that after Mr. Radek stopped the Los Angeles investigation around November 1—

here we are, the 20 of November—was that the first and most important meeting involving this investigation?

Mr. GANGLOFF. What you are wrong to suggest is that Mr. Radek stopped the investigation. Under the statute and under the procedures that have been in place in the Department for as long as the Independent Counsel Act has been there, as soon as it was realized that a U.S. attorney was involved in a matter that might warrant treatment under the independent counsel statute, that U.S. attorney would be told to step down, not to issue subpoenas, not to use the grand jury, not to use search warrants, not to immunize anyone. And not only that, they would be told that under departmental policies and practices, those matters were handled by the Department.

Senator SESSIONS. And that was done, and the Department had a duty to commence an investigation if it was going to take it over, did it not?

Mr. GANGLOFF. We had a duty to perform the analysis within the requirements and restrictions of the independent counsel statute.

Senator SESSIONS. And who was in charge of it?

Mr. GANGLOFF. Mr. Radek.

Senator SESSIONS. And what role did you have in it?

Mr. GANGLOFF. I was his principal deputy. So as I mentioned, I was out of the country when these allegations first came in and he called me and alerted me to the fact that important allegations had arisen and that when I got back we would be handling those.

Senator SESSIONS. What role would you have specifically in handling this matter?

Mr. GANGLOFF. It would depend. When you say "would I have"—what role did I have?

Senator SESSIONS. Did you have.

Mr. GANGLOFF. Prior to Laura Ingersoll's appointment, as I recall, or her designation, I was working closely with Mr. Radek in looking at the incoming information, reviewing the analyses that would have been done as to the nature of the allegations.

And I believe that one of the very first things that we did was to actually look at the statutes that were involved and to reach out to the FEC to try to find out what the statutes actually meant. But I don't know that that was in the context specifically of the Buddhist allegations or just generally.

I am sure you appreciate, Senator, that not only is this something where, looking back, we can say this was a certain event, the fact is the next many years were filled with other events on this same issue of importance. And the other fact is that there are many, many matters of importance in the Public Integrity Section at any given time.

Senator SESSIONS. Well, as I understand your testimony, you and Mr. Radek were doing the investigation prior to the submission of his recommendation to the Attorney General that an independent counsel not be appointed. Is that correct?

Mr. GANGLOFF. That is your understanding, yes.

Senator SESSIONS. My understanding or yours?

Mr. GANGLOFF. No, it is not. You make it sound as though we were exclusively doing something. I am telling you I don't recall——

Senator SESSIONS. Well, who else was? You took it from the U.S. attorney's office.

Mr. GANGLOFF. We have a deputy who has been involved in independent counsel matters since the inception of the Act who would have been involved in terms of analysis.

Senator SESSIONS. Well, who made——

Mr. GANGLOFF. Excuse me, Senator. We have a director of an Election Crimes Branch who would have been involved in performing analysis. At some point, I recall that we requested that the appellate section do an analysis of certain aspects of the statute, so they would have been involved in it.

We would certainly have had attorneys who were involved in reviewing documents or figuring out what kinds of questions—so to say me and Mr. Radek, you know, marched forward and did something I just think is not really realizing how much work was being done by how many people.

Senator SESSIONS. I am sorry it is taking so long, Mr. Chairman, but I would like to pursue this to a conclusion.

Somebody has to be in charge of an investigation. You took it from the Los Angeles office. Mr. Radek took charge, is that correct? Were you his chief deputy or were these other people his deputy?

Mr. GANGLOFF. That is correct.

Senator SESSIONS. You were his chief deputy?

Mr. GANGLOFF. That is correct.

Senator SESSIONS. So the two of you were in charge of the investigation. Now, he initiated the 30-day review on the last day of October or November 1. Mr. Esposito and Gallagher recall this meeting to be November 20, 20 days later, and on November 30 Mr. Radek recommended to Attorney General Reno that an appointment of the independent counsel not be made.

Do you disagree with that?

Mr. GANGLOFF. I don't disagree.

Senator SESSIONS. And did you concur in that recommendation?

Mr. GANGLOFF. It was made at that time, yes.

Senator SESSIONS. All right. Now——

Mr. GANGLOFF. I concur with that recommendation as of today.

Senator SESSIONS. My question is to you, what was done of an investigative matter between the time that case was taken over by you and Mr. Radek from the U.S. attorney's office and the time that recommendation was made to the Attorney General?

Mr. GANGLOFF. There is two parts to that answer. The first is I don't specifically recall what specific steps were taken, but the other is that the independent counsel analysis and investigation is a matter that evolves, so that if new facts come in—it is not as though you make a determination and say no independent counsel should be there and that freezes things forever.

All it does is says that we are going to proceed in this other way, and if something comes up or something develops, then, you know, we can make a different recommendation. So I am sure some investigation was done, but we could have——

Senator SESSIONS. You are sure some investigation was done? This was an important recommendation on a matter that was front-page news throughout the country, and you don't remember whether you had any investigation?

Mr. GANGLOFF. I am sure that a thorough and appropriate investigation of what could have been gathered up until that point was done just as a matter of routine, Senator. But I don't recall specifically what took place within the first 30 days that we had that case, as opposed to which investigative steps took place in the several years that followed that.

Senator SESSIONS. Are you aware of an investigation under your supervision of national importance, what witnesses were interviewed and what documents were examined during this 30-day period?

Mr. GANGLOFF. No. Today, I do not have a specific recollection of that.

Senator SESSIONS. Mr. Chairman, I think that indicates to me from what we have been able to evaluate and study that no investigation was done. And the man in charge of it to say it is 3 years ago and can't remember a case like this—I can remember a case 15 years ago, less important than this one.

Mr. GANGLOFF. I remember the case vividly, Senator.

Senator SESSIONS. I am not asking a question at this point. I am making a statement.

Mr. GANGLOFF. Yes, but you are directly attacking my character, and I will point out that you didn't recall Mr. Gallagher's testimony as to whether I was at the meeting or not and that was just a few days ago.

Senator SESSIONS. Well, you don't recall being at the meeting, I think, is important.

My view is that this was poorly handled at best, and that by denying an independent counsel on a matter of this nature—the Department of Justice has great responsibility to conduct an investigation with expertise, aggressiveness, and completeness, which was not done. And the embarrassment is going to linger and it is going to hurt respect for justice in this country, and I hate that.

Thank you.

Senator SPECTER. Thank you, Senator Sessions.

Just a couple more questions, Mr. Gangloff. I believe I wrote this down correctly when you said that no career prosecutor reached another conclusion. You had been asked by Senator Torricelli whether the threshold was met for independent counsel, and you said it had not been, and that no career prosecutor reached any other conclusion.

Did I accurately quote you?

Mr. GANGLOFF. No. I believe that if you look at your notes, you will see that I made two distinctions. One was making a distinction under the mandatory and discretionary provisions of the Act, and the other was career prosecutors familiar with the Act who had worked with the Act.

Senator SPECTER. No, my notes don't show that, and you did not make a reference to it as to career prosecutors familiar with the Act. But let's examine that. A lawyer prosecutor can become familiar with the Act by studying the Act. And when you say that no career prosecutors—and take your addendum—familiar with the Act thought that the threshold had been reached, would you say that Director Freeh, a career prosecutor before he became a judge and an FBI Director, fell into the category of someone not familiar

with the Act, even though he had concluded the threshold had been met?

Mr. GANGLOFF. I had no direct conversations with Secretary—with Director Freeh. My conversations were with the general counsel of the FBI, and it was my opinion at the time that the FBI's analysis, insofar as it was being expressed in my presence, was erroneously focused not on the technical requirements of the Act which focus on allegations against individuals, but on the more general matter allegations.

And that is the point that I was trying to make earlier, and I am sorry if I am being redundant, but obviously it didn't get through that the point of my frustration was that those who had dealt with the Act and were familiar with it were constantly looking at the statutory language and basically taking the facts and putting it against the statutory language. And the critical result of that is that you look for information against an individual that meets a certain threshold.

On the other hand, when you are in the discretionary field, and also when you don't quite understand the Act in its specifics, in its technical aspect, you have an impression that basically says, oh, this matter involves the President or this matter involves the Vice President. Well, the fact is, under the Act, that is not a basis for mandatory appointment.

Senator SPECTER. Well, let's come back to my question. Do you think that Lou Freeh doesn't understand the Act?

Mr. GANGLOFF. I think that the information that I received from the FBI in terms of legal analysis under the Act reflected that those who were engaged in analyzing the Act did not understand the central language of the Act. That is correct.

Senator SPECTER. Well, let's pursue that. There are a lot of people in the FBI besides Director Freeh. Come back to my question. Do you think Director Freeh doesn't understand the Act?

Mr. GANGLOFF. I don't have an opinion as to whether—I don't have a basis for opinion——

Senator SPECTER. OK, fine, so you don't have an opinion. So you are not saying that——

Mr. GANGLOFF. If he believed——

Senator SPECTER. Wait a minute, wait a minute. So you are not saying he doesn't understand the Act. You don't have an opinion.

Mr. GANGLOFF. No. I have an opinion as to——

Senator SPECTER. As to whether Director Freeh understands the Act?

Mr. GANGLOFF [continuing]. The information I received from the Bureau.

Senator SPECTER. Does anybody understand the Act besides you and Mr. Radek?

Mr. GANGLOFF. Yes. And, Senator, I think that you understand the Act, and I think that you are able to make the distinction between a matter and an individual.

Senator SPECTER. Well, I am a career prosecutor.

Mr. GANGLOFF. Yes, I am familiar with that.

Senator SPECTER. Are you familiar with the fact that Director Freeh recommended independent counsel?

Mr. GANGLOFF. Yes.

Senator SPECTER. But you are not prepared to say that Director Freeh understands the Act?

Mr. GANGLOFF. I am not prepared to say that he knowingly recommended it under the mandatory provisions of the Act. He may very well have done it under the discretionary provisions, and he may very well have done it with reference to the matter as opposed to with respect to individuals.

Senator SPECTER. Do you think there is clear and convincing evidence that he didn't do it knowingly?

Mr. GANGLOFF. Clear and convincing evidence. I don't have a basis to make that judgment.

Senator SPECTER. Good. How about Mr. Parkinson? He recommended independent counsel. Does he understand the Act?

Mr. GANGLOFF. I thought at the time that his arguments did not address the central portion of the Act which goes to individuals as opposed to matters.

Senator SPECTER. So he did not understand the Act either?

Mr. GANGLOFF. I think that if you read his analysis, you will see the distinction made that I have explained.

Senator SPECTER. I couldn't hear the last part.

Mr. GANGLOFF. If you read the analysis that was prepared by the FBI——

Senator SPECTER. I have, I have.

Mr. GANGLOFF [continuing]. You will see that the distinction that I have made, namely that the allegations against individuals were not sufficient to satisfy the threshold of the Act, is not addressed within those papers. And, certainly, although I haven't seen all of the papers that were done behind the scenes, certainly in the arguments that I heard him make orally I thought that they were missing this very fine distinction.

Senator SPECTER. OK, so Larry Parkinson doesn't understand the Act.

You testified——

Mr. GANGLOFF. He may have made the recommendation based on the discretionary portion, as I say, and he also may have understood the Act in a different way than the arguments that he made if, as you propose, Mr. Freeh was making those arguments and telling him to express that opinion.

Senator SPECTER. But from what you saw of Mr. Parkinson, General Counsel of the FBI, longstanding lawyer, as he applied the Act, it was incorrectly applied, so that you conclude that as to what you saw him do, he didn't understand the Act?

Mr. GANGLOFF. He did not—in my opinion, he did not appreciate the mandatory provisions of the Act.

Senator SPECTER. OK, I will take that as not understanding the Act. The threshold wasn't reached.

Did Mr. Litt understand the Act when he recommended independent counsel as to Vice President Gore?

Mr. GANGLOFF. Frankly, I would not have been privy to the specific recommendation, certainly in written form, and analysis. And I believe that Mr. Litt's position was such that he also may have been involved in the discretionary aspect of it to a greater degree. But my general opinion would be that Mr. Litt did understand the Act, yes.

Senator SPECTER. Well, and he did recommend independent counsel as to Vice President Gore.

Mr. GANGLOFF. Yes, and I don't know whether that was done, as I say, under the mandatory or the discretionary provisions.

Senator SPECTER. Well, the Act has both. But as to one or the other, since he did recommend independent counsel as to Vice President Gore, you think he did understand the Act?

Mr. GANGLOFF. No, I didn't say that. And what I am suggesting, though, is if the mandatory requirements of the Act are met and no referral is made, then I think that a judgment can be made that the Attorney General has acted improperly. If, on the other hand, you are in the discretionary section of the Act, then it is discretionary to the Attorney General. So if she exercises that discretion, it is, by definition, not improper under the Act.

Senator SPECTER. Well, do you know whether Mr. Litt made a recommendation under the mandatory provisions?

Mr. GANGLOFF. I don't—I may have known that at some time, but I don't have a specific recollection of that. Also, Senator, let me point out I don't know over a period of time. As I said, it is a continuing process, an investigation that may lead to the appointment of an independent counsel. So, you know, Mr. Litt may have said—reached one recommendation at one time and later modified that recommendation. I just don't know that. I don't recall it.

Senator SPECTER. Well, at one point Mr. Litt recommended to the Attorney General that independent counsel be appointed, and you don't know whether that was under the mandatory or discretionary. So he may have made a recommendation under the mandatory provisions, which would have led to his conclusion that the Attorney General was wrong not to appoint independent counsel as to the Vice President.

Mr. GANGLOFF. I don't know whether that occurred or not. That is right.

Senator SPECTER. What would the argument be, Mr. Gangloff, about not appointing independent counsel to Vice President Gore under the mandatory provisions?

Mr. GANGLOFF. Senator, rather than give you that off the top of my head, I think you have probably seen the analysis. The argument at bottom would be that there wasn't specific and credible information of the violation of a statute—excuse me—of a criminal law that is covered under the Act on the part of Mr. Gore.

Senator SPECTER. Isn't it information, not evidence?

Mr. GANGLOFF. Well, let me say yes just for the purpose of saying yes. I don't know that I have ever really made the distinction between information and evidence. But you know as a prosecutor information is evidence, and the question is how much probity does it have.

Senator SPECTER. Well, the Congress, on going forward with a preliminary inquiry, used the word "information," which is a lower standard, at least in the Congressional view, than evidence.

But where you have the issue as to whether the Vice President knew that he was raising hard money, and you have four witnesses who testify to it—Strauss, who has a memorandum reflecting 35 percent hard money; Panetta, who said that the Vice President was focused and, "knew what the hell was going on;" and two other wit-

nesses testify about hard money—and you have 13 memoranda coming from Ickes to the Vice President and you have Ickes at a meeting where he discontinues the meeting when the Vice President walks out on the issue of drinking iced tea and having rest room breaks, and you have the Vice President saying that he has been a campaigner for 16 years and has lots of experience, and you have the Vice President saying that the materials that were in the Ickes memoranda were gone over with the President and the Vice President, isn't that sufficient for further investigation, not for an indictment, not for deciding to prosecute, but for further investigation under the independent counsel statute?

Mr. GANGLOFF. First, that is a hypothetical without other pertinent facts perhaps there. But I think that—and, again, I don't want to be at all unhelpful here, but I haven't reviewed the record on this. As I explained, I knew yesterday that I was coming and I understood we were going to stay on this memorandum. And perhaps this inquiry is relevant to it, and to the extent that it is, you know, I apologize, but I am not in a position to redo an analysis based on oral representations.

Senator SPECTER. OK, fair enough. It is not a hypothetical question, it is in the record. But it is true that this goes beyond the memorandum, and I pursued the question because you affirmatively testified that the threshold wasn't met. If you say I don't know that the threshold is met and I am not prepared to answer the question, I wouldn't broach it with you.

OK, thank you very much, Mr. Gangloff.

Senator TORRICELLI. Mr. Chairman, could I ask a few questions?

Senator SPECTER. Oh, by all means, sure.

Senator TORRICELLI. Mr. Gangloff, now concluding your testimony, I thought we should put it somewhat in perspective.

A great deal has been made about your presence at this meeting in which you have no particular memory. It should be noted for the record, since Mr. Gallagher is not sitting next to you at this time, that on May 24, 2000, before this committee, the following exchange took place which may put in perspective the value of your testimony with regard to the allegations concerning the Attorney General and her political position.

Mr. Gallagher speaking: "I have a specific recollection of Mr. Radek, who I have dealt with extensively during the same time period on other investigative matters, but I have a less specific but general recollection that there may have been some reference to pressure on the FBI, and walked away from the meeting with a sense that, again, this would have been a very sensitive and critical investigation."

Mr. Gallagher, later: "There may have been some general discussion as to the fact that the Attorney General had not yet been selected by the President to continue in his Cabinet."

Mr. Gallagher again: "If it will help Lee Radek, I was sitting on the sofa in Bill Esposito's office. Bill Esposito was in the wing chair to my left, Lee Radek was in the wing chair to my right. The three of us were the primary participants in the discussion. I have a vague recollection that he may"—my emphasis, "may"—"have had a deputy off to the side."

Then Senator Torricelli speaking: "Do you remember who was in the room?" Mr. Gallagher: "I remember Lee Radek, myself, and Bill Esposito." Senator Torricelli again: "But not whether there were any others?" Mr. Gallagher: "At most, there was a fourth person. If it was, he sat off to the side and did not actively participate in the discussion. So while I give you his name, in complete candor, as to who could have possibly been in the room, that is the only person who may have been in the room."

So, Mr. Gangloff, if your memory seems sketchy, it appears to be because there appears to be no one who is certain you were in the room. You would be entitled to not have complete recollection. And indeed from what I am told, you may not actually have been Mr. Radek's only deputy; there are others in the division. It may have been you, it may not have been you. But I thought before we closed the record on your testimony, that should be included.

Mr. GANGLOFF. Well, if I could just make one point on the context of that, which is that assuming I was in the room, the note that I did not—or the person there did not actively participate in the conversation would also indicate why, if I were there, I would not really have a full recollection of the meeting.

Senator TORRICELLI. Exactly.

Mr. GANGLOFF. Thank you.

Senator TORRICELLI. Thank you, Mr. Gangloff.

Thank you, Mr. Chairman.

Senator SPECTER. So having not participated much, as Senator Torricelli has questioned, as you put it, you may not, "have a full recollection of the meeting."

Mr. GANGLOFF. I guarantee I don't have a full recollection of that meeting.

Senator SPECTER. You do not have a full recollection of the meeting?

Mr. GANGLOFF. That is correct.

Senator SPECTER. OK, so some things might have been said that you don't recollect.

Mr. GANGLOFF. That is correct.

Senator SPECTER. Thank you very much.

Mr. Esposito, will you step forward, please? Would you raise your right hand?

Do you solemnly swear that the evidence you will present to this subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ESPOSITO. I do.

Senator SPECTER. Mr. Esposito, back on November 30, 1996, what was your position?

STATEMENT OF WILLIAM ESPOSITO, FORMER DEPUTY DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. ESPOSITO. I was the Assistant Director of the Criminal Division of the FBI.

Senator SPECTER. And what is your occupation today?

Mr. ESPOSITO. I am a senior executive vice president with a company up in Wilmington, DE.

Senator SPECTER. Do you recollect a meeting on November 30, 1996—November 20, 1996?

Mr. ESPOSITO. Yes, I do, sir.

Senator SPECTER. Who was there?

Mr. ESPOSITO. It was in my office. I was there. My deputy, who at that time was Neil Gallagher, was there. Lee Radek was there, Chief of Public Integrity, and Joe Gangloff was there.

Senator SPECTER. What was the purpose of the meeting?

Mr. ESPOSITO. There were two purposes of the meeting. The first purpose was to formally request that we receive some kind of formal referral on the matter involving campaign finances. The second purpose of the meeting was to discuss with Mr. Radek the Bureau's input into whatever conclusion was made on the recommendation to the Attorney General as far as recommending an independent counsel.

Senator SPECTER. And what was said at the meeting, by whom?

Mr. ESPOSITO. The meeting—and Mr. Gallagher was correct; I specifically remember where we were sitting. And Mr. Gangloff was seated to the right, my right, of Mr. Radek, on the couch also.

And the meeting—we discussed those two points. It was a very cordial meeting, and the indications were that we were going to receive a formal referral on this matter, and that we would work together as far as input, as far as recommendations to the Attorney General.

At the end of the meeting, if I—do you want me to finish what——

Senator SPECTER. Go ahead, yes.

Mr. ESPOSITO. At the very end of the meeting, the meeting was breaking up and we were—and I had known Mr. Radek and Mr. Gangloff for many years and we worked together on many different matters. And like I said, it was a cordial meeting, and at the end of the meeting, as a matter of fact, I think I was out of my chair at that time and I think Mr. Radek, as I remember it, was even rising out of his chair.

And the topic came up about the pressure that was put on both organizations, but specifically Public Integrity because they had to make the recommendation in this matter. And Lee did make the statement that, as a matter of fact, the Attorney General's job could hang in the balance. I do remember that specifically.

Senator SPECTER. Did you make any response to that statement?

Mr. ESPOSITO. I can't recall exactly what I said, but something to the fact that I am sure you will do the right thing.

Senator SPECTER. And what was the context——

Mr. ESPOSITO. And we walked out of the room.

Senator SPECTER. Where was Mr. Gangloff, as best you recollect, at the time Mr. Radek said that?

Mr. ESPOSITO. If I can construct the seating arrangements in my office, there is a couch, and on each side of the couch there is wing chairs. On the right side, if you are looking at the couch, is where I was sitting. Neil Gallagher was to my right. Across from me was Mr. Radek, who was in the opposite wing chair, and to his right was Mr. Gangloff.

Senator SPECTER. This comment by Mr. Radek was said at the very conclusion of the meeting?

Mr. ESPOSITO. Yes, it was, just as we were getting ready—as a matter of fact, I was already out of my chair, I believe. And right after that, they walked out my door.

Senator SPECTER. And specifically where was Mr. Radek at the time? You were out of your chair and where was Mr. Radek?

Mr. ESPOSITO. He was in his chair, in the same wing chair.

Senator SPECTER. And where was Mr. Gangloff?

Mr. ESPOSITO. Sitting on the couch.

Senator SPECTER. Was Mr. Gangloff within earshot of what Mr. Radek was saying?

Mr. ESPOSITO. Yes. I mean, I was much further away and I could hear it, so——

Senator SPECTER. And where was Mr. Gallagher?

Mr. ESPOSITO. He was sitting on the couch, to my right.

Senator SPECTER. And was Mr. Gallagher within earshot?

Mr. ESPOSITO. Yes, he was.

Senator SPECTER. What was your reaction to Mr. Radek's statement?

Mr. ESPOSITO. My reaction was that I immediately after the meeting went down and reported it, reported the results of the meeting, including the statement, to the Director.

Senator SPECTER. Did you consider Mr. Radek's statement an unusual one?

Mr. ESPOSITO. Well, I think it indicated to me the thought that he had to put into this decision.

Senator SPECTER. What was the context of the public discussion, if you recall, at that time, November 20, 1996, about the Attorney General staying on in a second Clinton administration term?

Mr. ESPOSITO. The general knowledge I have—this was not discussed at any meeting I was at, but general discussion in the media around this period of time was the Attorney General had not been renamed to be Attorney General for the next 4 years, or for the next administration.

Senator SPECTER. And whom did you report this conversation to in the FBI, if anyone?

Mr. ESPOSITO. To Louis Freeh, the Director of the FBI.

Senator SPECTER. And how soon after the meeting did you make that report to Director Freeh?

Mr. ESPOSITO. That was probably with—my recollection is that we did it almost right away.

Senator SPECTER. Did you go straight from that meeting to Director Freeh's office?

Mr. ESPOSITO. My recollection is that after Mr. Gangloff and Mr. Radek left the office that Mr. Gallagher and I discussed personnel that we would assign to this investigation, and then I walked down to Mr. Freeh's office.

Senator SPECTER. Did Mr. Radek's comment surprise you about pressure and the Attorney General's job being on the line?

Mr. ESPOSITO. Yes, it did. Yes, it did.

Senator SPECTER. Did you discuss that with Mr. Gallagher contemporaneously with the event?

Mr. ESPOSITO. I don't recall if I did or not. I know I discussed it with Mr. Freeh.

Senator SPECTER. And how long after the meeting, as best you can tell, did you report that to Director Freeh?

Mr. ESPOSITO. It had to be within 30 minutes, I would say.

Senator SPECTER. And what, if anything, did Director Freeh say to you when you reported that to him?

Mr. ESPOSITO. He indicated to me that he thought this was a very serious matter and he was going to have to have a discussion with the Attorney General. Subsequently, whether it was that night or the next day, we had a further discussion about this conversation.

Senator SPECTER. Whom do you mean by "we?"

Mr. ESPOSITO. The Director and I; Mr. Freeh and myself.

And I asked him specifically if he wanted me to put the discussion of this meeting in an FD–302, which is a form that most Federal prosecutors are familiar with. A 302 is a form that Bureau agents put reports on. And Mr. Freeh told me that, no, do not. He was going to have a meeting with the Attorney General and then he would construct a memo, which he subsequently did.

Senator SPECTER. And did the Director then send you a memorandum?

Mr. ESPOSITO. Yes, he did.

Senator SPECTER. And what did that memorandum say, in essence?

Mr. ESPOSITO. Well, it is the memo——

Senator SPECTER. Do you have the memorandum with you?

Mr. ESPOSITO. Yes, I do. It is the memo of December 9 that Senator Sessions referred to earlier. It is a memo from the Director of the FBI to me, Mr. Esposito; subject: Democratic national campaign matter.

Do you want me to read the——

Senator SPECTER. Just read it. It is a short memo. Put it in the record.

Mr. ESPOSITO. Let me put my glasses on, sir.

"As I related to you this morning, I met with the Attorney General on Friday, 12/6/96, to discuss the above-captioned matter. I stated that DOJ had not yet referred the matter to the FBI to conduct a full criminal investigation. It was my recommendation that this referral take place as soon as possible."

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

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

"I also stated that it didn't make sense for PIS to call the FBI" the lead agency' in this matter while operating a task force with DOC IG's," meaning Department of Commerce, "who were con-

ducting interviews of key witnesses without the knowledge or participation of the FBI. I strongly recommended that the FBI and hand-picked DOJ attorneys from outside Main Justice run this case as we would any matter of such importance and complexity."

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

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

"It was unfortunate that DOJ declined to allow the FBI to play any role in the independent counsel referral deliberations. I agree with you that based on DOJ's experience with the Cisneros matter, which was only referred to an independent counsel because the FBI and I intervened directly with the Attorney General, it was decided to exclude us from this decisionmaking process. Nevertheless, based on information recently reviewed from PIS/DOC, we should determine whether or not independent counsel referral should be made at this time. If so, I will make the recommendation to the Attorney General."

Senator SPECTER. That concludes the memo?

Mr. ESPOSITO. Yes, sir.

Senator SPECTER. What did you take the Director's reference to, "junkyard dogs," to mean?

Mr. ESPOSITO. Well, I have discussed this with the Director because I remember discussing it with him at the time. And my interpretation of a junkyard dog is somebody who latches—a dog that latches onto somebody, like an ankle, and won't let loose. And I think in this context, what I took it to mean is somebody who will latch onto this and overturn every stone to find out what actually happened.

Senator SPECTER. The Director has quotes around, "Attorney General's job might hang in the balance," "(or words to that effect)." What is your best recollection as to the specific language which Mr. Radek used in that respect?

Mr. ESPOSITO. The quote I remember is Attorney General's job might hang in the balance. I remember that specifically. I think why he put "(or words to that effect)" is because I cannot remember if he said pressure or stress. But we had discussed this memo 3½ years ago and I had not seen it until about a month ago.

Senator SPECTER. Do you know if this memo was made available to any oversight committee of Congress?

Mr. ESPOSITO. I am not aware of that, sir.

Senator SPECTER. Did you then attend a meeting with the Director and the Attorney General on December 11?

Mr. ESPOSITO. Yes, I did.

Senator SPECTER. And is that meeting reflected in your diary?

Mr. ESPOSITO. It is my 1996 calendar, and I do have—I do have an entry on December 11: at 2:15 p.m., meet with AG re campaign finance reform with Director.

Senator SPECTER. When you use the word "reform," what do you mean by that?

Mr. ESPOSITO. Well, this is—my secretary had put that note in. I think what that specifically means is the campaign finance investigation.

Senator SPECTER. And what was the substance of that meeting?

Mr. ESPOSITO. I believe this meeting was——

Senator SPECTER. First of all, who all was present and where was the meeting held?

Mr. ESPOSITO. I believe the meeting was held at the Attorney General's conference room, at Department of Justice. I believe the Attorney General was there, Bob Litt was there, I was there, Director Freeh was there. Other than that, it would just be speculation on my part as far as who was there. I know there could have been others.

Senator SPECTER. And who said what to whom?

Mr. ESPOSITO. I can't recall the exact specifics, but I think the basis of the meeting was to set up groundwork, or talk about the groundwork to set up for the task force to begin this investigation.

Senator SPECTER. Was there any discussion at that time about any pressure on the Public Integrity Section?

Mr. ESPOSITO. No, there was not.

Senator SPECTER. Was there any discussion about the Attorney General's job hanging in the balance or being on the line, or words to that effect?

Mr. ESPOSITO. No, there was not.

Senator SPECTER. Was there ever any following discussion with Mr. Radek or anybody else from the Department of Justice about pressure on campaign finance investigations or potential prosecutions?

Mr. ESPOSITO. Not to me, no.

Senator SPECTER. Any other discussion with Mr. Radek or anybody else of the Department of Justice about the Attorney General's job hanging in the balance or being on the line?

Mr. ESPOSITO. No, there wasn't.

Senator SPECTER. Senator Sessions.

Senator SESSIONS. Is it fair to say, Mr. Esposito, that this statement about the job hanging in the balance troubled you enough that you went rather directly to the Director of the FBI to discuss that with him?

Mr. ESPOSITO. Yes.

Senator SESSIONS. And did it trouble him, also?

Mr. ESPOSITO. Yes, it did.

Senator SESSIONS. And that was the primary reason—or was that a factor in his deciding to go to see the Attorney General?

Mr. ESPOSITO. That was one of the reasons, yes.

Senator SESSIONS. You mentioned that the purpose of this meeting was two-fold. One was to request a formal referral. Now, a matter comes up and potentially a crime is reported that is a potential crime. At some point, someone has to be the lead agency to inves-

tigate it, to be the person charged, the agency charged with the investigation.

Is that what you meant, that it would be referred to the FBI formally as the agency in charge of the investigation?

Mr. ESPOSITO. That is part of it. What I actually meant was that, as I recall, there were numerous articles appearing daily in the paper about the work that was being done by the inspector general's office at Department of Commerce regarding Mr. Huang. Although it was referred to as the FBI was the lead agency, we had not received any formal request from anybody to do anything.

The Director normally holds morning briefings, around 8 a.m. in the morning, at this particular time, and it was discussed at that meeting that I thought that since we are being bandied about in the paper as the lead agency but we have not received any formal referral, which is usually the way it occurs, from DOJ, that I was going to call Mr. Radek and set up a meeting.

I do recall calling Mr. Radek and ask him to stop by my office sometime today. This was the day in question. And I seem to recall—my memory tells me that Public Integrity Section at that time,—and I don't know if they still are because I have been retired for 2 years and 9 months—their offices were not at Main Justice. And I seem to recall that Mr. Radek told me that he was either going to go—and I can't remember specifics, but he was either going to a meeting at DOJ or coming back from a meeting at DOJ and we would meet at my office. And according to my calendar, it shows a meeting at 4:30 in the afternoon.

Senator SESSIONS. But it was important for the FBI, if they were going to be publicly identified with this investigation, to be in charge of it, or not, have that matter clarified?

Mr. ESPOSITO. Well, we felt that eventually somebody was going to ask us to be in charge of it and we wanted to get moving on it.

Senator SESSIONS. And the second request was to ask for input into the independent counsel decision. Of course, the Department of Justice has the ultimate authority to decide the call or not. That is the Attorney General's call.

Mr. ESPOSITO. That is correct.

Senator SESSIONS. But as a Federal prosecutor for a long time, I was never offended or in any way reluctant to receive any memorandum or suggestions from the FBI or any other law enforcement agency. And you were going to ask that you be allowed at least to provide some input from the FBI on this matter?

Mr. ESPOSITO. That is correct.

Senator SESSIONS. Were you allowed to do so?

Mr. ESPOSITO. Yes, we were.

Senator SESSIONS. What about the preliminary investigation decision that was entered into that concluded on, I believe, the November 30, 10 days after this meeting? Were you involved in that recommendation? Did you know that decision was going to be made?

Mr. ESPOSITO. I don't think we were, sir.

Senator SESSIONS. Well, isn't it a fact, Mr. Esposito, that sometimes you have got to move promptly on cases?

Mr. ESPOSITO. That is correct.

Senator SESSIONS. And isn't it a fact that quite a number of witnesses who were present at the Buddhist Temple are no longer in the country and have never been interviewed?

Mr. ESPOSITO. I believe once we started on the investigation, it was determined that some had left the country, yes.

Senator SESSIONS. Ed Siong was one of those. Do you recall?

Mr. ESPOSITO. I couldn't tell you the specific names, sir.

Senator SESSIONS. And are you aware that there were records shredded in this case?

Mr. ESPOSITO. No, I am not.

Senator SESSIONS. Testimony, I believe, in the House committee from individuals who did not flee that records were shredded.

But let me go back to this point. According to the facts we have, Senator McCain and a number of House members requested an independent counsel as a result of this fundraising event at the Buddhist Temple, and they detailed quite a number of complaints they had, and bases for that request.

At that point, Mr. Radek at Public Integrity stopped the initial investigation that was ongoing in Los Angeles, or at least being prepared to go forward in Los Angeles by the U.S. attorney's office, and undertook to make a 30-day review. And I guess my question to you is, did you participate in doing any evidence-gathering to help him make that decision 10 days later from your meeting, November 30?

Mr. ESPOSITO. I think as was stated earlier, this was the very first meeting we had about this matter where we asked for a formal referral. I think the next——

Senator SESSIONS. Did you even know that the Attorney General was going to make a decision a few days later, and that Mr. Radek was going to make a recommendation as to whether an independent counsel should be appointed?

Mr. ESPOSITO. I believe not, sir.

Senator SESSIONS. And to your knowledge, no investigation was done by the FBI during that period?

Mr. ESPOSITO. Correct, unless it was the Los Angeles office, but they had not—I am sure they would have forwarded that to me.

Senator SESSIONS. Well, I just wonder how you make a decision if you don't interview witnesses and gather evidence, unless you just read the newspaper. And going back and reading law books is not the way to do an investigation.

In fact, Mr. Esposito, based on your experience with the FBI, isn't it true that a lot of times a case begins on a rather maybe significant but not particularly shocking criminal allegation, and that aggressive investigation uncovers a whole can of worms and a pattern of criminality?

Mr. ESPOSITO. Yes, that happens, sir.

Senator SESSIONS. And isn't that why, when you do an investigation of this kind, you need an absolutely independent prosecutor and investigative team?

Mr. ESPOSITO. Yes. There was no—there is no mixing of words here. The FBI was pretty adamant in its position that they thought early on that this should be referred to an independent counsel.

Senator SESSIONS. And isn't it a fact, also—well, I guess I want to get——

Senator SPECTER. Senator Sessions, I am reluctant to interrupt you, but the House has their proceedings set for one o'clock, and there are people waiting. So to the extent we can expedite the balance of our questioning, I think they would appreciate it.

Senator SESSIONS. Well, I will ask one more question.

In the memorandum, Mr. Freeh referred to meeting with the Attorney General again to discuss the investigative team. Did he report to you what kind of commitments the Attorney General had made to establishing an independent investigative team of skilled prosecutors who were used to litigating?

Mr. ESPOSITO. My recollection is that—and this is a question that should be directed to Mr. Freeh, but we had a conversation about the—Director Freeh and I had a conversation about his conversation with the Attorney General, and he pretty much told me that she was going to not seek somebody outside of the Department, of Main Justice, and was going to give this to the Public Integrity Section.

Senator SESSIONS. Which would have been contrary to his recommendation?

Mr. ESPOSITO. Yes, sir.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Sessions.

Mr. Radek, would you step forward?

Mr. Gallagher, would you pull your chair forward?

Both of you men have been sworn in at the last proceedings, so you understand, Mr. Gallagher, you are still under oath?

Mr. GALLAGHER. Yes, I do.

Senator SPECTER. Mr. Radek, you understand you are still under oath?

Mr. RADEK. Yes, I do.

Senator SPECTER. To try to boil this all the way down, Mr. Gallagher, we hadn't expected you to be here, but we thank you for being here. You were on your way to Ireland last week. I want to read you just two questions and two answers. I think that would be the fastest way to handle your testimony today.

Your testimony at page 38 of the record, you said, "During this discussion, there was a statement made by Mr. Radek that, as reflected in the memorandum, there was a lot of pressure on him and on the Public Integrity Section, and this was attributed to the fact that the Attorney General's job may hang in the balance." My question to you: "Are you sure that conversation occurred." "I am certain of the conversation."

And then similarly, at page 39, my question: "And you are sure the conversation occurred where Mr. Radek used the language pressure on the Public Integrity Section because the Attorney General's job hangs in the balance?" And you said, "Yes, Senator; yes, Senator." My question: "Sure of that?" Your response: "I am positive."

Do you reaffirm that testimony?

Mr. GALLAGHER. Yes, Senator, I do.

Senator SPECTER. Is it absolutely clear, Mr. Gallagher, in your mind that the two issues, the pressure and the Attorney General's job hanging in the balance, were linked?

Mr. GALLAGHER. Yes, Senator.

Senator SPECTER. Mr. Esposito, is it absolutely clear in your mind that the two issues, the pressure and the Attorney General's job hanging in the balance, were linked?

Mr. ESPOSITO. Yes, sir.

Senator SPECTER. Mr. Radek, we discussed this issue at some length on the 24, and as I had read your testimony earlier, you said that you may have used the word "pressure" and you may have talked about the Attorney General's job hanging in the balance, but there was no link between the two.

Are you absolutely certain that there was no link between the two, Mr. Radek?

Mr. RADEK. Sir, if I may reiterate my testimony——

Senator SPECTER. Yes, you may.

Mr. RADEK [continuing]. I have no recollection of the meeting and I have no recollection of the conversation. The speculation that I engaged in was speculation about things that I would have said because they were true.

What was not true at the time, and so therefore my conclusion is I would not have said it, is that there was any link between anything having to do with the Attorney General's job status and any pressure on the Public Integrity Section. I acknowledged at that testimony as I acknowledge now that there was press speculation that the Attorney General's job was in such a state that she might not serve a second term. And I clearly acknowledge and was willing to tell anyone at the time that the Public Integrity Section was under a lot of pressure to do a good job in this investigation.

Senator SPECTER. So those two factors were true, pressure on the Public Integrity Section and the Attorney General's job hanging in the balance?

Mr. RADEK. Well, hanging in the balance necessarily relates to something and makes that connection. What I testified to was I was aware that there were press reports that she might or might not be chosen to serve a second term.

Senator SPECTER. But the pressure on the Public Integrity Section was not due to trying to protect the Attorney General's job?

Mr. RADEK. That is correct.

Senator SPECTER. Senator Sessions.

Senator SESSIONS. Is it your testimony that—well, do you remember a phone call from Mr. Esposito to you asking you to come over to discuss this matter at the FBI office?

Mr. RADEK. I do not. I do remember that it was a cause of some concern that while the investigation was going forward—and I believe FBI agents were actually working on the case; I may be wrong, but I believe that is true—no formal referral had been received from the Bureau by the Department. And that very often happens. We will get a case started with a phone call, followed by a formal referral later.

Senator SESSIONS. Well, that does happen, but it was appropriate at this point to do it formally, was it not?

Mr. RADEK. Yes.

Senator SESSIONS. It was a fair request of the FBI?

Mr. RADEK. Yes, and——

Senator SESSIONS. Bandied about in the paper, and they needed to be either in or out?

Mr. RADEK. There was no disagreement about that, yes, sir.

Senator SESSIONS. And do you recall that you were requested to allow the FBI to have input into the appointment of the independent counsel?

Mr. RADEK. I do not remember that specifically, although it does not surprise me to hear that I would have been asked that. It seems natural. The history of the independent counsel deliberations in the Department was generally that the decisions were made without input as to the final recommendation by the FBI.

I think that changed in the Cisneros matter because the FBI had an institutional interest there. They were the organization that was lied to, and so the Attorney General involved them quite a bit. And I think from that time on, they stayed involved in every independent counsel matter that I have been involved with.

Senator SESSIONS. But with regard to the recommendation that you made on November 30, or thereabouts, against an independent counsel to the Attorney General?

Mr. RADEK. I am not sure which recommendation——

Senator SESSIONS. The 30-day initial inquiry. Did you offer them an opportunity to participate in that?

Mr. RADEK. I am just not sure what recommendation you are referring to, Senator, if there is a document there. I don't recall specifically making a recommendation on November 30 on any independent counsel matter. There was a letter, a congressional letter, which under the statute had to be answered at that time which rejected a lot of independent counsel suggestions or demands, recommendations from the Congress. Is that what you are referring to?

Senator SESSIONS. Well, yes. The Congress made that recommendation. You took over the case under the rubric of the 30-day review, did you not, from the U.S. attorney's office in Los Angeles? Mr. Gangloff said you took it over because you had a request for an independent counsel.

Mr. RADEK. You are confusing this matter, the entire campaign finance matter, with a small part of it, which was the Hsi Lai Temple matter. The Hsi Lai Temple matter is a discreet matter that fell under the rubric of campaign finance, but the allegations that we were investigating and looking at initially were much broader than that.

Senator SESSIONS. Well, in our last——

Mr. RADEK. So when you say this case, yes, I reached out and stopped the Hsi Lai Temple matter, but that wasn't the entire campaign finance matter and that wasn't the beginning of it.

Senator SESSIONS. Well, I know our time is short. I guess the last time you testified here, you talked about recommending not having an independent counsel, and apparently the Attorney General at that point did so.

Mr. RADEK. On a number of specific matters, I have made recommendations to the Attorney General. Some of them have been not to have an independent counsel, and some of those she has agreed with.

Senator SESSIONS. Well, Mr. Radek——

Mr. RADEK. On the Hsi Lai Temple matter, we examined quickly, once we received the information, whether or not the independent

counsel statute was triggered. We determined it was not because there was no specific and credible allegation against the Vice President.

Senator SPECTER. Senator Sessions, we are going to have Mr. Radek back a week from today. We had sought to limit his testimony to just the memorandum, but these matters are familiar. But I just wanted to call to your attention that we are going to go into a number of matters where Mr. Radek had taken control of investigations under the rubric, as you two have worked out the term—you agreed upon a term—under that rubric, and we are going to be discussing those next week, so that you will have ample opportunity to go into detail.

I say that because your trusted deputy just brought you a big sheaf of materials and the House members are waiting, and as a matter of comity, we ought to liberate the witnesses.

Senator SESSIONS. That is all I have.

Senator SPECTER. Thank you very much, Senator Sessions.

Thank you, Mr. Gangloff, Mr. Radek, Mr. Esposito, Mr. Gallagher.

Mr. RADEK. Thank you, Mr. Chairman.

[Whereupon, at 1:13 p.m., the subcommittee was adjourned.]

THE 1996 CAMPAIGN FINANCE INVESTIGATIONS

WEDNESDAY, JUNE 21, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senators Grassley, Sessions, and Torricelli.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, it is a little past 2 p.m., so we are going to begin these hearings. We had wanted to wait for others who had committed to be here by 2:00 p.m., but it is 2:05 p.m. and we have a great many witnesses who have other commitments. So we will proceed.

This hearing is another in our line of subcommittee oversight on the Department of Justice to inquire into the practices of the Department on enforcing the campaign laws. We have a long group of witnesses today. We are going to be dealing with a number of the specific cases where the Public Integrity Section had intervened and inquire as to their reasons for intervening in cases and why they did not pursue them.

We are going to be inquiring into the allegations of Common Cause in 1996, and we have the Chairman and Vice Chairman of the Federal Election Commission here today to comment about what happened in 1996. And Common Cause has given public notice of an intention to pursue complaints again this year. The officials from Common Cause could not be here today because of board meetings, but we have a letter from Mr. Fred Wertheimer, President of Democracy 21, and Mr. Scott Harshbarger, President of Common Cause. It was written in response to the subcommittee's request for them to appear as witnesses, and I am going to read a portion of the letter to start the proceeding.

"In response to your recent inquiry, we are writing to confirm that Common Cause and Democracy 21 will shortly ask the Justice Department to conduct an investigation of the illegal use of soft money in the 2000 presidential campaigns by both major party candidates and their political parties."

"These soft money funds are being used by the presidential campaigns to run ads promoting the Gore and Bush candidacies in the guise of being so-called political party 'issue ads.' "

"In fact, the ads are clearly campaign ads to promote the presidential candidates, are created by members of the respective presidential campaigns, are targeted to run in key presidential battleground states, and are without question for the purpose of influencing the presidential campaign."

"As such, it is illegal to fund these ads with soft money. If this practice, which has just begun for the 2000 presidential election, is not stopped, massive violations of the federal campaign finance laws will occur this year, in amounts even greater than the similarly massive violations that occurred in the Clinton and Dole 1996 presidential campaigns."

Skipping ahead, "In our view, the Gore for President Committee and the Bush for President Committee, and their agents, along with their respective national political parties, are engaging in an illegal scheme to violate the prohibitions of corporate and labor union contributions, and the limits on individual contributions, in presidential campaigns."

Skipping further, "In October 1996, Common Cause filed a complaint with the Justice Department charging that the Clinton and Dole campaigns similarly were using ad campaigns to illegally inject millions of dollars in soft money into the presidential campaigns."

"The Justice Department originally responded by stating in a letter that the allegations 'warrant careful consideration by the Department.' The letter also stated, 'the facts you allege in your letter and the points you raise will be carefully reviewed and considered.' "

"Recently released Justice Department documents, however, establish that this commitment was never kept."

"These documents highlight the fact that key Department officials—including Louis Freeh, the Director of the FBI, and Charles La Bella, appointed by Attorney General Reno to head the task force investigating campaign finance charges—raised serious concerns about the Department's failure to conduct an investigation of the Common Cause allegations."

I know Senator Sessions plans to be here. He has an amendment pending on the Foreign Operations appropriations bill, and I just talked to Ranking Member Senator Torricelli a few minutes before 2 p.m., and I know he intends to be here. But because of the long list of witnesses and other commitments, we are going to proceed at this time. Now I call on my distinguished colleague from Iowa, Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman. I think it is fair to say that, given the documents that we have been provided for this investigation and specifically for this hearing, an independent counsel should have been appointed for the campaign fundraising violations. There were many prominent players in the decision-

making process who wanted it. Those that did not—and Mr. Radek was chief among them—really had to stretch the logical arguments.

In the end, Mr. Radek bought hook, line, and sinker the argument peddled by the President's attorneys and advice of counsel argument which basically says that my lawyers made me do it.

From documents that we have read, many people in the process were trying to do the right thing. They were calling them as they saw them. There should have been an independent counsel for the Vice President and for Mr. Ickes, and I would say that at a minimum. But the Public Integrity Section really was operating with a mind of its own, and it rubbed just about everyone the wrong way as it went through this process. Even James Robinson and Robert Litt disagreed with Public Integrity on the key issues involving an appointment. The FBI Director and everyone in the FBI from top to bottom believed with passion that an independent counsel should have been appointed, and the Attorney General's own hand-picked attorney, Charles La Bella, and his lieutenants supported it with equal passion.

And this tells me a lot, Mr. Chairman. It appears that Mr. Radek, who is known in the investigative community as "Dr. No," had cases from the field transferred to Main Justice and placed under his control. It is quite obvious those cases languished. He butted heads with the task force's lead attorney, Mr. LaBella. He referred the cases to the FEC with a memorandum of understanding between the Department of Justice and the FEC that clearly stated that the cases were in the Department of Justice's jurisdiction.

He kind of wrote a scorch-and-burn memo to his superiors blasting the work of the task force. Some attorneys of that task force even resigned in protest. One of those attorneys, Steve Clark, we have yet to hear from. He was brought in to investigate the Common Cause allegations, yet he was prevented from even commencing the investigation.

Mr. Clark wrote this upon his exit, "Never did I dream that the task force's efforts to air this issue would be met with so many behind-the-scenes maneuvering, personal animosity, distortions of fact, and contortions of law."

The single most egregious non-act performed by Mr. Radek was his failure to allow the Common Cause allegations to be investigated, and for nearly 2 years that was the case. His office is called Public Integrity for a reason. The allegations charged a massive fraud being perpetrated on the American taxpayers. The Public Integrity Section's response was to abrogate its responsibilities to preserve public integrity. Its response was to look the other way to frustrate the process, to lawyer the case to inaction.

So, Mr. Chairman, I believe that today's hearing will bring out much of this story contained in the documents that we have been provided, and I would like to commend you for your diligence in pursuing this and look forward to today's testimony.

Senator SPECTER. Thank you very much, Senator Grassley.

For the record, without objection, we will introduce the Common Cause letter to Attorney General Reno dated October 9, 1996, and the letter from Mr. Harshbarger and Mr. Wertheimer to me, dated June 20, 2000.

[The letter to Attorney General Reno follows:]

October 9, 1996

The Honorable Janet Reno
The Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Reno:

There are substantial grounds to believe that the Clinton/Gore '96 Primary Committee, Inc. (Clinton Committee), acting through the Democratic National Committee (DNC), and the Dole for President Primary Committee, Inc. (Dole Committee), acting through the Republican National Committee (RNC), have each engaged in an illegal scheme to circumvent the federal campaign finance laws. Through these schemes, the Clinton Committee and the Dole Committee, and their agents, each committed knowing and willful violations of the federal election laws, involving tens of millions of dollars, during the 1996 presidential primary campaign.

These matters warrant investigation to determine whether criminal violations of the federal campaign finance laws have occurred.

In the circumstances here, the Independent Counsel Act requires the appointment of an independent counsel in an investigation involving high-level officers of the President's reelection campaign committee, 28 U.S.C. 591(b)(6), and authorizes the appointment of an independent counsel in an investigation where, as in this matter involving the Dole Committee, the RNC and the DNC, you may have a "political conflict of interest." 28 U.S.C. 591(c).

Common Cause therefore urges you to fulfill your responsibility under the law by taking the steps necessary to seek the appointment of an independent counsel under the Independent Counsel Act to investigate all of the matters discussed below.

I. Summary of the Allegations

During the 1996 presidential primary campaign, the Clinton Committee and the Dole Committee, and their agents, both spent millions of dollars in excess of the overall presidential primary spending limit that applied to each of their campaigns, and in doing so, used millions of dollars in "soft money" contributions that could not legally be used directly to support a presidential campaign.

The Clinton and Dole Committees and their agents made these campaign expenditures through their respective national political parties, using the parties as conduits to run multimillion-dollar TV ad campaigns to support their candidacies. The

TV ad campaigns were in each case prepared, directed and controlled by the Clinton and Dole campaigns and their agents. Money used to pay for the ad campaigns was raised by agents of the Clinton and Dole Committees. The ads were targeted to run in presidential battleground states. The ads dealt with President Clinton and Senator Dole by name, and promoted their respective candidacies or criticized their respective opponents.

Thus, the TV ad campaigns, run in the guise of being DNC and RNC ad campaigns, were in fact Clinton and Dole ad campaigns, and accordingly were subject to the contribution and spending limits that apply to presidential campaigns.

The purpose of the Clinton ad campaign, according to published reports, was to allow the Clinton Committee and its agents to conduct a multimillion-dollar TV advertising campaign for the President's reelection, from the summer of 1995 until the summer of 1996, without any of the money being counted against the $37 million spending limit applicable to the Clinton Committee during the presidential primary period. The ad campaign cost at least $34 million during this period.

The purpose of the Dole ad campaign, according to published reports, was to allow the Dole Committee to conduct a multimillion-dollar TV advertising campaign to support Senator Dole's candidacy during the period from April 1996 through the Republican convention in August 1996, a time when the Dole campaign already had spent nearly all of the $37 million that it could legally spend during the presidential primary period. The ad campaign cost at least $14 million through June 1996, the period for which relevant FEC disclosure reports are currently available.

We believe the Clinton and Dole Committees massively violated the primary election spending limits they had each agreed to as a condition of receiving taxpayer funds. In addition, the Clinton and Dole Committees massively violated the contribution prohibitions and limits by financing their ad campaigns in large part with millions of dollars of "soft money" funds which they could not legally use to support their candidacies. The Clinton Committee used at least $22 million in "soft money" and the Dole Committee used at least $9 million in "soft money." These "soft money" funds included corporate and labor union contributions, and large contributions from individuals in excess of the federal contribution limits.

In sum, the Clinton Committee and the Dole Committee, and their agents, acting through their respective national political parties in the ways described above, each have engaged in an illegal scheme to violate the presidential primary spending limits and to violate the prohibition on a federal candidate's use of corporate and labor union contributions and the restrictions on such candidate's use of large individual contributions. The Committees have also engaged in an illegal scheme to violate the disclosure requirements of the federal election laws.

Any such scheme to knowingly and willfully exceed the presidential primary spending limit, to knowingly and willfully spend "soft money" directly to support a federal candidate and to knowingly and willfully violate the federal disclosure requirements is a criminal violation of the federal election laws.

The Justice Department has exclusive jurisdiction to prosecute such criminal violations, subject to the Independent Counsel Act. Justice Department guidelines indicate that this is the kind of election law case that should be pursued by the Department, regardless of the Federal Election Commission's primary jurisdiction to investigate potential civil violations of the law.

Common Cause believes that massive violations have occurred during the 1996 presidential election, the most massive violations of the campaign finance laws since the Watergate scandal. These violations involve tens of millions of dollars in campaign contributions and expenditures.

Under these circumstances, an independent counsel is required to investigate these matters and to take appropriate action to hold responsible individuals and entities accountable for any violations that have occurred.

Set forth below is a review of the applicable statutes and the factual allegations requiring an investigation by an independent counsel.

II. Independent Counsel Act

The Independent Counsel Act, 28 U.S.C. 591 et seq., provides for the appointment of an independent counsel to conduct criminal investigations that involve any member of a specified class of individuals, including the President and Vice President, members of the Cabinet, high-ranking individuals in the Executive Office of the President, other high-level Executive Branch officials, and the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President and any officer of that committee exercising authority at the national level. 28 U.S.C. 591(b).

The law also provides for the appointment of an independent counsel to conduct criminal investigations of any person where the Attorney General determines such investigation "may result in a personal, financial, or political conflict of interest." 28 U.S.C. 591(c).

Some of the matters raised in this letter involve the Clinton presidential campaign committee, whose national officers are "covered persons" within the meaning of section 591(b).

Other matters raised here are intimately related to the allegations about these "covered persons," and involve the Dole presidential campaign committee, the Democratic National Committee and the Republican National Committee. Any investigation of these entities would plainly involve a "political conflict of interest" for you as Attorney General within the meaning of section 591(c). The allegations related to these entities should be examined as part of the investigation of the section 591(b) "covered persons" that must be referred to an independent counsel. As a result, all of the matters raised here should, under the Act, be referred to an independent counsel.

Accordingly, under sections 591(b) and 591(c), the investigation of this entire matter is governed by the independent counsel law.

The independent counsel law provides that whenever you receive "information sufficient to constitute grounds to investigate" whether any covered person, including a person covered by section 591(c), "may have violated any Federal criminal law," you have 30 days to determine if the information is sufficiently specific and from a sufficiently credible source to justify beginning a "preliminary investigation." 28 U.S.C. 591(a), (d).

Under the law, if you determine that the information is specific and from a credible source, then you have 90 days to conduct a "preliminary investigation" for the purpose of determining whether "further investigation is warranted." 28 U.S.C. 592(a). If you conclude that there are "reasonable grounds to believe that further investigation is warranted," you must apply to the appropriate court for the appointment of an independent counsel. 28 U.S.C. 592(c)(1)(A).

Common Cause calls on you to fulfill your responsibilities under the Act by opening a preliminary investigation leading to the appointment of an independent counsel to investigate the matters discussed in this letter. The independent counsel should be responsible for conducting only this investigation. Given the statutory time frames, we recognize that an application to the court for appointment of an independent counsel may not be made until after the election on November 5.

III. The Applicable Federal Statutes

A. The presidential campaign financing system and related criminal laws.

1. Public funding provisions

Candidates seeking the presidential nomination of a political party are eligible to receive public matching funds if they so choose and if they meet the conditions of eligibility for receiving the funds. 26 U.S.C. 9031 et seq. As one of those conditions, a candidate must agree in writing to abide by an overall spending limit during the primary campaign. 26 U.S.C. 9033(b). For the 1996 election, the overall primary spending limit was approximately $37 million.[1]

President Clinton and former Senator Dole both sought and received taxpayer funds and, in exchange, both signed commitment letters to the Federal Election Commission in which they agreed to comply with the primary election spending limit.[2]

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[1] The 1996 overall primary spending base limit was $30,910,000. Candidates were, in addition, allowed to spend another 20 percent, or $6,182,000, for fundraising purposes, making the total overall spending limit $37,092,000. Federal Election Commission, "FEC Announces 1996 Presidential Spending Limits," (Press Release, March 15, 1996).

[2] Letter of October 13, 1995 from William J. Clinton to the Honorable Danny Lee McDonald; Letter of April 24,

Major party nominees are also eligible to receive full public funding of their general election campaigns, provided they agree to limit their spending to the public money received. 26 U.S.C. 9003(b). For the 1996 general election, the public funding is approximately $62 million to each major party candidate. President Clinton and former Senator Dole both have sought and received this money and have agreed in a written commitment to comply with the condition to limit their campaign spending to $62 million.[3]

The national political parties are authorized to make expenditures, subject to a limit, in connection with the general election campaign of their presidential nominees. 2 U.S.C. 441a(d). For the 1996 presidential general election, the limit on party spending is approximately $12 million.[4] The national parties are not separately authorized to make any other expenditures directly to support a presidential candidate.[5]

2. Criminal provisions

There are a number of statutory limitations, prohibitions and disclosure requirements (set forth below) that accompany the above provisions. For "knowing and willful" violations of these limitations, prohibitions and disclosure requirements, there are federal felony penalties. In particular, two criminal statutory provisions are applicable:

First, the Federal Election Campaign Act (FECA), in 2 U.S.C. 437g(d)(1)(A),

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1995 from Robert J. Dole to Chairman, Federal Election Commission.

[3] Letter signed August 29, 1996 by William J. Clinton and Albert Gore, Jr. to the Honorable Lee Ann Elliott; Letter of August 14, 1996 from Robert J. Dole and Jack F. Kemp to the Honorable Lee Ann Elliott.

[4] Federal Election Commission, "FEC Announces 1996 Presidential Spending Limits," (Press Release, March 15, 1996).

[5] Although a recent Supreme Court decision, Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S.Ct. 2309 (1996), held that political parties can make "independent expenditures" on behalf of their candidates for Congress, the Court specifically noted that it was not "address[ing] issues that might grow out of the public funding of Presidential campaigns," and thus did not hold that the political parties could make independent expenditures in publicly funded presidential elections. In any event, the expenditures at issue in this matter were controlled and directed by agents of the presidential campaigns, and plainly could not qualify as having been made "independently" from the presidential campaigns.

states:

> Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both.

Second, section 9042 of the Presidential Primary Matching Payment Account Act ("the Primary Fund Act"), which establishes the presidential primary campaign financing system, 26 U.S.C. 9042, states:

> Any person who violates the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both. Any officer or member of any political committee who knowingly consents to any expenditure in violation of the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both.

3. Justice Department guidelines

The Justice Department guidelines for criminal prosecution of election offenses state:

> Intentional and factually aggravated violations of the FECA are crimes, subject to prosecution by the Justice Department. ...
>
> Most violations of the FECA and the public financing provisions of Title 26 are handled civilly by the FEC. A campaign financing violation is generally prosecuted criminally only if it was a willful violation of a core prohibition of the FECA, ... involved a substantial sum of money, and resulted in the reporting of false campaign information to the FEC.
>
> In addition, a scheme to infuse illegal sums into a federal election campaign impedes the FEC in its statutory enforcement and disclosure responsibilities. Such schemes have been successfully prosecuted as conspiracies to obstruct and impede the lawful functioning of a government agency ... and as willfully causing false information to be submitted to a

federal agency. ... [6]

The matters involved here and set forth in detail below clearly fall within these guidelines for criminal prosecution. These matters deal with potentially willful and knowing violations of "core" provisions of the FECA,[7] that involve "substantial" sums of money, and result in the reporting of "false campaign information" to the Federal Election Commission.

These matters also deal with "a scheme to infuse illegal sums into a federal election campaign" that would have the effect of impeding the FEC from carrying out its statutory enforcement and disclosure responsibilities.

Therefore, under the Justice Department's guidelines, the allegations discussed below warrant a criminal investigation.

4. "Knowing and willful" violations

Criminal violations of the campaign finance statutes must be "knowing and willful." We believe the violations set forth below meet this standard.

We believe the Committees and their agents intended to circumvent the law: they intended to make expenditures in the presidential primary campaign in excess of what could be legally spent to promote their candidates; they intended to spend "soft money" that could not be legally spent to directly support a federal candidate, and they intended to use their respective political parties as conduits to accomplish these goals. In short, there was "such reckless disregard of the consequences as to be a knowing, conscious and deliberate flaunting" of the FECA, which constitutes a "knowing and willful" violation of the Act. AFL-CIO v. FEC, 628 F.2d 97 (D.C. Cir.) cert. den. 449 U.S. 982; see also Screws v. United States, 325 U.S. 91, 106 (1945) (where, in dealing with violations of the Civil Rights Act, the Court required that the defendants "at least act in reckless disregard" of constitutional prohibitions or guarantees).

Even if the standard is the "good faith" test adopted by the U.S. Supreme Court for tax cases in Cheek v. U.S., 498 U.S. 192 (1991) -- i.e., that a person has not acted willfully if he had a "good faith" belief he was not violating the law -- the unreasonableness of the interpretation of the FECA under the factual circumstances set forth below would constitute evidence for a jury to consider in determining whether a

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[6] U.S. Department of Justice, Federal Prosecution of Election Offenses (6th ed. Jan. 1995) at 93.

[7] These "core" provisions, according to the Justice Department guidelines, include the limits on contributions from persons and groups, the ban on contributions from corporations and labor unions, and the avoidance of the statute's disclosure requirements. Federal Prosecution of Election Offenses at 96-97.

defendant's claimed good faith belief in the legality of his actions was in fact the state of mind with which the acts were carried out. This is not an issue that can properly be resolved by you as Attorney General in deciding whether to appoint an independent counsel. Rather, it must be resolved by the independent counsel in deciding whether to initiate a prosecution or, ultimately, by a jury.

B. Knowing and willful violation of the presidential primary spending limit is a federal crime.

Two statutory provisions are violated when a presidential campaign committee exceeds the spending limit that the candidate agreed to abide by in return for receiving taxpayer funds. When the violation is knowing and willful, it becomes criminal under 2 U.S.C. 437g(d)(1) and 26 U.S.C. 9042, both set forth above.

The first provision violated by exceeding the spending limit is in the FECA which states, in 2 U.S.C. 441a(b)(1)(A):

> No candidate for the office of President of the United States who is eligible under ... section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of [the spending limit].[8]

This provision makes it illegal for a candidate who receives taxpayer funds to exceed the overall spending limit in the presidential election.

The second provision violated by exceeding the spending limit is contained in the Primary Fund Act, which establishes the presidential primary campaign financing system. Section 9035 of the Act (26 U.S.C. 9035) states:

> No candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of title 2. ...

This provision also makes it illegal for a candidate who receives taxpayer funds to exceed the presidential primary spending limit in the FECA.

Thus, it is a criminal violation of both the FECA (section 437g(d)(1)) and the

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[8] The dollar amount of the spending limit set forth in the statute is $10 million, but this amount is adjusted each election cycle to account for changes in the consumer price index. 2 U.S.C. 441a(c). As noted above, the adjusted spending limit for the 1996 primary campaign, including the 20-percent exemption for fundraising disbursements, was approximately $37 million.

Primary Fund Act (section 9042) for a presidential campaign committee or its agents to knowingly and willfully make "expenditures" or incur "qualified campaign expenses" in excess of the spending limit that a presidential candidate agrees to in order to receive taxpayer funds.

C. Knowing and willful violation of the ban on use of corporate and union money, and the limit on individual contributions, in federal elections is a federal crime.

The FECA, in 2 U.S.C. 441b, makes it illegal for any corporation or labor union to make contributions or expenditures to directly support a federal candidate, and for any candidate or political party to receive or accept any such funds for that purpose. When the violation is knowing and willful, it becomes criminal under 2 U.S.C. 437g(d)(1)(A).

Section 441b provides:

> It is unlawful for ... any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section.
>
> (Emphasis added)

The FECA, in 2 U.S.C. 441a(a)(1), also makes it illegal for any person to contribute more than $1,000 to a candidate with respect to any federal election, or more than $20,000 per year to any national political party:

> No person shall make contributions --
>
> (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;
>
> (B) to the political committees established and maintained by a national political party ... in any calendar year which, in the aggregate, exceed $20,000; ...

The FECA provides, in 2 U.S.C. 441a(f), that it is illegal for any candidate or political committee to accept any contribution in excess of these contribution limits, or to make any expenditure in violation of the statute's limits. When the violation is knowing

and willful, it becomes criminal under 2 U.S.C. 437g(d)(1)(A).

Section 441a(f) provides:

> No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of [section 441a]. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under [section 441a].

Thus, it is a criminal violation of the FECA, 2 U.S.C. 437g(d)(1)(A), for a presidential campaign committee or its agents to "knowingly and willfully" use corporate or labor union contributions, or contributions from individuals in excess of the federal contribution limits to directly support a federal candidate.

D. Knowing and willful violation of the FECA's disclosure requirements is a federal crime.

The FECA, in 2 U.S.C. 434, requires a presidential campaign committee, and the national political party committees, to report all contributions and expenditures in excess of $200 made in connection with a presidential campaign. When the violation is knowing and willful, it becomes criminal under 2 U.S.C. 437g(d)(1)(A).

Section 434 provides:

> (a)(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. ...
>
> (b) Each report under this section shall disclose -- ...
>
> (2) for the reporting period and calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:
>
> (A) contributions from persons other than political committees; ...
>
> (C) contributions from political party committees; ...
>
> (3) the identification of each --
>
> (A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, ...

(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses; ...

(G) for an authorized committee, any other disbursements; ...

(5) the name and address of each --

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Thus, it is a criminal violation of the FECA, 2 U.S.C. 437g(d)(1)(A), for a presidential campaign committee or its agents to "knowingly and willfully" fail to report all contributions and expenditures in excess of $200 made in connection with a presidential campaign.

E. The TV ad campaigns at issue were a Clinton ad campaign and a Dole ad campaign, respectively, and were subject to the presidential primary spending and contribution limits and prohibitions.

Under the FECA, an expenditure is defined to include "any purchase, payment, ... or anything of value, made by any person for the purpose of influencing any election for Federal office. ..." 2 U.S.C. 431(9)(A). Similarly, under the Primary Fund Act, a "qualified campaign expense" is defined to include "a purchase, payment ... or gift of money or of anything of value incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election. ..." 26 U.S.C. 9032(9).

Thus, any money spent by a presidential candidate or his agents "for the purpose of influencing" the candidate's campaign, or "in connection with" the candidate's campaign is an "expenditure" under the FECA and a "qualified campaign expense" under the Primary Fund Act, and therefore counts against the candidate's spending limit. This includes, of course, money spent by a candidate campaign committee or its agents to conduct an advertising campaign to support the candidate.

It is clear that a candidate makes an "expenditure" and incurs a "qualified campaign expense" for a candidate ad campaign, within the meaning of the federal campaign finance laws, where the candidate's campaign committee or its agents:

- Prepare, direct and control the ad campaign;
- Target the ads to run in presidential battleground states; and

- Run ads that name the candidate and promote his candidacy, or name his opponent and criticize him.

The record discussed below shows that these circumstances exist here for both the Clinton ad campaign run through the DNC and the Dole ad campaign run through the RNC. Under such circumstances, it does not make any difference if the candidate campaign chooses to use a political party (or any other third party) as a conduit through which it runs its campaign ads, as both the Clinton Committee and the Dole Committee did in this case.

Thus, the Clinton ad campaign and the Dole ad campaign, run through their respective political parties, are candidate ad campaigns and the money spent on these ads are candidate "expenditures" under the FECA and "qualified campaign expenses" under the Primary Fund Act. As such, the expenditures count against the overall primary election spending limits applicable to the Clinton Committee and the Dole Committee. The contributions used to finance these expenditures must also meet the contribution prohibitions and limitations contained in federal law, and must comply with the law's disclosure requirements.

In addition to the fact that the money spent on these ad campaigns plainly meets the definition of "expenditure" by a candidate under the FECA, the Act also provides, in 2 U.S.C. 441a(b)(2)(B), that for purposes of the presidential campaign spending limits, an expenditure is "made on behalf of a candidate" if it is made by any "agent of the candidate for purposes of making any expenditure," or by "any person authorized or requested by ... an agent of the candidate, to make the expenditure."

Thus, this provision also makes the money spent on the ad campaigns at issue here expenditures "on behalf of a candidate," and accordingly subject to the presidential primary spending limit applicable to the Clinton Committee and the Dole Committee.

Since the TV ad campaigns at issue here were candidate ad campaigns, and the expenditures involved were therefore candidate expenditures, the question whether the TV ads contained any terms of "express advocacy" such as "vote for" or "vote against" is irrelevant. While the Supreme Court has held that "express advocacy" is required for an ad by an independent group to fall under the federal campaign finance laws, see Buckley v. Valeo, 424 U.S. 1, 43 (1976), no one has ever contended, and no court has ever found, that an ad run by a candidate must contain terms of "express advocacy" in order to be treated as an expenditure under the campaign finance laws.

No one would argue, for instance, that an ad run by the Clinton Committee that promotes President Clinton's candidacy should not count against the Committee's spending limit simply because it does not say "Vote for Clinton." Indeed, many of the ads financed directly by the Clinton Committee and the Dole Committee do not contain any such terms of "express advocacy." Yet the Clinton Committee and the Dole Committee themselves have treated these ads as candidate ads and counted these expenditures against their spending limits.

The same holds true for the Clinton Committee ads and the Dole Committee ads run through their respective political parties: since they are candidate ads and candidate expenditures, there is no requirement for them to contain express advocacy in order to be covered by the federal campaign finance laws.

The record demonstrates that each presidential campaign committee used its respective national political party as a conduit to run its ad campaign, and that therefore the ad campaign is a candidate campaign expenditure. But the same result would be reached under federal law even if each presidential campaign and its national party was simply engaged in a joint venture in which the candidate campaign committee and the party coordinated their activities with each other.

Under 2 U.S.C. 441a(a)(7)(B)(i), expenditures "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate," and "shall also be reported as an expenditure" by the recipient candidate. 11 C.F.R. 104.13(a)(2).[9]

The record in this case clearly shows that there was direct involvement and control by the candidate campaign committees or their agents in virtually all aspects of the ad campaigns at issue. There is no way to treat these ad campaigns as efforts by the parties independent from and uncoordinated with the candidates and their agents.

Thus, even if the ad campaigns were not candidate ads run through the parties as conduits, they would still constitute expenditures by the candidates under section 441a(a)(7)(B)(i) of the FECA. As expenditures coordinated between the candidate campaign committees and their respective parties, they would constitute in-kind contributions to, and expenditures by, the candidates under this section, and therefore would count against the candidates' spending limits.

IV. The Clinton Ad Campaign Run Through the DNC

From the summer of 1995 through the summer of 1996, the Clinton Committee ran an ad campaign through the Democratic National Committee to promote President Clinton's reelection. The ad campaign was prepared, directed and controlled by agents of the Clinton Committee, the ads were targeted to run in presidential battleground states by

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[9] Nor could the ads in question here be considered party "generic" ads. Under FEC rules a "generic" party ad is one that urges voters to "support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. 106.5(a)(2)(iv) (emphasis added). The ads run through the parties here in each case specifically mention President Clinton or Senator Dole.

agents of the Clinton Committee, and the ads promoted President Clinton or criticized his presumptive general election opponent, Senator Dole. The ad campaign was financed in large part by "soft money" raised by agents of the Clinton campaign. The Clinton Committee spent on the ad campaign during this period at least $34 million in excess of the amount it was legally permitted to spend during the presidential primary campaign, and in doing so used at least $22 million in "soft money" contributions that cannot be legally used to directly support a presidential candidate.

Background

In early summer of 1995, the Clinton Committee spent $2.4 million of its campaign committee funds to run a series of ads relating to the ban on assault weapons in over 20 major television markets "in key electoral states," according to Bob Woodward's book, The Choice.[10] This candidate ad campaign, unusual in its timing some 18 months before the election, was designed by Clinton's chief media consultant Robert Squier [11] and his then-chief political strategist Richard Morris. Other Clinton aides strongly opposed spending so much of the Clinton Committee's campaign money so long before the election.[12]

According to a report published in *The Boston Globe*, this internal division led to a debate during the summer of 1995 about whether to turn down public financing during the primary elections "in order to avoid federal spending limits." According to this report:

> Worried about Clinton's battered popularity, his political advisers are tempted to use the fund-raising powers of the presidency to bankroll an early television advertising campaign in key states. ...
>
> Some Clinton aides, therefore, consider the $36 million limit on primary spending and the state-by-state caps as obstacles to their reelection plans. ...
>
> [T]he Clinton-Gore campaign already has spent more than $2 million on television ads and is contemplating another multimillion-dollar advertising blitz for the fall.
>
> Even though the president so far faces no Democratic opponent, his advisers are planning expensive media campaigns to boost Clinton's standing in key general election battleground states during next year's primary season.

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[10] B. Woodward, The Choice, p. 213.
[11] *Id.* at 212.
[12] *Id.* at 213.

> If the Clinton campaign accepts federal funds, it would have to honor the spending caps in essential states. ...[13]

In this debate, according a report in *The Washington Post*, some Clinton political advisers considered the spending limits that condition the receipt of public funds as imposing an unacceptable constraint on the reelection campaign:

> [S]ome Clinton political advisers argued that as an incumbent president, he could raise all the money he needed and then would be able to spend it however he wanted. The proposal was part of a larger strategy that suggested Clinton could spend millions on television advertising in late winter and spring of 1996. ...[14]

In this connection, Clinton political strategist Richard Morris reportedly advocated rejecting the federal funds and spending limits:

> Morris wanted to ensure that Clinton was in a position to maximize saturation television advertising in the coming primary season. ...
>
> The lawyers said that if Clinton rejected the federal matching funds, he would not have to abide by any fund-raising limits during the primary period. The possibilities would be limitless -- potentially tens of millions of dollars more to spend on television advertising, perhaps even $50 to $60 million or more for an unparalleled media blitz. Morris decided that was the solution.[15]

The Clinton Committee's chief political strategist, Morris, and its chief media strategist, Squier, in August 1995 were advocating an unusually early TV ad campaign to emphasize President Clinton's protection of Medicare in order to bolster Clinton's popularity as they headed into the election year.[16] Other campaign officials who advocated accepting public funds and spending limits were opposed to "using our precious money" for this ad campaign since they were going to be subject to "an absolute legal ceiling" as part of accepting public funds.[17]

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[13] J. Farrell, "Clinton campaign mulls private funding," *The Boston Globe* (August 28, 1995).

[14] A. Devroy, "Clinton Rejects Aides' Proposal to Refuse U.S. Matching Funds," *The Washington Post* (September 18, 1995).

[15] B. Woodward, The Choice, p. 233-34.

[16] *Id.* at 235.

[17] B. Woodward, "Clinton Called Shots for Party Ad Blitz," *The Washington Post* (June 25, 1996); B. Woodward,

In the end, published reports show, the Clinton campaign and its agents designed a scheme to try to have it both ways -- to receive taxpayer funds and agree to a spending limit, and also to run a multimillion-dollar Clinton ad campaign through the DNC without counting any of these expenditures against the spending limit the campaign had agreed to.

Running campaign ads through the DNC was, in their view, "the compromise that allowed the President to have television air time without eating into his own re-election treasury."[18] Under the scheme designed by the Clinton campaign, the ads would, in their view, "allow the President to start defining himself for the 1996 re-election campaign without using up his own campaign funds or counting the costs against the strict spending limits that Presidential candidates face."[19]

In fact, however, the ad campaign run through the DNC was plainly an ad campaign of the Clinton Committee and its agents, and the expenditures for the ad campaign of at least $34 million were required to be counted against the Clinton Committee's overall spending limit.

A. The Clinton campaign and its agents prepared, directed and controlled the ad campaign run through the DNC.

The Clinton campaign and its agents designed and produced the ads, determined the placement of the ads and made the media buys, and raised money to pay for the ad campaign run through the DNC. This included the campaign's chief media strategist, Robert Squier, and the campaign's chief political strategist, Richard Morris. It also reportedly included the President himself:

> At weekly evening meetings in the White House, Clinton went through [the ads], offered suggestions and even edited some of the scripts. He directed the process, trying out what he wanted to say, what might work, how he felt about it, and what it meant.[20]

The ad campaign run through the DNC was managed by Robert Squier,[21] the head of Squier Knapp Ochs and its division, the November 5 Group. At the same time, Squier was also serving as President Clinton's chief media advisor and directing the ad campaign

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The Choice, p. 235.

[18] A. Mitchell, "Democrats Plan Fund-Raising Drive for TV Ads in Budget Debate," *The New York Times* (October 17, 1995).

[19] *Id.*

[20] B. Woodward, "Clinton Called Shots for Party Ad Blitz," *The Washington Post* (June 25, 1996).

[21] *Id.*

for the Clinton-Gore Committee.[22] *Mediaweek* noted, "The Democratic planning is led by Bob Squier of the Washington firm Squier Knapp Ochs. The firm has a tight hold on the planning and buying process, creating ads and acting as chief media consultants to the Clinton-Gore campaign and the Democratic National Committee."[23] *National Journal* reported that Squier's "latest ad for the President's reelection effort emphasizes many of the same points found in the ads that he produced for the DNC."[24]

As *National Journal* noted with reference to both the Clinton and Dole campaign media consultants:

> [T]he fact that the media consultants who are crafting the commercials for the national parties are also the same strategists producing ads for the Clinton and Dole campaigns belies the notion that the ads are intended to benefit the party as a whole.[25]

According to published reports, the Clinton campaign's chief political strategist, Richard Morris, was heavily involved with Squier in the design and planning of the ads. They jointly "tested" various 30-second ad scripts and jointly prepared the first ad run in August 1995.[26]

According to published reports, President Clinton "directed a special fundraising effort"[27] for the DNC beginning in the summer of 1995 to raise money to pay for the ad campaign:

> McAuliffe [the President's chief fundraiser] knew that if the president was behind a special fundraising drive by the party, the money would be raised. Clinton did not make the fundraising calls himself, but Vice President Gore made about 50 personal calls, and the party's chairman and entire fund-raising apparatus were turned loose. Because the money supposedly would be for the party, there were no limits on contributions -- the so-called soft money loophole in the law allowing contributions for general operations. A number of large contributions in the $100,000 range were received.

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[22] J. Barnes, "Party Favors," *National Journal* (May 11, 1996).

[23] M. Gimein, "Media race shapes up," *Mediaweek* (March 25, 1996).

[24] J. Barnes, "Party Favors," *National Journal* (May 11, 1996).

[25] J. Barnes, "The Great 'Soft'-Money Flood of '96," *National Journal* (June 1, 1996).

[26] B. Woodward, The Choice, p. 236-37.

[27] *Id.* at 236.

> Of course the distinction between Clinton-Gore money and Democratic Party money existed only in the minds of the bookkeepers and legal fine-print readers. It was all being raised and spent by the same people -- Clinton, Gore, Morris and the campaign apparatus.[28]

In this effort, the DNC reportedly raised over $10 million in soft money and borrowed additional funds.[29] By the end of 1995, $18 million dollars reportedly had been spent to fund an advertising campaign sponsored by the DNC.[30]

During the first six months of 1996, under President Clinton's leadership and with his active involvement, the DNC raised $34.9 million in "soft money" contributions. A significant portion of this money was used to finance the Clinton ad campaign run through the DNC, which aired during this period.[31]

B. <u>The TV ads were targeted to run in presidential battleground states</u>.

The Clinton ad campaign run through the DNC during the period from July 1, 1995 to June 30, 1996 spent $27 million in the top 12 states where the most expenditures were made on the ad campaign, including $18 million in "soft money" and $9 million in "hard money."[32]

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 344.

[31] As of December 31, 1995, the DNC reported having $1,895,545 in "soft money" on hand.

[32] Under the federal campaign finance disclosure laws, a national political party can file either monthly or quarterly reports with the FEC. State political parties file quarterly reports on their federal activities, and their joint federal-nonfederal activities.

The DNC has chosen to file quarterly reports. As a result, information for July 1996 and August 1996 regarding the DNC's transfers to state parties to finance the Clinton ad campaign, as well as information on payments by the Democratic state parties for the ad campaign, will not be available until reports for the period July 1 through September 30, 1996 are filed on October 15, 1996.

The RNC has chosen to file monthly reports. As a result, information regarding the RNC's transfers to its state parties in July 1996 and August 1996 is already available. But since the state parties themselves file only quarterly, information regarding state party spending on the

Listed below are the top 12 states and the total amount spent in each state on the Clinton ad campaign:

	State Party	Amount spent on Clinton ads
1.	California	$4,156,092
2.	Pennsylvania	$3,809,470
3.	Florida	$3,578,159
4.	Ohio	$2,984,535
5.	Michigan	$2,647,529
6.	Washington	$1,910,807
7.	Illinois	$1,857,482
8.	Wisconsin	$1,470,784
9.	Minnesota	$1,401,058
10.	Colorado	$1,258,217
11.	Oregon	$1,115,941
12.	Missouri	$1,113,584

These 12 states were considered during this period as key states in President Clinton's reelection effort.[33] The fact that eight of these states -- California, Colorado, Illinois, Michigan, Missouri, Ohio, Pennsylvania and Washington -- were also among the top 12 states where expenditures were made for the ad campaign run by the Dole campaign confirms that these battleground states were chosen by both campaigns for their importance to winning the presidential election.

The amounts listed above for the top 12 states represent funds paid by the state parties to the two media firms headed by Robert Squier, Squier Knapp Ochs and the November 5 Group, to pay for the Clinton ad campaign. Based on disclosure reports filed at the FEC, Common Cause has traced virtually all of these "soft money" and "hard money" funds as moving from the DNC to the Democratic state parties involved, and then being paid by the state parties to the two media firms.[34]

Dole ad campaign in July 1996 and August 1996 will not be available until their third quarter reports are filed on October 15, 1996.

[33] See, e.g., A. Mitchell, "Behind the Cloak of Office, Clinton's War Room Hums, *The New York Times* (May 7, 1996).

[34] In tracing these transactions, Common Cause used (a) close proximity in time between the transfers from the DNC to the state parties and the payments by the state parties to the media firms, and (b) similarity in amounts between the transfers and the payments, to match transfers from the DNC to the state parties with disbursements by the state parties to the media firms.

Expenditures listed here do not include any payments

It is expected that further expenditures for the Clinton ad campaign will be revealed when the DNC and Democratic state parties file their disclosure reports for the period that covers July 1996 and August 1996. Those reports are due to be filed on October 15, 1996.

According to a published report:

> [M]illions of dollars [were spent] on ads touting President Clinton's reelection in various carefully selected markets. In what is called a 'stealth' campaign by some, the party has mostly avoided buying ads in big cities where air time is costly and voters tend to lean Democratic anyway. The Democratic strategists are hoping to firm up support for their ticket early.[35]

The report continued:

> Republicans and news organizations have been tracking the Democratic advertising buys, providing a picture of where the money has been concentrated. According to tracking done for CNN, Clinton has put his money in 24 states. The campaign has avoided states that he won by large margins in 1992 and where his strategists believe that he is well ahead now. These include New York, Massachusetts, West Virginia and Vermont. They have also largely stayed away from places where they believe that Clinton has no real chance -- Texas, the tier of states in the Great Plains north of Texas to North Dakota, and such southern Republican strongholds as South Carolina, Alabama and Virginia.[36]

In sum, the Clinton Committee and its agents, acting through the DNC, targeted a $27 million Clinton ad campaign to run in 12 presidential battleground states.

C. The ads name President Clinton and promote his candidacy or name Senator Dole, his presumptive opponent, and criticize him.

The ads run by the Clinton Committee and its agents through the DNC, from the summer of 1995 through the summer of 1996, were the same kind of ads that any candidate would run to promote his candidacy or criticize his opponent.

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made to the media firms directly by the DNC.

[35] E. Randolph, "Clinton Camp Sows Televised Seeds of Support in Key Regions," *The Los Angeles Times* (May 22, 1996).

[36] *Id.*

The following are examples of some of the ads:

- "Values" promoted President Clinton and criticized Senator Dole:

  American values. Do our duty to our parents. President Clinton protects Medicare. The Dole/Gingrich budget tried to cut Medicare $270 billion. Protect families. President Clinton cut taxes for millions of working families. The Dole/Gingrich budget tried to raise taxes on eight million of them. Opportunity. President Clinton proposes tax breaks for tuition. The Dole/Gingrich budget tried to slash college scholarships. Only President Clinton's plan meets our challenges, protects our values.[37]

- "Economy" promoted President Clinton and criticized Senator Dole:

  (Graphic: 1991) Recession, jobs lost. The Dole-GOP bill tries to deny nearly a million families unemployment benefits.

  (Graphic: 1992) Higher interest rates. 10 million unemployed. With a Dole amendment, Republicans try to block more job training.

  (Graphic: 1996 and images of Clinton) Today: We make more autos than Japan; record construction jobs; mortgage rates down; 10 million new jobs; more women-owned companies than ever. The President's plan -- education, job training, economic growth -- for a better future.[38]

- "Photo" promoted President Clinton and criticized Senator Dole:

  60,000 felons and fugitives tried to buy handguns -- but couldn't -- because President Clinton passed the Brady Bill -- five-day waits, background checks. But Dole and Gingrich voted no. One hundred thousand new police -- because President Clinton delivered. Dole and Gingrich? Vote no, want to repeal 'em. Strengthen school anti-drug programs. President Clinton did it. Dole and Gingrich? No again. Their old ways don't work. President Clinton's plan. The new way.

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[37] M. Daly, "Campaign '96: Ad Watch," *The Hartford Courant* (June 28, 1996).

[38] *The Associated Press*, "Democratic National Committee Ad Touts Clinton's Economic Record" (July 24, 1996).

Meeting our challenges, protecting our values.[39]

- "Same," promoted President Clinton and criticized Senator Dole:

  America's values. Head Start. Student loans. Toxic cleanup. Extra police. Protected in the budget agreement; the president stood firm. Dole, Gingrich's latest plan includes tax hikes on working families. Up to 18 million children face health care cuts. Medicare slashed $167 billion. Then Dole resigns, leaving behind gridlock he and Gingrich created. The president's plan: Politics must wait. Balance the budget, reform welfare, protect our values.[40]

- "Finish" promoted President Clinton and criticized Senator Dole:

  Head Start. Student loans. Toxic cleanup. Extra police. Anti-drug programs. Dole, Gingrich wanted them cut. Now they're safe. Protected in the '96 budget -- because the President stood firm. Dole, Gingrich? Deadlock. Gridlock. Shutdowns. The president's plan? Finish the job, balance the budget. Reform welfare. Cut taxes. Protect Medicare. President Clinton says get it done. Meet our challenges. Protect our values.[41]

- "Dreams" promoted President Clinton:

  The president says give every child a chance for college with a tax cut that gives $1,500 a year for two years, making most community colleges free, all colleges more affordable. ... And for adults, a chance to learn, find a better job. The president's tuition tax cut plan. ...[42]

- "Defend" promoted President Clinton and criticized Senator Dole:

  Protecting families. For millions of working families, President Clinton cut taxes. The Dole-Gingrich budget tried to raise taxes on eight million. The Dole-Gingrich budget

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[39] *The Associated Press*, "Analysis of DNC Ad on Crime Issues," (April 20, 1996).

[40] *The Associated Press*, "The New Democratic Ad on Clinton vs. Dole" (May 23, 1996).

[41] J. Lender, *The Hartford Courant*, "Campaign '96: Ad Watch," (May 8, 1996).

[42] *The Associated Press*, "The New DNC Ad on President Clinton's Tuition Tax-Credit Proposal" (June 11, 1996).

> would have slashed Medicare $270 billion. Cut college scholarships. The president defended our values. Protected Medicare. And now, a tax cut of $1,500 a year for the first two years of college. Most community colleges free. Help adults go back to school. The president's plan protects our values.[43]

All of these ads were produced by Robert Squier, the Clinton Committee's chief media strategist.

Conclusion on Clinton ad campaign

According to one published report:

> By spring 1996, Clinton personally had been controlling tens of millions of dollars' worth of DNC advertising. This enabled him to exceed the spending limits and effectively rendered the DNC an adjunct to his own reelection effort. ... For practical purposes, Clinton's control of the party advertising -- and his aggressive use of it going back to the first Medicare ads the previous August -- gave him at least $25 million more money for the primary period. That was in addition to the $37 million the Clinton-Gore campaign was authorized to spend under the law.[44]

Further:

> By using the Democratic National Committee money for advertising, Clinton's managers were able to continue to save much of the Clinton-Gore campaign money. And the Morris-Squier advertising blitz was in full force. In the fall [of 1995], the ads attacking the Republican budget had covered some 30 percent of all media markets in the nation. The December [1995] 30-second commercials followed the pattern showing Clinton as champion crime fighter and as the leader seeking tax cuts, welfare reform and a balanced budget that would protect vital health programs, education and the environment.
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> By Christmas, the pro-Clinton ads had been on the air in an incredible 42 percent of the national media markets. The

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[43] *The Associated Press*, "The New DNC Ad on President Clinton's Record," (June 15, 1996).

[44] B. Woodward, "Clinton Called Shots for Party Ad Blitz," *The Washington Post* (June 25, 1996).

> advertising pattern was designed to project one theme as spot after spot showed Clinton as a figure of national reconciliation, a healer bringing the various sides together, who rounded the sharp edges of the Republicans. ... By the end of [1995], $18 million had been spent on this extraordinary media campaign.[45]

This record shows that the Clinton Committee and its agents prepared, directed and controlled the ad campaign, targeted the ads to run in presidential battleground states, and prepared ads that named President Clinton and promoted his candidacy or named Senator Dole and criticized him.

The record shows that the Clinton campaign used the DNC as a conduit to run an ad campaign during the period from July 1, 1995 to June 30, 1996 -- costing at least $34 million and using at least $22 million in "soft money" -- to directly support President Clinton's reelection effort.

Under these circumstances, it is plainly correct that the ads involved here are ads of the Clinton Committee and its agents within the meaning of the federal campaign finance laws. The expenditures for those ads therefore must be counted against the expenditure limits applicable to President Clinton's reelection campaign and the money used to finance the ads must comply with the contribution limitations and prohibitions of the FECA.

V. The Dole Ad Campaign Run Through the RNC

During the period from April 1996 through the Republican convention in August 1996, the Dole Committee ran an ad campaign through the RNC to promote Senator Dole's election as President. The ad campaign was prepared, directed and controlled by agents of the Dole campaign, the ads were targeted to run in presidential battleground states by agents of the Dole campaign, and the ads promoted Senator Dole or criticized his general election opponent, President Clinton. The ad campaign was financed in large part by "soft money" raised by agents of the Dole campaign. Through the ad campaign, the Dole Committee during the period from April 1 through June 30, 1996 spent at least $14 million in excess of the amount it was legally permitted to spend and used at least $9 million in "soft money" to finance the ad campaign, money that cannot be legally used to directly support a presidential candidate.[46]

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[45] B. Woodward, The Choice at p. 344.

[46] Substantial additional expenditures for the Dole ad campaign run through the RNC are expected to be revealed for the months of July 1996 and August 1996 when Republican state parties file their disclosure reports covering the period from July 1 to September 30, 1996. These reports are

Background

By mid-May 1996, according to published reports, the Dole Committee was within $200,000 of the overall primary election spending ceiling that would limit the campaign's spending until the Republican convention in August.[47] "No Presidential campaign has reported coming this close to the spending limit this long before its convention. ..."[48]

With the Dole campaign unable to spend any money on a TV advertising campaign and months to go before the August convention when it would receive its general election public funds, the Dole Committee and its agents undertook a multimillion-dollar TV advertising campaign using the RNC as a conduit.

On May 16, 1996, RNC chairman Haley Barbour announced that the RNC would conduct a $20 million TV "issue advocacy" campaign.[49] Barbour called the timing of the RNC advertising campaign "more than serendipitous."[50] Another published report noted that this ad campaign is "designed to ride to the rescue of the Dole campaign. Short of money until the convention, when it will receive federal matching funds, the Dole campaign barely has travel funds, let alone advertising money."[51]

According to an article in *The New York Times*, "Without a meaningful advertising budget, for example, the [Dole] campaign must rely almost entirely on the national Republican Party to pay for advertisements."[52] Indeed, the Dole Committee did not pay for a TV commercial from March 18 until it received general election public funds after

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due at the Federal Election Commission on October 15, 1996. Any payments made in July 1996 and August 1996 by Republican state parties to media firms to finance the Dole ad campaign will be reported on these disclosure reports.

[47] K. Seelye, "A Financial Squeeze So Tight That Dole Campaign Is Forced to Sell Assets," *The New York Times* (May 18, 1996).

[48] *Id.*

[49] N. Fitzgerald, "Here Comes the Mud," *Adweek* (Jun 17, 1996); see also J. Bennet, "New G.O.P. Drive, New Finance Debate," *The New York Times* (May 31, 1996).

[50] M. Moore, "Republicans Roll Out Their Ads," *USA Today* (May 17, 1996).

[51] E. Chen, "Dole Travels to Heartland for New Beginnings," *Los Angeles Times* (May 17, 1996).

[52] S. Labaton, "Dole's Limited Cash Will Restrict His Message, Campaign Experts Say," *The New York Times* (May 17, 1996).

the Republican convention in August.[53]

According to a published report, "R.N.C. ads attacking Clinton on everything from welfare reform to his Paula Jones problems have aired across the country, with only the fact that they don't say 'Vote for Bob' as evidence that they don't emanate from Dole headquarters."[54]

In fact, however, the ad campaign run through the RNC was plainly an ad campaign of the Dole Committee and its agents and the expenditures for the ad campaign of at least $14 million, through June 30, 1996, were required to be counted against the Dole Committee's spending limit.

A. The Dole Committee and its agents prepared, directed and controlled the ad campaign.

The Dole Committee and its agents designed and produced the ads, determined the placement of the ads and made the media buys, and raised money to pay for the ad campaign. This included the campaign's chief media strategist, Don Sipple, the campaign's chief pollster, Anthony Fabrizio, and Dole's chief fundraiser for some 30 years, Joanne Coe.

In March 1996, Don Sipple became the Dole campaign's chief media strategist, and "the campaign's chief message-meister."[55] Sipple produced and directed the ad campaign run through the RNC at the same time he was serving as the chief media strategist for Dole.[56]

According to one published report, Sipple in June 1996 "set up a new company, New Century Media Group, Inc., to handle the RNC's advertising assignments as well as the Dole campaign's commercials during the general election. Its offices are on the 10th

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[53] J. Bennet, "Dole, Kemp and Their Tax Plan Make First Commercial Foray," *The New York Times* (August 21, 1996).

[54] J. Birnbaum, "The Bucks Start Here," *Time* (June 24, 1996).

[55] J. Barnes, "Team Dole," *National Journal* (April 13, 1996).

[56] H. Kurtz, "Dole's Fall Ad Team Takes Shape, With Help From Madison Avenue, *The Washington Post* (June 28, 1996); B. Jackson, "Dems, GOP Trade Accusations on Campaign Finance," *AllPolitics* (July 8, 1996); H. Kurtz, "Volleys Fired Before Target Was Fielded," *The Washington Post*, (August 7, 1996).

floor of the Dole campaign headquarters building in Washington."[57]

In March 1996, at the same time that Don Sipple became Dole's chief media strategist, Anthony Fabrizio became Dole's chief pollster, serving as head of polling and survey research for the Dole Committee.[58] Fabrizio is head of Multi-Media Services.[59]

Multi-Media Services, made the media buys for the Dole ad campaign run through the RNC at the same time Fabrizio was serving as the chief pollster for Dole.

Money to pay for the Dole ad campaign was raised by agents of the Dole Committee, led by Joanne Coe, "the trusted Dole adviser with the longest tenure -- almost three decades."[60] Coe has been Dole's chief fundraiser for some 30 years, raising money for his congressional campaigns, his presidential campaigns and his political action committee, Campaign America, since 1967.[61]

Coe served as the chief fundraiser for the Dole presidential primary campaign. In early April 1996, after Coe had raised the maximum amount the Dole Committee could legally spend on the presidential primary campaign, she moved to the RNC to take responsibility for raising "soft money."[62]

Under Coe's direction, some $38 million in "soft money" was raised from April 1, 1996 to August 31, 1996.[63] Significant amounts of this money were used to pay for the Dole ad campaign which aired during this period.

Much of this $38 million raised under Coe's leadership came in large contributions from Dole supporters:

> When [Coe and other Dole fundraisers] moved [to the RNC], so did the money of some of Dole's biggest backers. Philip Anschutz, a billionaire Denver oilman who serves on Dole's

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[57] J. Barnes, "Along the Campaign Trail," *National Journal* (June 8, 1996)(emphasis added).

[58] J. Barnes, "Shake-Up of Dole's High Command...Has a Very Familiar Ring to It," *National Journal* (March 2, 1996).

[59] *Campaigns & Elections* (February 1995).

[60] J. Barnes, "Team Dole," *National Journal* (April 13, 1996).

[61] J. Keen, "Primaries hardened Dole team," *USA Today* (March 28, 1996).

[62] J. Barnes, "Along the Campaign Trail," *National Journal* (April 6, 1996).

[63] This figure is based on a Common Cause analysis of RNC disclosure reports on file at the Federal Election Commission.

campaign finance committee, hadn't given heavily to the RNC in recent years. But in April, after Anschutz and his wife reached their individual contribution limits for Dole's presidential campaign, his company, Anschutz Corp., gave the RNC $250,000.

In April and May, nine other Dole finance committee members or the companies they run each gave $100,000 or more to the RNC.[64]

B. The TV ads were targeted to run in presidential battleground states.

The Dole ad campaign run through the RNC during the period from April 1, 1996 to June 30, 1996 spent more than $13 million in the top 12 states where the most expenditures were made on the ad campaign, including $8.8 million in "soft money" and $4.5 million in "hard money."

Listed below are the top 12 states and the total amount spent in each state on the ad campaign:

State party	Amount spent on Dole ads
1. California	$4,018,821
2. Pennsylvania	$1,735,443
3. Illinois	$1,553,663
4. Ohio	$1,295,910
5. Tennessee	$ 946,688
6. Georgia	$ 839,699
7. Washington	$ 684,000
8. Missouri	$ 661,980
9. Colorado	$ 496,485
10. Iowa	$ 420,720
11. Michigan	$ 346,260
12. New Mexico	$ 332,393

Eight of these states -- California, Colorado, Illinois, Michigan, Missouri, Ohio, Pennsylvania and Washington -- were also among the top 12 states where expenditures were made for the ad campaign run by agents of the Clinton campaign, confirming that these presidential battleground states were chosen by both the Clinton and Dole campaigns for their importance to winning the presidential election.

Three of the four other states -- Georgia, Tennessee and Iowa -- were also considered key states in Senator Dole's election efforts.

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[64] C. Babcock and R. Marcus, "'Dole Inc.': The Rise of a Money Machine," *The Washington Post* (August 20, 1996).

The amounts listed above for the top 12 states represent funds paid by the state parties to the two media firms, Multi-Media Services and Target Enterprises, to pay for the Dole ad campaign. Based on disclosure reports filed at the FEC, Common Cause has traced virtually all of these "soft money" and "hard money" funds as moving from the RNC to the Republican state parties involved, and then being paid by the state parties to the two media firms.[65]

This information does not reflect the full Dole ad campaign run through the RNC, since state party reports are not yet available for expenditures by state parties to media firms for Dole campaign ads that were made during July and August, 1996. RNC reports, which are available for this period, show that an additional $7 million in "soft money" was transferred by the RNC to state parties in July and August, 1996. The top five recipients of these funds are key states in Dole's election effort: Ohio ($839,670), North Carolina ($609,781), Florida ($599,979), Michigan ($424,961) and Washington ($408,797). Disclosure reports showing how much of these funds may have been used by state parties to pay for the Dole ad campaign are due to be filed on October 15, 1996.

These amounts represent funds that Common Cause has traced through FEC disclosure reports as moving from the RNC to the Republican state parties involved, and then from the state parties to the Dole media firm pay for the ad campaign.

It is expected that further expenditures for the Dole ad campaign will be revealed when the Republican state parties file their disclosure reports for the period that covers July 1996 and August 1996. Those reports are due to be filed on October 15, 1996.

In sum, the Dole Committee and its agents, acting through the RNC, targeted a $13 million Dole ad campaign to run in 12 states, including 11 presidential battleground states.

C. The ads name Senator Dole and promote his candidacy or name President Clinton and criticize him.

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[65] In tracing these transactions, Common Cause used (a) close proximity in time between the transfers from the RNC to the state parties and the payments by the state parties to the media firms, and (b) similarity in amounts between the transfers and the payments, to match transfers from the RNC to the state parties with disbursements by the state parties to the media firms.

Expenditures listed here do not include any payments made to the media firms directly by the RNC.

The ads run by the Dole Committee and its agents through the RNC during the period from April 1996 through August 1996 were the same kind of ads that any candidate would run to promote his candidacy or criticize his opponent.

The ads produced by Don Sipple, the Dole Committee's chief media strategist, at times used the same video footage first seen in ads made by Sipple for the Dole Committee.[66] According to a published report, "The Sipple/RNC ad even uses lots of video first seen in ads made by Sipple for the Dole campaign. The ads, obviously coordinated, look identical in spots."[67]

The following are examples of some of the ads run by the Dole Committee and its agents through the RNC:

- "The Story" promoted Senator Dole:

  (Dole) "We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in."

  (Announcer) Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called, he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.

  (Dole) "I went around looking for a miracle that would make me whole again."

  (Announcer) The doctors said he'd never walk again. But after 39 months, he proved them wrong.

  (Elizabeth Hanford Dole) "He persevered, he never gave up. He fought his way back from total paralysis."

  (Announcer) Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.

  (Dole) "It all comes down to values; what you believe in,

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[66] B. Jackson, "Dems, GOP Trade Accusations on Campaign Finance," *AllPolitics* (July 8, 1996).
[67] *Id.* (emphasis added).

what you sacrifice for, and what you stand for."[68]

According to a published report, "[T]he ad concluded with the innocuous entreaty, 'call your elected officials.' What one was supposed to tell them was never made clear."[69] This attempt to cast the ad as an "issues" ad rather than as a Dole candidate ad belies reality. This ad is the same kind of bio ad that any candidate would run to promote his candidacy.

Senator Dole himself made perfectly clear that this ad was intended to support his candidacy. Discussing this ad, Dole said, "It's called 'generic.' It's not 'Bob Dole for President.' It never says that I am running for President, though I hope that is fairly obvious, since I am the only one in the picture."[70]

As noted above, FEC rules make clear that this Dole bio ad is not a "generic" party ad, which is required to urge voters to support candidates of the party "without mentioning a specific candidate." 11 C.F.R. 106.5(a)(2)(iv). The Dole bio ad run through the RNC not only "mentions" a specific candidate -- Senator Dole -- but focuses exclusively on him in the same way that any candidate bio ad would.

- "Surprise" promoted Senator Dole and criticized President Clinton:

  (Announcer) Three years ago, Bill Clinton gave us the largest tax increase in history, including a 4 cent a gallon increase on gasoline. Bill Clinton said he felt bad about it.

  (Clinton): "People in this room still get mad at me over the budget because you think I raised your taxes too much. It might surprise you to know I think I raised them too much, too."

  (Announcer) OK, Mr. President, we are surprised. So now, surprise us again. Support Senator Dole's plan to repeal your gas tax. And learn that actions do speak louder than words.[71]

- "Stripes" criticized President Clinton:

  Bill Clinton, he's really something. He's now trying to avoid

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[68] *The Associated Press*, "Sipple's Ad for the GOP on Dole's Experience," (June 6, 1996).

[69] D. Morris, "Let the Ad Wars Begin," *PoliticsNow* (July 1, 1996).

[70] A. Clymer, "System Governing Election Spending Found In Shambles," *The New York Times* (June 16, 1996).

[71] *The Associated Press*, "Analysis of New GOP Ad on Taxes, (May 8, 1996)

a sexual harassment lawsuit claiming he is on active military duty. Active duty? Newspapers report that Mr. Clinton claims as commander in chief he is covered under the Soldiers and Sailors Relief Act of 1940, which grants automatic delays in lawsuits against military personnel until their active duty is over. Active duty? Bill Clinton, he's really something.[72]

- "Who" criticized President Clinton:

  (Announcer) Compare the Clinton rhetoric with the Clinton record.

  (Clinton) "We need to end welfare as we know it."

  (Announcer) But he vetoed welfare reform not once, but twice. He vetoed work requirements for the able-bodied. He vetoed putting time limits on welfare. And Clinton still supports giving welfare benefits to illegal immigrants. The Clinton rhetoric hasn't matched the Clinton record.

  (Clinton) "Fool me once, shame on you. Fool me twice, shame on me."

  (Announcer) Tell President Clinton you won't be fooled again.[73]

- "The Pledge" criticized President Clinton:

  (Clinton) "I will not raise taxes on the middle class."

  (Announcer) We heard it a lot.

  (Clinton) "We've got to give the middle class tax relief no matter what we do."

  (Announcer) Six months later, he gave us the largest tax increase in history. Higher income taxes, increased taxes on social security benefits. More payroll taxes. Under Clinton, the typical American family now pays over $1,500 more in federal taxes. A big price to pay for his broken promise. Tell

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[72] *The Associated Press*, "GOP Ad on Clinton's Claim in Sexual Harassment Suit," (May 25, 1996).

[73] *The Associated Press*, "New Republican Ad on Clinton's Welfare Record," (May 24, 1996).

President Clinton you can't afford higher taxes for more wasteful spending.[74]

- "The Plan" promoted Senator Dole:

  (Dole): "Americans are working harder and longer but taking home less. In fact, the typical American family spends more on taxes than on food, clothing and housing combined. The American people deserve better."

  (Announcer) Bob Dole's economic plan will cut taxes 15 percent for every single taxpayer. The typical family of four will save over $1,600 a year.

  (Dole) "The Dole plan: Americans keep more of what they earn."[75]

All of these ads were produced by Don Sipple, the Dole Committee's chief media adviser.

Conclusion on Dole ad campaign

The record shows that the Dole campaign and its agents prepared, directed and controlled the ad campaign, targeted the ads to run in presidential battleground states and prepared ads that named Senator Dole and promoted his candidacy or named President Clinton and criticized him.

The record shows that the Dole campaign used the RNC as a conduit to run an ad campaign during the period from April 1, 1996 to June 30, 1996 -- costing at least $14 million and using at least $9 million in "soft money" -- to directly support Senator Dole's election effort.

Under these circumstances, it is plainly correct that the ads involved here are ads of the Dole Committee and its agents within the meaning of the federal campaign finance laws. The expenditures for those ads therefore must be counted against the expenditure limits applicable to Senator Dole's election campaign and the money used to finance the ads must comply with the contribution limitations and prohibitions of the FECA.

VI. Potential Criminal Violations of Law

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[74] *The Associated Press*, "New Republican National Committee Ad on Clinton's Abandoned Tax Break," (July 10, 1996).

[75] H. Kurtz, "Volleys Fired Before Target Was Fielded," *The Washington Post* (August 7, 1996).

The foregoing provides substantial grounds to believe that the ad campaigns run by the Clinton Committee and its agents acting through the DNC and by the Dole Committee and its agents acting through the RNC constituted knowing and willful violations of the federal campaign finance laws.

A. Violation of presidential primary spending limits

The overall spending limit for the 1996 presidential primary campaign, which the Clinton Committee and the Dole Committee each agreed in writing to abide by in exchange for taxpayer funds, was $37.1 million. 2 U.S.C. 441a(b)(1)(A).

According to FEC reports, the Clinton Committee reported spending $34.1 million on its presidential primary campaign as of August 31, 1996. According to FEC reports, the Dole Committee reported spending $37.7 million on its presidential primary campaign as of August 31.[76] Thus, the Dole Committee reported that it was at its spending limit, while the Clinton Committee reported being within $3 million of the spending limit.

The Clinton Committee and its agents spent at least $34 million dollars on the ad campaign that the Committee and its agents ran through the DNC. This spending was not counted by the Clinton Committee against its spending limit and was not disclosed as Clinton Committee expenditures.

The Dole Committee and its agents spent at least $14 million on the ad campaign that the Committee and its agents ran through the RNC. This spending was not counted by the Dole Committee against its spending limit and was not disclosed as Dole Committee expenditures.

In each case, the Clinton Committee and the Dole Committee grossly exceeded the spending limit applicable to the presidential primary campaign.

An independent counsel is necessary to investigate whether the Clinton Commitee and the Dole Committee, and their respective agents, knowingly and willfully violated the presidential primary election spending limit, in violation of 2 U.S.C. 437g(d)(1) and 26 U.S.C. 9042.

B. Violation of ban on use of "soft money" to directly support a presidential candidate.

Federal law bars the use of corporate and labor union funds, and large individual contributions in excess of the federal limits, to directly support a presidential candidate. 2

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[76] These figures are from the Clinton and Dole Committees' August 1996, disclosure reports, filed with the FEC on September 20, 1996. The spending figures for both committees include funds spent under the 20-percent fundraising exclusion.

U.S.C. 441b; 2 U.S.C. 441a(a)(1),(2); 2 U.S.C. 441a(f).

The Clinton Committee and its agents used at least $22 million in "soft money" to finance the ad campaign the Committee and its agents ran through the DNC. The Dole Committee and its agents used at least $9 million in "soft money" to finance the ad campaign the Dole Committee and its agents ran through the RNC. These funds were used to directly support a presidential candidate.

An independent counsel is necessary to investigate whether the Clinton Committee and the Dole Committee, and their respective agents, knowingly and willfully violated the ban on the use of "soft money" to directly support a presidential candidate, in violation of 2 U.S.C. 437g(d)(1).

C. Violation of the disclosure requirements for federal candidates.

Federal law requires that a presidential campaign disclose and itemize all of its receipts and expenditures in excess of $200. 2 U.S.C. 434.

The Clinton Committee and its agents spent at least $34 million on the ad campaign that the Committee and its agents ran through the DNC. The Dole Committee and its agents spent at least $14 million on the ad campaign that the Dole Committee and its agents ran through the RNC. The expenditures by the Clinton and Dole Committees for these ad campaigns were not disclosed by either Committee. The contributions used by the Clinton and Dole Committees to pay for these ad campaigns also were not disclosed by either Committee.

An independent counsel is necessary to investigate whether the Clinton Committee and the Dole Committee, and their respective agents, knowingly and willfully violated the disclosure requirements of the FECA, in violation of 2 U.S.C. 434 and 2 U.S.C. 437g(d)(1).

VII. Conclusion

Common Cause believes that massive violations of this Nation's campaign finance laws have occurred in the 1996 presidential election. The issues raised here are of fundamental importance to the integrity of our democracy, of our political system and of the office of the presidency.

Under sections 591(b) and 591(c) of the Independent Counsel Act, you are required to open a preliminary investigation leading to the appointment of an independent counsel to investigate these matters and to determine whether the Clinton Committee, the Dole Committee, the Democratic National Committee and the Republican National Committee, and their respective agents, have engaged in knowing and willful violations of the Federal Election Campaign Act and the Presidential Primary Matching Payment Account Act.

Common Cause strongly urges you to take the steps necessary to seek the appointment of an independent counsel under the Independent Counsel Act in order to investigate these fundamentally important matters.

Sincerely,

Ann McBride
President

Counsel:

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[The letter to Senator Specter follows:]

JUNE 20, 2000.

Senator ARLEN SPECTER,
711 Senate Hart Building,
Washington, DC.

DEAR SENATOR SPECTER: In response to your recent inquiry, we are writing to confirm that Common Cause and Democracy 21 will shortly ask the Justice Department to conduct an investigation of the illegal use of soft money in the 2000 presidential campaigns by both major party candidates and their political parties.

These soft money funds are being used by the presidential campaigns to run ads promoting the Gore and Bush candidacies in the guise of being so-called political party "issue ads."

In fact, the ads are clearly campaign ads to promote the presidential candidates, are created by members of the respective presidential campaigns, are targeted to run in key presidential battleground states, and are without question for the purpose of influencing the presidential campaign.

As such, it is illegal to fund these ads with soft money. If this practice, which has just begun for the 2000 presidential election, is not stopped, massive violations of the federal campaign finance laws will occur this year, in amounts even greater than the similarly massive violations that occurred in the Clinton and Dole 1996 presidential campaigns.

The argument that these ads are legal as long as they are run as "political party" ads and do not contain so-called magic words, such as "vote for" or "vote against," has no basis in law.

In fact, when the Supreme Court established the magic words test, it did so for outside groups only, and explicitly made clear that it was not creating this test for either candidate or political party ads.

Furthermore, the political parties here are merely conduits, providing thinly veiled cover for the fact that the presidential campaigns design, create, target and control the ad campaigns, which are no different in kind or approach than other campaign ads being run by the Gore and Bush campaigns.

In our view, the Gore for President Committee and the Bush for President Committee, and their agents, along with their respective national political parties, are engaging in an illegal scheme to violate the prohibition of corporate and labor union contributions, and the limits on individual contributions, in presidential campaigns.

The Gore and Bush presidential campaigns are also engaging in an illegal scheme to violate the disclosure requirements of the federal election laws.

And the Gore campaign is engaging in an illegal scheme to violate the presidential primary spending limits. Governor Bush did not opt to take public funding in the primaries and thus did not agree to comply with a primary spending limit.

Furthermore, both the Gore and Bush campaigns will also be in violation of the presidential general election spending limits if they accept presidential general election public financing and continue these soft money funded ads during the general election period.

Any such scheme to knowingly and willfully spend "soft money" to influence a federal election, to knowingly and willfully violate the federal disclosure requirements and to knowingly and willfully exceed the presidential primary spending limit is a criminal violation of the federal election laws.

We also intend to file a complaint with the Federal Election Commission, which has jurisdiction over civil violations of the federal election laws.

In October 1996, Common Cause filed a complaint with the Justice Department charging that the Clinton and Dole campaigns similarly were using ad campaigns to illegally inject millions of dollars in soft money into their presidential campaigns.

The justice Department originally responded by stating in a letter that the allegations "warrant careful consideration by the Department." The letter also stated, "the facts you allege in your letter and the points you raise will be carefully reviewed and considered."

Recently released Justice Department documents, however, establish that this commitment was never kept.

These documents highlight the fact that key Department officials—including Louis Freeh, the Director of the FBI, and Charles La Bella, appointed by Attorney General Reno to head the task force investigating campaign finance charges—raised serious concerns about the Department's failure to conduct an investigation of the Common Cause allegations.

According to a November 1997 memo sent by Freeh to Reno:

> [T]he Campcom Task force has failed to address an overarching issue: whether the Clinton/Gore campaign (as well as the Dole campaign) engaged

> in an illegal scheme to circumvent the federal campaign finance laws. This issue was first raised by Common Cause in October 1996, long before the Task force was even constituted, but it has never been pursued.

See Memorandum attached to Letter of November 24, 1997 from Louis J. Freeh, Director of FBI to Attorney General Janet Reno, at 10.

According to a June 7, 2000 article in the Washington Post referring to task force head La Bella:

> La Bella, in a December 1997 memo, complained that he had been foreclosed from pursuing a complaint, filed by the watchdog group Common Cause, alleging that both the Clinton and Robert J. Dole campaigns had violated the law by having their political parties run millions of dollars' worth on "issue advocacy" advertising in their behalf.

La Bella noted in his interim report:

> One could argue that the Department's treatment of the Common Cause allegations has been marked by gamesmanship rather than even-handed analysis of the issues.

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Similarly, the FEC twice reviewed this matter, once in the context of an audit repayment determination, and once in the context of an enforcement action. In both cases the professional staff of the FEC, including the general counsel and the audit staff, concluded that the Clinton and Dole soft money funded ad campaigns violated the campaign finance laws.

The FEC Commissioners both times failed to approve these conclusions, the second time—in the case of the proposed enforcement action—by a tie vote of 3 to 3.

In 1996, tens of millions of dollars of soft money were illegally used by the two presidential candidates to conduct ad campaigns that clearly were intended, and clearly had the effect, of promoting their candidacies and influencing the presidential election.

The abject failure by both the Department of Justice and the FEC to take action against these massive illegalities is now being improperly seen as a license for further illegal conduct, such as the soft money funded ad campaigns recently begun by Gore and Bush.

We intend to strongly urge the Justice Department and the FEC to properly and promptly carry out their enforcement responsibilities and prevent tens of millions of dollars of soft money from being illegally contributed to and spent by the 2000 presidential campaigns.

Sincerely,

FRED WERTHEIMER,
President, Democracy 21.
SCOTT HARSHBARGER,
President, Common Cause.

Senator SPECTER. I will call the first two witnesses: the Honorable Darryl R. Wold and the Honorable Danny L. McDonald, Chairman and Vice Chairman of the Federal Election Commission. If you gentlemen would step forward and raise your right hands, our practice in the subcommittee is to swear in all witnesses. Do you each solemnly swear that the testimony you will give in this proceeding before the subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WOLD. I do.

Mr. MCDONALD. I do.

Senator SPECTER. Thank you very much. Be seated.

First, the subcommittee expresses its appreciation for your willingness to come on short notice. Let me turn to you, first, Chairman Wold, for any opening statement you care to make.

STATEMENT OF DARRYL R. WOLD, CHAIRMAN, FEDERAL ELECTION COMMISSION, WASHINGTON, DC

Mr. WOLD. Thank you, Mr. Chairman. Good afternoon. And, Senator Grassley, good afternoon. I'm Darryl Wold. It's my privilege to be the Chairman this year of the Federal Election Commission, and with me, as you noted, at the table, is our Vice Chairman this year, Commissioner Danny McDonald.

We are pleased to be here, primarily, I understand, to answer questions, so I will keep any remarks I have very brief. We have provided you with a couple pages of materials that explain some of the provisions of the Federal Election Campaign Act and how it is applied that might help put any questions you might have in context and provide us a point of reference if we need to refer to that in explaining or answering any questions.

The first of those documents, of course, explains the hard money contributions limits. The cover letter also explains the prohibitions of the Act against receipt of contributions from prohibited sources—primarily corporations, labor organizations, and foreign nationals. So I think everyone understands that when we're talking about hard money, those are the limitations that we are talking about. And soft money, of course, is donations of money that do not meet those limitations of the Act.

An issue that has arisen in several contexts that I believe this committee is interested in and that has also arisen in our enforcement actions is the question of a communication paid for by a political party or an advocacy organization, some independent organization, that has been coordinated with the candidate. That is not explained in great detail in the chart that you have, but it does appear there. But what doesn't appear is what constitutes the coordination.

Of course, the Act recognizes that the coordinated expenditure—that is, one made in cooperation, consultation, or at the request of the candidate—is a coordinated expenditure, and that makes it a contribution to that candidate.

The Supreme Court in *Buckley* v. *Valeo* recognized and acknowledged that the Act has that effect, that an expenditure made by an organization, including a political party, in coordination with the candidate is deemed to be a contribution to that candidate. And it is in that context that many of the difficult issues that we have had to face recently have arisen.

So, with that, maybe that puts our position in a little context and gives us a framework of reference. I think at that point I will ask the Vice Chairman if he has anything he would like to say, and then we'd be glad to entertain any questions the committee might have.

Senator SPECTER. Thank you, Mr. Wold.

Mr. McDonald.

STATEMENT OF DANNY L. MCDONALD, VICE CHAIRMAN, FEDERAL ELECTION COMMISSION, WASHINGTON, DC

Mr. MCDONALD. Mr. Chairman, Senator Grassley, thank you, only to say that I'll be happy to answer any questions. I think the Chairman has more than adequately covered the ground, and we'd be happy to answer any questions you have.

Senator SPECTER. Mr. Wold, did the Federal Election Commission undertake an investigation of the activities of both the Democratic and Republican nominees for President in the year 1996?

Mr. WOLD. We did, Mr. Chairman. We are required to audit the campaigns of every candidate for President that receives matching funds in the primary under the Presidential Primary Matching Payment Act. So we conduct—first, we conduct those mandatory audits of every candidate for President who has received Federal funds in the primary. So we conducted those audits. Our audit staff made reports and recommendations to the Commission.

Then at the same time we also received complaints from outside the Commission based on certain activities undertaken by those candidates. And the investigation was, in effect, our audit. Our general counsel's office did conduct a further investigation in support of the audit and in response to those complaints before it made recommendations to us.

So the short answer is, yes, we did investigate. I just want to make it clear, though, we did a good part of that investigation as part of our mandatory audit process.

Senator SPECTER. And what was the conclusion of the Federal Election Commission as to the campaign of President Clinton and Vice President Gore for 1996?

Mr. WOLD. Well, we reached a number of different conclusions because there were a lot of issues that were raised in those audits. I couldn't begin to describe or to list the variety of conclusions that we did reach. But before we pursue that further, I should note that we regard the campaigns in the primary for the nomination as separate from those in the general because they're under two different parts of the law. I think the complaints that we received from the outside were directed at the primary campaigns conducted respectively by the Clinton-Gore campaign committee and by Senator Dole's campaign committee.

Senator SPECTER. Well, did the Federal Election Commission undertake any enforcement action as to either Clinton-Gore or Dole-Kemp?

Mr. WOLD. We did undertake enforcement actions, but they did not result in any determination of a violation that I recall in any respect.

Senator SPECTER. So there was no determination of violation by either Clinton-Gore or by Dole-Kemp.

Mr. WOLD. Not in the enforcement track, no. I cannot recall if in approving the audits, if there were determinations that reimbursements should be made or other actions taken. I'm sorry, I just don't recall. But that was not in the enforcement track.

Senator SPECTER. Well, the general counsel of the FEC did make a recommendation for enforcement as to both campaigns?

Mr. WOLD. Yes, he did.

Senator SPECTER. And what was the Commission response by way of voting on the general counsel's recommendation?

Mr. WOLD. I can't recall if there were more recommendations than the recommendations concerning the media ads run by the national parties in support of their respective nominees or future nominees. The principal focus of the general counsel's report, the one that has received the most attention, anyway, concerned the

media ads run by the national party committees, the Democratic National Party's Committee and the Republican National Committee, respectively, in support of the Clinton-Gore campaign and the Dole for President campaign during the primary election period.

Senator SPECTER. Did the Commission split 3–3 on each of those votes?

Mr. WOLD. Yes, it did.

Senator SPECTER. The Commission is composed of six members?

Mr. WOLD. Six Commissioners, yes.

Senator SPECTER. And three from each of the parties, Republican and Democratic Parties?

Mr. WOLD. That's right. The law provides that no more than three Commissioners may be of the same party. There are, in fact, three Democrats and three Republicans serving as Commissioners.

Senator SPECTER. The report that I have from your general counsel is dated January 12, 2000, and my question to you is: Notwithstanding the grave complexities involved, is there any way that it can be expedited? Why does it, in fact, take so long for a 1996 election to have the general counsel's recommendation in the year 2000?

Mr. WOLD. Well, there are a number of factors that go into that. The audit process that takes place first begins shortly after the campaigns are over. In the case where a candidate in the primary wins that party's nomination, the audit does not begin until after the general election. So the audits of these two campaigns would have begun sometime after the November 1996 general election. We have a target now of completing those audits within 2 years after the election. That process is time-consuming because it involves our auditors going out into the field and reviewing the records of these campaigns; after a Presidential campaign is over, records are sometimes not in the best condition that one would hope and it just takes time to go through that process.

But our auditors did meet our target date of providing an audit report to us within 2 years after the general election. We got those reports in late 1998. It took the Commission then a period of some months to digest these, to vote on various aspects of those audits reports, on the various issues that were raised by them, and to adopt a final audit report reflecting the Commission's views on the issues raised by our audit staff.

Senator SPECTER. The Commission is the sole agency which has authority to apply for injunctive relief to stop violations of the Federal campaign laws?

Mr. WOLD. The Commission does have statutory authority to do that under the Federal Election Campaign Act, yes. I cannot say that we're the only entity that could seek injunctive relief. I don't—I simply haven't——

Senator SPECTER. Well, I believe the statute does make that provision, and I will give you a citation in a moment. We're going to have to go vote, and I want to give Senator Grassley some time to question here before we go to vote. But the question that I would like to focus on—a vote has been called. We will have to leave for a few minutes, and we will be back as fast as we can. But the question I would like you to focus on in the interim is that, given the

ads which have already started by both Presidential campaigns, and given the findings of your general counsel last time, and given the fact that you have authority to seek injunctive relief to stop the process, what are the prospects that the Commission might be able to undertake that in a meaningful way, it now being June 21 and these ads are now proliferating.

Let me give you time to ponder that question, which is substantial, and let me turn to Senator Grassley.

Senator GRASSLEY. I don't have any questions of these two witnesses. Mine are going to be for witnesses later on.

Senator SPECTER. Well, fine, Mr. Wold. Then answer the question. [Laughter.]

Mr. WOLD. I appreciate the time you've given me, Senator.

Senator SPECTER. Well, I think it is a very fundamental question.

Mr. WOLD. It is.

Senator SPECTER. The Federal campaign laws provide at Chapter 14, "The Commission shall have exclusive jurisdiction with respect to civil enforcement of such a provision." And the difficulty obviously is that to come in long after the fact, the horse is out of the barn—I see Vice Chairman McDonald nodding in the affirmative—that injunctive relief is very important which could stop violations. And this is a tough question of complexity of the issues, but you have been through a lot of them. It is a question of resources, and I want to come to that, as to whether you have adequate resources, because that is an issue for the Congress. And what are the realistic possibilities that the Commission could come to grips with this matter now in June and consider injunctive relief?

Mr. WOLD. Should I start on the answer now?

Senator SPECTER. Please do.

Mr. WOLD. All right. Well, Senator, as you noted, it is a complex area, and overlaying the complexity of the Act itself and the facts of any particular violation are considerations of the First Amendment. As a lawyer, I have a concern about any law that infringes on First Amendment rights of speech and with any judicial procedures that interfere with those. And seeking injunctive relief in this area raises the specter of or the prospect of it being a prior restraint. And I'm not sure how the courts would deal with that. I'm not aware of any action that any time the Commission has, in fact, sought injunctive relief, that is, of any time that it has exercised that authority it has under the statute. But assuming that——

Senator SPECTER. Well, Chairman Wold, when you talk about prior restraint, you are talking about *Near* v. *Minnesota.* You are talking about going in, stopping—Pentagon Papers cases, about going in and stopping publication of something which hasn't been disclosed, and that is a prior restraint.

But here you have a long record of what has been the practice, and now you have advertisements which have already been in the public domain. So that you are in a position to say not that you shall not advertise, but that you shall not advertise as you have advertised on the advertisements which constitute advocacy ads or intent to influence an election, a statutory term.

Let me ask you to ponder that question because we are close to the end of this vote, and we will stand in recess for a few minutes, and we will return as fast as we can.

[Recess 2:30 to 2:54 p.m.]

Senator SPECTER. Chairman Wold, coming back to the point of the last question, where you have a pattern of conduct and you have had an analysis that they are ads which are intended to influence an election, and they have all the other indications of violation of Federal election law, wouldn't you think that that kind of a situation would be appropriate for injunctive relief where you may have information as to the next ads which are coming because they are repeating themselves or they are being repeated, wouldn't that be an appropriate basis for injunctive relief, notwithstanding the great concern which I share with you about First Amendment and customary prior restraint?

Mr. WOLD. Well, Senator, I can understand the appeal of that, of the Commission seeking injunctive relief. On the face of it, that sounds like a very appealing route to go.

One impediment to that is the somewhat, I might candidly say, very cumbersome enforcement procedure that we have to go through under the Act that is mandated by Section 437(g) of the Act. And it's my understanding that that would apply to an action for injunctive relief as well as to our actions seeking penalties.

Senator SPECTER. Well, what are those cumbersome procedures? Perhaps we could legislatively act on them to simplify them.

Mr. WOLD. That could certainly be done.

Senator SPECTER. What would you like to see done so that you would have some effective injunctive powers?

Mr. WOLD. Well, I guess the answer would be to bypass some of those procedural steps that we are required to go through, but——

Senator SPECTER. Well, what are they?

Mr. WOLD. After we receive a complaint or a matter comes to our attention through our internal processes, the first stage is we get a report from our general counsel advising us whether we have sufficient allegations of a violation to find what the Act refers to as "reason to believe" that there has been a violation. We then have a Commission meeting to consider that, and assuming we do find that there is reason to believe that there has been a violation—I should add that if the complaint comes from the outside before we can find reason to believe, we have to send the complaint to the respondent and give the respondent the opportunity to file a brief showing why we should not find reason to believe. But assuming we do find reason to believe, then the general counsel can begin an investigation. Counsel has the usual typical civil discovery tools at his disposal to conduct that investigation. When the counsel feels he has enough facts under the applicable law to advise that we should proceed to the next stage, the next stage that is given to us, mandated by the statute, is to find "probable cause to believe" that there has been a violation.

Before we do that, though, the general counsel has to prepare a brief supporting that finding, send it to the respondent, and give the respondent time to reply to the general counsel's brief with their own brief. Then the Commission meets and considers the

issues, the arguments raised on both sides, and at that point we can find probable cause to believe that there has been a violation.

If we do cross that threshold and find that there is probable cause, then the statute mandates a conciliation period of at least 30 days before we can—during which time we have to try to reach an agreement on a penalty, or in this case on an injunction. And if we do not reach an agreement during that period of time, then our remedy is to file suit in the Federal district court to ask the court to impose the penalty, civil monetary penalty or in this case an injunction. And then that starts the typical proceedings in court.

So injunctive relief, while it has some appeal on the face of it, would be subject to these very time-consuming steps that we have to go through that have time periods built into them that we have to respect. So by the time we would get around to actually—if we didn't conciliate—filing suit in the Federal district court and getting the court to order the injunction, even if the court acted on an expedited basis, as they sometimes do in giving injunctive relief——

Senator SPECTER. Well, there are——

Mr. WOLD [continuing]. It would be months before we would get a result there.

Senator SPECTER. There are timetables for all of the filings. If you talk about conciliation, we might make some legislative changes on that. It would be appreciated if you would give, the Commission would give us your thinking on what we might do to speed it up.

Do you have adequate resources, Chairman, to handle these matters? Would additional resources be of assistance to you in moving along this chain, this timetable in a more expeditious manner?

Mr. WOLD. Well, we have wrestled with the question of adequate resources each year in our budget process. I can say that for our fiscal year 2001 budget request we have not requested additional resources in our enforcement staff because we have, I think, been doing a pretty good job of staying on top of the enforcement actions that we have. The number of cases that we have had to dismiss because we haven't been able to get to them in a timely manner has dropped considerably in the last couple of years.

In our current year's budget, fiscal year 2000, we had an increase of four in our enforcement staff between our audit division and our general counsel's office, which is only a couple less than we had actually asked for. So Congress gave us basically what we asked for there.

In the previous year's budget, fiscal year 1999, Congress had given us a very substantial increase in our enforcement staff that we took a long time—it took a long time to actually hire up to that level. But as I say, the real test is how many cases we are not able to get to in a timely manner, and that number has been dropping quite dramatically in the last couple of years.

So, generally speaking, I think we have had adequate resources. We have not told Congress that we need more at this point.

Now, if an additional task was given to us to seek injunctive relief, that's a time-consuming, time-intensive job. I know that as a private attorney. I'm sure you do, also, Senator. And we would almost undoubtedly need additional staff to handle that, because an-

other aspect of that is actually the facts of coordination. You know, we can look at the ads, we can say that that ad running on television is obviously for the purpose of influencing a Federal election, but that doesn't mean it was coordinated. We still have to do that investigation and get the depositions, get the testimony, get the admissible evidence to show that was, in fact, the case.

Senator SPECTER. Well, if you would take a look and give us your suggestions, we would appreciate it. It may be that some of those procedures like conciliation might be eliminated or we might not give you exclusive jurisdiction, let other parties come in.

Vice Chairman McDonald, I see you nodding in the affirmative. Do you think that would be a good approach to take away your exclusive jurisdiction?

Mr. MCDONALD. I hope we can have an opportunity to follow up on the discussion, because we would like to look for ways that we might be able to move more rapidly in all these areas, not only this area of injunctive relief.

Senator SPECTER. Mr. McDonald, moving to another subject for just a moment before yielding to the ranking member here, what is your thinking about having a Commission which is six, an even number, which has resulted in so many 3–3 decisions? Do you think Congress might be well advised to structure a Commission so that we do not have the political composition and might come to some resolution of some of these issues?

Mr. MCDONALD. Well, I think it presupposes something, Mr. Chairman, that I don't think the record actually reflects. For example, in the case you alluded to at the outset of this hearing, that vote was along party lines. Now, you——

Senator SPECTER. No, no. I know——

Mr. MCDONALD [continuing]. Didn't indicate that, but I'm just saying as a practical matter, when we hear——

Senator SPECTER. I did not—I know it wasn't along party lines. But sometimes there is speculation that there may be an accommodation here so that it is not along party lines but really is.

Mr. MCDONALD. Well, if the issues are about speculation and accommodation, no matter how many Commissioners you have, whether you have six, seven, nine, or five, I think you're always going to have that problem, if the issue is trying to anticipate speculation.

I think what's really more realistic about what you find at the Commission is that you have individuals who have a thorough knowledge of the law and they legitimately differ over a number of very fundamental issues. And I think the Chairman did a very good job indicating the battleground in one sense, which is over the First Amendment and just how far you can or cannot go.

Senator SPECTER. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman. I really only have one area of inquiry, and that is that while the focus of this committee and, indeed, the Justice Department is on previous elections, the Nation is now in the midst of a new election cycle. And in my judgment, whatever abuses there were of soft money or other problems in 1996 could pale in significance with what is unfolding before us at the moment with the misuse of the Tax Code and 527 organizations.

Soft money was important to the 1996 election, but the sum total of all improper money that entered the 1996 election, in my judgment, was not decisive in the outcome of any races of which I am aware. Laws were either violated or stretched to their limits, but it has not to my mind yet undermined the integrity of the process.

I am not convinced by the time the 2000 elections are over we will come to the same judgment. I am already witnessing in my own State that the misuse of the Tax Code for 527 elections are proving decisive.

Does the Commission believe it is in its jurisdiction to look at these organizations or the proliferation of other organizations that are a clear effort to evade the campaign finance limitations and structural limitations? And if you do, do you feel you have jurisdiction and means to deal with the problem, or is it a law enforcement problem that should be dealt with elsewhere?

Mr. MCDONALD. I'll be happy to respond, Senator. We just actually had in an open meeting session about 3 weeks ago this very discussion. One of my colleagues put forth a proposition, Commissioner Sandstrom, on this very issue of 527's. I indicated in that public session I do think we have the authority. I think we currently have the authority. Now, there is honest disagreement about whether we do or whether we don't, and I'll admit to you that it's always a tough call. I think we have the authority based on the nature of what I think the 527's are doing.

My concern about any group, whether it's 527's or anyone else, as a practical matter is the issue of secrecy. In that particular format, what you have, quite frankly, is substantial sums of money going into what surely most people would consider is the political process, and yet there is no indication of where the money's coming from.

I have spent years trying to work on issues of people's rights in terms of human rights and their ability to have free and fair elections around the globe. So I'm always somewhat chagrined when people talk about what their interpretation of my interpretation of the First Amendment is.

I'm real strong for the First Amendment. I don't believe any of us at the Commission are not. But the First Amendment, and secrecy, I don't find it in there.

As a practical matter, I think we currently do have the authority to proceed in those matters, and I think we should. Although soft money is a major issue and it is another issue the Commission is trying to grapple with and come to grips with, at least there is a record.

One of the most ironic things historically about the soft money issue is that the Commission in 1991 started requiring the disclosure of soft money. The irony is that without disclosure, as a practical matter, we probably would not be having this debate today because people were not cognizant of the amount of soft money being spent before it was recorded via disclosure.

At a minimum, I would hope we would do the same thing in the area of 527's because, again, there is a substantial amount of money, it appears to me, being put into the political process. I think anyone ought to be able to participate in the process.

Senator TORRICELLI. Let me pose the contradictions for you if I can. Here is my concern. I raise this with you not simply as a member of this committee, but as the chairman of the Democratic Senatorial Campaign Committee.

I watch these campaigns across the Nation every day. Here is the reality that we face. I know the Commission's reluctance to become engaged in investigations and these judgments during the course of a political campaign. Indeed, the FEC and the Justice Department, I think, should always err on the side of suspending investigations during the middle of a Presidential or other campaign.

You can influence the outcome simply by the inquiry. It is best left. That has been your policy. I believe it should be your policy.

However, this is an instance where the composition of the U.S. Congress and potentially the Presidency can be influenced by whether or not these 527 organizations proliferate. This is not a marginal question. This is not like soft money in 1996 that can have some ancillary impact. Races are being won and lost now because of organizations that, in my judgment, are created for the sole purpose of evading campaign finance laws, where within the current political culture and the laws that are being interpreted and applied, either foreign money or great individual wealth are being channeled into these organizations in what at least appears to be coordination with political entities in violation of the law.

I am outlining for you a dilemma, not an answer. I believe you err on the side of not interfering in the process by investigating during a campaign. I think that is true for you, and I think it is for the Justice Department.

However, if you do not, we are going to be having hearings in 2 years about how the U.S. Senate and the U.S. House of Representatives were altered in their composition because of patently illegal acts and you did not investigate and you did not act during an election campaign, and we will all be regretting that it happened. We will be discussing new laws to deal with it, or we will be chastising you or people in the Justice Department because you did not act, but the fact is the damage will be permanent and irreparable.

Mr. WOLD. Senator, if I could jump in on this. I recognize the concern that the Senator has and that many people have about these entities that have tax-exempt status under section 527 and are not subject to the reporting requirements of the Act. The limits on organizations that we can bring under the coverage of the Act, though, is defined in the Act as being for the purpose of influencing a Federal election, and on the expenditure side, anyway, the U.S. Supreme Court has said that we have to apply a bright line test to determine whether an expenditure is for the purpose of influencing a Federal election. That bright line test, they articulated is what we call the express advocacy standard.

If an organization is not engaged in that kind of express advocacy, expressly advocating the election or defeat of a clearly identified candidate by using the words "of advocacy" that the court listed or the functional equivalent of those words, I do not think that the Act enables us to say that they should be subject to the reporting requirements of the Act and to the limitations of the Act.

Senator TORRICELLI. Let me interrupt you for a second because I think we can narrow what I am looking for.

So, indeed, you may not actually have the current authority to deal with the problem that is now concerning me, and that is an advertisement is placed in television or on the radio or through mail that is advocating a position and, consistent with the interpretation by the Supreme Court, is not an express advocacy. Therefore, you have either limited ability or no ability to audit the source of those monies or to investigate coordination.

Mr. WOLD. We can investigate coordination because, if the coordination has been with the candidate and we receive a complaint that a candidate coordinated with some entity, even if that entity is not under our jurisdiction, we can investigate that coordination because that would be a contribution to the candidate, and that is within our jurisdiction. But if the organization is operating independently of a candidate and engaging in its own speech that falls short of expressly advocating the election or defeat of a candidate, then I have very substantial doubt that that could be brought within the coverage of the Act.

As the vice chairman said, there are reasonable people that disagree on that, but that is my basic concern.

Senator TORRICELLI. My concern—with all due respect to you and the people at the Justice Department, you have studied this as a matter of law and you followed these issues. Sometimes what looks to you like it does not meet the threshold, to some of us it does not get past the laugh test.

I am seeing campaigns every day where a former chief of staff leaves the office and establishes a 527. The same media consultant is used for both campaigns. Remarkably, they stress the same issue, and all of a sudden, the candidate has very little money in their own campaign, is spending millions of dollars on a tax-free basis and nobody knows where the money comes from or how this happened.

That, understandably, may not meet your threshold, look like a violation of the election laws, but to anyone engaged in these campaigns, this is the most transparent laundering of money on an illegal basis to evade reporting requirements in a coordination that one could witness.

If you do not have the authority or it does not meet your threshold, I understand, but somewhere in this Government, somebody has to recognize this or I am telling you the campaign finance laws of this country in the next 90 days are going to collapse around our ankles. We are close to no governing authority.

While you audit campaigns of 4 years ago, the Justice Department looks at what Al Gore or Bill Clinton may or may not have said 4 years ago, the campaign finance laws of the country are crumbling.

What I want to know is if you do not have that authority and you cannot deal with it, I understand, but we need somewhere in this Government, somebody, from the Attorney General on down, who has got to decide someone is going to get engaged.

Mr. MCDONALD. Senator, it is interesting. It is an ongoing debate at the Commission, and the chairman is a true good and valued friend of mine. We obviously have a fundamental difference of opinion.

I do not believe the law says simply that you have to have express advocacy to find a violation. For the purpose of influencing the election is the standard in the statute. And personally I think we do have the authority to regulate in this area. It is a close call on either side. I will be the first to say that.

But let me point out one other thing that is happening which is unfortunate. By the way, there are a number of 527's, I think, that certainly play by the rules of the game. That is the other side of this issue, and I would not want to leave that out.

Senator TORRICELLI. I do not want to leave the impression that some do not either. I may not like the rules of the game, but some of them, undoubtedly, comply.

Mr. MCDONALD. But the other side of it is that, ironically, I think at some point, it is going to start hurting the two political parties. Why would I go to a political party and put myself in jeopardy of being on the public record, when I can get the same result and I really do not have to be on the public record unless I want to?

Again, my concern about it is that the element of secrecy is a pretty serious matter. But, I have said this on numerous occasions, and so it is not a closet secret. Periodically, on some of these matters, I think we appear to be the only people in town that do not know what is going on. I do not mean that negatively. I just think we stretch and strain at a time we do not need to. And with the full understanding, with the differences I have with my colleagues, all of us try to get to these problems the best we can. But, realistically, from my vantage point, what we see out there, I do think we have the authority and I have always thought we had the authority. Otherwise, what you are basically saying is someone would just have to be incredibly naive to overstep the bounds. You would have to want to write out a statement, it seems to me, that yes, this, is express advocacy, and, therefore, I just want to tell you I am going to do that. I do not know anybody who would do that in this day and time. But, I think it hurts the political parties because they may start getting left out of the process, too.

Senator TORRICELLI. Thank you very much.

Mr. WOLD. Senator, if I could add one comment about this, also. One dilemma that we have considered is if we did—if the incentive to bring what we refer to as 527 organizations under the coverage of the Act, is driven by the need for disclosure, that is something that I don't believe that we can do under the present structure of the Act. We don't have any means of defining an organization that is subject only to disclosure requirements, but not to the limitations of the Act.

So, by interpreting the provisions of the Act to cover these organizations, we are automatically—the Commission would automatically be imposing not only the disclosure requirements, which have a relatively mild effect on the First Amendment rights of an organization, but we would also be imposing the limitations of the Act on the amounts of contributions and the sources of contributions.

Senator SPECTER. Mr. Wold, I think most of us would agree that you need some statutory change, and that is something we are going to be pursuing after the hearing.

I want to turn to Senator Sessions because we have got a great many witnesses, but before I do, I want to say that I agree with what Senator Torricelli has said about the campaign laws in a state of collapse as to the 527's. I think we are virtually in a state of collapse as to the proliferation of soft money if it accumulates as it did in 1996, but those are issues we will take up further.

Let me turn now to our distinguished colleague, Senator Sessions.

Senator SESSIONS. Mr. Chairman, I thank you for offering me the time and for your leadership. I have been on the floor of the Senate and was not able to be here, and I would not ask any questions at this time. So you can go on to your next subject.

Senator SPECTER. OK. I just have one final question. This may intrude upon your deliberations. So I am treading lightly. I think it is an appropriate question, but I shall not press it, but if you would care to answer it—Commissioner McDonald, Commissioner Thomas raised a public issue in his opinion statement of reasons in the Dole for President, Clinton-Gore, et cetera, and I quote from his printed public record, "As I consider the varying approaches of others on these matters, I might focus on my criticism on my friend and colleague, Commissioner McDonald, who always heretofore has joined me in finding similar party communications to be in-kind contributions or coordinated expenditures." That appears at page 17.

An answer may be intrusive. So I am not going to press you for an answer, but I would like to give you an opportunity to respond to that, if you care to.

Mr. MCDONALD. I would be happy to, and he will still be my friend. I don't need to look it up. I believe I have read that.

Yes, I would be happy to discuss it, Senator. Actually, it was something I wanted to say at the outset when we first—when you opened the hearing this afternoon.

First of all, he is right about the history at least in relationship to myself in terms of trying to come to grips with these coordination issues. What transpired, though, I must say to you—and I think it may be a key component to what is discussed later here this afternoon—in 1996—I'm sorry—in 1998, I guess in about December—I will have to look back through my notes just a second, but the Commission on December 10, 1998 by a vote of 6 to nothing, unanimously, rejected the audit recommendations for repayment of public funds, unanimously, not 3 to 3, unanimously.

The day before that vote, several of my colleagues—in fact, a majority of my colleagues, rejected a precedent which is understandable. I didn't happen to agree with it, but they rejected the precedent of repayment which we always had throughout the history of the Commission.

Subsequently, we had other matters that involved pretty much the same issue. We had a case in Wyoming—I'm sorry, my lawyer is whispering to me, Montana, and she is right. We had another case that, from my vantage point, was exactly the same in terms of the issues; that is to say, the participants of the National Committee on public record had gotten together with their candidates to arrange particular ads to be run.

I might say, Mr. Chairman, I had also voted for reason to believe for the first time around on the Clinton-Gore case. As you know we brought this case, the Clinton-Gore matter at least, through the process on two different occasions. It became very clear to me, after rejecting a program we had used for about 25 years in relationship to repayment determinations, and striking down Advisory Opinions 1915 and 1914, in which we used the shorthand version of the electioneering message standard, quite frankly, other than the names of the players, I could see no distinctions in the other two cases.

It appeared to me we have a very serious notice problem. I don't care what the rules of the game are, and I don't think the regulated community does as long as they feel they are consistent. And, I have an honest disagreement with some of my colleagues about how we applied the law.

If you tell me tomorrow a touchdown is worth 3 points and a field goal is worth 7, that is fine. I will just start practicing kicking. But I think you are entitled to know when you are in the regulated community what the rules of the game are.

It became clear to me, after being in a number of public sessions—I think the Justice Department may have had representatives there as well—the one thing that the six Commissioners agreed on was that there was no agreement on the rules of the game. Now, I am referring to the ads very specifically in the case you made reference to. We voted unanimously not to proceed for repayment in those matters.

I didn't feel in good conscience I could turn around after we had done that in a public session, which I might point out parenthetically that a major part of the action in the 1995–1996 case with the Clinton-Gore Campaign in particular focussed on 1995. And, two where we took no action at all in 1996, those were activities during the election year itself.

I think notice is a very important matter. I go back to something that Senator Torricelli said earlier. I would prefer to err on the side of being realistic about what we are saying to the regulated community, and Commissioner Thomas was right in his assessment of the history of my record at the Commission.

When I concluded that we were no longer applying the same rules that we have applied for the first 25 years of the Commission, and certainly in the first 16 or 17 years of my term, I could not go forward in the Clinton-Gore matter. I saw this from my own vantage point, I pass no judgment on my colleagues. My direction is not at my colleagues, but how I thought the regulated community would look at it.

I think it is incumbent on the Commission to come up with some sort of bright line test that we can get an agreement on out of the context of a particular political matter. I think failure to do that lends itself to the kind of problems you have alluded to from the outset in this process.

We said very clearly in the meetings in December 1998—and there was not a Commissioner, including Commissioner Thomas, who did not say that this has been a tortured, difficult, and unclear path. I think that being the case, it may well be why we voted 6 to nothing not to proceed. I hope we won't find ourselves in that posture anymore. In relationship to my vote, however, I am com-

fortable with it only in the sense I really didn't see any alternative because I do think notice and the ability for parties to have some understanding of what they get into is absolutely critical.

Mr. WOLD. Senator, if I could add a couple comments, just briefly. Since I was on the same 6–0 side of that vote, as was the vice chairman, I did not see any connection between that vote to not require a repayment—that is, not to reach a repayment determination—and the issue of whether the ads run by the parties had been coordinated with the candidates. At least from my standpoint—and I know that of at least a couple other Commissioners—our reason for not voting for a repayment determination was based on our reading of the Presidential Primary Matching Payment Act as it applies to the limitation on spending by a candidate who receives public funding in the primary. The Act itself did not provide for repayment as a remedy for exceeding the cap, as contrasted to that remedy which is provided for exceeding the cap in the general election. So I did not see any connection between the vote not to require a repayment and the issues of whether those media ads were coordinated.

In fact, the Commission at the same time also voted 6–0 to specifically leave that question of coordination open for a determination in the enforcement track. We said the Commission has not reached any conclusion regarding the staff's in-kind contribution analysis; that is, whether those expenditures were coordinated. So I didn't reach the same conclusion that the vice chairman did that that decision not to seek repayment confused the question or even bore on the question of whether the expenditures were coordinated.

Mr. MCDONALD. Senator, I would be happy to continue the debate, if you would like. I am not shy about any vote I have ever cast. I would be happy to read you some more, if you would like.

Senator SPECTER. I would not like that, but I think Senator Sessions has one more question.

Senator SESSIONS. There was a lot of hard feelings about the Commission. Some people believed it was not fair in a lot of different ways, and I know Mr. McDonald in one vote in 1997 on the 1996 campaign, you abstained. The reason you gave for abstaining was because you were at that time negotiating to be chairman of the Democratic National Committee.

Mr. MCDONALD. I wasn't negotiating, Senator, but my name had been mentioned.

Senator SESSIONS. All right. And later, though, you did not hesitate to vote to prosecute, which failed on a 3-to-3 vote, the Republicans.

Mr. MCDONALD. I am not sure what you have made reference to. Prosecute and what? I'm sorry.

Senator SESSIONS. Out of the 1996 campaign.

Mr. MCDONALD. I voted to proceed in a number of Democratic matters, if you want to look—if you would like for me to submit that for the record. If the inference is I have only proceeded against the Republicans, that is just simply not so. I would be happy to answer any question about a specific vote, and I will be happy to supply the committee any vote you would like.

Senator SESSIONS. This was a Republican Senatorial Committee vote, Republican Senate vote, tied 3 to 3 at any rate. You voted on that.

I must note I also——

Mr. MCDONALD. Would you have preferred I had voted in that matter or recuse myself? I thought recusal was the best approach to take. Is that the criticism of me?

Senator SESSIONS. No. My criticism is you abstained or recused yourself from the Democratic vote, but you voted to prosecute the Republicans.

Mr. MCDONALD. Should I have voted in the matter when I was talking to the national party? I just didn't think that was appropriate.

Senator SESSIONS. I am not saying you shouldn't have voted. I am saying that one of the problems we have had with the FEC is there is some concern about its objectivity.

I also would just note for the record, Mr. Chairman, that the day after the Commission voted 3 to 3 not to prosecute the DNC, Mr. McDonald voted not to prosecute. You were announced to a reappointment to a 5-year term as vice chairman of the Commission.

Mr. MCDONALD. No, I had been nominated long before that, Senator.

Senator SESSIONS. Had you?

Mr. MCDONALD. Yes, I had. And let me be very clear, if you don't mind me saying.

Senator SESSIONS. I will be glad for you to clarify that. If I am in error, I would like you to clarify that.

Mr. MCDONALD. Yes. That is just simply not so. I had been nominated earlier. My nomination had been up for some time as a practical matter. It is on the record.

Senator SESSIONS. Well, at any rate, I believe that we do have to be careful about these issues because they are so intense and there is so much fudge room in some of this campaign disclosure stuff that scares everybody that is in the business. I think we need to be careful that our nominees can stand the test of objective scrutiny.

Mr. MCDONALD. I think it is an awfully important question. I am kind of glad you raised it.

I would be willing—and I think even my colleagues who disagree with me—I hope that is the case—will take the position I have tried to be fair and objective.

One of the things you failed to mention there, and I guess you simply don't have it, but as a practical matter, one of my colleagues left immediately from the Commission and went over to represent the Republican National Committee. Another went from the Commission to work in the Reagan White House. We had another lawyer who left, a Commissioner, to go over and represent the party directly from the Commission. So I think it is not unheard of. I am hopeful that out of the thousands of votes I have cast—and that has gotten a lot of celebration, ironically, for not casting a vote—I, was puzzled by that.

The other thing about that particular vote, as you may know, actually a Republican joined in that vote, and that is why the case didn't move forward as a practical matter, but, ironically, I am sur-

prised. And, I think you are absolutely right. I totally agree with you. I think the business about people's integrity is pretty important. I know you take it important. I know something about your background. I take it important, but I would certainly not want to be in a position of casting a vote when my name was being mentioned at all. I just felt that was just not something I would be comfortable in doing. And I also knew, quite frankly, that I was going to get it either way.

Now, I must tell you, the bigger surprise was there were votes to move forward on that case previously without my vote, and the shocker wasn't the fact that I didn't vote, but that a Commissioner changed their mind and actually that was on the Republican side.

Senator SESSIONS. Well, I guess my only concern is it is all right, I think, for staff members to move and go back and forth, but the Commissioners, while they are sitting there, when they are negotiating to be chairman of a committee that is under investigation maybe should tell us all that we ought to be concerned about the appointment process.

I mean, it is all right to appoint someone who is involved in politics, I think, but to the degree that we could maintain some objectivity and maybe someone who is out of the business or has retired or a Howard Baker type or some people like that might be a better approach than people who are actively engaged at the very time these issues are coming before them.

Thank you, Mr. Chairman.

Mr. MCDONALD. Mr. Chairman, if I might on that point, I don't disagree with the Senator. Actually, there is a real irony to this. The reason I got a call to begin with was I was at the Commission, as you may recall. The committee was having some difficulty at that point with the FECA, and the consideration was maybe someone with my background could go over there and try to work to correct the problems they had. So, you know, maybe that is not the right approach. There wasn't any negotiation. I am kind of glad I was elevated in the press—not by you, but in the press. I sounded a lot closer than I was, but it was true I did get a call about that, and the question was, look, obviously we have got some problems. My record is very clear. I am extremely comfortable for any member of the committee to look at my record. I have proceeded against both sides. I have been criticized by both sides on numerous occasions, and I am awfully comfortable with my record.

Senator SPECTER. Thank you very much, Senator Sessions.

Thank you very much, Chairman Wold and Vice Chairman McDonald.

What the subcommittee would like to do would be to have staff pursue with your staff some of the issues we have discussed here today to see if there might be a streamlining, also to get your recommendations as to whether there ought to be an odd number, so you have 4-to-3 decisions as opposed to 3-to-3 decisions, and to pursue the issue also on the memorandum of understanding with the Department of Justice. They have left to you a great ambit of authority. We have not gotten into that because we have so many other witnesses. Where the Department of Justice has responsibilities to enforce the criminal laws, it is curious that they have delegated to the Federal Election Commission baseline judgments be-

fore they will undertake to have enforcement responsibility, but these are very important subjects which I think could be usefully discussed at the staff level, and we may be asking you to come back.

Thank you very much, Mr. Wold. Thank you, Mr. McDonald.

Mr. Wold. Thank you, Mr. Chairman, Senators.

Commissioner McDonald is absent from another engagement he has this afternoon. Are we excused for the afternoon?

Senator SPECTER. Oh, absolutely. You certainly are, yes. Thank you.

Mr. MCDONALD. Thank you very much.

Senator SPECTER. Mr. Robert Conrad, step forward, please. Mr. Conrad, would you raise your right hand. Do you solemnly swear that the testimony you will give before this subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CONRAD. I do.

Senator SPECTER. Mr. Conrad, you submitted an opening statement. Would you care to read it or otherwise make an opening statement?

Mr. CONRAD. Yes, sir, I would.

Senator SPECTER. Please do.

STATEMENT OF ROBERT J. CONRAD, JR., SUPERVISING ATTORNEY, CAMPAIGN FINANCING TASK FORCE, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. CONRAD. Mr. Chairman, other members of the subcommittee, my name is Bob Conrad.

I have been an Assistant U.S. Attorney for over 11 years. I was originally hired by the U.S. Attorney's Office in the City of Charlotte in the Western District of North Carolina by U.S. Attorney Tom Ashcraft in January 1989. From August 1992 until my present detail, I was chief of the Criminal Division in the U.S. Attorney's Office in the Western District of North Carolina.

I have served in both Republican and Democratic administrations as chief of the Criminal Division. In that capacity, I have been responsible for supervising hundreds of prosecutions involving white collar crime, public corruption, narcotics trafficking, firearms violations, and a wide variety of other types of Federal crimes. I have personally tried numerous cases ranging from bank robberies to capital litigation.

The U.S. Attorney's Office in the Western District of North Carolina is known for its aggressiveness, consistently ranks high in all categories of Federal prosecution nationwide, and I am proud of its accomplishments over the last 10 years.

Since the day after Christmas in 1999, I have been the supervising attorney in charge of the Justice Department's Campaign Financing Task Force. I am personally committed to aggressively pursuing all violations of the campaign finance laws.

Today, I would like to announce to this committee the filing of two plea agreements in the task force cases. Pauline Kanchanalak and Georgie Kronenberg have filed plea agreements this morning to campaign finance violations. Those plea agreements bring to five

the number of defendants this month who have pled guilty and agree to cooperate in the ongoing task force investigations.

I am appearing here today voluntarily in response to your request to answer the committee's questions about the Campaign Financing Task Force. I do so mindful of the admonition to open your mind before you open your mouth, as well as a two-fold caveat. Frankly, I will not disclose information about pending criminal matters, ongoing investigations. I would not want to say anything today that would potentially compromise ongoing investigations, violate grand jury secrecy rules, or otherwise jeopardize the integrity of an investigation. My obligation as a prosecutor requires that.

I also want to emphasize at the outset that I started with the task force more than 6 months after the Independent Counsel Act expired. I played no role in any independent counsel decisions and have only a general familiarity with the now-defunct Independent Counsel Act. I have had no input in specific Independent Counsel Act decisions which were made by the Attorney General well before I became involved with the task force. I do not feel qualified to render any opinion regarding its applicability to any matter occurring before my tenure, having had no opportunity to study the statute or apply it in a concrete factual context.

Because I am not competent to discuss matters occurring before my tenure nor able to talk about ongoing matters, I think my testimony may be of limited value to you. In this respect, I feel like someone from the movie, "Dumb and Dumber." Nonetheless, I am happy to answer any questions you have.

Senator SPECTER. Thank you, Mr. Conrad, and congratulations to you on working through the plea agreements. We would like to take a look at those to see precisely what is involved, and we like the sound of both Ms. Kanchanalak and Ms. Kronenberg agreeing to cooperate in further investigations.

Mr. CONRAD. Yes, sir.

Senator SPECTER. Is that the similar situation with Mr. Charlie Trie?

Mr. CONRAD. I understand that Charlie Trie's plea agreement included cooperation provisions. Yes, sir.

Senator SPECTER. And cooperation from Johnny Chung?

Mr. CONRAD. I understand that as well. Yes, sir.

Senator SPECTER. And John Huang?

Mr. CONRAD. Yes, sir.

Senator SPECTER. And Maria Hsia?

Mr. CONRAD. Maria Hsia was convicted after trial, and there is no cooperation agreement with respect to her.

Senator SPECTER. Is Maria Hsia cooperating?

Mr. CONRAD. No, sir.

Senator SPECTER. Mr. Conrad, you have left a very narrow—I was about to say you have left a very narrow ambit for responding, but you really have not left any ambit at all. But I do believe, difficult as these matters are, that this subcommittee has a duty to find out what is going on, and we intend to do just that.

We believe we have a right to know what is happening within the Department of Justice upon the issue of special prosecutors, which is the replacement now for independent counsel, and we

have reviewed the long line of authorities with the Department of Justice on the precedence which give congressional oversight authority on pending matters. We have pursued the recommendations of the Department of Justice on this issue of recommending independent counsel and similarly a special prosecutor from Mr. Radek who is chief of the Department of Justice Public Integrity Section. We have the recommendation from Mr. Litt, who will be a witness here later, who was Principal Associate Deputy Attorney General. We had the recommendation from Charles La Bella who was head of the task force. We had the recommendation from Director Freeh, and through a torturous route, we have secured the memoranda and the writings on those recommendations and we are interested in your recommendations.

We have a good bit of information as to what happens because this is a town where at least I found nothing is secret. Have you in your capacity as chief of the task force had occasion to personally question people under investigation?

Mr. CONRAD. Yes, sir.

Senator SPECTER. And whom have you questioned?

Mr. CONRAD. I feel comfortable in stating because the people who were examined have issued press releases concerning the examinations, but on April 18, I personally examined the Vice President of the United States, Albert Gore. On April 21, Good Friday, I personally examined the President of the United States, Bill Clinton. Both of those examinations were disclosed to the public via a press release issued by the White House.

Senator SPECTER. Have you made or attempted to make a recommendation as to either of those matters with respect to special prosecutor?

Mr. CONRAD. That, I don't feel comfortable discussing in public. I would perceive whether I have done that or not as something that pertains to an ongoing investigation.

Senator SPECTER. When you say you do not feel comfortable doing it in public, were you suggesting you would do it in private?

Mr. CONRAD. No, I am not suggesting that. I am suggesting that my obligations as a prosecutor would prevent me from discussing that.

Senator SPECTER. Well, both of the individuals whom you mentioned have been the subject of extensive hearings by this subcommittee. Are you conducting to be even handed any investigation as to Senator Dole who was a candidate for the Presidency?

Mr. CONRAD. You asked me—Senator, you asked me questions about whether I had examined people personally, and I felt comfortable answering your questions because the two individuals that I mentioned had issued press releases saying that I had done that. I don't feel comfortable talking about any other potential matter.

Senator SPECTER. Well, I want to ask the question, and I have asked the question, so that it is asked in both directions in an even-handed manner.

This subcommittee is interested in knowing whether you have made a recommendation as to either the President who has made the press release and as to the Vice President who has made the press release, and we would cite as our authority in the practice of the Department of Justice, which has responded, to subpoenas.

Actually, the subpoena was not directed at the Department of Justice. It was directed to Mr. Freeh and Mr. La Bella, but the Department of Justice then made available not only their records, but also the records of Mr. Radek and Mr. Litt and the recommendations of others. So we think we do have the precedent of what this Department has done and the precedent of the authority to get a response to that question.

Mr. CONRAD. My only involvement in that process was to screen those documents prior to their issuance to you or pending-matter concerns, and I was involved in that process.

The question you are now asking me deals with matters—subject matter of the examinations of both the President and the Vice President are pending-matter concerns, and so my answer to you plays the same role as my process was—my role in the process was earlier, to screen from disclosure things that might affect pending investigations.

Senator SPECTER. Well, Mr. Conrad, are you saying that the matters under investigation as to the President, which he has publicly disclosed, do not relate to matters which have previously been under investigation? I am probing now on the question as to the subject matter. My judgment here is that they are, and that they have been responded to on the question of whether there should be independent counsel/special prosecutor as to the President. So, if you are telling me they are different matters, then I might see some distinction, but if they are the same, I would press you for an answer. Are they the same?

Mr. CONRAD. As to the subject matter of the examinations, I think the examinations dealt with pending matters which I am not comfortable answering.

Senator SPECTER. Well, are those matters different from the ones which have been the subject of the investigation before for the President which have been in all these documents we have seen from La Bella and Freeh and Radek and everybody else?

Mr. CONRAD. Not being totally familiar with all of that, what has gone on before me, I know that the matters I inquired into on April 18 and April 21 were matters that are pending matters.

Senator SPECTER. Well, the question is, Are they the same? As to the Vice President, aren't they the same as before?

Mr. CONRAD. I don't feel at liberty to discuss the subject matter in that examination, no, sir.

Senator SPECTER. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman.

Mr. Conrad, you were polite in your introduction, but for a fellow under oath may have been only marginally frank with the committee. You said that you had limited knowledge of the matters dealing with an independent counsel.

Mr. CONRAD. Yes, sir.

Senator TORRICELLI. Wouldn't indeed it have been more accurate to say since you never attended meetings discussing the independent counsel, never wrote memorandums for the discussion of appointment of independent counsel, had no contemporaneous knowledge on the question of appointing independent counsel, that you didn't have limited knowledge, in fact, you have no knowledge

of the events surrounding the decision to appoint independent counsel?

Mr. CONRAD. My limited knowledge dealt with the Act itself and its application to certain facts. I do have some knowledge, having been in this position for 6 months and read some of the things that you have read, about——

Senator TORRICELLI. But the focus of the committee's questions, that is, how Attorney General Reno reached her judgment, the advice that was given to her, the meetings that were held, is it not true that you were at a safe distance in North Carolina at that point and participated in none of these deliberations?

Mr. CONRAD. That's true. I had no personal participation in any of them.

Senator TORRICELLI. Therefore, as to contemporaneous knowledge or firsthand experience with the actual judgment of the Attorney General whether or not to appoint independent counsel, you really have nothing to offer this committee?

Mr. CONRAD. No, sir.

Senator TORRICELLI. Now, let us deal for the moment, Mr. Conrad, with whether or not the process of justice has been compromised by there not being an independent counsel as opposed to the task force exploring these matters, and whether that has meant the process is not proceeding with integrity. What is the sum total of appointments that you have received by direct appointment of President Clinton or Vice President Gore?

Mr. CONRAD. I have not been directly appointed to any position by either one of those two——

Senator TORRICELLI. Do you have any political association with either campaigns or either individual?

Mr. CONRAD. No, sir.

Senator TORRICELLI. Is there any reason why this committee or the Attorney General or the American people should have a lack of confidence in your objectivity, fairness, impartiality, as a partisan matter in pursuing this investigation?

Mr. CONRAD. Not that I'm aware of, no, sir.

Senator TORRICELLI. It seems to be in the mind of some that having the task force now proceed with these matters—and, indeed, I am not asking you to discuss any of the matters with regard to the President or Vice President—that somehow the public interest is not being served by the task force doing so as opposed to an independent counsel.

Is there reason to believe that if an independent counsel were pursuing this matter as opposed to the task force that somehow the people on the independent counsel's staff would have greater knowledge, more experience, or greater expertise than those now available on the task force?

Mr. CONRAD. Well, the Independent Counsel Act has expired, so there would be no——

Senator TORRICELLI. I understand that.

Mr. CONRAD [continuing]. Possibility of that situation.

Senator TORRICELLI. But let's speak theoretically. The American people are entitled to know this is being pursued aggressively and impartially. I want you to give a frank accounting through us to the American people that indeed, if there were an independent

counsel, if theoretically it were possible, if the Attorney General had named one before the statute had expired, it would be your judgment that you now have the expertise, you have the manpower, you have the support of the Department to vigorously pursue these cases wherever they might go, and that in sum and substance that does not differ from if there had been an independent counsel.

Would you share your own judgment with the committee on that question?

Mr. CONRAD. I don't know what value my judgment would be——

Senator TORRICELLI. Well, it entertains me, and it may prove persuasive with Senator Specter.

Mr. CONRAD. I can say this: that I have a reputation for aggressiveness, I have a reputation for serious—pursuing serious violations of the criminal law. I would attempt in any leadership position I was in to do that and to inspire others to do that.

Senator TORRICELLI. And how many attorneys do you have now at your disposal?

Mr. CONRAD. Approximately a dozen.

Senator TORRICELLI. Have you asked for any resources by your superiors at the Justice Department of any appreciable nature and been denied?

Mr. CONRAD. No, sir.

Senator TORRICELLI. Have you asked for cooperation from the FBI in investigations and been denied cooperation?

Mr. CONRAD. No, sir.

Senator TORRICELLI. Have you felt that at any point, as someone with no partisan affiliation, that there has been an interference with your judgment, other than the advice that you would naturally receive from experienced superiors, that in any way compromised your ability to perform responsibly?

Mr. CONRAD. I don't believe my ability to perform the tasks that I have conducted to date has been compromised in any way, no, sir.

Senator TORRICELLI. Therefore, can I assume it would be your testimony that even if there were still an independent counsel statute or if the Attorney General had appointed an independent counsel before the law expired, in sum and substance you have no reason to believe that violations of the law would be pursued any more or less aggressively or any more or less fairly than you are now doing?

Mr. CONRAD. I really would have no opinion on that. I just wouldn't.

Senator TORRICELLI. OK. Mr. Conrad, thank you very much.

Senator SPECTER. Before turning to Senator Sessions, Mr. Conrad, I want to say that you have an outstanding professional record. There is no doubt about it. And everything I hear about you is very good, and I have a pretty good idea of what it is like to be a prosecutor for 11 years. I was one for 12 years, and I know the sort of things you face. So——

Mr. CONRAD. I hope I make it to your tenure.

Senator SPECTER. Oh, you will. Whatever happens, you will. The odds are strong that you will exceed it.

So that on the professional level, you have an outstanding record, and it is a curious town, it is a curious world; when people know

you are coming in to testify, people come to volunteer about what a straight shooter you are. And there have been volunteers who have spoken for you. A person's reputation goes a long way. That is to say nothing of the questions which I have asked you and will repeat, but let's turn now to Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. And I have heard good things, also. As I get older, reputations usually turn out to be fairly good indices of the character of a person. And your office is a good office. I am familiar with the statistical production of the Western District of North Carolina over the years, and it has always been at the top in the United States.

Mr. CONRAD. Thank you.

Senator SESSIONS. And even beat the Southern District of Alabama.

Senator TORRICELLI. That is extraordinary.

Senator SESSIONS. That is. We were all in the top four, three or four consistently.

Well, let me say this: You bring with you a lot of experience. You have been through some tough cases in your career. You have had to deal with pressures and political attacks and other things that go with the territory of being a prosecutor.

Are you ready for this one? Let me ask you that: Are you ready to see this one through if that becomes your cup to drink?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. And are you prepared to call it as you see it and to defend your position even if others who may think they have more experience disagree?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. Do you feel an obligation, if you were asked to take actions that you did not believe were justified within the parameters of honest dispute, would you speak out on that if need be?

Mr. CONRAD. I'm trying to understand your question so I can answer it appropriately. I wouldn't do anything that violated my own ethical or conscientious beliefs. I would stand for that which I believe to be the right thing to do in the appropriate setting.

Senator SESSIONS. As a career Assistant U.S. Attorney, your basic training is that you do the task you are assigned, you do it fairly and objectively, you fight for what you think is right. But if someone higher up makes a decision and they have the responsibility ultimately of making that decision, you take it and try to do the best you can with it.

Mr. CONRAD. Yes, sir.

Senator SESSIONS. Is that fair to say?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. So by being in the Department of Justice, being a career employee, there is some ability for the Department to affect your decisionmaking process or the decisionmaking process in the case.

Mr. CONRAD. Yes, sir; in particular cases, without getting into management, as a general rule, I've won some battles and lost some battles.

Senator SESSIONS. Have you ever been——

Mr. CONRAD. That's both in the district and here.

Senator SESSIONS. Have you ever been overruled by the bureaucrats in Washington?

Mr. CONRAD. Well, if I had an attorney here, he might object to the characterization. But I have not——

Senator SESSIONS. Well, there are good lawyers in Washington in any case. I mean, a lot of your decisions are reviewed in North Carolina by the Department of Justice. Isn't that correct?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. But if they say no, you have to go along with what they say. Isn't that correct?

Mr. CONRAD. Yes, sir. I recognize my role in a hierarchical organization.

Senator SESSIONS. Well, what would happen if—now, are you operating under Mr. Radek?

Mr. CONRAD. No, sir. My chain of command would be up through the Assistant in charge of the Criminal Division and ultimately the Attorney General.

Senator SESSIONS. So you have a direct reporting link to the Assistant Attorney General for Criminal?

Mr. CONRAD. There's a Deputy Assistant Attorney General between me and the Assistant Attorney General, yes, sir.

Senator SESSIONS. And who is that person?

Mr. CONRAD. That would be Alan Gershel.

Senator SESSIONS. Gershel?

Mr. CONRAD. Gershel, G-e-r-s-h-e-l.

Senator SESSIONS. And he would answer to Mr. Robinson?

Mr. CONRAD. Yes.

Senator SESSIONS. And he to the Attorney General?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. But in any decision to indict a person of prominence, you would expect the Attorney General would be briefed on this, would you not?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. If there came to be a point in which there were serious disagreements, would you be prepared to recommend to the Attorney General an independent counsel should be appointed?

Mr. CONRAD. That statute having lapsed 6 months before I came here, I would not be in that situation. If you're talking about the potential for a special counsel——

Senator SESSIONS. A special prosecutor, a special counsel, would be the correct phrase.

Mr. CONRAD. The language used by Senator Specter, I would call it as I saw it, yes, sir.

Senator TORRICELLI. I am sorry, Mr. Conrad. I didn't hear that.

Mr. CONRAD. I would call it as I saw it.

Senator SESSIONS. In other words, if you felt that it was the right thing to do, you would recommend it?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. I don't know what you can say about this. I am just looking at an article from the New York Post. The first paragraph says this: "Vice President Al Gore blew his top when he was grilled last week by funny-money investigators." Is that you?

Mr. CONRAD. That article was brought to my attention by Jim Neill, an attorney in Nashville, TN.

Senator SESSIONS. OK. Blew his top because they asked about his illegal Buddhist Temple fundraiser for the first time, sources say. Gore seemed stunned, fumed that the questions were "outrageous" and the session was contentious.

It is a free country. If that happened, it happened. First of all, can you confirm or deny that?

Mr. CONRAD. I've read that article.

Senator SESSIONS. Would you. [Laughter.]

You can confirm that article exists?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. The best of your knowledge. Well, I am really trying to get at this thing we are talking about here. The reason an independent counsel is important is this is the Vice President of the United States. You are trained to respect that office, and all of us are. If a serious allegation is afoot, then you work for the Department, you work for the Attorney General, the chief of the Criminal Division, and you answer to them and they are ultimately answerable to the President of the United States, who is a friend of the Vice President, who picked him for his Vice President, and who supports him to be the next President. So it just creates an awkward situation, would you not agree?

Mr. CONRAD. There is the potential for that, yes, sir.

Senator SESSIONS. And particularly if the persons higher up, to some degree, in your ultimate chain of command are contentious and hostile and blow their top and reject—and are not totally forthcoming with matters, it would make it more difficult.

Mr. CONRAD. Are you asking me if——

Senator SESSIONS. Yes, I am asking you.

Mr. CONRAD. A hypothetical situation?

Senator SESSIONS. Hypothetically.

Mr. CONRAD. I wouldn't want to comment on anything that happened in either one of the examinations that I took, but I understand all the points you have made with respect to the awkwardness of the situation in a hypothetical sense.

Senator SESSIONS. See, we represent the people of the United States at this deal. We no longer have an independent counsel law. And the people of this country have got to know that—they have got to know that you, Mr. Conrad, find yourself on the hot seat primarily at this very moment, are going to do what a professional prosecutor would do. And the Vice President would be treated like anybody else. True, if the facts are there, or if they are not there, you call it as you see it. But you have to obtain the facts and do your duty, and I think there is cause for concern when the ultimate decisions are made well above your level on most of these matters.

Let me ask you about the team at your disposal, the attorneys at your disposal. Were they working on the case before you arrived? And did you select any of them yourself, or was that the group that was previously involved?

Mr. CONRAD. Most of the attorneys on the task force are attorneys that have—that were members of the task force prior to the time that I came. I have hired two attorneys in the 6 months that I have been the chief of the task force.

Senator SESSIONS. Were those attorneys people you knew previously?

Mr. CONRAD. One of the attorneys was an attorney from my district, which our U.S. attorney was generous enough to detail to us for a year. The other attorney worked for one of the independent counsels prior to the time he was hired by me to join our task force.

Senator SESSIONS. And those attorneys you chose, basically?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. Have you investigated the Hsi Lai Temple matter? Can you tell us that?

Mr. CONRAD. I would feel uncomfortable testifying about specific matters that I've investigated.

Senator SESSIONS. So we are just left with the New York Post. Thank you, Mr. Chairman.

Senator TORRICELLI. Could I, Mr. Chairman——

Senator Specter. Go ahead.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Mr. Conrad, first, I want to thank you for being here today. I think your testimony has been very helpful. With the exception of knowing that you read the New York Post, you have certainly increased my confidence in the task force and——

Mr. CONRAD. I thought I made it clear that Attorney James Neill brought that article to my attention. [Laughter.]

Senator TORRICELLI. Well, then, you have fully restored my confidence.

I wanted only to address the question that I raised with the Commissioners from the Federal Election Commission, and that is, not looking back but looking forward, and not with any specific matter but with a theoretical problem. You are in the Nation's highest political debating society, and you could not help but notice real consternation in this institution about the fact that our campaign finance laws are now not only being violated, in my judgment, wholesale, but may be at the point of near collapse. The Tax Code is being misused to establish parallel organizations that, in my judgment, are unquestionably in some instances being coordinated.

As I was corrected by Mr. McDonald, that is clearly not true in all instances. But in my experience as the chief political organizer of the Democratic side of the aisle in this institution, it is happening in many instances.

It appears to me from the testimony of the Federal Election Commission they either do not think they now have the mandate or the resources to deal with this problem, and yet I repeat to you, as I suggested to them, us having this hearing 2 years from now is going to prove very inadequate for many of these problems. If these laws are violated in the next few months, it is going to change the composition of this Congress. And once these laws are violated to this extent, I don't think we are ever going to restore respect generally for the disclosure and the separation of these organizations.

My question to you, in spite of that rather complex build-up, is really very simple. Is it in your mandate, do you believe you have the authority, to look at these organizations and conduct investigations if you have reason to believe the law might be violated?

Mr. CONRAD. I don't think the 2000 election is within my mandate. I think that would be a Public Integrity issue at this——

Senator TORRICELLI. So that ultimately is Mr. Radek's responsibility, in your——

Mr. CONRAD. Yes, sir.

Senator TORRICELLI. Thank you, Mr. Conrad.

Senator SPECTER. Mr. Conrad, just a couple more questions. What would be the procedure if you obtained information that there was a need to have a special prosecutor? Whom would you recommend that to?

Mr. CONRAD. I think I would recommend—hypothetically, I think I would recommend that up through my chain of command. That would be, first level, Jim Robinson, the Assistant Attorney General in charge of the Criminal Division, and Alan Gershel, his Deputy, and up through them to the Attorney General.

Senator SPECTER. Are there guidelines that you are operating under as to when—do you call it special counsel now as opposed to special prosecutor?

Mr. CONRAD. Yes, sir.

Senator SPECTER. Are there guidelines that you are operating under, written guidelines?

Mr. CONRAD. There are special counsel regulations which would inform the recommendation and the decision. There is a practice of a regular meeting with the people I've described to you and myself. So there are now—as I understand it, there are no formal steps that I would take, but such a decision would—the situation would be created on a regular basis for me to bring it to the attention of the people I needed to bring it to.

Senator SPECTER. If there were an allegation of campaign finance violations as to Governor George W. Bush, would it fall to you to investigate, or would that come under the Public Integrity Section?

Mr. CONRAD. My understanding at this point is that would be a Public Integrity matter. I have not been given any 2000 election cycle——

Senator SPECTER. Your authority is just under the 1996 election cycle?

Mr. CONRAD. Prior to 2000, yes, sir.

Senator SPECTER. So that involves matters from 1998 as well?

Mr. CONRAD. The mandate is really the 1996 election cycle. As part of our investigation of that election cycle, there have been matters that occurred both prior to 1996 and subsequent to 1996. But it would not extend as far as the 2000 election cycle.

Senator SPECTER. Or the 1998 election cycle?

Mr. CONRAD. That's correct.

Senator SPECTER. Are there any memoranda or other writings, Mr. Conrad, on any of your recommendations for appointment of special counsel?

Mr. CONRAD. I would not feel comfortable answering your question and would respectfully decline.

Senator SPECTER. Thank you very much.

Senator SESSIONS. Mr. Chairman, may I ask him two questions?

Senator SPECTER. Go ahead, Senator Sessions.

Senator SESSIONS. With regard to Maria Hsia, has that case gone to sentencing, been sentenced yet?

Mr. CONRAD. No, sir. The conviction was in January. There have been post-trial motions filed by the defendant. They include post-trial motions to dismiss, motions to disqualify the district court judge presiding over that case, and other motions. As I'm sure you're aware from your past experience, there is also the process whereby a pre-sentence report is prepared by the probation office, and parties have an opportunity to file objections to that report. And that whole process has not been completed.

My best recollection is that sentencing in that case is scheduled for September of this year.

Senator SESSIONS. Now, that case would be under your supervision?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. And are you able to tell us, has there been a public memorandum, sentencing memorandum, by the Department of Justice setting forth what the Sentencing Guidelines range should be in that? And could you tell us what that is?

Mr. CONRAD. I could tell you we have not yet filed our sentencing memorandum because of the stage and the process that we're in. We're waiting for the pre-sentence report.

Senator SESSIONS. Now, you have tried that case. The defendant has been convicted, assuming it is upheld by the judge. I would expect that you would pursue vigorously the sentencing phase of that case and that you personally would oversee it. Will you?

Mr. CONRAD. Yes, sir.

Senator SESSIONS. I think that is important because, for the edification of others, sometimes the sentence a person is facing can be affected by the skill of the prosecutor, and I have seen some cases previously involving these very matters in which I believe the Department of Justice was not sufficiently aggressive toward sentencing. And a person can achieve a downward departure—let me ask you this: The only way a person who has been tried and convicted can get a downward departure under normal circumstances is to provide evidence that they have cooperated fully with the prosecution. Is that correct?

Mr. CONRAD. That's the most usual way. I believe the Sentencing Guidelines allow district court judges other latitude, but——

Senator SESSIONS. Under certain circumstances.

Mr. CONRAD [continuing]. They're very circumscribed, yes.

Senator SESSIONS. But I would expect that you would treat this like any other case, that unless the defendant was prepared to testify fully and completely and provide information that you can verify, that you would not accept a recommendation of any downward departure?

Mr. CONRAD. In fact, with respect to substantial assistance, downward departures, we would actually have to make a motion before the district court even had the authority to depart, and we would not make that motion in this or any other case unless the information provided had been valuable.

Senator SESSIONS. But if you thought that the cooperation had been partial and Mr. Robinson, your supervisor, said, well, that is good enough for me, file for downward departure, what would you do then?

Mr. CONRAD. I would anticipate that if the recommendation of the line attorneys and myself was that the—I would anticipate that our evaluation of the cooperation would be deferred to, in much the same way that if you pursued a case in the appellate courts, there would be an abuse of discretion standard. I would not anticipate our decision on an issue like that being overruled by someone who has less contact with the case than we do.

Senator SESSIONS. You wouldn't normally expect that, but we have seen some odd things, in my opinion, as we have gone through these cases.

Well, I hope that you will use your best judgment, your experience, and that you will follow those standards of dealing in a plea and sentencing.

Mr. Chairman, thank you.

Senator SPECTER. Thank you very much, Mr. Conrad.

Mr. CONRAD. Thank you.

[The prepared statement of Mr. Conrad follows:]

PREPARED STATEMENT OF ROBERT J. CONRAD, JR.

Good Afternoon, Mr. Chairman and other members of the Subcommittee. My name is Bob Conrad. I have been an Assistant United States Attorney in the Western District of North Carolina for over eleven years, having been originally hired by USA Tom Ashcraft in January, 1989. From August, 1992 to my recent detail as Chief of the CFTF, I was Chief of the Criminal Division in the U.S. Attorney's Office. I have served as chief of that criminal unit under both Republican and Democratic administrations. In that capacity I have been responsible for supervising hundreds of criminal prosecutions involving white collar crime, public corruption, narcotics trafficking, firearms violations, and a wide variety of other types of federal crimes. I have personally tried numerous cases ranging from bank robberies to capital litigation. The USAO for the WDNC is known for its aggressiveness. It consistently ranks high in all categories of prosecution and I'm proud of its accomplishments over the last ten years.

Since, the day after Christmas, 1999, I have been the Supervising Attorney, in charge of the Justice Department's Campaign Financing Task Force. I am personally committed to aggressively pursuing all violations of the campaign finance laws. Today, I would like to announce the filing of two plea agreements in task force cases. Pauline Kanchanalak and Georgie Kronenberg filed plea agreements this morning to campaign finance violations. That brings the number of defendants to five who have this month pled guilty and agreed to cooperate in the ongoing task force investigations.

I am appearing here today voluntarily, in response to your request, to answer the Committee's questions about the Campaign Financing Task Force. I do so mindful of the admonition to "open your mind before you open your mouth" as well as a two fold caveat.

Frankly, I will not disclose information about pending criminal matters. I certainly would not want to say anything today that could potentially compromise ongoing investigations, violate grand jury secrecy rules, or otherwise jeopardize the integrity of an investigation. My obligation as a prosecutor requires that.

I also want to emphasize at the outset that I started with the Task Force more than 6 months after the Independent Counsel Act expired. I played no role in any independent counsel decisions and have only a general familiarity with the now defunct Independent Counsel Act. I have had no input in any specific Independent Counsel Act decisions, which were made by the Attorney General well before I became involved with the Task Force. I do not feel qualified to render any opinion regarding its applicability to any matter occurring before my tenure having had no opportunity to study that statute or apply it in concrete factual context.

Because I am not competent to discuss matters occurring before my tenure, nor able to talk about ongoing matters. I think my testimony may be of limited value to you. Nonetheless, I am happy to answer your questions.

Senator SPECTER. I would like to call now Mr. Stephen Mansfield. Step forward, please.

Mr. Mansfield, would you raise your right hand? Do you solemnly swear that the testimony you will give to this subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MANSFIELD. I do.

Senator SPECTER. Thank you for joining us here today, Mr. Mansfield. Would you care to make an opening statement?

STATEMENT OF STEPHEN MANSFIELD, FORMER ASSISTANT U.S. ATTORNEY, U.S. DEPARTMENT OF JUSTICE, LOS ANGELES, CA

Mr. MANSFIELD. No, Senator. I'm happy to answer any questions you may have.

Senator SPECTER. Mr. Mansfield, you were an Assistant U.S. Attorney in Los Angeles, California?

Mr. MANSFIELD. Yes, sir.

Senator SPECTER. Tell us a little bit about your background, education, practice, tenure with the U.S. Attorney's Office, present occupation.

Mr. MANSFIELD. Yes, Senator. When I graduated law school, I came to Washington, DC, and served as a law clerk to Judge Thomas Lyden in the U.S. Claims Court. After that I worked as an associate at a law firm here in Washington, DC, Freed, Frank, Harris, Shriver and Jacobson. After about 3 years, I moved to Los Angeles to begin a career as a Federal prosecutor where I served for 11 years.

At the U.S. Attorney's Office in Los Angeles, I specialized in public corruption and white-collar crime prosecutions. During my tenure, I tried a lot of cases in that area, supervised a large number of investigations. For a period of time, I served as a deputy chief in the Criminal Division responsible for public corruption cases, and I also served as a senior litigation counsel for a period of years in that office.

One of the cases that I handled involved a Member of Congress and resulted in the conviction of the Member of Congress for campaign finance fraud violations as well as the——

Senator SPECTER. And who was that?

Mr. MANSFIELD. Congressman Jay Kim. His campaign committee was also convicted, as was his campaign treasurer and five Korea-based corporations.

Senator SPECTER. Mr. Mansfield, you had occasion to participate in the investigation of the so-called Hsi Lai Temple case?

Mr. MANSFIELD. Well, I think we probably need to define the term "investigation." I opened a file in the Los Angeles U.S. Attorney's Office in mid-October 1996 and began preliminary steps in an investigation relating to the temple and another entity that had been mentioned in press accounts.

Senator SPECTER. Would you repeat the last part of that, relating to what?

Mr. MANSFIELD. Another entity that had been mentioned in press accounts.

Senator SPECTER. And what entity was that?

Mr. MANSFIELD. Cheong Am.

Senator SPECTER. And what happened during the course of your investigation?

Mr. MANSFIELD. Well, basically, it started because there were a number of news accounts that alleged possible violations of campaign finance rules. I had been, as I mentioned, in the midst of a campaign finance fraud investigation involving Congressman Kim, and I had at that point in time prosecuted, I believe, four of the Korea-based corporations based on campaign finance violations. And in reading these stories, it appeared that there might be evidence of violations of the campaign finance laws, and so I consulted with my U.S. attorney about the possibility of beginning an investigation relating to what had been described in the newspaper accounts. The U.S. attorney agreed——

Senator SPECTER. Who was the U.S. attorney?

Mr. MANSFIELD. I'm sorry?

Senator SPECTER. Who was the U.S. attorney?

Mr. MANSFIELD. Norma Minella.

I also conferred with the Public Integrity Section and advised them that we were going to take this action as well. And so at that point——

Senator SPECTER. What happened to your investigation?

Mr. MANSFIELD. I began accumulating news accounts from various papers around the country to get a handle around what the allegations were and where the allegations pointed. I conferred with the FBI agent who had been working with me on the Congressman Kim investigation, who assisted me in pulling together some of this basic factual information. I also conferred with an individual at the FEC, Kent Cooper, who was helpful in providing to me various FEC reports that related to individuals mentioned in those press accounts. And so we were also analyzing that material from the FEC.

I also obtained FEC advisory opinions that related to issues concerning foreign national contributions and began to prepare an outline for investigative steps in terms of issuing subpoenas and interviewing witnesses.

In that regard, I was conferring with another FBI agent who had been assigned to the case out of the Los Angeles office of the FBI.

Senator SPECTER. And what happened with this investigation? Were you able to complete it?

Mr. MANSFIELD. Well, I received an instruction from the Public Integrity Section—I think it was on October 31—to stop work on the investigation because they were going to handle it.

Senator SPECTER. You are quoted in the New York Times to this effect, Mr. Mansfield—it might be faster if I simply read it and asked you if it is accurate. "'I wanted to move very quickly to gather evidence by issuing subpoenas, interviewing witnesses, and considering the execution of search warrants,' said Mr. Mansfield, who had extensive experience prosecuting campaign finance cases. 'But it got yanked off my desk, and as far as I know, nothing happened for many, many months. The consequence of a strategy of sitting back and doing nothing means you effectively make the matter go away. It is so much harder to develop. Speed is everything in a highly publicized case.'"

Then the story goes on to say: "In the months that elapsed, several figures involved in the temple fundraising fled the country."

Were you accurately quoted, Mr. Mansfield?

Mr. MANSFIELD. Yes. Those quotes are accurate, but I would like to explain and clarify the final segment of that quote.

Senator SPECTER. Please do.

Mr. MANSFIELD. Because I think it's important.

Senator SPECTER. Yes.

Mr. MANSFIELD. The final segment of the quote says something to the effect—I don't have it in front of me—the consequence of moving slowly can hurt an investigation. Perhaps you could read the last——

Senator SPECTER. It says, "Speed is everything in a highly publicized case." The last thing you said says this. I will read it all. "But it got yanked off my desk, and as far as I know, nothing happened for many, many months. The consequence of a strategy of sitting back and doing nothing means you effectively make the matter go away. It is so much harder to develop. Speed is everything in a highly publicized case."

Mr. MANSFIELD. The segment of the quote starting with "The consequence of a strategy of sitting back and doing nothing," that quote was in response to a generic hypothetical question from the reporter. Specifically, the reporter said: What if there was a high-profile case and prosecutors didn't do anything for months? I made the point to the reporter—I'm not commenting in any way on what the Department of Justice did with respect to this investigation because, frankly, I have no knowledge of what they did. So my quote was basically answering the hypothetical that was put to me, that if there was a high-profile case that was publicized and prosecutors didn't move quickly, you really jeopardize making the case. And that is precisely my belief about these matters, having worked on them for many years, which is why, going back to the first part of the quote, it was my strategy to move quickly on the investigation. It was a strategy that I had used really for 11 years as a prosecutor in Los Angeles.

An example was in the Congressman Kim case, which started similarly in a sense with a newspaper story. There had been a L.A. Times story in that case that had detailed allegations, rather specific allegations of wrongdoing by the Congressman's campaign committee. And so as a result, what we did in that case was within a couple, 3 weeks, issued grand jury subpoenas, and then within a couple of months we executed search warrants. And I think by moving quickly we were able to gather a lot of the important documentary evidence in that case.

Senator SPECTER. And that is what you wanted to do in this matter?

Mr. MANSFIELD. Yes, sir.

Senator SPECTER. Well, did your hypothetical answer as such apply factually in this case, that when you didn't move there was—the matter, in effect, went away?

Mr. MANSFIELD. I really can't answer that because I don't know what happened once the case was taken over by Public Integrity. I don't know what they did or did not do, so I think they are in the best position to respond to that.

Senator SPECTER. Are you aware that some 18 witnesses left the country shortly after this matter was removed from your desk to Public Integrity?

Mr. MANSFIELD. I'm not aware of details. I've read, you know, press accounts occasionally over the years, but I'm not aware of the details.

Senator SPECTER. Mr. Radek, would you step forward, and let's talk about this case with Mr. Mansfield here. Thank you for joining us today, Mr. Radek.

As I know you know from your experience as a trial lawyer, you are still under oath.

Mr. RADEK. Yes, I do, Mr. Chairman. Thank you.

Senator SPECTER. Thank you. Mr. Radek, I have the letter dated November 1, 1996, addressed to Mr. Stephen E. Ziperstein, Chief Assistant U.S. Attorney, which says in pertinent part on page 2, "Your office should take no steps to investigate these matters at this time." Signed by—purporting to be signed by you. Is, in fact, that your letter?

Mr. RADEK. It is my letter.

Senator SPECTER. What was this case all about, Mr. Radek?

Mr. RADEK. Well, at the time I wrote the letter, we weren't sure. Mr. Mansfield, as he has testified, contacted Mr. Donsanto, who informed me that Mr. Mansfield was beginning to conduct this investigation. At the same time, press reports were coming to our attention as well as a letter from five Members of Congress alleging that there was some type of misconduct involving the Hsi Lai Temple event that the Vice President spoke at. And Mr. Mansfield had communicated to Mr. Donsanto that there was in the press reports some indication that possibly conduit contributions were involved.

Senator SPECTER. And what happened after you issued instructions to the U.S. Attorney's Office in Los Angeles to take those steps to investigate these matters?

Mr. RADEK. Well, I think it's important for the committee to understand why I sent that letter, and it was because of really two factors, the first being I was instructed by my superiors in the Criminal Division, Mr. Litt and Mr. Richard, to take the matter over for the task force, which was then just being started, and I was also informed by them after a discussion with me to inform the U.S. Attorney's Office in Los Angeles that the matter needed to be examined to see whether there was any allegation which constituted specific and credible information against Vice President Gore, that is, to do an independent counsel scrub on it.

Senator SPECTER. And you determined as a matter of your judgment that independent counsel should not be appointed?

Mr. RADEK. It was determined somewhat later after an analysis of the materials that Mr. Mansfield sent and the materials that we were gathering at the same time, that there was no allegation amounting to specific and credible allegation against the Vice President, specific and credible information.

Senator SPECTER. Well, was the matter pursued on any investigative level, then, either by the Public Integrity Section or by the U.S. Attorney's Office in Los Angeles or by anybody else?

Mr. RADEK. Oh, yes. As I've said, it was anticipated, and, in fact, it was taken over by the task force, which was then under the Public Integrity Section.

Senator SPECTER. And what happened?

Mr. RADEK. Well, for one, Maria Hsia has been convicted in that investigation and is now awaiting sentencing. Other indictments were returned, and the matter was pursued most vigorously, I assure you.

Senator SPECTER. And why was it taken over by the task force instead of being handled by the U.S. Attorney's Office in Los Angeles?

Mr. RADEK. Well, first of all, let me say that our office had a long relationship with Mr. Mansfield, and we recognized that he was a very good prosecutor, and it had absolutely nothing to do with his abilities to carry it out. And, in fact, I'm sure that had he been left in charge of the matter, it could have been and would have been handled more quickly.

The problem is that the independent counsel statute required that we do an examination without issuing subpoenas and without issuing immunities. And so in each and every case where we had an allegation that was potentially an independent counsel matter, we would instruct the U.S. Attorney's Office to stop their investigation, not issue subpoenas, not issue immunities, not engage in plea bargaining, and that's what I did here with Mr. Mansfield and Mr. Ziperstein.

Senator SPECTER. Well, Mr. Radek, the task force wasn't even in existence until sometime substantially after November 1. You had your meeting with Mr. Esposito November 20. The matter was in abeyance for a period of time. What——

Mr. RADEK. Well, I've heard that——

Senator SPECTER. Excuse me. Let me ask you the question.

Mr. RADEK. I'm sorry. I thought you were finished, Mr. Chairman.

Senator SPECTER. What losses were there for the speed of this prosecution? Mr. Mansfield has described what was necessary during the intervening weeks before the task force was set up?

Mr. RADEK. I'm sorry. What's the question? What losses were there?

Senator SPECTER. Right.

Mr. RADEK. Well——

Senator SPECTER. Was anybody working on this case from the time you took it from Mr. Mansfield until the task force was set up?

Mr. RADEK. Yes, sir. Somebody was working on it from the time we took it over.

Senator SPECTER. But it wasn't the task force.

Mr. RADEK. Well——

Senator SPECTER. You didn't have a task force.

Mr. RADEK. It was the task force. It was what was to become the task force. There was, as has been testified here, a group of attorneys who were doing these matters, who later came to be referred to as a task force, headed by Ms. Ingersoll, who was in place at that point. But you have to understand, what was done here first and what was required to be done was to do an independent coun-

sel analysis to see whether there was specific and credible information against the Vice President. That took some time.

Senator SPECTER. Well, while that analysis was undertaken, was this matter being investigated by the task force or by the people that later became the task force? Because you didn't have a task force at that time.

Mr. RADEK. We couldn't issue subpoenas or do other investigative matters that were prohibited by the independent counsel statute. But, clearly, this matter was under analysis, the same type of analysis that Mr. Mansfield was doing, with an eye towards investigating it, which investigative steps were begun in December.

Senator SPECTER. Well, Mr. Radek, do you agree with the thrust of what Mr. Mansfield is quoted as saying, even be it hypothetical or applicable to this case, that the consequence of a strategy of sitting back doing nothing means that you effectively make the matter go away, much harder to develop, speed is everything in a highly publicized case? Beyond that, isn't it true that some 18 witnesses moved out of the country?

Mr. RADEK. I don't know that 18 witnesses moved out of the country. I talked to the trial attorney who handled this matter and was assured by him that there were no losses of evidence due to witnesses leaving the country. So I've read that in places. I don't know where that comes from, Mr. Chairman.

Senator SPECTER. Well, how long did it take after November 1, when this letter was written, and the Los Angeles U.S. Attorney's Office got out of the case, to have a full-scale investigation going where you could use the grand jury subpoenas, search warrants, et cetera?

Mr. RADEK. I'm prohibited from saying exactly what the investigative steps were by grand jury secrecy rules, but by the middle——

Senator SPECTER. All I have asked you for is how much time was lost.

Mr. RADEK. By the middle of December, investigative steps were taken.

Senator SPECTER. So 6 weeks was lost?

Mr. RADEK. Well, again, we wanted for Mr. Mansfield to provide us whatever evidence we got, and I got a letter from him on the November 13. Again, the analysis was being done on the independent counsel matter, so we couldn't issue subpoenas, engage in immunities, or whatnot. So some time was lost, absolutely, and it was due to the independent counsel statute. You can say it's 6 weeks, you can say it's 4 weeks, you can say it's 2 weeks. I don't know. You may want to ask Mr. Mansfield how quickly those subpoenas would have gotten out. I'm sure they would have taken a little time, but, yes, some time was lost. There's no doubt about it.

Senator SPECTER. He has a question for you, Mr. Mansfield. How quickly would those subpoenas have gotten out if he left it with you?

Mr. MANSFIELD. Well, I mean, you're asking me to pinpoint the time it would take to issue subpoenas on something I looked at 4 years ago. When you've figured out where you want to go in your investigation and who you want to contact for information, it takes a matter of minutes to issue a subpoena, and then the question is

how long does it take to get it served. The Bureau in my experience——

Senator SPECTER. It doesn't take you minutes if you're on the Judiciary Committee.

Mr. MANSFIELD. I've been happy to comply with your subpoena.

I think we were about a few days, a week. It's hard to say exactly. But we had begun—I had been working with an agent from the Westwood office of the FBI, and we were putting together an investigative outline. We identified various individuals and entities, and we were prepared to issue those subpoenas promptly. Frankly, one factor that we were considering—and I believe I had some discussion, perhaps with Craig Donsanto about this. But one factor that we took into consideration was that we didn't want to issue subpoenas prior to the election to have any sort of unfair influence on the election, because, obviously, once you take the step of issuing subpoenas, you make a grand jury investigation potentially public if the subpoenas party publicizes the information.

So we were about at the time—I don't remember the date that the election was in November that year, but on the 31, when we were—when the case was transferred to Public Integrity, we were probably a few days to a week away, I would guess.

Senator SPECTER. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Mr. Mansfield, could you refresh for me who Mr. Donsanto is?

Mr. MANSFIELD. Craig Donsanto is a career prosecutor who has worked for many years in the Department of Justice and has a specialty and expertise in campaign finance law.

Senator TORRICELLI. Do you have high confidence in him?

Mr. MANSFIELD. I certainly defer to Mr. Donsanto on a lot of questions and areas on campaign finance, although there were times in cases that we worked together that we disagreed in terms of the application of law to fact.

Senator TORRICELLI. A man of integrity?

Mr. MANSFIELD. Yes, I think so.

Senator TORRICELLI. Mr. Donsanto claims in a memorandum dated November 1 that you claimed that subpoenas were, "prepared and ready to serve yesterday afternoon." He actually cites that several times in his memorandum. Did you tell him on November 1 or the days before that that you had subpoenas prepared and ready to serve?

Mr. MANSFIELD. Absolutely not. I did not have any subpoenas prepared, and they certainly weren't ready to be served because that would have been prior to the election.

What I did have was—again, what is the date of the memo he's referring to?

Senator TORRICELLI. November 1.

Mr. MANSFIELD. As of November 1, I would have had an outline prepared, because I believe I had prepared an investigative outline with the FBI agent. And in the outline, we had identified names of entities and individuals who were going to be subpoenaed, as well as I think there were references to the types of documents and materials——

Senator TORRICELLI. This is Mr. Donsanto's statement: "He"—meaning Mr. Mansfield—"then told me that in his view these sub-

poenas were needed to prevent records from being destroyed, and he asked me whether he could serve them."

Mr. MANSFIELD. It's true that the reason to issue subpoenas promptly is to ensure that evidence would not be destroyed and also, obviously, to gather the evidence.

Senator TORRICELLI. That I understand, Mr. Mansfield. We all went to law school. But the point is this—a man that you have now claimed is a man of integrity, a superior in the Department of Justice, a man in whom you have confidence, who has claimed in his memorandum that you said that subpoenas were prepared and ready to be delivered.

Mr. MANSFIELD. Well, if he is saying that in a memo, I've never received the memo. He's absolutely——

Senator TORRICELLI. Well, the memo is not to you——

Mr. MANSFIELD. Excuse me, Senator. I'm trying to respond to your question. You've asked me a question——

Senator SPECTER. Senator Torricelli, let the witness respond.

Senator TORRICELLI. I will let him respond but——

Senator SPECTER. Senator Torricelli, let the witness respond.

Senator TORRICELLI. Mr. Chairman, is this time not allocated to me for me to engage the witness?

Senator SPECTER. Yes, it is, and as chairman, it is my responsibility to see that there is fairness to the witness. And he is in the process of responding.

Senator TORRICELLI. He can't respond without my clarifying the question, because he, I think, is not understanding the paper that is before me. This is a memorandum that is to Mr. Radek, from Mr. Donsanto to Mr. Radek, so it was not to you. You would not have seen it.

Mr. MANSFIELD. Right. He could have copied me, but he chose not to, apparently, with this letter.

Senator TORRICELLI. All right. Now, that is Mr. Donsanto's statement on November 1.

Mr. MANSFIELD. Yes, I'd like to respond to the question that was pending before that digression. It is absolutely incorrect that I told Craig Donsanto I had subpoenas prepared. I did not have subpoenas prepared. I was working on an investigative outline with the FBI agent to get to the point where we could issue subpoenas. The reason we wanted to do that was to be ready so that shortly after the election we could begin issuing the subpoenas so that we could gather the evidence and avoid any possible document destruction.

Senator TORRICELLI. Well, indeed, you seem to have made an impression on him because not only did he claim that you said that subpoenas were prepared and ready to be delivered, he on three instances in his memorandum comes to the conclusion that, though you have claimed this, he does not believe you. He says, "My guess is that there are no subpoenas and that this call was designed to give him ammo to charge that the change in jurisdiction was designed to prejudice the investigation of whatever crimes may have been present." Rather prescient thought, don't you think? Your reaction——

Mr. MANSFIELD. Am I entitled to that question, Senator?

Senator TORRICELLI. Please.

Mr. MANSFIELD. That's absolutely untrue, as far as I'm concerned. There were no subpoenas prepared during the time that I had this matter before it was removed from me. The reason there were no subpoenas prepared is because we were not planning—and I had discussed with Mr. Donsanto this issue. We were not planning to issue subpoenas prior to the election, for one very good reason: it would have been a bad thing to do. It would have politicized an investigation just prior to a Presidential election, and that's not a good way to begin a criminal investigation.

So we had made the decision not to issue subpoenas until after the election. I did not have subpoenas prepared before the election. We weren't ready to serve them before the election. In fact, what we were doing, as I explained earlier, was trying to get our arms around the facts. New facts were coming out in press accounts every day. We wanted to make sure that we had prepared a strategic investigative plan that allowed us to go to Point A before Point B in a logical way to maximize the evidence that we obtained. So we were not going to rush in some blunderbuss fashion to issue subpoenas willy-nilly. We were trying to do it in a strategic way, but also being aware of the need to move quickly. So that's what we were trying to do.

Senator TORRICELLI. Let me bring your attention to Mr. Donsanto, who in a later recollection writes, on July 30, 1999, that he pressed you on the question of the subpoenas. "He was very thin on what these subpoenas sought on his theory that data they were to obtain would be lost forever if the subpoenas were not served immediately. I remain unpersuaded that he had the subpoenas ready to serve when he placed this November 1, 1996, call to me."

It should be very troubling to have a superior in the Justice Department who on two occasions expresses a lack of confidence in your credibility and a call you are making on official business about an investigation which you are conducting.

Mr. MANSFIELD. Well, if Mr. Donsanto had questions about whether we were ready to issue subpoenas, Senator, they were never communicated to me before the case was removed from me or, significantly, after. And, frankly, I would have thought that either Mr. Donsanto or someone else in his section who took over the case would have called at some point to discuss what our thinking had been. I don't know whether they consulted with the agent I worked with. There were actually two agents. But I never received a call from them about where I thought subpoenas ought to be issued or as a follow-up to the investigative outline that I had prepared.

Senator TORRICELLI. But the call that——

Mr. Chairman, may I ask just one—interject one point?

Senator SPECTER. Will you yield, Senator Torricelli?

Senator TORRICELLI. Yes.

Senator SESSIONS. Have you seen these memos that Senator Torricelli is referring to? Have you been given a copy of them?

Mr. MANSFIELD. This is apparently a memo that Mr. Donsanto makes statements about the investigation, but he did not copy me on it. I'd like an opportunity to review them if there are going to be more questions about them.

Senator SESSIONS. Well, my question was: Have you had a chance to read it and study it before you are being asked about it?

Mr. MANSFIELD. I may have seen this memo in the last few days. The one that's been placed before me I have not reviewed.

Senator SESSIONS. Well, just do the best you can. I just wanted——

Senator SPECTER. Do you have a copy of it now, Mr. Mansfield?

Mr. MANSFIELD. I have a copy of a memo with no date that says "Lee" on the top. Is that the memo to which we're referring?

Senator TORRICELLI. That is, and that is from November 1, 1996.

Senator SPECTER. Senator Torricelli, is your copy—the memorandum is dated on page 2.

Senator TORRICELLI. Yes.

Senator SPECTER. At the bottom.

Senator TORRICELLI. It is.

Senator SPECTER. Single line on page 2.

Senator TORRICELLI. Did this telephone call, Mr. Mansfield, from Mr. Donsanto, in fact, take place? "Mr. Mansfield called me at 1:50 p.m. I returned the call at 2:05 p.m. and spoke with him for 5 minutes."

Senator SPECTER. Let's give Mr. Mansfield just a moment to read the memorandum.

[Pause.]

Mr. MANSFIELD. I was never provided a copy of this memo at the time that it was apparently drafted.

Senator TORRICELLI. Did the telephone conversation actually take place, Mr. Mansfield?

Mr. MANSFIELD. I'm sure that I spoke with Mr. Donsanto after the case was removed. I don't have a particular recollection of the date and time, but I know that—I would guess that I spoke with him on the day the case was removed, which would have been October 31. This seems to be dated November 1, but I don't have a specific recollection. I think it was about 4 years ago.

Senator TORRICELLI. Well, Mr. Mansfield, this is obviously a troubling situation to have someone in the Justice Department as your superior who seems intimately involved and knowledgeable of your work in several instances in two different memorandums over the period of 3 years raise questions about your credibility on an issue that is so important as your reporting to the Department of Justice on whether or not you have indeed drafted subpoenas or not. But, fortunately, the question is ultimately resolved by you on November 13, when you send correspondence under your own name and that of Norma Minella, who is the U.S. Attorney at that point in your district. Is that correct?

Mr. MANSFIELD. The point being November of 1996?

Senator TORRICELLI. I am asking you to identify Norma Minella.

Mr. MANSFIELD. For November 1996?

Senator TORRICELLI. That is correct.

Mr. MANSFIELD. Yes.

Senator TORRICELLI. In that letter, you write, "No subpoenas have been drafted or served, and no interviews have been conducted by this office or the FBI in Los Angeles in connection with this matter." Do you have a memory of that correspondence?

Mr. MANSFIELD. Let me take a look. Is this document in the binder before me?

Senator TORRICELLI. No, it is not.

Mr. MANSFIELD. Can I see a copy of it, please?

Senator TORRICELLI. Of course, now I don't have a copy of it, but we will share.

Mr. MANSFIELD. Yes, this is an accurate letter that I sent to Mr. Radek, and it responds to the letter that was formally sent to my office about removing the case. It does not include what I recall being attached, which was an outline of investigative steps, and as I recall, the reason it's dated November 13 is the letter that was sent to my office went to Stephen Ziperstein, who was the chief assistant, not to me. And by the time I got it, apparently a number of days had elapsed. But——

Senator TORRICELLI. In any case——

Mr. MANSFIELD. It is my letter, and there was attached to it an outline of investigative steps.

Senator TORRICELLI. I understand that. Thank you. But in any case, on November 13, it would then be accurate that indeed you did confirm, as indeed it was Mr. Donsanto's suspicion previously, that, in fact, not only had no subpoenas been served, but none had been drafted previously.

Mr. MANSFIELD. It was not only Mr. Donsanto's suspicion, it was absolutely true that no subpoenas had been drafted. I have never maintained otherwise to Mr. Donsanto or anyone else. We were not going to issue subpoenas before the Presidential election. We were using our time to get our hands around the facts, which were unfolding every day. It's 4 years later. People know a lot more now——

Senator TORRICELLI. Of course.

Mr. MANSFIELD [continuing]. About all these events. At the time, if I can complete my answer, new facts were coming out every day, many new facts. And so we were assimilating that information and working with the FEC In terms of getting information from public records as well as advisory opinions about foreign national finance rules, and putting together an investigative plan to issue subpoenas.

I believe Mr. Donsanto was aware of that. Why he is saying in a memo that I would have prepared subpoenas ready to serve before a Presidential election, I do not know.

I also noticed in his memo he said that in his experience documents don't get trashed. Well, I was a Federal prosecutor for 11 years, and I can tell you that it is certainly a risk in every case involving documents and Federal violations that there is a significant risk of people destroying evidence or trashing it. So I would disagree with Mr. Donsanto on that point as well.

Senator TORRICELLI. Mr. Mansfield, you were involved in the prosecution of the Kim case in California?

Mr. MANSFIELD. Yes, sir.

Senator TORRICELLI. Are you aware that Mr. Donsanto has stated criticism of your handling of that case?

Mr. MANSFIELD. No, I'm not, because Mr. Donsanto approved each prosecutive decision made in the case in terms of indictment decisions, plea agreement decisions, and sentencing decisions. Each

time a critical decision needed to be made in that case, I conferred with Public Integrity and specifically with Mr. Donsanto. Each time he concurred with the recommendation that we ultimately pursued in that case.

Senator TORRICELLI. Would it surprise you to know that in his memorandum of July 30, 1999, he wrote that his memory was that you had been calling every other day complaining that your superiors were undermining your investigation and the strategy in the case?

Mr. MANSFIELD. I don't know what memo you're referring to in 1999. I wasn't even in the Department of Justice in 1999.

Senator TORRICELLI. This is Mr. Donsanto's recollection of his experiences with you and the Kim case.

Mr. MANSFIELD. In 1999, you're telling me that Mr. Donsanto was writing a recollection of what had happened 3 years or 4 years earlier?

Senator SPECTER. Excuse me. Let's make a copy of that memorandum available to Mr. Mansfield.

Senator TORRICELLI. Mr. Mansfield, admittedly, Mr. Donsanto's memo was written several years later, but it was one year closer in time than what you are expressing to the committee right now. So, indeed, it cannot be claimed not to have any credibility whatsoever.

Senator SPECTER. Let's just take a moment to give Mr. Mansfield a chance to read the memo.

[Pause.]

Mr. MANSFIELD. I have never seen this before, and I don't know why in July 1999 Mr. Donsanto would be writing a memo unless it had to do with the fact that congressional committees were investigating decisions by Public Integrity.

Senator TORRICELLI. Mr. Mansfield, you and I are the only ones here who have the advantage of reading this. I don't know if—do you, Senator Sessions, have it?

Senator Sessions. I have a copy, yes.

Senator TORRICELLI. And Senator Specter does. For those others who are listening, the reason is clear on this. He received a press question about the handling of this matter, so he is reconstructing contemporaneously at that time his recollection of events, just as we are asking you to do so orally today.

Now, there are several things in this memorandum that bear on this question, and in a moment I will explain why I am raising them. But one of those is whether or not—indeed, Mr. Mansfield, I regret to raise—you have a pattern of raising questions as to whether you are being undermined by your superiors. It would appear to be, at least the inference from your testimony today, that in this matter being removed to Mr. Radek's office, this somehow was not in the interest of justice and was undermining an investigation.

Mr. MANSFIELD. That's absolutely incorrect, and that is not my testimony, Senator. I've never——

Senator TORRICELLI. So you believe that——

Mr. MANSFIELD. Excuse me——

Senator SPECTER. Let him finish.

Mr. MANSFIELD. Excuse me, Senator. I'd like to respond to the point you've just made. It is incorrect to say that I have information to believe the investigation was undermined. I do not. I was not involved in the investigation that occurred when the case was taken from me. I have no information——

Senator TORRICELLI. So would it be your testimony——

Senator SPECTER. Senator Torricelli, let the——

Mr. MANSFIELD [continuing]. What was done——

Senator TORRICELLI [continuing]. Witness finish his——

Senator Specter, I——

Senator SPECTER. Excuse me, Senator Torricelli. The witness has been repeatedly interrupted, and I think unfairly.

Senator TORRICELLI. Senator Specter, if I cannot conduct an interview of a witness as I as a member of this committee want to do so in the limited time that I have to elicit the best answers I believe are appropriate, not only will this examination not continue, but neither I nor a member of my party will remain in this committee. This witness is here to testify. He is under oath. He has important information about the integrity of Mr. Radek, a senior official at the Justice Department, the Attorney General of the United States, and the President of the United States. This is a matter of great seriousness.

I have never and would never interfere with your examination of a witness. I have not been rude to him. I have not been abusive to him. I am not leading him. I am trying to focus his testimony on documents in the limited time that I have available. And I would like to proceed, with all due respect, to do so.

If at any point you find I am abusive to him, misleading him, confusing him, by all means, interrupt my testimony because that is not my intention. But if I am doing so politely and properly in procedures of this committee, I would like to proceed. I only have a few minutes left, and I have three more matters I would like to get his testimony on.

Now, it appears from Mr. Mansfield's testimony I may have misunderstood him. He has now said that he does not question the integrity of the judgment, that indeed if I am now understanding him properly, it may not have been improper in his opinion for this matter to be transferred from Los Angeles to the Justice Department. If that is his testimony, it is welcome. If I have misunderstood him for that, I apologize. But, indeed, it would be helpful to this committee.

So if I could restate the question, is it——

Mr. MANSFIELD. Can I——

Senator TORRICELLI. I am restating the question for you. Is it, therefore, your testimony that given what the committee now knows about procedures in the independent counsel law, that their judgment about not interfering with the electoral process, the issuance of subpoenas, the resources available in Washington, whatever other reasons Mr. Radek may cite, that indeed in your judgment it was not improper and indeed was in the public interest to transfer this matter to Mr. Radek's office?

Senator SPECTER. Before you answer, I want to respond to Senator Torricelli briefly. You may have as much time as you like with Mr. Mansfield. No one is saying you have been abusive or in any

way discourteous. I have been a party to many, many proceedings and hearings and in court, and a witness is always permitted to finish an answer. It may be that on some occasions a witness may be interrupted if he has finished a thought and if—there is a wide latitude which the questioner has, especially a Senator questioner. And as far as I am concerned, you have very, very broad latitude. But a witness also has a right at a point to finish an answer. That is my only point.

Senator TORRICELLI. That right will be respected by me, Senator Specter, and indeed I will not prohibit any answers from coming. But I simply want to focus the question, because—let's clear up this matter. Is it your testimony, then——

Mr. MANSFIELD. May I respond?

Senator TORRICELLI [continuing]. That that was proper?

Mr. MANSFIELD. Well, that is a very large question, and let me do my best to answer it based on the limited knowledge I have, and so there is no misunderstanding about my testimony at all, Senator.

I do not have information that can be critical of the way the Public Integrity Section handled the investigation after it was taken from me because I don't know what they did or did not do. I was not involved in that. So I have never been critical of what they have done or not done in terms of investigation, and I have never had a basis to opine about their position on Independent Counsel Act review. I was not involved in that. I did not have any information. The matter was simply taken off my desk effective October 31.

That is my testimony. It is as narrow as that.

I don't know if that responds to your question.

Senator TORRICELLI. Therefore, you do not have anything to offer this committee or any reasons to believe that this matter was not pursued aggressively or with integrity or that there was any reason to remove this matter from the Los Angeles office other than Mr. Radek's judgment of his interpretation of the independent counsel law, his resources, experience with the matter, and that he thought justice was better served by this matter being handled in Washington?

Mr. MANSFIELD. Well, I don't have any reason to doubt Mr. Radek's good-faith decisions about the case. I did what I thought was the right thing to do during the short, approximate 2-week period I had the matter. I had worked as a prosecutor by that time for 9 years. I had made a lot of complex cases as a prosecutor. I saw the need to put together an investigative plan and hit the ground running after election with a full-scale investigation to preserve evidence and move forward on certain targeted subjects based on our analysis of what was coming out at that point. That's what I did, and I think, frankly, we did the right thing.

Now, if the case was taken by Public Integrity and the Department of Justice and there are questions about how it was handled once taken by them, I'm simply not in a position to answer those questions because I don't know what was done or not done.

Senator TORRICELLI. That is very helpful. Now let me just for a moment put the committee in Mr. Radek's position. Mr. Radek sees these allegations about matters in the midst of a Presidential campaign in 1996. It is Justice Department procedure, and indeed I be-

lieve in the best interest of justice in the middle of a Presidential campaign, not to conduct investigations or have the risk of things becoming public that would interfere with the electoral process.

He then receives reports on November 1 from a trusted subordinate that makes several claims: one, stating his own belief that, in fact, there were not subpoenas ready; therefore, there was not an interference with anything that was ongoing; second, this subordinate apparently was of the belief that in the handling of the Kim case there was a failure of focus, that is, the case which you handled had dealt with subordinate and side issues which had detracted from the main matter, meaning Congressman Kim.

Now, this may or may not be an accurate portrayal of the situation, but I am trying to re-create the situation in which Mr. Radek found himself.

Mr. MANSFIELD. Well, let me—I have never—I was not a party to this memo that was created last year by Mr. Donsanto, but if you'd like to talk about the Kim case, I can fill you in on what went on in that case because it was actually a very, from my standpoint, interesting and ultimately successful investigation and prosecution. I believe both Mr. Radek and Mr. Donsanto would agree with that.

It was a long-haul investigation. It is incredibly difficult and time-consuming to make campaign finance prosecutions, and——

Senator TORRICELLI. It is not my intention to criticize your handling of the case.

Mr. MANSFIELD. No, but you raised questions about the investigation and whether there was a focus, and I wanted to respond to that statement about the focus of the investigation.

There were times in the course of that investigation that, frankly, there was an interest in closing it down, in shutting it down, because it did take a lot of time to complete. And, frankly, I did disagree. At times I think Mr. Donsanto thought we should wrap it up. I think at times there may have been people in my office who thought maybe we should wrap it up. The agent and I who had been working with it were, frankly, dogged. We wanted to get to the bottom of it. We continued to pursue it. And as we got to the fifth foreign company, Hitai, the fifth one that we obtained a conviction, it was at that point that we actually had a very significant amount of cooperation in the deal that broke the case. And had we shut it down—just so I can finish because you raised this, had we shut it down earlier, we would not have gotten that cooperation from Hitai, the fifth corporation we convicted. That cooperation led to the conviction of the campaign treasurer, the campaign committee, and ultimately the Congressman.

So I think at the end of the day, Mr. Donsanto and I know Mr. Radek would agree, it was a successful prosecution. It was ultimately the largest campaign fraud prosecution ever brought against a Member of Congress.

Senator TORRICELLI. Indeed, Mr. Mansfield, it may have all been done properly, and it may be a model of prosecution. I am trying to re-create Mr. Radek's situation in November 1996. He was faced with a judgment on what is potentially the most important campaign finance question in history dealing with the President of the United States. He was dealing with Justice Department procedures not to proceed with a case in the midst of an election because it

could influence the electoral process. He was dealing with a subordinate indicating that he had a conversation with you right before the election in which the subordinate expressed doubts whether you were dealing with him frankly and whether or not, in fact, you had prepared subpoenas. It now appears by your own correspondence that subordinate was correct, you had not done so.

He is dealing with criticism from a subordinate who is claiming in the only other major campaign finance case that you had handled that there was a lack of focus and criticism of the case, criticism which may or may not be well founded but, nevertheless, was making its way to Mr. Radek. And then Mr. Radek was dealing with the independent counsel law, which does not envision subpoenas or offering immunity but had specific procedures which were better handled in Washington.

He then, I assume, was making the judgment he had the expertise and the proper resources to handle this matter correctly and bring it to its proper conclusion. And you——

Mr. MANSFIELD. I don't quarrel——

Senator TORRICELLI [continuing]. Are not quarreling with——

Mr. MANSFIELD. I don't quarrel with the idea that Public Integrity believed it should handle the case or that it wanted to take the case away from the U.S. Attorney's Office.

Senator TORRICELLI. I recognize——

Mr. MANSFIELD. I don't quarrel with it because it doesn't matter who the person is working a case. It really doesn't. And it's not about the individual. It's about doing things right. And if the case is handled properly, it doesn't matter who's handling it, whether it's someone out of D.C. or in Los Angeles.

I'm very proud of the office I was with for 11 years. I know the caliber of work product and the caliber of AUSA in that office, and I know that we've always done a great job on our cases. So I am always confident that my former office can handle a case well.

But it's not to say that it couldn't be handled by the Public Integrity Section or other U.S. Attorney's Offices around the country. I don't quarrel with that at all, and if there is a question about whether things were done properly once the case was assumed by Public Integrity, they're really the ones in the position to respond to that, not me. I've never offered an opinion of it, and I don't quarrel with the fact that the case needed to be handled in some way by some prosecutor at all.

Senator TORRICELLI. Very good. I think that testimony is helpful. I think it puts perspective on Mr. Radek's judgment, makes clear that you are not questioning the judgment in doing so. I think it lays the facts out properly, and I think your testimony is very helpful, and I thank you.

Senator SPECTER. Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Mr. Chairman, I think it is important for us to refocus a bit, and I will make a few opening comments, and I think I can clarify some of this confusion that is going on here.

I know Mr. Donsanto well. I don't know how many cases he has tried. I know how many Mr. Mansfield apparently has tried. And

as to the judgment of a case, I would tend to favor the discretion and judgment of the one who is living with it on the field, who has got to stand in court before a judge and defend it.

And I would just comment on the memos of Mr. Donsanto. They were a little bit of a cover-your-fanny mentality about them, pretty dramatic, I think.

In 1996, people were raising money for the campaign. This was late in the campaign. The evidence—a newspaper broke the story that there had been a fundraiser at the Buddhist Temple, the Vice President had been there, that foreign money had been contributed. It is illegal to give foreign money to a campaign. That was big news. It actually became a significant issue in the latter days of the campaign. Everybody in this country had some knowledge of it who paid any attention to the issues, and it was discussed whether or not one of the sources was the People's Republic of China and whether or not the People's Republic of China was participating in a determined effort to influence this campaign.

The Democratic National Committee, which handles much of the fundraising for the Clinton-Gore campaign, returned over $2 million in illegally raised money from many foreign sources, including the People's Republic of China.

An examination of the fundraising for that election, most of which, of course, was legitimate, must include an examination of the 1996 Buddhist Temple event which Vice President Gore attended. Who were the people surrounding him at that event? Were the people involved in this event involved in illegal foreign-source contributions? What was the role of the Vice President's staff and the DNC staff in raising these monies? What was the Vice President's role regarding the event?

The questions arising from the funding of the 1996 Presidential campaign in general and the Buddhist Temple in particular are so important to the integrity of our process that they resulted in a series of investigations. And so Mr. Mansfield testified how he started his investigation.

And so I would just say this: There are two issues involved in this campaign of real significance. The first is the legal question, which we have been discussing for some time, of whether the Attorney General should have appointed an independent counsel to investigate Vice President Gore, who would have been the relevant covered person. Second, what was the weight of the proof of the facts that show that a violation may have occurred and whether or not that required an independent counsel?

So that is the matter we are dealing with. It is not an itty-bitty one. It was a big deal. I think it is appropriate for us to analyze the decisionmaking process of the Department of Justice.

Now, let me ask you, Mr. Mansfield, a few things here. From what you have studied in the newspaper, you were concerned about it. You had a number of years of expertise in white-collar fraud and public corruption cases. Is that correct?

Mr. MANSFIELD. Yes, sir.

Senator SESSIONS. And you thought something should be done.

Mr. MANSFIELD. Yes, sir.

Senator SESSIONS. I believe in your book there, your binder, there is a document. Is there a document there that you prepared? My staff I think handed it to you.

Mr. MANSFIELD. Oh, yes.

Senator SESSIONS. Yes. Now, all this talk about you issuing a subpoena and Mr. Donsanto saying you issued a subpoena and you looked right at us befuddled and say you never issued one, sometimes a telephone conversation can get a little bit confused, and it is easy to happen. People hear different things.

Is Mr. Donsanto kind of excitable?

Mr. MANSFIELD. Well, I'll leave that to those who have met him and worked with him to answer——

Senator SESSIONS. Well, you met with him and worked with him. Does he get excited sometimes?

Mr. MANSFIELD. Yes, I think it might be fair to say that he's excitable.

Senator SESSIONS. All right. Well, at any rate, he is a good person. I have known him for many years. But I guess what I would say to you is: It wasn't untrue that you had begun to think about subpoenas and had actually done some paperwork as of October 30, the day before this phone call reported, to begin commencing drafting subpoenas. Is that correct?

Mr. MANSFIELD. Absolutely right. I mean, the point here is that there was a need to begin an investigation, a need to do it properly, and a need to do it in a strategic, organized way. We were on the path to do that.

The question about whether someone had subpoenas on a particular day versus another day is really a red herring. The question is——

Senator SESSIONS. I can't understand why that——

Mr. MANSFIELD [continuing]. Was there a proper investigation proceeding to gather and preserve evidence. We were on that track for the 2 weeks that we had it, and if subpoenas were issued or prepared by Mr. Donsanto on the day that he took the case over or someone else, that is for Mr. Donsanto and others to answer. I no longer had the case. It was taken from me. But during the time period that my office had the case, I believe we proceeded expeditiously and properly in trying to move forward.

Senator SESSIONS. Well, and you even as of that date, October 30, had prepared a list of some potential people to be subpoenaed and some of the documents to be requested, had you not?

Mr. MANSFIELD. This was a partial list, and it's something that prosecutors do, and I know that Senator Specter, who has me beat by one year as a prosecutor, I'm sure did this in his cases as well. You begin a working outline.

Senator SESSIONS. Right. That is all I am saying.

Mr. MANSFIELD. And it changes over time.

Senator SESSIONS. You had begun to think about the question of subpoenas. In your professional judgment and experience, it was important to subpoena the records, either you or somebody else, before they got destroyed——

Mr. MANSFIELD. Absolutely.

Senator SESSIONS [continuing]. Removed or otherwise been disposed of.

Mr. MANSFIELD. Yes.

Senator SESSIONS. And you were aware that many of the people in the Buddhist Temple were not American citizens and had the potential to flee the country or leave the country.

Mr. MANSFIELD. There was that risk.

Senator SESSIONS. And if you don't interview people like that before they go back to Red China, you are not going to ever be able to interview them. Isn't that correct?

Mr. MANSFIELD. Well, once they leave the country, it is exceedingly difficult to ever, you know, make the case with those witnesses. That's true.

Senator SESSIONS. Wasn't it prudent and sensible to you to think that the matter, whether there was any merit to the complaints or not, the investigation needed to go on and get started promptly?

Mr. MANSFIELD. Yes. I did agree, though, with the proposition that we ought to not issue the subpoenas until after the election because I thought that was the responsible way to proceed.

Senator SESSIONS. Well, all right. That is a judgment call that I would respect. You could take another position, too. Why wait just because the guy is running for President of the United States? Why does he get a break that an average guy wouldn't? But I can understand your——

Mr. MANSFIELD. The decision wouldn't be made to give a person a break but, rather, a weighing of the risks of what effect the issuance of the subpoena might have.

Senator SESSIONS. "Give him a break" was my term. But there was no law that told you you should wait until after the election. It was a courtesy, a respect for the system that you decided outweighed the other choice.

Mr. MANSFIELD. Yes, it was a balance, and I think it's the correct balance. You're right that, you know, these are judgment calls. I think it was the correct balance because you have to go back in time, I mean, this was all unfolding on a daily basis and——

Senator SESSIONS. Well, I am not criticizing you for that.

Mr. MANSFIELD. And what we were—we were trying to piece it together, and we had a couple of weeks. And, frankly, we needed a couple of weeks to make sense of it all and put together an outline for subpoenas and interviews. And that's really what we were doing.

Senator SESSIONS. In this memo, I see in the third or fourth paragraph, Mr. Donsanto says, you told me—Donsanto—"that in his view"—I will just read it—"he"—talking about Mansfield—"then told me that in his view these subpoenas were needed to prevent records from being destroyed." Is that a concern of yours that you may have expressed with Mr. Donsanto during that conversation?

Mr. MANSFIELD. Yes.

Senator SESSIONS. Later on, "I asked him whether he had any specific exigent circumstances suggesting to the contrary"—that is, destruction—"and he did not, although he restated his view that the stuff would be trashed if his subpoenas were not served." Does that sound like something you may have told him in that conversation?

Mr. MANSFIELD. It does in the sense that—I mean, I'm not sure those would have been my words, but, you know, I did have concern about document destructions, and I did have a concern about moving at an expeditious rate to secure the documents. And there's a concern about loss of documents. I mean, I frankly had cases early as a prosecutor where massive amounts of documentary material had been destroyed. In fact, it became a count in the indictment, an obstruction of justice count.

So it does happen. I disagree strongly with what's written in this memo that document destruction is not something to be concerned about in campaign finance fraud cases. I think it's just completely inaccurate, and I think the job of a prosecutor is to vigorously enforce the law and to conduct thorough, informed investigations, and you need simply to secure the evidence. You can't, you know, make decisions not to secure the evidence.

Senator SESSIONS. Well, let me ask another, a different question. This Congressman Kim, he was a Republican Congressman, was he not?

Mr. MANSFIELD. Yes, sir.

Senator SESSIONS. And you pursued that investigation to its end, and he was convicted.

Mr. MANSFIELD. Yes, sir.

Senator SESSIONS. Are you suggesting that at points during the process that Mr. Donsanto and others didn't feel like the case was going to succeed and wanted to pull back? Is that what you were suggesting?

Mr. MANSFIELD. In the Kim case?

Senator SESSIONS. Yes.

Mr. MANSFIELD. Well, I'm trying to make sense of Mr. Donsanto's statements in these memos about the case not being focused and there being some disagreement with superiors.

I do recall—and I don't criticize Mr. Donsanto for this. I mean, you know, being a prosecutor is a very demanding job, and you have to make judgments.

Senator SESSIONS. He has the advantage over——

Mr. MANSFIELD. And there are times—there are times when it makes sense to simply decline a case or stop proceeding on a case, on an investigation. And so it's a healthy debate and it's an important debate, and it's one that, you know, prosecutors and supervisors need to have on a regular basis.

In the Kim case, I can tell you—and I had to be the "I told you so" mode, but there were people who wanted to shut it down at various points in time. I don't say that because they had some bad intent, but it was their sense that it was taking longer than they thought it should take. And I can tell you, these cases are extraordinarily difficult to make. They're hard to make, they take a lot of time, and there's just an immense amount of political and other loyalties involved that you don't see in other cases. And it makes it very difficult to flip witnesses and build cases, so it does take time.

In our experience in the Kim investigation, what we found is that by being dogged and moving forward—and in this case it was on the fifth corporation that we convicted—we finally got the co-

operation we needed and the documents we needed to close out the case.

Senator SESSIONS. Well, we need to move on, but I would just suggest that you had to take some of these contributors which he criticized you for in that memorandum and prosecute those, and it took the fifth one before they confessed and admitted the scheme and you were able to really make the case. And I think that shows sometimes that the person on the front line who's trying the case has a better perspective than a line attorney, an attorney back in Washington.

I also would note, Mr. Chairman, the tenor of this memo shows why it is hard for even career attorneys—Mr. Mansfield had been there a number of years—to ever speak out. They are sort of victims of their superiors. This is what Craig Donsanto wrote: "I responded to him and ended my conversation by telling Mansfield that he and I are both soldiers in this matter, that there is nothing personal this, he should not consider this personal, that we needed to follow whatever the marching instructions are, and do so without discussing the matter outside the circle of Federal law enforcement, that as one particularly sensitive to such issues, I saw nothing sinister in the reassignment of the particular matter to Public Integrity," et cetera, et cetera. There are several other notes there.

So there is a lot of discipline within the Department, and people, professionals, don't like to criticize their supervisors, and they are overruled, they take it and go about their business day after day and don't get involved in that.

Mr. MANSFIELD. I appreciate that, Senator, and could I just add something to that?

Senator SESSIONS. Please.

Mr. MANSFIELD. This wasn't a personal decision from my standpoint. I mean, I had enough work on my plate at the time. I had the Kim investigation at the time. There was an investigation of a Federal judge, and there were other corruption investigations I was involved in.

This wasn't personal to me. I didn't need another case. There were other prosecutors who could have handled this, either in my office or in other parts of the Department of Justice. So I don't have any quarrel with the notion that the case is going to be assigned to someone else to work.

If there are questions about what was done during my handling of it, I'm happy to answer all those. But the questions about what was done after it was taken from me need to be answered by the people who had the case then.

Senator SESSIONS. Well, Mr. Radek—well, let me just say this: I do believe there is evidence at the time that you possessed, that all of you possessed, that the Vice President exercised bad judgment and was involved with a cast of characters we now know are criminals. Many of them have been convicted. I have got a poster here I would just like to show. This is what occurred at that Buddhist Temple. This is a photograph of the group that was there.

It shows a picture of the Vice President. To his far right is Maria Hsia, his long-time friend and fundraiser of more than 10 years, who was subsequently convicted on five felony counts. Her conviction stemmed directly from the Buddhist Temple fundraiser.

To Vice President Gore's immediate left is Ted Sioeng, who fled the country as soon as he was implicated in the fundraising scandals, as Mr. Mansfield suggested might happen, and who we believe is still under criminal investigation.

Behind and to Vice President Gore's right is John Huang, a vice chairman of the Democratic National Committee staff who helped the Vice President plan the temple event. Mr. Huang also subsequently pleaded guilty to a felony charge. He raised over $1 million in illegal foreign-source campaign contributions.

Finally, behind the Vice President and to his far right is Man Ho Shih, a Buddhist nun, who admitted to another committee of the Senate that she and others set about destroying documents at the fundraiser, the temple fundraiser. Those documents were destroyed because they "did not want to embarrass the Vice President." She also fled the country before she was scheduled to testify in a court of law.

There was a video of that event showing what happened. That video has disappeared.

Moreover, the Senate Governmental Affairs Committee has stated that Maria Hsia is "an agent of the Chinese Government, that she acted knowingly in support of it, and that she attempted to conceal her relationship with the Chinese Government." The committee concluded that Ted Sioeng "worked and perhaps still works on behalf of the Chinese Government." These conclusions have never been satisfactorily refuted and must be thoroughly investigated.

I believe that the Vice President owes an explanation to the American people about this. More importantly, for this hearing, it is important for us to know why the planned investigation by the Los Angeles U.S. Attorney's Office was stopped, but, more importantly, why no investigation occurred after that investigation was stopped. That was what was really wrong, in my opinion. So I hope our hearings will focus on that.

Mr. Radek, to follow up on what Senator Specter asked you, again, as of approximately a month after you wrote to Mr. Mansfield in the U.S. Attorney's Office and took over that case, you recommended to the Attorney General that there be no independent counsel. You took over the case under the theory that you were investigating whether or not an independent counsel appointment should be made. And my question to you is: Did you issue any subpoenas for any documents? Did you interview any witnesses at the Buddhist Temple who had been there before you made that recommendation? And if you did any other investigation, please share it with us.

Mr. RADEK. Senator, first let me point out that all those people are convicted felons because of the work of the campaign finance task force. All right? So let's give a little credit where credit's due.

Now, let's talk about what we did. There was an immediate investigation done, but first there was an independent counsel analysis done. And what was done there was to look at the allegations. There were no interviews conducted. There were no subpoenas issued. The independent counsel statute doesn't let us do it.

And so what happened was we analyzed a letter from Congress, five Members of Congress, the material that Mr. Mansfield had

sent, which wasn't just that outline, which sort of laid out and gave some leads, but also the press accounts that he had accumulated that he sent, the press accounts that we had accumulated. We looked at all that information to see if there was an allegation against the Vice President. Is there something here that says he committed a crime? And does that amount to specific and credible information? The answer was no, Senator, and——

Senator SESSIONS. OK. Well, let me ask you this——

Mr. RADEK. And then we started an investigation of the Hsi Lai Temple matter, and that was as vigorous an investigation as you could ever want to see.

Senator SESSIONS. You said this special prosecutor act doesn't allow you to investigate—interview witnesses?

Mr. RADEK. No. I said it didn't allow us to issue subpoenas. I was referring to the second problem——

Senator SESSIONS. But the U.S. Attorney's Office could have, and you stopped them.

Mr. RADEK. No, sir. Once we started an independent counsel analysis, that had to be stopped, and it was done on many other occasions with other U.S. Attorney's Offices on other independent counsel matters. That's what the statute required.

Senator SESSIONS. But you could have interviewed witnesses?

Mr. RADEK. Oh, yes, sir, we could have.

Senator SESSIONS. And none were interviewed?

Mr. RADEK. None were interviewed during the one month that we were doing the analysis on the independent counsel statute.

Senator SESSIONS. No investigation was done other than from your own letter to the Attorney General or the Attorney General's declination of a special prosecutor. All you did was review the letter from Congress and the newspaper reports. You don't say you considered any other evidence before you suggested that they—you denied an independent counsel?

Mr. RADEK. I'm glad you used the term "evidence." We considered all the information that was before us. We considered everything we had to see whether any of that amounted to an allegation that the President—Vice President had committed a crime. And we came up no.

Senator SESSIONS. Well, do you deny that witnesses fled the country and that evidence was destroyed before your investigation got untracked?

Mr. RADEK. I am aware that the two clerics, Man Ho and Yi Chu, have testified before a congressional committee that they were destroying documents shortly after the matter hit the newspaper and also in November.

Senator SESSIONS. Do you know how many people that were at that temple fundraiser have fled the country and are now unable to be interviewed?

Mr. RADEK. I don't know how many witnesses have fled the country and weren't able to be interviewed. I asked the trial attorney in charge of this matter, and he told me that he was confident that they didn't lose any evidence due to people fleeing the country.

Now, the two clerics that you talked about that fled, that were unavailable for trial and under indictment for having not shown up

for trial, their evidence was obtained. We know what they said. They're the ones who told us that they were destroying documents.

Senator SESSIONS. But they have now fled and are not available for testimony——

Mr. RADEK. That's right, but Ms. Hsia was——

Senator SESSIONS [continuing]. In any trial or prosecution that——

Mr. RADEK. Ms. Hsia was convicted anyway.

Senator SESSIONS. Well, there are others that might be charged in this case. Isn't that correct?

Mr. RADEK. That's correct, and that's why the investigation is proceeding.

Senator SESSIONS. Well, do you deny that you received a letter from five Members of Congress, you stopped the prosecutor who was ready to do investigations, you conducted no independent investigation yourself, and then you advised the Attorney General and she declined a special prosecutor?

Mr. RADEK. She declined to appoint a special prosecutor based upon the letter from Congress. At the time she made that decision, we gave her all the information we had, which was not investigative information but was press reports and the other information that Mr. Mansfield provided.

Senator SESSIONS. Well, it would be my view that before you advise the Attorney General on a matter of this import, just as a person who has been involved in prosecutions, I would think you would interview some witnesses. I think you would go and talk to the people at the temple and ask them what happened. I think you might even have interviewed the Vice President. It seems to me almost beyond belief that you would not do that, and as a result of that, evidence was lost, in my view.

Mr. RADEK. Well, I'm sorry, I question that as a result of that the evidence was lost. And if it was, it's unfortunate. But that was the requirement of the independent counsel statute.

Senator, what you're saying is you wanted the decision made after an investigation, and that's exactly what we tried to do. We started the investigation. We conducted it, and had any evidence come up that was specific and credible against a covered person, we would have triggered the independent counsel statute, as indeed the Attorney General did on several occasions.

Senator SESSIONS. What about the first time the Vice President was interviewed about this matter, about the temple? How long was it before he was even interviewed about it?

Mr. RADEK. I don't know. As I testified previously, the one interview I conducted, he was not asked about this.

Senator SESSIONS. Well, it was 4 years, according to our records, and that does not suggest to me, Mr. Chairman, that we are handling this matter wisely. I do not dispute that Mr. Radek may have had the authority and maybe even the right—if not the right, the ability to take over the case and pursue it. Maybe that was even the right thing to do for him. But if he were going to do that, he should have done the things an investigation required. Those were not done. The Attorney General herself was not given the kind of evidence that she needed to make a good decision, and I believe a bad decision was made. And it has hurt the Department of Justice.

Whether or not there was any criminal wrongdoing by any covered person, I believe this decision should have been made outside the Department.

Senator SPECTER. Thank you, Senator Sessions.

Mr. Radek, moving on to some other subject matters——

Mr. RADEK. Yes, Mr. Chairman.

Senator SPECTER. And, Mr. Mansfield, that concludes your portion, so we thank you, and you are free to go. Thank you very much.

Mr. MANSFIELD. Thank you, Senator.

Mr. RADEK. Mr. Chairman, may I get a glass for water?

Senator SPECTER. Of course, yes. Would you like a break, Mr. Radek?

Mr. RADEK. I'm fine. I just need a drink.

Senator SPECTER. OK. Back to the inquiries made as to Mr. Terry McAuliffe, on March 13, 1996, you submitted a memorandum to Mr. Keating, which the essential part is, "I have concluded for the reasons set forth below that McAuliffe is not a covered person."

Subsequent to that memorandum, on September 30, 1997, there was an issue raised as to Mr. McAuliffe being the subject of a Federal criminal investigation in the Southern District of New York. The memorandum says this: "Because McAuliffe is a subject of a Federal criminal investigation of the Southern District of New York, we advise the U.S. Attorney's Office for SDNY"—meaning Southern District of New York—"that it was required to hold any investigation that encompassed activities by McAuliffe in abeyance pending results of the inquiry into McAuliffe's status under the law."

Now, the issue or the question has been raised as to your removing the New York U.S. Attorney's Office from the case in order to stymie that investigation. What reason was there to call off the Southern District of New York U.S. Attorney when you had already made a determination that Mr. McAuliffe was not a covered person?

Mr. RADEK. Well, Mr. Chairman, if I may go into the statute——

Senator SPECTER. By all means.

Mr. RADEK [continuing]. This was one of the most troubling parts of the independent counsel statute. It defined campaign officials in a sort of amorphous way, and I think the congressional intent was to keep campaigns from avoiding the strictures of the Act by redesignating in terms of title so the Act wouldn't name anybody in particular.

It called for a person to be covered if they were a national officer or an officer of the campaign exercising national authority. I can't find the language right here, but it's something close to that effect.

Senator SPECTER. Mr. Radek, before you go too deeply into that—and I will give you a full chance to do that. By the way, it is now 5:38 p.m., and we have been notified that there are going to be two votes at 6:10 p.m., and we have a fair amount of ground to cover. But I will hear you out on the point you are making, but let me just ask you a very narrowly focused question. Whatever the statute defines a covered person to be, you had already determined that Mr. McAuliffe was not a covered person.

Mr. RADEK. That's because he was holding a different position in the first memo than the second memo, and the coverage is dictated by the position.

Senator SPECTER. What position was he holding at the time of the first memo?

Mr. RADEK. If you'll let me read the memo so I know——

Senator SPECTER. I will read it along with you, whether——

Mr. RADEK. The first one was the 1992 election campaign.

Senator SPECTER. Well, this is March 13, 1996.

Mr. RADEK. No, but his position was in the 1992 election campaign.

Senator SPECTER. Well, you define Mr. Terence McAuliffe as "the Finance Chair of the Clinton-Gore Re-election Campaign," and in your letter of September 30, 1997, you define his——

Mr. RADEK. Honorary Campaign Co-Chair.

Senator SPECTER. Wait just a minute. As the Finance Chair and then Honorary Campaign Co-Chair of the Clinton-Gore Re-election Campaign.

Mr. RADEK. Right. And it was the change in status to that second one that caused the re-evaluation. And, Mr. Chairman, may I say, I didn't take this case away from New York. I temporarily halted their investigation while this analysis was done.

Senator SPECTER. How long did you halt it?

Mr. RADEK. Not very long. I can't remember but it was a matter of weeks, I think.

Senator SPECTER. So you are saying that the status as Honorary Campaign Co-Chair led you to question whether that would make him a covered person. Both times he was the Finance Chair, but the second time he was also an Honorary Campaign Co-Chair. And you are saying that the title of Honorary Campaign Co-Chair required an analysis as to whether he was a covered person and to remove that matter from the New York U.S. Attorney's Office even for some period of time.

Mr. RADEK. I still argue with your term "remove," Senator. I asked them to stop—I asked them to stop while I made that analysis. And, yes, any kind of national title like that would cause us concern and cause us to do a quick analysis.

Senator SPECTER. How quick was the analysis?

Mr. RADEK. Again, I don't remember, but I'm quite confident it was very brief.

Senator SPECTER. Mr. Radek, turning to the inquiry as to Charlie Trie, a subpoena was issued by the Governmental Affairs Committee in March of 1997, and there was a trash cover—and I am trying to boil this down to a focused essence to move as quickly as we can. Testimony by FBI Agent Smith before the Governmental Affairs Committee was this: "As we continued the investigation, a trash cover of Mapill's residence revealed documents in the case, checks with Asian-sounding names all in the amount of $1,000 payable to the 'Presidential Legal Expense Trust' were being destroyed. And I was told that departmental attorney Laura Ingersoll stated this matter would not be pursued. And, further, she was of no obligation to advise the Senate Ms. Magdali was routinely destroying documents covered by a Senate subpoena."

As a result of this testimony, the chairman of the Governmental Affairs Committee, Senator Thompson, had some very harsh comments. My question to you is: First of all, was Laura Ingersoll under your Department at that time?

Mr. RADEK. Yes, she was.

Senator SPECTER. Well, why did she do what she did, saying that the matter would not be pursued and not even to advise the Senate Governmental Affairs Committee about the document destruction?

Mr. RADEK. Well, the quote that you cite from Mr. Smith deals with the Presidential Legal Expense Trust. And it was the FBI's theory in Arkansas that it would be a Federal crime for the Presidential Legal Expense Trust to accept foreign contributions.

We disagreed, and so I'm sure what is here is a memorialization of Laura Ingersoll's legal opinion that this was not a Federal offense.

Senator SPECTER. Was there an ultimate determination made as to whether there was a possible violation by Mr. Trie on that subject?

Mr. RADEK. On the Presidential Legal Expense Trust?

Senator SPECTER. Yes.

Mr. RADEK. The determination was made early that it's not a crime to obtain foreign funds for the Presidential Legal Expense Trust. It's not regulated by the Federal Elections Campaign Act.

Senator SPECTER. And it is your position that when the FBI wanted to obtain a search warrant that it was an inappropriate application?

Mr. RADEK. No, Senator. The FBI wanted a search warrant to find evidence of campaign finance violations possibly on the part of Mr. Trie.

Senator SPECTER. It is that which was turned down, though, by——

Mr. RADEK. By Ms. Ingersoll and me.

Senator SPECTER. Laura Ingersoll.

Mr. RADEK. And me, Senator, and this was a subject of a hearing before Senator Thompson's committee. I'm sure you've read the proceedings.

The problem was that an agent was proceeding to Little Rock without an attorney review of a search warrant affidavit, and by the time that search warrant affidavit arrived in Little Rock and was being reviewed—and it, in my opinion had some serious problems—we learned that an attorney had removed the records that were supposedly the subject of the search warrant and had called the FBI—an attorney had called the FBI and said, "I'm ready to produce these documents." In my opinion, probable cause went away at that moment. And I'm sure I would have been before the full Judiciary Committee had I seized records from an attorney before he had a chance to turn them over to the FBI.

Senator SPECTER. Why was the FBI so upset about this matter, if you know?

Mr. RADEK. Well, there were a lot of disagreements, and that eventually is what led to the Attorney General taking the move she did. You know, you'll have to ask the FBI that question.

We, the Public Integrity Section, had had some dealings with Mr. Smith when he was here in Washington, and Special Agent Parker

was sort of off there on her own. And it seemed to me highly inadvisable to have an FBI agent going to take an affidavit to a judge for a search warrant when an attorney had not approved it. Sometimes mistakes are made, and it seems to me that in every case an attorney ought to approve that.

Senator SPECTER. Shifting to one other subject, Mr. Radek, FBI Deputy Director Robert Bryant, in a memo in May 1997, raised a question about the Public Integrity Section attorneys investigating White House activities, even though it has insufficient predication. And the memo says, "If the attorneys truly believe that predication is lacking, it is difficult to justify the use of grand jury subpoenas and other criminal investigative tools."

Now, this was just a month after the Attorney General had declined a preliminary investigation. And my question to you is: What was the justification for proceeding if, in fact, Deputy Director Bryant is correct that there was no sufficient predication?

Take whatever time you need, Mr. Radek, to——

Mr. RADEK. I have the document here, Senator, but I don't see that part. Can you cite me to a paragraph or page?

Senator SPECTER. The paragraph reads as follows: "On more than one occasion"—perhaps my staff can pinpoint it for you—"Public Integrity Section attorneys have stated that the task force is investigating certain White House activities even though it has insufficient predication." And then there is some information deleted. Continuing: "If the attorneys truly believe that predication is lacking, it is difficult to justify the use of grand jury subpoenas and other criminal investigative tools."

Mr. Radek, the point here is that if it in quest of an independent counsel, you can't use the grand jury. And the secondary issue is the insufficient predicate.

Mr. RADEK. Well, they are separate issues, Mr. Chairman. It is true that the independent counsel statute prohibits us from using grand jury subpoenas, immunities, or plea bargaining while we conduct our preliminary investigation.

This issue is one that is more general, and the problem was this: The Attorney General had serious and repetitive marching orders. I mean, she looked each of us in the eye and said, "Leave no stone unturned. You have to gather all the facts. Don't miss anything." That was constant. She hammered us with that.

That left a charter, a universe to investigate a lot of things, a lot of scandal, some of which were not crimes. We had to sort through and it was difficult to in the end sort of focus on what was crimes. It was one of the most difficult things we had to do both as attorneys and agents.

Senator SPECTER. OK, Mr. Radek. But if the question is whether independent counsel should be appointed, you can't use the grand jury.

Mr. RADEK. Correct.

Senator SPECTER. That is precisely the time where you have to turn it over to somebody who is impartial. And if you found reason to pursue the matter, to turn over the stones because further investigation was required, isn't that precisely the purpose of the independent counsel statute, that you should not do that but an independent counsel should do that?

Mr. RADEK. I don't dispute that the purpose of the independent counsel statute was to take matters away from the Department of Justice when there was certain statutory requirements met. And it accomplished that to a limited extent. What it didn't do was to say any time that the Department of Justice feels that there is an appearance of a problem on any matter, it should appoint an independent counsel, which is, I think, what you suggest and what you take from this.

The fact is what the statute says is, if there is specific ad credible information on a person, you must conduct a preliminary investigation. That person can either be covered under the independent counsel statute or create a conflict for the Department of Justice.

Then at the end of that preliminary investigation, the Attorney General has to make a decision. She has to decide if further investigation warranted. If she says yes, the statute requires an independent counsel. If she says no, it doesn't. And don't forget, the Department of Justice came to this body and asked for jurisdiction under the discretionary clause over matters, and the Senate refused—and the Senate and the House refused to do it.

Senator SPECTER. Well, I don't know if the last part is relevant, and I am not going to get into that. But I am going to come back just one last time to the point that once you get around to issuing subpoenas, you have a basis for doing so, and that it must have met the minimal test of specific and credible information. So that at that point—and I am just going to make a statement because I have heard you out and I just can't accept—I will give you a chance to reply, however—can't accept your justification for proceeding there without going to independent counsel once you think there is a sufficient basis for issuing the grand jury subpoenas.

Mr. RADEK. Perhaps the misunderstanding is this says certain White House activities. This does not say an investigation of the President or the Vice President. And, clearly, we were investigating White House activities. We were investigating how much the White House was involved in the campaign financing crimes that were involved that we were uncovering. We never came up with specific and credible information against a covered person where the Attorney General did not trigger, and she did trigger on a couple of occasions.

Senator SPECTER. Mr. Radek, in 1997, the November 21, 1997, memorandum to Mark Richard, you had made the point that the media fund suffered from a shortage of Federal hard funds. And in a memorandum on November 17, 1998, you had shifted and said that there was no need to differentiate between hard and soft funding.

Now, that distinction is important because the Vice President would not be implicated on the facts available in 1997 if there were a shortage of hard funds. But once the issue arose to his soliciting hard funds, then it became relevant or perhaps some would say convenient for you to say that it didn't matter whether they were hard or soft. So that when he was soliciting the money, he would have no motivation to solicit for hard funds instead of soft funds.

And the question to you is why the change of position from—there was no shortage of—the media fund suffered from a shortage

of hard funds in 1997 to exactly the opposite that dovetailed and helped the Vice President's defense, exoneration, and declination to appoint independent counsel.

Mr. RADEK. Senator, as I sit here—and I haven't seen the remark to which you refer—I don't believe there was a shortage of hard funds in the media fund. I think the opposite was true. I think there was a shortage of soft money. Can you point to where I said that?

Senator SPECTER. Well, this is your November 21, 1997, memo to Mark Richard. Our staff can pinpoint it, but you say that the media fund suffered from a shortage of Federal hard funds. If they did suffer from hard funds, Mr. Radek, there would have been a reason for the Vice President to raise hard funds and to solicit hard funds. But in 1997, there was no indication—this hard fund/soft fund category was not relevant. But then in 1998, you change your position, and you say that it didn't matter whether they were hard funds or soft funds, so that the Vice President would have no reason to have specific hard funds.

It is a convenient change of position which helped you say there was no basis for proceeding to get independent counsel as to the Vice President.

Mr. RADEK. The point here is a little obscure for me, and I'm sorry, I just don't recall it, Senator. All I can say is my belief today is that there was not a shortage of hard funds. There was a line of credit for hard funds for that media fund use. And, by the way, the fund was not a separate fund. And I don't think I ever changed my position. I'm citing something here that Harold Ickes said, and I just don't—I'd have to read before and after a little bit more to get it in context.

But my impression is that the media fund did not suffer from——

Senator SPECTER. The hour is growing late. Give us a response in writing on it, would you, please?

Mr. RADEK. Sure.

Senator SPECTER. With respect to the investigation into Loral—and now I am referring to a memorandum which you wrote on August 5, 1998—"It is true that with regard to the Loral matter the task force is examining a transaction without a predicate. That happens from time to time when there is substantial public concern about a matter."

Now, Mr. La Bella in his memo said that if there is going to be an investigation as to Mr. Bernard Schwartz, CEO of Loral, then there had to be an investigation as to the President as well, requiring independent counsel. When I had questioned Mr. La Bella about that in his hearing, I did not know of a supplemental memo which he had—at that time we had to keep all the documents in S-407—where he had said that there was no evidence as to Mr. Schwartz, and, therefore, there wouldn't be any reason to have any investigation as to anybody. But he did say that if you were going to proceed as to Mr. Schwartz, you should have proceeded as to the President, because you can't have a quid pro quo without having people at two ends of the quid and the quo.

Now, focusing on the part I just read to you, how can you possibly initiate an investigation without a predicate, where there is

no basis to do so, because of newspaper articles, which embodies the public concern concept?

Mr. RADEK. Well, I didn't initiate it. Chuck La Bella did at the Attorney General's instruction. And the reason he did it was that the Attorney General has some discretion in this area. While our investigation was a criminal investigation—and I argued on the other side of that issue. I thought that we shouldn't be conducting investigations without predication. But the Attorney General had some discretion, and so she wanted this matter looked into. Again, her standing order——

Senator SPECTER. So who recommended it?

Mr. RADEK. I don't know that anyone recommended it. I think the Attorney General told Chuck to investigate it.

Senator SPECTER. Told Chuck La Bella to investigate it.

Mr. RADEK. Yes.

Senator SPECTER. Well, Mr. Radek, here you are in this memo in black and white justifying an investigation without any basis to investigate. That is essentially what you are saying.

Mr. RADEK. What I'm saying to you—what I said there and what I'm saying to you is the Attorney General has some discretion. To the extent that there are matters that need investigation—and may I suggest to you that any crimes committed at Waco, the statute of limitations is long past, and yet there's an investigation of that. Sometimes there are matters that require investigation. The Attorney General reached beyond the normal purview of what a criminal investigation is in order to satisfy herself and, I presume, the American people that this matter was investigated. And so she ordered it to be investigated.

That's a totally different standard from the independent counsel statute which says you have to have specific and credible information.

Senator SPECTER. Well, I know you will be glad that I am not going to take your opening of the door on Waco to get into that subject today. And I disagree with you when you start to talk about the Attorney General's discretion to start an investigation without any basis. I disagree with you totally. But I am not going to argue the point; I am just going to give you a principle of my understanding of the law with some experience in the field. Public prosecutors, Attorneys General, and district attorneys do not start investigations without a basis. You don't put somebody through an investigation unless you have a basis. And if you have a newspaper account, that is not a basis.

And to say that the task force is examining a transaction without a predicate just seems to me to be incorrect. I won't characterize it beyond that.

Would you care to comment? You are welcome to.

Mr. RADEK. Well, I tend to—I know exactly where you're coming from, Mr. Chairman, and I tend to agree with you. But there are extraordinary circumstances where the Department of Justice investigates things that will never be prosecutable. That is an unusual circumstances, but it is done. And I think that's what was done here.

Senator SPECTER. That happens all the time. You investigate matters which you can't prosecute, which you don't prosecute, but you have some reason to investigate.

Mr. RADEK. Well, but you know at the beginning that it's not going to be prosecutable. Some of the biggest scandals, it was at the very beginning known that there would never be a criminal case come out of them, and yet it's investigated because of a lot of reasons, but mainly because the Attorney General in this case wanted it investigated.

Senator SPECTER. Senator Sessions.

Senator SESSIONS. I would just conclude my thoughts, Mr. Chairman, by noting that since Mr. Conrad has been on board, apparently they have gotten five guilty pleas, two of them I guess today or yesterday, and the case is moving. And I find it unacceptable, however it developed, that with all the activities that went on that the Vice President was 4 years being interviewed. Had that been done promptly, maybe this thing would have been laid to rest and be over with.

I do not know of evidence that convicts the Vice President of any crime. I would expect and hope that he never was aware of the illegal shenanigans that were going on around him. I hope and pray that was true. And would expect that it would be that he did not know.

However, the Department of Justice is required to find the facts and do an investigation and let the American people know the truth, and this thing has not gone well. I believe it is worthwhile for you to labor through these issues to discuss what kind of standards and activities we will expect out of the Department of Justice in the future. And thank you for your leadership.

Senator SPECTER. Mr. Radek, as a final point here, a good bit of the disagreement comes down to what was expressed by Mr. La Bella in his memorandum about your analysis. And some might say that there is room for disagreements, that reasonable people can differ. But many of us have been troubled why the analysis which you have gone through, which draws different sets of inferences and varying legal standards at variance with what the statute says, all which come out to the conclusion that you don't need an independent counsel. You and I went through at some length your—you concede a bias that you don't like the independent counsel statute. Am I correct, quoting you correctly on that?

Mr. RADEK. I didn't like it. Yes, Senator.

Senator SPECTER. OK. Well, and La Bella says this: "The type of analysis involved in determining whether the Vice President was part of a scheme to solicit soft money knowing that it would be turned into hard money for the media campaign is subjective and open to debate." And now he refers to what you have done: "By routinely embracing the most innocent inference at every turn, even if the inferences are factually defensible, the memorandum creates an appearance that the Department is straining to avoid the appointment of an independent counsel and foreclose what many would characterize as an impartial review of the allegation. When you look to the facts, the memos, the meetings, and the DNC practice, it is hard to say that there is only one conclusion to be reached."

And FBI Director Freeh said it somewhat differently: "Based on the facts, the Attorney General simply cannot reach such a conclusion." And at another point, "The Department of Justice has invited substantial criticism by appearing to resolve these untested legal issues at the outset of the investigation before the facts are fully developed." Which you did, except that from time to time you conducted more investigation, which under the statute really was the purview of somebody who was outside of the Department of Justice, an independent counsel.

Would you care to comment?

Mr. RADEK. Well, the fact that Mr. La Bella and Director Freeh and I disagreed, of course, is not news. I called those shots as I saw them. I never stretched the law. I never engaged in inferences favorable to anybody. I looked at that stuff as objectively as I think anybody in the world. And let me assure you, Mr. Chairman, so did the Attorney General.

There was the vigorous debate, and the fact that people disagreed with me and disagreement with me in the Department I think is both healthy and natural. It is probably not healthy and natural to have disputes—and it was a shame to see the formerly good relationship between Mr. Mansfield and Mr. Donsanto dragged out here. But I do appreciate that there is a need for oversight.

All I can say is, yes, people disagreed but, no, no inferences were drawn improperly. And if you disagree with my conclusions, I respect you for that. But I think my conclusions were right, and I stand by them. And those were the recommendations I made to the Attorney General. But ultimately she made the decisions, and as everybody has testified, she did it free from politics.

Senator SPECTER. OK. Thank you very much.

Mr. RADEK. Thank you.

Senator SPECTER. Mr. Litt, would you step forward, please?

Mr. LITT, do you solemnly swear that the evidence you will give before this subcommittee of the Judiciary Committee of the U.S. Senate will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LITT. I do.

Senator SPECTER. Mr. Litt, I know you have an extensive opening statement. It is now 6:07 p.m. and we are going to start a vote at 6:10 p.m. It will be made a part of the record in full. To the extent you wish to present it, we are prepared to listen to you.

STATEMENT OF ROBERT S. LITT, FORMER PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. LITT. Mr. Chairman, I will rely, thank you, on the submission of the written statement with one exception, and that is that there is one matter that I didn't cover in the written statement that I would like to just briefly address orally.

Senator SPECTER. That would be fine.

Mr. LITT. You read as part of your opening statement a letter from Common Cause, which, as I understood it, suggested or alleged that the Department had never looked into the allegations

that were set forth in the 1996 letters from Common Cause to the Attorney General.

And as you know from the materials that have been provided to you, that is incorrect. There was an extensive legal analysis done. Many memoranda were prepared. I had the unfortunate assignment of being the person who was responsible for trying to make sense out of all these complicated legal issues and preparing a cover memo to the Attorney General that I think has been provided to you.

And the fact of the matter is that the issue that was before the Department of Justice was not whether the use of soft money for issue advertisements was a good thing or a bad thing for the American political process. The issue was whether this was a crime under the Federal election laws.

And as you heard from the Chairman and the Vice Chairman of the Federal Election Commission, the FEC, which is the body that is charged by Congress with the primary interpretation of the election laws, the FEC did not conclude that these ads violated the election laws for the purposes of a civil remedy. And, indeed, I think that the initial decision of the FEC on the audit indicate that the conclusion of the Commissioners, or at least the majority of them, was that the legal standard applied was so vague that nobody could possibly understand it.

Criminal violations require an even higher standard. A criminal violation of the election law requires that there will be a willful violation of a known standard. The decision not to prosecute or not to investigate these matters criminally I think was an entirely appropriate one given the facts that were known and the legal standard. And I believe that there was a full analysis of this done, and the analysis assumed all the facts that Common Cause set forth in their letter, which is to say they assumed that the advertising campaigns done by the DNC and the RNC were completely controlled by the candidates and, nonetheless, concluded—correctly, in my view—that that was not a crime under the Federal election laws.

Senator SPECTER. Well, Mr. Litt, you recommended independent counsel as to the Vice President. You did so in a very lawyerly, judicious way, saying that you thought there would not be a prosecution, but the statute required independent counsel, as you saw it. Is that an accurate paraphrase of what you said?

Mr. LITT. Yes, that's correct.

Senator SPECTER. If at the end of the rainbow, at the end of the whole process, there is no statute, no definable criminal violation, what is the point of any of it?

Mr. LITT. I'm sorry. I don't understand your question.

Senator SPECTER. Well, are you saying that the campaign finance laws are so vague that you can't have a prosecution under them?

Mr. LITT. I'm not saying that with respect to the campaign finance laws in general. I'm saying that specifically with respect to the issue of the legality or illegality of the use of soft money to finance issue ads in the 1996 election campaign. But there are many areas of the campaign finance laws where there are clear and bright lines and a prosecution is possible, as the actions of the task force have demonstrated.

Senator SPECTER. Mr. Litt, how can the Attorney General, in a memorandum of understanding with the Federal Election Commission, delegate to the Commission what may turn out to be essential judgments for whether there can be a prosecution or not? I don't have to say to you that the Attorney General has the responsibility for prosecuting all the Federal criminal laws. And there is a criminal law attached to the Federal election law. But how can there be a delegation of reaching issues which impact upon what is essentially her job?

Mr. LITT. I think, Mr. Chairman, that this goes back to what—I think it was—I forget whether it was the Chairman or the Vice Chairman of the FEC was talking about earlier, and that is the question of notice. As I mentioned before, under the applicable cases, a criminal violation of the Federal election laws requires that there be a willful violation of a known legal standard. In areas of ambiguity and unclarity in the Federal election laws, the FEC is given the responsibility for fleshing those ambiguities out. And I think that's appropriate because we're dealing with matters here, political advertising and political campaigns, that are absolutely at the heart of the First Amendment. And I think that it is appropriate for the criminal prosecutive process to tread carefully in this area so that prosecutions are brought only when people have clearly violated known legal standards.

When there is no known legal standard, I think it is appropriate for the Department of Justice to defer to the FEC to establish that standard.

Senator SPECTER. Well, I agree with you totally about treading very, very carefully, but not to delegating to anybody outside of the Department of Justice to make judgments as to whether there is adequate notice or what is the appropriate basis for a criminal prosecution.

We questioned the Attorney General about that at length. This is a matter which has gone on since the spring of 1997. In this room I asked her the questions about those ads which——

Mr. LITT. I remember.

Senator SPECTER. Which have all the indicia of advocacy ads. We asked her for the Freeh memorandum within a week after he wrote in late 1997, November 1997, and the La Bella memo a few days after he wrote it in July 1998. So we have been looking at this matter for a long time.

But the Attorney General is the chief law enforcement officer of the country, and it seems to me she cannot defer to anybody else to set the standards.

Mr. LITT. Mr. Chairman, I would respectfully disagree with you to this extent, and that is, you did, as I recall, ask the Attorney General—at the very first hearings in this matter, you read to her the text of some advertisements, and you asked her, "Doesn't this contain an electioneering message?" And I think the fact of the matter is, as we heard earlier, the FEC, which has a staff whose job it is to make this kind of analysis and has experience and expertise in the area that neither the FBI nor the Department of Justice has, the FBI has looked at—the FEC has looked at these and has not recommended either a repayment under the audit or an enforcement action.

Senator SPECTER. Well, they may be right, but I would be a lot more comfortable if the Department of Justice made the judgment.

When we heard the testimony of Mr. Gangloff, he said that those who—this is sort of a sweeping statement, but I think it is one I would like your comment on. He said that those who recommended the Independent Counsel Act did not understand the Act. But you recommended that independent counsel be appointed for the Vice President. He also said at one point that I probably understood the Act. But the question that I have for you was: What made you conclude that independent counsel should have been appointed for the Vice President?

Mr. LITT. If I can back up a minute to summarize what the issue was there, originally, in 1997 or so, the Department conducted a preliminary investigation under the Independent Counsel Act of whether the President and the Vice President had violated Section 607 of Title 18 by making fundraising telephone calls from the White House. She ultimately concluded that independent counsel was necessary. One of the reasons for that determination—and there were several—was a conclusion that the telephone calls that were made were raising soft money rather than hard money. And she relied on a number of facts to support that conclusion. One of the facts was a statement that the Vice President made that he did not understand that the media fund for which they were raising this money had a hard money component.

Subsequently, in the summer of 1998, the Vice President's lawyers turned over to the Department some documents which suggested that the Vice President had been present at a meeting at which somebody had said that there was a hard money component to the media campaign, and this raised the possibility that the Vice President's statement had not been accurate.

The Department again commenced a preliminary investigation that was really—it was quite extensive. They interviewed I think everybody who was present at that meeting. They reviewed a lot of documents. And at the end of the day, I think everybody came to the conclusion—I don't think there was anybody who was part of this process, as I think Senator Sessions referred to earlier, who thought there was actually a prosecutable case against the Vice President here.

The question was sort of the technical one of whether the standard of the Independent Counsel Act that further investigation was required was met. In my judgment, that standard was met, although I believed it was a question that was very close to the line. There were a lot of people whose judgment I respect very greatly, including my boss, Eric Holder, the Deputy Attorney General, who is a former public corruption prosecutor and a judge, including career lawyers like Lee Radek and Dave Vicinanzo, who was then the head of the task force, they disagreed with me and ultimately the Attorney General did as well.

Senator SPECTER. Is it your view that a section 1001 violation, false statements, would have to be investigated by someone other than the Public Integrity Section? In other words, if it comes up now, would it have to go to special counsel, special prosecutor?

Mr. LITT. I can't say that with respect to any potential 1001 violation, and I'm not familiar, frankly, with the regulations that are in effect today.

Senator SPECTER. Well, as to one involving the Vice President.

Mr. LITT. As I said, I'm not familiar with the regulations. I believe they're discretionary with the Attorney General and not mandatory, but I just don't know that.

Senator SPECTER. Turning for just a moment to the waiver signed by the President, you and I have talked about this before.

Mr. LITT. Yes, we have, Mr. Chairman.

Senator SPECTER. I would like to put it on the record. Our discussion was an informal one, as I say. At that time, the Department of Justice objected to a waiver on the ground that it would have a potentially detrimental effect if there were a criminal prosecution brought as to Loral and Hughes. Would you state the background and your participation in that matter?

Mr. LITT. I'll try to remember. To begin with, I wouldn't characterize it as an objection by the Department. I received a phone call from Mr. Ruff, who was counsel to the President, who informed me that there was a waiver decision pending and he had learned that there was a grand jury investigation pending, and he wanted the Department's views on what impact the granting of a waiver would have on the pending criminal investigation.

I made some inquiries, and I called him back, and I said that the judgment of the Department was that it could have an adverse impact, not on the actual conduct of the investigation but on the jury appeal of any prosecution that might subsequently be brought because a jury might view the granting of a subsequent waiver as, in effect, a ratification of the company's conduct.

Senator SPECTER. So you would articulate that it could have an adverse impact on the prosecution?

Mr. LITT. Yes. I believe I conveyed that to Mr. Ruff.

Senator SPECTER. Thank you very much.

The vote has just started. It is 6:20 p.m. We had a brief intermission for one vote at about 2:30 p.m., so we have gone a little over 4 hours today. We appreciate very much your all coming in.

Mr. LITT. Thank you, Mr. Chairman.

[The prepared statement of Mr. Litt follows:]

PREPARED STATEMENT OF ROBERT S. LITT

Mr. Chairman, members of the Subcommittee:

I had the privilege to serve as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice from 1994 through 1997, and as Principal Associate Deputy Attorney General from 1997 through January 1999. I am now a partner in a law firm in Washington, D.C.

While I was at the Department of Justice, I participated in the Attorney General's decisions whether to seek an independent counsel to investigate allegations of campaign finance abuses, in the establishment of a centralized task force to investigate those allegations, and in the ongoing management and operation of that task force.

From the beginning, the Department's campaign finance investigation was subject to outside scrutiny and criticism to a degree that I believe is unprecedented for an ongoing criminal investigation.

I also believe that that criticism was unjustified.

Mr. Chairman, legal decisions like those required by the Independent Counsel Act are not like math problems. There is often no single "right" answer. Rather, the decisions require a careful and thorough analysis of the law and the facts, and the exercise of sound judgment. Reasonable people can often disagree on these matters, just as the Supreme Court often decides cases by a 5–4 vote.

So I think that the real issue is not always who was "right" or "wrong," but whether the process by which the Attorney General reached her decision was proper. Did she reach a decision after hearing all of the arguments and after weighing the law and the facts? Did she decide solely on the merits, or was she influenced by improper considerations such as politics?

The Department's deliberations in this matter have now been made public. The thousands of pages of memoranda analyzing this issue which have been released to the public make it abundantly clear that all of the Attorney General's decisions were made solely on the merits, after full—indeed exhaustive—consideration of the factual and legal issues involved, and without any political influence at all.

Director Freeh and Mr. La Bella, who disagreed with her decision on several occasions, have said that. And as one who participated in some of the discussions concerning these matters, I can attest to that.

In late 1996, a number of allegations surfaced around the country of improprieties or illegalities in the election.

The Attorney General recognized that the nature of these allegations required a centralized task force to investigate them efficiently. It simply would not have worked to have individual prosecutors in individual districts working individual cases in isolation. Coordination, interchange of information, and centralized direction were required, and it was for that reason that the Attorney General established the Campaign Finance Task Force within the Public Integrity Section, and charged it with investigating all of these related allegations.

The Attorney General emphasized that she was placing no limits on the conduct of the investigation. The Task Force was instructed to pursue all the evidence, wherever it led. It was to explore all evidence, all theories, and all allegations fully. The Attorney General also made clear that if anyone ever felt an independent counsel was required, she wanted to hear it, and she would trigger the provisions of the Independent Counsel Act if it was required. She repeated that instruction many times at the weekly meetings that she had with the task force leadership and the FBI.

On a number of occasions the possibility of appointing an independent counsel arose. These questions were reviewed by the Public Integrity Section of the Department's Criminal Division, just as all independent counsel matters were reviewed during the 20 or so years that the statute was in existence.

In each case, the Public Integrity Section—which is staffed and led by nonpolitical career prosecutors such as Mr. Radek—made recommendations based on its analysis of the facts, the law and the precedents. These recommendations have now been made public and people can see how thorough and careful they were.

In each case, the Public Integrity Section's recommendation was reviewed at several levels within the Department. If there was any disagreement, dissenting views were heard in full. I participated in numerous meetings at which the Attorney General met with line attorneys, supervisors, FBI agents and FBI supervisors, up to Director Freeh, and heard a full debate on independent counsel issues. There was vigorous discussion of the facts and the law—and only of the facts and the law.

In some instances, after careful consideration, the Attorney General concluded that an independent counsel was necessary. In others, she concluded that one was not necessary.

As you know, on several occasions Mr. La Bella and Director Freeh recommended that an independent counsel should be appointed. On some occasions, so did I.

But the decision to seek an independent counsel is given by law to the Attorney General, not to me, or Mr. La Bella, or Director Freeh.

Mr. La Bella was an experienced prosecutor, but he had no prior experience with the Independent Counsel Act. And Director Freeh, as capable and experienced as he is, is still the director of the FBI. There are good reasons why we have these sorts of decisions made by prosecutors rather than law enforcement agents.

In each case, the Attorney General fully considered their views, as well as the recommendations of many others involved in the investigation, including myself. But ultimately, she made the decision, as the law required her to do, and she made it solely on the merits.

Because it has recently been made public, I would like to discuss briefly my recommendation that the Attorney General seek the appointment of an independent counsel to investigate whether Vice President Gore made false statements to investigators concerning his knowledge that an advertising campaign was funded in part with so called "hard money."

One of the original allegations that arose at the end of 1996 was whether the President and Vice President had made telephone calls from the White House seeking to raise money for a DNC issue advertising campaign. These calls could have been illegal if they were made from official office space, as opposed to personal resi-

dence areas, and if they were solicitations of hard money contributions rather than soft money. If they were soft money, or not made from office areas, they would not have been illegal.

In 1997, the Department did a preliminary investigation of these allegations under the Independent Counsel Act. They interviewed hundreds of people and reviewed many pages of documents.

At the end of this preliminary investigation, the Attorney General concluded that there was no basis to investigate these allegations further. There was overwhelming evidence that the calls were made to solicit soft money rather than hard money. Moreover, there was an established Department of Justice policy—a policy that the Department was required to follow in making independent counsel decisions—against bringing cases under this particular statute unless there were aggravating circumstances not present in this case.

With respect to the Vice President, one of the facts the Attorney General noted in finding that his calls were made to solicit soft money was the Vice President's statement during the preliminary investigation that he believed that the DNC media campaign was funded only with soft money. This fact was mentioned in one sentence of the Attorney General's lengthy determination, which contained an extensive analysis of the evidence and the law.

In 1998, evidence surfaced that the Vice President had been present at a meeting where persons may have discussed the fact that there was a hard money component to the media campaign. The Attorney General decided that this required her to determine whether an independent counsel was needed to investigate whether the Vice President had lied. A full preliminary investigation under the Independent Counsel Act was done, again with interviews of the people who were present at the meeting and others with knowledge.

After this preliminary investigation, while it was a very close question, I felt that appointment of an independent counsel was required.

It is important to remember that no one really thought that the Vice President ought to be prosecuted. The question was only whether the technical provisions of the Independent Counsel Act required that an independent counsel be appointed to make that decision.

And everyone recognized that this case was very close to the line. Some people agreed with my view. Many others whose judgment I greatly respect disagreed with me. These included Mr. Radek, a non-political career prosecutor who had two decades' experience with the Independent Counsel Act; Dave Vicinanzo, a career prosecutor who replaced Mr. La Bella as head of the Task Force; Jim Robinson, the Assistant Attorney General in charge of the Criminal Division; and the Deputy Attorney General, my boss, who had been a public corruption prosecutor and a judge himself. They all concluded after a careful review of the evidence that overwhelming proof showed that the Vice President had not been lying, and that there was no basis to seek an independent counsel. I know that everyone who was part of this process gave their best views, based solely on the law and the evidence.

Ultimately the Attorney General disagreed with me as well. But the record shows that she rejected my recommendation because she thought I was wrong; that she made the decision entirely on the merits of the facts and the law, as she did in every case.

Mr. Chairman, as I mentioned at the outset, this case has been the subject of a degree of Congressional scrutiny and pressure that I believe is unprecedented for an ongoing criminal investigation.

The Congress has an extremely important oversight function, with respect to the Department of Justice as all other parts of the Executive Branch. Congressional oversight is a necessary check on malfeasance by Executive Branch officials and can be essential to bring to light corruption, improper behavior, or the need for reform.

But because the purpose of Congressional oversight is ultimately to ensure the honest and efficient workings of government, it should be exercised with due respect for the impact that oversight has on the agencies in question.

As a matter of law and policy, criminal investigations are supposed to be conducted outside of the public eye, for very good reasons. Public exposure of an ongoing criminal investigation can hamper the investigation and tarnish the reputation of innocent persons. And outside political pressure on prosecutors damages the legitimacy of law enforcement, by making it appear that prosecutive decisions are influenced by politics.

In this case the internal deliberations of Department employees have been exposed—deliberations that were never intended to be public—and line attorneys and career prosecutors have been required to testify about those deliberations. This may make it more difficult for future Attorneys General to get candid and comprehensive recommendations from Department employees in sensitive cases.

There have been bitter partisan attacks on public servants who do not deserve it—people like Lee Radek, a career prosecutor who has passed up the chance to make considerably more money in the private sector, in order to serve the public with distinction in both Republican and Democratic administrations. These unfounded attacks are going to make it a lot harder in the future to attract talented people to work for the government.

And the constant political pressure with respect to this matter—and the unceasing but utterly unfounded allegations that the Department was influenced by politics—may create the dangerous perception that the law enforcement decisions are subject to political pressure.

In short, I fear that the net effect of this congressional oversight—oversight that is intended to improve the functioning of government—may be a damaged, less effective, more timid Department of Justice, and I do not think that would serve the public well.

This is not a partisan issue. It is an institutional one. Over the last decade, both parties have engaged in increasingly intrusive oversight of the Department of Justice. I would hope that thoughtful members of Congress on both sides of the aisle would take stock of the effects of this oversight on the Department and on the public, and would make a joint decision to draw back for the long-term good of the American people.

Thank you, Mr. Chairman. I would be pleased to answer any questions that you have at this time.

[Whereupon, at 6:20 p.m., the subcommittee was adjourned.]

QUESTIONS AND ANSWERS

JUNE 21, 2000

RESPONSES OF LARRY PARKINSON TO QUESTIONS FROM SENATOR LEAHY

Question 1. Among the numerous documents the Justice Department has provided to the Judiciary Committee in connection to oversight of the 1996 campaign finance investigations is a memorandum written by Lee J. Radek, Chief, Public Integrity Section, Department of Justice, dated September 25, 1998, to Assistant Attorney General James Robinson of the Criminal Division, which states: "we were seeking to obtain from the FEC copies of the Audit Division's Exit Conference Memo on the Dole for President and the Dole/Kemp '96 committees, which we understand reach similar conclusions on the legality of issue ads run by the RNC during the 1996 election cycle. We have now received those memoranda, which similarly find that the costs of certain RNC ads should be attributed to Dole for President and Dole/Kemp '96, and that those costs would constitute unlawful contributions to and expenditures by the committees* * *[w]e have accordingly opened a criminal investigation. The issues in the RNC investigation are largely identical to the issues in DNC investigations. The principal difference is that the facts in the RNC media project have not been fleshed out as much." (DOJ–P–00754 to DOJ–P–00755).

Question 1a. Please explain why the facts of the RNC media project had not been "fleshed out as much" at the time this memorandum was prepared.

Answer 1a. At the time Mr. Radek prepared his September 25, 1998 memorandum, the Campaign Financing Task Force had not undertaken a comprehensive investigation of the Common Cause or "media fund" allegations relating to either the DNC or the RNC. However, from the time of its creation in 1996, the Task Force had investigated a variety of allegations of campaign finance violations. During the course of the investigation, the Task Force acquired a significant amount of information about the fundraising practices of the DNC, some of which related to the DNC's "media fund." While the Task Force has also acquired some general information about the RNC's fundraising practices, that information was significantly less than the DNC information. I assume this is what Mr. Radek meant when he said the facts of the RNC media project had not been "fleshed out as much."

Question 1b. Has the status of the Department's review of the above-referenced allegations changed in any way since 1998?

Answer 1b. To my knowledge, there has been no Department of Justice review of these allegations since 1998.

Question 2. Over the past year, the Chairman of the Senate Committee on the Judiciary has to date been authorized to issue seven subpoenas, including four to the Department of Justice, on a variety of oversight issues being handled by the Subcommittee on Administrative Oversight and the Courts; the Subcommittee has to date held six hearings and conducted about thirty interviews of Department personnel; and the Department has made numerous, continuing document productions in response to Committee requests amounting to over 500,000 pages of documents. Please provide a breakdown of the number of personnel diverted, the estimated cost of and the number of hours expended to comply with the continuing oversight investigations by the Senate Judiciary Committee and its Subcommittee on Administrative Oversight and the Courts, including by personnel of the Public Integrity Section, the Campaign Financing Task Force, U.S. Attorney Offices, the Federal Bureau of Investigation and other components of the Department of Justice pertaining to the matters set forth below: a. Waco; b. Wen Ho Lee; c. Peter Lee; d. John Huang, Johnny Chung, Charlie Trie; e. Technology Transfers to China; f. Campaign finance and application of the lapsed Independent Counsel statute; and g. White House electronic messages.

Answer 2. The cost and effort expended to comply with the various oversight requests was substantial. However, the FBI does not maintain records reflecting this cost and effort.

Question 3. Mr. Radek testified that the use of "soft money" to fund issue ads was a campaign financing strategy invented by Republicans and perfected by Democrats. In a similar vein, Charles La Bella stated, in his July 16, 1998 memorandum, "For its part the RNC, * * * had its fair share of abuses. The Barbour matter is a good example of the type of disingenuous fundraising and loan transactions that were the hallmark of the 1996 election cycle. In fact, Barbour's position as head of the RNC and NPF—and the liberties he took in these positions—makes the one $2 million transaction even more offensive than some concocted by the DNC. Indeed, with one $2 million transaction, the RNC accomplished what it took the DNC over 100 White House coffees to accomplish." (DOJ–0087). Do you agree with these assessments?

Answer 3. I cannot comment on these particular characterizations by Mr. Radek and Mr. La Bella.

Question 4. Despite the fact that he is neither the author nor the recipient of the December 9, 1996 memorandum referring to a meeting which took place over three year ago, Neil Gallagher, Assistant Director of the FBI, National Security Division, testified he was "positive" Mr. Radek said during that meeting that the pressure he was feeling was "because" the Attorney General's job was on the line.

Question 4a. The December 9, 1996 memorandum from Director Freeh to Mr. Esposito (DO 03137–03138) referring to this meeting states: "I also advised the Attorney General of Lee Radek's comment to you there was a lot of 'pressure' on him and PIS regarding this case because the 'Attorney General's job might hang in the balance' (or words to that effect)." The word "because" is not in quotation marks. Does this suggest that the statement in the memorandum was Director Freeh's interpretation of Mr. Radek's comments rather than a direct quote from Mr. Radek?

Answer 4a. Director Freeh was not present when Mr. Radek made his comments. The Director's memorandum reflected his understanding of those comments based on what he was told by Mr. Esposito. As to whether the language in the memorandum represents a direct quote, I would refer to the previous testimony by the participants in the meeting (Mr. Esposito, Mr. Gallagher, Mr. Radek, and Mr. Gangloff).

Question 4b. With whom within the Department of Justice and its components did Mr. Gallagher discuss this memorandum, including in preparation for this hearing?

Answer 4b. Mr. Gallagher did not discuss this memorandum with anyone at the Department of Justice. Within the FBI, Mr. Gallagher recalls discussing the memorandum with Director Freeh, Mr. Esposito, Mr. Parkinson, Mr. Collingwood, and Mr. Lampinski.

Question 5. FBI employees have testified that 1995 and 1996 memoranda from Harold Ickes to the Vice President describing the split between hard and soft money being solicited was sufficient to impute knowledge to the Vice President about these matters. Yet, as Robert Litt points out in a November 22, 1998 memorandum, a different standard of imputed knowledge was apparently applied to the Director of the FBI regarding whether he testified falsely to Congress on March 5, 1997. Specifically, Mr. Litt cites "[f]or example, in the Freeh matter there was evidence from which one could have inferred that Director Freeh knew his statement was false (a briefing book presented to him contained the true information), yet the Attorney General found this outweighed . . . by other evidence showing he did not." (DOJ–VP–00784). Do you agree that the Attorney General may—as any prosecutor does—draw factual conclusions about a person's state of mind in determining whether to bring charges or seek appointment of an independent counsel?

Answer 5. Yes.

Question 6. In a December 4, 1998 memorandum, Larry Parkinson opined that an independent counsel referral should be made for allegations against the Dole Presidential Campaign. (DOJ–P–01381). Please explain the basis for an independent counsel referral for the Dole Presidential Campaign.

Answer 6. I wrote my December 4, 1998 memorandum in the context of a specific decision facing the Attorney General at that time: whether to seek the appointment of an independent counsel to further investigate potential election law violations in connection with the DNC's "media fund". I believed that further investigation was warranted and that an independent counsel should conduct the investigation because of the involvement of the President and Vice President, two "covered persons" as defined by the Independent Counsel Act. Although the Dole campaign was not a "covered person" under the Act, the allegations that had been made against that campaign could have been referred to an independent counsel under either the Act's "discretionary clause," 28 U.S.C. § 591(c)(1), or the "related matters" provision, 28

U.S.C. § 592(d) and 594(e). In my view, if the Attorney General concluded that she should seek the appointment of an independent counsel to investigate the DNC's "media fund," the independent counsel's mandate also should include the RNC's "media fund." Because similar allegations had been made against the two campaigns, and the FEC had made similar findings about both, I believed that one entity should have been responsible for investigating both.

Question 7. Among the documents produced by the Department of Justice are memoranda from FBI Director Freeh, dated December 9, 1996 and December 8, 1998, to subordinates describing conversations he had with the Attorney General regarding the campaign finance investigations, without copies being sent to the Attorney General.

Question 7a. Does the FBI Director prepare memoranda to his subordinates on every occasion when he has a substantive conversation over the telephone or in person with the Attorney General, without forwarding a copy to the Attorney General?

Answer 7a. No.

Question 7b. If the FBI Director does not prepare such memoranda on every occasion, is this his routine practice?

Answer 7b. No.

Question 7c. If the FBI Director does not prepare such memoranda routinely, please describe the circumstances under which the Director has prepared such memoranda.

Answer 7c. Director Freeh frequently conveys to his subordinates the relevant substance of conversations with the Attorney General. These communications take a variety of different oral and written forms, in any particular instance depending upon numerous factors, such as the schedules of the Director and the recipient of the information, the need (or lack thereof) for prompt action, and the need (or lack thereof) for face-to-fact discussion. As for the memoranda of December 9, 1996 and December 8, 1998, Director Freeh prepares this specific type of memorandum only in rare circumstances—such as these were—to memorialize a very significant series of events involving senior leadership of the FBI.

Question 8. In 1997, the Federal Election Commission requested resource assistance from the Department of Justice to investigate the large number of cases arising out of the 1996 election cycle after the Congress failed to act on a request for additional resources. While senior officials within the Department of Justice recommended providing resources to the FEC, the FBI opposed the request. In a November 25, 1997 memorandum, FBI Director Freeh explains that "[w]hile the Task Force is appropriately staffed at the moment, we must maintain the flexibility to redirect even more resources to the Task Force if the need arises." (DOJ–03148).

Question 8a. Were additional resources directed to the FEC by the Department of Justice over the FBI's objections and, if so, when?

Answer 8a. To my knowledge, the Department of Justice did not provide any resources to the FEC.

Question 8b. Did the FBI's objection to detailing personnel and resources to the FEC hinder or slow down the FEC's investigations into allegations relating to the misuse of soft money in the 1996 election cycle?

Answer 8b. Director Freeh's November 25, 1997 memorandum to the Attorney General set forth in two pages the reasons why he opposed committing FBI resources to the FEC at that time. The ultimate decision on whether to commit DOJ or FBI resources to the FEC rested with the Department of Justice. I do not know whether the Department's decision had an effect on the FEC's investigation.

Question 9. The July 1998 La Bella memorandum states that "[e]very time" it was suggested that the Task Force "conduct [] an inquiry or investigation of the entire campaign finance landscape in order to determine if there exists specific information from a credible source" that would trigger the Act, "it has been rejected on the theory that such an inquiry can only be conducted pursuant to a preliminary investigation." A senior Justice Department official commenting on the La Bella memorandum states, in a July 20, 1998 memorandum, that "I am unaware of any occasion on which this has happened. On the contrary, the Attorney General constantly asks whether we have uncovered information sufficient to trigger the Act, and constantly emphasizes that the Task Force must follow the evidence wherever it leads." (DOJ–03149)

Question 9a. Do you concur in the observation that the Attorney General constantly asked whether the Task Force has uncovered information sufficient to trigger the Act?

Answer 9a. For a substantial period of time, I was a regular attendee at weekly Task Force meetings with the Attorney General. During many of those meetings,

the Attorney General asked whether the Task Force had uncovered information sufficient to trigger the Act, typically in the context of specific investigative matters raised during the course of the meeting. In addition to the weekly meetings, I attended many other meetings with the Attorney General devoted to specific campaign finance matters, in which the very purpose of the meetings was to discuss whether the Act had been triggered.

Question 9b. Do you concur in the observation that the Attorney General constantly emphasized that the Task Force must follow the evidence wherever it leads?

Answer 9b. The Attorney General frequently emphasized that the Task Force should follow the evidence wherever it led.

Question 10. In a July 20, 1998 memorandum to the Attorney General, a senior Justice Department official states that "[o]ur decision to investigate the Loral matter was, thus, in part a response to outside pressure . . . I do not doubt that had this matter been brought to any U.S. Attorney's office in the country it would have been closed without investigation. (I note that no one has expressed interest in following up criminally on the recent Wall Street Journal article setting forth numerous instances in which Senator Lott took actions favoring large contributors)." (DOJ–03150).

Question 10a. What was the "outside pressure" to which this memorandum refers?

Answer 10a. I have to defer to the author of the memorandum to explain what he meant by "outside pressure." I never saw the memorandum until after it had been released in connection with this year's congressional hearings, and I never spoke to the author about this comment.

Question 10b. In your view, does it undermine confidence in the criminal justice system and is it dangerous for political pressure to be applied to bring criminal charges against an individual?

Answer 10b. Yes.

Question 11. In an August 3, 1998 memorandum, Lee Radek states that Mr. La Bella "denied on a weekly basis that there was any specific and credible evidence concerning a covered person" that would trigger the Independent Counsel law. (DOJ–03156).

Question 11a. Were the "weekly" denials by Mr. La Bella in meetings with the Attorney General?

Answer 11a. For a substantial period of time, I was a regular at weekly Task Force meetings with the Attorney General. I believe it is inaccurate to say that Mr. La Bella "denied on a weekly basis that there was any specific and credible evidence concerning a covered person." When independent counsel issues arose during the course of those meetings, Mr. La Bella gave his opinion. As with many other participants, his opinion on whether the Independent Counsel Act had been triggered differed depending on the specific topic being discussed at any given time.

Question 11b. Was the conclusion reached by Mr. La Bella in his July 1998 memorandum regarding appointment of an independent counsel different from the recommendation he had been making to the Attorney General in regular meetings up to that point?

Answer 11b. I did not consider Mr. La Bella's conclusion in his July 1998 memorandum to be inconsistent with the comments or recommendations he had expressed in previous meetings with the Attorney General.

Question 12. Chairman Hatch has stated that he is "not nearly as concerned with the allegations about some of the occurrences within the White House with regard to a phone call or phone calls that may have been made, although they may unknowingly have violated the law . . ." (Transcript of Executive Business Meeting of Senate Committee on the Judiciary, March 6, 1997, at p. 19). Nevertheless, the La Bella memorandum cites the Vice President's telephone call solicitations from the White House as grounds for seeking an independent counsel. (DOJ–FLB–0090–0091).

Question 12a. In your view, would prior Department precedent on when prosecutions were initiated when solicitations were made from federal property be relevant in evaluating such prosecutions?

Answer 12a. Yes, prior Department precedent would be relevant in evaluating whether investigation or prosecution was appropriate. It is important to note that Mr. La Bella recommended an investigation, and not a prosecution, by an independent counsel.

Question 12b. Was the Department correct to consider the precedent that in 1988, the Justice Department learned that Republican Senator Gordon Humphrey and another Republican Senator had sent solicitation letters to employees of the Criminal Division, but that prosecution had been declined? (DOJ–VP–00353).

Answer 12b. I have insufficient knowledge of that 1988 matter to give a responsible answer.

Question 12c. Was the Department correct to consider the precedent that in 1976, the Department declined prosecution when federal employees complained about receiving solicitation letters from then President Ford for Republican congressional candidates that the Fraud section found were "patently coercive" in content and tone? (DOJ–VP–00351).

Answer 12c. I have insufficient knowledge of that 1976 matter to give a responsible answer.

May 15, 1997

To: Director Freeh
Deputy Director Esposito

Re: CAMPAIGN CONTRIBUTION (CAMPCON) INVESTIGATION AND THE INDEPENDENT COUNSEL STATUTE

Attached is an overview of our investigative strategy, resource allocation plan and an analysis of the Independent Counsel Statute aspects of this investigation. **This attachment is both classified Secret and contains Federal Grand Jury material. It should not be disseminated or discussed beyond those officials with authorized access.**

As reflected in the attached document, the Campcon investigation is a multi-faceted investigation into alleged violations of federal criminal law associated with campaign financing during the course of the 1996 federal election cycle. The investigative plan focuses on three distinct but interrelated matters:

1. An aggressive campaign fundraising operation developed and executed by a core group of individuals from the DNC and the White House, including the President and a number of his closest advisors.

2. Allegations of illegal conduct by a myriad of opportunists and other individuals who gained White House access in order to further their personal, business, and political interests.

3. Efforts by the PRC and other countries to gain foreign policy influence by illegally contributing foreign money to U.S. political campaigns and to the DNC through domestic conduits.

There are reasons to conclude that the "mandatory" provision of the independent counsel statute may have already been triggered. With respect to several pieces of the investigation, the Attorney General certainly could conclude that there is information "sufficient to investigate" whether the President and/or Vice President "may have" violated any federal criminal law. Those investigative areas include the following allegations:

Enclosure

1 - Director Freeh (Copy 1 of 5)
1 - Deputy Director Esposito (Copy 2 of 5)
1 - Mr. Bryant (Copy 3 of 5)
1 - Mr. Gallagher (Copy 4 of 5)
1 - Mr. Parkinson (Copy 5 of 5)

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-- Exceeding campaign spending and contribution limits

-- Solicitation of campaign contributions on federal property (Vice President Gore's telephone solicitations; coffees; overnights)

-- Solicitation of contributions from foreign nationals

-- Misuse or conversion of government property (WhoDB)

Even if the "mandatory" provision of the statute has not been triggered, there are a number of compelling reasons why the Attorney General should invoke the "discretionary" provision of § 591(c):

1. DOJ is investigating the actions of the President and Vice President of the United States. This is precisely the kind of case for which the independent counsel statute was enacted. (DOJ is also investigating certain actions of "covered person" Peter Knight, the Chairman of the Clinton/Gore Committee.)

2. DOJ is investigating persons close to the President, including McLarty, Ickes, Trie and Huang.

3. DOJ is investigating top campaign officials, whose main job was to ensure the re-election of the President.

4. Invoking the discretionary clause would be consistent with recent precedent, particularly the Whitewater matter, in which AG Reno sought an independent counsel because of allegations of criminal conduct by "McDougal and other individuals associated with President Mrs. Clinton."

5. DOJ and the FBI have conflicting duties to (1) keep the President informed about significant national security matters, and (2) simultaneously keep from the White House national security information that may relate to the ongoing criminal investigation.

6. There is a widespread public perception that the Department has a conflict of interest.

7. Because the investigation reaches into the top levels of the White House, the Task Force is proceeding differently than it would in a "normal" investigation.

8. DOJ has now engaged in a five-month "threshold inquiry," involving complicated factual and legal analyses. This

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is the kind of inquiry for which the Department has been severely criticized by Congress in the past.

9. The chief investigator -- Director Freeh -- has concluded that there is a conflict of interest.

For the reasons stated above and in the attached memorandum, I recommend that you meet with the Attorney General and ask her to seek the appointment of an independent counsel under the "discretionary" provision of 28 U.S.C. § 591(c).

Robert M. Bryant
Assistant Director

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III. Legal Issues

A. Overview

As set forth above, the Campcon Task Force is aggressively investigating a variety of fundraising activities by a core group of White House and DNC officials (as well as others). The Task Force is examining these activities through a variety of traditional investigative techniques, including the use of grand jury subpoenas and testimony. Because this criminal investigation has taken our investigators into the highest reaches of the White House -- including an examination of specific actions taken by the President and Vice President -- there must be a careful (and continuing) examination of whether the Independent Counsel statute has been, or should be, triggered. (U)

The Independent Counsel Act establishes a system "to investigate and prosecute allegations of criminal wrongdoing by officials who are close to the President. The purpose of this system is to ensure fair and impartial criminal proceedings when an Administration attempts the delicate task of investigating its own top officials."[2] When this legislation was first enacted in 1978, the Senate Governmental Affairs Committee listed a number of reasons for such a system. The top three reasons were:

(1) The Department of Justice has difficulty investigating alleged criminal activity by high-level government officials. (U)

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[2] S. Rep. No. 123, 100th Cong., 1st Sess. 2 (1987), reprinted in 1987 U.S.C.C.A.N. 2150. To simplify, subsequent citations to legislative history will be cited in this shorthand form: "1987 CAN 2150."

(2) It is too much to ask for any person that he investigate his superior. . . . "[A]s honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential." (quoting former Special Prosecutor Cox) (U)

(3) It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof. This is not a question of the integrity of the individual. . . . The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself.[3] (U)

The Independent Counsel statute can be triggered in one of two ways. First, the Attorney General shall conduct a preliminary investigation where there is information sufficient to investigate whether any "covered person" may have violated any federal criminal law (other than certain minor violations). 28 U.S.C. § 591(a). This is often called the "mandatory" or "covered persons" provision of the statute. Second, the Attorney General may conduct a preliminary investigation under the following "discretionary" provision:

> When the Attorney General determines that an investigation or prosecution of a [non-covered] person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person . . . if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction. (U)

28 U.S.C. § 591(c).[4]

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[3] 1978 CAN 4216.

[4] Section 591(c) was amended in 1994 to give the Attorney General discretionary authority to use the independent counsel process with respect to Members of Congress. It was also

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B. "Mandatory" or "Covered Persons" Provision as it Relates to Campcon Investigation

1. What Triggers the Statute?

The independent counsel statute contains three basic requirements for triggering a preliminary investigation under the "mandatory" provision: (a) Specific information, (b) From a credible source, (c) That a covered person may have violated the law.[5] (U)

a. Specific Information. The purpose of the specificity requirement is to weed out "generalized allegations of wrongdoing which contain no factual support [such as] a letter saying that a particular member of the President's cabinet is a 'crook.'" 1982 CAN 3548. Clearly, the specificity threshold is low one, intended simply to weed out "frivolous or totally groundless allegations." Id.; 1978 CAN 4270. (U)

b. From a Credible Source. The credibility requirement was added to the statute in 1983 after Congress concluded that the existing standard (specificity only) was too low. "Public confidence is not served by investigating merit less allegations made by unreliable sources." 1982 CAN 3548. In considering whether a source is credible, the Attorney General is expected to follow "the usual practices of the Department of Justice in determining the reliability of a source." Id. (U)

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reworded for "simplification" purposes, but otherwise made no change from the existing law in the "substantive reach or scope" of the discretionary provision. The Senate bill would have authorized the Attorney General to use the independent counsel process to investigate a "matter" as well as a person, but that proposed revision was rejected in conference "because it would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793.

[5] The statute as originally passed in 1978 required a preliminary inquiry whenever the Attorney General received "specific information that [a covered] person has committed a violation" of federal law. In 1982, Congress decided to add a "credibility" requirement. Unfortunately, instead of simply changing "specific information" to "specific and credible," it replaced "specific information" with "information sufficient to constitute grounds to investigate." To figure out what that means, one must look to § 591(d)(1), which sets forth the specificity and credibility requirements.

One question that has arisen in the course of the Campcon investigation is whether newspaper reports can or should constitute a "credible source." The Public Integrity Section (PIS) has taken the position in this case that newspaper articles cannot be a credible source for purposes of the statute. This is a debatable proposition, particularly where reputable news organizations have dispatched small armies of investigative reporters to track down witnesses and documents. As time goes on, and we are able to follow up news reports with witness interviews and grand jury subpoenas, this issue should become moot. (U)

It is important to note that the statute permits the Attorney General to consider only the two factors of "specificity" and "credibility" in determining whether there are grounds to investigate. In 1987, Congress added the word "only" to the statutory language of § 591(d)(1) in an effort to curb the Department's "disturbing practice" of conducting lengthy "threshold inquiries" before deciding whether the statute had been triggered. 1987 CAN 2164. (U)

c. That a Covered Person May Have Violated the Law. The Attorney General must conduct a preliminary inquiry if she receives specific and credible information that a covered person may have violated any federal criminal law. In 1987, Congress changed the statute from "has committed" to "may have violated." The legislative history makes very clear that DOJ's role should be limited: "It cannot be expected, at this first step in the process, that the Attorney General could or should determine that a criminal act has been committed." 1987 CAN 2164; see also 1982 CAN 3549 ("[I]f facts or suspicious circumstances suggesting that a covered person may have engaged in criminal activity come to the attention of the Department of Justice, these would qualify as 'information sufficient to constitute grounds to investigate,' thus triggering a preliminary investigation.") (U)

In fact, Congress has severely criticized the Department for conducting extended "threshold inquiries," often lasting months and involving "elaborate factual and legal analyses." As stated in the Senate Report:

> It is not clear why the Department of Justice has adopted this practice. Some have suggested that the Department is conducting preliminary investigations in all but name to avoid statutory reporting requirements that attach only after a 'preliminary investigation' has taken place. Since these reporting requirements are the primary means of ensuring the Attorney General's

> accountability for decisions not to proceed under the statute, Congress intended them to attach in all but frivolous cases.[6] (U)

In light of this history, it is critical for the Attorney General to insist upon a rigorous and ongoing analysis of the independent counsel issues arising during the Campcon investigation. It would be particularly useful for PIS to provide a written summary of prior independent counsel experience within DOJ. Under what circumstances has the Attorney General

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[6] According to the 1987 Senate Committee report, DOJ reported processing a total of 36 cases under the independent counsel statute between 1982 and 1987. Of the 36 cases, the Department reported closing 25 prior to conducting a preliminary investigation. It reported closing five of these cases because the allegations did not involve a covered official, and 20 others (which did involve covered persons) because a "threshold inquiry" had determined that the information was insufficient to trigger a preliminary investigation. In the 20 cases involving covered officials, DOJ reported spending an average of approximately 75 days before closing the case. 1987 CAN 2155.

The Senate Committee criticized the Department for failing to clearly articulate why, in the 20 cases on covered persons, it found the information insufficient to trigger a preliminary investigation. The Committee concluded that DOJ had closed 10 cases, despite receiving specific information from a credible source of possible wrongdoing, because it determined that the evidence available did not establish a "crime." In at least five of these 10 cases, the decision appeared to have been based, at least in part, on insufficient evidence of criminal intent. The Committee concluded:

> Thus, contrary to the statutory standard, in 50% of the cases handled by the Justice Department since 1982 in which it declined to conduct a preliminary investigation of a covered official, it relied on factors other than credibility and specificity to evaluate the case. Moreover, in at least half of these cases, the Department of Justice refused to conduct a preliminary investigation into the alleged misconduct, because it had determined there was, at this early stage in the process, insufficient evidence of criminal intent.

Id. at 2155-56.

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previously sought an independent counsel? Under the mandatory or discretionary prong? What was the state of the evidence? Where it was decided not to seek an independent counsel, what were the factors? (U)

2. Who are the Potential "Covered Persons" in this Case?

Based on the evidence collected to date, it appears that the only "covered persons" who potentially could be implicated in criminal activity would be (a) President Clinton, (b) Vice President Gore, and (c) Campaign Committee Chairman Peter Knight. Although the "covered persons" provision also includes individuals working at the Executive Office of the President who are paid at or above level II of the Executive Schedule (currently $133,600), there are only six people paid at this level, none of whom are the focus of the Campcon investigation.[7] In particular, former Deputy Chief of Staff Harold Ickes apparently was not paid at level II. (U)

Although Campaign Chairman Knight has surfaced in at least two matters under investigation -- White House "coffees" (which he specifically called fundraisers) and an attempt to pressure the Cheyenne-Arapaho Indian Tribe -- the investigation apparently has not yet developed specific and credible evidence of a potential violation. Consequently, the following summary focuses on the activities of the President and the Vice President. (U)

3. **Is there Sufficient Information that One of the Covered Persons "May Have" Violated Federal Law?**

a. Exceeding campaign spending and contribution limits: President Clinton. The investigation has developed compelling evidence that the President and his close advisors (particularly Harold Ickes) were personally involved in orchestrating and directing a massive campaign fundraising effort in coordination with the DNC. If there had been any serious doubt about the White House's control over the DNC's budget and expenditures, the 4-17-96 Ickes memorandum should have removed it. In addition, there can be little doubt that the primary purpose of these efforts was the re-election of the President. (U)

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[7] Those six persons, according to the most recent listing provided by the White House Counsel's Office to the FBI's Public Corruption Unit, are the Director and two Deputy Directors of OMB, the Chairman of the Council of Economic Advisors, the U.S. Trade Representative, and the Director of the Office of Science & Technology Policy.

There are serious questions as to whether these efforts constitute violations of the FECA's spending and contribution limits. The circumstances of this case present unprecedented legal issues that have sparked a substantial difference of opinion among various election law experts, particularly on the "hard money vs. soft money" issue. If one thing is certain, it is that the law in this area is unclear and that there are no established enforcement policies either at DOJ or the FEC. See 1982 CAN 3551 ("Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances are present should be sent to a special prosecutor.") DOJ has invited substantial criticism by appearing to resolve these untested legal issues at the outset of the investigation, before the facts are fully developed. We must be particularly careful not to make the following exculpatory factual assumption: because a particular money gift exceeded the statutory contribution limits (or because it came from foreign national or corporation), it must have been a "soft money donation" instead of an illegal "hard money contribution." (U)

Notwithstanding the technical and narrow legal arguments set forth in the Attorney General's 4-14-97 letter to Chairman Senator Hatch, it is difficult to understand how DOJ can dispute the contention that there "may have" been a violation of federal law sufficient to warrant further investigation. The Task Force is, after all, continuing an aggressive investigation of all facets of the campaign fundraising effort. (U)

Given the ambiguous statutory framework in the FECA and the uncertain state of the law, this may well be an area in which prosecution is unwarranted. However, under the independent counsel statute, the Attorney General is not authorized to resolve such matters at the "threshold inquiry" stage. The purpose of the threshold inquiry is to weed out "frivolous" allegations, not to decide whether prosecutions should be brought. The Attorney General is free, when requesting appointment of an independent counsel, to include "the Department's views of the potential prosecutorial merit of the case." 1994 CAN 766. (U)

b. Soliciting campaign contributions on federal property: Vice President Gore. 18 U.S.C. § 607 makes it unlawful "for any person to solicit or receive any contribution within the meaning of section 301(8) of the FECA in any room or building occupied in the discharge of official duties by any [officer or employee of the United States]." On its face, this felony prohibition would appear to cover Vice President Gore's fundraising calls from his White House Office. (U)

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The Attorney General's letter to Chairman Hatch concedes that such conduct "could be" a violation and states that we "have commenced" investigations on allegations of this sort (without referring specifically to the allegations relating to Gore). The letter also stresses that a potential § 607 violation is a "fact-specific inquiry." If we are indeed investigating the Gore allegations, the independent counsel statute should already have been triggered. (U)

The Attorney General's letter (again, without referring specifically to the Gore allegations) implicitly relies on the argument that because § 607 applies only to "contributions" as technically defined in the FECA, it would not prohibit the solicitation of "soft money." However, at this point in the investigation, we cannot conclude either factually or legally that the Vice President was in fact soliciting "soft" instead of "hard" money. (U)

There are other arguments that can be made, but which were not made by the Attorney General. Some have argued that the President and Vice President are exempt, for separation of powers reasons, from the proscriptions of § 607; however, DOJ's Office of Legal Counsel concluded in 1979 that the statute does apply to the President and Vice President. Another argument is that Gore's phone calls did not fall within the intent of § 607, which was principally designed to prevent government workers from being pressured for contributions in their offices. (U)

In any event, the fact remains that there appears to be a violation. The various arguments that have been put forth are just that: arguments, with no conclusive legal authority to resolve them. Whatever we may think of the prosecutive merit of § 607 charges in this context, the allegations do not appear to be "frivolous" for purposes of applying the independent counsel statute. Moreover, the statute does not authorize the Attorney General to rely on prosecutorial discretion in cases involving covered persons. (U)

c. Soliciting campaign contributions on federal property: coffees and overnights. As set forth in the investigative summary, the White House/DNC Core Group devised and implemented an ambitious plan to reward big donors with White House coffees, overnight stays, trips on Air Force One, and other types of access to the President and Vice President. All of these activities are being aggressively investigated through grand jury subpoenas and other traditional law enforcement methods. (U)

With respect to the White House coffees and overnights, the Attorney General's letter to Chairman Hatch relies primarily on one implied argument: that the events may have taken place in

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private areas of the White House residence rather than in areas "occupied in the discharge of official duties." DOJ has relied very heavily on a 1979 opinion from the Office of Legal Counsel, but that opinion has only limited reach. The key issue addressed by OLC was whether § 603 (the predecessor to § 607) prohibited an alleged campaign solicitation by President Carter during a luncheon for Democratic Party donors and fundraisers that took place in the Family Dining Room of the White House. After undertaking a fact-specific analysis of how the Family Dining Room was used and how the luncheon was arranged, OLC concluded that the solicitation "probably" fell outside the scope of § 603. (U)

The 1979 OLC opinion concluded that rooms in the White House may fall outside the scope of § 603 if used for "personal entertaining where there is a history of such use and where . . . the cost of such use is not charged against an account appropriating funds for official functions." On that basis of that fact-specific standard, DOJ appears to have concluded that the White House Map Room -- in which at least one coffee klatch was held -- is not covered by the current § 607 prohibition. The problem is that we know virtually nothing about how the Map Room is traditionally used or how any of the coffees were arranged. And even if the Map Room is eventually deemed to fall within the "personal entertaining" exception, there are over 100 other coffees and similar fundraising events for which we have little information to date. (U)

There are other arguments that certainly can be made to resist a § 607 charge in these circumstances. For example, if it is established that no one made a direct pitch for money during the course of these events, one could argue that there was no legally-viable "solicitation."[8] Similarly, even if there was a "solicitation," one could argue that it was a solicitation for "soft money" instead of "hard money" and therefore did not involve a "contribution." However, these are fact-specific questions and difficult legal issues that cannot be resolved at this time. Here again, we have subpoenaed White House records and are undertaking a criminal investigation of these activities which involve the President and Vice President. (U)

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[8] The one coffee for which we have developed significant information shows strong evidence of solicitation. At a 6-18-96 coffee in the Map Room attended by the President, John Huang, Don Fowler, Pauline Kanchanalak, two Thai businessmen, and others, Huang directly solicited the businessmen -- in the presence of the President -- after Fowler described the upcoming election as the most important since Lincoln.

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d. Soliciting contributions from foreign nationals. The Federal Election Campaign Act explicitly prohibits any person from soliciting, accepting, or receiving from a foreign national "any contribution of money or other thing of value . . . in connection with an election to any political office." 2 U.S.C. § 441e. The Campcon investigation has developed innumerable allegations that money from foreign nationals flowed into the DNC as a result of the massive fundraising effort coordinated by the DNC and the White House. The DNC has already turned back at least $1.5 million because of apparent improprieties. (U)

The key legal questions are (1) whether "soft money" falls within the scope of the FECA, and (2) whether the foreign gifts to the DNC were in fact "soft money." DOJ has taken the legal position that all soft money falls outside the scope of the FECA -- including § 441e -- because it fails to meet the strict definition of "contribution" in § 431. This interpretation by the election law experts at PIS has been publicly adopted by the Attorney General. This position has been greeted with intense criticism from some election law attorneys, who correctly point out that, at the very least, these are uncharted areas of the law. The FECA, after all, neither defines "soft money" nor specifically addresses "soft money" gifts to national parties. The uncertain state of the law invites the question of whether DOJ should be resolving these thorny legal issues at such an early stage in the investigation, particularly in the face of independent counsel concerns. Certainly there are significant passages in the legislative history of the independent counsel statute that admonish the Department not to undertake such "elaborate legal analyses" when a covered person is involved. 1987 CAN 2158. (U)

Even if it is appropriate for DOJ to resolve the threshold question of "soft money" at this stage, it is not at all clear that the suspicious foreign gifts in this case all constitute "soft money." In light of the evidence of direct control of DNC fundraising efforts by the White House -- as evidenced by the 4-17-96 Ickes memo and many other documents -- there is a very real issue about whether the "soft money" argument is largely a sham. The FEC's General Counsel is quoted in the 1-6-97 Legal Times as saying that if money "is used for a candidate's election directly, then there is no question that 441e applies." (U)

At the very least, we need to investigate far more thoroughly before we can comfortably conclude -- as a factual matter -- that the specific gifts at issue were in fact "soft money" donations. In some cases, such as the Hsi Lai Temple fundraiser attended by the Vice President, the evidence points specifically to the solicitation of "hard money contributions." Presumably during the course of our investigation, we are asking

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whether the President or Vice President knew about the details of such suspicious transactions. If so, it is fair to ask why the independent counsel statute has not been triggered. If not, we should ask whether we are avoiding such questions in order to stay away from the trigger. (U)

e. Misuse or conversion of government property. There are a number of separate investigative matters that raise the question of whether White House personnel have misused or converted government property. At the moment, the most significant example is that of the WhoDB database, which apparently was a high priority for the President and the First Lady (at least according to an internal White House memo). We are obtaining the database and related White House documents through subpoena and have developed an aggressive investigative strategy to examine its procurement and use. Whether or not the investigation leads to prosecutable offenses, we are again in the posture of investigating the activities of senior White House officials. And while it may turn out that the President had no hands-on role in either the development or use of the database, it is difficult to contend that there is "insufficient information to investigate" for purposes of the independent counsel statute. (U)

C. "Discretionary" Provision

Even if the Attorney General continues to conclude that the mandatory provision of the independent counsel statute has not been triggered, she must continually assess whether to invoke the "discretionary" provision of § 591(c). On balance, there appears to be a compelling case to do so. (U)

1. Reasons to Invoke the Discretionary Provision

a. DOJ is Investigating the Actions of the President and Vice President. The central reason to invoke the discretionary provision is that the Campcon Task Force is investigating the actions of the President and Vice President of the United States. This focus is neither fortuitous nor peripheral; it is because the President and Vice President were personally involved in many of the matters under active scrutiny. Moreover, this is a criminal investigation using the full range of standard investigative techniques, including wide use of grand jury subpoenas. (U)

The independent counsel statute is based upon the fundamental premise that it is a conflict of interest for the Attorney General to investigate potential criminal violations by high-level officials of the Executive Branch. She is now

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supervising an aggressive, wide-ranging investigation that reaches directly into the highest levels of the White House.[9] (U)

b. DOJ is Investigating Persons Close to the President. As set forth in the investigative summary, the Task Force is investigating the activities of a Core Group of persons close to the President. Certain of these persons, such as Thomas "Mack" McLarty and Harold Ickes, are at least subjects (and potential targets) of the criminal investigation. Beyond the Core Group, the Task Force has focused intense investigative effort toward others who also appear to be close to the President, such as Charles Yah Lin Trie and John Huang. Investigation of such individuals is precisely the kind of circumstance for which the discretionary provision was designed. "This [discretionary] provision could apply, for example, to members of the President's family and lower level campaign and government officials who are perceived to be close to the President." 1987 CAN 2165. (U)

With respect to McLarty and Ickes, it appears that Congress intended to capture within the "covered persons" provision individuals who occupy such high-level White House positions. As originally structured in 1978, the total number of covered Executive Branch positions was approximately 120, with approximately 93 of those positions within the Executive Office of the President. In 1983, Congress reduced the total coverage of Executive Branch positions to approximately 70, of which 36 were within the Executive Office of the President. 1982 CAN 3543. As presently written, the "covered persons" section includes any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule. § 591(b)(3). Although he is authorized by statute to appoint and pay twenty-five persons at level II, the President currently pays only six persons at that level. (U)

As these numbers show, the White House has avoided mandatory coverage for virtually all of its top level officials by simply paying them below level II. Whether or not this is an intentional effort by the White House to limit the number of "covered" senior officials, it certainly exposes a loophole in

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[9] On more than one occasion, PIS attorneys have stated that the Task Force is investigating certain White House activities even though it has insufficient predication. While the FBI investigators do not agree that there is inadequate predication, the statement is nonetheless disturbing. If the attorneys truly believe that predication is lacking, it is difficult to justify the use of grand jury subpoenas and other criminal investigative tools.

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the independent counsel statute. In deciding whether or not to exercise her discretion under the statute, the Attorney General should consider whether McLarty and Ickes are among that group of top level officials so close to the President that DOJ investigation of them would "present the most serious conflict of interest of an institutional nature." 1978 CAN 4269. (U)

c. DOJ is Investigating Top Campaign Officials. Because the independent counsel statute arose from the abuses of Watergate, it reserves a unique spot for campaign-related misconduct. Top campaign officers are the only non-government officials to be included as "covered persons" within the mandatory provision of the statute. The reason for including campaign officials is spelled out clearly in the legislative history:

> There are few individuals who are as important to an incumbent President running for re-election or a serious candidate for President than that individual's campaign manager or the chairman of any of his national campaign committee of his or of his party. (U)

1978 CAN 4269.

The mandatory "covered persons" provision of § 591(b)(6) currently includes "the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President."[10] The independent counsel law was originally drafted to cover the chairman of any national campaign committee seeking the election of reelection of the President, but that section was dropped after the Department of Justice expressed concern that it could potentially cover hundreds of campaign committees that spring up during a national campaign, such as "Youth for Carter" or "Doctors for Ford." 1978 CAN 4394. (U)

By its literal terms, the independent counsel statute covers only the chairman and treasurer of the Clinton-Gore Committee (Peter S. Knight and Joan Pollit, respectively), along with any officer "of that committee" exercising authority at the national level. It does not by its terms cover senior officers of the

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[10] Section 591(b)(7), which provides that "covered" government officials remain subject to the independent counsel statute for one year after leaving the office or position, does not apply to campaign officials.

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Democratic National Committee. However, in deciding whether to exercise her discretionary authority, the Attorney General should consider how the DNC was used during the 1996 election cycle. By essentially commandeering the DNC for the purpose of getting the President re-elected, the White House appears to have erased the traditional lines between the President's own campaign committee and the national party committee. In fact, the DNC appears to have been the President's central re-election machine, under the control of senior White House advisors. Under the circumstances, it is almost nonsensical that the independent counsel statute could be invoked for Peter Knight or Joan Pollit but not for Don Fowler and John Huang. (U)

d. Precedent. This Attorney General has invoked the discretionary clause in at least three matters: Whitewater, the White House requests for FBI files, and the Bernard Nussbaum perjury allegation. In the Whitewater matter, the Attorney General invoked the political conflict of interest provision because of allegations of criminal conduct by "McDougal and other individuals associated with President and Mrs. Clinton." Similarly, the Attorney General found a conflict of interest in the Nussbaum matter because the investigation would "involve an inquiry into statements allegedly made by a former senior member of the White House staff." (U)

It would certainly be consistent with those precedents to find a political conflict of interest in this case, where there are strong allegations against "individuals associated with" the President. Charles Trie, for one, has been described as a personal friend. Similarly, Thomas (Mack) McLarty, who serves as "Counselor to the President" and is one of the President's closest friends and advisors, has been implicated in the Tamraz matter. (U)

e. National Security Matters. With respect to the investigation of Chinese government efforts to influence U.S. elections, DOJ and the FBI have conflicting duties to (1) keep the President informed about significant national security matters, and (2) simultaneously keep from the White House certain national security information that may relate to the ongoing criminal investigation. Because of this conflict, the relationships between DOJ, the FBI, and the White House have become a matter of public controversy. The June 1996 FBI briefing of NSC staffers has been the subject of a public quarrel between the White House and FBI, and is a relevant part of the Campcon investigation. (For example, if information of Chinese efforts to influence Members of Congress was in fact passed up the White House chain, such evidence might become relevant in analyzing the criminal intent of White House officials who played instrumental roles in Asian fundraising efforts.)

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f. Appearance of a Conflict. There is a widespread public perception that the Department of Justice has a conflict of interest in investigating the campaign financing allegations. When testifying before Congress in 1993 in support of the Independent Counsel Reauthorization Act, the Attorney General emphasized the importance of avoiding the appearance of a conflict:

> There is an inherent conflict of interest whenever senior Executive Branch officials are to be investigated by the Department of Justice and its appointed head, the Attorney General. . . .
>
> It is absolutely essential for the public to have confidence in the system and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. . . . The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials and to prevent . . . . the actual or perceived conflicts of interests. The Act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters, and to avert even the most subtle influences that may appear in an investigation of highly-placed Executive officials. (U)

Senate Hearing 103-437, at 11-12 (May 14, 1993). These comments are virtually identical to statements appearing throughout the legislative history of the independent counsel statute. (U)

Notwithstanding her statements in 1993, the Attorney General recently took the position (in her letter to Chairman Hatch) that in order to invoke the discretionary provision of the statute, she "must conclude that there is a potential for an actual conflict of interest, rather than merely an appearance of a conflict of interest." This position, based upon a 3-14-97 memorandum from DAAGs Mark Richard and Robert Litt,[11] has been

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[11] The Richard/Litt memorandum relies primarily on legislative history from 1982 and 1994. When it reconsidered the statute in 1982, the Senate passed an amendment allowing the discretionary appointment of an independent counsel "if the Attorney General determines that investigation of such person by

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strenuously challenged by Chairman Hatch and others. (U)

While there certainly is support for the Attorney General's recently-stated position (as set forth in the Richard/Litt memo), it seems contradicted by a host of references in the legislative history. Moreover, it makes little sense conceptually to conclude that appearances can be taken into account for investigating "covered persons" but not other officials. After all, the underlying premise for the mandatory trigger is that there is an actual conflict of interest whenever Attorney General is called upon to investigate a "covered person" (so there is no need to analyze appearances). (U)

On balance, the better argument seems to be that the Attorney General can and should consider the "appearance of a conflict" as one of the factors in deciding to invoke the discretionary clause. And in the circumstances of the Campcon

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the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest, or the appearance thereof." 1982 CAN 3545. However, Congress eventually adopted the House version of the amendment, which did not contain the "appearance" language underscored above. The floor manager of the House bill, Rep. Hall, stated: "The bill as amended deletes the reference to appearances, and thereby requires the Attorney General to determine that an actual conflict may exist in order to utilize the special prosecutor provisions." Congressional Record, Dec. 13, 1982, at H9507.

In 1994, Congress considered two changes relevant to this issue. First, it rejected a DOJ proposal to allow the Attorney General to seek discretionary appointment of an independent counsel if a conflict existed with respect to a "matter" (in addition to a specific individual), concluding that such an amendment "would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793. Second, Congress extended coverage of the statute to Members of Congress, in circumstances where the Attorney General concludes that appointment of an independent counsel "would be in the public interest." The legislative history characterizes this as a "broader standard" which enables the Attorney General to consider "a larger range of factors and to exercise greater discretion" in cases involving Members of Congress. "For example, the Attorney General could consider not only whether an actual conflict of interest might result if the Department handled the matter, but also whether an appearance of a conflict of interest might weaken public confidence in the investigation and any prosecution." 1994 CAN 781.

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investigation, that factor should weigh heavily. (U)

g. White House Involvement Is Affecting Task Force Investigative Actions. Because top officials at the White House were involved in many of the matters under investigation, the Task Force is proceeding differently than it would in a "normal" investigation. At various times, the Task Force has slowed down when the investigation began to point toward a "covered person." As explained by the PIS Chief in a recent meeting with the Attorney General, such slowdowns resulted from the need to step back and analyze whether the independent counsel statute has been triggered. (U)

h. The Chief Investigator Has Concluded That There is a Conflict of Interest. The chief Campcon investigator, Director Freeh, has concluded that the investigation presents the Department with a political conflict of interest. This by itself does not trigger the independent counsel statute, since the ultimate resolution of the conflict issue rests solely with the Attorney General. However, the Director's view should be a significant factor in the Attorney General's continued analysis of whether to invoke the discretionary provision. (U)

IV. Staffing

A. Overview

The Campaign Financing Task Force is currently staffed with 28 FBI Special Agents (SAs), two DOC-OIG SAs, six DOJ-Public Integrity Section (PIS) Trial Attorneys, one DOJ Internal Security Section Trial Attorney, and a professional support staff of 23 combined analysts, data loaders, computer specialists, paralegals, and other specialists. (U)

The FBI complement is slated for a permanent enhancement of 13 agents and five professional support employees within the next 90 to 120 days. Additionally, effective 5/14/97, ten analysts drawn from FBI Headquarters and various FBI field offices will be detailed to the Task force for a minimum of 60 days to assist in records analysis. (U)

Washington, D.C. Operations

An FBI Inspector In Charge and two Supervisory Special Agents (SSAs) manage two Washington based squads composed of 19 SAs, four of whom are skilled in Foreign Counter-Intelligence investigations. A professional support staff of 21 FBI employees and two contract computer specialists support operations, including an Evidence Control/Processing Center situated on the eleventh floor of FBI Headquarters. One of the SSAs is also

responsible for coordinating the Los Angeles and Little Rock aspects of the investigation. (U)

A Lead Trial Attorney supervises six DOJ-PIS Trial Attorneys, as well as an attorney assigned to the DOJ Internal Security Section. Their professional support staff is comprised of a paralegal and secretary. A request is pending for one or more paralegals to monitor subpoena compliance, help with the logistics of grand jury witness appearances, and conduct legal research. (U)

Los Angeles, California Operations

One FBI case agent and six "team leaders" comprise the Los Angeles complement of the Task Force. They are supervised by an experienced white collar crime SSA who is cognizant of all case developments and coordinates weekly, or more frequently, with his Washington based counterpart. Eighteen additional agents are available part-time to meet case demands as necessary. (U)

Little Rock, Arkansas Operations

Two agents are assigned full and part time, respectively, to coordinate with Washington in conducting all Arkansas related investigation. (U)

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3/31/2000

"FREEH MEMO"
November 24, 1997

Redacted to delete information the disclosure of which could adversely affect
a pending criminal investigation or prosecution
or would violate Rule 6(e) of the Federal Rules of Criminal Procedure
Redactions completed on March 24, 2000.

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

November 24, 1997

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

Dear Madame Attorney General:

RE: CAMPAIGN CONTRIBUTIONS (CAMPCON)
AND THE INDEPENDENT COUNSEL STATUTE

In May, 1997, I provided you with an overview of the FBI's investigative strategy in Campcon. This document also included an analysis of the related aspects of the Independent Counsel Statute. At the time, the investigative plan focused on three distinct but inter-related matters: (1) a campaign fund-raising strategy executed by a core group of individuals from the DNC and the White House; (2) an allegation of illegal conduct by a myriad of "opportunists"; and, (3) efforts by the PRC and other countries to gain foreign policy influence through illegal contributions. In conjunction with providing you this document, I recommended that you refer the Campcon matter to an Independent Counsel.

Since May, there have been a number of significant developments in each of the above-three areas. In addition, there have been numerous discussions on issues associated with this overall investigation which impact on the Independent Counsel Statute. Today, I am convinced, now more than ever, that this entire matter should be referred to an Independent Counsel.

I have attached a current overview of an evaluation which I requested, and which I believe will clarify my understanding of the Independent Counsel Statute, as well as the investigative focus and direction of the Campcon Task Force.

Per our conversation this afternoon, a copy of the attached document is only being provided to you and to the Deputy Attorney General.

Honorable Janet Reno

I am available to discuss these matters at your convenience.

Sincerely,

Louis J. Freeh
Director

Enclosure

A. PURPOSE OF THE INDEPENDENT COUNSEL STATUTE

The Independent Counsel Act establishes a system "to investigate and prosecute allegations of criminal wrongdoing by officials who are close to the President. The purpose of this system is to ensure fair and impartial criminal proceedings when an Administration attempts the delicate task of investigating its own top officials."[1] When this legislation was first enacted in 1978, the Senate Governmental Affairs Committee listed a number of reasons for such a system. The top three reasons were:

(1) The Department of Justice has difficulty investigating alleged criminal activity by high-level government officials.

(2) It is too much to ask for any person that he investigate his superior. . . . "[A]s honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential." (quoting former Special Prosecutor Cox)

(3) It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof. This is not a question of the integrity of the individual. . . . The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself.[2]

1 - Attorney General Reno (Copy 1 of 6)
2 - Deputy Attorney General Holder (Copy 2 of 6)
3 - Director Freeh (Copy 3 of 6)
4 - Deputy Director Bryant (Copy 4 of 6)
5 - Mr. Gallagher (Copy 5 of 6)
6 - Mr. Parkinson (Copy 6 of 6)

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[1] S. Rep. No. 123, 100th Cong., 1st Sess. 2 (1987), reprinted in 1987 U.S.C.C.A.N. 2150. To simplify, subsequent citations to legislative history will be cited in this shorthand form: "1987 CAN 2150."

[2] 1978 CAN 4216.

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For nearly a year, the Campcon Task Force has been actively investigating a variety of fundraising activities by a core group of White House and DNC officials (as well as others). The Task Force is examining these activities through a variety of traditional investigative techniques, including the use of grand jury subpoenas and testimony. Because this criminal investigation has taken our investigators into the highest reaches of the White House -- including an examination of many specific actions taken by the President and Vice President -- we have had to assess the potential application of the Independent Counsel statute virtually every step of the way.

B. STRUCTURE OF THE INDEPENDENT COUNSEL STATUTE

1. Mandatory and Discretionary Provisions

The Independent Counsel statute can be triggered in one of two ways. First, the Attorney General shall conduct a preliminary investigation under the so-called "mandatory" or "covered persons" provision in the following circumstances:

> whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any ["covered person"] may have violated any federal criminal law other than [certain minor violations].

28 U.S.C. § 591(a). Second, the Attorney General may conduct a preliminary investigation under the following "discretionary" provision:

> When the Attorney General determines that an investigation or prosecution of a [non-covered] person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person . . . if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than [certain minor violations].

28 U.S.C. § 591(c).[3]

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[3] Section 591(c) was amended in 1994 to give the Attorney General discretionary authority to use the independent counsel process with respect to Members of Congress. It was also reworded for "simplication" purposes, but otherwise made no change from the existing law in the "substantive reach or scope" of the discretionary provision. The Senate bill would have

2. What Triggers the Mandatory Provision?

The independent counsel statute contains three basic requirements for triggering a preliminary investigation under the "mandatory" provision: (a) Specific information, (b) From a credible source, (c) That a covered person may have violated the law.[4]

a. Specific Information. The purpose of the specificity requirement is to weed out "generalized allegations of wrongdoing which contain no factual support [such as] a letter saying that a particular member of the President's cabinet is a 'crook.'" 1982 CAN 3548. Clearly, the specificity threshold is low one, intended simply to weed out "frivolous or totally groundless allegations." Id.; 1978 CAN 4270.

b. From a Credible Source. The credibility requirement was added to the statute in 1983 after Congress concluded that the existing standard (specificity only) was too low. "Public confidence is not served by investigating meritless allegations made by unreliable sources." 1982 CAN 3548. In considering whether a source is credible, the Attorney General is expected to follow "the usual practices of the Department of Justice in determining the reliability of a source." Id.[5]

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authorized the Attorney General to use the independent counsel process to investigate a "matter" as well as a person, but that proposed revision was rejected in conference "because it would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793.

[4] The statute as originally passed in 1978 required a preliminary inquiry whenever the Attorney General received "specific information that [a covered] person has committed a violation" of federal law. In 1982, Congress decided to add a "credibility" requirement. Unfortunately, instead of simply changing "specific information" to "specific and credible," it replaced "specific information" with "information sufficient to constitute grounds to investigate." To figure out what that means, one must look to § 591(d)(1), which sets forth the specificity and credibility requirements.

[5] One question that has arisen in the course of the Campcon investigation is whether newspaper reports can or should constitute a "credible source." This is a debatable proposition, particularly where reputable news organizations have successfully tracked down witnesses and documents. Early in the investigation, the Public Integrity Section took the position that newspaper articles cannot be a credible source for purposes

It is important to note that the statute permits the Attorney General to consider only the two factors of "specificity" and "credibility" in determining whether there are grounds to investigate. In 1987, Congress added the word "only" to the statutory language of § 591(d)(1) in an effort to curb the Department's "disturbing practice" of conducting lengthy "threshold inquiries" before deciding whether the statute had been triggered. 1987 CAN 2164.

c. That a Covered Person May Have Violated the Law. The Attorney General must conduct a preliminary inquiry if she receives specific and credible information that a covered person may have violated any federal criminal law. In 1987, Congress changed the statute from "has committed" to "may have violated." The legislative history makes very clear that DOJ's role should be limited:

> It cannot be expected, at this first step in the process, that the Attorney General could or should determine that a criminal act has been committed.

1987 CAN 2164; see also 1982 CAN 3549 ("[I]f facts or suspicious circumstances suggesting that a covered person may have engaged in criminal activity come to the attention of the Department of Justice, these would qualify as 'information sufficient to constitute grounds to investigate,' thus triggering a preliminary investigation.")

Congress amended the statute in 1987 in direct response to what it saw as DOJ's "disturbing practice" of conducting extended "threshold inquiries," often lasting months and involving "elaborate factual and legal analyses." As stated in the Senate Report:

> It is not clear why the Department of Justice has adopted this practice. Some have suggested that the Department is conducting preliminary investigations in all but name to avoid statutory reporting requirements that attach only after a 'preliminary investigation' has taken place. Since these reporting requirements are the primary means of ensuring the Attorney General's accountability for decisions not to proceed

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of the statute. That position appeared to change in early September when the Attorney General announced that DOJ had opened a 30-day inquiry regarding the Vice President's telephone solicitations based upon a Washington Post article by Bob Woodward.

under the statute, Congress intended them to attach in all but frivolous cases.[6]

3. Seeking an Independent Counsel

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[6] According to the 1987 Senate Committee report, DOJ reported processing a total of 36 cases under the independent counsel statute between 1982 and 1987. Of the 36 cases, the Department reported closing 25 prior to conducting a preliminary investigation. It reported closing five of these cases because the allegations did not involve a covered official, and 20 others (which did involve covered persons) because a "threshold inquiry" had determined that the information was insufficient to trigger a preliminary investigation. In the 20 cases involving covered officials, DOJ reported spending an average of approximately 75 days before closing the case. 1987 CAN 2155.

The Senate Committee criticized the Department for failing to clearly articulate why, in the 20 cases on covered persons, it found the information insufficient to trigger a preliminary investigation. The Committee concluded that DOJ had closed 10 cases, despite receiving specific information from a credible source of possible wrongdoing, because it determined that the evidence available did not establish a "crime." In at least five of these 10 cases, the decision appeared to have been based, at least in part, on insufficient evidence of criminal intent. The Committee concluded:

> Thus, contrary to the statutory standard, in 50% of the cases handled by the Justice Department since 1982 in which it declined to conduct a preliminary investigation of a covered official, it relied on factors other than credibility and specificity to evaluate the case. Moreover, in at least half of these cases, the Department of Justice refused to conduct a preliminary investigation into the alleged misconduct, because it had determined there was, at this early stage in the process, insufficient evidence of criminal intent.

Id. at 2155-56.

Upon completion of a preliminary inquiry,[7] the Attorney General must apply to the court for appointment of an independent counsel if she determines that "there are reasonable grounds to believe that further investigation is warranted." 28 U.S.C. 592(c). In making that determination, she may not conclude that the person under investigation "lacked the state of mind" required for the relevant criminal violation unless there is clear and convincing evidence that the person lacked such state of mind. 28 U.S.C. 592(a)(2)(B)(ii).

If the Attorney General concludes that an independent counsel is required, she must file with the court an application which contains sufficient information to assist the court in (1) selecting an IC, and (2) defining the IC's jurisdiction so that the IC "has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter." 28 U.S.C. 592(d) (emphasis added).

C. COVERED PERSONS BEING INVESTIGATED BY THE TASK FORCE

The Task Force currently has preliminary investigations pending against five "covered persons": (1) President Clinton; (2) Vice President Gore; (3) Former Energy Hazel O'Leary; (4) Interior Secretary Bruce Babbitt, and (5) Alexis Herman. The Task Force has also been investigating a number of activities of a sixth covered person -- Peter Knight, the chairman of the Clinton/Gore campaign. Among other things, Knight coordinated VP Gore's fundraising calls from the White House and was present when the calls were made. The Department has not yet triggered an independent counsel review as to Knight.

It should be noted that, in the current Administration, even the most senior White House staffers (such as former Deputy Chief of Staff Harold Ickes) are not "covered persons" under the statute. The "covered persons" provision includes individuals working at the Executive Office of the President who are paid at or above level II of the Executive Schedule (currently $133,600). Although Congress clearly intended to capture a significant

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[7] After initiating a preliminary inquiry, the Attorney General normally has 90 days to decide whether an independent counsel should be appointed (with the option of one 60-day extension upon a showing of good cause). However, when a preliminary inquiry is begun following a congressional request, the Attorney General must make her decision no later than 90 days after the request is received. Therefore, the Attorney General must resolve the matter of the Vice President's telephone solicitations no later than December 2, 1997, which is 90 days after the House Judiciary Committee's request for appointment of an independent counsel on this matter.

number of high-level White House officials within the "covered persons" provision, most of the current officials have avoided coverage simply by accepting a salary below level II.[8] While currently authorized by statute to appoint and pay twenty-five persons at level II, President Clinton pays only six persons at that level, none of whom are the focus of the Campcon investigation.[9]

D. OVERVIEW OF THE CAMPCON INVESTIGATION

1. The Investigative Plan

The Campcon investigative plan, which has remained essentially unchanged since it was originally crafted by the FBI investigators in early 1997, has focused on three distinct but interrelated matters:

-- An aggressive campaign fundraising operation developed and executed by a core group of individuals from the DNC and the White House, including the President, the Vice President, and a number of top White House advisors.

-- Allegations of illegal conduct by a myriad of opportunists and other individuals who gained White House access in order to further their personal, business, and political interests.

-- Efforts by the PRC and other countries to gain foreign policy influence by illegally contributing foreign money to U.S. political campaigns and to the DNC through domestic conduits.

The core group investigative plan was based on a theory that most of the alleged campaign abuses flowed, directly or indirectly, from the all-out effort by the White House and the DNC to raise money. It was this consuming quest for campaign

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[8] As originally structured in 1978, the total number of covered Executive Branch positions was approximately 120, with approximately 93 of those positions within the Executive Office of the President (EOP). In 1983, Congress reduced the total coverage of Executive Branch positions to approximately 70, of which approximately 36 were within the EOP. 1982 CAN 3543.

[9] Those six persons, according to the most recent listing provided by the White House Counsel's Office to the FBI's Public Corruption Unit, are the Director and two Deputy Directors of OMB, the Chairman of the Council of Economic Advisors, the U.S. Trade Representative, and the Director of the Office of Science & Technology Policy.

cash, for example, that led to the transfer of John Huang from the Department of Commerce to the DNC to begin the aggressive solicitation of Asian Americans. It led to the ambitious plan for White House coffees, overnights, and other perks for large donors. It led to the telephone solicitations by the President and the Vice President and the attempted merger of the WHODB and DNC databases. In fact, virtually all of the viable Campcon investigative avenues are clearly connected to the core group's initiatives. While that does not mean the core group members necessarily are culpable for the criminal violations the investigation uncovers, neither should they be immune from intensive investigative scrutiny.

While the DOJ prosecutors in charge of the Campcon investigation did not formally object to this investigative plan, they also did not embrace it.[10] From the beginning, there was a fundamental disagreement about how the investigation should proceed. The FBI investigators wanted to focus intently on the core group, on the theory that many of the apparent campaign abuses flowed, directly or indirectly, from the core group's all-out effort to raise money. In contrast, the prosecutors wanted to focus on the opportunists, with a "bottom up" strategy that might or might not lead eventually to the core group.

For the most part, the prosecutors' approach prevailed. Throughout the investigation, the Task Force has focused on building prosecutable cases against individuals such as Charlie Trie, Maria Hsia, and While this approach may be understandable, and is beginning to show promising results, it did neglect some of the larger issues. With the exception of the investigation of the White House fundraising calls, begun belatedly in September 1997, there has never been a concentrated investigation of the core group and its fundraising efforts. In fact, DOJ did not assign a prosecutor specifically to core group activities until July, after Director Freeh ordered an aggressive plan to interview all relevant core group and DNC officials and to become more persistent on subpoena compliance issues.

Even after the September shakeup and expansion of the Task Force, the "bottom up" approach has continued to dominate the investigation. While the Task Force has made significant progress in developing prosecutable cases against several of the opportunists, the activities of the core group -- with the

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[10] The reference to "DOJ prosecutors" is not meant to include the line prosecutors conducting the day-to-day investigation. For the most part, those line prosecutors appeared to be removed from the major decisions about how the investigation would proceed, particularly on issues that potentially involved the independent counsel statute.

exception of the White House telephone solicitations -- have received comparatively little attention.

2. Cautious Approach to Investigating "Covered Persons"

From the outset, the DOJ attorneys in charge of the Task Force have proceeded very cautiously before authorizing any investigative step that might involve a "covered person." Unlike a normal investigation, where agents and attorneys simply follow all logical investigative leads, the DOJ attorneys have been extremely reluctant to venture into areas that might implicate "covered persons." This reluctance has led to a flawed investigation in several ways.

First, the Task Force has partitioned its investigation, focusing on individual persons and events without effectively analyzing their relationship to the broader fundraising scheme. Second, the Task Force attorneys sometimes have made dispositive factual assumptions without investigating to see if those assumptions are accurate. For example, the attorneys concluded in the spring of 1997 that Vice President Gore's White House fundraising calls were not worth investigating because they all involved solicitation of "soft money" (a factual assumption that turned out to be incorrect). The White House coffees are a second example; until very recently, there still has been no serious investigation of the coffees, primarily because the DOJ attorneys had assumed -- incorrectly -- that they all occurred in "private" White House space. Third, important investigative areas, such as the serious allegations raised by Common Cause, have never been pursued because they have been tied up in lengthy threshold legal analyses within the Department.

The Department has also walled off the day-to-day investigation from much of its Independent Counsel legal analyses. Most decisions regarding IC issues are still being handled by DOJ attorneys who have only limited involvement in the ongoing investigation. While obviously these issues deserve the careful scrutiny of experienced Public Integrity attorneys, the separation between the legal analysts and the front-line investigators (both agents and attorneys) has been unusually rigid. Ironically, this separation became even more pronounced following the September shakeup of the Task Force. Until at least mid-October, the new Task Force heads, Chuck LaBella and Jim DeSarno, had no meaningful role in the Department's handling of Independent Counsel-related matters. As a result, the investigative approach to those matters has suffered from lack of coordination.[11]

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[11] There was also a marked change in how the Independent Counsel issues were discussed. Before the September changes, there had been regular discussions during the weekly Campcon

E. THE CORE GROUP'S FUNDRAISING SCHEME

1. The Common Cause Allegations

By pursuing its "bottom-up" investigative strategy instead of focusing on the core group, DOJ has failed to adequately address many of the larger campaign financing issues that could and should lead to the appointment of an Independent Counsel. As a starting point, the Campcon Task Force has failed to address an overarching issue: whether the Clinton/Gore campaign (as well as the Dole campaign) engaged in an illegal scheme to circumvent the federal campaign financing laws. This issue was first raised by Common Cause in October 1996, long before the Task Force was even constituted, but it has never been pursued. To this day, there has been no decision on whether the allegations should be investigated by the Task Force or referred to the FEC.

As background, candidates seeking the presidential nomination are eligible to receive public matching funds if they so choose. However, in exchange for the public funds, a candidate is required to limit his overall campaign spending. In 1996, the spending limit was approximately $37 million for the primary campaign and approximately $62 million for the general election. For knowing and willful violations of these limitations, there are criminal penalties set forth in the FECA and the Presidential Primary Matching Payment Account Act and the Presidential Election Campaign Fund Act.

The alleged scheme appears to have been borne in the summer of 1995, in response to a plan by campaign strategist Dick Morris to run an extremely ambitious series of TV ads, primarily in swing-voter states where President Clinton had problems. Morris wrote in his book that the key to Clinton's reelection was this early television advertising, designed to show selected TV viewers from "150 to 180 airings" or "about one every three days for a year and a half." According to published reports, there was an internal debate within the Clinton/Gore campaign about whether to turn down public financing during the primary elections "in order to avoid federal spending limits." In the end, the campaign appears to have designed a scheme to have it both ways -- to receive taxpayer funds and agree to a spending

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meetings about all Task Force matters, including those involving the potential application of the Independent Counsel statute. Beginning in September, however, the nature of the weekly meetings changed markedly, and there no longer was any meaningful discussion of IC-related issues. While the FBI has very recently received several DOJ drafts on pending IC matters, FBI officials have not had any significant role in the deliberative process.

limit, and simultaneously use the DNC to buy millions in advertising above the spending limit. According to Common Cause, the expenditures for the ad campaign totaled at least $34 million.

The heart of the Common Cause allegations is that the Clinton/Gore campaign -- and not the DNC -- fully controlled the advertising campaign, and that the so-called "soft money" funneled through the DNC was a sham. That is, the money was not used for "party building" activities, as "soft money" is supposed to be used, but rather to directly support the President's reelection. As stated in the October 28, 1997, Common Cause letter to the Attorney General: "[T]he presidential campaigns, and not the parties, fully controlled the raising and spending of these funds and designed, targeted and conducted the TV advertising campaigns financed with these funds. While the money was technically deposited into and disbursed out of political party bank accounts, the parties in reality played only a clerical role in serving as a conduit for these funds. In short, these funds were raised and spent by the presidential campaigns "for the purpose of influencing" a federal election, and thus should be treated as within the scope of the federal campaign finance laws."

While the Campcon Task Force has not undertaken any concerted effort to trace the funds used for these advertising campaigns, it has obtained substantial evidence that the President and his key advisors controlled virtually all aspects of the DNC fundraising efforts. There are numerous documents supporting such a conclusion, but none quite so compelling as the 4-17-96 memorandum from Harold Ickes to DNC Chairman Don Fowler:

> This confirms the meeting that you and I and Doug Sosnik had on 15 April 1996 at your office during which it was agreed that all matters dealing with allocation and expenditure of monies involving the Democratic National Committee ("DNC") including, without limitation, the DNC's operating budget, media budget, coordinated campaign budget and any other budget or expenditure, and including expenditures and arrangements in connection with state splits, directed donations and other arrangements whereby monies from fundraising or other events are to be transferred to or otherwise allocated to state parties or other political entities and including any proposed transfer of budgetary items from DNC related budgets to the Democratic National Convention budget, are subject to the <u>prior</u> approval of the White House.

With respect to the ads themselves, Dick Morris and others have stated the President personally reviewed and approved all ads before they ran. As Morris wrote in his book:

> [President Clinton] worked over every script, watched each ad, ordered changes in every visual presentation, and decided which ads would run when and where. He was as involved as any of his media consultants were. The ads became not the slick creations of admen but the work of the president himself. . . . Every line of every ad came under his informed, critical and often meddlesome gaze. Every ad was his ad.

Behind the Oval Office, at 144.

The recently-uncovered White House videotapes bolster the Common Cause allegations. At a DNC luncheon at the Hay Adams Hotel on December 7, 1995, the President stated to his supporters:

> We realized that we could run these ads through the Democratic Party, which meant we could raise money in $20,000 and $50,000 and $100,000 blocks. So we didn't have to do it all in $1000 and run down what I can spend, which is limited by law so that is what we've done.

On that tape and others, the President emphasized that the TV ad campaign was central to his favorable position in the polls. As Common Cause correctly points out, this certainly looks like an intentional scheme to evade the contribution and spending limits by "running these ads through" the DNC.

The Justice Department has weighed in on the legal issue, at least initially concluding that this scheme was simply an act of "coordination" between the Clinton/Gore campaign and the DNC. In her April 14 letter to Congress, the Attorney General stated that the FECA "does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office." The Common Cause response, which appears to be supported by the evidence, is that this is not a case about mere "coordination." Instead, it argues, the case is about a scheme in which President Clinton and his top advisors raised and spent millions in direct support of his candidacy, and used the DNC as a mere conduit.

The circumstances of this case present unprecedented legal issues that have sparked a substantial difference of opinion among various election law experts, particularly on the "hard money vs. soft money" issue. If one thing is certain, it is that the law in this area is unclear and that there are no established enforcement policies either at DOJ or the FEC. See 1982 CAN 3551 ("Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances are present should be sent to a special prosecutor.") DOJ has invited substantial criticism by appearing to resolve these

untested legal issues at the outset of the investigation, before the facts are fully developed.

On their face, the Common Cause letters present serious allegations of potential criminal conduct that deserve to be investigated. Of all the potential campaign violations brought to the attention of the Campcon Task Force, these arguably are the most serious. The allegations were compelling when they first reached the Justice Department in October 1996, and they have become stronger as more and more facts have been uncovered during the investigation. Because the allegations clearly involve the President, they should be investigated by an Independent Counsel. Moreover, the Attorney General should seek the appointment of an Independent Counsel immediately, for two reasons: (1) the Department has had the allegations for more than a year; and (2) there is virtually no chance that the allegations could be resolved in the course of a limited preliminary inquiry.

2. Other Allegations Connected to the Scheme

In addition to allegations of a broad conspiracy to circumvent the campaign contribution and spending limits, many of the other allegations that have arisen in the course of the investigation have a direct connection to the core group's fundraising scheme. For example, the fundraising operation included a $7 million targeting of the Asian-American community. The key player in this effort was John Huang, who was moved from the Department of Commerce to the DNC following the personal intervention of the President. Huang and others involved in carrying out the Asian-American targeting have been implicated in illegal fundraising. Huang is closely tied to the and the Lippo Group, which has substantial connections to the Chinese government.

As this one example illustrates, it is important to keep in mind that virtually all of the various pieces of the Campcon investigation are connected to the overall fundraising scheme. While this is not to suggest that the core group necessarily is culpable for all the fundraising improprieties being uncovered, it does demonstrate the need for an investigative strategy that includes a comprehensive look at the core group's activities.

F. VICE PRESIDENT GORE'S TELEPHONE SOLICITATIONS

1. The Statute

18 U.S.C. § 607 makes it unlawful "for any person to solicit or receive any contribution within the meaning of section 301(8) of the FECA in any room or building occupied in the discharge of official duties by any [officer or employee of the United States]." On its face, this felony prohibition would

appear to cover Vice President Gore's fundraising calls from his White House office.

2. The Investigation

While Vice President Gore admitted in March 1997 that he had made fundraising calls from his West Wing office at the White House, the Task Force did not undertake any serious investigation of these calls until July. In her April 1997 letter to Chairman Hatch, the Attorney General rejected a call to trigger the Independent Counsel statute for investigation of potential 607 violations. The Attorney General's letter implicitly relied on the argument that because Section 607 applies only to "contributions" as technically defined by the FECA, it would not prohibit the solicitation of "soft money." (VP had originally characterized the calls as soft money solicitations.) When it became apparent in early September that a portion of the monies raised by the Vice President's telephone solicitations had been placed into a "hard money" account by the DNC, the Department initiated a threshold inquiry and later a preliminary investigation under the Independent Counsel Act.

The Task Force has now established that the Vice President made approximately 86 fundraising calls from his West Wing Office and reached at least 43 potential donors. At least five of the persons solicited by the Vice President gave money that was deposited, in part, into a DNC "hard money" account.

3. Legal Issues

At this point, the Attorney General is faced with three questions: (1) Does Section 607 apply to the Vice President's telephone solicitations? (2) Assuming Section 607 does apply, is there an established DOJ policy of non-prosecution of such offenses? (3) Assuming Section 607 applies and there is no established policy of non-prosecution, is further investigation warranted by an Independent Counsel?

In determining whether the statute applies to the Vice President's telephone calls, the Department has focused on three threshold legal questions. First, does the statutory phrase "any person" include the President and Vice President, or are they exempt from the statute's coverage for separation of powers reasons? On this point, there appears to be a consensus that the statute does indeed reach the President and Vice-President. The Office of Legal Counsel reached the same conclusion in 1979 when analyzing a White House political event hosted by President Carter.

Second, because Section 607 was principally designed to prevent government workers from being pressured for contributions in their offices, does the statute apply to solicitation of non-

federal persons? DOJ has apparently concluded that non-federal persons are protected by the statute.

Third, because the statute prohibits the solicitation or receipt of contributions "in any room or building occupied in the discharge of official duties," does it apply to the Vice President's calls made to persons located on non-federal property? Stated differently, does a telephone "solicitation" occur both where the call was received and where the call was made? The DOJ attorneys who have been analyzing this issue have reached different conclusions, but all agree that it is a close question.

The disagreement on this point stems largely from differing interpretations of the Supreme Court's decision in United States v. Thayer, 209 U.S. 39 (1908), which is one of only four reported decisions (and the only Supreme Court decision) involving a Section 607 prosecution. Thayer involved a prosecution of a private individual who solicited contributions by mail from federal employees working in a post office. The defendant argued that because he had never set foot in the post office, he had not solicited "in" a federal building. In rejecting that argument, the Court stated that "the solicitation was in the place where the letter was received." 209 U.S. at 43-44.

Notwithstanding the broad language of Thayer, the better view is that Section 607 does prohibit telephone calls from a federal office to an outside location. The Court in Thayer was defining the point in time when the offense was complete, and obviously the mailing of a letter involves a time gap. In contrast, a telephone conversation occurs simultaneously at both ends of the line, and a prohibited solitication would be complete when made.

Assuming the Attorney General resolves the three threshold legal questions in a way that supports a technical violation of Section 607, she must then decide whether there is an established DOJ policy of non-prosecution of such offenses. In determining whether there are "reasonable grounds to believe that further investigation is warranted," the Attorney General is directed by the Independent Counsel Act to comply with "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations." 28 U.S.C. 592(c)(1)(B). Primarily because Section 607 cases are necessarily fact-bound, there is neither a written nor "other established" policy of non-prosecution of these kinds of offenses. While there appears to be a consensus within DOJ that the telephone solicitations at issue here would never be prosecuted even if there was a technical violation, the Department nevertheless must concede that the Independent Counsel

statute does not permit the Attorney General to simply dispose of a case through an exercise of prosecutorial discretion.

With respect to the final issue -- whether further investigation is warranted -- the Attorney must apply to the court for appointment of an Independent Counsel unless she concludes, by clear and convincing evidence, that the Vice President "lacked the state of mind" required for a Section 607 violation. Based on the facts, the Attorney General simply cannot reach such a conclusion. The evidence tends to show that the Vice President was a active participant in the core group fundraising efforts, that he was informed about the distinctions between "hard" and "soft" money, and that he generally understood there were legal restrictions against making telephone solicitations from federal property.

We have received a draft DOJ memorandum dated November 21, 1995, which recommends shutting down the investigation on the ground that there is clear and convincing evidence that the Vice President subjectively intended to ask only for "soft" money. However, the draft memorandum is seriously flawed, relying almost exclusively on the Vice President's own statements to draw inferences favorable to him, even where those statements are contradicted by other reliable evidence. The weak analysis is demonstrated by the following introductory statement:

> There are a few circumstances and a few ambiguous descriptions by donors of their conversation with the Vice President which raise the question of whether the Vice President may have been asking in a handful of cases for contributions that could have been characterized as hard money contributions. However, in each instance, the same evidence can be viewed as leading to the contrary inference that the Vice President was asking the donor in question to make a soft money contribution.

This simply is not close to carrying the burden of demonstrating a lack of intent by "clear and convincing" evidence. In establishing the "clear and convincing" standard, Congress intended to set a high threshold before an Attorney General can close down an investigation involving a "covered person." In the face of compelling evidence that the Vice President was a very active, sophisticated fundraiser who knew exactly what he was doing, his own exculpatory statements must not be given undue weight. If the Attorney General relied primarily on those statements to end this investigation, she would be inviting intense and justified criticism.

4. Conclusion

The Attorney General should seek the appointment of an Independent Counsel with respect to the Vice President's telephone solicitations. Such an appointment is warranted on two levels. The preferable course of action would be to refer this matter as simply one piece of a comprehensive Independent Counsel investigation which focuses on the alleged scheme to circumvent the campaign financing laws, as discussed above in Section E. Viewed in that context, it is essentially immaterial whether the telephone solicitations sought "hard" money or "soft" money, or whether they were made from public space or private space. Because they were a key component of the overall fundraising scheme alleged by Common Cause and others, these solicitations should be referred for further investigation by an Independent Counsel. Such a referral could be made under either the mandatory clause of the statute or as a discretionary matter.

If the Attorney General decides not to seek an Independent Counsel on the broader fundraising scheme, she still should refer the matter of the Vice President's telephone solicitations. Even on the narrowly focused issue presented by the existing preliminary inquiry, there appears to be a technical violation of Section 607. Given the uncertain state of that law and probable difficulty establishing a knowing violation, this may well be an area in which prosecution is unwarranted. However, under the Independent Counsel Act, the Attorney General is not authorized to use prosecutorial discretion to resolve such matters at this stage; those decisions must be left to an Independent Counsel. The Attorney General is free, when requesting appointment of an Independent Counsel, to include "the Department's views of the potential prosecutorial merit of the case." 1994 CAN 766.

G. PRESIDENT CLINTON'S TELEPHONE SOLICITATIONS

The preliminary investigation of President Clinton's telephone solicitations has led the Task Force to the conclusion that, based on the investigation to date, there is no specific and credible evidence of a Section 607 violation. Although the evidence indicates that the President was asked to place fundraising calls on five separate occasions, he appears to have made such calls on a single date: October 18, 1994. The available evidence indicates that the President called nine donors on that date, and that six of the nine definitely were called from the President's study in the White House residence (apparently on the advice of the White House Counsel's office). As to the calls to the remaining three donors (John Connelly, Arthur Coia, and John Torkelson), there is circumstantial evidence that they were also made from the President' study, but that fact has not been conclusively established.

Notwithstanding the conclusion on the narrowly-constructed Section 607 issue, the Attorney General should also

seek the appointment of an Independent Counsel with respect to the President's telephone solicitations. Like those of Vice President Gore, the President's fundraising calls were part of the alleged scheme to circumvent the campaign financing laws, regardless of where the calls took place or how the money is characterized. While the DOJ memorandum suggests that further investigation would not be warranted even if the calls to the three donors were placed from the Oval Office (because "the evidence suggests these donors were solicited for soft money"), this conclusion is incorrect when considered in connection with the broader scheme. An Independent Counsel should be appointed to investigate this scheme, and the President's solicitations should be part of that investigation. As with the Vice President's calls, such a referral could be made under either the mandatory clause of the statute or as a discretionary matter.

H. FORMER ENERGY SECRETARY HAZEL O'LEARY

The preliminary investigation of Former Energy Secretary Hazel O'Leary has led the Task Force to the conclusion that O'Leary was not personally implicated in the solicitation of the $25,000 Africare donation from Johnny Chung. While there is no reason to challenge this conclusion based on the evidence known to date, it is also clear that the donation was made under extraordinarily suspicious circumstances that are worthy of additional investigation, as stated in the DOJ recommendation. Moreover, the events surrounding the donation and the meetings at the Department of Energy and the Africare event show substantial involvement by DNC officials, including Richard Sullivan and Don Fowler. Consequently, these events should be further investigated by an Independent Counsel as part of an investigation of the broader fundraising scheme of the core group. This course of action is particularly important in light of the various other Chung fundraising matters still under active investigation.

I. OTHER MATTERS IMPLICATING THE IC STATUTE

1. White House Coffees and Overnights

As part of its broad fundraising efforts, the White House/DNC Core Group devised and implemented an ambitious plan to reward big donors with White House coffees, overnight stays, trips on Air Force One, and other types of access to the President and Vice President. All of these activities are being investigated through grand jury subpoenas and other traditional law enforcement methods.

With respect to the coffees, the investigation to date shows that from January 1995 to November 1996, the White House hosted 108 coffees, attended by 1239 DNC and Clinton/Gore supporters. 314 of these supporters made donations within 90

days of the event (either before or after). 185 gave solely "hard money" contributions, 25 gave only "soft" money, and 91 gave a combination of the two. Within the 90-day windows, the supporters contributed approximately $2.35 million in "hard" money and $5.15 million in "soft" money. According to White House records, President Clinton attended 74 of the coffees and Vice President Gore attended 38 of them.

In her April letter to the Senate Judiciary Committee rejecting an Independent Counsel request, the Attorney General relied primarily on one implied argument: that the events may have taken place in private areas of the White House residence rather than in areas "occupied in the discharge of official duties." That argument has both factual and legal flaws. As a factual matter, the Task Force has learned that the coffees were held in at least eight different locations. While DOJ attorneys have been quick to characterize the "Map Room" (where at least 65 of the coffees were held) as private White House space, there has been virtually nothing to demonstrate that assertion. Even if the "Map Room" turns out to be part of the private living space, there were many other coffees held in other parts of the White House.

DOJ has relied very heavily on a 1979 opinion from the Office of Legal Counsel, but that opinion has only limited reach. The key issue addressed by OLC was whether § 603 (the predecessor to § 607) prohibited an alleged campaign solicitation by President Carter during a luncheon for Democratic Party donors and fundraisers that took place in the Family Dining Room of the White House. After undertaking a fact-specific analysis of how the Family Dining Room was used and how the luncheon was arranged, OLC concluded that the solicitation "probably" fell outside the scope of § 603.

The OLC opinion concluded that rooms in the White House may fall outside the scope of § 603 if used for "personal entertaining where there is a history of such use and where . . . the cost of such use is not charged against an account appropriating funds for official functions." Applying that fact-specific standard, there is little basis to conclude that any of the White House coffees, including those held in the "Map Room," fall outside the scope of the § 607 prohibition.

In addition to determining the character of the rooms used for the coffees, the Task Force must also investigate whether the President or other participants made a "solicitation" within the meaning of Section 607. Although the recently-discovered White House videotapes appear to be of only limited value in determining the full scope of the coffee discussions, the coffees certainly were effective in raising millions of

dollars -- both "hard" and "soft."[12] In any event, the Task Force has subpoenaed White House records and is undertaking a criminal investigation of these activities which involve the President and Vice President.

Because the coffees, overnights, and other White House perks for big donors were simply pieces of the broader fundraising scheme carried out the the White House and DNC, they should be part of a comprehensive Independent Counsel investigation of that scheme.

2. Soliciting Contributions from Foreign Nationals

The Federal Election Campaign Act explicitly prohibits any person from soliciting, accepting, or receiving from a foreign national "any contribution of money or other thing of value . . . in connection with an election to any political office." 2 U.S.C. § 441e. The Campcon investigation has developed substantial evidence that money from foreign nationals flowed into the DNC as a result of the massive fundraising effort coordinated by the DNC and the White House. The DNC has turned back millions of dollars because of apparent improprieties.

The key legal questions are (1) whether "soft money" falls within the scope of the FECA, and (2) whether the foreign gifts to the DNC were in fact "soft money." DOJ has taken the legal position that all soft money falls outside the scope of the FECA -- including § 441e -- because it fails to meet the strict definition of "contribution" in § 431. This interpretation by the election law experts at the Public Integrity Section has been publicly adopted on several occasions by the Attorney General. This position has been greeted with intense criticism from some election law attorneys, who correctly point out that, at the very least, these are uncharted areas of the law. The FECA, after all, neither defines "soft money" nor specifically addresses "soft money" gifts to national parties. The uncertain state of the law invites the question of whether DOJ should be resolving these thorny legal issues, particularly in the face of independent counsel concerns. Certainly there are significant passages in the legislative history of the independent counsel statute that admonish the Department not to undertake such "elaborate legal analyses" when a covered person is involved. 1987 CAN 2158.

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[12] The one coffee for which we have developed significant information shows strong evidence of solicitation. At a 6-18-96 coffee in the Map Room attended by the President, John Huang, Don Fowler, [ ] two Thai businessmen, and others, Huang directly directly solicited the businessmen -- in the presence of the President -- after Fowler described the upcoming election as the most important since Lincoln.

Even if it is appropriate for DOJ to resolve the threshold question of "soft money" at this stage, it is not at all clear that the suspicious foreign gifts in this case all constitute "soft money." In light of the evidence of nearly absolute control of DNC fundraising efforts by the White House, there is a very real issue about whether the "soft money" argument is largely a sham. The FEC's General Counsel is quoted in the 1-6-97 Legal Times as saying that if money "is used for a candidate's election directly, then there is no question that 441e applies."

At the very least, we need to investigate far more thoroughly before we can comfortably conclude -- as a factual matter -- that the specific gifts at issue were in fact "soft money" donations. In some cases, such as the Hsi Lai Temple fundraiser attended by the Vice President, the evidence points specifically to the solicitation of "hard money contributions."

3. Misuse or Conversion of Government Property

Since early 1997, the Task Force has been investigating whether White House personnel misused or converted government property for political purposes. The most significant example is that of the WHODB database, which appears to have been a high priority for the President and the First Lady. According to a recently-discovered White House memo, the President wanted to integrate the taxpayer-funded database with the DNC database. Despite a January 1994 warning from the White House Counsel's Office not to use WHODB for political purposes, the new memo for Erskine Bowles and Harold Ickes shows an intent to do just that. The memo, written by a former Bowles aide, states:

> Harold and Deborah DeLee want to make sure WHODB is integrated w/DNC database--so we can share--evidently POTUS want this to[o]! Makes sense.

The Task Force obtained database and related White House documents through subpoena and had developed an aggressive investigative strategy to examine its procurement and use (although that investigation appears to faded into the background in recent months). Whether or not the investigation leads to prosecutable offenses, the Task Force again is in the posture of investigating the activities of senior White House officials, including the President. And while it may turn out that the President had no hands-on role in either the development or use of the database, it is difficult to contend that there is "insufficient information to investigate" for purposes of the Independent Counsel statute.

J. THE DISCRETIONARY CLAUSE OF THE IC STATUTE

Even if the Attorney General continues to conclude that the mandatory provision of the Independent Counsel statute has not been triggered, there are compelling reasons to invoke the "discretionary" provision of § 591(c). At this stage in the investigation, with the Task Force actively investigating the President, the Vice President, three Cabinet members, and others close to the President, it is difficult to imagine a situation any more compelling. All matters relating to the broad fundraising scheme -- including but certainly not limited to the telephone solicitations by the President and Vice President, and the events surrounding the $25,000 Chung donation to Africare -- should be referred immediately for a comprehensive investigation by an Independent Counsel.

1. DOJ is Investigating the President and Vice President.

The central reason to invoke the discretionary provision is that the Campcon Task Force is investigating the President and Vice President of the United States. This focus is neither fortuitous nor peripheral; it is because the President and Vice President were personally involved in many of the matters under active scrutiny. They were hands-on participants in the development and implementation of the overall campaign financing initiative that spawned so many abuses. Moreover, this is a criminal investigation using the full range of standard investigative techniques, including wide use of grand jury subpoenas.

The independent counsel statute is based upon the fundamental premise that it is a conflict of interest for the Attorney General to investigate potential criminal violations by high-level officials of the Executive Branch. She is now supervising an aggressive, wide-ranging investigation that reaches directly into the highest levels of the White House.

2. DOJ is Investigating Other "Covered Persons"

The Task Force now has under active investigation three additional "covered persons," former Energy Secretary Hazel O'Leary, Interior Secretary Bruce Babbitt, and Labor Secretary Alexis Herman. While it may be possible to consider each piece of the Campcon investigation separately and conclude that there is no conflict as to the individual pieces, at some point the Attorney General should consider the cumulative effect of presiding over an inquiry that has already focused on three Cabinet members in addition to the President and Vice President.

3. DOJ is Investigating Persons Close to the President.

The Task Force is investigating the activities of a Core Group of persons close to the President. Certain of these persons, such as Thomas "Mack" McLarty and Harold Ickes, are at

least subjects (and potential targets) of the criminal investigation. Beyond the Core Group, the Task Force has focused intense investigative effort toward others who also appear to be close to the President, such as Charles Yah Lin Trie and John Huang. Investigation of such individuals is precisely the kind of circumstance for which the discretionary provision was designed. "This [discretionary] provision could apply, for example, to members of the President's family and lower level campaign and government officials who are perceived to be close to the President." 1987 CAN 2165.

With respect to McLarty and Ickes, it appears that Congress intended to capture within the "covered persons" provision individuals who occupy such high-level White House positions. As presently written, the "covered persons" section includes any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule. § 591(b)(3). Although he is authorized by statute to appoint and pay twenty-five persons at level II, the President currently pays only six persons at that level.

As these numbers show, the White House has avoided mandatory coverage for virtually all of its top level officials by simply paying them below level II. Whether or not this is an intentional effort by the White House to limit the number of "covered" senior officials, it certainly exposes a loophole in the independent counsel statute. In deciding whether or not to exercise her discretion under the statute, the Attorney General should consider whether McLarty and Ickes are among that group of top level officials so close to the President that DOJ investigation of them would "present the most serious conflict of interest of an institutional nature." 1978 CAN 4269.

4. DOJ is Investigating Top Campaign Officials.

Because the Independent Counsel statute arose from the abuses of Watergate, it reserves a unique spot for campaign-related misconduct. Top campaign officers are the only non-government officials to be included as "covered persons" within the mandatory provision of the statute. The reason for including campaign officials is spelled out clearly in the legislative history:

> There are few individuals who are as important to an incumbent President running for re-election or a serious candidate for President than that individual's campaign manager or the chairman of any of his national campaign committee of his or of his party.

1978 CAN 4269.

The mandatory "covered persons" provision of § 591(b)(6) currently includes "the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President."[13] The Independent Counsel law was originally drafted to cover the chairman of <u>any</u> national campaign committee seeking the election of reelection of the President, but that section was dropped after the Department of Justice expressed concern that it could potentially cover hundreds of campaign committees that spring up during a national campaign, such as "Youth for Carter" or "Doctors for Ford." 1978 CAN 4394.

By its literal terms, the Independent Counsel statute covers only the chairman and treasurer of the Clinton-Gore Committee (Peter S. Knight and Joan Pollit, respectively), along with any officer "of that committee" exercising authority at the national level. It does not by its terms cover senior officers of the Democratic National Committee. However, in deciding whether to exercise her discretionary authority, the Attorney General should consider how the DNC was used during the 1996 election cycle. By essentially commandeering the DNC for the purpose of getting the President re-elected, the White House appears to have erased the traditional lines between the President's own campaign committee and the national party committee. In fact, the DNC was in large part the President's central re-election machine, under the tight control of senior White House advisors. Under the circumstances, it is almost nonsensical that the Independent Counsel statute could be invoked for Peter Knight or Joan Pollit but not for Don Fowler and John Huang.

5. <u>Precedent</u>.

This Attorney General has invoked the discretionary clause in at least three matters: Whitewater, the White House requests for FBI files, and the Bernard Nussbaum perjury allegation. In the Whitewater matter, the Attorney General invoked the political conflict of interest provision because of allegations of criminal conduct by "McDougal and other individuals associated with President and Mrs. Clinton." Similarly, the Attorney General found a conflict of interest in the Nussbaum matter because the investigation would "involve an inquiry into statements allegedly made by a former senior member of the White House staff."

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[13] Section 591(b)(7), which provides that "covered" government officials remain subject to the independent counsel statute for one year after leaving the office or position, does not apply to campaign officials.

It would certainly be consistent with those precedents to find a political conflict of interest in this case, where there are strong allegations against "individuals associated with" the President. Charles Trie, for one, has been described as a personal friend. Similarly, Thomas (Mack) McLarty, who serves as "Counselor to the President" and is one of the President's closest friends and advisors, has been implicated in the Tamraz matter.

6. National Security Matters.

With respect to the investigation of Chinese government efforts to influence U.S. elections, DOJ and the FBI have conflicting duties to (1) keep the President informed about significant national security matters, and (2) simultaneously keep from the White House certain national security information that may relate to the ongoing criminal investigation. DOJ and the FBI have faced this conflict several times during the course of the investigation, most recently in early November 1997.

Although the appointment of an Independent Counsel certainly would not eliminate the difficulty of deciding which matters should be brought to the attention of the President, it would lessen the perception problem.

7. Appearance of a Conflict.

There is a widespread public perception that the Department of Justice has a conflict of interest in investigating the campaign financing allegations. When testifying before Congress in 1993 in support of the Independent Counsel Reauthorization Act, the Attorney General emphasized the importance of avoiding the appearance of a conflict:

> There is an inherent conflict of interest whenever senior Executive Branch officials are to be investigated by the Department of Justice and its appointed head, the Attorney General. . . .
>
> It is absolutely essential for the public to have confidence in the system and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. . . . The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials and to prevent . . . the actual or perceived conflicts of interests. The Act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters, and to avert even the most subtle influences that may appear in an investigation of highly-placed Executive officials.

Senate Hearing 103-437, at 11-12 (May 14, 1993). These comments are virtually identical to statements appearing throughout the legislative history of the independent counsel statute.

Notwithstanding her statements in 1993, the Attorney General recently took the position (in her letter to Chairman Hatch) that in order to invoke the discretionary provision of the statute, she "must conclude that there is a potential for an actual conflict of interest, rather than merely an appearance of a conflict of interest." This position, based upon a 3-14-97 memorandum from DAAGs Mark Richard and Robert Litt,[14] has been strenously challenged by Chairman Hatch and others.

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[14] The Richard/Litt memorandum relies primarily on legislative history from 1982 and 1994. When it reconsidered the statute in 1982, the Senate passed an amendment allowing the discretionary appointment of an independent counsel "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest, or the appearance thereof." 1982 CAN 3545. However, Congress eventually adopted the House version of the amendment, which did not contain the "appearance" language underscored above. The floor manager of the House bill, Rep. Hall, stated: "The bill as amended deletes the reference to appearances, and thereby requires the Attorney General to determine that an actual conflict may exist in order to utilize the special prosecutor provisions." Congressional Record, Dec. 13, 1982, at H9507.

In 1994, Congress considered two changes relevant to this issue. First, it rejected a DOJ proposal to allow the Attorney General to seek discretionary appointment of an independent counsel if a conflict existed with respect to a "matter" (in addition to a specific individual), concluding that such an amendment "would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793. Second, Congress extended coverage of the statute to Members of Congress, in circumstances where the Attorney General concludes that appointment of an independent counsel "would be in the public interest." The legislative history characterizes this as a "broader standard" which enables the Attorney General to consider "a larger range of factors and to exercise greater discretion" in cases involving Members of Congress. "For example, the Attorney General could consider not only whether an actual conflict of interest might result if the Department handled the matter, but also whether an appearance of a conflict of interest might weaken public confidence in the investigation and any prosecution." 1994 CAN 781.

While there certainly is support for the Attorney General's recently-stated position (as set forth in the Richard/Litt memo), it seems contradicted by a host of references in the legislative history. Moreover, it makes little sense conceptually to conclude that appearances can be taken into account for investigating "covered persons" but not other officials. After all, the underlying premise for the mandatory trigger is that there is an actual conflict of interest whenever Attorney General is called upon to investigate a "covered person" (so there is no need to analyze appearances).

On balance, the better argument seems to be that the Attorney General can and should consider the "appearance of a conflict" as one of the factors in deciding to invoke the discretionary clause. And in the circumstances of the Campcon investigation, that factor should weigh heavily.

8. The Chief Investigator Has Concluded That There is a Conflict of Interest.

The chief Campcon investigator, Director Freeh, has concluded that the investigation presents the Department with a political conflict of interest. This by itself does not trigger the independent counsel statute, since the ultimate resolution of the conflict issue rests solely with the Attorney General. However, the Director's view should be a significant factor in the Attorney General's continued analysis of whether to invoke the discretionary provision.

Copy 1 of 6 copies

MEMORANDUM

TO: Eric H. Holder, Jr.
Deputy Attorney General

FROM: Larry R. Parkinson LRP
General Counsel, FBI

SUBJECT: Common Cause Allegations

DATE: January 30, 1998

On January 23, 1998, your office provided us with a copy of a draft memorandum for the Attorney General (referred to herein as the "DOJ Memo") relating to the allegations made by Common Cause. As requested, I am setting forth the FBI's position on these important issues.

I. Allegations Under the FECA

A. Attorney General's Letter to Chairman Hatch

As a starting point, it is inappropriate to shut off consideration of potential FECA violations with the conclusory statement that the Attorney General "rejected" the Common Cause theory in her April 14, 1997 letter to Chairman Hatch. First, that characterization of the letter is simply inaccurate. Second, even if the April 14 letter can be so construed, it is essential that we take a fresh and comprehensive look at the Common Cause allegations, and not dismiss a major part of them based upon a single sentence in the letter. We have appropriately reassessed other issues discussed in that letter, particularly when new facts have come to light (most notably the Section 607 issues), and we should be willing to do so again.

The April 14 letter was crafted under substantial time pressures without the benefit of a detailed FECA analysis. In fact, the first written memorandum on the soft money issue was not produced until May 27, six weeks after the Attorney General sent her letter to Senator Hatch. Moreover, while the May 27 memo (from Mark Richard and Robert Litt) questioned the Common Cause theory, it did not "reject" the possibility of FECA violations. Quite the contrary, that memo concluded with the following paragraph:

> It is important to note that this analysis does not imply that the advertisements, and their funding, did not violate the FECA. It only says that, based on the present record, that determination should be made as an initial matter by the FEC rather than by the Department and a grand jury.

During subsequent discussions within the Department, no one has argued that as a matter of law the Common Cause allegations do

not present a potential violation of the FECA.

It should also be pointed out that the Attorney General's April 14 letter did not respond directly to the Common Cause allegations themselves. Instead, as required by the statute, that letter addressed the formal Senate Judiciary Committee request of March 13, 1997, which made only a brief reference (one clause in a single sentence) to the "coordination" issue in the context of a broader conflict of interest argument. The detailed allegations set forth by Common Cause were neither raised by the Judiciary Committee request nor addressed by the Attorney General's April 14 letter (as Common Cause forcefully pointed out in its April 22, 1997 response to the Attorney General).

B. "Full Control" vs. "Coordination"

The heart of the Common Cause allegation is that the Clinton and Dole campaigns fully controlled all phases of the TV advertising campaigns and used their respective political parties as mere conduits. Because of this total control, the money raised and spent for the advertising was "for the purpose of influencing" a federal election and therefore constituted "hard money" subject to the FECA's contribution and expenditure limits, according to Common Cause.

The Common Cause description of "full control," at least as it relates to the DNC, has been corroborated by the evidence obtained by the Campcon Task Force.[1] That evidence convincingly demonstrates that the President and his key advisors controlled all aspects of the DNC campaign financing efforts; the 4-17-96 memorandum from Harold Ickes to Don Fowler is a particularly compelling example. With respect to the advertising campaign, the President apparently "worked over every script, watched each ad, ordered changes in every visual presentation, and decided which ads would run when and where. . . . Every ad was his ad."[2]

The DOJ memo accepts these facts as a given, at least for purposes of argument, but concludes that they are irrelevant because the "FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office." However, this argument assumes that "total control" is merely a form of "coordination." This is like saying a factory worker is "coordinating" with his foreman.

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[1] This may be an accurate description of the RNC's activities as well, but the Task Force has obtained only limited information about the RNC media campaign.

[2] Dick Morris, Behind the Oval Office, at 144.

It is inappropriate to simply take the Common Cause allegations and force them into the legal box called "coordination." They do not fit. As Common Cause persuasively argued in its April 22 response to the Attorney General, this is not a case about DNC activities conducted "in coordination with" the Clinton campaign. Rather, the DNC was used as a conduit to carry out the advertising campaign being directed and fully controlled by the President and his advisors.

The precedents cited in the DOJ memo are very easily distinguished from our case, and provide little support for the sweeping proposition that "the proper characterization of a particular media expenditure depends not on the degree of coordination, but rather on the content of the message." It is particularly problematic that the DOJ memo (as well as the April 14, 1997 Attorney General letter) relies heavily on FEC Advisory Opinion 1995-25 for that proposition. In fact, that Opinion neither said nor implied anything about whether "the degree of coordination" was a relevant factor. The Opinion addressed an RNC plan to produce and air media advertisements on a series of legislative proposals, and focused on allocation formulas. There was no suggestion whatsoever that the RNC was coordinating its plans with anyone, and therefore no discussion of that issue.[3]

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[3] The Advisory Opinion was one of a series of opinions clarifying the FEC's allocation regulations, which are designed to prevent political committees from using nonfederal "soft money" to subsidize federal election activities. Those regulations require political committees that maintain separate federal and nonfederal accounts to allocate shared expenses according to set formulas. While Advisory Opinion 1995-25 did indicate that the content of the message (i.e., whether or not it contains an "electioneering message") is a relevant factor in deciding how to allocate costs between federal and nonfederal accounts, the Opinion neither stated nor implied that "content" is the <u>only</u> relevant factor.

In fact, Advisory Opinion 1995-25 highlights a need to investigate the DNC money trail. That Opinion emphasizes that even national party spending on "issue ads" -- such as those focused on national legislative initiatives -- are always treated, at least in part, as an FECA-regulated expenditure which must be paid with hard money. Where the ads go further, and contain an "electioneering message" identifying a specific candidate (or are reported as a coordinated expenditure under 2 U.S.C. 441a(d)), <u>all</u> of the costs must be paid with hard money. In the face of compelling evidence that the President and his advisors were trying to get around apparent FECA strictures, the investigation should include an analysis of how the media campaign expenditures were allocated. Instead of investigating such matters, the Task Force has been held back, apparently on

In fact, neither DOJ nor the FEC has ever seen a case like this before, and thus there is no controlling precedent. Therefore, it is important to go back to the fundamental issue: Was the DNC media campaign developed and implemented "for the purpose of influencing" the Presidential election? Obviously, the common sense answer is a resounding "Yes." That conclusion is strongly supported by the President's own statements at various fundraising events, in which he touted the advertising campaign as the key to his reelection strategy. Not only did the advertisements benefit him, he and his advisors controlled and directed every facet of the campaign. Under the circumstances, it would be a fiction to conclude that the DNC was merely "coordinating" with the White House advisors.

C. The "Content" Test

The DOJ memo states that the "content of the message" is the only relevant factor in determining whether advertising expenditures are subject to the FECA limits. We strongly disagree with this proposition, at least in this context, where the candidate is controlling the ad campaign to further his own reelection. However, even if the "content" test is the sole test, that does not mean the Task Force should not undertake an investigation.

To our knowledge, the Task Force has not reviewed a single campaign ad during the course of its investigation. The Attorney General has never said, in her April 14 letter or otherwise, that DOJ is not capable of doing a content analysis. Such an analysis involves two questions: (1) Does the communication refer to a "clearly identified candidate"? (2) Does the communication contain an "electioneering message"? Obviously, the first question would not require substantial expertise. On its face, the second question also does not appear unreasonably difficult. While there has been an unstated assumption that the Task Force would never engage in such an analysis, it is not at all clear why.

There is nothing uncommon about investigators and DOJ lawyers analyzing regulatory provisions in the context of criminal investigations. For example, virtually any time a federal agency is defrauded, it is necessary to analyze and apply pertinent agency regulations, with the assistance of agency

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the assumption that the relevant players must have simply taken advantage of FECA loopholes rather than committed potential crimes. Unfortunately, this is not a conclusion that can be reached without investigating the facts, and under the circumstances known to the Task Force, there is ample predication to warrant an investigation.

officials. And there is no question that in many cases this task would be far more complicated than trying to determine whether a particular campaign advertisement contained an "electioneering message." Not only is there relevant case law and FEC guidance to assist in defining the term, but presumably the FEC staff would be readily available to assist. Under the circumstances, it is difficult to understand why we think the FEC could make such determinations but DOJ (working with the FEC staff) could not.

We are not necessarily advocating an ad-by-ad analysis. Instead, we are objecting to an investigative approach that cuts off an entire line of inquiry based on a threshold assumption that may or may not be accurate. How can we make an informed judgment about the ads if we have never reviewed a single one? Even if it turned out that the Department was truly incapable of making solid conclusions about the content of the ads (a dubious proposition), there may well be evidence that does not require dissection of the ads themselves. For instance, Common Cause alleges that the ads in question were "indistinguishable in approach from other campaign ads run by the Clinton and Dole presidential campaigns." While not dispositive, such evidence would be extremely telling, particularly when combined with an analysis of how the campaign committee treated their own ads for allocation and reporting purposes. Similarly, a focused investigation could well turn up documentary or testimonial evidence that supports the Common Cause theory without necessitating a "content analysis."

D. Referral to the FEC

The DOJ memo glosses over a paramount issue: if neither the Task Force nor an Independent Counsel investigates the Common Cause allegations, they will be left to the FEC. It is definitely an understatement to say that "the FEC lacks the resources of the Task Force and is often hamstrung by political division." (DOJ memo at footnote 15). By its own admission, the FEC is woefully understaffed and incapable of handling the "deluge of complaints" resulting from the 1995-96 election cycle. (Letter to Attorney General Reno from FEC, March 10, 1997.) It sought an additional $5 million from Congress to carry out its investigative plan and received nothing. A recent news article reported that the FEC has only two investigators and 31 attorneys, and highlighted the Commission's inability to obtain necessary resources from Congress.[4] In recognition of its dismal investigative resources, the FEC recently asked DOJ for more than 32 investigative and attorney personnel, office space, equipment, cars, telephones, and pagers. (Lawrence Noble Memorandum to Robert Litt, October 1, 1997.)

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[4] Wall Street Journal, Dec. 15, 1997, at A24.

In fact, a referral to the FEC, particularly at this late date, would be a sure-fire guarantee that there would never be a comprehensive investigation of the Common Cause allegations.

II. Presidential Primary Matching Payment Account Act (PPMPPA)[5]

A. "Qualified Campaign Expenses"

Because they chose to receive public matching funds for the primary election, both President Clinton and Senator Dole were required to limit their "qualified campaign expenses" to the expenditure limits set by the FECA (approximately $37 million for the 1996 primary campaign). Within the Clinton/Gore campaign, there were reportedly internal debates about whether to turn down public financing in order to avoid the federal spending limits. In the end, the campaign appears to have developed a scheme to have it both ways -- to receive taxpayer funds and agree to a spending limit, and simultaneously use the DNC to buy tens of millions of dollars in advertising. Campaign strategist Dick Morris and others developed an extremely ambitious ad campaign, primarily directed at swing-voter states where President Clinton had problems. According to Common Cause, the expenditures for the ad campaign totaled at least $34 million in excess of the spending limit. (The Dole campaign spent at least $14 million in excess of the spending limit, according to Common Cause.)

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[5] Because the legal and investigative issues raised by the Presidential Election Campaign Fund Act (PECFA) are virtually identical, as the DOJ memo points out, we have not done a separate analysis of that Act. As to the threshold question of whether there is a sufficient factual predicate to investigate the media campaigns under PECFA, we do not believe this is a close question. If there is a sufficient basis to investigate the media campaign for purposes of the PPMPAA -- which there clearly is -- it would be ludicrous as an investigative strategy to wall off the PECFA simply because Common Cause has not made a specific reference to the PECFA. (If the Department asked Common Cause whether it believes its allegations were relevant to a potential PECFA violation, there can be little doubt about its likely answer.) Although the Task Force has not focused on the issue, the Clinton and Dole campaigns undoubtedly continued their media advertisements and polling after the August 1996 conventions. Whether or not we have specific evidence that the campaigns may have exceeded the general election spending limits, any comprehensive investigation of the media campaign necessarily would extend beyond the primary season. This is particularly true with respect to the Clinton campaign, which faced no primary challenge and designed the DNC media campaign to influence the general election.

The DOJ memo correctly states that "if the media campaigns constituted 'qualified campaign expenses,' that were knowingly and wilfully 'incurred' by the candidates or their campaign committees during the period covered by either PPMPAA or PECFA, a criminal violation occurred." Criminal violations could also be found if the candidates or their committees "knowingly made false statements by omitting from required reports to the FEC 'qualified campaign expenses' that they had incurred."

1. "Specifically authorized in writing"

The PPMPAA provides that a "qualified campaign expense" must be incurred by a person "specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or committee." For no apparent reason, this "written authorization" requirement appears only in the PPMPAA; there is no similar requirement under the PECFA or the FECA, nor is there such a requirement in the regulations implementing the PPMPAA itself. While we agree that the regulations could not supplant the statute for purposes of a criminal prosecution, the regulations certainly are useful in assessing the intent of the statute. As set forth in those regulations, an expenditure is made on behalf of a candidate if it is made by "any person authorized or requested by the candidate, and authorized committee of the candidate, or an agent of the candidate to make the expenditure." 11 C.F.R. 9032.9(b).

There appears to be a consensus that "written authorization" would not be required of the candidate himself or his committee: "a candidate or campaign committee need not give himself or itself written authority to make expenditures on his or its behalf." DOJ memo at 8, note 5. As discussed, there is strong evidence that the President personally controlled many aspects of the advertising campaign, including the individual ads themselves. The advertising expenditures were made "on his behalf" for the purpose of getting himself reelected. Under the circumstances, it seems clear that the media expenditures -- whether or not paid by DNC check -- were in reality made by President Clinton and/or his campaign committee.

Even if we concluded there must be "written authorization" in this case, there does not appear to be any requirement that the authorization be in any particular form. If the point of this statutory provision is to require some written documentation that the expenditures were duly authorized by a particular candidate or committee, the Task Force certainly has obtained that kind of documentation. In fact, the April 17, 1996 memorandum from Harold Ickes to DNC Chairman Don Fowler says it all: "This confirms the meeting that you and I and Doug Sosnik had on 15 April 1996 at your office during which it was agreed that all matters dealing with allocation and expenditure of monies involving the Democratic National Committee ("DNC")

[redacted]

including, without limitation, the DNC's operating budget, media budget, coordinated campaign budget and any other budget or expenditure . . . are subject to the prior approval of the White House." It would be truly bizarre to conclude that there could be a potential PPMPAA violation if Ickes sent a memo to the DNC with an "authorization" on the bottom, but no potential violation on our known facts where Ickes sent a written message essentially stating that the White House controlled everything and that the DNC could do nothing without White House approval. Under the circumstances, the "written authorization" requirement clearly seems to be satisfied.

Finally, even if the existing "written documentation" did not satisfy the "written authorization" provision, the Task Force has not undertaken any investigation to determine whether a more formal "authorization" exists. While we can speculate about whether or not such a document is likely to exist, we simply do not know. The DOJ memo correctly points out that is "plainly a factual rather than a legal question"; the only way to answer it is to investigate. Finally, there clearly is sufficient predication to investigate, particularly in light of the evidence of White House control that has already been gathered.

2. Expenses "incurred on behalf of" the Candidate

Under the PPMPAA, a "qualified campaign expense" must be "incurred"[6] by an authorized person acting "on behalf of" the candidate or his committee. Although the phrase "on behalf of" is poorly defined in the FEC regulations,[7] it appears designed to

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[6] Although the term "incurred" is not defined by the statute, there is no reason to resort to the dictionary or to non-election law cases. Federal election law is replete with examples of expenditures by third parties being attributed in appropriate circumstances to the candidates themselves. Several of these examples, including 2 U.S.C. 441a(b)(2)(B)(ii) and those mentioned in Buckley v. Valeo, are included in the DOJ memo and need not be repeated here. There is absolutely nothing to suggest that a rigid concept of financial liability should govern in this matter. The far better view, which apparently is shared by FEC staff, is that the term "incur" clearly encompasses those who control and direct the expenses and not simply those who write the checks.

[7] "On behalf of" means:

(1) An authorized committee or any other agent of the candidate for purposes of making an expenditure; (2) Any person authorized or requested by the candidate, and authorized committee of the candidate, or an agent of the candidate to make the expenditure; or (3) A committee which

sweep broadly and there is nothing to suggest that it should not be given a common sense interpretation. In this case, because the President and his advisors completely controlled the DNC media campaign, how could the DNC do anything but act "on behalf of" candidate Clinton?

Certainly for any non-advertising expenses, the determination of whether any particular expense is "incurred on behalf of" the candidate is largely a factual question. And in answering that question, nothing would be more important than the degree of control exercised by the candidate. Therefore, if a candidate exercised complete control over items such as supplies or building rent, presumably the FEC would have no difficulty concluding that the expense was "incurred on behalf of" that candidate. The question before us is whether that clearly-understandable approach should be jettisoned when it comes to analyzing advertising expenditures.

What is so unique about advertising expenses that would justify treating them differently from other campaign-related expenses? There are two logical possibilities: (1) they may raise unique First Amendment concerns; and/or (2) the FEC may have already set forth unique rules (regardless of what the statutory language might suggest). With respect to the first possibility, the DOJ memo points out that there is a difference of opinion on whether the application of the "content test" for FECA purposes in based upon First Amendment concerns. While it is difficult to conclude that the "content test" is purely for administrative convenience (notwithstanding the informal opinion offered by the FEC staff), the resolution of that question is not critical here. Whatever First Amendment concerns may apply in the FECA context, they do not apply under PPMPAA, since the candidate voluntarily accepts a limitation on his free speech (i.e., spending) by opting for taxpayer funding under that Act.

The critical issue, then, is whether the FEC has set forth unique rules for advertising expenditures and, if so, whether those unique rules preclude any meaningful investigation of potential PPMPAA violations. As a threshold matter, the DOJ memo correctly states that there is a "complete dearth of case law or relevant FEC decisions" in the PPMPAA context. In searching for the next best thing, there are two options. First, one could apply the rules that ordinarily would apply to other kinds of

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has been requested by the candidate, by an authorized committee of the candidate, or by an agent of the candidate to make the expenditure, even though such committee is not authorized in writing.

11 CFR 9032.9(b).

(non-advertising) campaign expenses. Under this standard, one could easily conclude that advertising expenses directed and controlled by the candidate were expenses "incurred on behalf of" the candidate. The second option is to import the FECA rules and apply them to the PPMPAA. In our view, the first approach is the most sensible and the most consistent with the statutory language. Particularly if the FEC has adopted the "content test" purely for administrative convenience, we should focus on the language and intent of the statute, absent some compelling reason to do otherwise. Since there is no persuasive reason to justify a content analysis under the PPMPAA, "then a factual investigation would be necessary -- either by the Task Force or by an independent counsel -- to determine whether, in fact, the law was violated." DOJ Memo, at 15.

Finally, for the reasons set forth in Part I of this memorandum, even if the "content test" was engrafted onto the PPMPAA, it is not the only available test for analyzing expenditures. "Coordination" has not been eliminated by the "content" test, even in the FECA context. More importantly, there is no reason to even consider the "content" test in the situation presented here, where President Clinton and his key advisors controlled virtually every aspect of the DNC's media campaign.

III. Broader Issues

The DOJ memo correctly states that "the Common Cause allegations are the most serious of those issues raised in connection with the investigation of campaign finance." In a series of extremely well-researched submissions, Common Cause has described a scheme to circumvent the FECA and presidential funding laws on a breathtaking scale. For knowing and willful violations of these laws, Congress provided for criminal penalties.

It has been nearly 16 months since Common Cause first brought these allegations to the attention of DOJ. The Department has on more than one occasion written to Common Cause stating that the Task Force is "reviewing a variety of campaign financing issues arising out of the last national election" and is "examining" the soft money issues raised by Common Cause.[8] In

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[8] Letter from Lee Radek to Ann McBride, March 25, 1997. See also Mark Richard letter to McBride, November 8, 1996 (task force has been created "to fully explore the range of allegations and issues that have been raised" in Common Cause's letters from October 1996); Radek letter to McBride, January 21, 1997 (re: Kanchanalak).

The FBI's concern on this score has been highlighted since

[redacted]

fact, the Task Force has undertaken no actual investigation of these allegations.[9] Consequently, some of the most fundamental questions relating to the 1995-96 presidential campaign remain outstanding:

-- How were the campaign funds raised?

-- How were they spent?

-- How were they allocated and reported for FECA purposes?

-- Who made the fundraising and spending decisions?

While the Task Force has uncovered partial answers to these questions, in particular the last one, it is not because we have addressed them in any systematic investigative fashion. Instead, our information has come primarily from Common Cause, the newspapers, and tangentially from our investigation of other matters.

We must reemphasize that if the Common Cause allegations are not investigated by criminal investigators, it is unlikely that they will ever be investigated by anyone. Referral to the FEC presents two problems. First, how would the Department explain that it waited 16 months and only then decided to refer the matter to the FEC (while the FEC presumably is gearing up for a brand new election cycle)? Second, and more important, the FEC simply cannot handle it. While DOJ may have a policy and practice of referring unresolved campaign financing questions in ordinary cases, this is hardly an ordinary case. If there are violations here, they are violations on a massive scale, far beyond the ability of the FEC to even investigate, let alone resolve. In contrast to the FEC, the Department has assembled a huge Campaign Finance Task Force (apparently many times larger than the entire FEC investigative staff) and has announced to the world the broad scope of its investigative jurisdiction.

The Common Cause allegations need to be investigated. First, they need to be investigated in their own right because

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late October, when Common Cause began sending its communications directly to the FBI Director and to Deputy Assistant Director DeSarno. The FBI has not yet replied to these submissions.

[9] Since the March 25, 1997 representation on behalf of the Task Force includes the many FBI personnel assigned, it is our view that this issue should be promptly decided and the record clarified.

[redacted]

they present serious issues of potential criminal conduct.[10] These allegations were compelling when they first reached the Department in October 1996, and they have become stronger as more and more facts have surfaced. Second, the Common Cause allegations need to be investigated as part of a broader inquiry into campaign fundraising abuses. While the Task Force has had wide range and a variety of targets, it is been partitioned in a way that no ordinary criminal investigation would have been. By pursuing piecemeal investigations of individual subjects, the Task Force may very well be missing the big picture. The conduit contribution and foreign contributor cases are related to the media campaign. In fact, virtually all of the abuses uncovered by the Task Force have resulted, directly or indirectly, from the frenzy to raise millions for the campaign. Yet the Task Force has never undertaken a concentrated look at the core of the money-raising campaign itself; nor has it taken an integrated approach to the investigation as a whole.

Because the Common Cause allegations clearly involve the President, they must be investigated by an Independent Counsel. Moreover, the Attorney General should seek the appointment of an Independent Counsel immediately. Since the Department has had the allegations for nearly 16 months, a preliminary inquiry does not appear to be an option. Finally, we once again would incorporate by reference the FBI's prior written submissions recommending that, independent of the mandatory provision of the Independent Counsel statute, the Attorney General should exercise her discretionary authority pursuant to the political conflict of interest provision.

cc: Director Freeh
Deputy Director Bryant
Principal Associate Deputy Attorney General Litt

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[10] The investigation should include, in addition to an examination of the advertising campaign itself, an inquiry into related matters such as polling and consultant services (which would not require any "content analysis" under any standard).

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

December 8, 1998

MEMORANDUM

TO: LARRY PARKINSON

FROM: DIRECTOR, FBI

SUBJECT: INDEPENDENT COUNSEL MATTER: POTENTIAL ELECTION LAW VIOLATIONS INVOLVING PRESIDENT CLINTON AND VICE PRESIDENT GORE

I concur in your analysis and recommendations regarding the above-captioned matter as summarized in the attached 12/4/98 memorandum.

I spoke with the Attorney General on 12/3/98 and advised that my recommendation in favor of the appointment of an Independent Counsel in this matter should be further discussed. We agreed to meet at 7:00 a.m. on 12/4/98 at DOJ.

We met as agreed for approximately thirty (30) minutes. I fully presented my recommendation and reasons for the Attorney General to use her discretionary authority to appoint an Independent Counsel. Using the attached notes and my annotated copy of the 11/20/98 Radek-Vicinanzo memo, I strongly urged the Attorney General to appoint an Independent Counsel.

I argued that her decision was probably one of the most important to be made as Attorney General and certainly the most significant of all the Independent Counsel matters previously considered. I explained that a decision not to appoint would be made in the worst set of circumstances. The "Common Cause" allegations have been at DOJ in an unresolved state for almost two (2) years. Until the August, 1998, FEC audit report, PIS and others at DOJ have been advising that no violation of FECA or the matching campaign funding statutes was viable.

After the audit report, those same advisors now argue that DOJ policy and the advice of counsel defense preclude further investigation. I used the analogy of a USA preempting a grand jury investigation--using subpoenas and sworn testimony--because the subjects' lawyers present an advice of counsel defense and voluntarily supply and certify that all of the records the Government has requested are produced. I specifically pointed out that in this case the subjects on whose testimony and personal certifications DOJ was relying upon were, in some cases,

people who have ostensibly lied under oath or who were actively being considered for possible perjury charges. I stated that DOJ and the TF have frequently been "surprised" by these subjects when previously subpoenaed or requested records mysteriously turn up long after requested.

I also argued once again that the Attorney General has and had had for some time an irrevocable political conflict of interest which makes it inappropriate and--in my judgement--impossible for her to have conducted the preliminary inquiry and, now, to make legal and policy decisions which close this inquiry without further investigation.

I recommended that rather than analyzing these three (3) very technical statutes--which contain ambiguous provisions--the Attorney General should follow the analysis set forth in the memoranda prepared for her by Chuck LaBella and me. That is, a broad referral based on a Title 18, Section 371, Conspiracy involving the "core group"--including covered individuals--and specific and credible information that a pattern of potential criminal activities should be investigated further by an Independent Counsel without a political conflict. I also pointed out that the Radek-Vicinanzo memo did not even discuss the issue of political conflict or discretionary referral. That pattern would include, but not be limited to, FECA violations, foreign campaign contributions, telephone solicitations, and a conspiracy by the PRC to bribe high-ranking U.S. political figures.

I stated that such a referral could recite that the Attorney General believed that actual prosecution should not result because of DOJ Guidelines, advice of counsel defenses, or for any other reason.

I also pointed out that a decision not to refer this matter still leaves the TF with the RNC issues.

More particularly, I made all the arguments contained in your memo emphasizing that I did not agree that the clear and convincing standard had been reached. I argued that the advice of counsel defense was insufficient here for a number of reasons:

(a) Ickes and Quinn--neither of whom are "disinterested" attorneys--are the principal conduits of "legal advice" to the President/Vice President. Moreover, Ickes, the primary conduit, has serious credibility issues;

(b) The DNC Clinton/Gore attorneys never directly advise the President/Vice President;

(c) Sandler and Utrech are not "outside attorneys" but employees of the campaign or party apparatus who are interested in the outcome;

MEMORANDUM TO PARKINSON FROM DIRECTOR

(d) No advice was ever sought from the FEC or from bona fide "outside counsel";

(e) A serious conflict exists between the "issue ad" legal standard advice supplied according to Sandler and Utrech and what everyone else claimed they furnished as a standard;

(f) Sandler's 2/5/96 "memo" which indicates issue ads may be "over the line";

(g) The inappropriateness of closing down a matter of this significance on the subjective statements, volunteered records, personal certifications and quasi-regulatory review of records and unsworn testimony.

CONCLUSION

The Radek-Vicinanzo memo's statement that this is the most "compelling" case for an advice of counsel defense is a self-serving exaggeration. Conversely, given the gravity of the Attorney General's political conflict of interest--as well as the DOJ's and her principal advisors--I cannot imagine a more compelling matter for the appointment of an Independent Counsel. We now need to review both the purpose and the need for a continuing TF.

1 - Mr. Bryant
1 - Mr. Pickard
1 - Mr. Gallagher
1 - Mr. R. Bucknam

LJF:wss (6)

DOJ-P-01380

December 4, 1998

MEMORANDUM

To: Director Freeh

From: Larry Parkinson

Subject: Independent Counsel Matter: Potential Election Law Violations Involving President Clinton and Vice President Gore

For purposes of your consultation with the Attorney General on the pending independent counsel matter, this memorandum is intended to summarize our discussions on the key issues. For the reasons stated below, it is appropriate to recommend that she seek the appointment of an independent counsel to investigate potential election law violations involving President Clinton and Vice President Gore. Because similar allegations have been made against the Dole presidential election campaign, the independent counsel should be authorized to investigate those allegations as well.

This memorandum is divided into two parts. The first section focuses primarily on the narrow question presented at the end of this 90-day preliminary inquiry: is the advice of counsel defense sufficient for the Attorney General to conclude by "clear and convincing evidence" that the President and Vice President lacked the requisite criminal intent? The second section discusses broader issues that justify the appointment of an independent counsel (regardless of the outcome on the narrow legal issue).

I. The 90-Day Preliminary Inquiry

A. Threshold Issues

The Radek/Vicinanzo memorandum dated November 20, 1998 ("DOJ memo") streamlines the discussion by resolving correctly several important threshold issues. First, the memo defers appropriately to the FEC auditors' conclusion that the DNC-financed "issue ads" can be attributed to the Clinton/Gore campaign committee, thereby violating the spending limits. That conclusion obviously has been strengthened by this week's public release of the Audit Division's final report. The audit report, along with the very strong concurring opinion by the FEC Office of General Counsel, makes a compelling statement that the Clinton/Gore campaign

illegally benefited from the media campaign.[1] Therefore, the basic facts that led to the initiation of the 90-day preliminary inquiry -- the audit findings -- have become stronger.[2]

The DOJ memo also resolves the issue of control, after setting forth a good factual summary of the genesis and development of the issue ad campaign. The memo correctly concludes that the ad campaign was controlled in all major respects by the White House:

> [T]here was little dispute that the DNC issue ad campaign was not only coordinated with the White House but controlled by it. Fowler described the White House control as "near absolute."

DOJ Memo at 29. Among many other things, the memo relies on the April 17, 1996 from Ickes to Fowler establishing that all DNC expenditures were subject to prior White House approval.[3]

With respect to the purpose of the media campaign, the DOJ memo appears to give credence to the witness statements that the primary purpose of the issue ads was to aid the Democratic party and not to reelect the President. Such statements appear to be disingenuous at best; the documentary evidence clearly indicates that the primary purpose of the ads was the reelection of the President. In fact, the FEC Audit Report takes the matter a step further: not only does it flatly reject the argument that the ads

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[1] As you know, the career FEC auditors and lawyers reached similar conclusions about the Dole campaign.

[2] The FEC Commissioners met in public session on December 3, 1998. Campcon had agents in attendance and has reported that several of the Commissioners appeared hostile to the Audit Report. As expected, the final resolution by the Commission is uncertain. One thing that does appear certain, however, is that there will be no resolution for at least several months. Thus, there appears to be little reason for the Attorney General to seek a 60-day extension of the preliminary investigation.

[3] This total White House control of DNC expenditures raises a significant legal issue. As you will recall, in our January 30, 1998 memorandum to DAG Holder, we argued strongly that this was a case about "control" and not mere "coordination." Based on their discussions with the FEC auditors and attorneys, our agents believe that the FEC has acquired only a fraction of the evidence that Campcon has obtained regarding "control." When asked how they would treat a situation in which there was total control of committee expenditures by a campaign, the FEC staff responded that it was an intriguing scenario with which they had never been faced.

were not intended primarily to reelect the President, it essentially alleges an outright fraud:

> The Audit Division does not dispute that the advertisements in fact address pending political issues. However, the facts ascertained during the audit indicates that the primary purpose for addressing these issues was to assist President Clinton's reelection. It further appears that those facts which might otherwise demonstrate that the purpose and "targeting" of the advertisements were related to an overall party agenda (rather than the President's reelection) are true because of a deliberate effort to conceal the actual purpose of the advertisements.

FEC Audit Division Report on Clinton/Gore '96, at 42 (emphasis added).

Although its own analysis of "purpose" leaves something to be desired, the DOJ memo does reach a very significant conclusion: "it is clear that [President Clinton and Vice President Gore] both were sufficiently involved to be deemed coconspirators or aiders and abettors of any potential criminal violations of the FECA or PPMPAA." DOJ Memo at 31. This is an enormously significant conclusion in light of the FEC audit findings that there were violations of the relevant statutes. We are left, then, with the sole issue of whether the President and Vice President committed such violations "knowingly and willfully."

B. Advice of Counsel Defense

I view the advice of counsel defense as fairly strong in this case, but not strong enough to satisfy the "clear and convincing" standard under the Independent Counsel Act. I strongly disagree with the statement in the DOJ memo that "it is hard to imagine a more compelling set of facts establishing an advice-of-counsel defense." DOJ Memo at 40. While there appears to be no dispute that two of the lawyers representing the DNC and Clinton/Gore -- Sandler and Utrecht -- were involved significantly in the ad campaign process, the DOJ memo itself notes certain factors that cut against a viable advice of counsel defense.

1. No Direct Contact Between Lawyers and Principals.

The memo points out that where the attorneys never advise the principal clients directly, this undercuts to some degree the advise of counsel defense. It appears to be undisputed that the two experts, Sandler and Utrecht, never had direct contact with the President or Vice President. Instead, their advice was filtered through intermediaries. The principal intermediary was

Harold Ickes, who is, after all, the subject of a separate investigation for perjury. (While the perjury allegations are unrelated to media fund issue, does it make sense to shut down an investigation based on an advice of counsel defense where the person actually relaying the advice is about to have his own independent counsel?)

There appears to be relatively little evidence that actual legal advice was transmitted to the President or Vice President. Instead, this seems to be a situation in which the President and Vice President were told that "lawyers were involved" and that seemed to satisfy them. (See, e.g., DOJ memo at 40: "The Vice President felt confident that Quinn, who had some expertise in this area and was a good lawyer, had ensured that the ads were legal.") While certainly relevant to state of mind, this kind of evidence is not particularly persuasive in establishing a solid advice of counsel defense.

It also appears that the President and Vice President were relying primarily on Ickes and Quinn, even though they were not acting in a legal capacity. At the time, Ickes was Deputy Chief of Staff to the President and Quinn was Chief of Staff to the Vice President. The fact that they also happened to be lawyers does not necessarily mean they were dispensing "legal advice" for purposes of analyzing an advice of counsel defense.

Finally, there is one clear indication that the legal advice of Sandler and Utrecht may not have been getting through. As noted in footnote 11 of the DOJ memo (p. 22), "Sandler and Utrecht stated that they consistently applied the 'electioneering message' legal standard, not the express advocacy standard, when they reviewed the content of the DNC ads. Yet virtually every other witness recalls Sandler and Utrecht's advice in terms of express advocacy." While the memo concludes that this inconsistency is not significant, certainly it raises some question about whether the attorneys' advice was being heard and heeded.

2. <u>The Attorneys Were Not Disinterested</u>

The DOJ memo points out accurately that Sandler, as general counsel for the DNC, and Utrecht, as general counsel for the Clinton/Gore campaign committee, "worked for organizations with an unmistakable interest in ensuring the reelection of President Clinton." DOJ Memo at 38. The memo also states that "courts have declined to instruct juries on advice of counsel where the evidence indicated that the attorney was not disinterested in the outcome." Without impugning their integrity or professionalism,[4]

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[4] Apparently both Utrecht and Sandler are recognized experts in the election law arena, which has very few

Sandler and Utrecht certainly were not disinterested in the outcome.

3. No One Sought Advice From the FEC

If the DNC or Clinton/Gore truly wanted disinterested -- and dispositive -- advice on whether the spending for "issue ads" was properly allocated, they obviously could have gone to the FEC. They chose not to, presumably because they were afraid they might receive an answer they did not like. (When I met with the FEC's Chief Auditor in September 1998, he reacted viscerally when I asked him if the DNC or Clinton/Gore had ever sought advice on these matters.)

4. The Sandler Memo

There is one clear indication that Sandler -- one of the two lawyers critical to a viable advice of counsel defense -- had doubts about whether the media campaign was violating the law. In a February 2, 1996 memo to Don Fowler, Sandler stated:

> Under [the FEC's legal] test, the DNC is bumping up right against (and maybe a little bit over) the line in running our media campaign about the federal budget debate, praising the President's plan and criticizing Dole by name.

(Emphasis added). When the same memo was sent to Ickes at the White House, it had been rewritten to state that the FEC's "electioneering message" test "is the standard we are applying (albeit aggressively) in the current DNC media campaign." When interviewed about these memos, Sandler gave a contorted explanation which led our agents to believe he was lying.

5. The Investigation Was By Definition Limited

As is true in any preliminary investigation conducted pursuant to the Independent Counsel Act, we conducted this 90-day inquiry[5] without the use of standard investigative tools. Therefore, we had to rely on voluntary production of documents, voluntary statements by witnesses, and agreed-upon attorney-client privilege waivers. While our agents felt that they received full document production from the DNC, they were not

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practitioners. Utrecht in particular is a very impressive witness, according to the agents who interviewed her.

[5] In fact, because of the deadlines required for preparation and review of the DOJ memo and subsequent deliberations, the actual investigation was approximately 60 days.

confident that all relevant White House documents had been produced. While I am unaware of any specific documents we believe to be missing, Campcon has had significant difficulties with White House document production since the Task Force began its work.

C. The "Clear and Convincing Evidence" Standard

Under all the circumstances, is it reasonable to conclude by "clear and convincing evidence" that the President and Vice President lacked the requisite state of mind? As we pointed out during deliberations on the recent Gore and Ickes matters, Congress clearly intended to set a very high threshold before an Attorney General could close a case, either before or after a preliminary investigation, on the ground that the subject lacked the state of mind necessary to commit the alleged crime. In 1987, Congress amended the Independent Counsel Act in an effort to curb what it viewed as a "disturbing" practice by the Department:

> A third problem with the Department of Justice's implementation of the statute is its practice in several cases to decline further proceedings, despite specific information from a credible source of possible wrongdoing, due to a lack of evidence of the subject's criminal intent. The decision not to proceed has sometimes been made even in the face of conflicting or inconclusive evidence on the subject's state of mind.
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> . . .
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> The Justice Department's demand for proof of criminal intent to justify continuing independent counsel cases is disturbing, because criminal intent is extremely difficult to assess, especially in the early stages of an investigation. Further, it often requires subjective judgments, which should ideally be left to an independent decisionmaker. It is not the type of factual question that the Attorney General should be resolving in light of the Attorney General's limited role in the independent counsel process and lack of access to important investigative tools such as grand juries and subpoenas.

1987 U.S.C.C.A.N. at 2159-60.

The 1987 conference agreement emphasized, "The conferees believe it will be a rare case in which the Attorney General will be able to meet the clear and convincing standard and in which such evidence would be clear on its face. It would be unusual for the Attorney General to compile sufficient evidence at that point in the process." Id. At 2190 (emphasis added).

The question is whether this is one of those "rare cases." We should bear in mind the accurate conclusion that the President and Vice President "both were sufficiently involved to be deemed coconspirators or aiders and abettors of any potential criminal violations of the FEC or PPMPAA," DOJ memo at 31. There was a conscious, well-orchestrated effort by the White House to evade the spending limits through the media campaign. Moreover, this kind of campaign was unprecedented, as the President readily acknowledged when he bragged to his supporters about how he had found a new way to spend enormous amounts of money for the campaign. Under all the circumstances, notwithstanding the potentially viable advice of counsel defense, this matter should not be closed on a "clear and convincing" finding.

II. Broader Issues: Conflict of Interest

Even if the Attorney General determines that there is "clear and convincing" evidence of a lack of intent in this 90-day matter, she should step back and consider the impact of closing this investigation. It would be fair to summarize the decision in the following way:

-- For two years, the investigators advocated a need to conduct a broad investigation of the entire campaign financing scheme conducted by the White House and the DNC, including both the raising of campaign money and the spending of that money. The media campaign was critical to the reelection and many of the apparent criminal abuses resulted from the need to keep the money flowing into the media fund.

-- For nearly two years, investigation of the media fund was largely off-limits while the Department debated internally about the scope of the campaign finance laws and whether we should defer to the FEC. In the meantime, the Task Force pursued a variety of individual cases largely independent of one another.

-- While we were debating internally on the broader issues, the FEC was actually working on a comprehensive audit of the two presidential campaigns (much to our surprise). Contrary to the prevailing view within DOJ, the FEC auditors found massive violations of the law by both presidential campaigns.

-- Faced with evidence of legal violations, the Department was forced to initiate a preliminary investigation under the Independent Counsel Act.

-- The preliminary investigation consisted primarily (but not exclusively) of an examination of an advice of counsel defense. We went to the subjects and their lawyers and asked them what happened. They informed us that the subjects had no criminal intent, notwithstanding the apparent violations. After investigating that issue, we agreed with the subjects and closed the entire matter, with one exception:

-- The exception is the related investigation of the Dole campaign. Since we have no evidence relating to an advice of counsel defense for that campaign, we will keep that investigation alive, particularly in light of the FEC's recent Audit Report.

The media fund/Common Cause allegations have always been the biggest piece of the campaign finance scandal. In large part, those allegations led to the creation of the Campcon Task Force in the first instance. Nevertheless, those allegations have never been investigated in any comprehensive or organized way.

Nearly a year ago (January 1998), we sent a detailed memorandum to the Department seeking a comprehensive investigation of the Common Cause allegations. In that memo, we stated:

> "[T]he Common Cause allegations are the most serious of those issues raised in connection with the investigation of campaign finance." In a series of well-researched submissions, Common Cause has described a scheme to circumvent the FECA and presidential funding laws on a breathtaking scale. For knowing and willful violations of these laws, Congress provided for criminal penalties.
>
> It has been nearly 16 months since Common Cause first brought these allegations to the attention of DOJ. The Department has on more than one occasion written to Common Cause stating that the Task Force is "reviewing a variety of campaign financing issues arising out the last national election" and is "examining" the soft money issues raised by Common Cause. In fact, the Task Force has undertaken no actual investigation of these allegations. Consequently, some of the most fundamental questions relating to the 1995-96 presidential campaign remain outstanding:
>
> -- How were the campaign funds raised?
>
> -- How were they spent?
>
> -- How were they allocated and reported for FECA purposes?

-- Who made the fundraising and spending decisions?

While the Task Force has uncovered partial answers to these questions, in particular the last one, it is not because we have addressed them in any systematic investigative fashion. Instead, our information has come primarily from Common Cause, the newspapers, and tangentially from our investigation of other matters.

Very little has changed in the last year. After several months of memos and discussions last winter, in February the Attorney General took under advisement the matter of whether the Common Cause allegations could be investigated. We never received a response until July of 1998, when we read (with great surprise) the Attorney General's congressional testimony in which she stated that the Department was deferring to the FEC.[6]

Our January 1998 memorandum also recommended the immediate appointment of an independent counsel:

> Because the Common Cause allegations clearly involve the President, they must be investigated by an Independent Counsel. Moreover, the Attorney General should seek the appointment of an Independent Counsel immediately. Since the Department has had the allegations for nearly 16 months, a preliminary inquiry does not appear to be an option. Finally, we once again would incorporate by reference the FBI's prior written submissions recommending that, independent of the mandatory provision of the Independent Counsel statute, the Attorney General should exercise her discretionary authority pursuant to the political conflict of interest provision.

Notwithstanding the passage of time, our arguments remain the same. If anything, the need for investigation has increased.

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[6] In April 1998, the Task Force investigators developed a investigative plan and dubbed it the "Media Fund" plan. Because it was never clear how the Task Force could investigative the "media fund" while steering clear of the Common Cause allegations, the investigative plan was necessarily truncated. In any event, beginning in May, the investigators began to conduct the "media fund" investigation and obtained a significant amount of information that became very useful during the current 90-day preliminary investigation. That investigation consisted primarily of interviews of state party officials in a dozen key battleground states (focusing on the use of the state parties as conduits for the DNC), document production by the media consultants, and interviews of three DNC employees (Brad Marshall and two lower-level employees).

Intentionally or not, the Department has deferred to the FEC, which has spoken publicly in a resounding way.

For nearly two years, the Department has been investigating the potential criminal conduct of the President and Vice President. That is an inherent conflict of interest that the Independent Counsel Act was designed to address. Even if the Attorney General concludes by "clear and convincing evidence" that there is a lack of intent, she should exercise her discretionary authority and seek the appointment of an independent counsel.

Memorandum

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

To : MR. ESPOSITO

Date 12/9/96

From : DIRECTOR, FBI

Subject : DEMOCRATIC NATIONAL CAMPAIGN MATTER

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

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

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

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

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

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

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

LJF:wss (2)

CONTINUED--OVER

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

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

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

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

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

November 20, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General

FROM: Lee J. Radek
Chief
Public Integrity Section

David A. Vicinanzo
Supervising Attorney
Campaign Financing Task Force

SUBJECT: Independent Counsel Matter: Potential Election Law Violations Involving President William Jefferson Clinton and Vice President Albert A. Gore, Jr.

As you know, the Public Integrity Section and the Campaign Financing Task Force have conducted a preliminary investigation to determine whether the President of the United States William Jefferson Clinton or Vice President Albert A. Gore, Jr., both of whom are covered persons under the Independent Counsel Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have violated federal criminal law in connection with the production and dissemination of broadcast media advertisements financed by the Democratic National Committee during the 1996 election cycle. As explained below, we have concluded that there are no reasonable grounds to believe that further investigation of this allegation is warranted and accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

OK

The Attorney General must reach her decision in this matter no later than December 7, 1998, 90 days after she advised the Special Division for Independent Counsel Matters of the United States Court of Appeals for the District of Columbia Circuit of her decision to commence a preliminary investigation under the Act. See 28 U.S.C. § 592(a)(1). If the Attorney General agrees with this

recommendation, we will provide the necessary paperwork to be filed with the Special Division in accordance with our recommendation.

INTRODUCTION AND SUMMARY

On August 7, 1998, the Department of Justice received the Exit Conference Memoranda of the Federal Election Commission's (FEC's) Audit Division on the Clinton/Gore '96 Primary Committee, Inc., and the Clinton/Gore '96 General Committee, Inc., and General Election Legal and Accounting Compliance Fund (collectively the "ECMs"). In those memoranda, the Audit Division concluded, albeit preliminarily, that certain expenditures by the Democratic National Committee ("DNC") for broadcast media advertisements during the 1996 election cycle constituted in-kind contributions by the DNC to the Clinton/Gore '96 Primary Committee or the Clinton/Gore General Committee, in violation of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act (PPMPAA), 26 U.S.C. § 9031 et seq., and the Presidential Election Campaign Fund Act (PECFA), 26 U.S.C. § 9001 et seq. At the time it received the ECMs, the Department also was aware, based on published accounts of the DNC media campaign and other information gathered by the Campaign Financing Task Force, that specific and credible information suggested that the President, and to a lesser extent the Vice President, personally participated in the conception and implementation of this DNC media campaign. Based on this information, and inasmuch as a knowing and willful violation of the FECA, PPMPAA, or the PECFA could constitute a criminal offense, the Attorney General triggered this preliminary investigation to determine whether "there are reasonable grounds to believe further investigation is warranted," 28 U.S.C. § 592(c)(1)(A), thus requiring the appointment of an Independent Counsel.

The potential criminal violations here revolve around the question whether, under the FECA, PPMPAA, or PECFA, the costs of the ads are attributable to one or the other of the campaign committees, such that they constituted in-kind "contributions" by the DNC to the candidates and "expenditures" by the candidates themselves. To the extent these advertising expenditures did constitute contributions to and expenditures by the campaign committees, they were unlawful, in that they would have violated, among other things, (1) the FECA's limits on contributions to candidates by multicandidate political parties like the DNC, and (2) the PPMPAA's and PECFA's expenditure limits on publicly financed elections. Any such violations made knowingly and willfully would potentially be criminal.

Whether these advertising expenditures were attributable to the campaign committees such that they violated the FECA, PPMPAA, or PECFA, turns on the content of the ads, and specifically

whether the ads referred to a clearly identified candidate and contained an electioneering message. In its memoranda, the Audit Division found, among other things, that the ads met these tests and accordingly constituted contributions to and expenditures by the campaign committees in violation of the referenced statutes. In conducting this preliminary investigation, we have not reconsidered these determinations by the Audit Division, for the simple reason that, in light of the presumed expertise of the FEC auditors in reaching such determinations, we would be unable to reach a definitive determination to the contrary and conclude on that basis that no further investigation would be warranted.

Our preliminary investigation has accordingly focused on two issues: (1) determining whether the President and Vice President were sufficiently involved in or exercised sufficient control over the DNC issue ad campaign as to be potentially criminally responsible for the violations found by the Audit Division; and (2) if so, determining whether the President and Vice President acted with the requisite "knowing and willful" mental state.[1]

As will be explained in detail later in this memorandum, with respect to the President's and Vice President's involvement in the issue ad campaign, there is little dispute that they both were intimately involved in the conception and implementation of the ad campaign throughout the 1996 election cycle. Indeed, as a practical matter, the President and Vice President exercised nearly absolute control over the ad campaign. As the head of the

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[1] During this preliminary investigation we have also considered the involvement and intent of former Deputy Chief of Staff Harold Ickes in the DNC-financed media campaign. Although the Attorney General has made no formal determination in this matter that under the conflict of interest provisions of the Act Ickes should be deemed to be a covered person, such a determination has been made in a separate matter and the same rationale would seem to apply here as well. As in the cases of the President and Vice President, we conclude that there are no reasonable grounds to believe that further investigation of this allegation is warranted as to Ickes as well. We base our conclusion on the fact that, as set forth below, there is clear and convincing evidence that Ickes lacked the intent to violate the law. Indeed, the facts show that Ickes was a conduit of much of the advice of counsel the President received, and attended most or all of the same meetings as the President and Vice President at which the legal advice and the ongoing involvement of the lawyers were discussed. Alternatively, we also conclude, as with the President and Vice President, that further investigation is not warranted in light of the written and other established policies of the Department of Justice.

national party, the President, and to a lesser extent the Vice President, had the ultimate authority to sanction the issue ad campaign, and they both were involved in nearly every aspect of it, including raising money to finance it, formulating the political strategy the ads were intended to advance, and reviewing and commenting on the ads themselves. Setting aside the issue of intent, we conclude that these facts show sufficient involvement of the President and Vice President in the issue ad campaign as to make them potentially criminally liable for the violations found by the auditors.

With respect to consideration of the intent element of a potential criminal offense, the Attorney General may not, as you know, conclude under the Independent Counsel Act that no further investigation is warranted based on lack of evidence of intent, unless there is "clear and convincing evidence" that the covered persons lacked the requisite state of mind. In reaching our conclusions here, we have considered the evidence of intent under this high standard.

The potential criminal violations under consideration here all require a "knowing and willful" mental state, meaning a violation is potentially a crime only if there is an intentional violation of a known legal duty. Our investigation in this regard has focused generally on the President's and Vice President's knowledge of the law and specifically on any advice they received as to the legality of the DNC issue ads. We have concluded, based on the uncontradicted statements of the principal participants in the ad campaign and a substantial amount of corroborating documentary evidence, that the President and Vice President were advised that the issue ad campaign was lawful and that lawyers were reviewing every ad to ensure full compliance with the law. In addition, there is no evidence suggesting either the President or Vice President ever harbored a subjective belief that they were violating the law or that the review undertaken by the lawyers was insufficient. As we will explain in detail later, in our view these facts establish clearly and convincingly that the President and Vice President lacked the requisite specific intent to violate the law.

In reaching this conclusion, we also have considered that the determinative legal standard at the time -- the FEC's "electioneering message" test -- was so ambiguous and ill-defined as likely to preclude showing that the persons involved in the DNC issue ad campaign ever intended to violate it. We conclude that under such circumstances, where there is no reasonable possibility of establishing the requisite mens rea for a criminal violation, then under the governing standard of the Independent Counsel Act there are no "reasonable grounds to believe further investigation is warranted."

but you haven't seen the ads

Finally, the other substantial issue we have addressed during this preliminary investigation is whether, under the standard set forth in the Independent Counsel Act, "further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations." As we set forth at the end of this memorandum, we have concluded that further criminal investigation of the DNC issue ad campaign is not warranted, in light of the written policy and established practice of the Department of Justice to defer to the FEC in cases involving, as here, the resolution of ambiguities in the reach of the FECA.

In sum, we have concluded that no further investigation of the allegation is warranted and accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

SCOPE OF THE INVESTIGATION

As we note above, our preliminary investigation has focused on the involvement of the President and Vice President in the DNC issue ads campaign and any evidence of their subjective beliefs as to the legality of those ads under the federal election laws. We have not reconsidered the determination by the Audit Division that the DNC ads referred to a clearly identified candidate and contained an electioneering message, recognizing that, in light of the presumed expertise of the FEC auditors, we would be unable to reach a definitive conclusion under the Independent Counsel Act standard that no further investigation of this issue would be warranted.

Even so limited, however, our investigation has been fairly wide-ranging and comprehensive. We have interviewed all of the principal participants in the DNC issue ad campaign, with the only notable exception being Richard Morris, as to whom we saw no need for an interview because he had been comprehensively deposed on this subject matter during the Senate's campaign finance investigation. In conducting this preliminary investigation, we also have had the benefit of all of the previous witness interviews touching upon this subject matter that have been conducted by the Campaign Financing Task Force over the past 18 months.

In addition, we have been able to take advantage of the documents previously gathered by the Campaign Financing Task Force. We also have made our own specific document requests to the President, Vice President, former Deputy Chief of Staff Harold Ickes, the Executive Office of the President (which includes the Office of the Vice President), the Clinton/Gore '96 committees, and the DNC. Each of these persons and entities has been requested to certify that, after a thorough search for all documents called for by the request, all responsive documents

located have been provided to the Department of Justice as part of this preliminary investigation.

To facilitate our consideration of any potential advice-of-counsel defense, the President and Vice President and the Clinton/Gore '96 committees and the DNC all waived any applicable attorney-client and work product privileges that could have been invoked in connection with this investigation. We are satisfied based on the certifications we have received, as well as our interviews of the relevant witnesses, that we have received all relevant privileged material in connection with this investigation.[2]

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[2] As you know, the Republican National Committee financed a similar issue ad campaign between May and August 1996, after Bob Dole became the presumptive Republican nominee and before the Republican National Convention. We have received and reviewed the FEC Audit Division's Exit Conference Memoranda on Dole for President, Inc., and Dole/Kemp `96 and Dole/Kemp Compliance Committee, Inc., which conclude that the RNC's issue ad expenditures similarly violated the FECA and the public funding statutes. Inasmuch as the RNC matter is legally very closely related to the instant DNC matter, we opened a similar investigation of the RNC ads, recognizing that in the absence of distinguishing factual issues, the DNC and RNC matters would likely either be referred together to an independent counsel or closed.

Given the posture in which we were reviewing the RNC matter and its potential overlap with the triggered DNC matter, we determined that in seeking the relevant documents from the campaign committees, the RNC, and the RNC media consultants, we would seek voluntary production rather than use grand jury subpoenas. We have received documents from each of the referenced entities and have considered them and the audit memoranda. The DNC and RNC issue ad campaigns were similar in most material respects: the RNC coordinated and consulted with Dole campaign manager Scott Reed in running the ad campaign; the RNC and the campaign committee employed the same media consultants and pollsters; and the ads, in the opinion of the auditors, contained an electioneering message. It is likely that the RNC would assert a good faith advice-of-counsel defense to any potential criminal case, although at this point the RNC has not waived its attorney-client privilege. As did the DNC, the RNC used lawyers in the general counsel's office to review the ads for conformity with applicable FECA law.

Inasmuch as the Independent Counsel Act has not been triggered as to the RNC, we do not believe we have an obligation

THE POTENTIAL OFFENSES

A. The FECA

Under the FECA, all contributions and expenditures "for the purpose of influencing any election for federal office" are subject to regulation, including certain specified contribution and expenditure limits. 2 U.S.C. §§ 431(8)(A)(i) and (9)(A)(i). The contribution and expenditure limits are set forth in section 441a. With respect to a multicandidate political committee such as the DNC, the FECA specifies a $5,000 contribution limit to any candidate or his authorized political committee with respect to any election for Federal office, including President. Id. § 441a(a)(2)(A). For purposes of this $5,000 limitation, a contribution would include an "expenditure[] made by any person [including a political committee, see id. § 431(11)] in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . or [his] agents." Id. § 441a(a)(7)(B)(i). Subsection (b) of section 441a sets forth the expenditure limitations that apply to candidates receiving public funds in the primary and general elections for President, id. § 441a(b); at the time of the original enactment, this provision limited expenditures to $10 million and $20 million, respectively, in those elections. Subsection (c) provides for annual adjustments to those amounts based on increases in the price index. As a general matter, these provisions limited the amount of money that Clinton/Gore '96 could spend during the 1996 election cycle to approximately $37 million during the primary election campaign and $62 million during the general election campaign.

Despite these limitations, a national committee of a political party may make certain expenditures in connection with

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to consider the evidence of intent under the clear and convincing standard of the Act. Indeed, our investigation of the RNC ads has not been as complete as it has with respect to the DNC ads. For one, as mentioned above, the entities on the RNC side have not waived the attorney-client and work product privileges as they have on the DNC side. In addition, the RNC side has been reluctant to submit to interviews, expressing some sensitivity on that score given that at least two of the principal individuals involved in the RNC issue ad campaign have been informed they are targets in pending Campaign Financing Task Force investigations. Nevertheless, we conclude, as we have regarding the DNC, that in light of the ambiguity of the "electioneering message" standard, it is unlikely we could ever prove that the persons involved in the RNC issue ad campaign possessed the requisite intent to violate the law. For this reason, as well as under the written and other established policies of the Department of Justice, we recommend that this matter be closed as well.

the general presidential election campaign. See id. § 441a(d). Section 441a(d) provides:

> Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party . . . may make expenditures in connection with the general election campaign of candidates for Federal office [including President], subject to [certain specified limitations].

See H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for this subsection [441a(d)], these expenditures would be covered by the contribution limitations stated in subsections [441a(a)(1) and (2)]"). It is undisputed that the DNC spent its limit under this provision on things other than the DNC issue ads that are at issue here.[3]

The thrust of the Audit Division's allegation here is that the DNC-financed ads constituted coordinated expenditures under section 441a(a)(7)(B)(i), meaning that: (1) the DNC violated the $5,000 contribution limit of section 441a(a)(2)(A), and (2) Clinton/Gore '96 violated either the primary or general election spending limits, depending upon whether the DNC issue ad expenditures are attributable to the primary or general election committee. Alternatively, the Audit Division posits that even without coordination, the ads constituted national committee expenditures "in connection with" the general presidential election campaign, because the ads referred to "a clearly identified candidate" and contained "an electioneering message," the FEC's standard for determining whether an ad is broadcast "in connection with" a general election campaign. Inasmuch as the DNC had spent its 441a(d) limit on other things, the DNC expenditures on the ads at issue here violated the 441a(d) limit. In sum, the Audit Division asserts that the DNC's expenditures on the issue ads violated the FECA if either (1) irrespective of the content of the ads, the expenditures on them were in fact coordinated with the Clinton/Gore '96 campaign committee (such that 441a(a)(7)(B)(i) applied), or (2) irrespective of coordination, the content of the ads satisfied the "in connection with" test by referring to a clearly identified candidate and

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[3] The potential violations here involve the issue ads run between August 1995 and August 1996, inclusive, prior to the Republican National Convention.

containing an electioneering message (such that 441a(d) applied).[4]

At bottom, it makes no difference which provision -- 441a(a)(7)(B)(i) or 441a(d)-- applies, or whether both do, because contrary to the Audit Division's interpretation of the statutes, the FEC has interpreted them, at least in the context of national party committee broadcast ads, to embody the same content-driven test for determining whether expenditures on an ad are attributable to a candidate or his campaign committee; i.e., whether the ads refer to a clearly identified candidate and contain an electioneering message. In its brief to the Supreme Court in Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309 (1996) ("CRFCC Brief"), the FEC stated that under the regulatory scheme it has established,

> application of the statutory contribution limits to expenditures by political parties depends upon whether an expenditure is "allocable" or "attributable" to a particular candidate. FEC Advisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185 (May 30, 1985) (AO 1985-14); see FEC Advisory Op. 1984-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5766 (May 31, 1984). "Generic" appeals for public support for a party's federal candidates (e.g., "Support Republicans for Congress") are considered "expenditures" (because they are made "for the purpose of influencing" federal elections, 2 U.S.C. § 431(9)(A)(i)), but they are not allocable or attributable to particular candidates. See AO 1985-14, at 11,185-11,186. They are therefore not deemed to be "coordinated" expenditures -- expenditures made "in cooperation, consultation, or concert, with" a candidate or the candidate's agents, 2 U.S.C. 441a(a)(7)(B)(i), and are, consequently, not subject to the Act's contribution limits. Where a party expenditure is used to finance communicative activities, the Commission has determined that the expenditure will be considered attributable or allocable to a particular campaign committee only if the communication refers to a "clearly identified candidate" and contains an "electioneering message." AO 1985-14, at 11,185.

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[4] But see Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309, 2318 (1996) (must show actual coordination between candidate and party for expenditures to fall within section 441a(d)). This fact is not in dispute here.

CRFCC Brief at 3. In the same section of the brief, the FEC notes that notwithstanding section 441a(a)(7)(B)(i)'s limitation, the national parties may make coordinated expenditures in connection with the general election campaign of candidates for Federal office, up to certain specified amounts, citing section 441a(d). Furthermore,

> [i]n determining whether a party expenditure for communicative activity is made "in connection with" a general election campaign for purposes of Section 441a(d), the Commission employs the same test (depiction of a "clearly identified candidate" plus communication of an "electioneering message") that it utilizes in determining whether an expenditure is attributable to an individual candidate. See AO 1985-14, at 11,185; FEC Advisory Op. 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5561, at 10,691 (Oct. 24, 1980).

CRFCC Brief at 4-5 n.6.

Inasmuch as the United States took this position in the Colorado Republican case, and adopted the position that national party committee ads constitute coordinated expenditures under either provision only if they refer to a clearly identified candidate and contain an electioneering message, we cannot argue that a different standard should apply in this criminal case. Thus, contrary to the Audit Division's opinion, coordination alone, at least in the context of national party committee ads, does not mean an expense is allocable or attributable to a candidate under section 441a(a)(7)(B)(i). Rather, the appropriate test under either provision is whether the ads refer to a clearly identified candidate and contain an electioneering message.

As you know, the FEC auditors found that all of the DNC-financed issue ads referred to a clearly identified candidate and contained an electioneering message. The auditors further found that these advertising expenditures were made by the DNC in consultation and cooperation with President Clinton and his reelection committees. The auditors accordingly concluded that the DNC's expenditures on these ads violated the Act.

In reaching this conclusion, the Audit Division defined "electioneering message" to "include[] statements designed to urge the public to elect a certain candidate or party, or which would tend to diminish public support for one candidate and garner support for another candidate." Primary Committee ECM at 6. The Audit Division contends that the Commission adopted this definition of "electioneering message" in Advisory Opinion 1984-15. Although some of the language on which the Audit Division relies does appear in that opinion, it is in the context of a

broader discussion, including the observation that the ads in question there "effectively advocate the defeat of a clearly identified candidate in connection with the [presidential] election." AO 1984-15, at 11,069-11,070. Moreover, the ads in that Advisory Opinion contained an explicit call to action ("Act today to preserve tomorrow. Vote Republican."), which is a considerably stronger electioneering message than the Audit Division's restatement of the standard in the ECM here would seem to suggest.

A later advisory opinion, AO 1985-14, states only generally that an electioneering message "includes statements 'designed to urge the public to elect a certain candidate or party.'" AO 1985-14, at 11,185 (*quoting* United States v. United Auto Workers, 352 U.S. 567, 587 (1957)).[5] With the exception of this limited guidance, the FEC has shied away from giving any more content to the "electioneering message" test. See Clifton v. FEC, 114 F.3d 1309, 1316 (1st Cir. 1997) (criticizing the FEC for "not even pretend[ing] to explain what [it] means by 'electioneering message'" and acknowledging that the vagueness of the standard "is readily apparent"). Indeed, in Advisory Op. 1995-25, the Commission

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[5] As the Audit Division recognized, the determination whether a communication refers to a clearly identified candidate and contains an electioneering message is based on the content of the ad. See Primary ECM at 20 (basing conclusion that ads contain electioneering message on a review of the content of the ads). In AO 1985-14, the Commission applied this content test and found that the ads did not count against the 441a(d) limit presumably because they did not mention a clearly identified candidate. Even in the one ad that exhorted voters to "let your Republican Congressman know" and to "vote Democratic," the Commission split, by tie vote, on whether the ad should count against the 441a(d) limit. This was so even though the Democratic Congressional Campaign Committee acknowledged that the purpose of the ads was to influence voters' perceptions of the Republican candidates and weaken their reelection prospects. Similarly, in United States v. United Auto Workers, supra, only the content of the ad was considered in determining whether the allegations of the indictment made out a potential violation of the statute. See id. at 584. And the FEC itself has said in published comments in the Federal Register that with respect to communications containing both issue advocacy and electoral advocacy "the subjective intent of the speaker is not a relevant consideration because the inquiry [focuses] on the audience's reasonable interpretation of the message." 60 Fed. Reg. 35292, 35295 (1995).

> [declined] to express any opinion as to what is or is not an electioneering message by a political party committee. The courts and the Commission have addressed the issue of what constitutes an electioneering message by a political party in other circumstances. See Advisory Opinions 1984-15 and 1985-14; Federal Election Commission v. Colorado Republican Federal Campaign Committee, Nos. 93-1433 and 93-1434, 1995 Westlaw 372934 (10th Cir. (Colo.), June 23, 1995.

2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6162, at 12,108. It bears noting in this regard that the cited Tenth Circuit case merely quotes Advisory Opinions 1984-15 and 1985-14 in setting forth the "electioneering message" test.

The upshot of this analysis is that there was very little guidance available for one to look to in determining the precise scope of what the Commission meant by an "electioneering message." The auditors themselves qualify their "electioneering message" conclusions by stating only that "[i]n Audit Staff's opinion" the ads "appeared" to convey electioneering messages. Primary ECM at 19, 20. Indeed, a fair reading of the FEC's previous enforcement actions suggests that the auditors may have applied too broad a test, and that the Commission itself will only find an electioneering message where the ad contains some "call to action" in reference to a federal election, through either the mention of a candidacy, an election, voting, or contributions.[6]

Whether or not the DNC issue ads contained an electioneering message is not the issue here, because the auditors concluded they did and we see no purpose to second-guessing that conclusion in the context of an Independent Counsel Act preliminary investigation. But one of the issues in this preliminary investigation is whether the violations found by the auditors were potentially criminal, which they would be only if committed knowingly and willfully. See 2 U.S.C. § 437g(d)(1)(A). Such a standard of intent requires proof of a "voluntary, intentional

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[6] For example, the Commission took no action against a state Democratic Party whose ads, broadcast in late August to mid-September of 1996, criticized the Gingrich agenda and identified Congressman Hutchinson with that agenda, and then urged the voters to call the Congressman and tell him to "stop listening to Newt and start listening to us!" It also took no action against another state Democratic Party whose ads mentioned a candidacy and specifically criticized the Republican candidate for Senator ("Now [Chuck Hagel] thinks he can just walk in and run for Senator from Nebraska . . . Nebraska deserves better.")

violation of a known legal duty," United States v. Bishop, 412 U.S. 346, 360 (1973), and in that regard, any ambiguity in the meaning of the "electioneering message" test is important, as we discuss in our analysis below.

B. The Public Funding Statutes

Public funding is provided for presidential primary and general elections through the PPMPAA and PECFA, respectively. Under the PPMPAA, candidates seeking their party's nomination for the presidency can qualify to receive matching funds by raising over $5,000 in individual contributions of $250 or less from each of 20 states; qualifying candidates may then receive public funds to match the first $250 of each individual contribution. To be eligible to receive those funds, the candidate must certify that he and his primary committee "will not incur qualified campaign expenses in excess of [the expenditure limits applicable under FECA]." 26 U.S.C. § 9033(b)(1). See 26 U.S.C. § 9035(a); 2 U.S.C. § 441a(b)(1)(A). PECFA provides for full public funding of the presidential general election campaign out of the Presidential Election Campaign Fund. Under the statute, a presidential nominee electing to receive public funding of his campaign must agree that he and his committee "will not incur qualified campaign expenses" in excess of the amount of public funding they receive. 26 U.S.C. § 9003(b)(1). The nominee also must agree not to accept private contributions for the general election campaign. Because the DNC issue ads were broadcast only during time periods covered by the PPMPAA, we do not discuss further the provisions of the PECFA.

Under the PPMPAA, the term "qualified campaign expense" means:

> a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value --
>
> (A) incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election . . . .
>
> For purposes of this paragraph, an expense is incurred by a candidate or by an authorized committee if it is incurred by a person specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or the committee.

26 U.S.C. § 9032(9). There is a dearth of case law or regulation defining the term "in connection with" for purposes of this provision. However, the phrase also appears in the FECA in section 441a(d), defining expenditures by national committees, and, as noted above, has been interpreted by the FEC in the

context of national party advertisements to require a clearly identified candidate and an electioneering message. The same meaning here would make sense, particularly in light of the fact that the PPMPAA expressly incorporates the FECA's expenditure limit, suggesting that Congress intended the two statutes to be similar in scope. Under the FECA, a primary candidate who accepts matching funds may not make "expenditures" in excess of $10 million (adjusted for inflation). 2 U.S.C. § 441a(b)(1)(A). Similarly, the PPMPAA limits a candidate to the same $10 million amount in "qualified campaign expenses" and accomplishes this result by incorporating by reference the limit imposed by the FECA. 26 U.S.C. §§ 9033(b)(1); 9035(a). Under these circumstances, it would be totally illogical for a national party advertisement to be treated differently under the two statutes. This is consistent with the ordinary rule of statutory construction that identical words used in related statutes should be interpreted to mean the same thing. Sullivan v. Stroop, 496 U.S. 478, 484 (1990); see also Commissioner v. Lundy, 116 S. Ct. 647, 655 (1996) (identical terms in same statute). Nothing in either statute suggests that different definitions of the same term should apply here.

As this analysis suggests, the DNC-financed issue ads could constitute "qualified campaign expenses" potentially in violation of the PPMPAA's spending limitation only if they referred to a clearly identified candidate and contained an electioneering message.[7] Thus, the ultimate determination of a potential violation under this statute is the same as under the FECA.

The PPMPAA also criminalizes certain violations. Under the statute, any candidate accepting matching funds who "knowingly" incurs qualified campaign expenses in excess of the limits imposed commits a felony. 26 U.S.C. § 9042(a). Despite slightly different language, it appears that the "knowingly" intent standard here is meant to embody the same intent standard as the FECA, namely an intentional violation of a known legal duty. Given that the two statutes criminalize identical conduct, i.e., exceeding the spending limitation, it would be incongruous for the FECA misdemeanor offense to require a higher level of intent than the PPMPAA felony. In addition, 2 U.S.C. § 437g -- which addresses civil and criminal enforcement of the FECA as well as the PPMPAA -- refers to both statutes requiring evidence of a

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[7] Of course, under the definition of "qualified campaign expense," the expense also would have to have been either "incurred" by the candidate or his committee or "incurred by a person specifically authorized in writing by the candidate or committee . . . ," a factual issue we do not find it necessary to explore.

knowing and willful violation for (1) the imposition of enhanced civil penalties by the FEC, id. § 437g(a)(5)(B), (2) referral by the FEC to the Attorney General, id. § 437g(5)(C), and (3) the imposition of enhanced civil penalties by a court, id. § 437g(6)(C).

In sum, the potential offenses at issue in this preliminary investigation revolve around whether the DNC-financed issue ads can be attributed to the Clinton/Gore committee, whether as "expenditures" under the FECA or as "qualified campaign expenses" under the PPMPAA. In either case, the resolution of this issue turns on the content of the ads and whether the ads referred to a clearly identified candidate and contained an electioneering message. We assume they did, in light of the auditors' conclusions, and that they therefore violated the FECA and PPMPAA. We have accordingly focused our preliminary investigation on whether the President and Vice President were sufficiently involved in the DNC ad campaign as to be potentially criminally liable for the violations found by the auditors, and whether in so doing they had the requisite "knowing and willful" mental state.

THE FACTS[8]

A. The Genesis of the Issue Ad Campaign

According to all of the witnesses, the defeat of the Democrats in the 1994 midterm election directly precipitated the DNC issue ad campaign. The President and his advisors believed that they had not successfully informed the American public about his Administration's objectives and accomplishments. The President felt that he needed to convey more effectively his vision to the American people to counter that of the Republicans. This prompted him, in approximately December 1994,[9] to hire Richard (Dick) Morris, whom he had previously worked with in Arkansas, as a consultant to assist in his reelection effort. As a condition of agreeing to work for the President, Morris insisted that the President hire the polling firm of Schoen and Penn to conduct opinion polling, that he place a staff person in the White House to serve as Morris's liaison, and that he meet

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[8] Special Agent [redacted] of the Federal Bureau of Investigation, the case agent in this matter, has reviewed and verified the facts contained in this memorandum.

AGENT NAME

[9] Morris also had conducted some polls for the President in the fall of 1994 but at that time there was no long-term plan for Morris to work for the President.

weekly with Morris to discuss political strategy. The President eventually agreed to all three conditions.

As part of his strategy to help the President get his message out to the American public, Morris advocated early and frequent paid advertising as a means to communicate broadly the President's message. He assembled a team of consultants, including Douglas Schoen and Robert Squier, a media consultant, to help develop this strategy The group later expanded to include Schoen's partner, Mark Penn, Squier's partner, William Knapp, and a few other media consultants. The overall strategy underlying the ad campaign, which remained constant throughout its existence, was to emphasize the President's and the Democratic Party's positions on key issues that set them apart from the Republican's "Contract with America." Because the differences between the parties were stark, they believed, the ensuing legislative battles provided a unique opportunity to communicate the President's message. And while they had every reason to believe that these advertisements would assist the President in his reelection bid, the consultants agreed that the President had to win key legislative battles, most notably the budget battle, to assure his viability as a candidate.

As agreed, the President met weekly with Morris to discuss political strategy, and their group steadily expanded to include the First Lady (who at some later point dropped out), Vice President Gore, Harold Ickes, Jack Quinn, Leon Panetta, Senator Christopher Dodd, the consultants, and various other Cabinet members and political advisors. Morris prepared detailed written agendas for these meetings, commonly referred to as the "Wednesday night residence meetings," since they typically occurred on Wednesday nights initially in the Treaty Room and later in the Yellow Oval Office in the White House residence.

According to Morris, the Wednesday night residence meetings focused on political strategy, including media, polling, speeches, issues, and policy positioning. According to Ickes, the meetings almost exclusively focused on the issue ad campaign. Ideas for upcoming ads were discussed, animatics (or rough versions of the ads) were viewed, scripts were reviewed, and opinion polls measuring the impact of the ads were discussed. The President's reelection was a constant theme of the meetings. The agendas show that the topic of paid media advertising was discussed as early as March 2, 1995.

The ad campaign was a source of constant friction between Morris and Ickes. Morris, as mentioned, advocated frequent and continuous paid advertising, and he believed that all other political efforts should be subordinated to it, including spending whatever time was necessary to raise funds to finance this effort. Morris also advocated rejecting federal matching funds for the primary campaign so that there would be no limit on

the campaign's spending under the FECA and PPMPAA. Ickes was highly skeptical of early advertising and was concerned that such an effort both would bankrupt the DNC and use too great a proportion of Clinton/Gore primary committee funds too early in the election cycle. In a memorandum to the President dated August 14, 1995, Ickes and Douglas Sosnik outlined the problems with spending Clinton/Gore reelection money in the fall of 1995 and the political risks in rejecting matching funds and the spending limits. One of their fears was that they would have no money left by the spring of 1996 to respond to anticipated Republican attacks financed by the RNC and other "independent" but Republican-aligned groups using "generic" ads. Ickes and Sosnik discounted the possibility of responding with similar generic DNC ads in anticipation that all fund-raising efforts would have to be devoted to replacing the federal matching funds that had been rejected. They also laid out in detail in this and a subsequent August 24th memo the applicable spending limits for the Clinton/Gore primary committee if it accepted matching funds. The President apparently never seriously considered refusing public funds, and ultimately informed Morris of this.

While this debate was ongoing, the Clinton/Gore primary committee ran a series of ads focused on the crime issue. As described by their creator, Bill Knapp, these ads were designed as a "one shot" effort to "resuscitate" the President and to tout the Clinton Administration's record on crime issues. The ads were run in July 1995 at a cost of $2.4 million. The record is unclear why these ads were paid for by Clinton/Gore rather than the DNC. There appears to have been little discussion of the funding for these ads. Lyn Utrecht, the general counsel for the Clinton/Gore reelection committees, believed that the DNC simply lacked the money at the time to pay for the ads. Jack Quinn, who at that time was Vice President Gore's Chief of Staff, believed that Morris had persuaded the group that the ads had to run immediately and the Clinton/Gore reelection committee had the funds on hand. Both Utrecht and Joseph Sandler, the general counsel for the DNC, stated that it was their opinion at the time that the ads could have been funded by the DNC. Nevertheless, prior to the running of these crime ads, the possibility of funding issue ads through the DNC had been considered. In his agenda for the June 21st residence meeting, Morris presented the rationale for advertising on the crime issue and wrote, "[d]o it [paid media on crime issues] through DNC and take Republican complaint which we probably win."

The date of this initial consideration of issue ads is somewhat inconsistent with Morris's testimony before the Senate Committee on Governmental Affairs, where Morris recounted that his discovery of the issue-ad concept was precipitated by a conversation he had had with Erskine Bowles in July 1995. During that discussion, Bowles informed him that the President was unlikely to reject federal matching funds, and that Morris needed

to formulate an alternative course of action for funding a media campaign. Morris testified that although he had a general notion of issue ads, he had not focused on them in detail because he had assumed that the reelection committee could fund the media campaign. Morris testified that at some later point he learned more about issue ads, either from Sandler, Utrecht, or Bill Knapp, and realized that the DNC could finance precisely the sort of ads he wished to run without running afoul of federal spending limits. As Morris recalled in his testimony (pp. 134-36):

> When I found out that you could run advertising that was related to issues that did not explicitly urge the election of a candidate, I realized that that was precisely what I had in mind, anyway, doing. . . .
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> So it was not a question of finding a loophole in which we could restructure the advertisements to achieve a different goal in a different way in order to get under the DNC label. It was that the goals that I had in mind strategically were a precise description of what that label -- of what issue advocacy entailed. . . .
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> * * *
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> So that, when I found out that there was a kind of advertising, advertising that could be done, that was so congruent with my political purposes at that point, which was to win an issue before the Congress, I was thrilled because it showed me -- because it gave me the answer.

B. The First DNC-Financed Issue Ads

Morris and the other consultants were heartened by the results of the Clinton/Gore crime ads, which they said proved the effectiveness of their paid media strategy. A Morris agenda shows that on July 26th he presented to the President a plan to have the DNC pay for ads during the recess months to sway the votes of moderate Republican Senators on the upcoming budget battle. The strategy was to run the ads in markets with large numbers of persuadable voters who in turn would pressure their swing Senators to support the Administration's plan. In the agenda, Morris listed the Senators and the markets he wished to target. While the DNC would pay for the ads, "we control production." By the next week, the agenda contained the same strategy as part of a more long-term and elaborate plan that envisioned spending $5 million for 1500 points[10] of advertising.

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[10] A point is the percentage of television households that

Ickes continued to attempt to curb Morris's plans. On August 4, 1995, Morris wrote a memo to the President, complaining that Ickes, who he referred to as "the God of Strife," had indicated that Morris could not use Squier because Squier was already working for the "re-elect committee." This memo is an important indicator that by this time, Morris (and presumably the President) was aware of potential legal issues surrounding the DNC's financing of the issue ads, because he noted that:

> The legal issue on the DNC's ability to pay for the medicare ads is not even a close one. (Harold himself even thought the July ads -- much, much more Clinton oriented than these -- could have been paid for by DNC).

The first issue ads that the DNC funded were a small-scale "flight" focused on the Medicare debate, which itself was a subset of the looming budget battle. These ads ran in August 1995 and cost the relatively modest sum of $.9 million. At the time, most of the principal participants in the media campaign did not view their airing as an endorsement of Morris's media plan, but instead approval for the particular ads in question.

By the time of the September 7th residence meeting, Morris's plans had become more grandiose. He deemed the Medicare ads to be a success, and he believed that more were needed to "hammer the point home." Morris proposed at that meeting running $50 million in pre-convention ads, to be split between the DNC and the Clinton/Gore primary committee. In total, he proposed the DNC would pay $33 million and the campaign would pay $17 million. Morris's agenda for the meeting included some key questions, such as whether the campaign could limit other spending so that it could afford an additional $17 million on ads, and whether the additional net amount of $40 - $45 million could be raised. Morris's agenda concluded with the question: "Can we stop DNC from spending the money on things other than our ads[?]"

The next week's agenda elaborated on the strategy, and Morris established priorities for running ads according to time periods (e.g., September through November 15th was his first priority for running ads; November 15th through January 15th was his lowest priority). For the time period January 15th through April 15th, which Morris listed as his third priority, he noted that they had to "work" to make it appropriately funded by the DNC. Thus, they had to:

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can be reached during a "flight" of ads. Five hundred points indicates that an ad will be seen an average of five times per week for each household targeted.

1. Create relationship to current legislation
2. Defend more Dems than Clinton; attack more Republicans than Dole
3. Run in non primary states as well
4. Run in some areas well before primary.

While most of the witnesses stated there was no particular meeting or moment when it was decided to run a more extended set of ads, Donald Fowler, the DNC's national chairman, described a significant meeting on September 10, 1995. That meeting, attended by the President, Vice President, Ickes, Leon Panetta, Bowles and perhaps others, focused on whether the DNC should undertake the media campaign and whether it could be afforded. The legality of the campaign was not discussed, except to acknowledge that it was, in fact, legal according to Utrecht and Sandler. Fowler recalled that the meeting was "collegial," and that all agreed in principle to the idea of running a continuing series of ads. As the individual who was "more equal among equals," the President endorsed the plan. The initial decision was to run ads addressing the pending budget battle and (what later became) the government shutdown for 10 weeks beginning in October, to carry almost through the end of the year, at a cost of $1 million per week. Ultimately, because of the government shutdown, the ads were run through the end of the year, for a total of 12 weeks in 1995.

C. The Formalized Issue Ad Campaign

By October the process for developing, testing, and approving the issue ads was well underway. According to Morris and others, the ads were to focus on the predominant issues of the day, including the budget, tax cuts, and Medicare, and were to promote the President's legislative agenda. The media team, sometimes after discussions at the residence meetings, would develop concepts to be tested as topics for particular ads, and then Penn and Schoen, the pollsters, would develop lengthy questionnaires to measure the import of these topics. The polls also would test the President's approval rating and approval ratings for Bob Dole and other potential Republican presidential candidates. Based on the results of the polls and what they indicated about which topics were effective, the consultants would develop scripts and animatics (very rough video presentations of the ads). The animatics were then tested in shopping malls throughout the country, in which individuals would be questioned about their views of the ads and their impressions regarding whether Clinton (or his Republican adversaries) "takes clear stands on issues," "has a plan to balance the budget," is "in touch with my values," is "working to give families a tax cut," and the like. The mall tests also tested for Clinton and Republican approval ratings.

The results of the polling and mall tests were then discussed at the Wednesday night residence meetings. The participants also frequently viewed the animatics. Following the meetings, the consultants would refine the ads and obtain the final approvals needed, both from the lawyers, as described below, and from Ickes or Sosnik. A form was developed so that the White House could authorize the Squier, Knapp firm to produce animatics or the ads, or to purchase air time. The form sometimes included the maximum amount authorized and noted how the costs would be allocated between the DNC and Clinton/Gore '96. In the alternative, the form would note that the attorneys would determine the allocation.

Most of the ads were actually paid for through state Democratic parties. This was done to take advantage of FEC regulations allowing the state parties to use higher percentages of soft money than the DNC could to pay for the ads. At least one day before the tapes and checks were mailed to the stations, the Squier, Knapp firm would send to Brad Marshall, the DNC's Chief Financial Officer, a list of states in which the ads were to run and the amounts for the buy. The firm also would enclose an invoice for the state party that showed the amount the state party had to pay for the flight. The DNC did not transfer money to the state parties until someone from the White House (either Ickes, Sosnik or Karen Hancox) approved the expenditure. Once the White House authorized the purchase, Marshall would wire transfer the funds to the state parties. The state parties were instructed to then wire the funds to the Squire Knapp Ochs' bank account. It was expected that any refunds that the state parties received because of unplaced ads would be returned to the DNC.

Although it appears that the state parties had little involvement in decisions concerning the issue ad campaign, both Sandler and Fowler stated that many state chairs requested that the ads be shown in their states because of their effectiveness and benefit to Democrats across the board. In addition, a few state chairs specifically declined to run ads, and some requested modifications to ads to make them more appropriate in their particular regions.

In addition to endorsing the plan for DNC-sponsored issue ads and in controlling the DNC's expenditures on them, the President and Vice President were actively involved in raising the money to finance the ad campaign and in reviewing the ads themselves -- in script, animatic, or final form -- and thereby controlling the content and message of the ads. Though by most accounts Morris was exaggerating when he wrote in his book that the President frequently edited ad scripts, all the witnesses agreed that the President and Vice President reviewed most of the ads in some form or another, made suggestions to the content, and ultimately approved them.

In total, DNC issue ads were run from August 16, 1995, through August 6, 1996. The DNC subsequently ran "441a(d)" ads until the Democratic National Convention on August 28, 1996. The FEC auditors determined that the DNC spent a total of $42,373,336 on issue and "441a(d)" ads. After the initial flight of Clinton/Gore '96 crime ads run in July 1995, the campaign committee did not run further ads until March 1996. The FEC auditors determined that Clinton/Gore '96 spent a total of $11,731,101 on preconvention ads.

D. The Lawyers' Involvement

All the witnesses gave a consistent account of the lawyers' involvement in the process. From the inception of the issue ad campaign, Utrecht and Sandler were involved in reviewing and approving the ads to ensure that the DNC's expenditures on the ads would not be attributed to the Clinton/Gore primary committee. Many of the persons involved recognized that inasmuch as 1995 was the start of a presidential election cycle, there were particular legal rules that would govern such a determination. Harold Ickes in particular was instrumental in getting Utrecht and Sandler involved. When the idea of issue ads first arose in the late spring or early summer of 1995, Ickes asked Sandler and Utrecht for advice as to whether and under what circumstances the DNC could run paid media without it being attributed to the campaign committee. According to Ickes, both the President and Vice President were sensitive to the legal issues and would not have pursued the idea had they not been assured of its legality by the lawyers.

Ickes stated that Utrecht and Sandler advised that issue ads could be run by the DNC during the presidential election cycle without being attributed to the campaign committee so long as the ads did not expressly advocate the election or defeat of a particular candidate.[11] All that mattered in determining whether

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[11] In their interviews, Sandler and Utrecht stated that they consistently applied the "electioneering message" legal standard, not the express advocacy standard, when they reviewed the content of the DNC ads. Yet virtually every other witness recalls Sandler and Utrecht's advice in terms of express advocacy. We do not view this apparent inconsistency as being particularly significant, however. First, the advice-of-counsel defense depends exclusively on the subjective intent of the principals. Even if the advice was incorrect or misunderstood, the subjective intent of the principal to intentionally violate the law is still lacking. Second, we conclude from the evidence that the lawyers in fact applied the electioneering message test, though in discussing the standard with others they oversimplified

the ads would be attributed to the campaign committee was their content. Ickes recalls discussing with the President and Vice President the advice received from the lawyers and his view that the lawyers should be involved at every stage of the process, including review of the ads themselves, to ensure that the ads met the applicable legal standards. According to Ickes, the President and Vice President agreed and were assured that the lawyers would stay involved. Every subsequent indication to the President, Vice President, and Ickes was that the lawyers did stay involved, inasmuch as Ickes specifically recalls the consultants periodically complaining during the Wednesday night residence meetings about the constraints the lawyers were placing on them. An RNC ad that featured Dole's biography especially angered Morris and led to his efforts to have the lawyers relax their standards. On this and other such occasions, the President, Vice President, and Ickes all were of the view that the consultants simply had to follow the lawyers' advice.

Another person who played a role in getting the lawyers involved and conveying their advice to the President and Vice President was Jack Quinn. Quinn recalls being sensitive to the potential legal issues before the first issue ads were run in August 1995. At the time, Quinn was the Vice President's Chief of Staff, and in that role he attended the Wednesday night strategy meetings in the White House residence. When the idea to run issue ads first arose, Quinn was familiar enough with the law to know that there had been a number of recent legal developments both before the FEC as well as the courts, and Quinn insisted that Utrecht, as counsel for the campaign committee, be consulted. Quinn recalls someone, possibly Ickes, telling him that the lawyers already had been consulted.

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it to speak simply in terms of express advocacy. For example, Ickes recalls only references to "express advocacy" in his discussions with Sandler and Utrecht, yet Sandler's February 8, 1996 memo to Ickes discussing the DNC's position in the Colorado Republican litigation refers explicitly to the FEC's "'electioneering' message" test and states, "[t]his is the standard we are applying (albeit aggressively) in the current DNC media campaign, to avoid having the ads count towards the limit on expenditures for Clinton/Gore." In addition, the ad scripts themselves and related notes show that the lawyers were not simply applying an "express advocacy" test because although the scripts for DNC ads never contained express advocacy, the lawyers often insisted on changes that would have been unnecessary had they been applying that test. At least two contemporaneous notes refer to consideration of the electioneering message test (undated note from February 1996 referring to express advocacy and "electioneering" in comparing a DNC ad and a Clinton/Gore ad; note dated 4/2/96 referring to an ad being "close to electioneering").

Quinn stated that the President and the Vice President wanted to be certain that all the legal guidelines were followed, particularly in light of Administration policies on campaign finance reform. Quinn recalls initially discussing issue ads at a White House meeting where the President and Vice President were assured that the lawyers had been consulted and would remain involved in the issue ad campaign to ensure compliance with FEC regulations. Though Quinn does not specifically recall what was said at the meeting, he, and similarly the President and Vice President, clearly had the impression that lawyers had been consulted and that no ad would move forward without the lawyers' approval. Quinn recalls that this took place before the first issue ads were run in August 1995.

According to Utrecht and Sandler, no formal process had been set up for their review and approval when the first DNC issue ads were run in August 1995. Nevertheless, it was clear to them and to the consultants creating the ads that Utrecht and Sandler's approval was necessary before an ad could be run, and Utrecht and Sandler did approve those ads before they were broadcast.

Once it was decided that the DNC would run the $10 million ad campaign, the consultants requested that the lawyers provide to them clear guidance concerning the legal parameters governing the issue ads. In response, Utrecht drafted some legal guidelines, which she provided to the media consultants, that discussed the applicable legal standards, but which also strongly suggested that she and Sandler review each ad. According to the media consultants, they were amenable to such a procedure because in particular they were concerned that time and money not be spent on an ad, including getting Presidential approval, only to have the lawyers determine later that the ad could not be run. Utrecht reiterated these guidelines and her suggestion to Quinn during a late night telephone call she received from Quinn while he was with the President in the White House residence on September 14, 1995 (corroborated by a fax the next day from Utrecht to Quinn). It was accordingly decided that Utrecht and Sandler would be integrated into the ad creation and review process, so that even before actual production started the lawyers would vet and approve the ads as within the statutory and regulatory guidelines, and a written protocol to that effect was established. From that point on, Sandler attended most of the consultants' creative meetings to enable him to comment immediately on ideas for ads and proposed scripts. Under the written protocol, and in practice according to the witnesses, Sandler, Utrecht, and Deputy White House Counsel Cheryl Mills were consulted for their legal opinions on ad content and timing

at several stages in the ad creation and approval process.[12] According to every witness we interviewed, the lawyers had absolute veto power over every proposed ad. They reviewed all changes to the ads after their initial legal review and approved each final ad before it was broadcast.

These procedures were memorialized in a contemporaneous document titled, "Procedures for Generic Media Buys." In response to our requests for voluntary production of documents, several versions of these written procedures were produced, reflecting changes to the procedures over the course of the 12-month issue ad campaign. Each iteration of the procedures stated that draft scripts were to be provided to Utrecht and Sandler before the ad concepts were tested and that animatics of the ads would be provided to the lawyers as soon as they were available. Sandler was responsible for obtaining final script approval from Utrecht and Cheryl Mills. The lawyers also were provided tapes of the final ads for approval.

Other available documentary evidence corroborates that this protocol was followed. Sandler's and Utrecht's calendars and diaries reflect many meetings between the lawyers and the consultants, and in particular Sandler's participation in the consultants' creative meetings. There are also memoranda corroborating both that the lawyers were to be involved in reviewing everything (e.g., Utrecht memo provided to Morris and Quinn stating, "Sandler and I can provide the best advice if we have sufficient time to consider all of the circumstances surrounding a particular ad campaign [which means] an opportunity to review the ads, to understand the selection of the markets and the timing") and that the lawyers periodically gave the consultants general advice (Schwartz memo to Morris, et al., memorializing 12/20/95 meeting with Utrecht and Sandler). More important, however, is that Clinton/Gore '96 and the DNC produced numerous documents, principally facsimiles, reflecting scripts being sent back and forth among the lawyers and the consultants for lawyer approval and comment. Many of these scripts reflect the lawyers' advice, such as ensuring that DNC issue ads referred to Bob Dole in the context of his legislative proposals instead of simply to Bob Dole. A December 8, 1995, memorandum to the President from the co-chairmen of the DNC states that the DNC General Counsel's office "continue[s] to work with counsel for the re-elect, the media team, and DNC and White House staff to refine legal ground rules for the DNC generic media campaign."

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[12] White House counsel was consulted for the limited purpose of ensuring no misuse of official resources or insignia.

These documents strongly corroborate that the lawyers were intimately involved in reviewing the content of the ads. Morris's agendas for the Wednesday strategy meetings further corroborate the lawyers' involvement, in that the agendas contain several references to the lawyers' review of the ads: December 7, 1995 ("[w]e will work with lawyers on placement and content to avoid spending campaign money before April"); February 7, 1996 ("[l]egal opinion is that we must use Cl-Gore money inside 28 day windows before primaries"; May 2, 1996 ("[w]e are now operating under a unilateral ruling by [Lyn] Utrecht and Joe Sandler that we cannot run DNC ads after memorial day unless we use up our 441 general election money[;]" "[t]here is no statutory or caselaw basis for this deadline, it is just their attempt to be cautious"). Although some of the lawyers' contemporaneous notes suggest a concern that they needed more time to consider and review ads, there is no indication that the process ever actually broke down or, more important, if it did, that the principals ever had reason to believe it had broken down.

There was only one indication that any of the lawyers questioned the appropriateness of the DNC issue ads that were approved and run. In a memo to Fowler dated February 2, 1996 concerning the possible positions that the DNC could take in the Supreme Court in the Colorado Republican case, Sandler described the standard that he was applying to the issue ads at that time as follows:

> The FEC has adopted a vague and fuzzy test for determining when a party communication counts as an expenditure for a federal candidate -- and therefore counts against the above limits. The test is that a communication counts if it contains an "electioneering" message about a clearly identified candidate. . . .
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> Under this test, the DNC is bumping up right against (and maybe a little bit over) the line in running our media campaign about the federal budget debate, praising the President's plan and criticizing Dole by name.

Despite this memo, Sandler insisted that he never believed that the DNC issue ads in fact crossed the line. He stated that he had included this language in the memo because others could believe that the DNC ads contained an electioneering message and he wished to emphasize the stakes involved. Fowler, the recipient of the memo, did not recall the parenthetical, and remembered only discussions about the political consequences of the Colorado Republican case. He recalled that Sandler consistently had informed him that the ads were "within the law." In any event, there is no indication that such a view was ever communicated to the President or the Vice President, and indeed, when this same memo was prepared to go to Ickes in the White

House, it was changed to state that the "electioneering message" test "is the standard we are applying (albeit aggressively) in the current DNC media campaign . . . ."

As you know, the President and Vice President were both interviewed as part of this preliminary investigation, and both stated it was their understanding that the lawyers had expressly sanctioned the idea of DNC-financed issue ads during the election cycle and had in fact reviewed every ad to ensure compliance with the applicable legal standards. In addition, both the President and Vice President denied ever having harbored any subjective doubts as to whether the ads were violating the law or whether the legal review undertaken by the lawyers was sufficient.

E. The Purpose of the DNC Issue Ad Campaign

The witnesses described the issue ad campaign as having several purposes. Although all acknowledge that the President's reelection was one of these, they also said it was not the primary one. Morris, as the self-proclaimed architect of the media campaign, described its purpose as follows:

> Specifically, I was not very concerned in the early part of '95 or throughout most of '95 with the President's re-election, per se, because I felt that for the President to have a hope of being re-elected, he first had to win the fight over the budget. He first had to defeat the agenda of the Gingrich-Dole Congress and win the battle associated with the budget and tax cut issues, and I felt that winning that battle was a condition prior to being able to be re-elected President. I felt that if he failed to win that fight, there was no way that he would ever be reelected. . . . So I wasn't much interested at that point in trying to get votes for Bill Clinton for President.

(Morris testimony at 135-36.)

> What I'm saying is that these DNC ads were aimed primarily at winning the budget fight in Congress and this document [July 26, 1995 agenda] shows how we targeted individual Senators and designed the time buy not primarily with a view toward winning Clinton's reelection but primarily with a view toward breaking the Republican support in Congress and defeating the budget cuts.
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> * * *
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> My testimony today is that at any point in a presidency, any advertising, any issue advertising the President does whether for health care reform or for

> the stimulus package or to win the budget fight would eventually accrue to his benefit in the reelection.
>
> And defeating the Republican budget cuts would ultimately accrue to his benefit in winning the election. But my testimony today is that the purpose of these issue advocacy ads was not to sure [sic] the President's reelection primarily but it was primarily to win the budget fight.

(Morris testimony at 292-93.)

These views were echoed by others. The President acknowledged that, if effective, the issue ads would help his reelection, but also would assist all Democrats. The fortunes of the Democrats in Congress were inextricably tied to his own, as were those of the Republicans in Congress tied to their leaders, Newt Gingrich and Bob Dole. If Americans favored the Clinton positions over the Gingrich/Dole views, all Democrats benefitted. The budget battle provided a unique opportunity to contrast the parties' opposing views. We do not view this as inconsistent with the President's acknowledgment at the time, as recorded at various fund-raising events, that the DNC ads were having a substantial impact on his public approval rating, which presumably strengthened his hand in dealing with the Congress on legislative issues as much as it improved his chances for reelection.

Vice President Gore had a similar view. The overall goal of the ad campaign was to prepare for the clash between the Republicans and Democrats over the budget. As early as February 1995 he had predicted that the budget battle would lead to a government shutdown. The secondary goal of the media campaign was to frame the Democratic position for the reelection in 1996.

Both Sandler and Fowler talked about the importance of the issue ad campaign to the Democratic party. If the ads benefitted the President, they benefitted the party as well. Because the President is head of the party, it is impossible to separate the value to him from the value to the party and its candidates.

Documents indicated that the reelection of the President was very much a focus of the issue ad campaign. For example, both the mall tests and the opinion polls frequently tested the President's popularity and included "head to head" comparisons between the President and Republican hopefuls.[13] And the ads,

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[13] The DNC and Clinton/Gore '96 would apportion the costs of the poll depending on the nature of the questions asked.

while apparently run in markets aimed at persuading Republican and Democratic moderates to support the President's budget plan, also ran in "swing states" geared toward influencing the President's reelection. In the face of this evidence, both Sandler and Utrecht were emphatic in their view that the purpose behind the running of the issue ads was irrelevant to determining whether the ads constituted an excessive in-kind contribution to the Clinton/Gore campaign. More important, this was also their advice at the time to Ickes and, through him, to the President and Vice President.

As a final matter, there was little dispute that the DNC issue ad campaign was not only coordinated with the White House but controlled by it. Fowler described the White House control as "near absolute." The most telling example of this control is exemplified in a memo that Ickes drafted to "Chairman Fowler," with copies sent to Chairman Dodd, other officials at the DNC and White House staff, dated April 17, 1996, in which he confirmed matters raised at a meeting that had taken place among Fowler, Sosnik, and Ickes on April 15th:

> This confirms the meeting that you and I and Doug Sosnik had on 15 April 1996 at your office during which it was agreed that all matters dealing with allocation and expenditure of monies involving the Democratic National Committee ("DNC") including, without limitation, the DNC's operating budget, media budget, coordinated campaign budget and any other budget or expenditure . . . are subject to the <u>prior</u> approval of the White House. (Emphasis in original).

While it does not appear that Ickes sent this memo, Fowler stated that it accurately reflected the April 15th meeting, and that the DNC had followed that directive.

Thus the ads resulted from the Wednesday night residence meetings, which were in large part controlled by the White House. After the decisions were made, it was Ickes and others in the White House who maintained control over the DNC and approved all expenditures. While Ickes attributed this approval to the need to avoid erroneous expenditures, officials in the DNC acknowledged that no money could be spent on the ad campaign without such approval. The Procedures for Generic Media Buys confirmed that "no money will be moved by the DNC unless and until DNC has received confirmation from Harold of the total amount approved to be spent."

Sandler and Utrecht reviewed the polls question by question to determine the appropriate attribution.

The fact that the same consultants and pollsters worked for both the DNC and the Clinton/Gore primary committee on advertising also guaranteed complete coordination. In fact, Morris had insisted on the selection of these individuals to work on the entire media effort, and complained to the President in an August 4, 1995 memo that "unless I keep control — through Squier, (I can't through Greer), the whole play won't work."

In Morris's eyes, the DNC ads were virtually indistinguishable from Clinton/Gore ads in their intended purpose and effect. In the agenda for the December 7, 1995, residence meeting, Morris outlined his strategy for the next several months. He estimated that he would need $15-18 million for paid media in January through early April and assumed the DNC could fund it so long as they "work[ed] with lawyers on placement and content to avoid spending campaign money before April."[14] Similarly the May 6th agenda indicates that it was unlikely that the DNC would not be able to fund specific ads because "content can always be adopted to reflect legislative priorities." An Ickes memo also reflects the view that Morris believed that the DNC and Clinton/Gore ads were interchangeable.

ANALYSIS

In analyzing this matter, we have considered whether the President and Vice President potentially may have committed criminal violations of the PPMPAA and the FECA, and whether further investigation of those potential violations is warranted. As set forth above, we have not reconsidered the Audit Division's conclusion that the DNC issue ads referred to a clearly identified candidate and contained an electioneering message. Rather, we have assumed for purposes of this preliminary investigation that the DNC expenditures on issue ads violated the contribution and expenditure limits of the FECA and the PPMPAA. The issues we have focused on during this preliminary investigation have been whether the President and Vice President were sufficiently involved in the DNC media campaign to be potentially criminally responsible for the violations found by the Audit Division, and whether the President and Vice President committed any such violations "knowingly and willfully," as required by the statutes.

As set forth above, although there is some disagreement among the witnesses as to the precise nature of the President's

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[14] This in fact did not occur. Because the lawyers had insisted that no DNC ads run in the 28-day period before a primary or caucus, Clinton/Gore ads would replace DNC ads during that window of time.

and Vice President's involvement in the ad campaign, it is clear that they both were sufficiently involved to be deemed coconspirators or aiders and abettors of any potential criminal violations of the FECA or PPMPAA. The President and Vice President not only authorized the DNC issue ad media campaign, but they were regularly apprised of what was being done, actively participated in raising funds to finance the ad campaign, and approved and occasionally edited the ads themselves. The only substantial issue here is whether the President and Vice President knew they were violating the law in doing so.

Our analysis of the President's and Vice President's intent focuses primarily on the advice they received concerning the legality of the DNC-financed issue ads and the involvement of counsel in reviewing and vetting the ads to ensure their compliance with the law. Based on our investigation, we have concluded that there is "clear and convincing" evidence that the President and Vice President did not intend to violate the law. As set forth more fully below, we base our conclusion on the uncontradicted testimony and statements of all of the principal participants in the media campaign, who uniformly confirmed that the President and Vice President were advised that according to DNC and Clinton/Gore counsel the issue ads could be run, with certain limitations, during the presidential election cycle without attribution to the campaign and that the lawyers would be involved in reviewing every ad to ensure full compliance with the law. This testimony is further corroborated by the documentary evidence, which shows that the President and Vice President were advised of the lawyers' advice and received periodic indications that the lawyers remained involved in reviewing the ads throughout the relevant time period. Further, the President and Vice President both stated that to their knowledge no ad had ever been run without the lawyers' approval and that at no time had either one of them harbored any doubts as to the legality of the issue ad campaign or the efficacy of the legal review procedure. This too is corroborated by the documentary evidence, which shows that the lawyers diligently reviewed the ads for legal compliance and had the final say on whether an ad could be run or not.

The factual record establishes clearly and convincingly that the President and Vice President lacked the specific intent to violate the law. In reaching this conclusion, we also have considered that the determinative legal standard at the time -- the FEC's "electioneering message" test -- was so ambiguous and ill-defined as to preclude showing that the persons involved in the DNC issue ad campaign ever intended to violate it. We conclude that under such circumstances, where there is no reasonable possibility of establishing the requisite mens rea for a criminal violation, then under the governing standard of the Independent Counsel Act there are no "reasonable grounds to believe further investigation is warranted."

A. The Standard Under the Independent Counsel Act

Under the Independent Counsel Act, the Attorney General may not base a determination "that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind." 28 U.S.C. § 592(a)(2)(B)(ii). Given this stringent standard under the Independent Counsel Act, the mere lack of affirmative evidence that the President and Vice President acted with criminal intent, without more, would not be grounds to close the matter. Rather, there must be clear and convincing evidence of a lack of intent.

The "clear and convincing" evidence standard of proof has been described as an intermediate standard, lying somewhere between the "beyond a reasonable doubt" standard and the "preponderance of the evidence" standard. See Santosky v. Kramer, 455 U.S. 745, 756 (1982); Buildex, Inc. v. Kason Industries, 849 F.2d 1461, 1463 (Fed. Cir. 1988). The clear and convincing evidence standard of proof by its very terms demands consideration of both the quality and the quantity of the evidence. See Santosky, 455 U.S. at 764. Its function "is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" Addington v. Texas, 441 U.S. 418, 423 (1979), *quoting* In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J. concurring). As one evidence commentator has noted,

> standards like clear and convincing evidence (or preponderance of the evidence, or even proof beyond a reasonable doubt), are selected to govern a decision by a trier of fact, Judge or jury, who is expected to take credibility into account. The standard represents a confidence level, not an abstract measure of the quantity or quality of evidence presented in any case. For example, a jury might convict a defendant -- i.e., find him guilty beyond a reasonable doubt -- on the basis of a single witness' testimony, despite contrary testimony by two defense witnesses. It may do so even if the Trial Judge would not have believed the single witness. The same is true of cases when clear and convincing evidence is the standard.

Saltzburg, 1 Federal Rules of Evidence Manual 389 (7th ed. 1998) (discussing problems with clear and convincing standard in 404(b) context). Courts and commentators frequently cite the Supreme Court's articulation of the standard in Colorado v. New Mexico, where the Court stated that the clear and convincing evidence

standard requires that the entire body of evidence "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" 467 U.S. 310, 316 (1984). See C. McCormick, Law of Evidence, § 320, p. 679 (1954) (standard requires that the factfinder "be persuaded that the truth of the contention is 'highly probable'").

As this discussion makes clear, the term "clear and convincing" does not mean uncontradicted. The evidence on both sides of the issue must be considered and weighed both qualitatively and quantitatively. The fact that there may be some evidence tending to establish criminal intent does not mean the opposing body of evidence cannot be clear and convincing, and vice versa. A determination whether there is clear and convincing evidence of a lack of intent requires that all of the evidence of intent be weighed, and a judgment reached, in light of that entire body of evidence, whether it is "highly probable" that the covered persons lacked the requisite state of mind in committing an offense.

B. The Intent Standard of the Potential Offenses

Only knowing and willful violations of the FECA and PPMPAA are potentially criminal. Under those statutes, consideration of this intent standard has more often arisen in the context of the imposition of enhanced civil penalties -- which also can only be imposed for knowing and willful violations -- than it has in the context of criminal prosecutions. In the civil enforcement context, the knowing and willful standard has been interpreted to mean an intent purposely to violate a statutory standard known and understood by the offender. See National Right to Work Committee, Inc. v. FEC, 716 F.2d 1401, 1403 (D.C. Cir. 1983); AFL-CIO v. FEC, 628 F.2d 97 (D.C. Cir. 1980). Thus, knowledge of illegality is an essential element of the potential offenses. See also Cheek v. United States, 498 U.S. 192, 201 (1991) (willfulness intent standard requires proof of "a voluntary, intentional violation of a known legal duty"). In the context of the potential offenses here, our intent inquiry boils down to whether the President and Vice President knew the applicable standard for determining what constituted an appropriate issue ad and whether they knew that the DNC issue ads violated that standard.

Relevant considerations in this regard include the clarity of the applicable legal standard under which the conduct would be judged and the principals' subjective beliefs, based on advice of counsel or otherwise, whether they were violating that standard. In National Right to Work Committee, supra, the court considered whether certain violations of the FECA by the NRWC were committed knowingly and willfully. For reasons not relevant here, that determination depended upon whether the NRWC knew the meaning of the terms "member" and "membership organization" as defined by the

FEC. The court concluded that ambiguities in the statute and the failure of the FEC to provide any guidance as to the meaning of the terms precluded a finding of a "knowing, conscious, and deliberate flaunting of the Act" as required by the knowing and willful standard. Id. At 1403. Similarly, in AFL-CIO v. FEC, supra, the court concluded that uncertainties in the meaning of the law and the principal's good faith belief in the legality of its actions precluded a finding of willfulness. Id. at 101. See Cheek, supra, 498 U.S. at 201-202 (it is well established that willfulness under a criminal statute is negated by a subjective good-faith belief based on advice of counsel that one's actions are lawful; a good-faith misunderstanding of the law; or a good-faith ignorance of the law).[15]

Our investigation has uncovered no evidence to suggest that the President or Vice President ever subjectively believed that the DNC's financing of the issue ads was a violation of the law. The President, and to some degree the Vice President, knew that the PPMPAA and the FECA limited how much money they could spend during the primary; that if these ads counted they would be over the limits; and that these ads would count if their content impermissibly advocated the President's election or Dole's defeat.[16] But there is no evidence that they knew the meaning of

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[15] Ignorance of the law is not the same as "willful blindness." Willful blindness with respect to knowledge of the requirements of the law is inconsistent with a good-faith misunderstanding of the law, and will preclude a good-faith defense. The Ninth Circuit explained the reasons for the willful blindness rule in United States v. Jewell, 532 F.2d 697, 700 (9th Cir.)(en banc), cert. denied, 426 U.S. 951 (1976), as follows:

> The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, "positive" knowledge is not required.

There is no evidence here to support the inference that the President or Vice President consciously avoided knowledge of the legal standard or deliberately ignored learning the facts.

[16] Of course, proof of knowledge of other facts and

an electioneering message or that any of these ads contained one. As in NRWC and AFL-CIO, this lack of intent is bolstered by the fact that the applicable legal standard itself was vague and ambiguous. Such a factual record -- where there is no evidence that the covered person had subjective knowledge of the standard and even if he attempted to determine the standard he would have no certainty as to what the law required -- in and of itself makes it "highly probable" that he lacked the intent to knowingly violate the legal standard.

Indeed, the "electioneering message" test was so ambiguous and ill-defined at the time as likely to preclude one from ever showing under these facts that the persons involved in the DNC issue ad campaign intended to violate that standard. See United States v. Harris, 942 F.2d 1125 (7th Cir. 1991) (lack of clarity in applicable tax law prevents finding of willfulness and deprived defendant of fair notice; "criminal prosecutions are no place for the government to try out 'pioneering interpretations of tax law'"). This principle is illustrated by United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974). There, in the context of a tax prosecution, the Fourth Circuit reversed a conviction on the ground that, since the question whether the income had to be reported was so doubtful, the defendant lacked the requisite intent to evade:

> As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions. As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so

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applicable legal standards would suggest other potential knowing and willful violations. For example, the following facts would constitute "knowing and willful" violations of other applicable FECA and PPMPAA provisions: (1) proof that the President and Vice President knew there was a legal limit on DNC contributions to the re-elect committee, that if these ads counted toward that limit the DNC would exceed it, and that these ads would count if they contained an electioneering message (and referred to a clearly identified candidate); or (2) proof that the President and Vice President knew that under the FECA a national party committee could never use soft money to pay any portion of the costs of an ad containing an electioneering message (and referring to a clearly identified candidate) and that these ads were paid for in part with soft money. But with respect to all such potential violations, the intent issue always boils down, in part, to whether the President and Vice President knew the standard for what constituted an electioneering message and knew that the DNC ads violated it.

> problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required.
>
> It is settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it.

Id. at 1162. See Harris, supra, 942 F.2d at 1132 n.6 ("[a] claim of objective ambiguity [in the applicable law] requires that the court examine all of the relevant precedents and dismiss the indictment if it concludes that the tax obligation is ambiguous as a matter of law").

In our view, at the time of the DNC ads in question, the definition of an electioneering message was so vague that it would be similarly problematical to predicate criminal liability on a violation of that standard.[17] As we discuss earlier in this memorandum, the FEC has never clearly defined what it means by the term "electioneering message." Former FEC Vice Chairman Trevor Potter, two years prior to the commencement of the DNC issue ad campaign under investigation here, implored his colleagues to establish a clearer standard. See Statement of Reasons of Vice Chairman Potter, MUR 3524, Sep. 15, 1993. And one court has expressly criticized the FEC for "not even pretend[ing] to explain what [it] means by 'electioneering message.'" Clifton v. FEC, supra, 114 F.3d at 1316.

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[17] Indeed, it is debatable whether the "electioneering message" test is even the appropriate legal standard. In Federal Election Commission v. Colorado Republican Federal Campaign Committee, the District Court held, on grounds of statutory construction, that the applicable legal standard was express advocacy. 839 F. Supp. 1448, 1455 (D. Colo. 1993). The Court of Appeals reversed, and without expressing an opinion on the clarity of the electioneering message standard, held that the ad in question violated that standard. 59 F.3d 1015 (10th Cir. 1995). The Supreme Court in turn reversed the Court of Appeals, but did not reach this issue. 116 S. Ct. 2309 (1996). In their submission to the Department of Justice on August 11, 1998, the lawyers representing the reelection committees and the DNC make a credible argument for why the courts will ultimately hold that express advocacy is the appropriate standard. Under these circumstances, even if the electioneering message test were clear, there would be a strong argument that the President and Vice President lacked the requisite intent to violate the legal standard inasmuch as it is undisputed that the issue ads did not contain express advocacy.

We conclude that under such circumstances, where there is no reasonable possibility of establishing the requisite mens rea for a criminal violation, then under the governing standard of the Independent Counsel Act there are no "reasonable grounds to believe further investigation is warranted." This is a sufficient reason in itself to conclude that the appointment of an independent counsel is not warranted here. But in any event, the overwhelming evidence shows that the President and Vice President affirmatively believed, based on the involvement and advice of DNC and Clinton/Gore counsel, that the DNC issue ads were in full compliance with the law.

C. Advice of Counsel

It is well established that willfulness can be negated by advice of counsel. Simply put, one who believes his actions are lawful based on advice of counsel lacks willfulness because he has not intentionally violated his legal duty. Strictly speaking, advice of counsel is not a defense, but rather goes to whether the individual possessed the requisite criminal intent. In a case such as this under the Independent Counsel Act, therefore, advice of counsel may be considered only under the clear and convincing evidence standard of the Act, and the Attorney General may decline to seek the appointment of an independent counsel in such a case only where there is clear and convincing evidence that the covered persons relied on advice of counsel.

To be entitled to assert a defense of advice of counsel, a person must show that he made full disclosure of all material facts to his attorney and that he relied in good faith on advice that the conduct was lawful. United States v. DeFries, 129 F.3d 1293, 1308 (D.C. Cir. 1997); United States v. Lindo, 18 F.3d 353, 356 (7th Cir. 1994). While some courts require evidence that the defendant initially sought the advice in good faith, see e.g., United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir. 1993), cert. denied, 114 S. Ct. 1055 (1994), the D.C. Circuit in DeFries rejected that approach, holding instead that the individual's initial motivation in seeking counsel's advice is irrelevant. See DeFries, 129 F.3d at 1308 n.7.

In the context of this case, full disclosure cannot be seriously disputed. Here, the legal review was set up in such a way as no representations would have to be made to the lawyers, because the lawyers were part of the ad creation process itself. This process was largely necessitated by the amorphous and uncertain "electioneering message" standard. The rationale for the lawyers' involvement was to keep an electioneering message out of the ads, so the only relevant factual information was the content of the ads themselves. Because both Sandler and Utrecht reviewed all of the ads, they were fully aware of all material information before rendering their opinions. Moreover, to the

extent relevant, if at all, the attorneys were fully aware of the facts surrounding the issue ad campaign, including the purpose of the ad campaign, the identity of consultants between the DNC and the reelection committees, and the control of the ad campaign by the White House. Our investigation has uncovered no evidence suggesting that either the President or Vice President withheld any information that could have affected the nature of the attorneys' legal advice.

An advice-of-counsel defense could fail if the President and Vice President did not rely on the attorneys' advice in good faith. For example, courts have declined to instruct juries on advice of counsel where the evidence indicated that the attorney was not disinterested in the outcome. In United States v. Shewfelt, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972), the defendant retained attorneys to facilitate his fraudulent scheme. In affirming the district court's refusal to give an advice-of-counsel instruction, the Court of Appeals stated:

> Here the evidence beyond question indicates that appellants retained counsel to insure the success of their mendacious scheme, not to secure legal advice. The attorneys in question merely implemented in the most expeditious manner the plan concocted by their clients . . . . Legal assurance was not sought because acting within the framework of the law was not the reason appellants elected to deal with members of the Bar.

Id. at 839. See also United States v. Carr, 740 F.2d 339, 347 (5th Cir. 1984), cert. denied, 471 U.S. 1004 (1995) ("[w]hen the lawyer is a partner in a venture, takes a share of the profits, or is 'not a lawyer who had no interest save to give sound advice for a reasonable fee,' the advice of counsel defense is unavailable"); United States v. Piepgrass, 425 F.2d 194 (9th Cir. 1970) (in challenge to sufficiency of the evidence, court found that jury was entitled to discount advice-of-counsel defense because attorney had a financial stake in the venture); United States v. Cheek, 3 F.3d 1057 (7th Cir. 1993) (after remand from the Supreme Court and subsequent reconviction, court of appeals held defendant's reliance on attorney's advice was not in good faith, because among other reasons he relied on an attorney who confirmed his views that tax system was voluntary and disregarded advice that failure to file might result in criminal prosecution).

With respect to the facts here, it is clear that Sandler, as general counsel for the DNC, and Utrecht, as general counsel for the Clinton/Gore re-election committees, worked for organizations with an unmistakable interest in ensuring the reelection of President Clinton. While the issue ad campaign was conceived in

part to further the goal of reelecting the President, there is no evidence that the lawyers' advice was shaped or tainted in some way also to further that goal. Moreover, Sandler and Utrecht are experts in the field of federal election law, and the Vice President, Quinn and Ickes all described Utrecht in particular as one of the preeminent lawyers in this field.

The lawyers' description of their advice as conservative in the face of uncertain and perhaps unconstitutional restrictions by the FEC was borne out by the interviews and documents. For example, the lawyers' invocation of the 28-day rule, in which they would not permit the running of DNC issue ads during the four-week period preceding a primary or caucus, was not required by law. Similarly, their reevaluation of the DNC ads following key events, such as Dole's resignation, indicated a sensitivity to the ambiguities surrounding party issue ads. Finally, their decisions remained firm despite pressure from Morris and the other consultants to loosen their guidelines (especially in light of the Dole "bio" ad), and they were backed up wholeheartedly by the President, Ickes, and others.

The only evidence that any of the lawyers suggested that the ads may not have been proper was the February 2nd Sandler memo to Fowler, described above. While Sandler's explanation was not especially persuasive, we found no evidence that the President or Vice President ever received such advice or that any concern about the ads was brought to their attention.

In short, it was entirely logical that the President and Vice President would turn to these attorneys to ensure that the issue ad campaign was legal, and there is no evidence that they received any information whatsoever to the contrary.

There are two additional facts in this investigation that could affect the validity of an advice-of-counsel defense. The first is that the attorneys never advised the President or Vice President directly. When intermediaries are the source of the legal advice, there must be evidence that the principals received the advice and relied on it. See United States v. Bostian, 59 F.3d 474, 480 (4th Cir. 1995), cert. denied, 116 S. Ct. 929 (1996). In addition, if the advice was conveyed by individuals with their own biases or motivations, the covered persons' reliance on such advice may be misplaced. Second, the President himself is an attorney and both he and the Vice President have been involved in numerous campaigns. As a result, one could argue that they should have known that the issue ads contained electioneering messages and were funded in violation of FEC law. Proof that an individual harbored criminal intent despite an attorney's advice would defeat a good-faith reliance on counsel. United States v. Poludniak, 657 F.2d 948, 959 (8th Cir. 1981), cert. denied, 455 U.S. 940 (1982) ("no one can willfully and knowingly violate the law and excuse herself from the

consequences by claiming that she followed the advice of counsel"). See also Williamson v. United States, 207 U.S. 425, 453 (1907).

However, the evidence establishes that Ickes, Quinn, and perhaps others told the President and Vice President of the lawyers' advice and that the President and Vice President relied on it. Moreover, we found no evidence that the President or Vice President had any reason to doubt the accuracy of the advice that Ickes and Quinn conveyed to them. The Vice President described Ickes and Quinn as sticklers, and recounted how Quinn had insisted early on that the lawyers become involved in the process. The Vice President felt confident that Quinn, who had some expertise in this area and was a good lawyer, had ensured that the ads were legal. In fact Quinn's telephone call to Utrecht confirms that he wanted to make sure for himself that the lawyers were involved and that he would not rely solely on Morris and the other consultants' representations.

Similarly, Ickes took steps to ensure that the lawyers remained involved, and he was satisfied that they were, especially in light of the consultants' complaints that the legal advice was too restrictive. Although Ickes received a version of Sandler's February 2nd memo, the memo Ickes received described the standard as being applied "aggressively" and made no mention that the ads were "over the line." Ickes had no motive to inaccurately convey the lawyers' advice to the President, and in the context of his well-known disputes with Morris over the issue ad campaign in general, it can be fairly assumed that he would have put an end to the funding of these ads if there was some basis to do so. Moreover, the President stated explicitly that he believed that Ickes faithfully related the advice.

Finally, there is absolutely no evidence suggesting that the President or Vice President had independent knowledge of the "electioneering message" standard or ever entertained a subjective belief that they might be violating it. Both President Clinton and Vice President Gore insisted that although they had some passing knowledge of the law in this area, they knew that they needed lawyers to determine that the issue ads were legal. The evidence suggests they acted conscientiously at all times to ensure that at least the letter of the law was followed. Indeed, it is hard to imagine a more compelling set of facts establishing an advice-of-counsel defense.

D. Conclusion

As the foregoing analysis demonstrates, the evidence is "clear and convincing" that the President and Vice President lacked any intent to violate the law in connection with the DNC issue ad campaign and reasonably believed that the ad campaign was lawful and that DNC and Clinton/Gore counsel reviewed every

ad to ensure compliance with the law. For that reason, we conclude that no further investigation of this matter is warranted and we recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

WRITTEN OR OTHER POLICIES OF THE DEPARTMENT OF JUSTICE

We have also explored during this preliminary investigation whether "further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations." As set forth below, we have concluded that based on these entirely separate grounds further investigation is not warranted, in light of both the written policies and established historical practice of the Department of Justice to defer to civil FEC enforcement in certain matters involving the application of regulatory campaign financing legal standards.

A. Background

Prior to the enactment of the FECA, the Department prosecuted campaign financing violations under statutes codified in Title 18. For the most part, these offenses were strict liability crimes, imposing criminal sanctions on those who made illegal expenditures or contributions regardless of intent. As part of its enforcement responsibilities during this time period, the Department also issued "advisory opinion letters" that clarified the reach of the campaign financing statutes in specific factual scenarios.

Congress enacted FECA in 1971, and it became effective on April 7, 1972. The Act originally was limited to establishing enforceable reporting and public disclosure requirements for federal candidates and their campaign committees. The legislation did not alter the pertinent criminal codes in any way and the Department continued its enforcement role.

In 1974, Congress amended the Federal Election Campaign Act, effective January 1, 1975. One of its principal features was the establishment of a bipartisan Federal Election Commission comprised of six Commissioners. This new Commission was given specific power to formulate policy, issue regulations (subject to legislative veto), and render advisory opinions regarding specific transactions or activities. Following the enactment of the 1974 Act, the Department ceased rendering its own advisory opinions and began deferring to the FEC on the scope of the new law. At the same time, the FEC was required to refer to the Department all apparent violations of the campaign financing statutes.

Shortly after its enactment, the legislation was challenged on constitutional grounds, and the Supreme Court, in Buckley v.

Valeo, 424 U.S. 1 (1976), struck down significant features of FECA. Congress was thus required to enact remedial legislation on an expedited basis prior to the 1976 presidential elections. The result was the Federal Election Campaign Act amendments of 1976, which took effect in mid-June of that year.

The amended legislation changed the FECA in several significant ways. Among other things, it incorporated within the Act itself the campaign financing statutes, which then became subject to the FEC's noncriminal enforcement processes and remedies. It also restructured the penalties for violations of the Act. Specifically, it repealed the strict liability criminal penalty that had been applicable to violations of the original FECA, and replaced it with a series of flexible administrative and civil remedies that applied to all violations of the Act enforced exclusively by the FEC. In addition, it added a criminal misdemeanor penalty that applied only to FECA violations involving at least $2000 and committed "knowingly and willfully." 2 U.S.C. § 441j. Moreover, under the amendments, it was no longer mandatory for the FEC to refer violations of the campaign financing statutes to the Department, but instead was within its discretion. 2 U.S.C. § 437g(a)(5)(C).

The amended statute expressly gave to the Federal Election Commission the power and the duty to "formulate policy with respect to" FECA. This power is conferred directly by the Commission's statutory charter. 2 U.S.C. § 437c(b)(1). Even the courts defer to the Commission's interpretation of the FECA. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981) (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded"); Bush-Quayle '96 v. FEC, 104 F.3d 448, 452 (D.C. Cir. 1997)(same). As reflected in the Memorandum of Understanding (MOU) between the Department and the FEC, signed in 1977 and still in force, the Department too has deferred to the Commission's authority to interpret the Act by confining itself to the prosecution of a subset of clearly defined offenses.

The law does not preclude the Department from initiating a criminal action while related agency proceedings are still pending or have never been brought. See United States v. Tonry, 433 F. Supp. 620 (E.D. La. 1977); see also United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979); United States v. Jackson, 433 F. Supp. 239 (W.D.N.Y. 1977). Nevertheless there are important legal and policy reasons why the Department has chosen to defer to the FEC, especially in cases where the underlying law is unclear or in flux. The Department policy in this regard is described below.

B. Department of Justice Policy

The Department consistently has deferred to the FEC in matters involving the interpretation of its own statutes and regulations. This makes sense where, as here, the standard governing the content of speech is ambiguous and awaits further clarification from the FEC. This practice is reflected not only in our historical practice of not prosecuting cases such as those under investigation here, but also in certain of the Department's written policy statements.

To begin, in December 1977 the Department and the FEC entered into an MOU that clarified their respective roles in the enforcement of federal election matters. It recognizes, among other things, that "Congress intended to centralize civil enforcement of the Federal Election Campaign Act in the Federal Election Commission by conferring on the Commission a broad range of powers and dispositional alternatives for handling nonwillful . . . violations" of the FECA and the public funding statutes. See paragraph 1 of the DOJ/FEC MOU.

The Department's policy is more specifically laid out in its written manual, Federal Prosecution of Election Offenses. That manual states on page 107 that "[c]ivil enforcement is clearly appropriate for FECA violations . . . that are committed openly and in obvious ignorance of the law." This policy recognizes that where the governing legal standards are ambiguous and the potential violation is committed openly, such that willfulness is absent or would be difficult to prove, then deference to civil enforcement by the FEC is appropriate.

Finally, although only recently reduced to writing, the Department has long adhered to the following policy, recently included in a written memorandum to Assistant United States Attorneys assigned to serve as "District Election Officers" in the 93 United States Attorney's offices:

> All criminal violations of FECA brought under the Act's criminal misdemeanor provision [2 U.S.C.§ 437g(d)] require proof of a specific intent on the part of the offender to violate a substantive provision of the Act which the offender knew of and purposefully flouted. [citations omitted] This strict scienter element requires that the offender's conduct offend a clearly defined statutory standard. Resolution of ambiguities in the reach of FECA are the exclusive responsibility of the FEC, subject of course to judicial review. E.g., 2 U.S.C. § 437c(b)(1), § 437d(e), § 437f, and § 438(a)(8). Felony prosecutions involving FECA brought under 18 U.S.C.§ 371 or § 1001 require additional proof of scienter beyond that needed to gain a conviction under 2 U.S.C.§ 437g(d). . . .

As these written policies suggest, the Department of Justice has historically deferred to the FEC where the governing standard is ambiguous and the alleged offense was committed openly. The Department has followed these policies without exception. The DNC issue ads fall squarely within this policy, because the governing electioneering message standard was ambiguous and the offense, if indeed it was one, was committed openly. Under these circumstances, the Department's longstanding policies dictate that this matter should be deferred to the FEC's administrative authority and enforcement.

CONCLUSION

As set forth above, we have concluded that there are no reasonable grounds to believe that further investigation is warranted in the investigation of President Clinton and Vice President Gore concerning their involvement in the DNC-financed issue ads broadcast in the 1996 election cycle. We therefore recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

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U. S. Department of Justice

Washington, D.C. 20530

November 20, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

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

David A. Vicinanzo
Supervising Attorney
Campaign Finance Task Force

SUBJECT: FBI's Recent Memo in Independent Counsel Matter involving the Vice President

On November 18, 1998, we received a memorandum from the FBI (hereafter "FBI Recommendation") that recommends appointment of an Independent Counsel. In support of this recommendation, the document cites evidence uncovered during our two preliminary investigations and finds it "sufficient to support a finding that the Vice President knew that "hard" money was a component of the media fund." After careful review, we conclude that the evidence cited in the FBI Recommendation does not challenge or refute the factual conclusions set forth in our 90-day memorandum.[1] This

[1] With the single exception of the recent Jack Quinn interview, all the evidence cited in the FBI Recommendation has been available to investigators since August 26, 1998, the

memorandum responds to the FBI's analysis.

Ickes Memoranda

According to the FBI Recommendation, 13 memoranda from Harold Ickes, "directed to" the Vice President, "detail discussions of "hard" money in relation to the media fund."[2] However, as we noted at the conclusion of our section 607 investigation, the Vice President and several members of his staff have stated credibly that he did not read the Ickes memoranda. These statements are supported by others who, in their interviews, indicated that the Vice President showed little interest in DNC finances, the topic of these memoranda. In fact, we have developed no evidence during either investigation that indicates the Vice President even read these Ickes memoranda, let alone comprehended the brief references to the hard money component of the media fund contained therein. Moreover, as explained in some detail in our previous memorandum, an examination of the content of these documents shows that the Vice President, at the time of his interview last Fall, had little reason to falsely deny knowledge of a hard component to the fund since the DNC planned, at various stages throughout the life of the fund, to borrow the hard portion leaving only the soft portion to be raised by the phone calls and other events.

As noted at the end of our previous investigation, the Vice President, during his interview last Fall, when shown several of the Ickes memoranda mentioned in the FBI's Recommendation, said he did not typically read Ickes's DNC memoranda. By way of explanation, he noted that the Ickes budget analysis documents were ideological tracts used by Ickes to show that Dick Morris's

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beginning of the 90-day period.

[2] As a threshold matter, only the first seven of these documents are relevant to our inquiry because the Vice President's statement about his mistaken belief regarding the media fund was a statement about his belief at the time he made the telephone calls. Since the last calls were made on May 2, 1996, memos and meetings after this date are not relevant to show his state of awareness from November 28, 1995, when the calls began, to May 2, 1996, when they ended.

spending program would break the DNC. He noted that the memoranda would stay in his box until they were removed and destroyed.

In an effort to determine the accuracy of the Vice President's statement, we interviewed several of his staff members, including his two Chiefs of Staff. In addition, we spoke to Liz Cotham and Joel Velasco, two of the Vice President's secretaries and David Strauss, his Deputy Chief of Staff, about the paperflow through the Vice President's West Wing Office.

Jack Quinn was the Vice President's Chief of Staff through November 1, 1995. In an interview on November 17, 1998, when asked by one of the agents to describe the "paperflow" in the Vice President's office while he was Chief of Staff, Quinn described his frustration at the time with the amount of mail that piled up in the Vice President's in-box. According to Quinn, the Vice President's in-box typically had a "ton" of mail in it and the Vice President was not getting through it. Quinn was concerned at the time that the Vice President would not notice and read the important mail sent to him because it was contained in such a large pile of incoming material, some of which was not of importance to the Vice President. In light of this problem, according to Quinn, Beth Alpert and Quinn would go through the Vice President's in-box and separate the "wheat from the chaff." Quinn stated that he and Alpert did this "not necessarily" with the Vice President's knowledge that they were doing so.

According to Quinn, in going through the Vice President's in-box, he would have pulled out the Ickes DNC-related memos as documents that the Vice President did not need to see. Quinn also told us that he would be "amazed" if the Vice President had read Ickes' DNC-related memos.

Ron Klain, who became Chief of Staff on November 1, 1995, told us during his interview during the section 607 investigation that memoranda that would arrive in the Vice President's West Wing Office would be placed in the in-box. According to Klain, on his way in or out of the office, the Vice President would brush through the memoranda in the box and pluck out anything of interest to him. Approximately every two weeks when the memoranda in the box had stacked up, one of the secretaries would

send the stack to Klain's office, which would, in turn, route the memoranda to the staff member who had an interest in topics covered.

According to Klain, the Ickes memoranda were the "quintessential" example of a memo that was left in the box since they were not of particular interest to the Vice President. Klain's view was that the Vice President was not interested in these items because they did not call on him to take any action. Klain also added that memoranda such as the February 22, 1996 Ickes memo were "technical", leading the Vice President not to pay attention to them. In any event, Klain never saw the Vice President show an interest in an Ickes memorandum by taking it from the in-box.[3]

According to Klain, he would send the Ickes memoranda to Deputy Chief of Staff David Strauss. Strauss, when interviewed last Fall, confirmed receiving a steady stream of these documents. After receipt, Strauss would scan the documents to determine if he was required to take action.[4] If not, he would file the document in the proper file. Strauss noted that he had no reason to pay attention to references in the documents to the distinction between federal and non-federal contributions and never discussed these issues with the Vice President.

Finally, turning to the documents themselves, several contain references that indicate that the Vice President, at the time of his interview last Fall, had little reason to falsely

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[3] Both Cotham and Velasco verified Klain's description of the paperflow through the office. Both said that piles would stack up outside of the Vice President's office. Cotham recalls the Vice President would occasionally go through the large volume of stacked memos.

[4] It should be noted that in addition to reading the Ickes memoranda, including those documents discussed at the November meeting, Strauss attended the November meeting and actually took notes relating to the media fund composition. Despite his level of involvement in DNC budgetary matters that far exceeded that of the Vice President, Strauss was unaware during this period of a hard money component to the media fund.

deny knowledge of a hard component to the fund since the DNC planned all along to borrow the hard portion leaving only the soft portion to be raised by the phone calls and other fundraising events. For example, the October 20, 1995 memorandum notes at page two that "the $4.0 loan of "hard" dollars will cover the "hard" part of the $10 million for media." Again, the Fowler to Ickes memorandum attached to the November 20, 1995 Ickes memorandum defines the outstanding media budget goal of $6,600,000 in the following terms: "$3,600,000 in non-federal funds which will be raised and $3,000,000 in federal funds which will be borrowed. Finally, the memoranda dated December 18th (the Strauss notes document) and December 20th, with their attachments, contain numerous references to past and present efforts to raise soft money for the media -- some from "major donors" like the people called by the Vice President -- and borrow the hard component.[5]

Accounts of the November Meeting

As the FBI Recommendation notes, interviews conducted during our preliminary investigation establish that the Vice President attended a DNC budget meeting on November 21, 1995 that included a discussion of the DNC media fund.[6] In fact, the excerpts from the FBI 302s that are set forth as interview summaries serve to confirm the factual finding we set out in our 90-day memorandum:

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[5] As we noted in our section 607 memorandum and again in our 30-day report in this matter, we have found only one document that suggests the idea that the DNC may have been considering raising hard money for the media fund during this period. While this document, quoted in our section 607 memorandum, was attached to the December 20, 1995 Ickes cover memorandum and titled "DNC 1995 BUDGET ANALYSIS -- 11/21 POTUS PRESENTATION" it appears to be another version of, and, in part, at odds with the "Budget Analysis" we know was handed out at the meeting because of the presence of the Strauss notes. In any event, we uncovered no evidence that the Vice President read this or any of the other Ickes memoranda.

[6] We have found no reference in documents or FBI 302s that refer to the topic of discussion as the "election budget" as noted in the introductory section of this portion of the FBI Recommendation.

that only two of fifteen meeting participants, Bradley Marshall and Leon Panetta, were able to say that the use of hard money was discussed in connection with the media fund.[7] Nor do these excerpts challenge our conclusion that none of the attendees who did not arrive at the meeting with a pre-existing knowledge of the media campaign appear to have gained an understanding that the media fund required a mix of hard and soft money by attending the meeting. Significantly, the FBI Recommendation fails to identify any evidence to support a conclusion that the Vice President heard, understood, or retained whatever comments were made at all.[8]

In conclusion, the FBI Recommendation cites no evidence that the Vice President said or did anything either inside or outside

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[7] While the FBI Recommendation notes that Brian Bailey too recalls a mention of hard money at the meeting, Bailey did not know whether it was made in connection with the media fund or the overall DNC budget, an important distinction in our investigation. The Vice President freely admits that he was fully aware of the fact that there was a hard money component to the DNC budget overall. Moreover, it should be recalled that Bailey was unsure whether the media fund actually had a hard money component, a significant admission since he was at the same meeting and should have heard the same comments as the Vice President.

[8] It should be noted that the FBI Recommendation may appear to raise questions about whether Bradley Marshall clearly indicated that it was established at this meeting that the DNC needed to raise soft not hard money for the media fund at this point in time. Some of this confusion is removed, however, when the portions of the 302 edited out for the FBI Recommendation excerpt are replaced. For example, omitted from the excerpt are the following lines: "The DNC had already "pulled down" all of the "soft" line of credit available. There was still borrowing capacity on the "hard" line of credit and therefore no need to increase it." With the addition of these two lines it becomes clear that the President's decision not to borrow by "increasing the line of credit" relates only to the soft money. As Marshall indicated, the President made the decision to raise soft money, not hard, and, as a result, the fundraising discussions did not involve a lot, if any, references to hard money. We have attached the entire 302 to avoid any confusion.

of the November meeting that would indicate that indeed he knew, whether because of what was heard or some other way, that the media fund was not all soft money or the hard money limit to the DNC was $20,000.

Evidence of the Chief of Staff's Knowledge

The FBI Recommendation also implies that Jack Quinn, the Vice President's Chief of Staff until November 1, 1995, may have learned about the media fund composition in September of 1995. In fact, Quinn told investigators that he is not sure about whether he read and understood a legal memorandum faxed to him by Lyn Utrecht that set forth the hard and soft components to the media fund.[9] In any event, no evidence has been uncovered that Quinn, or anyone else, told the Vice President about a hard money component to the fund.

Quinn stated during his November 17, 1998, interview that he does not specifically recall whether or not he provided Utrecht's memo to the Vice President, but he stated that he was "virtually certain" that he would not have given her memo to the Vice President because it had so much detail in it. Nor did Quinn recall ever briefing the Vice President on the subjects contained in Utrecht's memo. Quinn is confident that he never had any conversation with the Vice President concerning the fact that the DNC media fund had a "hard" money component.

Vice President's Participation in Residence Meetings

The FBI Recommendation implies that the Vice President may have been at one or two Residence Meetings where the topic of the media fund composition may have been discussed. As noted in the FBI Recommendation, this suggestion is made because two meeting

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[9] Quinn in his interview could not presently recall whether he read Utrecht's memo when she faxed it to him in September 1995. Quinn said that he may have read it then, gained some understanding of the subjects it covered, and forgotten about it since then, but Quinn stated that he also may not have read it at the time. His main concern at the time was to ensure that Utrecht was "in the loop" on election-related issues because she had "encyclopedic" knowledge of the relevant rules.

"agendas" -- one dated September 7th and the other dated September 14th -- prepared by Dick Morris have one line each that indicates that the DNC issue ads under consideration were going to be paid for, in part, with hard money. However, no evidence has been uncovered that indicates the topic was raised at these meetings. More importantly, the Vice President's schedules for the relevant dates indicate that he may not have attended. We are seeking more definitive evidence as to whether or not the Vice President was at either meeting.

During his interview, Quinn did not recall one way or the other whether the Vice President attended either or both of the Residence meetings reflected in the Morris agendas dated September 7 and September 13, 1995. Quinn stated that the Vice President usually attended the Residence meetings if he was in Washington and did not have a schedule conflict. Quinn stated that the Vice President's schedule very likely would reflect his attendance at such meetings. When shown the Vice President's schedule for September 7, 1995, which indicates that the Vice President was in Washington, DC that evening without another event scheduled but without any indication that the Vice President attended a Residence meeting that night, Quinn stated that it was possible that the Residence meeting scheduled for September 7 had "slipped" to another night. Alternatively, Quinn stated that he might be mistaken in his assumption that the Vice President's schedule would reflect his attendance at the Residence meetings. Quinn suggested that we look at the Vice President's schedules for other time periods to see whether the Residence meetings typically were reflected on the Vice President's schedule.[10]

Quinn was not sure if the Residence meeting scheduled for September 13, 1995, occurred on that night or on September 14, 1995. He said that it was possible that this meeting had "slipped" to the 14th, or that Utrecht's fax dated September 15, 1995, inaccurately referred to their conversation as having occurred "last night," rather than the "night before last."

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[10] We have in fact reviewed numerous Vice Presidential schedules and have found, in fact, that the Residence meetings are consistently entered giving both time and place.

For her part, Utrecht has stated that her telephone conversation with Quinn occurred after 10:00 p.m. on September 14, 1995. The Vice President's schedule for that evening reflects that he hosted a function at his own residence. In conclusion, Utrecht's recollection in combination with the language of the fax and the Vice President's schedule provides sufficient evidence to conclude that the Morris Residence meeting originally scheduled for the 13th was in fact held on the 14th without the Vice President in attendance.

Notations on Call Sheets

The FBI Recommendation suggests that notations on three call sheets used by the Vice President to make his fundraising calls raise the possibility that the Vice President was asking for hard as well as soft money in his telephone calls which would indicate that he knew that the media fund had a hard money component. As we noted in our memorandum at the end of the section 607 investigation, though, the circumstances surrounding these calls indicate that the Vice President was making a soft money request, and the Attorney General so found.

Turning first to the Becker and Bendheim calls sheets that contain David Strauss's notes reflecting the Vice President's phrases "soft money permitted" and "soft and corporate OK", the Vice President, in each of these instances, asked for $50,000 for the media fund.[11] A knowledgeable donor -- aware that he could give up to $20,000 per year in hard money to the DNC -- would have understood the Vice President to be asking for at least $30,000 in soft money.[12] The $30,000 could not only possibly be

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[11] While Bendheim did not recall the mention of soft money and remembers the request was for $25,000, this recollection is contradicted by Strauss's notes that indicate an initial request of $50,000 and a reference to "soft and corporate".

[12] In fact, Bendheim clearly understood that the Vice President was requesting soft money in his phone call. He based this understanding on a belief shared by several of the donors we interviewed during the section 607 investigation, that the DNC's media campaign was "issue driven" and, as such, could be funded entirely with soft money. This belief, of course, is the same

soft money; rather, it had to be soft money. There is no reason to believe that, in stating that soft money is "permitted" and "OK", the Vice President was trying to tell Becker and Bendheim that the first $20,000 or any other portion of their contributions could be given in hard money. If that had been the Vice President's intent he presumably would have said so directly. In our view, the only reasonable inference to be drawn from these statements to Becker and Bendheim is the one offered by the Vice President, that he was trying to make sure that they knew they had the option to make their contributions through their corporations.

Finally, the James Hormel call sheet containing a reference to hard money also contains the phrase "non-federal $ soft" in the Vice President's handwriting. And while Hormel does not recall a reference to soft money during the conversation with the Vice President, his own contemporaneous notes as to how his donation should be forwarded to the DNC -- "Check request: $30,000. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to Peter Knight 1615 L St. NW #650 W DC 20036 202659-3005" -- suggest that the Vice President asked him for a soft money contribution. There is no evidence that this notation, even if seen by the Vice President, changed his view of the media fund or led to a hard money request of Hormel.[13]

The Vice President's Press Conference

Finally, the FBI Recommendation sets forth excerpts from the Vice President's press conference that, according to the FBI Recommendation, "imply that the Vice President was raising money for the re-election" in his telephone calls. The FBI Recommendation fails to note that the Vice President clarified his references to the "campaign" and "candidate" later in the

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mistaken notion that the Vice President said he had during the period he was making the fundraising calls.

[13] While the FBI Recommendation correctly notes that the Vice President said that the notation was not on the call sheet when he made his call, his secretary, Joel Velasco, recalls that Peter Knight told him to make this notation before the call sheet was given to the Vice President.

press conference by stating that he was raising money for the DNC media effort, not the reelection campaign, in his phone calls and that there was a "clear distinction" and a "separate message" for these ads. Furthermore, there is no dispute that one of the purposes of the media campaign was to bolster the prospects of the reelection effort; as an exploration of the legal issues surrounding payment for the campaign has made clear, the requirements concerning how ads funded by the DNC must be paid for are driven by the content of the ads themselves, not the subjective purpose of the candidate. In any event, we have developed no evidence, in either investigation, that the Vice President, in his telephone calls, asked any of the individuals he contacted directly for funds to support his reelection or the election of any other federal official. Nor can his press statement be reasonably interpreted to show that he was aware of a hard money component to the media fund.

Conclusion

In conclusion, nothing in the FBI Recommendation provides reasonable grounds to believe that further investigation of this matter is warranted. It remains, therefore, our recommendation that an independent counsel not be appointed in this matter.

07/28/98 17:57 ☎[redacted] PUBLIC INTEGRITY 001

U. S. Department of Justice

Washington, D.C. 20530

PUBLIC INTEGRITY SECTION
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

TELECOPIER TRANSMITTAL SHEET

DATE: 7-28-98

TO: JIM ROBINSON

FROM: LEE RADEK

RE:

NUMBER OF PAGES (excluding transmittal sheet):

COMMENTS:

TO TRANSMIT A MESSAGE: [redacted]
TO INQUIRE ABOUT A MESSAGE:

U. S. Department of Justice

Washington, D.C. 20530

July 28, 1998

MEMORANDUM

TO: Lee Radek
Chief
Public Integrity Section
Criminal Division

FROM: [redacted]
Trial Attorney
Public Integrity Section
Criminal Division

SUBJECT: Documents produced by Vice President's counsel on July 27, 1998

This memorandum discusses the discovery and substance of six pages of memoranda, charts, and summaries with handwritten notations which appear to relate to a November 21, 1995 meeting that dealt with, among other topics, the fundraising telephone calls made by the Vice President during late 1995 and 1996.

Background

As we discussed yesterday, the Vice President's counsel, Jim Neal, in a phone conversation yesterday afternoon, informed me that documents were recently discovered by [redacted] a clerical employee who at one time worked as an assistant to the Deputy Chief of Staff in the Office of the Vice President. According to Neal, [redacted] found the documents while searching files in order to respond to an FEC subpoena. Neal noted that [redacted] found the documents in a file marked "Clinton/Gore". He said he was unaware of any other circumstances surrounding their discovery.

Neal characterized the documents as responsive to requests we had made of the Executive Office of the President (EOP) and the Vice President, personally, during the course of our Independent Counsel investigation. He noted that the memos themselves had previously been produced by the EOP and pointed out that he had written the EOP number on the documents to indicate when and where in the production they could be found. Significantly, Neal pointed out that the six pages recently found by [redacted] had handwritten

notations made by David Strauss, the Vice President's former Deputy Chief of Staff. Neal stated that these six pages had not been produced during our investigation adding that he did not know why they were "missed" during his search for documents conducted last fall.

Upon my request, Neal faxed me the six pages after our phone conversation. I told him that we would like the originals; he said he would pass the request on to White House Counsel's Office who would contact me to make arrangements.

The Documents

The pages provided by Neal yesterday are part of a larger set of "documents that were reviewed at the DNC budget and fundraising meeting on 21 November 1995 in the map room" according to a Harold Ickes memorandum dated December 18, 1995.[1] As we set forth in our investigative findings, the documents deal generally with the DNC media fund and specifically with plans to raise several million dollars for paid television ads through the end of 1995. Within this context, one of the documents, dated November 20, 1995, and found among the six pages with Strauss notes provided yesterday, suggest fundraising phone calls by the "POTUS" and "VPOTUS" as an additional way to raise the media budget shortfall. The remaining five pages received yesterday with Strauss notes make up parts of four documents dealing with DNC media budgets and fundraising projections for the remainder of the year. The December 18, 1995 Ickes memorandum indicates that the President, Vice President, and David Strauss were among the attendees of the November 21, 1995 meeting where these documents were "reviewed".

The Vice President, when questioned about the larger set of documents and the November 21, 1995 meeting, during our interview last November, did not recall a discussion at this or any other meeting about the DNC's specific need for both hard and soft money in late 1995 to keep the ads on the air. The Vice President said that he believed that the fundraising phone calls probably were discussed during the meeting. He also recalled that the general topic of the media budget being increased was raised and discussed. However, the Vice President recalls that he believed, at the time, that the ads were paid for with non-federal money, claiming that he was not aware that there was a hard money component to the media fund. When asked about portions of these and other memos that indicated a hard money component to the media fund, the Vice President said that as a rule he did not read the Ickes memos on these topics.

Contrary to the Vice President's recollection, the Strauss

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[1] Why the "Strauss notes" consist of six pages when the original packet appears from the face of the Ickes memo to have consisted of five documents totaling 13 pages is one of many questions raised by the recent production.

notes on these documents may indicate that the hard money component to the media fund was, in fact, discussed at the November 21, 1995 meeting attended by the Vice President.[2] We know from several Strauss interviews that he took notes during meetings and often used quotation marks to indicate verbatim statements. He also told us that after he took his notes it was his practice to write a file title on the top of the document and give it to his assistant to file in the appropriate drawer in the Old Executive Office Building.[3] This background on Strauss's practice and the fact that several phrases are put in quotation marks raises a suggestion that Strauss's notes may reflect things that were said during the November 21, 1995 meeting.[4] If this in fact is so, Strauss's writing--which notes "65% soft/35% hard" (at EOP 41259)--seem to be at odds with the Vice President's memory of what was discussed on a significant topic: whether the media fund shortfall to be raised in part through fundraising calls had a hard money component.

The Strauss notes also include what appears to be a definition of soft money which, again, if reflective of something said during the November meeting seems to be at odds with what the Vice President stated, in his interview, was his belief at the time. Specifically, the Strauss note (on what has been marked "EOP 41259") includes what appears to be an attempt to define soft money: "corporate or anything over $20 k from an individual."[5]

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[2] The "11/21/95" that appears on these documents (written in the corner) looks to be in Ickes's writing. Ickes told us he authored or passed on these memos and requested these kinds of meetings.

[3] The notation on the top of the new documents, apparently in Strauss's writing, is "DNC Media File". As noted earlier, though, Neal has said that [redacted] found the documents in a file marked "Clinton/Gore".

[4] While it may seem equally plausible that Strauss was making notes, either during the meeting or at another time, about what he knew versus what was said, Strauss has told us that he was not knowledgeable about soft and hard money distinctions since his only experience in fundraising came from Congressional races. Of course, this begs the question: how can Strauss know nothing about soft money having sat through meetings such as the one in November where the topic appears to have been discussed?

[5] Of course, the Strauss note that appears to define soft money is also filled with ambiguity. Read one way, it appears to mean any individual contribution over $20,000 is soft money. Returning to the results of our investigation, the Vice President routinely asked for gifts of over $20,000 and may not have asked for less. On the other hand, an alternate, albeit strained reading, could interpret the phrase as a reference to the DNC's practice, at the time, of allocating the first $20,000 of an individual gift to their hard money account. The phrase is simply unclear as written.

Again, while not clearly written a second notation that appears to say "hard limit $20k" appears on page 2 of the "DNC budget analysis" document (at EOP 41260). However, the Vice President has said that during this time period he believed, erroneously, that the individual limit for hard money giving was $2,000, not $20,000.

Conclusion

In conclusion, it should be emphasized this new evidence does not establish what topics were discussed during the November meeting. Nor can we say conclusively that the Vice President was present during the entire meeting, in the event that the notes memorialize these discussions. If these two facts can be established, though, the notes appear to show that the Vice President was provided information at odds with his stated belief during this period on two significant topics.

NEAL & HARWELL, PLC
LAW OFFICES
2000 FIRST UNION TOWER
150 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219-2498

TELEPHONE [redacted]
TELECOPY

FACSIMILE TRANSMITTAL FORM

FROM: JAMES F. NEAL

To: Peter Ainsworth	Fax: [redacted]	Phone:
Date: 07/27/98		# Pages Including Cover Sheet: 7
Client/Matter Name:	Gore	
Client/Matter/UTBMS#:	[redacted]	Job No. [redacted]

IF TRANSMISSION PROBLEMS, CONTACT SENDER'S OFFICE

MESSAGE: [redacted] Attached are the documents we discussed by phone today, and in our phone conversation, I gave you all of the information we have.

RECEIVED
JUL 1998
Public Integrity Section

The information contained in this facsimile message is intended only for the use of the individual or entity named below. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us [illegible] the above address via the U.S. Postal Service. Receipt by

07/28/98 17:59 [redacted] PUBLIC INTEGRITY 007
JUL 28 1998 15:32 FR NEAL & HARWELL [redacted] TO ##73624#12025143 P.02/07

DNC Media file

BS 11/21/95

WEEK BY WEEK SUMMARY FOR 11/20 - 12/31

MAJOR DONOR PROJECTION

The DNC has raised $2,755,000 of the projected $8,950,000 on 10/23.

The week by week projections listed below assume the following:

1. The four outstanding requests are scheduled.

POTUS luncheon originally scheduled for 11/15
FLOTUS dinner
VPOTUS dinner
POTUS January White House dinner

11/20 - 11/22		450,000
11/27 - 12/1		1,029,000
12/4 - 12/8		1,267,000
12/11 - 12/15		1,537,000
12/18 - 12/22		1,462,000
12/26 - 12/29		450,000
	TOTAL	6,195,000
		2,755,000 Raised To Date
		8,950,000

We project the following for January. We are not ready to make any further projections without any scheduled dates.

New York	700,000
Nashville	300,000

EOP 4/262

11/21/95

In Response To Question # 4 of the 11/19/95 Memo:

11/20/95

Democratic National Committee
Deposits From Fundraising October 23 Thru November 17, 1995

	Direct Mail	Major Donor Federal	Major Donor Non-Federal	Total
10/23/95	23,960	99,025	105,250	228,235
10/24/95	16,190	45,765	59,250	121,205
10/2595	6,236	0	50,000	56,236
10/26/95	7,810	0	0	7,810
10/27/95	9,103	86,550	128,326	223,979
				0
10/30/95	6,790	177,624	0	184,414
10/31/95	16,578	0	0	16,578
11/01/95	21,858	101,050	209,750	332,658
11/02/95	13,439	10,000	2,000	25,439
11/03/95	22,130	82,500	523,000	627,630
11/06/95	47,798	0	0	47,798
11/07/95	2,114	73,275	62,065	137,454
11/08/95	0	0	0	0
11/09/95	40,922	133,000	211,000	384,922
11/10/95	31,988	0	0	31,988
11/13/95	8,201	8,750	75,000	91,951
11/14/95	109,246	101,000	307,000	517,246
11/15/95	37,173	11,000	37,000	85,173
11/16/95	725	1,875	40,300	42,900
11/17/95	107,532	0	0	107,532
Totals	529,793	931,414	1,809,941	3,271,148

2,741,328

EOP 4/258

07/28/98 18:00 [redacted] PUBLIC INTEGRITY 009
JUL 28 1998 15:33 FR NEAL & HARWELL [redacted] TO ##73624#12025143 P.04/07
11/20/95 22:43 DEMOCRATIC NATIONAL COMMITTEE [redacted] NO.198

11/21/95

November 20, 1995

TO: Harold Ickes
FR: Don Fowler, Marvin Rosen, Scott Fastrick and Richard Sullivan
RE: Additional DNC Fundraising Requests

The following information is submitted in response to information requested concerning the possibility of raising an additional 4 million to be applied to paid television. Because of the short lead time and lack of time to cultivate additional donors, we believe the following represents the maximum that can be raised prior to year end. (Additional to prior projections.)

POTUS

1. ~~18-20 calls by POTUS~~
   10 calls by VPOTUS

This will provide us with an advantage to assure our projections and assist in raising an additional $1.2 million.

2. One additional DC luncheon and one additional DC dinner.

These will raise a total of $1 million.

3. One White House Holiday Dinner

This dinner will be an accountability event for prior projections and commitments. VP: "is it possible to do a reallocation for me to take more of the events and the calls?"

VPOTUS

1. Two events in any of the following cities. New York, New Jersey, Long Island or Philadelphia.

Each would raise $250,000 totalling $500,000.

FLOTUS

1. Two events in any of the following cities. New York, New Jersey or Long Island.

Each would raise $250,000 totalling $500,000.

SUMMARY

1. POTUS and VPOTUS Calls	1,200,000	VP: "Count me in on the calls"
2. POTUS DC Lunch	500,000	
3. POTUS DC Dinner	500,000	Potus: "making calls on my T-bailey survey..."
4. ~~White House Dinner~~		
5. VPOTUS Event	250,000	
6. VPOTUS Event	250,000	
7. FLOTUS Event	250,000	
8. FLOTUS Event	250,000	
TOTAL -	3,200,000	

EOP

to DNC media file

DB 11/21/95

DNC 1995 BUDGET ANALYSIS
($ in Millions)

1. SOURCES -

Direct Mail	$12.3	($4.0 from 10/21 - 12/31)
Major Donors	26.6	($8.9 from 10/21 - 12/31, see attached)
Surplus Funds	1.9	
TOTAL SOURCES	$40.8	

USES -

DNC Oper. Budget	$34.8	(includes $2.0 for Coordinated Campaign)
Media Fund	10.0	65% soft | 35% hard
TOTAL USES	$44.8	

corporate or anything over $20K from any candidate

2. At year-end, the DNC will have total net debt of $4.0 million ($44.8 million of uses minus $40.8 million of sources). This debt will consist of:

Hard Net Debt	$1.6
Soft Net Debt	2.4
TOTAL NET DEBT	$4.0

In addition, the DNC will owe $2.3 million in hard bills, and have $2.3 million of soft cash on hand.

3. The DNC's current financial status is as follows:

Current Bank Debt	$5.2	($2.2 hard + $3.0 soft)
Bills and Commitments	1.6	
Total Debt	$6.8	
Less: Available Cash	(0.6)	($0.03 hard + $0.58 soft)
TOTAL NET DEBT	$6.2	

Total Debt Capacity	$7.0	($4.0 hard + $3.0 soft)
Less: Current Bank Debt	(5.2)	($2.2 hard + $3.0 soft)
TOTAL AVAILABILITY	$1.8	($1.8 hard + $0.0 soft)

need for $8 million in next 5 weeks to meet fundraising goals. ($4 million from direct mail)

EOP 41259

DNC 1995 BUDGET ANALYSIS
Page 2
($ in Millions)

4. Media Buy Schedule:

Already Purchased	$8.8
~~Fri/Sat~~ after Thanksgiving	0.3
Week of 12/1	1.2
Week of 12/8	1.2
Week of 12/15	1.2
Production Costs	0.3
TOTAL	$13.0

3206 RP

To make these purchases, we need to increase the media budget from $10.0 million to $13.0 million. This requires an additional $3.0 million.

5. With a $10.0 million media budget, the DNC ends the year with $4.0 million of net debt (see Note 2).

Two options to realize the additional $3.0 million for media in 1995:

a) Borrow another $3.0 million. This will yield total year-end net debt of $7.0 million.

Potus - not an option

Net Bank Debt	$6.0
Net Bills Owed	1.0
TOTAL NET DEBT	$7.0
Avail. Debt Capacity	$1.0
Available Cash	$0.0

b) Raise an additional $2.2 million with new events in December 1995 and borrow $0.8 million. This will yield total year-end net debt of $4.8 million.

Net Bank Debt	$3.8
Net Bills Owed	1.0
TOTAL NET DEBT	$4.8
Avail. Debt Capacity	$3.2
Available Cash	$0.0

hard limit
< 20 k

EOP 4126

- Houston
- New York
- Luncheon

DNC MAJOR DONOR FUNDRAISING PROJECTIONS
October 21 - December 31, 1995

Date	Event	Total	Federal	Non-Federal
Events - Media Fund				
11/1	Event	$400,000	$0	$400,000
11/9	Event	600,000	0	600,000
11/10	Event	400,000	0	400,000
12/14	Event	400,000	0	400,000
12/15	Event	400,000	0	400,000
12/21	Event	400,000	0	400,000
	TOTAL MEDIA	$2,600,000	$0	$2,600,000
	PLUS: Commitment from 10/6 Lunch	1,000,000	0	1,000,000
	TOTAL MEDIA FUND	$3,600,000	$0	$3,600,000
Events - Operating Budget				
10/27	Event	$600,000	$100,000	$500,000
10/30	Event	500,000	300,000	200,000
	- Already Included in YTD Receipts	(225,000)	(135,000)	(90,000)
11/2	Event	200,000	100,000	100,000
	- Already Included in YTD Receipts	(100,000)	(20,000)	(80,000)
11/2	Event	200,000	50,000	150,000
11/8	Event	500,000	100,000	400,000
11/8	Event	200,000	100,000	100,000
11/30	Event	250,000	120,000	130,000
12/7	Event	600,000	150,000	450,000
12/9	Event	500,000	200,000	300,000
12/11	Event	25,000	25,000	0
12/19	Event	750,000	150,000	600,000
TBD	Event	500,000	150,000	350,000
TBD *	Event	500,000	50,000	450,000
TBD *	Event	200,000	100,000	100,000
TBD *	Event	150,000	75,000	75,000
	TOTAL OPERATING BUDGET	$5,350,000	$1,615,000	$3,735,000
TOTAL MEDIA FUND		$3,600,000	$0	$3,600,000
TOTAL OPERATING BUDGET		5,350,000	1,615,000	3,735,000
TOTAL		$8,950,000	$1,615,000	$7,335,000

* These events have not yet been scheduled. In addition, the DNC will need a January 1996 event to achieve its fundraising projections.

EOP 41261

U. S. Department of Justice

Washington, D.C. 20530

August 5, 1998

MEMORANDUM

TO: Lee Radek
Chief
Public Integrity Section
Criminal Division

FROM: [redacted]
Trial Attorney
Public Integrity Section
Criminal Division

SUBJECT: Impact of Documents Recently Produced on the Results of the Section 607 Preliminary Investigation of the Vice President

This memorandum explains why the recent discovery of six pages of memoranda, charts, and summaries with handwritten notations that appear to relate to, among other topics, the fundraising telephone calls made by the Vice President during late 1995 and early 1996 should be viewed as a new matter focussed on a possible violation of 18 U.S.C. § 1001 and not an event that triggers the reopening of the former section 607 investigation.

Background

As discussed in my July 26, 1998 memorandum, the Vice President's counsel, Jim Neal, recently produced documents that he claimed were discovered by Joe Eyre, a clerical employee in the Office of the Vice President. While the documents themselves had been previously produced by the Executive Office of the President (EOP), the six pages found by Eyre had handwritten notations apparently made by David Strauss, the Vice President's former Deputy Chief of Staff.

As noted in my previous memorandum, the recently produced documents relate to some of the topics that were at issue in our preliminary investigation into whether the Vice President violated 18 U.S.C. § 607 by making fundraising telephone calls from his office in the White House. Specifically, the handwritten notations may indicate that the hard money component to the media fund was,

in fact, discussed at the November 21, 1995 meeting attended by the Vice President. Similarly, the notes may indicate that a definition of soft money including the limitations on individual gifts may have been discussed.

If the notes do indeed reflect discussions on these two topics, they may show that the Vice President was provided information at odds with his stated belief during this period on two significant topics. Stated differently, the notes may provide evidence that the Vice President's state of mind and knowledge of the media fund at the time of the calls was not what he described to agents and attorney during his interview.

However, the notes do not provide any more evidence that the Vice President violated section 607 when he made the calls. Moreover, the recently produced evidence has no effect on the determination, made last December, that pursuant to established Department of Justice policy the absence of an aggravating circumstance makes prosecution for a section 607 violation unwarranted.

New Evidence and Results of Section 607 Investigation

When on December 2, 1997, the Attorney General notified the court of her determination not to seek an independent counsel, she cited two reasons. First, she noted that evidence that the Vice President may have violated section 607 is insufficient to warrant further investigation. Second, she told the court that even if the evidence suggested a violation, established Department of Justice policy required that there be aggravating circumstances before a prosecution under this statute is warranted. No aggravating circumstance was uncovered during our investigation.

In summarizing the basis for her finding that the evidence was insufficient to warrant further investigation, the Attorney General, in her Notification to the court, cited a "wealth of affirmative evidence" that had nothing to do with the Vice President's understanding of the media fund but, nevertheless, demonstrated that the Vice President was not soliciting hard money in his telephone calls. Noted was the fact that no evidence was uncovered that indicated that the Vice President knew of the Democratic National Committee's (DNC) practice of reallocating a portion of large contributions to hard money accounts. Also cited was the absence of evidence showing that the Vice President asked for funds to support the election of any federal official, including himself. It was further noted that donors who understood the concepts of hard and soft money interpreted the Vice President's request to be for soft money and many of the these donors recall that the conversations focussed on soft money. In addition, the amounts requested by the Vice President suggested a soft money request and, in some cases, his requests focussed on corporate contributions which could only be soft money contributions. Finally, the Attorney General noted that the donations made in response to the Vice President's calls were, in

the vast majority of cases, handled by the DNC as soft money.

While the Attorney General included the Vice President's explanation--that he understood the media campaign to be funded entirely by soft money--as part of her analysis, the fact that the explanation may be discredited by the new evidence and further investigation, does not raise questions about the conclusion itself. It remains undisputed that a major share of the media campaign was, in fact, funded by soft money. Moreover, documentary evidence uncovered during our investigation clearly indicates that the need for soft money, not hard money, was most critical at the time that the Vice President volunteered to make the phone calls.[1]

Furthermore, even if it can be established that the Vice President falsely stated, during his interview, that he believed, at the time, that the media campaign was run with soft money, this fact does not draw into question the remainder of his explanation for his conduct. Specifically, his claim that it was easier to ask for soft money, especially corporate soft money, and that the people he was calling were asked for--because they were capable of giving--large sums that could only be soft money remain credible.

Turning to the policy ground cited by the Attorney General in her notification, the recently produced evidence in no way affects the finding that evidence of aggravating circumstances are lacking in this matter. The notes on the new documents do not suggest that the Vice President was told in the November meeting of the DNC allocation practice--a fact that may suggest an aggravating circumstance if it can be shown that he asked donors for soft money knowing all along that some of their gift would be treated as hard money. Nor can the Vice President's statement about his understanding of the media fund composition, assuming it was made in violation of section 1001, be reasonably viewed as an aggravating circumstance relating to a section 607 violation two years earlier.

Absent new evidence of an aggravating circumstance, then, the policy finding, as described in the Notification, remains an independent dispositive ground for declining to seek an independent counsel to pursue a section 607 violation. For this reason the new information, which does not appear to relate to any possible aggravating circumstance, should not support a decision to reopen

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[1] Documents indicate that at the end of 1995, when the party was in need of at least $3 million dollars to stay "on the air", the DNC had the capability of borrowing hard money but not soft money. It was in this context--the need to make up a shortfall of mostly soft money through the end of the calendar year--that the phone call project was conceived. This factor was given very little emphasis during our preliminary investigation because the Vice President claimed both that he did not read the documents and that he erroneously believed that the media campaign was run entirely with soft money.

the section 607 investigation.

Conclusion

In conclusion, the new matter that arose upon receipt of the six pages on July 27, 1998, is properly treated as a new and independent investigation focussed on a possible section 1001 violation. Pursuant to 28 U.S.C. § 591 (d)(2), the Attorney General will need to determine by August 26, 1998, whether the new information requires the commencement of a preliminary investigation under the Act.

U. S. Department of Justice

Washington, D.C. 20530

AUG 03 1998

MEMORANDUM

TO: Jim Robinson
Assistant Attorney General
Criminal Division

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

SUBJECT: Timing of Independent Counsel Decisions

The Attorney General's Office has requested an analysis of the various deadlines that may exist if any of the recommendations contained in the LaBella report are deemed by the Attorney General to be specific and credible information about a covered person, or about a person whose investigation would constitute a conflict of interest for the Department of Justice.

A few guiding principles have led to the deadlines listed below.. First, there are no deadlines with respect to the Attorney General's invocation of the Discretionary Clause. Section 591(c)(1) provides that when she determines that an investigation or prosecution may result in a conflict of interest, she may conduct a preliminary investigation if she receives information sufficient to constitute grounds to investigate. Implicit in the use of the permissive "may" is the ability to not conduct a preliminary investigation at any time.

With respect to covered persons, the statute's time requirements always begin with the receipt of information by the Attorney General. Interpreting this to mean information constituting an allegation, the statute then gives her 30 days to determine if there are grounds to investigate, and gives her permission to find otherwise only if the information is not specific or from a credible source. If she is unable to so find, she must commence a preliminary investigation, which must be completed within 90 days, with one 60 day extension permissible with court approval.

JR:LJR:mcw
Typed: 8-3-98

The phrase, "receipt of information by the Attorney General" is problematic. The Attorney General acts through her agents and attorneys, who often fail to recognize Independent Counsel Act ramifications of information that they receive. Yet the legislative history makes clear that the Department of Justice cannot avoid the time strictures of the Act by simply concealing the information from the person of the Attorney General. The question of who must receive the information in order for the deadlines to be triggered was addressed in an Office of Legal Counsel opinion on Dec. 21, 1981. OLC opined that the information is received by the Attorney General when it is received by someone in a position to recognize it for what it is. The Department has consistently interpreted that opinion to mean receipt of the information by someone in a position to recognize its nature, usually the Public Integrity Section or someone in the chain of command above that Section.

Note that the statute and the Department procedures all begin with the receipt of information at some level. There is no history of incidents where the Department has received information, analyzed its independent counsel ramifications, and later determined that there was a previously unnoticed violation. There is simply no precedent for a triggering event other that the receipt of information.

However, it could be argued that a reasonable interpretation of the statute and the OLC opinion is that if the information must be received by someone in a position to recognize its Independent Counsel implications, such a receipt could only occur if it was possible to determine that it constituted a violation. For example, if the Department possessed information that a covered person performed an act that courts had subsequently held to be noncriminal, no independent counsel deadline would occur. If the Supreme Court were to then reverse those judicial decisions and determine that the conduct was prohibited, this would be the first opportunity for the Department to recognize a violation, and the deadlines should be based upon that point in time.

However, just as it is the receipt of information by someone in a position to know, not actual knowledge, that triggers the time provisions, it should be the receipt of knowledge of a potential violation by a person in a position to recognize it, not the actual recognition that causes the statute to become operational. To interpret otherwise would leave the triggering device open to differences in the legal reasoning of Departmental officials at all levels, a test much too subjective to be consistent with the purposes of the statute.

One final assumption leads to the deadlines that follow. This memorandum treats Mr. LaBella as if he was an attorney in the field, without an intimate working knowledge of the Independent Counsel Act. This is justified because he was not in the actual

decision making apparatus on Independent Counsel matters, and further, he denied on a weekly basis that there was any specific and credible evidence concerning a covered person. To treat him otherwise would require that the deadlines be set whenever Mr. Labella learned the facts he sets out under each of the allegations in the memo.

LABELLA ALLEGATIONS

Applying the above principles to the LaBella/DeSarno memorandum and its various arguments for an independent counsel, the following deadlines would, or could apply:

All allegations against Harold Ickes.

If the Attorney General agrees with the premise that Ickes is a covered person either under the LaBella de facto theory or the "should have been paid more" theory, the fact that he was a covered person was not recognized until the Attorney General did so. Moreover, since these theories are so obscure, it seems reasonable to concluded that there was no one in a position to know that he was covered until the Attorney General so determined. Therefore, it would seem that the 30-day analysis of specificity and credibility should commence upon the Attorney General's determination. At worst, since the LaBella report is the first recitation by anyone of such a theory, the date that the Attorney General received the July 16 report would begin the 30-day analysis period.

If the Attorney General believes that there is a conflict of interest for the Department to investigate these allegations against Ickes, there are no statutory deadlines. The permissive language of the Discretionary Clause allows the Attorney General to invoke the provisions of the Act and trigger a preliminary investigation at any time after the receipt of specific and credible information.

Allegation that President Clinton took bribes or gratuities from Charlie Trie.

The first time such an inference from these facts has been drawn seems to be the July 16 LaBella report. The 30-day period would commence with the Attorney General's receipt of that report.

Allegation that President Clinton and Vice President Gore had knowledge of foreign contributions by Johnny Chung.

Should the Attorney General determine that this is a crime, the date of the report, which first sets out the operative facts, might be deemed the triggering date. It could also be argued, since the violation is so obscure, no one was in a position to

recognize it until the Attorney General found it to be a possible violation.

Allegation that President Clinton participated in accepting conduit or foreign contributions by not alerting the DNC and Clinton/Gore about problems with Trie's legal fund contributions.

As above, the date would be the date of the report, or arguably the date that the Attorney General determined that this was a crime.

Allegation that Vice President Gore violated the law by making fund raising calls.

To the extent that this is a revisitation of the old section 607 allegation, the statute has already been triggered. Absent new evidence, it seems that reopening this would require an immediate independent counsel request, since all the time periods have expired.

All allegations against Hillary Rodham Clinton.

The First Lady is not a covered person. To the extent that there is any allegation against her contained in the report, the discretionary provisions apply, and there are no deadlines.

Common Cause allegations.

This area is problematic, in that each and every facet of these allegations has been examined and analyzed under the Independent Counsel Act. It is difficult to argue that there was no one in a position to recognize the nature of these allegations almost from the day they were received. Therefore, the time limits have run, and an immediate independent counsel request is probably required.

However, the memo sets forth the first written analysis of the theory that the evidence developed to date constitutes an allegation that the President, Vice President and others engaged in a conspiracy to defraud the Federal Election Commission by circumventing its regulations by committing civil violations. This, like several above, is a novel theory that one could argue no one in the Department was in a position to recognize until the Attorney General determines that it might constitute a crime, and therefore, the date the Attorney General makes such a determination is the controlling date. It could also be argued that the date the theory was first posited to her, i.e. the date she received the report, could control.

The Loral allegations.

To the extent that the allegations are against the President, the 30-day period should commence from when they were first reported in the press, and almost immediately made known to the Attorney General and others in position to recognize their nature. They have changed little subsequently. It could be argued, however, that the report is the first time that an inference of Presidential bribery has been drawn from these facts, and therefore the date of receipt of the report begins the 30-day period.

To the extent that the Loral investigation constitutes a conflict of interest for the Department to investigate, there are no deadlines under the discretionary clause.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

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

PURPOSE: To recommend that the Attorney General not trigger a preliminary investigation in this matter.

TIMETABLE: The Attorney General has until August 26, 1998, to decide whether a preliminary investigation is triggered.

SYNOPSIS: New information regarding Albert Gore, Jr., and 1996 fundraising violations is insufficient and no preliminary investigation should be triggered.

DISCUSSION: (see attached)

RECOMMENDATION: I recommend that you not trigger a preliminary investigation in this mattter for the reasons set out in the attached memorandum to me.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring Components:
None

Noncurring Components:
None

Attachment

DOJ-VP-00463

98000735

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

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

PURPOSE: To recommend that the Attorney General not trigger a preliminary investigation in this matter.

TIMETABLE: The Attorney General has until August 26, 1998, to decide whether a preliminary investigation is triggered.

SYNOPSIS: New information regarding Albert Gore, Jr., and 1996 fundraising violations is insufficient and no preliminary investigation should be triggered.

DISCUSSION: (see attached)

RECOMMENDATION: I recommend that you not trigger a preliminary investigation in this mattter for the reasons set out in the attached memorandum to me.

APPROVE: _____ Concurring Components: None

DISAPPROVE: _____ Noncurring Components: None

OTHER: _____

Attachment

DOJ-VP-00464

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Typed: 8-24-98
Records Section Chron CTS#98000 7355

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

AUG 24 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

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

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

The Public Integrity Section has conducted an initial inquiry into the question of whether there exists specific information from a credible source warranting further investigation into whether the Vice President of the United States, Albert Gore, Jr., a covered person under the Independent Counsel Act Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have provided one or more false statements, in potential violation of 18 U.S.C. § 1001, to attorneys and agents investigating his fundraising telephone calls last November. We have concluded that we have insufficient information upon which to base any further investigation, and therefore recommend that this matter be closed. We also have concluded that the new information we have received does not require the Attorney General's determination in the prior preliminary investigation to be reopened. This memorandum will summarize the information we received and the results of our review.

POTENTIAL SECTION 1001 VIOLATION

The Independent Counsel Act

When information is received suggesting that a person covered by the Independent Counsel Act may have committed a federal crime, the Department of Justice has 30 days to review the allegations. At the end of this period, a determination must

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Records Section Chron

DOJ-VP-00465

be made as to whether the information we have is sufficiently specific and credible to warrant further investigation, and whether in fact the allegations constitute a violation of federal criminal law. At the end of the 30 days, the matter must either be closed, or a preliminary investigation must be triggered. The purpose of a preliminary investigation, which is limited to 90 days, is to determine whether further investigation is warranted; if so, the Attorney General must apply to the Special Division of the Court for the appointment of an independent counsel.

If the Attorney General disagrees with our conclusion in this case and concludes that a preliminary investigation should be conducted, that decision must be made by August 26, 1998, 30 days after receipt of the information. In that event, the Special Division of the Court must also be notified that a preliminary investigation pursuant to the Independent Counsel Act has commenced.

The Facts

In the Fall of 1997, the Public Integrity Section conducted a preliminary investigation into the question of whether the Vice President may have violated 18 U.S.C. § 607 when he made fundraising telephone calls from his White House office. The investigation resulted in the Attorney General's conclusion that there were no grounds to seek appointment of an independent counsel for two independent reasons: first, the overwhelming weight of the evidence supported the Vice President's statement that he was soliciting soft money contributions, outside the scope of section 607's ban on political fundraising from the federal workplace, when he made the telephone calls; and second, established Departmental policy precluded prosecutions under section 607 in the absence of aggravating circumstances, such as coercion, that were absent there. Given this, the Attorney General decided that she need not resolve the substantial legal question of whether section 607 even applies to telephone calls from a federal office to a private citizen outside the federal workplace.

Statements made during the previous investigation: As set out above, the Vice President's explanation was that when he made the fundraising calls, he was seeking large, so-called soft money contributions to the DNC. During the previous preliminary investigation, we therefore explored the question of whether there was any evidence that would tend to cast doubt on the veracity of that explanation. One central event that led up to the fundraising calls was a meeting held at the White House on November 21, 1995.

As part of our preliminary investigation, the Vice President was interviewed on November 11, 1997, and was questioned about several documents, including memoranda, charts, and analyses, that are described in a Harold Ickes memorandum dated December 18, 1995, as having been "reviewed at the DNC budget and

fundraising meeting on 21 November 1995 in the map room." As we set forth in our investigative findings near the end of the preliminary investigation, the documents deal generally with the DNC media fund and specifically with plans to raise several million dollars for paid television ads through the end of 1995. Within this context, one of the documents, dated November 20, 1995, suggests fundraising phone calls by the "POTUS" and "VPOTUS" as an additional way to raise the media budget shortfall. The remaining pages make up four documents dealing with DNC media budgets and fundraising projections for the remainder of the year. The December 18 Ickes memorandum indicates that the President, Vice President, and David Strauss were among the attendees of the November 21, 1995 meeting where these documents were "reviewed".

The Vice President, when questioned about this set of documents and the November 21, 1995 meeting, stated that he did not recall a discussion at this or any other meeting about the DNC's specific need for both hard and soft money in late 1995 to keep the ads on the air. The Vice President said that he believed that the fundraising phone calls probably were discussed during the meeting. He also recalled that the general topic of the media fund budget being increased was raised and discussed. However, the Vice President recalled that he believed, at the time he made the calls, that the ads were paid for with soft or non-federal money, claiming that he was not aware that there was a hard money component to the media fund.

The Vice President stated that based on this erroneous belief, together with his equally erroneous belief that hard money contributions were limited to $2000, when he made telephone calls requesting large contributions to the DNC media fund, he subjectively believed that he was soliciting a soft money contribution by the very nature of the request.[1] In fact, the ads were financed pursuant to a complex regulatory formula apportioning their cost between hard and soft money, and individual donors are permitted to contribute up to $20,000 to the DNC in hard money, so long as their total hard money

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[1] As set out in our recommendation at the conclusion of the preliminary investigation in that matter, we did not, of course, rely solely or even give substantial weight to the mere fact of the Vice President's explanation. There was also substantial independent evidence confirming the Vice President's statements that he was in fact soliciting soft money, primarily the repeated statement from many of the donors that it was their explicit understanding that they were being requested to make a soft money donation. In addition, in some conversations, it was specifically suggested by the Vice President that the contributions could come from corporate funds, which can only be soft money.

contributions to all donees do not exceed $25,000. When asked about portions of other Ickes memoranda, unrelated to the November meeting, that showed a hard money component to the media fund, the Vice President said that as a rule he did not read the Ickes memoranda on these topics.

Recently produced documents: On July 27, 1998, the Vice President's counsel, Jim Neal, contacted the Public Integrity Section to inform it that six pages had been recently discovered that appeared to relate to the November DNC budget meeting.[2] Specifically, the documents were copies of documents already in our possession, with the addition of handwritten notations made by David Strauss, the Vice President's former Deputy Chief of Staff. The documents are attached at Tab A.

One of the documents, entitled "DNC 1995 Budget Analysis", upon which Strauss took notes, sets forth the current DNC budget, financial status including available loan capacity, and two options for funding an additional $3 million in media above and beyond the $10 million that had been designated for media in the 1995 budget. The document indicates that the party had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the ads (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion. Consistent with this interpretation of pages one and two of the document -- that the hard portion of the media budget could be borrowed leaving the soft portion to be raised -- the "fundraising projections" set forth on page 3 show that all recent past and future fundraising events planned for the media fund were designed to raise soft, not hard, money.

While the document itself does not break down the media fund into hard and soft components, the placement of the Strauss notes on the document raises a suggestion that the hard money component to the media fund may, in fact, have been discussed at the

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[2] All such documents were requested by us during the course of the preliminary investigation, but these documents were not produced at the time. Neal stated that he did not know why these documents were "missed" during the search for documents conducted last fall. The Campaign Finance Task Force is conducting an inquiry to determine whether an investigation is warranted into the failure to produce these documents previously.

November 21, 1995 meeting attended by the Vice President.[3] Specifically, Strauss's writing -- which notes "65% soft/35% hard" opposite the term "media fund" -- appears to reflect a phrase that may have been used at the meeting to describe the approximate proportions of hard and soft money used by the DNC to purchase television ads during this period.

The Strauss notes also include what may be a statement of the hard money limit for gifts to the DNC. Specifically, the note just below the "65%/35%" includes what appears to be an attempt to define soft money from the DNC's perspective as "corporate or anything over $20 k from an individual." In addition, while not clearly written, a second notation that appears to say "hard limit $20k" appears on page 2 of the "DNC budget analysis" document opposite option 2 in the Analysis document.

These new documents, then, raised some new questions concerning the Vice President's statements about his understanding of the DNC's efforts to fund the media campaign. The Strauss notes suggest that during the November 1995 meeting, both the fact that the hard money limit on donations to the DNC was $20,000, and that the media campaign was funded by a mix of hard and soft money may have been mentioned. Because the Vice President was present for a portion, if not all, of that meeting, and may have heard, understood and remembered these points, these notes thus suggest the possibility that his subsequent statements that he believed at the time that hard money donations were limited to $2000 and that the media campaign was funded only by soft money may have been false.

For example, the "65% soft/35% hard" note, if it reflects something that was said at the meeting about the media fund, may suggest that the Vice President was told in the course of the meeting that this fund, for which he was helping to raise money in part through the fundraising calls, had a hard money component. Moreover, the entries that seem to relate to the individual hard money limit -- "corporate or anything over $20K from an individual" and "hard limit $20K" --may indicate that the Vice President was told that individuals could give up to

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[3] Before receiving the documents, we knew from previous Strauss interviews that he took notes during meetings and often used quotation marks to indicate verbatim statements. He also told us that after he took his notes it was his practice to write a file title on the top of the document and give it to his assistant to file in the appropriate drawer in the Old Executive Office Building. This background and the fact that several phrases appear in quotation marks immediately suggested to us that Strauss's notes may reflect things that were said during the November 21, 1995 meeting.

$20,000, not $2000, in hard money per election cycle to the DNC at that same meeting.

We should make it clear at the outset that we did not view this matter as being one in which we were examining an allegation and evidence of a potential crime to determine whether facially sufficient information could be disproven, thus eliminating the need for a preliminary investigation, as has been the case in numerous independent counsel matters. Standing alone, the Strauss notes are not, in our view, sufficient to support a conclusion that the Vice President may have been making a false statement, though it does open that possibility. Rather, based on concerns created by the notes, we determined to reexamine the circumstances of the November 1995 meeting in the course of a 30-day initial inquiry to explore whether there might be additional evidence supporting the chain of inferences necessary to reach a conclusion that the Vice President may have lied, sufficient to warrant further investigation.

We specifically sought any information suggesting that the Vice President may in fact have heard and comprehended the facts noted by Strauss; such an inference would be supported, for example, by information that these facts were discussed in sufficient detail and focus at the meeting that many other attendees specifically recall them, or that the Vice President made comments or asked questions in the course of the discussion that would seem to reflect an active understanding of the details, or that the participants recall any affirmative discussion of a need to raise hard money for the media fund. We found no such evidence. Indeed, the range of impressions and vague misunderstandings about these matters among all the meeting attendees is striking, and virtually eliminates any reasonable inference that mere attendance at the meeting necessarily would have served to communicate an accurate understanding of the facts as reflected in the Strauss notes.

Subsequent investigation: In an effort to determine whether the apparent disparity between what the Vice President told us he believed at the time he made the calls and what the Strauss notes indicate may have been said at the meeting warrants further investigation, we set out to interview the attendees of the meeting.[4] As a threshold matter, the evidence we gathered

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[4] Of the 12 participants that Ickes identified in his December 18, 1995 memorandum, nine have been interviewed. A tenth, George Stephanopolous, has testified in a Senate deposition that he did not recall this meeting and, if he did attend, he would have left after 5 minutes. Of the remaining two, Don Fowler is scheduled to be interviewed the afternoon of August 24th and we are working on a proffer from the President.

during these interviews indicates that the Vice President did attend a meeting on November 21, 1998 where the DNC media fund was at least discussed.

Only the author of the notes, David Strauss, could confirm that the notes in fact reflected things that were said during the meeting, and Strauss's confirmation is based on his note-taking practices rather than on any independent recollection of what was said at the meeting. Neither Strauss nor any other attendee could explain the meaning of the phrases or otherwise provide a recollection of the meeting that could tie specific entries to a given topic.

While some of the meeting attendees had a vague recollection of some of the topics of discussion, only one, Leon Panetta, suggested that the use of hard money was discussed in connection with the media fund. Significantly, with the exception of the DNC officials and those few White House officials who had a prior working knowledge of the media fund, none of the attendees walked away from the meeting with an understanding that the media fund required a mix of hard and soft money. Moreover, no participant recalls a mention of $20,000 as the hard money limit for donations to the DNC.[5]

When asked about circumstances that might establish whether or not the Vice President comprehended the topics discussed, no one recalled a specific question or comment made by the Vice President. No one recalled whether or not he was there for the entire meeting; nor did anyone recall whether anyone interrupted the meeting to confer with him or to have him take a telephone call. Some volunteered that it was not unusual for the President

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In addition, we received on August 18, 1998, a copy of the President's unredacted schedule for this November date that lists a few more potential attendees. One, Doug Sosnich, had little recollection of this meeting and no recollection of a hard/soft money discussion in connection with the media fund. The remaining two Brad Marshall and David Gillette, are scheduled to be interviewed during the afternoons of August 24 and August 25.

[5] This does not mean that we conclude that this fact was not mentioned; indeed, we consider the Strauss note to be reasonably persuasive evidence that it was. Rather, it leads us to the conclusion that whether or not it was mentioned, it was not an issue sufficiently central to the meeting or discussed in sufficient detail that it made an impression on any of the attendees. Thus, there are no grounds to conclude that it is reasonable to believe that merely because the fact may have been mentioned in a meeting attended by the Vice President, he was lying two years later when he stated that his understanding at the time was to the contrary.

and Vice President to be interrupted during such meetings. One witness, Brian Bailey, recalled that the two may have conferred with each other a couple of times during the meeting.

The results of our interviews are set forth below:

David Strauss, Deputy Chief of Staff for the Vice President during this period, had no specific recall of the meeting held on Tuesday, November 21, 1995, in the Map Room at the White House.[6] He did confirm that the handwriting on the documents recently turned over is his. He also noted that, based on his habit and practice, he could say that the pages were part of a packet handed out during the meeting and the words noted in his handwriting were things said during the meeting that he recorded as they were said. Strauss said that he took notes during this and other meetings to assist him in his own role as "booking agent" or scheduler for the Vice President. The notes were not taken for the benefit of others and he does not believe that anyone else relied upon the notes that he took during the November budget meeting.

Turning to the notes themselves, Strauss could not recall, who might have uttered the words "65% soft/35% hard"; "corporate or anything over $20k from an individual"; or "hard money limit $20k" during the meeting. He was unable to provide an explanation about what each of the phrases might have meant within the context of the meeting. He did not recall the issue of "hard" and "soft" money discussed by those attending but noted that these issues were often discussed at DNC budget meetings. Strauss was also unable to say whether the words were used with regard to the media fund, the DNC's operating budget or something else. Finally, he could not recall whether the Vice President participated in the discussion regarding these topics, whatever the context might have been.[7]

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[6] While the FBI's 302 at several points attributes information imparted by the witness to his recollection, Strauss repeatedly said during the interview that he had no recollection of the meeting. Thus, many of the statements set forth in the 302 that appear to provide information about this meeting in fact were the witness's inferences based in whole or in part on the documents, his notes on the documents, and his general knowledge of the way things worked both at the White House and DNC.

[7] Strauss concluded, based on his handwritten notes with quotation marks opposite "VP", that the Vice President participated in the portion of the meeting that dealt with fundraising issues. Like everything else about the meeting, though, Strauss could do no more than confirm that, based upon his notetaking practices, the statements written on the page were made.

With regard to his own understanding of the DNC's use of funds, Strauss confirmed that he was aware that the DNC used a mix of hard and soft money in its budget. However, he said he was not familiar with the DNC media fund. He also said he had no knowledge of the ratio between hard and soft money in the fund, or even if the fund had a hard money component. Strauss learned of the DNC's overall need for a mix of hard and soft money because, as the Vice President's political scheduler, he was often told that the fundraising events that needed to be scheduled were either hard money events like the Saxophone Club meetings, designed to raise lots of smaller donations, or "high roller" fundraising events, designed to raise soft money.[8]

Leon Panetta, the President's Chief of Staff, recalls attending this and one or two other DNC budget meetings in 1995 also attended by the President and Vice President. While the earlier meeting or meetings dealt with the overall DNC budget, he indicated that the Ickes memoranda lead him to believe that the one in November was focussed on the need to raise additional money for the media fund. Panetta admitted that these were not the types of meetings where he paid a lot of attention to details. However, he was able to confirm that the Ickes memoranda was the kind of material usually passed out and the subjects covered were the kind of topics upon which the discussion would be based.

Panetta recalls a discussion of what would have to be raised both in hard and in soft dollars during the meeting. He added that since the Ickes memoranda clearly indicates that the major issue during the meeting was the media fund, he is able to say that these topics would have been raised in connection with the fund.[9] He has no recollection of whether it was mostly soft or

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[8] Strauss noted that this DNC budget meeting was a "big one" since the President and Vice President were in attendance. He distinguished it from regular Wednesday "money meetings" in the Ward Room of the White House that were attended by Strauss and others but not the principals. Strauss also attended the Wednesday "money meetings" in the Ward Room of the White House. Several witnesses who attended these Wednesday meetings on a regular basis confirmed that the DNC's specific needs for hard and soft money were typically discussed in some detail in this forum.

[9] Panetta was interviewed twice by telephone. In the first interview, he began by saying he had no specific recollection of the November meeting. Midway through the first interview, though, he stated that he recalled a discussion of hard and soft money but believed it was within the context of the overall DNC budget, not the media fund. When questions arose after this interview about whether Panetta recalled a hard money component

mostly hard that was needed at the time.[10] And while he had a "sense" that everyone in the room at the time understood what was being discussed, Panetta could not recall any particular detail that led to this conclusion. Panetta added that he thinks there was always a reference to what kind of money -- hard or soft -- needed to be raised at the time in the course of the other budget meetings attended by the Vice President. He believed these discussions included references to the media fund and other segments of the DNC budget.[11]

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being discussed at this meeting or at other meetings and private talks with Ickes, a decision was made to ask the witness to clarify his recollection in a second interview.

By the second interview, Panetta firmly stated that the discussion of hard and soft money was within the context of what needed to be raised for the media fund. When pressed to separate his recollection from the content of the Ickes memoranda, he admitted that he believed the topic of hard and soft money was made in the context of raising money for the media fund because the Ickes memoranda clearly indicated that this was the "main driving force" and "main topic" of the meeting.

[10] Panetta initially said that he recalled a discussion of how much soft and how much hard money was needed and what kind of fundraising events could be done to reach these goals. When asked what he specifically recalled about the phone calls and other events set forth on the back page of the Strauss notes (November 20, 1995 memorandum), Panetta said he recalled that the phone calls were one way to raise soft money. When asked whether he specifically recalls this being said in the meeting, though, the witness said it was only a "general memory" and added that it "seems to make sense". He then backed away from the statement saying he believes that there was not a "specific breakout" in the meetings but, instead, a general discussion about the need for a lot more money to be raised which could only mean a large time commitment from the President and Vice President. It should be noted that in the first interview, he did not recall any discussion concerning hard and soft money relating to the telephone calls.

[11] There is some question as to the accuracy of Panetta's memory in this regard. In his first interview, Panetta only ventured it was possible that the topic was raised during other meetings. While we have found one DNC budget meeting scheduled in the Map Room on June 8, 1995, the Vice President's schedule indicates he was not in attendance. Moreover, it appears the Media Fund was not an item in the DNC budget during the Spring and Summer of 1995. Documentary evidence indicates that the $10 million Media Fund, increased to $13 million in November 1995, was not added to the DNC budget until October 1, 1995. This is

Panetta said that while he does not recall a specific conversation about the limit on hard money contributions to the DNC, it would not surprise him if it was discussed.[12] When asked for his own understanding of these limits, he said he believed an individual could donate one thousand dollars to candidates but he was not sure how it applied to political parties.

Panetta does not recall specific comments being made by the participants, including the Vice President, but volunteered that it was his "impression" that they were following the discussion and that questions would have been asked by the principals. He noted that the Vice President's role was to listen and not actively discuss the topics at issue. Panetta had no recollection of the specific statements being made as set forth in the Strauss notes. In particular, he did not recall any of the statements that Strauss put in quotation marks, nor did he recall a particular discussion of what events to hold.[13]

Marvin Rosen, DNC Finance Chairman from September 1995 through January 1997, recalls the November meeting, which was memorable because he had just started working at the DNC, as focussed primarily on the issue of the overall DNC debt, not a distinct meeting on the media fund. By way of explanation, Rosen

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corroborated by witnesses who have noted that while the media campaign began to be discussed earlier, discussions over funding and raising money for the campaign did not begin until the Fall of 1995. Thus it appears to be very unlikely that Panetta attended meetings with the Vice President in the Spring and Summer of 1995 during which the hard/soft money split was discussed in connection with the media campaign.

[12] Panetta may have contradicted himself on this point. Page 3 of the 302 on the first interview notes that "Panetta did recall a discussion regarding the hard money limits on contributions". On page 4, though, it is noted that he had no specific recollection of the topic. In any event, we know that as of the date of the interview he was unaware of the legal limit.

[13] Because Panetta is the only attendee who recalls a discussion of hard and soft money in connection with the media fund, the clarity and consistency of his statements is particularly important in judging the weight they should be given here. We attach the first Panetta 302 at Tab B to assist you in your review. We have not received the 302 of the second interview conducted on August 18, 1998, and therefore the facts set out herein are drawn from [redacted] notes and memory of the interview. When we receive this second 302 we will forward it. ATT NAI

said he never understood the difference between the media fund and the money needed to run the DNC overall operating account since there was not separate bank account for the media campaign only a designation on how much needed to be spent on advertising. Instead, he remembers the participants discussing the fact that a fundraising strategy was badly needed given the increasing debt caused, in part, by media spending. He recalls a discussion about paying the DNC bills and raising more money or acquiring more debt to pay for the extra television ads the White House had already said they may want.

Rosen did not recall a discussion of hard money with respect to the media fund. Moreover, he volunteered that these issues were not likely to have been discussed at this meeting since soft money, not hard money, was needed at the end of 1995. He recalls that the DNC Finance Division that he chaired was told, toward the end of 1995, that soft money for the media fund, not hard money, needed to be raised. He added that hard money was not an issue at the end of 1995 because the direct mail solicitation campaign, one of the major sources for hard money, normally sent out solicitations at the end of December and hard money would be coming in at the beginning of the year. Accordingly, the focus of the fundraising proposals presented to the President and Vice President during the November meeting was on raising soft money from large donors through the end of the year.[14]

Ronald Klain, Chief of Staff for the Vice President, confirmed his presence at the meeting but did not recall any discussions about the DNC media fund. In fact, Klain, who was attending one of his first meetings after taking the job of Chief of Staff, claimed that he was not aware of the media fund even after the meeting. He states that he learned that the fund was a means by which the DNC could buy commercials in meetings held after November. Instead, Klain recalled that the meeting focussed on the status of DNC fundraising and the need to raise additional money. Consistent with this memory, Klain recalled that the meeting participants, especially those from the DNC, were seeking to ensure scheduling commitments from the President and Vice President, for events and telephone calls, to help meet fundraising goals. Klain added that his role at the meeting was to accompany the Vice President and learn how the White House worked while Strauss, as Deputy Chief of Staff, was responsible

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[14] Rosen said that he helped put together the November 20, 1995 memorandum (See last page of Attachment at Tab A) that mentions telephone calls and additional events which required participation from the President and Vice President. The memorandum was generated because the White House wanted a proposal on what the DNC needed, in terms of a commitment of the principals, to raise more money to fund additional media ads.

for scheduling fundraising events that were discussed at the meeting with the DNC.

While Klain entered the meeting with a general understanding of the distinctions between hard and soft money and the DNC's need to raise both, he did not recall any discussion of hard and soft money issues during this meeting. Klain volunteered that it was not until the Spring of 1996 that he learned that the media fund had a hard money component, when Harold Ickes tied the need for the Vice President to participate in hard money fundraising such as Saxophone Club events to the DNC media campaign. Klain did not share this knowledge of the media fund composition with the Vice President. He is unaware of whether the Vice President knew that the media fund had a hard money component.

Klain had no specific recollection of any of the phrases contained in the Strauss notes being uttered during the meeting. He did state, though, that the phrase "need for 8 million in next 5 weeks" was consistent with his memory that the primary topic of the meeting was a need to raise additional money for the DNC.

Brian Bailey, formerly an Assistant to Erskine Bowles, Deputy Chief of Staff to the President, recalls both attending the meeting and preparing a document that may have been discussed by meeting participants. Bailey explained that because of his educational background in business and accounting, in the Summer of 1995 Ickes began assigning him the task of analyzing DNC budgetary information. Through at least the end of November, Bailey served as Ickes's assistant "working the numbers" provided by the DNC. In connection with this task, Bailey prepared a memorandum titled "DNC 1995 Budget Analysis". While he is not sure, he believes that this document may have been included in a handout given to the meeting participants. It was his role as Ickes's DNC budget analyst, though, that led to his attendance at the November meeting, the only meeting he attended with the Vice President and President.

Bailey recalls the purpose of the meeting was to present to the President and Vice President information regarding the status of the DNC budget generally including debt, borrowing capacity, and future expenditures, especially those involving the media buys. In this connection, Bailey recalls a discussion about future fundraising events and projections on how much money could be raised by these events. An important topic was the Media Fund and options for meeting projected shortfalls. According to Bailey, DNC personnel, including Don Fowler and Marvin Rosen, may have led this portion of the presentation.

Bailey also recalls a discussion of hard and soft money during the meeting, stating that Strauss's note setting forth a 65/35 split sounded familiar. Significantly, in spite of his familiarity with the DNC budget, he could not say what these

references to hard and soft money or the proportions might have related to. In fact, Bailey conjectured one of three possibilities. First, that the reference was to the composition of the media fund. Second, that the reference was to the total amount of hard and soft money that the DNC had on hand. Finally, he noted that the reference to hard and soft and the 65/35 proportions may have related to the rate or proportions that the DNC was raising their funds. Bailey eliminated the second possibility only after he was shown that the documents that he prepared clearly showed that the DNC's current funds were not in fact split 65/35 at the end of 1995.

Bailey stated that he did not recall any discussion of hard and soft money as it applied to the media fund or the Vice President's plans to make fundraising telephone calls. Bailey recalls that the media fund was discussed but he also said he did not know whether the media fund had a hard money component. He had no specific recollection of any of the other phrases in the Strauss notes. Bailey, like the Vice President and Panetta, did not leave the meeting with an accurate understanding of the $20,000 hard money contribution limit to political parties; he believed the limit was $1000.

Scott Pasterick, DNC Treasurer from May, 1995 through January, 1997, recalls the purpose of the November meeting was to discuss the overall budget of the DNC. He did not recall any of the phrases on Strauss's notes being said at the meeting. While he did recall a discussion regarding the amount of hard and soft money the DNC had in their accounts, he remembers this as directly related to the overall DNC budget. He also recalls a discussion about how the DNC could only spend soft money if they had a particular balance of hard money. Pasterick did not recall a discussion at this or any other meeting attended by the Vice President relating to hard and soft money issues as they applied to the media fund.[15]

Pasterick confirms what others have said about the meeting providing an opportunity for the DNC to give a presentation to the President and the Vice President on the topic of their

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[15] Pasterick stated his belief that two concepts were widely understood or "common knowledge" among White House officials: that every DNC expenditure during a federal campaign was required to have a hard money component and that soft money was corporate and anything over $20,000 from an individual. However, Pasterick was unable to provide any information to indicate that the Vice President was aware of these facts. Moreover, our interviews with other White House officials, including former politicians such as Leon Panetta, show that these concepts are in fact more commonly not known.

budget. He describes the role played by the principals as one of listening while DNC officials did the presenting.

Harold Ickes, the President's Deputy Chief of Staff in charge of political matters, recalls that he requested the November 21, 1995, meeting in order to establish the DNC's fundraising accomplishments and to review "budgetary assumptions". Ickes has no specific recollection of two memoranda that he wrote just before November 21st suggesting a meeting to "develop a fundraising program to raise additional funds for media for 1995 and early 1996". He noted, though, that it was "fair to say" that these two documents referred to the meeting eventually attended by the President and Vice President in the Map Room. To set up the meeting, Ickes cleared a "manifest" and list of attendees with Leon Panetta, who in turn cleared both with the President, before the meeting was put down on the final schedule.

Ickes recalls that he chaired this and similar meetings on DNC budget topics. He started by laying out the agenda and purpose of the meeting and defining the issues that needed to be discussed. He then made his presentation briefing the President and Vice President on the current financial status of the DNC and projected financial needs. According to Ickes, future fundraising issues were also discussed with the principals since the two were an integral part of the DNC fundraising effort and future events affected their schedules. During Ickes's presentation portion, attendees from the DNC would be called upon to present specific information on various topics.

When asked about the Strauss notes, Ickes not only did not recall the handwritten phrases being uttered at the meeting but also expressed doubt that these topics would have been discussed in the level of detail reflected in the notes. Specifically, Ickes recalls giving the opening statement and presenting "aggregate" information regarding the overall DNC budget as a prelude to a discussion of fundraising events that required the commitment of the President and Vice President. As a possible explanation for the Strauss phrases, Ickes ventured that Strauss may have been making notes to himself in greater detail than the actual discussion at the meeting since Strauss was very sophisticated on matters of hard and soft money and political contributions.[16]

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[16] As evidence of Strauss's sophistication, Ickes noted that Strauss was a regular at the Wednesday money meetings where discussions of DNC finances including soft and hard money was often discussed in detail. While his active participation in the meetings was infrequent, according to Ickes, when Strauss did speak up, it was clear that he understood the topics being discussed.

Finally, while Ickes claims he had no specific recollection of a discussion, he was sure that references were made to hard and soft money during the meeting. By way of explanation, he pointed out several references to this topic in the memoranda reviewed at the meeting. He noted, though, that this presentation was meant to be an overview and not a detailed "line by line" discussion of the budget. Importantly, Ickes does not recall a detailed discussion of the media fund, or the issue of hard and soft money as it applied to the fund, being discussed during the meeting.

Robert Watson, DNC Chief of Staff during this period, is certain that he attended only one meeting on the DNC budget with upper level White House officials. He recalls the meeting was attended by the President but did not recall whether the Vice President attended. Watson remembers that the meeting occurred during the Summer of 1995. Also in attendance were the First Lady, and Bruce Lindsay. He provided a photograph of a meeting dated June 8, 1995.

Watson did not recall a November meeting and did not recognize the Ickes memoranda or the Strauss notes. Watson was unsure whether the DNC media fund consisted of hard and soft money but believed it might since DNC expenditures generally required a mix.[17]

The Vice President, when interviewed, again confirmed that he attended the November meeting stating, again, that the overall status of the DNC budget was discussed as well as sources of income including direct mail and fundraising events and expenses such as the media campaign. In summarizing the purpose of the meeting, the Vice President said that the presentation was aimed at showing that the DNC had predictable expenses such as payroll, travel, and overhead and, if they were also expected to pay for issue-related television commercials, they would need some fundraising help from the principals. He noted that he and the President did not often attend these types of meetings but they

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On the other hand, as noted above, Strauss in his interview claimed he knew very little about DNC budgetary matters, stating unequivocally that he took down what was said at this meeting without understanding many of the topics being discussed.

[17] After Watson's interview, we learned that his recollection is at odds with photographs and Secret Service records that establish his presence at the November meeting. His interview makes it clear that he has no memory of the November meeting, however, and it is possible that he was only present for a short time. As noted above, the Vice President's schedule indicates he was not at the June meeting.

were present at this meeting to participate in the discussions and to give guidance on the topics being discussed.

The Vice President was unable to refresh his memory by reviewing the Strauss notes and, consistent with his last interview, he again stated that he has no specific recollection of things that were said at the meeting.[18] Again, he did not recall a discussion of hard and soft money in connection with the media fund. While he was aware that other parts of the DNC's budget had hard and soft components, he heard nothing during this meeting, or in any other setting during this period that challenged his belief that the media campaign was being paid for by soft money. Instead, the Vice President remembers being told that the DNC needed soft money to keep the commercials on the air. He also recalls a general discussion relating to the need to raise more money for television and other DNC expenditure items to avoid going deeply into debt. He left the meeting with the goal and intention of raising this money for the DNC.[19]

In an attempt to explain why Strauss may have heard certain things during this meeting that he did not, the Vice President noted, consistent with the statements of other witnesses, that he was often interrupted during these meetings. He also noted that he would typically sit next to the President and often consulted with him on topics other than what was being discussed at the meeting in front of him, which corresponds with Bailey's memory of what happened during this meeting. He admitted that the DNC budget was not a topic that interested him noting that this could explain why he did not hear, or comprehend, some of the items discussed during the meeting. Finally, the Vice President said he knows Strauss to be a truthful and diligent person but, nevertheless, affirmed that he did not hear the things written in Strauss's notes during the November 21, 1995 meeting.

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[18] After reviewing the statements attributed to him and set apart by quotation marks, the Vice President could not recall saying these words but confirmed that at least two of the statements were the kind of thing he would have said since he believed his job was to ease the burden on the President by taking more of the fundraising responsibilities.

[19] When asked where his belief that the media fund was only composed of soft money originated, the Vice President recalls that the notion may have arisen from something he heard at the Wednesday night "residence" or strategy meetings. He speculated that it may likely have come from things said by Dick Morris, who was an advocate of the media campaign and actively pushed the television ad initiative by pointing out that soft money could be used to buy the air time.

Legal Analysis

The false statement statute provides, in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be [guilty of a felony].

18 U.S.C. § 1001. To obtain a conviction under § 1001, the government must prove (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. United States v. Herring, 916 F.2d 1543, 1546 (1990).

Turning to the facts developed in our 30 day inquiry, the "statement"; "materiality"; and "agency jurisdiction" elements for each of the statements at issue in the allegation are easily established. Clearly, the words uttered by the Vice President during the interview qualify as statements for purposes of section 1001. As noted above, the subject matter -- hard money component to the media fund and legal limits for hard money gifts to the DNC -- are relevant, and therefore material, since they describe the state of mind or intent of the Vice President at the time he made the fundraising telephone calls from his West Wing Office. Finally, because the agents and attorneys to whom the Vice President made his statement were investigating federal law violations, the "agency jurisdiction" element is met. The issue of specific intent cannot be considered during the initial inquiry.

The element of falsity should not be confused with the element of the state of mind required to commit the offense in this case. The question we have explored during the initial inquiry is whether there is sufficient information that the Vice President's statements -- (1) that he believed the media fund was financed with soft money and (2) that he believed the hard money donation limit was $2000 -- were false to warrant further investigation. The state of mind required to commit a violation of section 1001 is "knowingly and willfully," and whether the Vice President made an otherwise false statement knowingly and willfully is something we cannot explore in the course of the initial inquiry. In the words of the Act, we are not permitted to close a matter at the end of the initial inquiry period based on a determination that the subject "lacked the state of mind required for the violation of criminal law." 28 U.S.C. § 592(a)(2)((B)(i). However, whether or not the Vice President believed at the time that the hard money limit was $2000 and that the media fund was financed through soft money goes to the element of falsity, and can thus be explored under the normal

standards of information sufficient to warrant further investigation.

We note that were explorations of the truth or falsity of statements about beliefs considered to be subject to the state of mind restrictions in the Act, the Act would require that every such statement trigger the Act, whether or not the underlying belief was true, since it is the truth or falsity of the statement of belief that is at issue, not the underlying fact. Furthermore, we could only close the investigation without appointment of an independent counsel if we could develop "clear and convincing evidence" that the subject in fact had such a belief -- a standard that would be virtually impossible to meet in most cases. If we were barred from exploring whether there was evidence that a statement concerning ones belief was false on the theory that it is a matter of state of mind, we would be in the bizarre situation in which we could assess the truth or falsity of a statement such as "my assistant called and cancelled the appointment," but not "I believed my assistant called and cancelled the appointment." We would have to trigger on the latter statement whether or not the assistant in fact called, and furthermore would not be able to close without appointment of an independent counsel without affirmative, clear and convincing evidence that in fact the witness believed his assistant made the call.

Thus, the question here relates to the statutory element of falsity -- whether the evidence uncovered during the investigation is sufficiently specific and credible to support a conclusion that further investigation is warranted into whether the Vice President's statements concerning his beliefs about the media fund's financing and limitations on hard money contributions were false. Specifically, because no one interviewed could remember, let alone explain, the use of Strauss's terms "hard limit $20k" and "corporate or anything over $20k from an individual" in the meeting attended by the Vice President, we are left with no evidence to support a conclusion that the Vice President's statement that he believed the legal limit for hard money gifts to the DNC was the same as the limit for individual candidates -- $2000 per election cycle -- is false.[20]

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[20] As noted above, Panetta, who claimed at times to have a recollection of the meeting, is unaware that individuals can give up to $20,000 in hard money to the party per election cycle. When interviewed, he admitted he was only knowledgeable about the limit of $1,000 imposed on gifts to individual candidates.

Furthermore, like Panetta, Gore's background is as a congressional candidate, and he explained that from that experience he gained his understanding of the hard money

On the second statement, the only evidence that the Vice President's statement regarding his belief that hard money was not used to purchase DNC media ads is false rests on Strauss's belief that the words "hard" and "soft" were uttered in a meeting attended by the Vice President, and Panetta's memory that the raising of hard money was discussed in what must have been the media fund context. We have uncovered no evidence that the Vice President heard or understood the reference.

Moreover, the documents reviewed at the meeting show that soft, not hard, money was needed at the time the phone calls were discussed, which would suggest that raising soft, not hard, money would have been the major focus of discussion at this meeting. Finally, these same documents provide a strong indication that the Vice President lacked any motive to lie in his interview. The DNC was poised to borrow virtually all the hard money necessary for the ads, leaving only soft money to raise in the phone calls and other events through the end of the year. Thus, even if the Vice President knew that both soft and hard money were used to pay for the media campaign, the fundraising telephone calls upon which he was about to embark were needed to raise soft money, and he would have had no need to misrepresent the facts in order to support his statement that the calls were soft money fundraising calls.

Thus, it is our conclusion that the initial inquiry did not develop sufficient evidence to warrant further investigation into the question of whether the Vice President's statements, in his interview, regarding his state of knowledge or belief at the time he made the fundraising calls were false. First, the evidence that statements were in fact made during the November meeting that contradict the Vice President's interview statements is weak. Taken alone, Strauss's notes are both cryptic and ambiguous, and not even clearly from the meeting. He has no independent memory of what was said or what his notes mean. While we believed, upon our first review of the notes, that they indicated that both the split of hard and soft funds used to finance the media campaign and the $20,000 hard money contribution limit to the DNC were discussed at the meeting, it is telling that the actual attendees at the meeting either do not recall such a discussion, believe that these comments were not made, or offer a different explanation for the notes.

Panetta's statement is also far from unambiguous. He changed his statement concerning the meeting three times in the course of two interviews. He began the interview with no specific recollection of the meeting. His first impression was that there would have been references to hard money during the meeting because, he said, the Ickes memoranda had references to

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limitations, an explanation we find plausible.

hard money. He went on to state that the references would have been to the overall DNC budget. Later, in his second interview, Panetta offered another explanation, claiming now that the references to hard money had to be in connection to the additional funds needed for the media fund. When asked about the change in his rendition of the meeting, he admitted that he was relying on what the Ickes memoranda told him the meeting was about rather than his recollection.

Weak as the evidence is, we do conclude, however, that the notes, together with Panetta's evolving memory, support a conclusion that some sort of statement may have been made by someone at the meeting to the effect that the media campaign was funded by a mix of hard and soft money and that individuals could give up to $20,000 in hard money to the DNC. Even assuming this, however, we have developed no evidence that the Vice President heard the statements, understood the statements, or retained the information imparted. No one recalls him participating when these topics may have been discussed. Moreover, no one recalls him saying or doing anything outside of this meeting that would indicate that indeed he knew, whether because he attended the November meeting or some other way, that the media fund was not all soft money or the hard money limit to the DNC was $20,000.

Conversely, our inquiry has uncovered a wealth of evidence that other meeting participants, most of whom had more involvement in DNC budget topics and fewer other issues to concern themselves with than the Vice President, also failed to hear, understand, or retain the meeting statements. No one but Panetta recalled a mention of hard money in connection with the media fund. The list of people who attended the meeting yet failed to comprehend this hard money component included Brian Bailey, who spent several months crunching the DNC budgetary numbers for Ickes, Robert Watson, Chief of Staff at the DNC, Ron Klain and David Strauss, both with extensive political backgrounds. It is worthy of note that if the existing information is sufficient to warrant investigation of the Vice President based on his statements concerning his understanding of the hard money component of the media fund and the hard money contribution limits, each of these other meeting attendees have provided statements concerning their own understanding which is also at odds with the Strauss notes, and thus would have to be investigated as well for making false statements.

At least two inferences may be drawn from the consistent inability of the meeting participants to recall a mention of hard money in connection with the media fund. First, contrary to Panetta's statement, there may not have been such a discussion. The notes may have been a general discussion of the hard versus soft components of the overall DNC budget. Alternatively, the discussion may have been so brief that all but one participant

failed to hear or retain the significance of the point being made.[21]

An analysis of the documents passed out at the meeting offers additional support for the second possibility. It suggests that the need for soft money, as opposed to hard money, was the primary focus of this meeting. As noted above, the "DNC 1995 Budget Analysis" indicates that the party had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the adds (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion.

In conclusion, it should be noted that the documents and Marvin Rosen's recollection that soft money needed to be raised for the media fund at the end of 1995 leaves little motive for the Vice President to provide a false statement about the media fund. Stated differently, the Vice President had little reason to lie about his mistaken belief since the documents apparently discussed during the November meeting appear to show that soft money was what he needed to raise in the events and calls being planned for him.

REOPENING OF PREVIOUS DETERMINATION

As a necessary corollary to the conclusion reached above, the notes do not provide any more evidence that the Vice President violated section 607 when he made the calls, and thus it is our view that there is no necessity to reexamine the conclusion reached by the Attorney General last year that no independent counsel need be appointed to determine whether the Vice President violated section 607 when he made fundraising telephone calls from his White House office. There is no information in these notes that would tend to suggest the Vice President was in fact soliciting hard money contributions when he made the calls. Moreover, the recently produced evidence has no effect on the determination, made last December, that pursuant to

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[21] A related possibility is that the connection between the "issue ads" and soft money was so pervasive by the late Fall of 1995 that those meeting participants not familiar with the details of the DNC budget failed to pick up on the fact that there was a hard money element. This strong association between the concept of soft money and this media campaign is evidenced by public references to the television spots as "soft money ads" by a variety of public figures, including Representative Dan Burton.

established Department of Justice policy the absence of an aggravating circumstance makes prosecution for a section 607 violation unwarranted.

New Evidence and Results of Section 607 Investigation

When on December 2, 1997, the Attorney General notified the court of her determination not to seek an independent counsel, she cited two reasons. First, she noted that evidence that the Vice President may have violated section 607 is insufficient to warrant further investigation. Second, she told the court that even if the evidence suggested a violation, established Department of Justice policy required that there be aggravating circumstances before a prosecution under this statute is warranted. No aggravating circumstance was uncovered during our investigation.

In summarizing the basis for her finding that the evidence was insufficient to warrant further investigation, the Attorney General, in her Notification to the court, cited a "wealth of affirmative evidence" that had nothing to do with the Vice President's understanding of the media fund but, nevertheless, demonstrated that the Vice President was not soliciting hard money in his telephone calls. Noted was the fact that no evidence was uncovered that indicated that the Vice President knew of the Democratic National Committee's (DNC) practice of reallocating a portion of large contributions to hard money accounts. Also cited was the absence of evidence showing that the Vice President asked for funds to support the election of any federal official, including himself. It was further noted that donors who understood the concepts of hard and soft money interpreted the Vice President's request to be for soft money and many of the these donors recall that the conversations focussed on soft money. In addition, the amounts requested by the Vice President suggested a soft money request and, in some cases, his requests focussed on corporate contributions which could only be soft money contributions. Finally, the Attorney General noted that the donations made in response to the Vice President's calls were, in the vast majority of cases, handled by the DNC as soft money.

It remains undisputed that a major share of the media campaign was, in fact, funded by soft money. Moreover, documentary evidence uncovered during our investigation clearly indicates that the need for soft money, not hard money, was most critical at the time that the Vice President volunteered to make the phone calls.[22]

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[22] Documents indicate that at the end of 1995, when the party was in need of at least $3 million dollars to stay "on the air", the DNC had the capability of borrowing hard money but not

Turning to the policy ground cited by the Attorney General in her notification, the recently produced evidence in no way affects the previous finding that no aggravating circumstances have been established in this matter. We do believe that evidence of a concerted coverup of a section 607 violation might provide the necessary aggravating circumstances to warrant bringing a prosecution under that section, but any such evidence should be substantial, enough to persuade us that we are in fact dealing with an effort to obstruct the investigation, not a mere hypothetical possibility with no concrete support.

Absent new evidence of an aggravating circumstance, then, the policy finding, as described in the Notification, remains an independent dispositive ground for declining to seek an independent counsel to pursue a section 607 violation.

CONCLUSION

It is our recommendation that the newly discovered documents provided to us by the Vice President's counsel do not provide sufficient information to warrant further investigation of whether the Vice President may have made a false statement in the course of our previous preliminary investigation, and thus no preliminary investigation should be triggered. Furthermore, we conclude that the previous preliminary investigation into whether the Vice President violated section 607 in the course of making campaign fundraising telephone calls from his White House office need not be reopened based on this new information.

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soft money. It was in this context--the need to make up a shortfall of mostly soft money through the end of the calendar year--that the phone call project was conceived. This factor was given very little emphasis during our preliminary investigation because the Vice President claimed both that he did not read the documents and that he erroneously believed that the media campaign was run entirely with soft money.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

NOV 17 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section

David Vicinanzo
Supervising Attorney
Campaign Financing Task Force

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

Introduction

On August 26, 1998, the Attorney General initiated a preliminary investigation pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599, (the Act), to determine whether further investigation is warranted into the question of whether Vice President Albert Gore, Jr., a covered person under the Act, may have violated 18 U.S.C. § 1001 when he told attorneys and investigators last Fall that he did not know, at the time he made fundraising telephone calls from his West Wing Office, that the beneficiary of the solicitations, the media campaign run by the Democratic National Committee (DNC), was funded in part with federal money, and that he believed at the time of his telephone calls that federal money contributions to the DNC were limited to $2,000.

Many of the facts relating to this initial allegation were fully developed in the course of the investigation conducted during the initial inquiry. The Attorney General determined that a preliminary investigation was warranted to provide additional time and flexibility to explore all the evidence relating to the Vice President's understanding of these two issues. In addition, early on in our 90-day period, two additional related allegations

were received that warranted additional inquiry. Specifically, one witness contacted the Federal Bureau of Investigation (FBI) with hearsay information that the Vice President, in a telephone solicitation to Nicholas Allard, may have asked for hard money contributions. Another witness provided information suggesting that during a telephone call received by Charles Uribe in his presence, the Vice President may have requested a federal money contribution. Because these additional allegations, if substantiated, may have created new questions requiring further exploration, we examined the specificity and credibility of these allegations during our preliminary investigation as well.

Upon a full review of all the facts relating to all three allegations and the applicable law, we have determined that there are no reasonable grounds to believe that further investigation of this matter is warranted. It is therefore our recommendation that an independent counsel not be appointed. If the Attorney General agrees, a proposed filing, which informs the court that an independent counsel is not necessary, is attached for her signature. In any event, the Attorney General must reach her decision in this matter no later than November 24, 1998.

As discussed and analyzed in detail in this memorandum, we reach the conclusion that the evidence that the Vice President's statement was false is so insubstantial that no further investigation is warranted. We also conclude that the two allegations relating to Charles Uribe and Nicolas Allard are not sufficiently credible and specific to warrant further investigation.

The Independent Counsel Act

The Independent Counsel Reauthorization Act of 1994 is designed to remove investigative and prosecutive decision making from the hands of the Department of Justice and to place it in the hands of an outside independent counsel at a very early stage in the criminal investigation of certain high-level executive branch officials, including the Vice President. Upon receipt of information concerning a covered person, the Act provides for a 30-day initial inquiry period during which the Attorney General must determine if she possesses sufficiently specific and credible information of the potential violation of a federal criminal law to trigger a preliminary investigation. 28 U.S.C. § 591(d)(2). The purpose of the preliminary investigation, which is limited to 90 days, is to determine whether further investigation is warranted; if so, the Attorney General must apply to the Special Division of the Court of Appeals for appointment of an independent counsel.

If the Attorney General determines that there are no reasonable grounds for further investigation, the Attorney General must file a Notification setting forth a summary of the information received and a summary of the results of the preliminary investigation. 28 U.S.C. § 592 (b)(2). When a

Notification is filed, the Court has no power to appoint an independent counsel with respect to the matters involved. 28 U.S.C. § 592(b)(1).

The Initial Allegation

In the Fall of 1997, the Public Integrity Section conducted a preliminary investigation into the question of whether the Vice President may have violated 18 U.S.C. § 607 when he made fundraising telephone calls from his White House office. On July 27, 1998, long after the conclusion of that investigation, the Vice President's counsel provided the Public Integrity Section with six pages of handwritten notes that on their face raised questions about two statements made by the Vice President during his interview with agents and attorneys investigating the section 607 matter. The suggestions raised by this document can only be understood within the context of the previous investigation.

The section 607 investigation: The section 607 investigation resulted in the Attorney General's conclusion that there were no grounds to seek appointment of an independent counsel for two independent reasons: first, the overwhelming weight of the evidence supported the Vice President's statement that he was soliciting soft money contributions, outside the scope of section 607's ban on political fundraising from the federal workplace, when he made the telephone calls, and two, established Departmental policy precluded prosecutions under section 607 in the absence of aggravating circumstances, such as coercion, that were absent there. Given this, the Attorney General decided that she need not resolve the substantial legal question of whether section 607 even applies to telephone calls from a federal office to a private citizen outside the federal workplace.

Statements made during the previous investigation: During the previous preliminary investigation, the Vice President's explanation was that when he made the fundraising calls, he was seeking large, so-called soft money contributions to the DNC. During the previous preliminary investigation, we therefore explored the question of whether there was any evidence that would tend to cast doubt on the veracity of that explanation. One central event that led up to the fundraising calls was a meeting held at the White House on November 21, 1995.

As part of our preliminary investigation, the Vice President, on November 11, 1997, was questioned about several documents, including memoranda, charts, and analyses, that are described in a Harold Ickes memorandum dated December 18, 1995, as having been "reviewed at the DNC budget and fundraising meeting on 21 November 1995 in the map room." As we set forth in our investigative findings near the end of the preliminary investigation, the documents deal generally with the DNC media fund and specifically with plans to raise several million dollars

for paid television ads through the end of 1995. Within this context, one of the documents, dated November 20, 1995, suggests fundraising phone calls by the "POTUS" and "VPOTUS" as an additional way to raise the media budget shortfall. The remaining pages make up four documents dealing with DNC media budgets and fundraising projections for the remainder of the year. The December 18 Ickes memorandum indicates that the President, Vice President, and David Strauss were among the attendees of the November 21, 1995 meeting where these documents were "reviewed".

The Vice President, when questioned about this set of documents and the November 21, 1995 meeting, stated that he did not recall a discussion at this or any other meeting about the DNC's specific need for both hard and soft money in late 1995 to keep the ads on the air. The Vice President said that he believed that the fundraising phone calls probably were discussed during the meeting. He also recalled that the general topic of the media fund budget being increased was raised and discussed. However, the Vice President recalled that he believed, at the time he made the calls, that the ads were paid for with soft or non-federal money, claiming that he was not aware that there was a hard money component to the media fund.

The Vice President stated that based on this erroneous belief, together with his equally erroneous belief that hard money contributions to the DNC were limited to $2,000, when he made telephone calls requesting large contributions to the DNC media fund, he necessarily subjectively believed that he was soliciting soft money contributions by the very nature of the request.[1] In fact, the ads were financed pursuant to a complex regulatory formula apportioning their cost between hard and soft money, and individual donors are permitted to contribute up to $20,000 to the DNC in hard money per calendar year, so long as their total hard money contributions to all donees do not exceed $25,000 per calendar year. When asked about portions of other Ickes memoranda, unrelated to the November meeting, that showed a hard money component to the media fund, the Vice President said that as a rule he did not read the Ickes memoranda on these topics.

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[1] As set out in our recommendation at the conclusion of the preliminary investigation in that matter, there was also substantial independent evidence confirming the Vice President's statements that he was in fact soliciting soft money. For example, many of the donors who were interviewed stated that it was their explicit understanding that they were being requested to make a soft money donation. In addition, in some conversations, it was specifically suggested by the Vice President that the contributions could come from corporate funds, which can only be soft money.

The recently produced documents: As noted above, the Vice President's counsel, Jim Neal, on July 27, 1998, contacted the Public Integrity Section to inform it that six pages had been recently discovered that appeared to relate to the November DNC budget meeting.[2] Specifically, the documents were copies of documents already in our possession, with the addition of handwritten notations made by David Strauss, the Vice President's former Deputy Chief of Staff. The documents are attached at Tab A.

One of the documents, entitled "DNC 1995 Budget Analysis", upon which Strauss took notes, set forth the current DNC budget, financial status including available loan capacity, and two options for funding an additional $3 million in media above and beyond the $10 million that had been designated for media in the 1995 budget. The document indicates that the DNC had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would need to be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the ads (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion. Consistent with this interpretation of pages one and two of the document -- that the hard portion of the media budget could be borrowed leaving the soft portion to be raised -- the "fundraising projections" set forth on page 3 show that all recent past and future fundraising events planned for the media fund were designed to raise soft, not hard, money.

While the document itself does not break down the media fund into hard and soft components, the placement of the Strauss notes on the document suggests that the hard money component to the media fund may, in fact, have been discussed at the November 21, 1995 meeting attended by the Vice President.[3] Specifically, Strauss's writing -- which notes "65% soft/35% hard" opposite the

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[2] All such documents were requested by us during the course of the preliminary investigation, but these documents were not produced at the time. Neal stated that he did not know why these documents were "missed" during the search for documents conducted last fall. The Campaign Financing Task Force is conducting an inquiry concerning the failure to produce these documents previously, but so far found no evidence to suggest that the failure to produce the documents was anything other than accidental.

[3] Before receiving the documents, we knew from previous Strauss interviews that he took notes during meetings and often used quotation marks to indicate verbatim statements. This background and the fact that several phrases appear in quotation marks immediately suggested to us that Strauss's notes may reflect things that were said during the November 21, 1995 meeting.

term "media fund" -- appears to reflect a phrase that may have been used at the meeting to describe the approximate proportions of hard and soft money used by the DNC to purchase television ads during this period.

The Strauss notes also include what may be a statement of the hard money limit for gifts to the DNC. Specifically, the note just below the "65%/35%" includes what appears to be an attempt to define soft money from the DNC's perspective as "corporate or anything over $20 k from an individual." In addition, while not clearly written, a second notation that appears to say "hard limit $20k" appears on page 2 of the "DNC budget analysis" document opposite the second option in the "Analysis" document.

Possible implications of the new documents: These new documents, then, raised some new questions concerning the Vice President's statements about his understanding of the DNC's efforts to fund the media campaign. The Strauss notes suggest that during the November 1995 meeting, both the fact that the hard money limit on donations to the DNC was $20,000, and that the media campaign was funded by a mix of hard and soft money may have been mentioned. Because the Vice President was present for at least a portion, if not all, of that meeting, these notes thus suggested the possibility that his subsequent statements that he believed at the time that hard money donations to the DNC were limited to $2,000 and that the media campaign was funded only by soft money may have been false.

For example, the "65% soft/35% hard" note, if it reflects something that was said at the meeting about the media fund, may suggest that the Vice President was told in the course of the meeting that this fund, for which he was helping to raise money in part through the fundraising calls, had a hard money component. Moreover, the entries that seem to relate to the individual hard money limit -- "corporate or anything over $20k from an individual" and "hard limit $20k" -- may indicate that the Vice President was told at the same meeting that individuals could give up to $20,000, not $2,000, in hard money per calendar year to the DNC.

Obviously, the Strauss notes offer only a very weak link in a substantial chain of required inferences before reaching a conclusion that the Vice President may have lied in his interview when he said that it was his understanding at the time he made his calls that the media campaign was funded by soft money and that hard money donations to the DNC were limited to $2,000, and standing alone clearly are not sufficient to support a conclusion that the Vice President was making a false statement. The difficulty in establishing that the Vice President was lying in 1997 when he stated what his beliefs were in 1995 about the details of campaign financing requirements is patent.

Nevertheless, we reexamined the circumstances of the November 1995 meeting to explore whether there might be sufficient evidence to support that chain of inferences to warrant further investigation. We specifically sought any information suggesting that the Vice President may in fact have heard and comprehended the facts noted by Strauss; such an inference would be supported, for example, by information that these facts were discussed in sufficient detail and focus at the meeting that many other attendees specifically recall them, or that the Vice President made comments or asked questions in the course of the discussion that would seem to reflect an active understanding of the details, or that the participants recall any affirmative discussion of a need to raise hard money for the media fund. We found no such evidence. Indeed, the range of impressions and vague misunderstandings about these matters among all the meeting attendees is striking, and virtually eliminates any possible inference that mere attendance at the meeting would have served to communicate an accurate understanding of the facts as reflected in the Strauss notes.

Facts

In an effort to determine whether the apparent disparity between what the Vice President told us he believed at the time he made the calls and what the Strauss notes indicate may have been said at a meeting he attended on these topics warrants further investigation, we interviewed the attendees of the meeting.[4] As a threshold matter, the evidence we gathered during these interviews does establish that the Vice President did attend a meeting on November 21, 1995, during which the DNC media fund was at least discussed.

While some of the meeting attendees had a vague recollection of some of the topics of discussion, only two, Leon Panetta and Bradley Marshall, were able to say that the use of hard money was discussed in connection with the media fund. Significantly, none of the attendees who did not have a working knowledge of the media campaign appear to have gained an understanding that the media fund required a mix of hard and soft money by attending the meeting. Moreover, neither Panetta, nor any of the other participants, recalls a mention of $20,000 as the hard money limit for donations to the DNC.

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[4] Thirteen of the 15 people identified as having attended the meeting have been interviewed. A fourteenth, George Stephanopolous, has testified under oath in a Senate deposition that he did not recall this meeting and, if he did attend, he would have left after five minutes. The remaining attendee, the President, has stated through his attorney that he has no recollection of the meeting and has no information on the Vice President's state of knowledge on the relevant topic.

Evidence that hard money was discussed in connection with the media campaign at the November 21, 1995 meeting: Two of the fifteen witnesses who attended the meeting recall a mention of hard money in connection with the media fund. A third, David Strauss, who authored the notes, confirmed that the notes reflect things said in the meeting but could offer no explanation on their meaning and no current recollection of what was said.

Deputy Chief of Staff for the Vice President during this period, David Strauss had no specific recall of the meeting held on Tuesday, November 21, 1995, in the Map Room at the White House.[5] He did confirm that the handwriting on the documents recently turned over is his. He also noted that, based on his habit and practice, he could say that the pages were part of a packet handed out during the meeting and the words noted in his handwriting were things said during the meeting that he recorded as they were said. Strauss said that he took notes during this and other meetings to assist him in his own role as "booking agent" or scheduler for the Vice President. The notes were not taken for the benefit of others and he does not believe that anyone else relied upon the notes that he took during the November DNC budget meeting.

Turning to the notes themselves, Strauss could not recall who might have uttered the words "65% soft/35% hard"; "corporate or anything over $20k from an individual"; or "hard money limit $20k" during the meeting. He was unable to provide an explanation about what each of the phrases might have meant within the context of the meeting. He did not recall the issue of "hard" and "soft" money discussed by those attending but noted that these issues were often discussed at DNC budget meetings. Strauss was also unable to say whether the words were used with regard to the media fund, the DNC's operating budget, or something else. Finally, he could not recall whether the Vice President participated in the discussion regarding these topics, whatever the context might have been.[6]

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[5] While the FBI's 302 at several points attributes information imparted by the witness to his recollection, Strauss repeatedly said during the interview that he had no recollection of the meeting. Thus, many of the statements set forth in the 302 that appear to provide information about this meeting in fact were the witness's inferences based in whole or in part on the documents, his notes on the documents, and his general knowledge of the way things worked both at the White House and DNC.

[6] Strauss concluded, based on his handwritten notes with quotation marks opposite "VP," that the Vice President participated in the portion of the meeting that dealt with fundraising issues. Like everything else about the meeting, though, Strauss could do no more than confirm that, based upon his note taking practices, he believed that the statements written on the page were made.

A second attendee, Leon Panetta, the President's Chief of Staff, recalls being at this and one or two other DNC budget meetings in 1995 also attended by the President and Vice President. Panetta admitted that these were not the types of meetings where he paid a lot of attention to details. However, he was able to confirm that the Ickes memoranda were the kind of material usually passed out and the subjects covered in the memoranda were the kind of topics upon which the discussion would be based.

While much of Panetta's recollection is hard to separate from his interpretation of the documents that Strauss took his notes on, he did say he recalls a discussion of how much would have to be raised both in hard and in soft dollars for the media fund during the meeting.[7] He has no recollection of whether it

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[7] Panetta was interviewed twice by telephone. In the first interview, he began by saying he had no specific recollection of the November meeting. Midway through the first interview, though, he stated that he recalled a discussion of the mixture of hard and soft money needed but believed it was within the context of the overall DNC budget, not the media fund. The FBI's 302 also attributes a recollection of a "discussion, at this meeting, of the hard/soft components of the media fund, and that certain types of events were needed to raise each component." Later, the 302 notes that Panetta recalled "in general terms, discussions of how much had to be raised, and that so much of it was hard and so much soft. He could not recall any specific conversations relating this to the media fund." When questions arose after the interview, a decision was made to ask the witness to clarify in a second interview.

By the second interview, Panetta firmly stated that the discussion of hard and soft money was within the context of what needed to be raised for the media fund. When pressed to separate his recollection from the content of the Ickes memoranda, he admitted that he believed the topic of hard and soft money was made in the context of raising money for the media fund because he recalled those subjects of discussion and the Ickes memoranda clearly indicates that the media fund was the "main driving force" and "main topic" of the meeting. (This statement is memorialized in part in the 302 with the remaining portion set forth in notes taken by Peter Ainsworth, trial attorney with Public Integrity Section who was present during the interview.)

Finally, after our two telephone interviews, Panetta spoke to the Vice President's lawyer, Jim Neal. According to Neal, Panetta said, among other things, that he does not recall a statement at the meeting that there was a need for hard and soft money for the media fund, just that the need for hard and soft money for the overall budget was discussed and that the media fund was part of the overall budget.

was mostly soft or mostly hard that was needed at the time.[8] Panetta said that while he does not recall a specific conversation about the limit on hard money contributions to the DNC, it would not surprise him if it was discussed.[9] Finally, Panetta has no specific recall of any of the statements recorded by Strauss in his notes.

The last attendee who could provide information about the subject of hard money being discussed at this meeting was Bradley Marshall, Chief Financial Officer for the DNC. Marshall recalls the purpose of the meeting was to discuss the media campaign and how it was affecting the overall DNC budget. Several questions were addressed including how the media campaign had gone so far and what the DNC would do, in terms of media, for the rest of the year. While the format of the meeting was a briefing aimed primarily at the President and the Vice President, some of the topics were discussed generally by more than one attendee. Marshall did not recall anything said by the President or Vice President; he did volunteer that he recalls the President asked more questions than the Vice President.

Marshall recalls answering a question about the "spending side" of the media campaign by noting that the expenses were

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[8] Panetta initially said that he recalled a discussion of how much soft and how much hard money was needed and what kind of fundraising events could be done to reach these goals. When asked what he specifically recalled about the phone calls and other events set forth on the back page of the Strauss notes (November 20, 1995 memorandum), Panetta said he recalled that the phone calls were one way to raise soft money. When asked whether he specifically recalls this being said in the meeting, though, the witness said it was only a "general memory" and added that it "seems to make sense". He then backed away from the statement saying he believes that there was not a "specific breakout" in the meetings but, instead, a general discussion about the need for a lot more money to be raised which could only mean a large time commitment from the President and Vice President. It should be noted that in the first interview, he did not recall any discussion concerning hard and soft money relating to the telephone calls. (Again, this statement is partly memorialized in the 302 with the remaining portion set forth in notes taken by [redacted]

[9] Panetta may have contradicted himself on this point. Page 3 of the 302 on the first interview notes that "Panetta did recall a discussion regarding the hard money limits on contributions". On page 4, though, it is noted that he had no specific recollection of the topic. In any event, we know that as of the date of the interview he was unaware of the legal limit.

generally averaging "65% soft/35% hard".[10] The answer, according to Marshall, was one sentence without any elaboration. He does not know who asked the question but volunteered that the probable asker was Harold Ickes since Ickes often called on DNC officials in attendance at meetings to provide this type of specific detail. Marshall does not think the President or Vice President asked the question since they did not often get into "that level of detail". He had no memory of anyone else mentioning hard or federal money during this preliminary discussion of the "spending side" of the media campaign. Marshall recalls the discussion on this "spending side" was much shorter than that devoted to the "fundraising side".

Marshall does not recall a specific use of the term hard, soft, federal or non-federal money during the discussion that centered around the immediate need for media campaign fundraising. By way of explanation, Marshall noted that the DNC had $1.8 million left to borrow on their hard money line of credit but no borrowing capacity on the soft money side. In addition, direct mail contributions to the DNC operating budget -- all in hard money -- were available, if needed, for the media purchases. Marshall recalled both of these facts were cited as reasons why the hard money component of the media fund did not have to be raised in order to keep ads on the air through the end of the year.[11] According to Marshall, after this was established at the meeting, there was no need to differentiate between hard and soft since the money needed to be raised by the President and Vice President was all soft.

In turning to the two options set forth in the "DNC 1995 Budget Analysis", Marshall recalls a general discussion about whether to borrow all or just a portion of the expected media fund shortfall. He also recalls feeling a sense of relief, as Chief Financial Officer of the DNC, that the President did not want to borrow the entire amount. He has no recollection of the discussion about the ways in which this money was to be raised, including the telephone calls, explaining that once the participants turned from his area of expertise, the DNC budget, to address issues of fundraising he paid less attention.

Evidence that the Vice President heard, understood, and retained the meeting comments: Other than his presence at the meeting, we developed no evidence to support a conclusion that the Vice President heard, understood, or retained the comments about the funding of the media campaign that Marshall and Panetta recall were made at the meeting. In fact, as already noted, all

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[10] This phrase mirrors the Strauss note made on page one of the "DNC 1995 Budget Analysis".

[11] He could not say who addressed these topics or how long the discussion lasted but, instead, characterized it as a "general discussion" involving more than one person.

but these two attendees had no recollection of the comments at all. More importantly, several of the attendees who were not well versed in the intricacies of the media campaign also failed to understand the meaning of the comment during the meeting because, like the Vice President, they remained unaware of the media fund's hard money component. In short, what we are left with is the strong inference that the comments were either brief or of little importance to most of the attendees.

The only evidence uncovered that indicates that the Vice President actively participated in the meeting are the portion of the Strauss notes that attribute a couple of phrases about the telephone calls to the "VP" in quotation marks and Panetta's general memory that the President and Vice President were asking questions and making comments. No one interviewed recalls anything said by the Vice President including the phrases that Strauss, in his notes, attributes to him. Nor can anyone recall general topics he may have addressed. And, while Strauss is clear that the statements must have been made since he took them down, he too has no recollection of these things being said. Apart from the quoted phrases, no one can recall a specific instance where the Vice President participated by comment, question, or otherwise, in any way during the meeting. By contrast, Brian Bailey, who had never attended a meeting with the "principals", recalls being impressed with the President's grasp of the issues and budgetary numbers but does not recall the Vice President participating.[12] Bradley Marshall and David Gillette also recall the President, but not the Vice President, taking an active role in the discussion.

We also found no evidence to indicate, one way or another, that the Vice President was called away or was interrupted during the meeting so that he might not have heard any remarks about the funding of the media campaign. No one recalled whether or not he was there for the entire meeting; nor did anyone recall whether someone interrupted the meeting to confer with him or to have him take a telephone call. No one interviewed could recall whether or not the Vice President was interrupted during the meeting for any reason. David Strauss and others suggested that it was not unusual for the more important people in these types of meetings

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[12] Several attendees volunteered comments about the habit or routine of the President and Vice President at these type of meetings. For example, Harold Ickes noted that the two would routinely ask questions and participate in discussions. Similarly, Leon Panetta, in his first interview, described the "roles" of the President and Vice President at these types of meetings as not actively discussing but attentively listening. However, Panetta, when asked whether and how he could tell that the President and Vice President were listening attentively at this meeting, responded that he could recall no specific comments but had a general impression that they were following the discussions.

to be interrupted. Moreover, the President's schedule shows that he stepped out of the meeting to make a short telephone call to Senator Dole, an interruption that may have included the Vice President. However, Harold Ickes, who ran these meetings, noted that it was his practice to suspend the meeting if either "principal" excused himself. In any event, the only indication that the Vice President's attention may have been diverted is Bailey's memory that the two principals sat adjacent to each other and conferred a couple of times during the meeting.

No one interviewed could recall any conversation with the Vice President that might lead to an inference either that he had or had not picked up information about hard money and the media campaign at this or other meetings. Two DNC officials at the time, Scott Pastrick and Donald Fowler, indicated their belief that it was "common knowledge" that DNC expenditures and programs such as the media ads had a hard money component. As we will see in the discussion below, however, several of the meeting participants, including two regular attendees of the DNC Wednesday budget meetings, were unaware at the same time that the Vice President says he was unaware that the fund had such a hard money component. In any event, no one interviewed could specifically identify another meeting or conversation where the Vice President might have been given this information, or where he made any remarks that might indicate his awareness of how the media campaign was actually funded.[13]

Finally, several other attendees said, like the Vice President, that they did not gain an understanding of the media fund composition from this meeting. In fact, at least four other meeting attendees told us at one point or another in their interview that they were not sure that hard money was necessary to fund the campaign. This list includes Brian Bailey, who actually drew up the budgetary analysis that many identified as being at the heart of the media campaign funding discussion during this meeting. It also includes Robert Watson who stated that he was, at times, responsible for writing the checks to pay for the media spots. Importantly, the two attendees closest to and most likely to interact with the Vice President -- his Chief and Deputy Chief of Staff -- did not leave the meeting with this

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[13] Panetta does suggest that there was at least one more DNC budget meeting in the Map Room where both the Vice President was in attendance and the hard/soft breakdown of the media fund was discussed. Panetta suggests this meeting was in the Summer of 1995. Agents have found documentary evidence of one DNC budget meeting, in June of 1995, held in the Map Room. However, this meeting was held fully three months before the $10 million allotted for the Fall media campaign became an item in the DNC budget; thus, if the topic of the meeting was the DNC budget, the media fund was probably not discussed. Moreover, the Vice President, who was giving a speech at Harvard University on this date, did not attend the meeting.

information.

With regard to his own understanding of the DNC's use of funds, David Strauss, who attended the weekly DNC budget meetings as well as the "big" budget meetings such as the one in November that was also attended by the Vice President, confirmed that he was aware that the DNC used a mix of hard and soft money in its overall budget. He said he was not familiar, however, with the DNC media fund. He had no knowledge of the ratio between hard and soft money in the fund, or even if the fund had a hard money component. Strauss learned of the DNC's overall need for a mix of hard and soft money because, as the Vice President's political scheduler, he was often told that the fundraising events that needed to be scheduled were either hard money events like the Saxophone Club meetings, designed to raise lots of smaller donations, or "high roller" fundraising events, designed to raise soft money. He noted that he had no need to learn more than this about DNC budgetary matters.

Ron Klain, Chief of Staff for the Vice President, did not recall any discussions about the DNC media fund at the meeting. In fact, Klain, who was attending one of his first meetings after taking the job of Chief of Staff, claimed that he was not aware of the media fund even after the meeting. He states that he learned after November that the fund was a means by which the DNC could buy commercials. Instead, Klain recalled that the meeting focused on the status of DNC fundraising and the need to raise additional money. Consistent with this memory, Klain recalled that the meeting participants, especially those from the DNC, were seeking to ensure scheduling commitments from the President and Vice President, for events and telephone calls, to help meet fundraising goals. Klain added that his role at the meeting was to accompany the Vice President and learn how the White House worked while Strauss, as Deputy Chief of Staff, was responsible for scheduling fundraising events that were discussed at the meeting with the DNC.[14]

Evidence of lack of motive: In addition to the insubstantial nature of the evidence that the Vice President in fact was aware of the hard money component to the media campaign

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[14] While Klain entered the meeting with a general understanding of the distinctions between hard and soft money and the DNC's need to raise both, he did not recall any discussion of hard and soft money issues during this meeting. Klain volunteered that it was not until the Spring of 1996 that he learned that the media fund had a hard money component, when Harold Ickes tied the need for the Vice President to participate in hard money fundraising such as Saxophone Club events to the DNC media campaign. Klain did not share this knowledge of the media fund composition with the Vice President and is otherwise unaware of whether the Vice President knew that the media fund had a hard money component.

and therefore may have been making a false statement when he denied that awareness, we also find a lack of evidence to reasonably support a conclusion that he may have had a motive to commit such a violation in the context of our section 607 investigation.[15] First, we find no apparent motive for the Vice President to falsely deny he was aware of a hard money component to the media fund at this time when, in fact, the evidence clearly indicates that in spite of a hard money component, the Vice President was being asked to raise soft money in his telephone calls because this is what was needed during the relevant period. Second, we have found evidence that indicates that the Vice President has consistently maintained his erroneous state of belief about the media fund even though he was aware at the time that it might be in his interest to avoid such an admission. Finally, we have uncovered evidence about the history of the DNC's funding of issue ads that indicates that the Vice President's mistaken belief was both predictable and reasonable.

Affirmative evidence of the DNC's need for soft money during this time frame provides little reason for the Vice President to falsely deny he was aware of a hard money component. In fact, two of the meeting attendees, one high-ranking DNC official who did not attend, and the Strauss notes all indicate that at the time, the DNC media fund was in need of soft money to continue airing the ads through the end of 1995. First, Marvin Rosen, who did not recall a discussion of hard money and the media fund at the November meeting, nevertheless volunteered that hard money was not likely to be a major issue during this meeting since he had been informed as a DNC fundraiser that soft money, not hard money, was needed at the time of the meeting in late 1995. More

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[15] Because the issue here is falsity and not intent, the statutory standard is not whether evidence of lack of intent is clear and convincing. Nevertheless, in a recent preliminary investigation where a covered person in fact made a clearly false statement, we note that the Attorney General found clear and convincing evidence of a lack of intent in the context of strikingly similar facts. Specifically, in the Spring of 1997, a determination was made that a covered person lacked the necessary state of mind to violate section 1001 when he testified before Congress to an erroneous set of facts that were contradicted in briefing materials given to him prior to his testimony. This decision was based, in substantial part, on the absence of any other evidence that he was aware of the correct facts; a finding that his statement that he did not read the relevant portion of the briefing material was credible; and a determination that he had no substantial motive to lie. Similarly, here, we find no affirmative evidence that the Vice President was aware of the true facts, that his statement of lack of knowledge is objectively credible, and that there is no plausible motive for him to have lied about these facts, since conceding to knowledge of accurate facts would have benefitted him more than his mistaken belief.

importantly, Bradley Marshall recalls that the point was made during the meeting that because hard money could be raised through borrowing or direct mail, the Vice President's calls and other fundraising events were to focus on raising soft money. Finally, DNC Finance Director Richard Sullivan, who did not attend the meeting, confirmed that there was a shortage of non-federal money during this period, and stated that he believed this shortage would have been discussed at the November meeting.

Corroborating these three witnesses are the documents that Strauss confirms were actually handed out and discussed during the meeting, which make it clear that soft money was what was needed to be raised at the time. As noted above, one of the documents, entitled "DNC 1995 Budget Analysis", upon which Strauss took notes, indicates that the DNC had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the ads (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion.

In sum, the documents and several witness statements that indicate that soft money was needed for the media fund at the end of 1995 leaves little motive for the Vice President to provide a false statement about his knowledge of the fund's composition. Stated differently, the Vice President was left with no motive to falsely deny that he knew about the hard money component since there is no onus whatsoever that attaches to this knowledge. Indeed, the documents and statements establish that in spite of the hard money component, the Vice President was being asked to raise soft money in the events and calls being planned for him during the November meeting.

Evidence of the circumstances surrounding the making of the statement also raises a strong inference that the Vice President was aware that it would, in fact, be in his interest to avoid any mention of his mistaken belief. An affidavit provided by his attorney, Jim Neal, states that when the Vice President was being prepared for his interview last fall, during which the remarks in question were made, the Vice President stated his belief that the media campaign was funded exclusively by soft money. According to the affidavit, it was only after this statement of belief that Neal and his co-counsel George Frampton showed the Vice President documents, specifically an October 20, 1995 memorandum addressed to him, that clearly showed that the media fund had a hard money component and, consequently, that his belief was mistaken.[16]

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[16] This memorandum, like the Strauss notes document, indicates that in late October, the hard line of credit was

Aware that documentary evidence, known to investigators, indicated that he had received at least one memorandum that would have corrected his mistaken belief, the Vice President nevertheless informed his lawyers that he would have to admit the mistake in his interview.

Since the meeting with his lawyers last Fall, the Vice President has twice been interviewed and twice provided statements consistent with the statement recounted by Neal. He did so knowing that this statement would raise questions since documentary evidence showed that he had been provided information on at least one occasion that would challenge his stated belief. More importantly, he provided a consistent statement of his mistaken belief in spite of the fact that he had every opportunity, knowing both his error and the existence of evidence that should have corrected his error, to revise or change his statement of belief to conform to the evidence. In short, he could have chosen to either avoid any mention of his mistaken belief during the interview or state that he was aware of the hard money component, but, nevertheless, was asking for soft money from the people he called. Either of these versions would have avoided the inevitable questions about his mistake.[17]

Furthermore, the statement of his mistaken belief about the media fund composition provided him little advantage in defending himself from the section 607 allegation. By the time of the interview, there existed a substantial independent body of evidence, known to the Vice President, that showed that he was asking for soft, not hard, money in his calls. Thus the minor added persuasive effect of his comments about his mistaken belief could not plausibly be regarded as significant enough to warrant violating the law. In addition, the Vice President volunteered three additional reasons for his belief that he was raising soft money when he made the calls; namely, that he had been asked to raise soft money, that it never entered his mind that he would be asking for anything but soft money because the amounts he was requested to ask for clearly indicated that he was seeking soft money, and that soft money was always easier to ask for than hard money. All of these reasons for intending to ask for soft money could be corroborated by evidence, both documentary and

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adequate to "cover the hard part" of the media budget, leaving the "soft" portion to be raised.

[17] As we have repeated on several occasions, the Vice President explained that he did not read the Ickes documents such as the October 20, 1995 memoranda because, among other things, he had little interest in the fine points of DNC funding and felt that others, including DNC lawyers were responsible for these issues. Within the context of the hypothetical decision, then, the Vice President would have known that this explanation could not be easy to corroborate, providing more incentive to avoid mentioning his mistaken belief.

testimonial, as well as common sense. The addition of another reason that not only could not be corroborated but would likely be met with skepticism was both unnecessary and potentially harmful. In sum, the Vice President had little reason to provide attorneys and investigators with his mistaken belief unless it was true.

Finally, we find that the Vice President's explanation for his mistaken belief -- that he viewed the ads run by the DNC as "issue-related", not "candidate-specific", and therefore mistakenly believed that soft money could be used exclusively -- is reasonable given the history of the DNC's various media projects from 1994 through 1996.[18] In fact, we have uncovered evidence that the first significant ad campaign run by the DNC during the Clinton administration involved health care spots funded entirely by soft money. The party spent $4.6 million for these ads that were aired throughout 1994. It was not until the end of August, 1995, that the Federal Election Commission (FEC), in an advisory opinion issued in response to a Republican National Committee (RNC) request to fund its own issue ads exclusively with soft money, ruled that the allocation regulations required a "split" of hard and soft money for issue ads run by the national parties since electing candidates to Federal office was inevitably a related goal of the ad campaigns. According to Lyn Utrecht, an election law attorney who advised the DNC during this period, this advisory opinion was relied upon in formulating the media campaign spending formula once the $10 million media budget was put in place in late September of 1995.[19] In sum, the evidence indicates that the "splits" which were apparently mentioned in the November meeting were both new and a departure from past DNC practice of funding issue ads exclusively with soft money. Viewed from this perspective, then, the Vice President's mistaken belief was not only reasonable but predictable.

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[18] It should be noted that Deputy Assistant Attorney General Kevin DiGregory conducted a series of interviews with lawyers and agents who were involved in one or both interviews in an effort to determine whether evidence of the Vice President's demeanor might assist in determining his credibility. After the interviews, DiGregory concluded that "no inferences can be drawn from the Vice President's observable behavior" that would help to determine whether he was being truthful.

[19] Utrecht has told agents that her contact with the White House on these allocation issues was Harold Ickes. As noted above, Ickes has said that he did not share this information with the Vice President. Nor have we found documentary evidence to indicate that the topic of the FEC allocation rules and the ad campaign was raised in a meeting attended by the Vice President between the time of the August FEC ruling and the November meeting.

Legal Analysis

The false statement statute provides, in pertinent part:

> [w]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation shall be [guilty of a felony].

18 U.S.C. § 1001. To obtain a conviction under section 1001, the government must prove (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. United States v. Herring, 916 F.2d 1543, 1546 (11th Cir.1990), cert. denied, 500 U.S. 946 (1991).

Turning to the facts developed in our preliminary investigation, the "statement"; "materiality"; and "agency jurisdiction" elements for each of the statements at issue in the allegation are easily established. Clearly, the words uttered by the Vice President during the interview qualify as statements for purposes of section 1001. As noted above, the subject matter -- hard money component to the media fund and legal limits for hard money gifts to the DNC -- are relevant, and therefore material, since they describe the state of mind or intent of the Vice President at the time he made the fundraising telephone calls from his West Wing Office. Finally, because the agents and attorneys to whom the Vice President made his statement were investigating potential federal law violations, the "agency jurisdiction" element is met.

The element of falsity should not be confused with the element of the state of mind required to commit the offense in this case. The question we have primarily focused upon during the preliminary investigation is whether there is sufficient information that the Vice President's statements — (1) that he believed the media fund was financed with soft money and (2) that he believed the DNC hard money donation limit was $2000 — were false to warrant further investigation. The state of mind required to commit a violation of section 1001 is "knowingly and willfully". However, whether or not the Vice President believed at the time that the hard money limit was $2000 and that the media fund was financed through soft money goes to the element of falsity, and can thus be explored under the normal standards of information sufficient to warrant further investigation.[20]

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[20] We note that your memorandum recommending this preliminary investigation posits that more flexibility would be achieved by entering a period where the Attorney General could consider state of mind element of the offense, because we see insufficient evidence of falsity. Therefore, it is incongruous to ask whether the statement was made knowingly and willfully.

We note that were explorations of the truth or falsity of statements about beliefs considered to be subject to the state of mind restrictions in the Act, the Act would require that every such statement trigger the Act, whether or not the underlying belief was true, since it is the truth or falsity of the statement of belief that is at issue, not the underlying fact. Furthermore, we could only close the investigation without appointment of an independent counsel if we could develop "clear and convincing evidence" that the subject in fact had such a belief -- a standard that would be very difficult to meet in most cases.

Thus, the question here relates to the statutory element of falsity, and the evidence uncovered during the investigation is, in our view, so insubstantial that no further investigation is warranted. Specifically, because no one interviewed could remember, let alone explain, the use of the Strauss note's terms "hard limit $20k" and "corporate or anything over $20k from an individual" in the meeting attended by the Vice President, we are left with no evidence that the Vice President's statement that he believed the legal limit for hard money gifts to the DNC was the same as the limit for individual candidates -- $2,000 per election cycle -- is false.[21] While it is theoretically possible that the Vice President was lying and that evidence of that lie might exist somewhere, that possibility is so remote that we conclude no further investigation is warranted.

On the second statement, the only evidence that the Vice President's statement regarding his belief that hard money was not used to purchase DNC media ads is false rests on Strauss's belief that the words "hard" and "soft" were uttered in a meeting attended by the Vice President, and the memory of Panetta and Marshall that hard money was discussed in connection with the media fund. Strauss, though, has no independent memory of what was said or what his notes mean, and can only surmise that they reflect statements at the meeting because of his pattern of note taking.

Panetta's statement is also far from unambiguous. He changed his statement concerning the meeting three times in the

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However, even if one were to apply the clear and convincing standard to the element of falsity, that is, whether there is such evidence that he did not falsely state what he knew, one of the authors, Lee Radek, believes that this standard is met. Dave Vicinanzo sees the application of this standard to the falsity issue as problematic.

[21] As noted above, Panetta, who claimed at times to have a recollection of the meeting, is unaware that individuals can give up to $20,000 in hard money to the party per calendar year. When interviewed, he admitted he was only knowledgeable about the limit of $1,000 imposed on gifts to individual candidates.

course of two interviews. He began the interview with no specific recollection of the meeting. His first impression was that there would have been references to hard money during the meeting because, he said, the Ickes memoranda had references to hard money. He went on to state that the references would have been to the overall DNC budget. Later, Panetta offered another explanation, claiming that the references to hard money had to be in connection to the additional funds needed for the media fund. When asked about the change in his rendition of the meeting, he admitted that he was relying in part on what the Ickes memoranda told him the meeting was about.

Only Marshall unequivocally recalls his own one sentence reference about the "split" of funds used on the spending side of the media campaign in response to a question asked from someone other than the Vice President and a general discussion about the present availability of hard money for the media fund from a line of credit and direct mail receipts. Marshall notes that there was little need to reference hard money after these points were made since the remainder of the meeting would have been devoted to discussing the raising of soft money.

Weak as the evidence is, we do conclude that the notes, together with the memory of Panetta and Marshall, support a conclusion that some sort of statement was probably made by someone at the meeting to the effect that the media campaign was funded by a mix of hard and soft money and that individuals could give up to $20,000 in hard money to the DNC.

Even assuming the statements were made, however, we have developed no evidence that the Vice President heard the statements, understood the statements, or retained the information imparted. No one recalls him participating when these topics may have been discussed. Moreover, no one recalls him saying or doing anything outside of this meeting that would indicate that indeed he knew, whether because he attended the November meeting or some other way, that the media fund was not all soft money or the hard money limit to the DNC was $20,000.

Conversely, our inquiry has uncovered a wealth of evidence that other meeting participants, most of whom had more involvement in DNC budget topics and fewer other issues to concern themselves with than the Vice President, also failed to hear, understand, or retain the meeting statements. No one but Panetta and Marshall recalled a mention of hard money in connection with the media fund. The list of people who attended the meeting yet failed to learn about this hard money component included Brian Bailey, who spent several months crunching the DNC budgetary numbers, Robert Watson, Chief of Staff at the DNC, Ron Klain and David Strauss, both with extensive political backgrounds.

The reasonable inference that may be drawn from the consistent inability of the meeting participants to recall a

mention of hard money in connection with the media fund is that the discussion may have been so brief or so tangential to the main subject matter of the meeting that all but the speaker and one other participant failed to hear or retain the significance of the point being made. Support for this inference is found in Marshall's statement that his reference to hard money was brief, consisting of one sentence in response to a question. Moreover, Marshall's memory, corroborated by the documents, that soft money, not hard money, was the need in November of 1995 also lends support for this inference since there would have been little necessity to refer, at length, to hard money because this was apparently available to borrow at the time.

In addition to the insubstantial nature of the evidence that the Vice President was aware of the hard money component to the media fund, we also find a lack of evidence to reasonably support a conclusion that he may have had a motive to falsely deny that he knew about the hard money component. As noted, the documents reviewed at the meeting show that the DNC was poised to borrow virtually all the hard money necessary to run the ads into the next calendar year. The clear import of the documents, then, is that soft, not hard, money was needed at the time the phone calls were discussed, which would strongly suggest that raising soft, not hard, money would have been the major focus of discussion at this meeting. In fact, Marshall, in his statement, confirms as much. Because the fundraising telephone calls upon which the Vice President was about to embark were needed to raise soft money, not hard money, his knowledge of the media fund's hard money element was of no consequence. In sum, he had no need to misrepresent the facts about his knowledge of the fund's composition in order to support his statement that the calls were intended to be soft money fundraising calls.

Moreover, the statement provided by the Vice President's lawyer indicates that the Vice President was aware, by the time of his interview, of an additional reason why it would be in his interest to affirmatively state that he knew about the media fund's hard money component. He knew that investigators had uncovered documentary evidence that showed that the Vice President had been told, in a memorandum addressed to him, about this hard money component. He was, no doubt, also aware that his statement denying he had ever seen these documents could not, by definition, be corroborated.

On the other hand, he also knew that his mistaken belief about the media funding -- only one of several reasons that he cited in support for his statement that he intended to raise soft money in the calls — similarly could not be corroborated. In summary, the Vice President was likely aware at the time of his interview that he had little to gain and much to lose in admitting his misconception.

Finally, the Vice President's explanation for his mistaken belief -- that he viewed the ads run by the DNC as "issue-

related", not candidate-specific, and therefore mistakenly believed that soft money could be used exclusively -- is predictable. Both parties took the position that "issue ads" could be paid for exclusively with soft money until late August of 1995 when the FEC ruled otherwise. The RNC publicly advocated such a view as late as August 14, 1995. Viewed within this historical context, the Vice President's mistaken belief was reasonable.[22]

In sum, it is our conclusion that the preliminary investigation did not develop sufficient evidence to warrant further investigation into the question of whether the Vice President's statements regarding his state of knowledge or belief at the time he made the fundraising calls were false. First, we base our conclusion on the insubstantial nature of the evidence that the Vice President in fact was aware of the hard money component to the media campaign and therefore may have been making a false statement when he denied that awareness. Second, we note that we have found no evidence to reasonably support a conclusion that he may have had a motive to commit such a violation in the context of our section 607 investigation last Fall. For these reasons we recommend against the appointment of an independent counsel in this matter.

Nicholas Allard

On September 11, 1998, the Campaign Financing Task Force was contacted by a private citizen who claimed that she had learned through a friend, who was a cousin of Nicholas Allard, that the Vice President had pressured Allard to raise hard money campaign contributions during a fundraising phone call.[23]

Facts

In an effort to investigate this allegation, we interviewed

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[22] In fact, this strong association between the concept of soft money and issue ads appears to be rooted in the history of these type of ads and is evidenced by public references to the television spots as "soft money ads" by a variety of public figures, including Representative Dan Burton.

[23] Allard's name came up last Fall during our section 607 preliminary investigation because he, along with at least 11 others, appeared on call sheets dated June 1, 1995 prepared for the Vice President. Allard's call sheet, like the others from the Spring of 1995, noted that he "has agreed to join the National Finance Board for the Clinton/Gore '96 Reelection campaign." The sheet explained that "[t]his entails a commitment to raise $50,000 for the campaign, $25,000 by June 6th." The last sentence of the call sheet sets forth the need for the call: "[p]lease call to thank him and let him know how important and appreciated his efforts are."

the source of the allegation, Madeline Rhew, Allard's mother, who Rhew alleged was involved by Allard in raising funds, Peter Knight, who had asked Allard to raise money for the Clinton/Gore campaign, and Nicholas Allard himself. With the exception of Rhew's statement, which was based not on personal knowledge but on the hearsay of an unknown third party apparently communicated to her three years ago, we found no evidence that Allard was solicited by the Vice President.

Madeline Rhew: On September 14, 1998, Madeline Rhew told agents that a friend, who she would not identify except as "Cathy," who was a cousin of Nicholas Allard, told her that she had heard through her father that the Vice President called Allard in approximately June of 1995 and said that the elections were coming up and he would like to see Allard give a $25,000 campaign contribution to the Clinton/Gore campaign within two weeks. Rhew said that Cathy said that her father said the call came at a time when Allard was both lobbying Congress and talking to the Vice President about a telecommunications bill that he had written. Rhew told agents that her friend's father was aware of the call because Allard's mother had called him in a panic asking for contributions when Allard experienced difficulty in raising the money. Rhew stated that Cathy told her this in July of 1995.[24]

Rhew told agents that she had been an advocate for campaign finance reform as a member of "United We Stand", a grass roots entity that grew out of the Ross Perot organization. Her interest led her to staff a campaign reform booth at a Dallas conference in 1995 and organize a campaign task force. According to Rhew, her interest also led her to investigate the Allard situation to see if there was a "pattern" of donations to Clinton/Gore by telecommunication lobbyists. Her investigative work included visits to the House of Representatives Clerks Office and the Federal Communications Bar Organization. She also compiled FEC contribution histories and other records on Allard, his family, his law partners, and their families.

Nicholas Allard: When interviewed both last Fall and on October 19, 1998, Nicholas Allard said he received only one telephone call from the Vice President, not in the Spring of 1995, but in October of 1996. He stated that he was out of town when the Vice President called, but that when he returned, he called the Vice President's office and ultimately received a message asking that he call the Vice President at his residence. When he

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[24] Rhew cited a second reason for the Allard family to feel pressured by a Vice Presidential solicitation when she noted that her friend had a cousin, Allard's sister, who was apparently married to a doctor who had received a big favor from the Vice President. Rhew provided no further details about this allegation other than to pass on that it had become a joke in the Allard family not to let the Vice President do any more favors for them because it is too expensive.

did, the Vice President spoke briefly to him, stating that he was unable to talk. The next day, Allard was told by a White House staff person that the information the Vice President was seeking had been found.[25] The "issue" about which the Vice President was calling may have been health care but definitely was not campaign contributions, according to Allard. Allard denied having any direct dealing with the Vice President on the telecommunications bill passed in 1996 but stated he may have spoken to members of his staff. Apart from the brief conversation in the Fall of 1996, Allard states that he has never spoken to the Vice President on the telephone.

Allard explained that he agreed to raise $50,000 for the Vice President's reelection campaign upon the request of Peter Knight or one of "his people". Allard believes he, in turn, solicited family members, neighbors, and business associates during May and June of 1995 and would have asked these people to help him solicit others for contributions.[26] He admits he felt pressure to raise his commitment of $50,000 and believes he fell short of his goal but added that this was an endeavor that he took on without any type of coercion. The Vice President did not ask him to participate in this project and, while he recalls seeing a phone message record from around this time indicating that Peter Knight's secretary had called to say that the Vice President was going to call and thank Allard, he reiterated that he did not remember such a call and feels certain he would remember it if it happened.[27]

Lillian Allard: When interviewed on September 29, 1998, Nicholas Allard's mother, Lillian, told agents that she was not aware of her son ever being solicited for a campaign contribution

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[25] The FBI's 302 for the first interview does not mention the brief telephone conversation with the Vice President at his residence. Allard, when asked about this disparity, stated that he must have been misunderstood during the first interview since he recounted the same scenario in both interviews.

[26] Allard recalls his mother and father both contributed but no more than $100 each. He believes he raised less than $500 from his relatives but was unaware of anyone soliciting his uncle, the father of Rhew's friend, for a contribution.

[27] Several others who were mentioned in call sheets from this period stated, when interviewed during our previous investigation, that they did not, in fact, receive a call from the Vice President during the Spring of 1995. The remaining members of this group recall that the Vice President, consistent with the requests set forth on the call sheets, thanked them for their fundraising efforts. Finally, Peter Knight's secretary, Jewel Hazel, told investigators last Fall that she would place these calls on behalf of the Vice President.

in a telephone call by the Vice President. She noted that she and her husband each gave $100 to the Clinton/Gore campaign in response to a request from Allard, but she does not believe that her son asked her to solicit others for campaign contributions. Lillian Allard never asked anyone to make a political contribution including her brother, William Hagner.[28] Lillian Allard added that her son never told her he was raising $25,000, nor did he say he felt pressured to raise political contributions.

Peter Knight: When interviewed during our preliminary investigation, Peter Knight confirmed that he solicited Nicholas Allard to raise $50,000 for the Clinton/Gore campaign in the Spring of 1995. According to Knight, this commitment, which earned a membership on the campaign's "National Finance Board" entailed raising $25,000 in advance of an event held in early June of 1995 with the balance to be raised over the remainder of the year. He added that he was responsible for the call sheet which requested that the Vice President thank Allard for his commitment. Knight believed that, like some others whose names were included on these "thank you" call sheets, Allard was never called.[29] Knight was also unaware of any other telephone conversation between the Vice President and Nicolas Allard.

Analysis

We have been unable to substantiate Madeline Rhew's allegation that Vice President Gore solicited Nicholas Allard for a contribution to Clinton/Gore '96, much less that any such call may have been placed from the White House.

Contrary to Rhew's allegation, Allard's mother does not recall her son telling her that he had been solicited by Vice President Gore for campaign contributions. As for Allard himself, as he did a year ago, he maintains that he never actually had a telephone conversation with Vice President Gore in which the Vice President solicited him for any kind of contribution. Rather, according to Allard, the Vice President attempted to telephone him, but Allard in a return call was not able to have a substantive conversation. When Allard subsequently telephoned

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[28] Lillian Allard told investigators that Hagner has a daughter named Cathy, the first name given by Rhew to identify her friend.

[29] Knight explained that he kept a list of people that he had asked the Vice President to thank and used it to keep track of which calls had been made. We were given such a list during the previous investigation with several names, but not Allard's, crossed off. Comparing Knight's list with our previous interview results corroborates Allard's claim that he was not called since most of the people whose names are crossed off confirmed that they were called and thanked while the others, with a single exception, said they were not.

Vice President Gore's office, he was told that the "issue", which was not related to political contributions, had been resolved.

In theory, it is possible that Allard and his mother have lied to us. However, we have no evidence whatsoever to believe that this is the case. Given the consistent version of events that Allard has now recounted twice in the last year, it seems much more likely that Rhew, who apparently received her information in a conversation with a friend three years ago, provided us with an unfounded allegation.

Because we have discovered no evidence corroborating Ms. Rhew's multiple hearsay allegation, we believe that no further investigation of the Allard matter is warranted.

Charles Uribe

In mid-September 1998, we received information from prosecutors in the U.S. Attorney's Office, Southern District of New York, that Kenneth Smith, a cooperating witness in a commercial bribery/conduit contribution investigation, had alleged that his former boss, Charles Uribe, had received a telephone solicitation from Vice President Gore to raise $50,000 specifically for the Clinton/Gore '96 campaign.

Charles Uribe is the Chairman and Chief Executive Officer of AJ Contracting Company Inc. ("AJ"), a New York City construction management company. In June 1998, Uribe and AJ pleaded guilty to bribery in state court in New York, in connection with bid-rigging in the office construction market in New York City. Uribe received no jail time, apparently because of his poor health. AJ was fined $3.3 million. See Bagli, After Guilty Plea in Bribe Case, Company Calls the Payments Legal, New York Times, June 18, 1998, at B10.

Uribe was one of the names on call sheets involved in our section 607 investigation. In the course of that investigation, we learned that a four and one half minute telephone call was placed from the White House to AJ's main office telephone number on February 5, 1996. During our preliminary investigation last year, Uribe, whom we were informed was in very poor health and hospitalized because he was rejecting a transplanted kidney, declined to talk to us about this telephone call, but permitted his attorney to provide us with information. According to the proffer, the Vice President called Uribe at AJ's offices and asked Uribe to contribute $25,000 to the DNC. His lawyer said that Uribe did not remember whether or not the Vice President referred to the DNC Media Fund during their telephone conversation. When asked whether Uribe's memory of the time frame of this call was consistent with telephone records indicating that a call was placed from the White House to AJ's offices on February 5, 1996, Uribe's attorney said that, according to Uribe, the February 1996 time period "sounded about right." Finally, according to the proffer, Uribe gave $25,000 to the DNC in response to the Vice

President's request.

Because we were aware of only one phone call from the Vice President, and because that call was placed from the White House, Kenneth Smith's allegation to prosecutors in the Southern District of New York that the Vice President had solicited Uribe for contributions to the Clinton/Gore '96 campaign suggested that the Vice President may have violated 18 U.S.C. § 607, by soliciting hard money contributions in federal office space, and 18 U.S.C. § 1001, by telling investigators during an interview on November 11, 1997, that he did not recall ever soliciting individuals to make contributions to Clinton/Gore '96. Accordingly, we decided to explore Smith's allegation as part of the 90-day investigation that we had already begun concerning whether the Vice President lied to investigators during his November 1997 interview.

Facts

Kenneth Smith's Initial Interview: On September 17, 1998, Task Force agents interviewed Kenneth Smith, formerly the President of AJ, for the first time. Smith essentially provided the same information he had shared with the New York prosecutors, i.e., that some time in 1995 or 1996, but prior to the 1996 presidential election, an AJ secretary named Mary Dolan interrupted a meeting of approximately eight to twelve AJ executives in a conference room to say that the Vice President was on the telephone and wished to speak with Uribe. According to Smith, Uribe responded: "Vice President of what?" Dolan replied that it was the Vice President of the United States. According to Smith, Uribe instructed Dolan to transfer the call to the conference room where he took the call in front of the AJ executives.

Smith was only able to hear Uribe's side of the conversation, which consisted primarily of "yes sirs" and "no sirs." Smith did not hear Uribe refer to the DNC, the DNC Media Fund, or Clinton/Gore '96 during the telephone conversation. Smith estimates that the conversation lasted approximately two and one half minutes.

According to Smith, after Uribe hung up the telephone, Uribe told the other attendees of the meeting that the Vice President had just requested that Uribe "raise money for the campaign." According to Smith, Uribe then told the AJ executives that "we" needed to raise $50,000, and indicated that they and other AJ executives and employees would be expected to make contributions aggregating $50,000 to Clinton/Gore '96. According to Smith, Uribe also explained that the requested contributions needed to be raised within a specific period of time for reasons relating to federal "matching funds" for the Clinton/Gore campaign.

According to Smith, the following AJ executives and employees probably attended the meeting during which Vice President Gore

called Uribe: James Capolino, Betty Ahearn, and Pradeep Desai. Smith said that it was likely that Carl Schwartz, Ken Browne, Michael Gannon, and Greg Gannon also attended. In addition, it was possible that Robert Vitolo, Vinny Maiello, Frank Bilotto, and Mike Garone were present.[30]

According to Smith, after Uribe said that "we" needed to raise $50,000 for the Clinton/Gore campaign, Uribe went around the room and instructed specific attendees of the meeting to make a contribution based on Uribe's knowledge of how much they had already contributed toward their legal contribution limits. According to Smith, Uribe instructed each AJ employee present and able to legally contribute to make a specific dollar contribution to the Clinton/Gore campaign, ensuring that each employee contributed up to $5,000.

During his first interview, Smith told us that he was not sure whether he made a contribution subsequent to and as a result of Vice President Gore's telephone call to Uribe. In an effort to reconstruct his contribution history, Smith had located two check carbons and monthly statements from his Charles Schwab checking account. One of the carbons was for check number 389 and contained a notation in Smith's handwriting of "Democrats." The relevant account statement reflected that check number 389 was in the amount of $5,000 and was paid on September 5, 1996. The other carbon was for check number 347 and contained a handwritten notation of "Clinto." The relevant account statement reflected that check number 347 was paid on November 3, 1995. At the time of Smith's interview, Smith had not yet received copies of the actual checks, and he could not recall for certain without seeing the checks whether he had made checks 347 and 389 out to Clinton/Gore '96 and/or the DNC. Smith said that it was possible that he had written either one of these checks (or a third check that he had not been able to locate) as a result of Vice President Gore's request to Uribe. According to Smith, if he did make a contribution as a result of Vice President Gore's telephone solicitation, it would have occurred one or two days following the telephone call.

Finally, Smith told us that he was not aware of any other telephone calls from Vice President Gore to Uribe other than the one which came during the AJ executives meeting. According to Smith, Uribe would have boasted to Smith about any such additional calls.

Other Interviews: Two additional people we interviewed who used to be affiliated with AJ provided us with information concerning Uribe's telephone conversation with Vice President Gore.

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[30] Ahearn, Desai, Vitolo, Garone, and both Gannons declined to submit to interviews with Task Force agents.

1. James Capolino

James Capolino, formerly an Executive Vice President of AJ, recalls being in a lunch meeting in AJ's fifth floor conference room when a call came in for Uribe from the Vice President.[31] Capolino is unclear on the date of the call, but surmises that it probably took place in the Fall of 1996. According to Capolino, Uribe, himself, and Smith were present when the phone call came in. Although there may have been another person there as well, Capolino does not recall that being the case. Capolino believes that the call was placed to AJ's main number, 889-9100, and ultimately transferred to the conference room where the meeting was in progress. According to Capolino, he and Smith stayed in the room while Uribe spoke with the Vice President, which lasted approximately between three and four minutes. After the conversation was finished, Uribe immediately told Capolino that the Vice President had stated something like, "This is a tough campaign. We need all the help we can get. We need $25,000.00 as soon as possible. Can you do that?" According to Capolino, Uribe's answer was something like, "Consider it done." Capolino does not recall specifically, but believes it is possible that Uribe said that the Vice President told him that Knight or the Clinton/Gore campaign would contact Uribe about his pledge.

Capolino did not hear any mention during the conversation of hard versus soft money, to whom any contribution checks should be made out, or where the money would go. It was not clear to Capolino on whose behalf the Vice President was calling. However, he believes it was on behalf of the DNC, because by the time of the call "people were tapped out" and Uribe would have been unable to raise $25,000 in hard money contributions.

Capolino recalls that, immediately after the call, Capolino's attitude about the solicitation was "enough is enough." According to Capolino, Uribe seemed to sense this and responded to Capolino by stating something like, "Don't worry I'll handle this. I am going to call some people." Capolino does not recall being asked to contribute in response to the Vice President's call. According to Capolino, two or three weeks after the call, Capolino asked Uribe if he had been successful in raising the $25,000. Capolino says that Uribe told him that he had raised the $25,000.

Capolino is aware of only one telephone call to Uribe from the Vice President, and like Smith, believes that if there had

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[31] According to Capolino, at some point during the 1996 presidential campaign, Uribe asked Capolino how to become a "major player" in the DNC. Capolino told us that he may have contacted the DNC for purposes of developing Uribe as such a player. According to Capolino, from that time onward, Peter Knight worked with Uribe with respect to the Clinton/Gore campaign. According to Capolino, Knight would ask Uribe for contributions or to raise money, primarily for Clinton/Gore '96.

been more than one, Uribe would have bragged about it around the office.

2. James Cella

James Cella was a consultant for AJ and for a period of time dated Allison Uribe, one of Charles Uribe's daughters. According to Cella, he and Charles Uribe at one time were close personal friends, but since have had a falling out.

Cella recalls Uribe telling him that Uribe had missed a call from Vice President Gore. Cella believes that this missed call occurred in the Summer of 1996 because the weather was warm, but it would have been no later than August of 1996.

Uribe also told Cella about a second telephone call from Vice President Gore, which Uribe did receive. Cella was not present when this call came in, but he believes that it was more than two days after the first missed call and that the weather was still warm.

Cella recalls that Uribe told him that Vice President Gore requested $50,000 from Uribe, but that Uribe told the Vice President that "he could only do $25,000." Cella was not asked to contribute as a result of the Vice President's request, nor was he asked to solicit funds in connection with the Vice President's call.

According to Cella, he subsequently learned from Allison Uribe that Charles Uribe had collected $25,000 in response to the Vice President's request. According to Cella, "it was a while" and "a period of time" between the Uribe's conversation with the Vice President and the contributions being made. According to Cella, "it could have been months or even a year later after the request."

Cella recalls Allison Uribe telling him that the contributions in response to the Vice President's call were made to the DNC and were made up of $5,000 from Ken Smith, $5,000 from Charles Uribe, $5,000 from Pradeep Desai, $5,000 from either AJ or Integral Construction ("Integral"),[32] and $5,000 from Allison Uribe.[33] According to Cella, the $25,000 collected by Uribe for the DNC constituted soft money. Cella believes these funds were transmitted to the DNC either during or after August of 1996. According to Cella, Allison Uribe told him that she personally delivered these checks to Clinton/Gore '96 headquarters. Allison

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[32] Integral is another company controlled by Uribe.

[33] Allison Uribe did make a $5,000 contribution to the DNC in January 1997, but did not make any contributions to the DNC in August 1996.

Uribe told Cella that Charles Uribe requested her to bundle the contributions and deliver the bundle to Washington in order to "get credit." According to Cella, Charles Uribe thought that this might help Allison Uribe get a job in the Clinton/Gore Administration.

3. AJ Employees Who Were Not Present for the Telephone Conversation Between Vice President Gore and Uribe

We interviewed several additional AJ executives and employees concerning their knowledge of a telephone conversation between Vice President Gore and Uribe. Two of these individuals -- Kenneth Browne and Carl Schwartz -- had been identified by Kenneth Smith as people who likely attended the AJ executives meeting when Vice President Gore's telephone call was received. Two others whom we interviewed -- Robert Vitolo and Frank Bilotto -- were identified by Smith as possible attendees of the meeting. Browne, Schwartz, Vitolo, and Bilotto all told us they were not present at a meeting during which Uribe took a telephone call from Vice President Gore.

Smith's Second Interview: On October 2, 1998, we interviewed Kenneth Smith a second time. During this second interview, we showed Smith copies of the two checks from his Schwab account discussed above. Check 347 is a $2,000 check, dated October 20, 1995, made out to Clinton/Gore '96. Check number 389 is a $5,000 check, dated August 19, 1996, made out to the DNC.

Seeing these checks made Smith less certain about their relationship to Vice President Gore's solicitation of Uribe. Smith could not recall whether either contribution was made as a direct result of the Vice President's conversation with Uribe. While Smith opined that it was possible that the Clinton/Gore '96 contribution was related to the Vice President's telephone call, later in the interview he stated that he now questioned his recollection that Uribe had asked the attendees of the meeting to contribute to the Clinton/Gore campaign as opposed to the DNC. Smith recalls the amount that Uribe asked for as being $5,000, not $1,000 or $2,000.[34]

Smith reiterated that the meeting in question was attended by six or more AJ executives. Smith recalls that the Vice President's call may have come in during the afternoon, possibly after 3:30 p.m. During such a meeting, even in the afternoon, the

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[34] However, rather than definitively concluding that his August 19, 1996, check to the DNC was related to the Vice President's solicitation of Uribe, Smith stated that it was possible that he wrote this $5,000 check to the DNC in connection with James Cella's fundraising efforts. As noted below, Uribe's August 19, 1996, letter to Peter Knight seems to make clear that Smith's August 19, 1996, $5,000 check to the DNC was part of the $25,000 Uribe provided to the DNC in response to the Vice President's request.

AJ officers and employees present routinely would be eating.

Evidence Relating to Late 1995 Contributions to Clinton/Gore 96: On October 23, 1995, Uribe sent a letter to James Harmon, then the head of a Wall Street investment firm, enclosing eight checks totaling $10,000, each made out to Clinton/Gore '96. One of these checks was check number 347 drawn on Kenneth Smith's Charles Schwab checking account, in the amount of $2,000, which is referred to above.

We recently interviewed James Harmon, now the head of the U.S. Export-Import Bank, about the Clinton/Gore '96 contributions that Uribe sent to him in October 1995. A Democratic party activist, Harmon raised funds for Clinton/Gore '96 in late 1995 and early 1996, particularly in connection with a New York City Clinton/Gore fundraising event that occurred in early February 1996.[35]

Harmon told us that he knows Uribe somewhat through business. Although Harmon could not recall specifically, when shown Uribe's October 23, 1995, letter, Harmon stated that he likely solicited Uribe for contributions for the New York City Clinton/Gore event. Harmon has no knowledge of Vice President Gore being involved in soliciting the contributions that Uribe sent to Harmon in October 1995.

Letter to Peter Knight: On August 19, 1996, Uribe drafted a letter to Peter Knight, which stated in relevant part:

> Dear Peter:
>
> Vice President Gore personally called me in late spring -and I was very flattered - to ask if I could raise an additional $25,000 for the DNC above the amount we raised for Clinton/Gore '96.
>
> I am pleased to enclose the following checks:

Integral Construction	$10,000
Charles Uribe	5,000
Kenneth D. Smith	5,000
Pradeep Desai	5,000
Total	$25,000

The corporate check was deposited to the DNC's non-federal account. The three individual checks were deposited into the DNC's federal account.

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[35] The fundraising event apparently was originally scheduled for early November 1995, but was postponed due to the assassination of Israeli Prime Minister Yitzhak Rabin.

Analysis

Unlike Nicholas Allard, in the case of Charles Uribe, we do know with reasonable certainty that the Vice President in fact solicited Uribe for a political donation during a telephone conversation. However, the evidence we have amassed in our investigation indicates that the Vice President asked Uribe to contribute $25,000 to the DNC, not to Clinton/Gore '96, as Kenneth Smith originally alleged. Further, in our view, there is no evidence from which it may reasonably be inferred that Vice President Gore asked Uribe to make a hard money contribution, as opposed to a soft money contribution, to the DNC.

It first should be noted that Smith himself retreated substantially during his second interview from his initial position that Uribe told the other attendees of the AJ executives meeting that the Vice President had asked Uribe to raise money for the Clinton/Gore campaign. In both his interviews, Smith was quite certain that Uribe had sought $5,000 contributions from AJ officers in response to the Vice President's solicitation. Thus, when Smith was shown during his second interview that he had written a $5,000 check to the DNC in August 1996 and a $2,000 check to Clinton/Gore '96 in October 1995,[36] he was not sure whether Uribe had told him and the other attendees to write checks out to the DNC or to Clinton/Gore '96 in response to the Vice President's solicitation.[37] Smith's confusion appeared to heighten when he was told that the legal limitation on contributions to Clinton/Gore '96 was $1,000 per person.[38] He stated that Uribe

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[36] Although Smith's recollection during his first interview that Uribe referred to federal matching funds in the context of describing the Vice President's telephone call is suggestive of a solicitation for a contribution to Clinton/Gore '96, the documentary evidence discovered in the course of the investigation renders this unlikely. Perhaps Uribe referred to federal matching funds in Smith's presence in late 1995, in the course of raising funds for Clinton/Gore '96, apparently at the behest of James Harmon.

[37] Had Uribe submitted a series of $5,000 checks to Clinton/Gore '96, the committee presumably would have returned those checks to him, because they each would have been $4,000 in excess of the statutory limit. See 2 U.S.C. § 441a(a)(1)(A).

[38] Smith also seems to be confused about who was present during the telephone call. While Smith believes that eight to twelve AJ officers and employees were present when Uribe took the Vice President's call, Capolino recalls only himself, Uribe, and Smith being present. Our interviews have tended to corroborate Capolino's memory on this point. Several individuals whom Smith thought had probably or possibly attended the meeting have told us that they were not there. As noted below, however, we have not been able to interview every person whom Smith indicated

tracked the contributions given by AJ employees and would not have asked any AJ employees to write checks for greater than the applicable limitation.

Even if Smith had continued to maintain that he was certain Uribe had told him and the others present during the telephone call that the Vice President had asked Uribe to raise money for Clinton/Gore '96, Uribe's August 19, 1996, letter to Peter Knight provides conclusive evidence that the Vice President solicited Uribe for a contribution or contributions to the DNC. This is consistent with the proffer we received from Uribe's attorney during our preliminary investigation last year to the effect that the Vice President asked Uribe to contribute $25,000 to the DNC. In addition, James Cella recalls that Allison Uribe told him that contributions to the DNC were made in response to Vice President Gore's telephone solicitation of her father.

No one with whom we have spoken[39] has told us that he or she remembers hearing about more than one telephone conversation between Uribe and the Vice President. Both Kenneth Smith and James Capolino independently told us that Uribe would have boasted of another such call, and neither one recalls that happening. Nor have we discovered any telephone records which would lead us to believe that there was a telephone call to Uribe at AJ's offices from Vice President Gore other than the call that occurred on February 5, 1996.

Uribe's reference to the call in his letter to Knight as being in "late spring" of 1996 seems most plausibly explained as either an inadvertent or an intentional misdating by Uribe. If Uribe promised Vice President Gore on February 5, 1996, that he would contribute $25,000 to the DNC, but did not get around to doing so until more than six months later, one can understand why he might have wanted to refer to the call as having occurred in

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might have been present at that time.

[39] We have not been able to interview every AJ officer or employee who may have some information regarding a telephone call or calls to Uribe from Vice President Gore. In particular, Uribe has not been willing to submit to an interview. According to Uribe's attorney, Uribe still has health problems and his memory has been affected by medication he has been taking. However, as noted earlier, in the course of last year's investigation we did receive a proffer from Uribe's attorney concerning Vice President Gore's fundraising telephone call to Uribe.

In addition, AJ Executive Vice President Pradeep Desai (who made a $5,000 contribution in furtherance of Uribe's $25,000 pledge to the Vice President), Betty Ahearn (Uribe's personal secretary), and Mary Dolan (the receptionist who apparently fielded the call from the Vice President) have declined to speak with us.

late Spring. Moreover, Uribe's attorney proffered in late 1997 that Uribe then believed that a date of February 5, 1996, for his telephone conversation with the Vice President sounded about right.

Of course, it is theoretically possible that the Vice President solicited Uribe for a contribution to the DNC during the one telephone conversation that we know about and asked him to raise funds for Clinton/Gore '96 in another conversation that we have been unable to document.[40] Although the August 19 letter from Uribe to Knight refers to an "amount that we raised for Clinton/Gore '96," it provides no basis from which we can conclude that Vice President Gore was involved in any way in soliciting Uribe for those contributions. To the contrary, our investigation has established that James Harmon most likely solicited Uribe to raise the money for Clinton/Gore '96 to which Uribe presumably referred in his August 19 letter. Harmon has no knowledge of Vice President Gore being involved in soliciting funds from Uribe for Clinton/Gore '96.

With respect to the Vice President's solicitation of Uribe on behalf of the DNC, Uribe met his $25,000 pledge in the form of four checks -- one corporate check for $10,000 and three personal checks for $5,000 each. Although the corporate check by definition would have been a soft money contribution, the three personal checks, which ultimately were deposited into the DNC's federal account, conceivably could have been intended by Uribe to be hard money contributions.[41] However, we have no evidence that the Vice President explicitly asked Uribe to provide $25,000 or some portion thereof in hard money to the DNC.

It seems very unlikely that the Vice President asked Uribe to break up his $25,000 contribution into more than one check, let alone the unique grouping of one corporate and three personal checks that Uribe ultimately provided. The call sheet for Uribe merely suggested that the Vice President ask Uribe to contribute $25,000 to the DNC Media Fund. Moreover, in the course of our investigation last year, we came across no instance in which the Vice President asked a potential donor to break up a pledge into

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[40] Because we conclude that the Vice President asked Uribe to contribute to the DNC, we do not reach the question of whether a request to raise contributions from others would constitute a solicitation that might violate section 607.

[41] These three checks each were made out simply to the DNC. There was no indication on the checks whether they were intended by the contributor to go to the DNC's federal or non-federal account. As we learned during our preliminary investigation last year, during the 1996 election cycle the DNC often deposited checks on which there was no federal vs. non-federal designation into a federal account without the donor's knowledge or consent.

more than one check, let alone some combination of hard and soft dollars. It seems much more plausible that Uribe unilaterally decided to meet his $25,000 pledge by way of the four checks. To the extent he could get Kenneth Smith and Pradeep Desai to give $5,000 of their own money to the DNC, as opposed to funding the $25,000 entirely himself or through a corporation he controlled, it obviously would have been in Uribe's financial interest to do so.[42] In addition, as Capolino told us, Uribe previously had not been a major player in the DNC, and thus presumably was used to making contributions in the smaller increments applicable to congressional and some state and local campaigns. Thus, perhaps out of force of habit, Uribe decided to break up his $25,000 into four smaller amounts. Finally, to the extent Uribe wanted himself and/or Allison Uribe to be perceived as having worked hard for the Democratic party, bringing in four checks (two of which on their face were not linked to Uribe) probably would be more effective than Uribe simply writing one $25,000 check on a personal or corporate account.

Whatever Uribe's reason for not writing a $25,000 check from a personal or corporate account, there is no basis to conclude from the way Uribe met his pledge that the Vice President asked Uribe to give hard money to the DNC.

In sum, we have concluded that Vice President Gore made one telephone solicitation of Charles Uribe for a contribution to the DNC. Our evidence indicates that this call occurred on February 5, 1996. We have discovered nothing to make us believe that this call was different in any material way from the many telephone solicitations the Vice President made in late 1995 and 1996 in which he asked potential donors to make substantial soft money contributions to the DNC Media Fund. There is insufficient evidence to support any inference that Vice President Gore's telephone solicitation of Uribe included a request to contribute to Clinton/Gore '96 or to make a hard money contribution to the DNC. Accordingly, we recommend that the Attorney General conclude that no further investigation of the Uribe allegation is warranted.

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[42] The bank records that Smith provided to us from his Schwab checking account do not reflect any reimbursement to Smith around the time of this contribution. We do not know whether Uribe or AJ or any other person or entity reimbursed Desai for his $5,000 contribution to the DNC on August 19, 1996.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

NOV 17 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section

SUBJECT: "Clear and Convincing Evidence"

You have requested that I provide you with an analysis of section 592(A)(2)(B)(ii) of the Independent Counsel Act, which provides:

> The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

Specifically, you have inquired as to whether the determination of "clear and convincing evidence" is one made by the Attorney General as the finder of fact, or whether an objective standard, similar to the one that might be utilized by a reviewing court, governs the determination. The question was suggested to you, you told us, because you observed that rather than stating the standard in terms of the Attorney General determining that there is clear and convincing evidence, rather the Act states that the standard is whether there is such evidence. This raised the question whether the standard was intended to describe an objective fact or a subjective determination.

It is our view that the standard itself, the language of the Act, the legislative history, and consistent historical practice support a conclusion that the question of whether there exists

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clear and convincing evidence of lack of intent is one that is entrusted to the Attorney General as the finder of fact.

The implications of the issue. While it may initially seem that there would be little difference in result, in fact the results in a given case might be quite different. As will be discussed in more detail below, if the Attorney General is operating as the finder of fact with respect to whether there is clear and convincing evidence of lack of intent, reaching a personal subjective conclusion, the standard is whether the entire body of evidence provides "the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316 (1984)(citations omitted). The trier of fact should be left with "a firm belief or conviction as to the truth of the allegations sought to be established[.]" Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

On the other hand, if the standard is an objective test of the sort that a reviewing court might apply, the result might be quite different in a given case. Great deference is given to the fact finder by reviewing bodies. A court reviewing a jury's finding of a lack of clear and convincing evidence would reject the jury's conclusion only if it concluded that no "reasonable person" could have concluded that the standard of proof had not been met.[1] See, e.g., Creative Demos v. Walmart Stores, 142 F.3d 367, 371 (7th Cir. 1998) (evaluating the jury's award of punitive damages to determine whether a "reasonable trier of fact could find by clear and convincing evidence that the defendant acted [maliciously]").

Similarly, a court reviewing a judge's factual finding resting on a clear and convincing evidence standard applies a similarly demanding "clear error" standard. See, e.g., Gustafson, Inc. v. Intersystems Indus. Prods., 897 F.2d 508, 510 (Fed. Cir. 1990)(holding that willfulness determination in patent infringement suit must be proven by clear and convincing evidence and that this finding of fact is reviewable under the clearly erroneous standard). If rather than reaching her own assessment of the weight of the evidence, the Attorney General is to determine in a given case whether any reasonable person could disagree with a finding of no intent, or whether a person

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[1] Because of the peculiar reversal of the standard under the Independent Counsel Act -- the necessity of determining that something is not true based on clear and convincing evidence, rather than the more common requirement that a fact be affirmatively demonstrated by clear and convincing evidence -- it is difficult to avoid confusing double and triple negatives in analyzing the issue. We regret the resulting awkwardness in our discussion of the issue.

reaching such a conclusion necessarily is in clear error, the results in any case could clearly shift. This potential difference in result is perhaps most dramatic where assessments of witness credibility are required.

It is our conclusion, however, based on the language of the Act itself, the legislative history, and the Department's consistent historical practice in applying the Act, that the Attorney General is the factfinder in this situation. While the clear and convincing evidence standard is indeed a stringent one, it is in our view a determination that is entrusted under the Act to the Attorney General's judgment.

The Language of the Independent Counsel Act and its Legislative History. Perhaps the clearest indication that the Attorney General is intended to be a finder of fact rather than a reviewer of a determination is the fact that under the structure of the Act, there is no previous "determination." No one else under the structure of the Act plays any role until the Attorney General makes her initial determinations. Furthermore, the Act does not establish any factual presumptions that might substitute for a determination by a factfinder that factual prerequisites for proceeding under the Act have been made. Instead, the Act repeatedly speaks in terms of determinations being made by the Attorney General. These include, for example, determinations as to credibility, 28 U.S.C. § 591(d)(2); determinations as to conflict of interest, 28 U.S.C. § 591(c)(1); and determinations that there are reasonable grounds for further investigation, 28 U.S.C. § 592(b). Like the determination of clear and convincing evidence, all of these are subjective factual determinations, governed by established legal standards, that rest with the Attorney General as factfinder.[2] There is no hint in the language of the Act that unlike these other standards, the clear and convincing evidence finding is meant to be determined not by the established legal standard applicable to the

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[2] The effort to apply objective standards of the sort that a reviewing court might apply has created considerable confusion from time to time in attempting to discuss what these determinations require. For example, in discussing what our recommendation to the Attorney General ought to be with respect to her conclusion as to whether or not to seek appointment of an independent counsel, we have occasionally utilized, as analogy, whether the case would survive a rule 29 motion, or whether a "reasonable prosecutor" would pursue such a case. Both analogies are objective standards of the sort that a reviewing court would use; neither govern the Attorney General's subjective determinations as factfinder. The fact that such standards might help to clarify or organize a position should not be confused with a conclusion that they govern the Attorney General's determinations.

factfinder, but by another, higher standard such as that used by a reviewing court to inquire into a determination that has already been made by a finder of fact, whether judge or jury. For example, the Act does not say that the Attorney General is to determine whether any reasonable finder of fact could find a lack of clear and convincing evidence; rather, it states that she is to make a factual determination, and clear and convincing evidence is the standard she is to apply to that determination.

The legislative history of the standard offers additional support indicating that the standard was one that was meant to govern the Attorney General's own factual determinations, rather than to be a standard of the sort that a reviewing body might apply in the course of reviewing a determination that has already been reached. As in the Act itself, the legislative history contains no hint that the clear and convincing evidence standard was meant to play other than its traditional legal role as a evidentiary standard to be applied by the finder of fact, albeit a relatively stringent one. In a written explanation of the recommendation of the Senate Judiciary Committee that this standard be applied to determinations of intent, Senator Levin, the cosponsor of the 1987 Reauthorization Act, explained that this standard was chosen because it incorporates "a common legal standard which has a body of law interpreting its application." Cong. Rec. S14188 (daily ed. Oct. 13, 1987). That common legal standard, as is explained below, makes it clear that the phrase is used to describe a level of proof intended to govern the determinations of the finder of fact; nowhere to my knowledge has it been applied to a determination made by a reviewing body.

The Clear and Convincing Standard in the Law. The legal authority discussing the standard makes it clear that the standard is a subjective test, intended to be applied by the finder of fact. In case after case, it is described as a standard of proof intended to guide the determinations of the fact finder. See Santosky II v. Kramer, 455 U.S. 745 (1982) (holding clear and convincing standard "adequately conveys to the factfinder the level of subjective certainty about his factual conclusions" in parental rights termination proceeding); Addington v. Texas, 441 U.S. 418 (1979)("[T]he function of such a standard of proof ... is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.") The different standards of proof — such as "proof beyond a reasonable doubt," "preponderance of the evidence" and "clear and convincing evidence" — "communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions." In re Winship, 397 U.S. 358, 370(1970)(Harlan, J., concurring). As once evidence commentator has described it:

> [S]tandards like clear and convincing evidence (or preponderance of the evidence, or even proof beyond a reasonable doubt), are selected to govern a decision by a trier of fact, Judge or jury, who is expected to take credibility into account. The standard represents a confidence level, not an abstract measure of the quantity or quality of evidence presented in any case.

Saltzburg, 1 Federal Rules of Evidence Manual 332 (6th ed. 1994). As these authorities make clear, when there is a directive that a determination be made by clear and convincing evidence, as is the case with section 592((B)(ii), it is intended that this serve as a test by which a body of evidence is to be weighed by the finder of fact, to reach a subjective state of certainty about its conclusions. It is not a test that governs a reviewing body's determinations, and thus would not be used to describe an intent by Congress that the Attorney General apply an objective "abstract measure of the quantity or quality of evidence." Id.

Historical application of the Standard. We have never been faced before with a question as to whether the clear and convincing standard was one that was intended to guide the Attorney General in her subjective determinations as finder of fact, or was an objective test of the sort that might be applied by a reviewing court, and therefore there is no direct discussion of the question in previous recommendations. However, historical practice makes it clear, we believe, that in fact the determinations that were being made were by the Attorney General acting as factfinder, reaching subjective determinations about her own level of certainty. For example, she has found clear and convincing evidence even in the fact of substantial conflicting evidence, a determination that it seems would be impossible if she were applying the sort of test that a reviewing court would apply. See, In re George Tenet; In re Louis Freeh. She has also reached that conclusion in cases in which there was substantial disagreement among those advising her as to whether clear and convincing evidence existed, see, Tenet; if her standard was an objective one of the sort that a reviewing body would apply, the fact that presumably reasonable people had found a failure to meet the standard would seemingly dictate her conclusion.

In sum, we believe that the standard set out in the Independent Counsel Act is and was intended to be an adoption of the traditional legal standard of "clear and convincing evidence" as a direction as to the degree of confidence the Attorney General is to have in her factual conclusions under the Act. There is no basis in the language of the Act itself, the legislative history, the caselaw or historical precedents to suggest that the standard was intended to be an objective test of the sort a reviewing court might apply.

JUNE 21, 2000

U. S. Department of Justice

Washington, D.C.
20530

NOV 25 1997

MEMORANDUM

TO: Robert S. Litt
Principle Associate Deputy Attorney General
Criminal Division

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

SUBJECT: Recommendation to reject proposed theory relating to a possible criminal conspiracy predicated on the Primary Matching Payment Account Act and the Presidential Election Campaign Fund Act

You have asked that I evaluate a proposal -- articulated in [redacted] draft memorandum dated October 24, 1997 (conspiracy theory memo) -- that the Task Force undertake an investigation of a possible criminal conspiracy to violate the Presidential Primary Matching Payment Account Act and the Presidential Election Campaign Fund Act (public funding statutes). Consistent with our earlier analyses of allegations relating to issue advocacy, I continue to recommend that we formally refer the substantive concerns raised by the proposed conspiracy theory to the Federal Election Commission (FEC). The proposed theory necessarily focuses on the President as a possible coconspirator. Because the allegations underlying the theory have been known to us for over a year, the 30 and 90 day review periods pursuant to the Independent Counsel Act have already expired. Thus, adoption of the proposed theory would require immediate referral to the Special Division of the Court for the appointment of an independent counsel.

As we have discussed on several occasions, I do not believe that the proposed theory provides a predicate for criminal investigation at this time. The theory ignores the general

complexity of campaign finance laws and fails to account for FEC controlling guidance concerning closely related issues. The FEC notions underlying this guidance are illustrated well in the FEC's Advisory Opinion (AO) 1995-25, addressing the law and regulations governing the allocation between federal and nonfederal money for disbursements made in connection with legislative issue advocacy in the context of both federal and nonfederal elections. This AO critically undermines the proposed interpretation of the public funding statutes. In addition, an FEC publication, "The Presidential Funding Program" (1993), underscores that there is currently no basis for criminal investigation and that FEC review would provide the appropriate forum in which to resolve the substantive issues raised by the proposed theory.[1]

Referral to the FEC now would avoid launching an independent counsel investigation in order merely to develop facts that we are already willing to assume arguendo. Absent an FEC determination, the investigation could not resolve effectively the issue of possible statutory violation. Indeed, without an FEC determination that the alleged activity violates the public funding statutes, it is impossible to articulate a legitimate predicate for the investigation.[2] In addition, to delay referral of the issue as now framed would unnecessarily impede timely resolution by the FEC. As you know, we have received written notification from the FEC to anticipate that if confronted with the need to develop evidence, the FEC would likely request the detailing of Justice Department employees for investigative assistance.

Should the FEC determine that the alleged activities violate the statute, notwithstanding the contrary interpretation strongly suggested by the Commission's previous record, we could then implement the procedures of the Independent Counsel Act. Because an FEC interpretation of possible violation would provide information not now known to us, I believe that we then could trigger the 30 and 90 day reviews under the Act and appropriately consider evidence of intent.

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[1]Copies of the AO and the 1993 publication are attached.

[2]The FEC's input in determining the proper standard to be applied to the media advertising at issue must be a prerequisite to prosecutive evaluation. The responsibility for formulating policy concerning the application of FECA and Chapters 95 and 96 of Title 26 has been specifically entrusted by Congress to the FEC. 2 U.S.C. § 437c(b)(1) (FEC authority to administer the FECA and to formulate policy concerning the application of the Act and the public funding statutes to specific facts); 2 U.S.C. § 437d(a)(8) (FEC duty to promulgate rules and regulations to carry out the Act and Chapters 95 and 96 of Title 26).

Finally, I emphasize that we do not have the alternative of referring the matter to the FEC while the Task Force investigates the allegations. As noted, if we now believe that the matter provides a predicate for criminal investigation even absent an FEC determination of possible statutory violation, we are required immediately to seek appointment of an independent counsel.

Overview of Substantive Statutes

Since the inception of the current statutory structure for public funding of presidential elections in 1976, all major party candidates for the Presidency have chosen to receive public funds for their campaigns. In order to receive funds pursuant to the public funding statutes, candidates and their authorized political campaign committees must agree in writing to monetary limits relating to "qualified campaign expenses." 26 U.S.C. § 9033(b)(1) (Presidential Primary Matching Payment Account Act) and 26 U.S.C. § 9003(b)(1) (Presidential Election Campaign Fund Act). Neither a candidate, his campaign committee, nor their agents may "incur" "qualified campaign expenses" in excess of the statutory spending limits or accept private contributions to the general election campaign.[3]

Candidates accepting public funding under the Primary Matching Payment Account Act who "knowingly incur qualified campaign expenses" in excess of the agreed upon limits are subject to felony prosecution under 26 U.S.C. § 9042(a). Candidates accepting public funding under the Presidential Election Campaign Fund Act who "knowingly and willfully incur qualified campaign expenses" in excess of the amount of the grant and/or accept contributions from private sources are subject to misdemeanor prosecution under 26 U.S.C. §§ 9012(a) and 9012(b).

The Proposed Theory

The proposed conspiracy theory is derived from assertions made by Common Cause in its letter to the Attorney General dated October 9, 1996. The theory posits that a potentially prosecutable conspiracy to violate the criminal provisions of the public funding statutes has occurred. The linchpin of the theory

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[3]These public funding statutes principally were designed to address constitutional obstacles -- raised in the Buckley case -- to imposing expenditure limits on campaigns. Buckley recognized that allowing candidates to voluntarily choose to receive public funds and agree to be bound by expenditure limits as a condition precedent to receiving the funds is a constitutionally permissible structure for imposing campaign expenditure limits. A candidate may decide to forgo public funding and remain free from spending limits.

is that the President conspired with the Democratic National Committee (DNC) and state party committees to subvert the public funding programs in the 1996 election cycle.

The gist of the conspiracy argument is that the President conspired with others, including officials of the DNC and his own authorized committee, to breach his promise to hold "qualified campaign expenses" "incurred" by his authorized campaign committee within statutory limits.[4] Because the costs of certain advertising benefitting the President's campaign were paid from DNC and State party committee funds raised outside the requirements of the Federal Election Campaign Act (FECA) -- i.e., nonfederal/soft money, it is theorized that the President and agents of his authorized campaign committee effectively incurred "qualified campaign expenses" in excess of statutory maximums through "conduits" -- the DNC and State party committees -- and filed false reports with the FEC in that they failed to accurately disclose the incurring of these expenses. Because the coordination intentionally was designed to avoid the requirements of the public funding acts, according to the theory, it constituted a conspiracy to defraud the FEC in its administration of the public funding programs.[5]

In brief, the conspiracy theory memo argues that the costs of media advertising selected and directed by the candidate or his authorized campaign committee should be deemed per se qualified campaign expenses "incurred by the candidate." Thus, the alleged coordination with the candidate constituted "a scheme to evade the limitations of a contract voluntarily entered, while keeping its fruits:"

> [The] issue is whether the expenses for the ads were, in fact, incurred by the candidates or their authorized campaign committees either in connection with the primary campaign or to further the election to the office of president, regardless of the content of the ads.[6]

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[4]The President's authorized campaign committee throughout the 1996 election cycle was called "Clinton-Gore '96."

[5]The conspiracy theory memo also encompasses the conduct of the Republican presidential candidate and the Republican National Committee. All relevant issues are common to the allegations involving each presidential candidate.

[6]As noted, a condition precedent to receiving public funds is the candidate's agreement that neither he nor his authorized committee will "incur qualified campaign expenses" above specified quantitative limits. While FEC staffers have informally advised us that the Commission could determine that a candidate "incurred" an expense within the meaning of the public

Conspiracy theory memo at 8-9.

Analysis

We do not challenge the alleged factual underpinnings of the asserted conspiracy.[7] Rather, the dispositive determination is

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financing laws even in the absence of an explicit undertaking of financial liability for the candidate or his authorized committee, it should be noted that a candidate agreeing to receive public funds does not expressly make any commitment on behalf of any individual or entity other than himself and his authorized committee. No express agency relationship existed between the President's authorized campaign committee and the DNC.

Adoption of the proposed theory would require that the veil of plain meaning of the statutory term "incurred" be pierced. The language of the statutes and FEC regulations strongly suggest that "qualified campaign expenses" incurred by extrinsic persons and entities may be levied against limits of candidates accepting public funds only in limited circumstances where the candidate or his authorized campaign committee has specifically authorized the person or entity to incur a cost on its behalf. 26 U.S.C. § 9032(9); 11 C.F.R. § 9032.9(b).

Generally, the focus of authorities defining "to incur" is on the requirement that a person who "incurs" a liability is responsible for the debt. See, e.g., Black v. Secretary of Health and Human Servs., 93 F.3d 781, 785 (Fed. Cir. 1996)("to incur" is "to become liable or subject to," citing Webster's Third New International Dictionary 1146 (1968), "[i]n ordinary usage . . . to 'incur' expenses means to pay or become liable for them; the term does not refer to any and all expenses that may ultimately be traceable to a particular extent.") For a debt to be "incurred". the debtor or his legal representative must have made him liable for the debt. See also, Garner, A Dictionary of Modern Legal Usage 436 (2d ed. 1995) (defining "to incur" as "to bring upon oneself"); Webster's II New Riverside University Dictionary 621 (1984) ("to incur" means "[t]o become liable or subject to, esp. because of one's own actions").

[7]Arguendo we take no issue with the factual predicate underlying the proposed theory:

* The President and the DNC closely coordinated DNC spending to effectively benefit the President's campaign.

* The DNC, pursuant to this close coordination and at the specific direction of the President and officials of his campaign committee, placed and paid for a series of aggressive issue

whether the alleged activity constituted merely a noncriminal agreement to exploit the loopholes of campaign law or a criminal conspiracy to violate the law. Rejection of the criminal conspiracy theory clearly is compelled by: the record of FEC guidance relating to the use of "soft" money to benefit particular candidates; the FEC's explicit recognition that presidential candidates raise money for and coordinate with their national parties in order to directly benefit as effectively as possible from spending by the national parties; and the FEC's publicly disseminated acceptance of practices clearly demonstrating that spending, closely coordinated with the candidate and his authorized committee, is not imputed to the candidate for purposes of enforcing public funding contribution and expenditure limits.

Advisory Opinion 1995-25

The FEC unambiguously has accepted the principle that it is permissible for federally funded presidential candidates to benefit from numerous additional sources of funding beyond public financing, particularly spending by political parties. The noncontroversial premise for the accommodation of such supplemental spending to benefit federal candidates is the recognition that the principal purpose of a political party is to get its candidates elected.[8] The Commission also has long

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advocacy ads designed principally to benefit the President's campaign.

* Many of the advertisements were written by the President and geographically targeted to audiences identified by the President.

* Had President Clinton or his campaign directly placed the subject advertising, the costs would have constituted "qualified campaign expenses" properly paid for with funds provided pursuant to the public funding statutes.

* The President personally and effectively was able to direct and benefit from spending far in excess of the public funds available to him for "qualified campaign expenses."

[8]FECA reflects the basic understanding that the goal of a political party is to win elections in defining "political party" solely in election-related terms:

> The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

recognized that parties have a legitimate nonfederal election influencing component.

Parties accordingly have been permitted to set up separate nonfederal accounts to raise and spend money as allowed under applicable State and local law. For those expenses that relate to both federal and nonfederal elections the Commission has required allocation so that the federal share will be paid for with federally permissible funds. The Commission's allocation rules "serve the dual purposes of curbing the use of money raised outside of the FECA's requirements in federal elections, and of allowing the Commission and the public to monitor compliance with these requirements." 57 Fed. Reg. 8990 (March 13, 1992).

In 1990, the Commission revised its allocation regulations to clarify what expenses need be allocated, what formulas to use, and how to make payments. See Report at 20. The regulations were designed to prevent parties from evading the restrictions enacted by Congress to limit the potentially corrupting influence of certain donors in federal campaigns. See Explanation and Justification, 55 Fed. Feg. 26058 (June 26, 1990).

The regulations require allocation of not only administrative expenses and fundraising expenses where both federal and nonfederal funds are collected, but also "[g]eneric voter drives including voter identification, voter registration, and get-out-the vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. § 106.5(a)(2). For a non-presidential cycle, the federal account of a national party committee must pay at least 60 percent of the costs from federal money; in an election year, the minimum allocation is 65%. 11 C.F.R. § 106.5(b)(2)(ii).

Issue advocacy is at the heart of current FEC concern relating to the allocation regulations. In AO 1995-25, the Commission unanimously held that expenses incurred by national party committees conducting legislative advocacy campaigns and

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2 U.S.C. § 431(16). The courts have similarly noted that "[t]he party's ultimate goal . . . is to obtain control of the levers of government by winning elections . . . ." Nader v. Schaffer, 417 F.Supp. 837, 844 (D.Conn. 1976), aff'd mem., 429 U.S. 989 (1976). See also Rosario v. Rockefeller, 458 F.2d 649, 652 (2d Cir. 1972), aff'd, 410 U.S. 752 (1973)(political party composed of "individuals drawn together to advance certain aims by nominating and electing candidates who will pursue those aims once in office"). See also Statement of Reasons of Commissioners McGarry and Thomas relating to FEC MUR (Matter Under Review) 4246 at 5-7.

promoting the party fell within the types of expenses which the regulations require to be allocated.

The FEC explicitly acknowledged the obviously close link between promoting a legislative agenda and promoting the party and its candidates. The Commission reasoned that because a political party's primary mission is to elect candidates, where a national party committee seeks "to gain popular support for the [party's] position on given legislative measures and to influence the public's positive view of the [party] and their agenda, [the activity] encompasses the related goal of electing [the party's] candidates to Federal office." AO 1995-25 at 12.109. The Commission found that, like other types of party building activity, "[a]dvocacy of the party's legislative agenda is one aspect of building or promoting support for the party that will carry forward to its future election campaigns." Id. The Commission did not prohibit a political party from engaging in legislative advocacy and party promotion intertwined with activity the Commission deemed also designed to benefit specific federal candidates; rather, the Commission simply held that costs for such activity must be paid for, in part, with federal funds pursuant to the regulatory allocation formula.

The conspiracy theory memo ignores the common FEC sanctioned practices whereby a candidate benefits from spending by other than his authorized campaign committee. The allocation formulas set forth at 11 C.F.R. § 106.5(b)(2) clearly reflect the Commission's recognition that the national party committees' primary focus is on presidential and other federal candidates and elections, as well as the Commission's appreciation of the need to accommodate an unfettered range of appropriate party-building activities at state and local levels. Explanation and Justification, 55 Fed. Reg. 26058, 26063 (June 26, 1990). AO 1995-25 demonstrates the Commission's careful attention to the difficult issues raised by the necessary interaction of the federal and nonfederal interests of national political parties. Despite the obvious and necessary intersection of public funding and other FECA expenditure issues, the conspiracy theory memo implicitly regards the FEC's well developed body of FECA interpretation as wholly irrelevant.

"The Presidential Public Funding Program" (1993)

attorney name

Recently, [redacted] suggested that I review the FEC's 1993 publication entitled "The Presidential Public Funding Program." I agree with [redacted] that the publication is significant evidence of the scope of the specific obligations undertaken

pursuant to a candidate's public funding "contract."[9] Clearly, the Commission does not contemplate that a candidate who agrees to accept public funding waives his right to receive assistance from "private sources," including the use of soft money that he has assisted in raising.

Generally, the publication describes the operation of the public funding statutes and the FEC's role in implementation and enforcement. The Commission candidly describes issues raised by the public funding statutes, discusses points of intersection with other campaign finance statutes, and describes the views of critics of the routine campaign funding practices that have evolved in conformance with the letter of the law but that avoid elements of control and accountability arguably envisioned by the proponents of campaign finance legislation. The publication's discussion of numerous sources of funding -- including the use of soft money -- dispositively undermines the notion of public financing exclusivity that provides the foundation of the proposed conspiracy theory.

The publication's "Executive Summary" emphasizes that significant pending issues are unresolved and that some key issues "ultimately require legislative resolution" to address specific problems of statutory interpretation and practices not clearly anticipated by the original drafters. The Commission specifically notes: "In recent years . . . critics have argued that soft money is being raised and spent in ways that may affect federal candidates, including those running for President." Id. at 2; see also, id. at 32.

The Commission reports its efforts -- stricter allocation regulations[10] and expanded soft money reporting requirements --

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[9]The FEC reiterated almost verbatim virtually the entire relevant text of the 1993 publication in its "Twenty year Report" (April 1995) (Report). See, e.g. Report at 19-20.

[10]The Commission acknowledges:

> Even if soft money is spent according to these regulatory restrictions [During Presidential elections, national party committees must pay at least 65 percent of the costs related to generic party ads with federal funds], some critics believe it will continue to impermissibly influence federal elections, particularly Presidential elections. They contend that soft money spending helps committees conserve federal funds ("hard money") that can later be spent to supplement federal candidates.

to address "the soft money problem" arising from concerns that "Presidential candidates and/or their campaign staff help raise soft money for their party" and that soft money is routinely used to benefit both federal and non-federal candidates, effectively subsidizing federal activity with soft money. Id. at 2; see also, id. at 22-23. Further, the FEC acknowledges that "presidential candidates and their associates" play an "active role" in raising soft money for the party. Id. at 22. Indeed, the Commission notes the view that soft money donors achieve "the very type of access and potential influence that the public funding program was designed to eliminate." Id. Notably, the Commission points to legislative reform as the appropriate avenue to deal with troublesome issues. Id. at 22 ("In light of these concerns, the Commission has asked Congress to consider whether legislation is needed to deal not only with the way soft money is spent, but also with the way it is raised"). See also, Report at 22 ("In adopting its soft money allocation rules, the Commission proceeded as far as its statutory authority would permit, short of barring the combined use of federal and nonfederal funds altogether."). The legislative proposals are particularly relevant to assessing the scope of currently permissible activity:

> . . . The Commission has offered a broad range of specific [legislative] suggestions, including:
>
> * Expanding disclosure of soft money receipts;
> * Prohibiting the use of a federal candidate's name or appearance to raise soft money;
> * Confining soft money fundraising and spending to non-federal election years; and
> * Requiring that all party activity which is not exclusively on behalf of non-federal candidates be paid for with federally permissible funds.

Id. at 2, 23.

The Commission's evaluation of the success of the public funding statutes in accomplishing the objectives of the drafters to reduce the influence of wealthy contributors, reduce the demands of fundraising, and to level the playing field for presidential candidates is also instructive:

> Both sides of the debate [as to whether the current public funding program is desirable or effective] acknowledge that public money is not --nor was it intended to be -- the sole source of funding for Presidential campaigns, even during the general election period. The statutes and regulations

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Id. at 22.

> specifically sanction certain types of private contributions and expenditures during both the primary and general election periods. Funds not subject to federal election law ("soft money") may also play a role in Presidential elections.

Id. at 30. See also, id. at 21 ("the statute specifically permits some types of private spending, which may supplement the general election grants.")

In sum, the substantive content and the tone of the publication confirm that "private contributions and expenditures" are "sanction[ed]" under the public funding statutes if they are consistent with "statutes and regulations." Id. at 22. In fact, in discussing the wide range of permissible private spending available to supplement a candidate's public funding, the Commission explicitly notes:

> State and local parties, for example, may spend unlimited amounts for certain activities that may benefit their Presidential nominee, but do not count against the nominee's spending limit. These activities are "exempt" from the definitions of contribution and expenditure.

Id. fn. 26 at 22. Clearly, a "private" expenditure that is lawful under FECA cannot be the basis of a claim that a candidate has violated the prohibitions of the public funding statutes.[11]

Finally, it is clear that the Commission views the purpose of its audit and enforcement responsibilities relating to the public funding statutes to be ensuring that the public funds are not misused. See, e.g., id. at 4, 7-8, 16-17. Careful review of the publication's thorough exposition of public financing issues yields no evidence of concern that the public funding statutes were intended or have been interpreted to be a vehicle independent of FECA for limiting overall expenditures by national and State campaign committees.[12]

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[11]The conspiracy theory memo concedes that a criminal case cannot be grounded directly on violations of FECA, because of the ambiguity of the critical term "expenditure," First Amendment issues, and other issues identified in previous analyses.

[12]Generally, the FEC presumes that all disbursements by candidates and their authorized campaign committees are "expenditures" under FECA, reasoning that a candidate's authorized campaign committee would not have made them for any purpose other than "for the purpose of influencing" the candidate's election. At least one member of the FEC staff tentatively has opined informally that in theory, however, the

Conclusion

The FEC has sanctioned a wide array of national political party spending practices designed to implicitly and explicitly benefit federal candidates. The Commission has never even remotely suggested the illogical possibility that the very practices that it has carefully analyzed and determined to be appropriate under FECA expenditure regulations nonetheless may be deemed to violate the public funding statutes. Further, there is absolutely no reasonable basis to believe that political parties or their candidates could anticipate inconsistent interpretations of the relevant statutes. It would be nonsensical for the Department to ignore the FEC's own well developed regulatory framework and conclude that the proposed conspiracy theory is viable.

There simply is no basis to conclude that the President and the DNC may have violated any statutory or regulatory standard in connection with practices relating to the public funding statutes. To the contrary, only if the underlining conduct is found by the FEC to be violative of FECA, could the issue even arise. It is almost unimaginable that the Commission's review could establish any basis to believe that a violation occurred with intent to obstruct and impede the FEC.

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concept of "qualified campaign expense" in the public funding statutes would be narrower than the term "expenditure," because not all disbursements by authorized campaign committees that meet the definition of "expenditure" are necessarily sufficiently connected to electing the candidate to have been properly paid from public funds. We are aware of no instance in which this conclusion has been reached, and this possible interpretation suggests only that a qualified campaign expense is a subset of "expenditures." The proposed conspiracy theory requires that the opposite conclusion be drawn.

General Counsel TEL:[redacted] Aug 20 97 14:52 No.0

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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August 24, 1995

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ADVISORY OPINION 1995-25

David A. Norcross, General Counsel
Republican National Committee
310 First Street SE
Washington, DC 20003

Dear Mr. Norcross:

This responds to your letters dated August 9 and June 27, 1995, requesting an advisory opinion on behalf of the Republican National Committee ("RNC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to costs incurred by the RNC in connection with certain activities to be undertaken in 1995.

You state that the RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform. The purpose of the ads will be to inform the American people on the Republican and Democratic positions on these issues, as well as to attempt to influence public opinion on particular legislative proposals. The ads are intended to gain popular support for the Republican position on given legislative measures, and thereby influence the public's positive view of Republicans and their agenda.

You further state that your request is predicated on the following assumptions: (1) There may or may not be a reference to a Federal officeholder who has also qualified as a candidate for Federal office. (2) If there is reference to a Federal officeholder who is also a Federal candidate, there will not be any express advocacy of that officeholder's election or defeat, nor will there be any "electioneering message" or reference to Federal elections.1/ (3) If there

1/ The Commission relies on your statement that those advertisements that mention a Federal candidate or officeholder will not contain any electioneering message. In view of this representation, the Commission does not express

is a "call to action," it will be to urge the viewer or listener to contact that Federal officeholder urging support for, or defeat of, a particular piece of legislation. (4) The appropriate Federal Communications Commission disclaimer identifying the RNC as sponsor will be included within each advertisement. (5) The RNC will allocate the salaries of employees associated with this media effort based upon 11 CFR 106.5. (6) The RNC will report this media activity and its associated expenses, as appropriate, on financial disclosure reports filed with the Commission.

In response to the Commission's request for the text of one or more advertisements that have been or may be disseminated as part of this series, you have provided the texts for three such ads--one urging support for the Balanced Budget Amendment and the other two urging that the Medicare program be saved and restructured. Two ads do not mention a Federal candidate, and all three urge support for the Republican position on the issues discussed. The third advertisement (titled "Too Young To Die") mentions President Clinton's name six times, although only in the context of Medicare policy; there is no reference to any election. You state that none of these ads served as the basis for this advisory opinion request, and that this material may or may not be comparable to other such advertisements which the RNC may air in the future.

You further state that it is impossible to determine what effect these types of advertisements have on the electability of candidates at the Federal, state and local level. You believe the costs incurred in connection with these ads should be considered "administrative expenditures" under the Commission's rules on allocation of certain expenditures between Federal and non-federal accounts.2/ If

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(Footnote 1 continued from previous page)
any opinion as to what is or is not an electioneering message by a political party committee. The courts and the Commission have addressed the issue of what constitutes an electioneering message by a political party in other circumstances. See Advisory Opinions 1984-15 and 1985-14; Federal Election Commission v. Colorado Republican Federal Campaign Committee, Nos. 93-1433 and 93-1434, 1995 WESTLAW 372934 (10th Cir. (Colo.), June 23, 1995).

2/ Your letter makes reference to past conduct of the Democratic National Committee ("DNC"). The Commission stresses that this advisory opinion does not address those issues or imply any opinion whether the DNC's conduct was permitted or not permitted under the Act and Commission regulations. Commission regulations state that requests regarding the activities of third parties do not qualify as advisory opinion requests. 11 CFR 112.1(b).

so considered, the regulations provide that the costs should be allocated at least 60% to the RNC's Federal campaign account and 40% to its non-federal account. See 11 CFR 106.5(a) and (b)(2)(ii).

The Act requires that contributions accepted and spent to influence any Federal election be received subject to certain limitations and prohibitions. See 2 U.S.C. §§441a, 441b, 441c, 441e, 441f, and 441g. Most of these restrictions do not apply to funds raised and spent to influence only state and local elections.3/

Commission regulations set forth the procedures to be followed by party committees that make disbursements in connection with both Federal and non-federal elections. 11 CFR 106.5. Under section 106.5(a), party committees4/ may make such disbursements in one of two ways: They may make them entirely from funds raised subject to the prohibitions and limitations of the Act; or, if they have established separate Federal and non-federal accounts pursuant to 11 CFR 102.5, they may allocate them between these accounts according to various formulas set forth in section 106.5.

The allocation formulas for national party committees to allocate their administrative expenses and generic voter drive costs are found at 11 CFR 106.5(b)(2). The Explanation and Justification to these rules notes that these formulas reflect the national party committees' primary focus on presidential and other Federal candidates and elections, while still recognizing that such committees also participate in party-building activities at state and local levels of the party organizations. 55 Fed. Reg. 26058, 26063 (June 26, 1990).

After reviewing the additional material provided by the requester, the Commission concludes that legislative advocacy media advertisements that focus on national legislative activity and promote the Republican Party should be considered as made in connection with both Federal and non-federal elections, unless the ads would qualify as coordinated expenditures on behalf of any general election

3/ The prohibitions on contributions by national banks, by corporations organized by authority of Federal statute, and by foreign nationals, apply to contributions made in connection with any election whether Federal, state or local. 2 U.S.C. §§441b(a), 441e.

4/ The Commission notes that this opinion applies only to covered activity by national party committees. It does not apply to legislative issue advocacy by other entities, such as lobbying expenditures by corporations and their separate segregated funds. See Advisory Opinion 1984-57.

candidates of the Party under 2 U.S.C. §441a(d). See Advisory Opinions 1991-33, 1985-14, and 1984-15. Thus, such costs should be allocated in accordance with 11 CFR 106.5. The Supreme Court in Buckley v. Valeo, 424 U.S. 1, 79 (1976), noted that the major purpose of political committees is the nomination or election of candidates, so their expenditures are, by definition, campaign related. Similarly, the Internal Revenue Code defines the "(tax) exempt function" of a political organization, including a political party or committee, as "the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office . . . or the election of Presidential or Vice Presidential electors." 26 U.S.C. §527(e).

Section 106.5(a)(2) establishes four categories of costs to be allocated under these rules: administrative expenses; the direct costs of a fundraising program or event; the cost of activities that are exempt from the definitions of contribution and expenditure because they relate to specific state and local party activity; and generic voter drive costs.

You state that you believe the costs of the advertisements should be characterized as administrative expenses, which are defined in a non-inclusive listing at 11 CFR 106.5(a)(2)(i) to include such expenses as rent, utilities, office supplies, and salaries. The Commission notes that, depending on content, the costs of some advertisements may also be characterized as generic voter drive costs, which are defined at 11 CFR 106.5(a)(2)(iv) to include, inter alia, costs of activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. Although you state that the advertisements in question will not reference Federal elections or contain an electioneering message, their stated purpose--to gain popular support for the Republican position on given legislative measures and to influence the public's positive view of Republicans and their agenda--encompasses the related goal of electing Republican candidates to Federal office. This result is also contemplated by the Commission's regulations at 11 CFR 110.8(e), which recognize that certain party-building activities under specific conditions can feature the appearance of the party's candidates at a "bona fide party event or appearance." Advocacy of the party's legislative agenda is one aspect of building or promoting support for the party that will carry forward to its future election campaigns.

For purposes of the allocation rules, however, it is immaterial whether these costs are characterized as administrative costs or as generic voter drive costs. Under

~~11 CFR 106.5(b)(2), the costs of both types of activities are allocated 60% to the Federal account and 40% to the non-federal account in non-presidential election years, and 65% to the Federal account and 35% to the non-federal account in presidential election years.~~ FEC Schedules H3 and H4, on which joint activity is reported, similarly do not distinguish between administrative and voter drive costs. Rather, they classify them jointly as "administrative/voter drive" costs.

Since 1995 is a non-presidential election year, the Commission concludes that the proper allocation for these expenditures is at least 60% to the Federal account, with a corresponding allocation to the non-federal account.5/ Should the RNC continue these activities into 1996, a presidential election year, the Federal share will rise to at least 65% of these costs.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Danny Lee McDonald
Chairman

Enclosures (AOs 1991-33, 1985-14, 1984-57, and 1984-15)

5/ The Commission notes that, while committees are free to allocate a higher percentage of the disbursement to their Federal accounts (the language in section 106.5(b)(2)(i) reads at least 60%)(emphasis added), they may not so allocate less than the specified percentages. See Explanation and Justification to the Final Rules on Methods of Allocation Between Federal and Non-Federal Accounts, 55 Fed. Reg. 26058, 26063 (June 26, 1990).

U. S. Department of Justice

Washington, D.C. 20530

November 24, 1997

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

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

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

I. INTRODUCTION

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

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

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DOJ-VP-00251

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

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

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

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

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

II. SUMMARY OF SECTION 607

In relevant part, section 607 provides as follows:

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

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

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

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

III. SUMMARY OF FACTS[3]

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

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

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

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

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

A. THE INTERVIEW OF THE VICE PRESIDENT

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

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

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

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

1. Inception of the Fundraising Call Plan

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

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

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

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

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

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

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

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

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

(Emphasis in the original).

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

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

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

2. The Calls

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

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

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

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

3. Knowledge of the Law

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

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

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

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

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

B. THE DNC'S ALLOCATION PRACTICE

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

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

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

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

1. Background

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

2. March 1995 to November 1995

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

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

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

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

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

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

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

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

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

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

3. November 1995 to March 1996

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

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

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

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

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

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

4. The Ickes/Marshall Memos

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

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

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

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

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

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

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

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

Definition of Federal and Non-Federal monies (from the DNC perspective):

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

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

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

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

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

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

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

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

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

C. THE DONOR INTERVIEWS

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

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

prospective donors had telephone conversations about political contributions with the Vice President.[20] As many as five of the

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[20] 154 people who were interviewed or otherwise provided a statement said that they did not recall receiving a telephone call regarding political contributions from the Vice President. Another seven were not available to be interviewed, because of illness, travel schedules, or because they did not respond to our efforts to contact them. Nine prospective donors declined to provide a statement of any kind on the topic. Finally, we interviewed four individuals who received telephone solicitations from the Vice President in the Fall of 1994. However, those calls were made from DNC offices, and thus raise no questions of impropriety.

It is our view that the fact we have not been able to speak with 16 people whose names appeared on call sheets does not foreclose our ability to recommend that this matter be closed now. First of all, we are still expecting that most of these individuals will be interviewed before the end of the preliminary investigation period. Furthermore, of the 16, the documentary evidence -- phone records and notes on call sheets -- suggests that only a handful of the 16 were actually called. As to one of those, Eric Becker, we are confident that we have a full understanding of the conversation based on the copious notes taken during the conversation by David Strauss. In light of the consistency of the investigative results, it is our view that the likelihood that the few remaining donors would offer new evidence sufficiently compelling as to affect our recommendation is remote.

If it is nevertheless felt that we cannot close this matter without speaking to all prospective donors, it is our recommendation that we should seek the permission of the court to extend the preliminary investigation another 60 days. This preliminary investigation period has already been truncated to an even briefer period than normal by the fact that it was the subject of a letter from the majority members of the House Judiciary Committee. While the FBI has done a remarkable job of conducting a very large number of interviews in this foreshortened period, we have not had the luxury of time to try to persuade reluctant witnesses or to track down individuals who are traveling. An extension would give us the opportunity to try to complete the record.

It is not entirely clear whether the Congress intended the extension period to be available when a matter is pending pursuant to a Judiciary Committee request. We see nothing in the statute or the legislative history that would clearly bar such an extension, however, and believe that seeking an extension would be preferable to seeking an independent counsel simply because a

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43 were solicited by the Vice President and gave a gift that was deposited, in part, into the DNC's federal account. Another 11 were solicited and provided contributions to the DNC; their gifts were deposited into a non-federal account. Eight prospective donors were solicited but declined to give. The remaining 19 remember the purpose of the call as a thank you rather than a solicitation. Donations of three of these 19 individuals subsequently were split and partially deposited into a DNC federal account without their knowledge.

We will discuss here in detail only those telephone conversations that raise colorable issues as to whether the Vice President may have solicited hard money, or that provide useful context to interpreting the calls. An addendum to this memorandum will outline in chart form the results of the remainder of the interviews with donors.

1. Solicitations That Led to Contributions Deposited Into a DNC Federal Account

As mentioned above, this investigation was predicated on the plausible inference that if a donation was made to the DNC that was deposited into a hard money account, then it may have been that the solicitor of the funds requested a hard money donation. Our investigation has established that the Vice President made four telephone solicitations from the White House which resulted in donors contributing funds to the DNC that were thereafter deposited into a DNC hard money account. A fifth is strongly suggested by the circumstantial evidence.

As explained above, we have concluded that because the investigation established that the deposit of the funds into a federal account was accomplished without the donors' prior consent or knowledge, the mere fact that these donors made contributions a portion of which was deposited into a hard money account does not in and of itself suggest that they were solicited for a hard money contribution. Furthermore, four of the five describe the solicitation as having been for the "DNC media fund" or more generically for a DNC advertising campaign, rather than for any particular federal election.[21] Recall that the Vice President explained that he believed that the media campaign was funded solely with soft money, and thus, he explained, when he requested support for the media fund, in his mind he was expressly requesting soft money contributions.

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few interviews remain outstanding.

[21] The fifth donor in this category, Peter Angelos, does not remember whether the Vice President referred to the media fund or even whether the Vice President asked him to contribute.

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In addition to the fact that a portion of their contributions were deposited into a hard money account, the donations of two of the five raise an additional issue. These two recall some mention of elections in the course of the conversation; Robert Johnson recalls that the Vice President mentioned facing a "tough election," and William Dockser recalls a discussion of the fact that the recent elections had gone badly. Because hard money contributions are defined as those intended to influence a federal election, such references in a fundraising conversation must be closely examined. The implications of these references will be discussed in more detail later in this memorandum.

a. Robert Johnson

On February 5, 1996, the Vice President telephoned Robert Johnson, President of Black Entertainment Television (BET), from his West Wing Office in the White House.[22] The DNC Finance call sheet prepared in anticipation of this call notes that Johnson gave $50,000 in both 1993 and 1994 and $20,000 of a $50,000 commitment in October of 1995. It also notes that Johnson is a strong Clinton/Gore supporter. Beside the heading "Reason for the call," the Vice President is told to "[a]sk him to write $30k for the media campaign."

Johnson received his call from the Vice President while in his BET office in Washington, D.C. According to Johnson, the Vice President spoke of facing a tough election. He noted the need to get the Democrats' message out on issues such as health care. Within this context, Gore asked Johnson to contribute $30,000 to the DNC. Johnson told the Vice President that he would give this amount. He believes he asked his secretary to send the check which was written on his personal checking account.

After the call, Ann Braziel at DNC headquarters prepared a form letter containing the following language:

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[22] Because Johnson was called at his office in Washington, we do not have a telephone bill showing that the call was made from the White House. Telephone bills from February 5, 1996 do confirm that several other numbers which appear on the Vice President's call sheets were phoned on that date from 4:00 to 5:00 p.m. In addition, the Vice President's schedule for that date shows that he was scheduled to make phone calls from the "West Wing Office" from 4:00 to 5:00 p.m. Secret Service records show that Peter Knight entered the White House just prior to the scheduled phone session on February 5, 1996. Knight has a vague recollection of being present in the West Wing Office when the Vice President called Johnson.

> It was a pleasure to speak with you today. President Clinton and I thank you for your continued support and contribution to the Democratic National Committee. We appreciate your dedication to our Administration and your help at a time when needed. Thank you for your commitment to make an additional contribution of ____.

The pledged amount was filled in and the letter was sent by courier to the White House for the Vice President's signature.

Johnson gave $30,000 soon after the call. According to Johnson, he made the contribution with the understanding that the money was for advertising and "putting the message out." At that time, Johnson did not realize that the DNC could accept any hard money from individuals.

A copy of the check provided by Johnson, as well as check tracking forms and DNC computer records, indicate that the DNC deposited Johnson's $30,000 check into a federal account. A DNC Finance official tasked with the job of keeping track of the Vice President's project made an entry in the computer program entitled "Gore calls": "$30k IN."[23] DNC records indicate that $10,000 was eventually allocated into a non-federal account. Federal Election Commission records further reflect that the DNC's allocation of Johnson's gift may have caused him to exceed the $25,000 annual limit for federal contributions in 1996.

b. William Dockser

Also on February 5, 1996, the Vice President telephoned William Dockser, a real estate developer from Rockville, Maryland.[24] The call sheet prepared on Dockser notes that he gave $35,000 in 1995; $20,000 in 1994; and $10,000 in 1992. Under "Reason for the call" the DNC Finance staff states that he "has expressed an interest in making another major contribution to the DNC this year." The Vice President is told to "[a]sk him to send in $25,000 to fund the media campaign."

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[23] Another entry made by Ann Braziel soon after the call was made reads: "YES-PK to follow up," an apparent reference to Peter Knight. Robert Johnson does not recall a follow-up to the Vice President's call by Peter Knight or anyone else at the DNC.

[24] Like the call to Johnson, the Vice President's call to Dockser does not appear on a telephone bill. As explained above, however, circumstantial evidence and Peter Knight's recollection of the Johnson call suggest that Vice President Gore made fundraising calls on February 5, 1996 from his West Wing Office in the White House.

Dockser too received his call from the Vice President while in his office. He recalls that the Vice President explained that because the recent elections had gone badly, the Democrats were in need of a media campaign. These ads were being run outside of the Washington area, according to the Vice President, and were designed to promote "Democratic issues." The Vice President asked for $25,000 for the campaign and Dockser agreed to contribute in this amount. He recalls now that his gift was in response to the Vice President's request.

The witness did not recall the Vice President mentioning the terms "soft money" or "hard money" but he was under the impression at the time that the request was for "soft money." Dockser based that impression on his prior knowledge of the media campaign and a belief that the campaign was being funded by "soft money" gifts. Dockser believed that soft money, by law, could be used for "issue oriented" ads and that hard money was used directly in "election campaigns."

A thank you note to Dockser containing the same language as set forth above was prepared for the Vice President's signature following the call. After consulting with DNC fundraiser Ari Swiller, Dockser sent the DNC a personal check in the amount of $25,000 made out to "D.N.C.-Media Fund." Once the DNC obtained the check, a check tracking form was completed and the funds were deposited into two accounts: $20,000 into the federal account and the remaining $5,000 into a non-federal account. An entry showing "25k in" was also noted on the "Gore Calls" computer program.

c. E. Blake Byrne

Also on February 5, 1996, the Vice President telephoned E. Blake Byrne, President of Argyle Television, from his White House Office.[25] The DNC Finance call sheet, prepared in anticipation of this call, notes that Byrne gave $25,000 in April of 1995 and another $25,000 in September of 1995. It also notes that "this is an easy call-he is very concerned about the Radical Right and its effect on the rights of Gay Americans." Beside the heading "Reason for the call," the Vice President is told to "[a]sk him for $25,000 to fund the media campaign."

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[25] Clinton/Gore calling card records indicate that a 2 minute and 18 second phone call to Byrne's office from the White House occurred on February 5, 1996, at 4:39 p.m. As noted above, the Vice President's schedule for that date shows that he was scheduled to make phone calls from the "West Wing Office" from 4:00 to 5:00. Byrne recalls his office forwarding the call to Grand Rapids, Michigan, where he travelling on business.

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During the conversation, the Vice President asked Byrne to contribute $25,000 to the DNC media fund. Byrne was familiar with the fund from his work and agreed to make what he believed to be a soft money donation to the media fund. The Vice President instructed Byrne on how to fill out his contribution check. The contribution request was the only topic during a short conversation.

On February 12, 1996, Byrne wrote a check to the "Democratic National Committee Media Account" for $25,000. A DNC check-tracking form was completed but no revenue code was checked. The DNC deposited $20,000 into a federal account; the remaining $5,000 was deposited into a non-federal account. A DNC Finance official tasked with the job of keeping track of the Vice President's project made an entry in the computer program entitled "Gore calls": "$25k IN."

d. Andy Morse

On December 11, 1995, the Vice President telephoned Andy Morse, Senior Vice President at Smith Barney Shearson, from his White House Office.[26] The DNC Finance call sheet prepared in anticipation of this call notes that Morse gave $25,000 in both 1993 and 1994. Beside the heading "Reason for the call," the Vice President is told to "[a]sk Andy to contribute an additional $25,000 to the DNC Media Fund."

According to the Vice President, the purpose of his call was to raise money for the DNC media fund in response to a media blitz by the Republican National Committee. The Vice President asked Morse to contribute to the fund. In response, Morse said he would consider the matter. According to Morse, the terms hard or soft money did not come up in the conversation.

Morse received a follow-up call from a DNC employee soon thereafter. On February 23, 1996, he wrote a check payable to the "Democratic Nati Committee," assuming that the contribution would be recorded as a soft money gift. Instead, the DNC deposited $20,000 into a federal account and $5,000 into a non-federal account. This allocation by the DNC put Morse over the

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[26] The Vice President's schedule for December 11, 1995 shows that he was scheduled to make phone calls from the "West Wing Office" from 9:00 to 9:45 a.m. The call sheet for Morse shows a notation made by the staff assistant placing the call from the West Wing Office that the call was "Done" on "12/11" at "9:40."

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legal annual limit of $25,000 for federal contributions for 1996 by $450.[27]

e. Peter Angelos

Phone records show that a call lasting approximately four minutes was placed from the White House to the office of Peter Angelos at around 1:00 p.m. on April 26, 1996. The Vice President's schedule indicates that this call was made during a time set aside for fundraising calls. A DNC call sheet prepared for the Vice President also suggests that he ask Angelos to contribute $50,000 to the DNC. Approximately a month after this telephone call, Angelos wrote a check to the DNC in the amount of $100,000 which contained a notation in the memo line of "Pres. Campaign." DNC Finance deposited $20,000 of this gift into a federal account. A DNC check tracking form identifies Peter Knight and the Vice President as "solicitor" of the $100,000 gift from Angelos.

While he remembers receiving a call from Vice President Gore, Angelos does not remember the Vice President asking for money. Nor does Angelos link the Vice President's call to his decision to make the donation a month later. Rather, Angelos recalls going to the DNC and speaking with Peter Knight at length before making out his $100,000 check. No thank you letter memorializing a pledge to contribute has been produced by either the White House or the DNC in connection with the Angelos call.[28]

Because Angelos does not even recall this conversation as being a solicitation, and instead links his subsequent gift to conversations with Peter Knight, we do not believe that this call could be considered to be a basis for a potential 607 prosecution.

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[27] Morse did not learn that $20,000 of his gift had been allocated to the DNC's federal account until September of 1997 when he received a letter from Steve Grossman of the DNC, apologizing for what Grossman termed a "mistake." Morse's attorney replied by letter that since this allocation put Morse over the legal limit by $450, Morse would like the records changed to reflect a gift of federal money in the amount of $19,550.

[28] The Vice President does not remember the details of his conversation with Angelos.

2. Federal Money, But No Solicitation.

The Vice President called at least 18 people who, while active in DNC fundraising or giving, recall the conversation as a thank you, not a solicitation. Curiously, three of these individuals were recorded on the DNC spreadsheet entitled "Gore Calls" as having given in response to the Vice President's call. For example, an entry next to Eli Broad's name reads: "sent $50K; $50k in." Similarly, an entry opposite George Marcus indicates an amount of $50,000 and then "$50K IN" and an entry opposite Ira Leesfield indicates "YES-maybe $50k" and "$30k IN." In addition, these three donors each received a thank you letter from the Vice President following their telephone conversations with him. Although the thank you letters do not explicitly indicate that the donors have contributed or agreed to contribute to the DNC as a result of being asked by the Vice President to do so, such an inference possibly can be drawn from them. Each of the gifts recorded for these three donors had $20,000 allocated to a DNC federal account without their knowledge.

It may be that each of these individuals, as regular substantial contributors to the DNC, interpreted the Vice President's call as expressions of appreciation for previous contributions, and did not consciously link their later gift to the Vice President's call. Another possibility is that they may have previously promised to contribute, and interpreted the Vice President's call as a "thank you" for that promise, even though the contribution had not yet been delivered. In any event, it is our view that a section 607 prosecution cannot be based on a conversation in which the donor affirmatively believes there was no solicitation, notwithstanding ambiguous thank you letters which possibly call into question the accuracy of the donor's memory. However, even assuming for the sake of argument that the Vice President asked Broad, Leesfield, and Marcus to give to the DNC despite the fact that they do not remember this happening, we have no evidence that the Vice President asked any of them to make hard money contributions. Finally, as explained above, our investigation has established that the mere fact that their contributions were reallocated into hard money accounts is not sufficient to support an inference that they were solicited for hard money, because those reallocations were accomplished unbeknownst to them, without their knowledge or prior approval.

3. Telephone Solicitations That Led To Non-federal Donations, but in Which Federal Elections Were Mentioned -- Mark Dayton

On February 5, 1996, the Vice President telephoned Mark Dayton, head of Vermillion Investments Corporation, in his office in Minneapolis, Minnesota. The conversation started with "small talk," then shifted to Senator Paul Wellstone's Senate campaign. The Vice President next alluded to Dayton having committed to

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raising $50,000 in 1995 and 1996 for the DNC. In making his pitch, the Vice President said something to the effect that, "the DNC was gearing up for the 1996 campaign." The Vice President did not mention a specific dollar figure that he was presently seeking, nor did he mention the terms "hard" or "soft" money. Instead, he observed: "If you would be helpful, sooner rather than later, it would be appreciated."

Dayton was a Managing Trustee of the DNC. As such, he had pledged either to contribute or raise $50,000 in 1995 and 1996 for the DNC. According to Dayton, prior to receiving the telephone call from the Vice President, he had already told David Mercer of the DNC that he wanted his $50,000 gift to be soft money.

Soon after the call, Dayton spoke with David Mercer of the DNC to find out how Dayton should satisfy his pledge to give $50,000. Mercer directed Dayton to write a $30,000 check to the DNC's non-federal account; $10,000 to the New York (state) Democratic Party; and $10,000 to the New Jersey (state) Democratic Party. Dayton made a notation on the lower left portion of each check denoting "Non-Federal account." He wrote the checks within three days of speaking with the Vice President. Per directions, the DNC deposited Dayton's check into a non-federal account. The gift was noted on the "Gore Calls" spreadsheet: "YES-$50k; $50k IN."

The evidence clearly suggests that this call was a followup to a previous commitment by Dayton, and is thus, we believe, properly categorized as a "thank you" rather than a solicitation. Dayton already had a specific intent to make a soft money contribution, and there is no suggestion that anything about his conversation with the Vice President led him to believe that he was being solicited for hard money. We conclude that the brief conversation about a Senate campaign and the fact that the DNC was "gearing up" for elections is insufficient to suggest that the Vice President was seeking a donation to an election campaign. Certainly Dayton did not so interpret the conversation, or he would either have changed his subsequent donation to a hard money contribution, or told the Vice President that he couldn't make a hard money contribution, but would be willing to contribute soft money.

4. Telephone Solicitations That Led To No Donations

a. Solicitations That May Have Been Ambiguous

i. Penny Pritzker

The Vice President telephoned Penny Sue Pritzker, President of Classic Residence by Hyatt, on February 5, 1996.[29] Pritzker recalls that the Vice President asked her to contribute money for a media campaign which aired television commercials, aimed at smaller city markets. Pritzker told the Vice President that her family had already given $100,000 to assist in obtaining the Democratic National Convention for Chicago. She declined the Vice President's request to give to the media campaign, stating that neither she nor her family would be contributing any more at that time.

Several weeks prior to the call, Pritzker had been invited to attend a private meeting with the Vice President with about a dozen wealthy Chicagoans in a hangar at Midway Airport. Pritzker recalls viewing three to six television commercials with negative messages linking Senator Robert Dole to the policies of Speaker Gingrich. The attendees were told that the commercials were going to be shown in smaller city markets throughout the United States because of their demonstrated success in promoting the presidential reelection effort. The Vice President told the group that attendees would be contacted in the future for financial help in running the media campaign. When he called a few weeks later, the Vice President made mention of the television ads that Pritzker had viewed at the airport event and asked that she contribute so the ads could continue running.

ii. Noah Liff

The Vice President telephoned Noah Liff, Chairman of the Board of Steiner Liff Iron and Metal Company of Nashville, Tennessee, on May 2, 1996.[30] Liff has known the Gore family for 30 to 40 years and recalls the conversation in May as a friendly discussion between two friends. The conversation began on a personal note with the two trading information on family and

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[29] Clinton/Gore calling card records indicate that this call, which lasted for four minutes and 42 seconds, was made from a White House telephone at 5:03 p.m. Scheduling records and witness accounts detailed above indicate that this call was made from the Vice President's West Wing Office.

[30] Clinton/Gore calling card records indicate that this call was made from a White House telephone at approximately Noon. Scheduling records and witness accounts indicate that this call was made from the Vice President's West Wing Office.

mutual friends. Liff and the Vice President then spoke about how Liff approved of many of the policies and stances taken by the Administration.[31] After a brief discussion, the Vice President thanked Liff and then made a request for Liff's help.

Liff's best recollection is that the Vice President said something to the effect that any help Liff could provide would be appreciated. He responded by saying he had already given his "legal limit" and was unable to give any more.[32] According to Liff, nothing more was said by either party on the topic of "help" and the conversation ended on a friendly note.

Significantly, Liff also stated that he may not have been aware, at the time of the telephone call, that he could have provided a soft money donation to the DNC. He explained that his political gifts had all been made directly to candidates during this period. He believes now that he may not have learned about the option of giving non-federal gifts until the publicity about the Vice President's fundraising phone calls surfaced in the media this year. Even if he was aware, he believes that he did not consider the option when the Vice President raised the topic of "help." He is quite sure, though, that the Vice President did not specifically mention the DNC, the Clinton/Gore campaign, or the topic of a soft money gift during their conversation.

b. Solicitations in Which the Vice President Asked for Soft Money

The following descriptions involve three solicitation phone calls which we believe clearly cannot form the basis of a 607 violation because there is documentary and/or credible testimonial evidence that the Vice President asked the donors in question for soft money. We include these facts here because they provide examples of cases in which it appears from the conversations either that the Vice President made the fact that he was requesting soft funds explicit, or that both the Vice President and the donor expressly were discussing a soft money contribution.

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[31] In his first interview, Liff referred to a discussion of his "support of the Administration." In his second interview, Liff explained that by this reference to "support" he did not mean financial support. By support, Liff explained, he meant approval of the way the Administration was governing.

[32] While Liff claimed, in his second interview, that he did not consider what the Vice President meant by help, his response seems to confirm what he said in the first interview: that the Vice President was referring to monetary help. Additionally, Liff recalls that he did not state how much he had given or to whom. He does recall using the phrase "legal limit."

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i. Eric Becker

The Vice President spoke to Eric Becker, Chairman of Sterling Capital, in Baltimore, on February 9, 1996.[33] After a preliminary discussion about a children's museum that Becker was developing, the Vice President turned the topic toward political fundraising with the phrase: "let me ask you about a political matter." He went on to explain that the DNC media fund was concentrating on areas scientifically chosen to target swing voters. According to the Vice President, "the news media acts like they don't know about it." Notes of the telephone conversation indicate that the Vice President told Becker that "soft money is permitted." Becker replied that he had just sent $50,000 to DNC Finance official Ari Swiller the day before. FEC records indicate that Becker did not make a further contribution to the DNC during this time frame.

ii. Jack Bendheim

The Vice President also spoke to Jack Bendheim, President and owner of Philips Brothers Chemical, on February 9, 1996. Notes of the call taken contemporaneously by David Strauss, who was sitting in with the Vice President, indicate that the Vice President told Bendheim that "soft & corporate ok." The Vice President also pointed out that "early is much better than late." Apparently in reply, Bendheim told the Vice President that he had already given $50,000 to the DNC in 1996.

Bendheim confirmed in an interview that he was solicited by the Vice President and that he declined to give. While Bendheim does not recall the term "soft money" being used in the conversation, as suggested in Strauss's notes, it was Bendheim's understanding, however, that the Vice President was asking for non-federal money in his call.

iii. Johnny Johns

On December 1, 1995, Johnny Johns, President of Protective Life Insurance Corp., telephoned the Vice President at a number previously left for him by a member of the Vice President's

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[33] So far, Becker has refused to be interviewed by us in connection with this matter. However, the substance of the Vice President's solicitation was recorded by Deputy Chief of Staff David Strauss, who took copious notes of the Vice President's side of the conversation as he sat in the West Wing Office on this occasion. The details provided here of the Vice President's conversation with Becker come from Strauss' notes.

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staff.[34] After waiting for several minutes, the Vice President came on the line and explained that since the Republican Party was engaging in an extensive media campaign, the Democratic Party needed to respond. The Vice President asked Johns for a $50,000 contribution. Because Johns interpreted the request by the Vice President as a request for a contribution from his corporation, not from himself personally, Johns responded that he did not have the authority to commit the corporation. He added that this type of contribution would need to be decided by a committee within the corporation. He promised that if the corporation decided to make such a contribution, he would get back in touch with the Vice President.[35] The entire context of the conversation with the Vice President focused on the need for action by the Democratic Party in response to the action being taken by the Republican Party.[36] No action was ever taken by the corporation.

5. Telephone Solicitations That Led to Nonfederal Donations But in Which No Federal Elections Were Mentioned

As above, we here describe two additional conversations as examples of cases in which it appears that the Vice President made the fact that he was requesting soft funds explicit, because each donor states that he filled out his subsequent contribution check according to the instructions of the Vice President, and the check expressly indicate that they are soft money contributions. The contributions were deposited into soft money accounts.

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[34] While Johns does not recall what day he received the call, he does remember returning to his office one day in December of 1995 and receiving a message that the Vice President had called him. Clinton/Gore phone records indicate that a one minute call was made to Johns' office on December 1, 1995. In addition, a thank you letter, signed by the Vice President and mailed to Johns, references December 1 as the date of the call.

After receiving the message, Johns personally dialed the number left for him. The call was answered by a male secretary who eventually put the Vice President on the line.

[35] Johns' version of the conversation is corroborated by documentary evidence. For example, Johns' call sheet has a notation written by the Vice President in quotation marks as if to indicate a quote from Johns: "Let me go back & talk to my people and ask." An entry on the DNC spreadsheet entitled "Gore calls" reads: "He will ask and call Gore or Knight."

[36] Johns does not believe the Vice President mentioned his own election or any other specific election.

a. James Hormel

On December 1, 1995, the Vice President telephoned James Hormel, Chairman of Equidex, Inc., in his office in San Francisco. The Vice President asked Hormel for $50,000 to support "an advertising campaign for the DNC."[37] The two had a conversation about the DNC media fund. Hormel said he would consider the Vice President's request.

Hormel made a note with instructions given during his conversation with the Vice President as to how a donation should be forwarded to the DNC: "Check request: $30,000.00. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to: Peter Knight 1615 L St. NW #650 W DC 20036 202659-3005." His December 11, 1995 check was made payable to the "Democratic National Committee NON-FEDERAL ACCOUNT" for $30,000. The DNC deposited this gift into a non-federal account. Hormel's gift was tallied on the spreadsheet: "YES-$50K-Pastrick will follow up; $30K IN."

Prior to the call, Hormel attended a session where the Vice President addressed a small group about the ads being run by the DNC. The meeting provided a forum for the Vice President to make a presentation on the media campaign to the private sector. Hormel recalls no connection being made between the DNC media fund and the Clinton/Gore reelection effort.

b. Merv Adelson

On December 18, 1995, the Vice President telephoned Merv Adelson, Chairman of East Capitol Associates, at his office in Los Angeles.[38] The Vice President asked Adelson for a contribution of $25,000.[39] Adelson readily agreed to contribute

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[37] Next to the contribution history on Hormel's call sheet, staff assistant to the Vice President Joel Velasco, at Peter Knight's direction, made a notation: "no federal $ '95." At the bottom of the sheet, the Vice President wrote "Non-federal $ "soft" and "will call back."

[38] According to Adelson, the call was first received at his office in Los Angeles and then patched through to his residence in Aspen, Colorado.

[39] Adelson recalled that the request for funds was for a specific purpose, although he could not recall for what purpose. Adelson could only recall that the reason given by the Vice President for the request of funds was reasonable. To the best of his recollection, the terms hard, soft, federal, and non-federal were not used in the phone conversation, but the way that he completed his check, which he says he did pursuant to the Vice President's direction, strongly suggests that he was told to

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$25,000. The only question Adelson posed to the Vice President was to whom should he make the check payable. While he does not recall the response, Adelson said he would have followed instructions given by the Vice President.[40]

On January 24, 1996, Adelson's accountant wrote a check in the amount of $25,000 made payable to the "Democratic National Committee Non-Federal Account C/O Peter Knight". The DNC deposited this check into a non-federal account. Entries on the DNC spreadsheet entitled "Gore calls" were made opposite Adelson's name: "YES-25K; letter sent 12/18/95; 25k IN."

IV. ANALYSIS

Section 607 prohibits only solicitation or receipt in federal office space of "any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971." Section 301(8) defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office" -- i.e., hard money. 2 U.S.C. § 431(8)(A)(i).

Thus, a contribution made to a political campaign or a political party, specifically intended to support the election of the candidate, is a contribution within the meaning of section 607. On the other hand, a contribution to a political party -- as opposed to a campaign committee -- intended to support the party's general ability to "get out the word" about important issues is a soft money contribution, and not included within the scope of section 607.

Section 607 contains no explicit intent requirement. However, a 1908 district court opinion interpreted a predecessor version of section 607 as a general intent offense. United States v. Smith, 163 F. 926, 927 (M.D. Ala. 1908) ("The guilty intent to violate the law flows from the knowing and intentional doing of the acts which the statute forbids. Ignorance of the statute, or of the extent of its provisions, is no excuse."). Reading a general intent requirement into section 607 is consistent with the rebuttable presumption that Congress intends to incorporate some mens rea requirement in its definition of federal crimes. See United States v. Garrett, 984 F.2d 1402,

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complete his check to a non-federal account.

[40] While Adelson remembers taking instructions from the Vice President, he also provided us with a one-page fax cover sheet from Peter Knight's assistant to Adelson's secretary which states: "Mr. Adelson's check should be made out to Democratic National Committee -- Media Fund."

1410 (5th Cir. 1993) (noting that courts "will presume that Congress intended to require some degree of mens rea as part of a federal criminal offense absent evidence of a contrary congressional intent").

Thus, based on the Smith case and normal principles of construction of criminal statutes, we believe that, in prosecuting an alleged violation of section 607, the government must prove that the defendant knew that he or she was: (1) engaged in the act of soliciting or receiving; (2) in a federal office; and (3) was soliciting or receiving, in particular, a hard money contribution. However, we do not believe that the government would be required to prove that the defendant acted willfully, i.e., that he or she knew it was illegal to make such solicitations in federal office space.

Under the Independent Counsel Act, although intent is properly considered in the context of a preliminary investigation (as opposed to a 30-day initial inquiry), the Department is limited in the extent to which it can rely on evidence of lack of intent to justify declining to seek an independent counsel. Section 592(a)(2)(B)(ii) provides that the Attorney General cannot decline to seek the appointment of an independent counsel based on "a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind."

The facts developed during our investigation indicate that as many as five people solicited by the Vice President from his West Wing Office gave money that subsequently was deposited into a DNC federal account. As explained above, we have concluded that this was done without the donors' knowledge or prior consent, and thus does not provide any inferential support for the notion that they were solicited for hard money contributions. Furthermore, we have no direct evidence that the Vice President actually asked these or any other prospective donors to make federal contributions. Indeed, in each of the situations where the conversation was explicit, the evidence is to the contrary; the Vice President requested soft money contributions. To the extent the words used by the Vice President in any of his solicitations were ambiguous, the stronger inference to be drawn from the facts and the context is that the Vice President was asking for soft money. Moreover, even if the Vice President's words could have been understood by a reasonable person as seeking federal contributions, there is, we believe, clear and convincing evidence that the Vice President intended to solicit only soft money donations.

A. Evidence that the Vice President Asked Prospective Donors for Non-Federal "Soft Money" Contributions

We have discovered direct and circumstantial evidence that Vice President Gore explicitly or implicitly asked several prospective donors to make "soft money" contributions to the DNC during the telephone solicitations in question.

1. Notes on Call Sheets

Notes taken on several DNC call sheets during conversations between the Vice President and the listed donors provide evidence that the Vice President asked for soft money in those conversations. For example, call sheets for Eric Becker and Jack Bendheim contain handwritten notes by David Strauss, then the Vice President's Deputy Chief of Staff, which reference "soft money." According to Strauss, these notes which state, "soft money is permitted" and "soft and corporate OK," memorialize parts of the Vice President's side of the conversation. Another call sheet for James Hormel has the phrase "non-federal $ soft" noted in the Vice President's handwriting. During his interview, the Vice President explained that these three notes are indicative of the types of references he made during his telephone solicitations.[41]

In addition, a notation by the Vice President on Johnny Johns's call sheet in quotation marks as if to indicate a quote from Johns -- "Let me go back & talk to my people and ask." -- is consistent with a solicitation for a soft money corporate contribution, which is how Johns recalls the conversation

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[41] It could be argued that the Vice President's statement to Becker that soft money is "permitted" could have implied to Becker that the requested gift could also be made in the form of hard money. However, because the Vice President asked Becker for $50,000, it is clear that a knowledgeable donor would have understood the Vice President to be asking for at least $30,000 in soft money. That $30,000 could not only possibly be soft money; rather, it had to be soft money. There is no reason to believe that, in stating that soft money is "permitted" on February 9, 1996 -- two weeks before Marshall wrote his memorandum describing the DNC allocation practice, which, of course, the Vice President denies he even read at the time -- the Vice President was trying to tell Becker that the first $20,000 of his contribution could be given as hard money. If that had been the Vice President's intent, he presumably would have said so directly. In our view, the most reasonable inference to be drawn from the Vice President's statement to Becker that "soft money is permitted" is that the Vice President was trying to make sure that Becker knew he had the option to make the contribution through his corporation.

proceeding.[42] This inference is also supported by an entry on the DNC spreadsheet entitled "Gore calls" in connection with Johns's call which reads: "He will ask and call Gore or Knight."

2. Donors Who Understood the Vice President to Be Soliciting Soft Money

At least seven people called by the Vice President have indicated that they understood the Vice President to be explicitly or implicitly asking them for non-federal contributions.

William Dockser told us that the Vice President did not mention either "soft money" or "hard money" during their conversation, but instead referred to the need to fund the DNC's media campaign. Dockser was left with the impression that the Vice President was requesting soft money, given Dockser's belief that the DNC's issue-oriented ads were being funded by soft money gifts. Similarly, E. Blake Byrne, who also was familiar with the media fund from his involvement in the media business, indicated that he agreed during his conversation with the Vice President to make what he believed would be a "soft money" donation. Andy Morse told us that the Vice President did not mention either "hard" or "soft" money during their telephone conversation. However, when Morse wrote his contribution check, he assumed that the contribution would be recorded as a soft money gift.[43] Jack Bendheim also recalls no mention of hard or soft, federal or nonfederal money during his conversation. Nevertheless, Bendheim told us that because the media campaign was "issue-oriented," he understood the Vice President to be asking for soft money.

James Hormel's own contemporaneous notes as to how his donation should be forwarded to the DNC -- "Check request: $30,000.00. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to: Peter Knight 1615 L St. NW #650 W DC 20036

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[42] Corporations are prohibited under the Federal Election Campaign Act from giving hard money contributions. 2 U.S.C. § 441b. However, corporations may donate to a national party committee's nonfederal account. Thus, unless it is to be inferred that the Vice President was soliciting a plainly illegal contribution -- which in our view is clearly unwarranted -- the two were clearly discussing a soft money contribution.

[43] As noted above, the DNC deposited portions of the Dockser, Byrne, and Morse gifts into a hard money account without their knowledge.

202659-3005." -- suggest that the Vice President asked him for a soft money contribution.[44]

Similarly, Merv Adelson recalls asking the Vice President to whom should he make his $25,000 contribution payable. Although Adelson does not recall the Vice President's response, he says he would have followed instructions given by the Vice President. Adelson's accountant subsequently wrote a $25,000 check in the amount of $25,000 made payable to the "Democratic National Committee Non-Federal Account C/O Peter Knight." The evidence thus suggest that the Vice President asked Adelson for soft money.

As noted above, the Vice President made a notation on the Johnny Johns call sheet indicating that Johns perceived the Vice President as soliciting a corporate contribution. Johns himself has told us that he in fact thought the Vice President was asking him for a corporate contribution, which is why he told the Vice President that he did not have the authority to commit his corporation to the contribution the Vice President was requesting.

3. The Vice President's Interview

In his November 11, 1997 interview, the Vice President stated that he never asked a prospective donor for a federal contribution during his telephone solicitations, and that he in fact frequently made the "soft" nature of the funds he was soliciting an explicit part of his "pitch." According to the Vice President, he did this because he believed (incorrectly) that the DNC's media campaign was being funded only through soft money contributions, and because he thought it would sometimes be easier for an officer or high-level manager of a large corporation to make a substantial contribution through the corporation rather than with personal funds.

On the other hand, several memos addressed to the Vice President clearly state that the DNC media campaign had to be funded with a split of hard and soft money. At least one of these memos, entitled "DNC Budget Analysis -- 11/21 POTUS PRESENTATION," appears to suggest that the issue of hard money and the media fund was also discussed at a meeting attended by the Vice President. In addition, the February 21, 1996 Bradley Marshall memo, which was attached to the February 22, 1996 memo from Harold Ickes to the President and Vice President, appears to reflect the DNC's practice of splitting contributions.

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[44] However, Hormel recalls no reference to soft money during his conversation with the Vice President.

The Vice President told us that he does not recall the topic of a hard money component for the media fund having been raised at the November 21, 1995 meeting, or on any other occasion in his presence. Moreover, according to the Vice President, he did not read Ickes' DNC-related memos, including Ickes' February 22, 1996 memo which attached the February 21, 1996 Bradley Marshall memo.[45] At least two of the Vice President's assistants have confirmed that he did not read many of the memos that were placed in his in-box. Neither could say, however, whether the Ickes memos were among those ignored.

B. Solicitations That Were Arguably Ambiguous

We have no direct evidence that the Vice President explicitly asked any prospective donor to make a "hard money" contribution in the course of his telephone solicitations. However, several of the Vice President's solicitations, as described by the prospective donors, are arguably susceptible to more than one interpretation. In our view, the more reasonable interpretation of these solicitations is that the Vice President was asking for soft money.[46]

1. Solicitations in Which the Vice President Referred in Passing to His Reelection Campaign While Soliciting Contributions for the DNC's Media Fund

In the course of soliciting Robert Johnson for a contribution to the DNC media fund, the Vice President referred in passing to his reelection campaign. The Vice President told him that he was facing a tough election. However, he did not ask Johnson for a contribution to the Clinton/Gore '96 Committee, but instead asked Johnson to contribute $30,000 to the DNC in order to get the DNC's message out on issues such as health care.

In soliciting Penny Pritzker for a contribution to fund the media campaign, the Vice President reminded her that she had been present in Chicago when the Vice President had shown some sample ads to a group of Democratic party supporters. According to

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[45] The Vice President acknowledged that, had he read these memos, his belief that the media campaign was funded with soft money would have been challenged.

[46] We believe that this interpretation is bolstered by the evidence, summarized above, that in several instances the Vice President clearly asked for soft money in his telephone solicitations on behalf of the DNC. Given this fact, it seems reasonable to infer that, in other fundraising calls made around the same time and as part of the same fundraising effort, the Vice President also asked for soft rather than hard money contributions.

Pritzker, in the course of that presentation, which occurred several weeks prior to the Vice President's telephone solicitation, the Vice President had stated that the issue ads being run by the DNC had been successful in promoting the presidential reelection effort.

Critics of the DNC have complained that the DNC ran its issue ads for the very purpose of circumventing the limitations on contributions to and expenditures by the Clinton/Gore '96 Committee. However, federal election regulations permit national party committees to accept both federal and non-federal donations. See 11 C.F.R. § 102.5. Indeed, in light of the Supreme Court's holding in Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996), it may even be unconstitutional to restrict the DNC's ability to air commercials that do not expressly advocate the election or defeat of particular candidates, even if such commercials incidentally benefit or harm those candidates by shaping public opinion. In short, there is a legitimate distinction between hard and soft contributions rooted in federal election law which results in what has been termed a "soft money loophole."

As described by Johnson and Pritzker, the Vice President was expressly asking them to make contributions to the DNC so that the DNC could keep its issue ads on the air. Moreover, at least with respect to Johnson, the Vice President asked for a large enough donation that a knowledgeable donor must have understood the Vice President to be asking for at least some soft money.[47] The Vice President did not ask either Johnson or Pritzker to make contributions to the Clinton/Gore '96 Committee. To the extent that the Vice President acknowledged that his own campaign might benefit from the DNC's airing of issue ads, that did not, in our view, convert what the evidence suggests was intended and understood to be a soft money solicitation into a hard money solicitation. At most, it was an acknowledgement of the existence of a legal loophole.

2. Solicitations Which Did Not Leave the Prospective Donors With An Understanding of What the Vice President Was Asking For

In several instances, our interviews suggest that individuals who were solicited for money by the Vice President did not have an understanding following the call of whether the Vice President had asked them for federal or non-federal

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[47] As noted above, according to Johnson, he did not realize at the time that the DNC could accept any hard money. Apparently, nothing the Vice President said to Johnson changed Johnson's misunderstanding -- which is consistent with the Vice President's explanation that he was asking only for soft money.

contributions. However, all of the donations received from people in this category were deposited into non-federal accounts, and with respect to each of these calls, we have no evidence from which it could be inferred that the Vice President was soliciting hard money.

Of those who declined to make donations in response to the Vice President's request, the only solicitation which we feel was somewhat ambiguous was that which the Vice President made to Noah Liff. In his call to Liff, the Vice President first thanked him for his support of the Administration's policies and, according to Liff, then said something like: "any help you can give us here, we would appreciate." According to Liff, the Vice President did not mention the DNC or the media fund during the call. On the other hand, he also did not mention any federal campaign or reelection fund. The Vice President also did not state how much money, if any, he was seeking or how the money he might be seeking would be used. Liff recalls nothing more specific than a request to "help them out up there."

Liff, who is from Tennessee, has known the Vice President for several years and has supported him since he began running for public office. Interestingly, while the Vice President, during his interview, characterized Liff as a Republican, Liff considers himself a Democrat.[48] Regardless of his party affiliation, the two spent a considerable amount of time, during their conversation, talking about Liff's general support for the positions taken by the Administration.

Liff's response to the Vice President's request for "help" -- that he had already given the "legal limit" -- seems to indicate that Liff thought the Vice President was requesting support for Clinton/Gore '96. Moreover, the absence of a reference to the DNC during the call appears to set this call apart from most of the other solicitations.

On the other hand, the DNC did prepare a call sheet for the Vice President concerning Liff, and the Vice President called Liff on May 2, 1996, which was during the period that he was making calls for contributions to the DNC media fund. Furthermore, Liff has told us that he may not have understood at the time that he could make a soft money contribution to the DNC. In this context, Liff's reference to his previous contribution of the "legal limit" can most reasonably be interpreted as a nonsequitur born of Liff's misunderstanding of what the Vice President was asking for. Given the fact that we have found no other evidence of the Vice President asking any donors listed on

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[48] The Vice President recalls talking to Noah Liff, but he is not sure if the call was part of the DNC fundraising call program.

DNC call sheets for contributions to the Clinton/Gore '96 Committee, this latter interpretation of the Liff telephone call seems more plausible.

Taking all the evidence of this conversation into account, we conclude that the conversation was between two individuals who had known each other for years, and that after general conversational pleasantries, the Vice President tentatively broached the subject of a contribution to an individual he assumed to be a Republican, and therefore unlikely to contribute to the DNC. Liff in turn, familiar only with hard money contributions, immediately rebuffed the overture, saying he had given his "legal limit," at which point the Vice President dropped the topic. While it appears that Liff assumed that the Vice President was talking about a hard money contribution, based on his description of the conversation that assumption was not based on anything said by the Vice President.

C. The Vice President's Intent

The Vice President has stated that he intended to ask only for soft money, not hard money, contributions to the DNC in the course of his telephone solicitations from his West Wing Office. As noted above, the Vice President has stated that this must have been his intent because he believed (incorrectly) at the time that the DNC's media campaign was being funded only through soft money contributions. In addition, the Vice President told us that he incorrectly believed at the time that individuals were limited to giving only $2,000 in hard money to the DNC per election cycle. The Vice President claims that he was laboring under this misconception of federal election law because he assumed national party committees were subject to the same limitations of $2,000 in federal contributions per election cycle as were the committees he had formed when he had sought election to the House of Representatives and later to the Senate. Thus, according to the Vice President, when he saw suggested solicitation figures of over $20,000 on the DNC call sheets, he assumed that he had to be asking for soft money.

We have developed no evidence to show that the Vice President read Ickes' memos setting forth that the DNC had to raise both hard and soft money in order to keep its issue ads on the air, or that he read Marshall's memo which alluded to the DNC's annual individual hard money limit. Given the very large amounts that the Vice President was being asked to raise, it seems plausible that he would believe he was asking for soft money in his telephone solicitations. We have found no evidence to counter his claim to this effect.

V. CONCLUSION

To summarize, the preliminary investigation has established the following points:

1) There is no evidence that the Vice President knew of the DNC practice of reallocating a portion of large contributions to hard money accounts. Therefore, there is no factual basis on which one could conclude that further investigation is warranted of whether the Vice President may have violated section 607 by making vague or ambiguous solicitations, knowing that a portion of any ensuing contribution would be treated as hard money.

2) There is no evidence that the Vice President expressly asked any of the individuals he contacted directly for funds to support his reelection or the election of any other federal official.

3) There is affirmative evidence that the Vice President asked for support for the DNC media campaign in virtually every call. Such support could, under law, have been either hard or soft.

4) All donors who had an affirmative impression of what was being requested believed it was a solicitation for soft money. Noah Liff, who recalls a response to the Vice President that suggests he interpreted the request as a hard money request ("I've given my legal limit") states that he thinks he may not have been aware at the time that there was any other option available. Given that context, it is not warranted to interpret the general nature of the recalled request made by the Vice President ("Any help would be appreciated") as a request for hard money.

5) In numerous conversations with more sophisticated donors, the discussion explicitly focussed on the fact that the Vice President was soliciting soft money.

6) In the vast majority of the cases, donations resulting from the Vice President's solicitations were handled by the DNC as soft money. In the few cases where they were not, the evidence suggests that this was done without the donors or the Vice President's knowledge.

7) The amounts of the requests being made suggest prima facie that the requests were for soft money. Hard money donations in those amounts would have been unlawful. There is no evidence to suggest that there was ever any discussion or understanding by either the Vice President or any of the donors that a portion of a single donation might be treated as hard money.

Based on these factors, and our additional analysis above, we have concluded there is insufficient evidence that the Vice President may have violated section 607 to warrant further investigation, and we accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel. In order to justify the need for further investigation by an independent counsel here, one would be required to decide the following issues in the following ways:

a) 18 USC § 607 applies to telephone solicitations made from the Vice President's office in the White House to private citizens located outside the White House;

b) There is no Department of Justice policy that such solicitations will not be prosecuted;

c) At least one of the solicitations made here was a call for a contribution within the meaning of the FECA; and

d) That there is not clear and convincing evidence that the Vice President did not intend to solicit such contributions.

Although we would ordinarily attach to this memorandum the necessary paperwork to be filed with the Special Division of the Court of Appeals, we have not done so here so as not to delay, in light of the upcoming holiday, the review of our conclusions. We will immediately begin drafting this paperwork.

ADDENDUM

Persons Solicited by the Vice President -- Resulting
Contributions Partially Deposited into a DNC Federal Account

Angelos, Peter
Byrne, E. Blake
Dockser, William
Johnson, Robert
Morse, Andy

Persons Solicited by the Vice President -- Resulting
Contributions Deposited into a DNC Non-Federal Account

Adelson, Merv
Black, Scott
Cofrin, David
Dayton, Mark
Getty, Ann
Hormel, James
Jenrette, Richard
Landow, Nathan
May, Peter
Petrocelli, Anthony
Wang, C.J.

Persons Solicited by the Vice President --
No Contributions Given As a Result

Ellison, Lawrence
Johns, Johnny
Pritzker, Penny
Liff, Noah
Becker, Eric
Bendheim, Jack
Stephenson, Byron Rex
Utley, Robert

No Solicitation by the Vice President -- Thank You Call

* Broad, Eli
Casey, Thomas
Chaudary, Rashid
Coleman, Lynn Rogers
Donald, James
Dozeretz, Beth
Edwards, Jim
Gohd, Matthew
Green, Steven

* Leesfield, Ira
* Marcus, George
Manatt, Charles Taylor
O'Neill, Patrick
Pensky, Carol Ann
Rosen, Jacob
Rubin, Robert
Shorenstein, Walter
Shuman, Stanley
Stout, Thomas Philip

* Contributions to DNC partially deposited into federal account

No recall of telephone conversation with the Vice President re: contributions

Adler, Michael
Allaire, Paul
Allard, Nicholas
Allison, Gary
Alix, Jay
Arnold, Truman
Azima, Farhad
Bailey, Ken
Bakke, Dennis
Barrientos, Rene
Bass, Robert Muse
Belfer, Bob
Belz, Gary
Bildner, Allen
Boggs, Thomas
Branson, Frank L.
Bronfman, Edgar Sr.
Callaway, Eli
Casperson, Finn
Catsimatidis, John
Cauthen, Sonny
Cejas, Paul
Chao Chi-Chu, George
Chapman, Joe
Checchi, Alfred
Clayton, James
Cloobeck, Stephen
Clymer, Ray
Cofrin, Gladys
Cogan, Marshall
Connelly, John E.
Cooke, John Frederick
Cooper, Irby
Corzine, Jon S.

Daly, Thomas
Davis, Marvin
Dayton, Ken
Delk, Robert Mitchell
Dell, Michael
Demenil, Dominique
Drummond, Garry Neil
Dunavant, William B.
Dwoskin, Albert James
Eskind, Jane
Eychaner, Fred
Farouki, AbulHuda
Field, Fred
Fisher, Wayne
Flcm, Joseph H.
Ford, Gerald J.
Free, James Carlton
Friedenrich, John
Friedkin, Monte Norman
Frost, Phillip
Gallagher, Mike
Garrett, Richard
Geffen, David
Geiger, Keith Brian
Gilman, Howard
Glatfelter, Athur
Greenwald, Stephen
Gupta, Rajendra
Hall, Craig
Haney, Franklin
Hardy, G.P.
Hay, Jess
Hayward, Richard
Hazeltine, William Alan
Hurwitz, Charles
Hyde, Joseph R.
Irani, Ray
Jacobsen, Ken
Jamail, Joseph
Jones, Clark
Jones, Paul Tudor
Jordan, Vernon
Joyce, John
Katz, Lewis
Kelly, Peter G.
Kenmore, Ayse
Krise, Ron L.
Krupnick, Jon E.
Lausell, Miguel Demetrio Marxuach
Lerman, Miles
Lesniak, Raymond
Levin, Susan Bass

Lindner, Carl
Manilow, Lewis
Manilow, Susan
Manning, John Patrick
Masri, Hani
Master, Bernie
Mathews, Harlan
McDonough, Robert
McEntee, Gerald W.
McMillian, John G.
McWherter, Ned Ray
McWhorter, Clayton
Messinger, Alida Rockefeller
Mills, Olan
Mithoff, Richard
Moldaw, Stuart
Mondale, Ted
Montrone, Paul M.
Morey, Maura
Morton, Peter
Neal, Roy
Norton, Peter
Nutt, David
O'Quinn, John
Pearl, Frank
Pincus, Lionel
Podesta, Anthony
Pollin, Abe
Potter, Jonathan
Ramero, Edward
Rapoport, Bernard
Rivera, Dennis Hickey
Robertson, Sanford
Rohatyn, Felix
Roitenberg, Harold
Rudin, Lewis
Rudman, M. B. (Duke)
Russell, Madeleine
Sachs, Marshall
Sauter, Gary
Schoenke, Ray
Scott, Dr. Steven Martin
Sharp, James
Shipley, George Corless
Simon, Bren
Simon, Diana Meyer
Slawson, Richard William
Smith, Raymond William
Sparks, Willard
Sparks, Rita
Stein, Jay
Studley, Julian

Sussman, Donald
Sweeney, Patrick A.
Tagg, George
Thompkins, Susie
Tisch, Jonathan
Tisch, Steven
Tobias, Robert
Torkelson, John
Trauger, Byron
Tully, Daniel
Umphrey, Walter
Vernon, Lillian
Weaver, Delores Barr
West, Jake
Williams, John Eddie
Yokich, Stephen

1994 Calls Made from DNC Offices

Borish, Peter
Bronfman, Edgar Jr.
Dattel, Samuel
Walton, Alice

Unavailable for Interview

Jimenez, Mark
Uribe, Charles
Diller, Barry
Velez, Ruben
Lerach, William
Zappa, Gail
Jenrette, Richard

Refused Interview

Becker, Eric
Coia, Arthur
Fishelson, Julie
Hess, Leon
Lewis, Peter
Rechelbacher, Horst
Robb, Gary
Townsley, William
Zimmerman, Raymond

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/13/97

Albert Arnold Gore, Jr., Vice President of the United States, date of birth [redacted] Social Security Account Number: [redacted] was contacted via prior arrangement at his residence, U.S. Naval Observatory, Massachusetts Avenue, N.W., Washington, D.C. George Frampton and James Neel, Vice President Gore's legal counsel, were also present during the interview. After being advised of the identities of the interviewing agents and that of Department of Justice Attorneys [redacted], [redacted] Charles LaBella, and Lee Radek, Gore provided the following information:

SS #

During 1995, there were numerous discussions in small groups, which included President Clinton and Vice President Gore, regarding the issues of raising additional monies for the Democratic National Committee (DNC). As soon as January 1995, President Clinton and Vice President Gore were looking forward to the new election cycle. During the spring of 1995, the DNC had scheduled some fund-raising events. However, it became obvious during the summer of 1995, that the DNC would need to raise additional monies in order to put television ads on the air. With the scheduled events that the DNC had during the summer of 1995, the monies raised would just be enough to pay the existing DNC bills and there would be no remaining money for the media fund. It was not until the fall of 1995 that there were discussions regarding the Vice President making fund-raising telephone calls in support of the DNC media fund. President Clinton and Vice President Gore were keenly aware that there was a need to raise more money if the television ads were to be run. Such money could be raised more easily if both the President and Vice President were personally involved in fund-raising efforts. The idea to make fund-raising telephone calls was an attempt to raise the needed money and at the same time reduce the amount of time that the President and Vice President were out on the road at fund-raising events.

Vice President Gore was shown a memorandum, dated December 18, 1995, from Harold Ickes to the President, et al., and the five related documents. The interviewing agents directed Vice President Gore's attention to the first paragraph to a reference of "DNC budget and fund-raising meeting on 21 November 1995 in the map room." Although Vice President Gore recollects

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attending the 11/21/95 meeting, discussions of the fund-raising calls for him and the President would not have been discussed at that meeting. The discussions regarding the fund-raising calls would have been conducted in a meeting which preceded the November 21, 1995 meeting. The November 21 meeting would have also been preceded by discussions within a small group, including the President, the Vice President, Leon Panetta, Harold Ickes, and possibly one or two other individuals. The issue of the Vice President and President making fund-raising calls would have probably been referred to in the November 21 meeting, but probably only in passing and not discussed in detail. The discussion in the smaller group was not a debate session and again, the idea of the President and the Vice President making fund-raising calls seemed attractive because it would require less time and expense to raise the necessary money.

The smaller group meetings were held on a regular basis during this same time frame (November 1995). The meetings were generally run by Ickes during which he (Ickes) presented an agenda of approximately five - six items dealing with fund-raising and campaign issues.

The smaller group meetings were not the meetings commonly referred to as the "Wednesday meeting," also known as the "residence meetings," which were held in the yellow Oval room of the White House. The topics of discussion at the "residence meetings" usually centered on the polling results in support of the DNC commercials. The group would also review new commercials, which were planning to be aired. These "residence meetings" were attended by approximately thirty people. There were also infrequent meetings held in the map room, as needed. These meetings would be attended by six - ten people and were usually held so that an issue could be resolved by the President.

Vice President Gore was shown a copy of a memorandum dated November 20, 1995, from Ickes to the President. The interviewing agents directed Vice President Gore's attention to the first paragraph regarding "This confirms the decisions made at our meeting 18 November 1995." Vice President Gore advised that he never saw this memo. However, it implies that the November 18, 1995 meeting may have been one of the small meetings which he (Gore) discussed earlier where the issue of fund-raising

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calls were brought up.

Vice President Gore was shown a copy of a memorandum dated November 28, 1995, from Harold Ickes to the President and Vice President, et al. The interviewing agents directed Vice President Gore's attention to the last paragraph of the first page, which listed "approximately 20 phone calls by the President, approximately 15 phones call by the Vice President." Vice President Gore advised that he does not remember ever seeing this memo. He stated that the number of telephone calls to be made by the President and Vice President was never discussed with him and he doubts that the issue was ever discussed with the President. This was because the general decisions were made by the President and then Harold Ickes and the DNC would try to make sense of it. The number of fifteen calls for the Vice President and twenty calls for the President may have been an effort by the DNC to put a reasonable number of such calls on the President's and Vice President's schedule. However, this did not reflect a conversation between the Vice President, the President and the DNC.

Vice President Gore was shown a copy of a computer E-mail dated November 24, 1995, from K. Hancox to Kimberly H. Tilley. Vice President Gore stated that he did not see this E-mail initially but has seen it through newspaper accounts. Again, the reference to "on their own" was consistent with the President and the Vice President initiating the idea of the fund-raising calls to reduce the amount of time on the road that would be required to fund the media campaign. The practice of "issue" advertising was a well-established practice by previous campaigns.

From a historical background, the need for the media campaign began in January 1995. This was when Newt Gingrich was sworn in as the Speaker of the House and the Republicans were the majority party. The Republican agenda (Contract with America) was at odds with the direction the Clinton Administration had intended for the country. Vice President Gore felt that these differences would come to a head near the end of the fiscal year, October 1995. He stated that in February 1995, he advised the President that there was a likelihood of a government shutdown in October 1995. At the time, the Republicans had a higher approval rating in the public opinion polls. Vice President Gore felt

that in order to frame the upcoming election, the Democrats had to get their version as to the course of the country to the public. The public needed to be informed as to why this pending Republican agenda was not good for the country. At the time, the DNC was financially just barely keeping their head above water, but it was felt that they (DNC) could take on this media effort.

As the time for October 1995 was approaching, the only way that the Democrats could get their message out to the public was through the television ads. These ads had been budgeted at approximately one million dollars per week. The only way to get the message out was through the television ads and the only way to raise enough money for the DNC was for the President and Vice President to get personally involved in fund-raising. The DNC was running approximately one million dollars worth of television ads per week, depending on the DNC budget. However, this was on a week to week basis. Vice President Gore stated that when the DNC ads went off the air, the polls reflected an increase in the approval rating of the Republicans, but while the ads were running the Republicans approval rating fell. A government shut down was imminent.

During the November meetings, there was no discussion of where the fund-raising calls were to be made from. This issue was never discussed in the small or large meetings - at least, never in the presence of the President and Vice President.

The small meetings would usually be held based on a request from Harold Ickes. President Clinton would then convene one of these small meetings as needed. As background, there was a huge struggle going on between Dick Morris and Harold Ickes regarding the media effort. Morris was a strong advocate of having the television ads run each week. Ickes was highly skeptical of this approach. Ickes was also the liaison to the DNC, and as such was protective of the DNC budget. Any of the disagreements between Morris and Ickes over the media effort were resolved by the President. One of the normal disputes between Morris and Ickes would be around the issue of whether it was possible for the DNC to take on the media campaign without busting the DNC budget. There were also smaller disputes over particular ads, such as Ickes would feel an ad produced by Morris was terrible. Morris would then produce polling data that said the ad was good. Ickes would then question the legitimacy of the

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polling questions which had been asked. There were also disagreements over Morris being paid by the DNC. It was commonly known that Morris and Ickes did not like each other.

The small meetings were scheduled on very short notice and there was not a discussion of the fund-raising calls made during these meetings. The President and Vice President had already agreed to make the fund-raising calls so there was no need to bring the issue up at the small meetings. The context of these small meetings was framed by the larger question "was it possible or feasible for the DNC to take on such a large media project and would the DNC be able to raise the large amount of money needed for the project?" Vice President Gore said the answer to this question was "yes" because the President was the titular head of the DNC. Traditionally, the incumbent is able to do more for his party. Vice President Gore stated that he and the President were willing to do more personally to raise money for the media campaign by making more fund-raising trips and meeting with people to ask for contributions. However, there is also a need to balance the time spent in cities trying to raise money with spending more time on official duties. Vice President Gore stated that he had prior experience in calling people to raise money and knew that this could be done to raise money for the media fund.

Vice President Gore was shown a copy of a memorandum titled "DNC 1995 Budget Analysis - 11/21 POTUS Presentation." Attorney Ainsworth directed Vice President Gore's attention to the second page of the memo and the paragraphs numbered five - seven. Vice President Gore stated that the increase in the media budget from ten million to thirteen million, reflected the constant struggle between Morris and Ickes. Vice President Gore stated that he had not seen this memorandum and that he did not typically read Ickes' memos. There was usually one of these memos produced each day. He stated that these memos were ideological tracts (budget analysis) of the struggle between Ickes and Morris. Ickes would constantly document for the President reasons to show why Morris' ideas were "nuts" and would destroy the DNC. Vice President Gore stated that Ickes' memos would remain in his in-box until they were removed and destroyed. At the November 21 meeting, the topic of discussion was probably the DNC budget outlook and discussions regarding the potential

sources of income. It was also discussed whether it was feasible to continue the television ads at a cost of one million dollars per week. Vice President Gore stated that in general terms, he does remember the topic of the media budget being increased from ten million to thirteen million dollars being discussed during this meeting.

Vice President Gore stated it was his understanding from the start that the media fund was funded by so called "soft" money. He stated that he does not recall any discussions about "hard" and "soft" money relating to the media fund. From the start, the media fund was feasible because it could be financed by corporate money or non-federal money. Vice President Gore was aware that the DNC needed to raise both "hard" and "soft" money. However, the "issue ads" were financed through the use of "soft" money.

Vice President Gore was directed back to the memorandum titled "DNC 1995 Budget Analysis - 11/21 POTUS Presentation." Vice President Gore advised he remembered the DNC budget and the effect of the ads on that budget being discussed during the November 21 meeting. Vice President Gore does not remember going over the issue (paragraph seven) that one million of the new 2.2 million dollars needed to be raised for the media budget would be "hard" money. Vice President Gore stated he is confident that he did not know that anything other than "soft" money was used to fund the media effort.

Vice President Gore stated there were frequent references that the DNC needed to raise a combination of "soft" and "hard" money to optimize the workings of the DNC. Vice President Gore stated that in regards to the "hard" and "soft" money ratios, that was a science that he did not involve himself in. He stated that he now knows something about the "hard/soft" ratios but there was a great deal of what he did not know about the "hard/soft" issue that was a mystery to him. Vice President Gore stated he does not know if the memorandum was distributed at the November 21 meeting. He recalls that there were budget tables distributed at the meeting. The specific topics of the "hard/soft" money in regards to the media fund, to his recollection, were not discussed.

Vice President Gore stated that it was his

understanding that the media fund was a fund for the production and purchase of commercials to be run by the DNC. Vice President Gore advised he never saw any DNC accounting information indicating there was a separate, discrete account set up for the media fund. However, he believes that the DNC's media fund was analogous to the Social Security fund. Vice President Gore stated that as a result of being involved in the fund-raising process, he has become aware that if you are asking someone to contribute it is better to allow the donor to make a firm connection to a result of their contribution. People are less likely to give money if they think it will be used to pay the salaries of employees, travel budgets of the chairman, and pay for lavish parties. The media fund was a way of describing the need for extra money to be raised for the television ads. It was easier to get people to contribute if they could tie their contribution to a specific thing, such as the television ads. The DNC financed an effort to put the ads on television and possibly on the radio. The funding for the television commercials came from the media fund. The television ads were aimed at showing the contrast between the Gingrich/Dole agenda and the Democratic Party's agenda.

Vice President Gore stated that the idea for the media campaign and the television ads may have begun in May 1995. The idea for the media campaign was Dick Morris'. Initially, Morris advocated running the commercials for a few weeks. Sometime prior to May 1995, meetings were held to discuss the media campaign. These meetings were informal and would sometimes only consist of the President talking separately with Morris. Vice President Gore stated that the President would then come to him and ask for his thoughts about the media campaign. In late spring 1995, the President and Vice President Gore started raising funds for the DNC and the Clinton/Gore reelect. The earliest commercials shown in the media campaign may have been related to the President's crime bill. All of the television ads focused on issues where the Democrats and the President were on one side of an issue, with the Republicans on the opposing side of the issue. The overall goal for the media campaign was in preparation of the anticipated battle over the budget. Initially, Morris had an idea to compromise with the Republicans, specifically with Trent Lott over the budget. A secondary goal of the media campaign was to frame the Democratic position for the reelection in 1996. The overall goal of the media fund was

to prepare the battle field for the clash at the end of the year over the anticipated government shut down. The Vice President stated he had forewarned the President that this shut down was coming. If the ads were able to affect how Americans viewed the Democrats, they (Democrats) could win the budget battle with the Republicans. In addition, winning this budget battle would frame the reelection of the following year. Vice President Gore stated that in the meetings where the media campaign was discussed, he at first listened and then became an advocate for doing more (fund-raising) and launching the media campaign.

Vice President Gore stated there were several types of meetings in which the media campaign was discussed. One was the large "Wednesday or Residence" meetings, where the attendees would see the proposed television ads and hear the polling results. The DNC pretty much respected the wishes of the President in regards to the media campaign. The decision making process of the President regarding these media campaign issues included advice from his advisors, including DNC officials, information from the polls, discussions about the affordability of the media campaign and what effect or response the television ad would have on the Republicans. As a practical matter, the President would make any decision related to the media campaign. The media campaign television ads continued to focus on the clash between the Democrats and the Republicans. The media campaign was used to keep the pressure on the Republicans.

Vice President Gore stated it was understood that the President and he would have to do a lot more personal fund-raising to obtain the necessary monies for the media campaign. During meetings, the issues of how the DNC was presently raising money were discussed. These areas included how the direct mail campaign could be improved and discussing the number of fund-raising events that needed to be scheduled to meet the goals. It was understood that the media fund required adding extra effort by the President and Vice President. The only elasticity in the fund-raising system was the degree to which the President and Vice President would devote to these activities.

Vice President Gore stated that at the time, he was operating under the impression that the DNC was short of "soft" money. "Hard" money was raised from events with individual donors. Vice President Gore was shown a copy of a memorandum

dated October 20, 1995, from Harold Ickes to the President and Vice President. The interviewing agents directed Vice President Gore's attention to the second page, first paragraph, referencing "since the approximate ratio of hard/soft for the media purchases to date is approximately 40%/60%." Vice President Gore stated the memorandum would have been sent to his office, but he would not have seen it, again because it was a Harold Ickes memo. As background, every memorandum to the President is copied to the Vice President. In addition, the Vice President also receives memoranda which are directed to him from his staff. Vice President Gore stated that when Harold Ickes started producing these types of memoranda, he (Gore) would not look at them. There are two in-boxes for incoming memoranda in the Vice President's office. One is located on the Vice President's desk and the other on the desk of the secretary. Vice President Gore would set aside the Harold Ickes memoranda and they would start to stack up. Eventually, a secretary would come into the office and automatically send these types of memos to the Vice President's Chief of Staff. Because of the clash between Morris and Ickes, the significance of the memoranda was diminished. Vice President Gore stated he knew that the memoranda only stated Ickes' position and that there was another side (Morris') to the issues. Vice President Gore advised that his Chief of Staff would alert him to anything that he (Gore) needed to see in the memorandums. However, Vice President Gore assumed the subject matter of the memorandums would have already been discussed in his and the President's presence.

Vice President Gore stated that if he read a memorandum, he would usually place a right-handed check mark in the upper left-hand corner of the document or by the caption of the document. Vice President Gore does not utilize a stamp. He stated if the document got to his in-box, and he read it, he would have almost certainly placed a check mark on the document. However, he qualified the statement by saying, that if the volume of the documents that he was reviewing was high, he may not have placed a check mark on the documents. The memorandums received in the Vice President's office were not archived. Vice President Gore stated if he had seen the memo (10/20/95), it would have signaled that the media fund was made up of "hard" money. Vice President Gore stated that overall, he did know that the DNC's budgets required a mix of "hard" and "soft" money.

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There were no separate meetings to discuss how the media campaign was going to be funded. The topic may have been touched on but there were no specific discussions of how the money was going to be raised for the media campaign. The principal issues of discussion were the issues for the ads (health care, environment, et ct.) and whether the money could be raised.

DNC officials were almost always present in the Wednesday night meetings at the White House, as well as the infrequent Map Room meetings. However, the DNC officials were almost never in the small meetings. The small meetings were usually attended by the President, Vice President, Ickes, Panetta, and possibly the Vice President's Chief of Staff.

Vice President Gore was shown documents related to a supporters meeting held on October 13, 1995 in San Francisco and December 11, 1995 in Chicago, Illinois, for the purpose of discussing the media fund with likely contributors to the media fund. Vice President Gore stated these meetings were an attempt to introduce the media fund "wholesale" to a group of people rather than through individual calls. Both of these events were added to the Vice President's schedule after he had been scheduled to go to the respective cities for other purposes. The people in attendance at the meetings were individuals who would be willing to contribute to the DNC media fund. Vice President Gore assumed that the DNC organized these events and that the DNC finance division came up with the idea. Vice President Gore stated that during these meetings, the proposed television ads were shown to the attendees as a group and he made a pitch to them as a group.

The talking points for the supporters meeting in San Francisco were prepared by Eric Anderson, who was on the Vice President's staff. The talking points were developed or prepared in consultation with the DNC finance division. Vice President Gore stated that he would not use the talking points that were prepared for him. Vice President Gore would typically tell the attendees that the Democrats were in the middle of a struggle and they needed to win the fight with the Republicans over the budget. He advised the group that the Democrats were able to run ads for this purpose and that "soft" money (corporate) was allowed. Vice President Gore would then tie the ads with the

polling results which would show the success of the commercials. The commercials would then be shown to the group. Vice President Gore stated he would tie the commercials into the reelection campaign, as stated in the last bullet paragraph of the talking points for the supporters meeting. Vice President Gore stated the paragraph read "the outcome of this effort will not only affect the direction of many programs that affect Americans but will also frame the 1996 campaign." If there was hesitation on the part of a contributor, Vice President Gore would sometimes bring up the selling point that "soft" money was allowed because it is a lot easier to convince people to give "soft" money rather than "hard" money. Vice President Gore stated he did solicit the attendees for contributions during the meeting and sometimes let the attendees know that someone would be getting back to them in the future regarding a contribution to the media fund. Vice President Gore stated he was not sure if he told the attendees who would be getting back to them, but that it was safe to assume the attendees knew that someone would be contacting them. The attendees that were at the meetings were there because they were previous contributors. The DNC made the decision on what television ads were shown during these meetings.

Vice President Gore was shown a memorandum for the Vice President, dated February 26, 1996, titled "Weekly meeting with the President," which included "points for political budget meeting with President." Vice President Gore stated that he does not remember a "pep talk" meeting held on approximately February 28, 1996. He said that he does not think that he went to this meeting because either the meeting was canceled or he was called out of town. He stated that in any event, he did not use the talking points which had been prepared by Ron Klain. Vice President Gore advised he believes these talking points were prepared by Ron Klain because the format of the talking points is characteristic of Klain's writing. He advised that he also knows that the talking points were prepared by Klain because his memory has been refreshed by recent newspaper accounts.

Vice President Gore stated he has no recollection of the meeting and furthermore has never been scheduled to make a formal presentation at such a meeting. Vice President Gore advised that he would speculate the reason that Klain prepared the talking points was because of the continuing clash of recommendations between the President's advisors. Vice President

Gore was identified with the school of thought to do more fund-raising rather than less. Ron Klain's role was to try and arm the Vice President with specifics so that the Vice President could be persuasive in the discussions. Vice President Gore stated he does not remember seeing this memorandum during that referenced time period. Furthermore, he did not read the talking points at that time.

Vice President Gore stated that the list of people that he was to call for his fund-raising calls was prepared by the DNC. A block of telephone calling time would appear on his schedule to make the DNC fund-raising calls. David Strauss may have staffed the calls with the Vice President on one or two occasions. Peter Knight may have been present on one or two occasions also. On the days that the calls were on the Vice President's schedule, Heather Marabeti, the Vice President's Executive Assistant, would come into the Vice President's office with the call sheets from the DNC.

Vice President Gore stated that as background, there was an earlier period of thank you calls made during the spring of 1995, during which the calls were initiated and dialed from Peter Knight's office. Once the answering party was on the line, the Vice President was conferenced in. Vice President Gore stated that he assumed that the DNC fund-raising calls were going to be handled in the same manner (initiated and dialed from Peter Knight's office). However, at some point during the initial DNC fund-raising calls, Vice President Gore became aware that the calls were being initiated and dialed from his office. Vice President Gore advised that he realized there was a departure from this earlier practice and then asked his Executive Assistant "is it alright?" He stated that his Executive Assistant replied "yes, we have a credit card."

Vice President Gore stated his earlier practice in the Senate did not differentiate as to where you were sitting when you made the call but how the call was billed. It had to be clear that the call would not be billed as a government expense. As a House and Senate member, there were ethics rules regarding fund-raising calls from the official office. However, the only legal question involved the reimbursement of such calls. Vice President Gore stated that as a House and Senate member, he would leave his office to make calls due to this restriction. He was

also advised during his tenure as a House and Senate member, that if he left a message for an individual from which he was attempting to solicit a contribution, that it was "ok" to leave his office number for that individual to call him back. When the individual then returned the call to the official office, there would be no reimbursement issue as the caller would be paying for the call.

Vice President Gore stated when he got into the White House, it was this background from his House and Senate days, that he used when the calls were made in the spring of 1995. Vice President Gore advised that because there was no charge to the taxpayers he thought these calls were "ok." Vice President Gore stated that he assumed that the individuals listed on the call sheets from the DNC had been advanced, meaning the individuals had been previously been informed that the Vice President would be calling them.

Vice President Gore was shown a copy of a DNC finance call sheet, dated November 27, 1995, for Jim Hormel. Vice President Gore stated that the information that he looked for on such call sheets included any spouse information and additional notes. He stated that he looked at this information so that he would be alerted to what the person may possibly talk about during their conversation. The written "PSK" were the initials of Peter Knight, which indicated that Peter Knight was present during this call. Heather Marabeti's handwriting was the "L.M.2p 11/28". Joel Velasco may have written the telephone number beside Hormel's name. Vice President Gore stated that the writing "non-federal $ soft" and "will call back" was his handwriting. Vice President Gore could not identify who may have written "no federal $ '95," nor does he believe that this writing was on the call sheet when he used it to talk with Hormel. The telephone calls to the individuals listed on the calls sheets were actually placed by Joel Velasco.

Vice President Gore stated it was his understanding that the money he was asking for the media fund was "soft" money. Vice President Gore advised that he thought "hard" money was subject to the $1,000 limit to a candidate. If the candidate was involved in both a primary and general election, the limit would be $2,000. If the individual (contributor) had a spouse, there was a possibility of an additional $2,000 "hard" contribution.

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If the contributor had children, additional money could be given toward "hard" money. In all, the aggregate total for all candidates could not exceed in total $25,000.

Vice President Gore stated when the controversy over his fund-raising calls broke, that was the first time he became aware that "hard" money could be given in any amount other than $1,000 or $2,000 increments. He advised that he thought the "soft" money which was contributed as a result of his fund-raising calls was anything above those limits ($25,000). He stated that it never occurred to him that it could be anything but "soft" money. Again, he used "soft" money as a selling point for the media fund because an individual could use their company funds to make the contribution.

Vice President Gore stated that Peter Knight may have staffed a few (three) of his fund-raising calling sessions. David Strauss may have sat in on one or two of the sessions and Heather Marabout on one of the sessions. Vice President Gore stated that to his recollection, there were approximately four or five sessions in which he made fund-raising calls. During each of these sessions, there were approximately four to five calls made to donors. The other sessions that were conducted consisted of only one or two calls to donors. Vice President Gore stated the instances when a contributor returned his call were probably treated as a call session by the media.

Vice President Gore stated that during the fund-raising call sessions, Peter Knight would sit across from his desk and make notations on the call sheet. He advised that Peter Knight was his former Finance Chair and is recognized by those in the fund-raising arena as being associated with Vice President Gore's efforts to raise campaign funds. At the time that Knight was staffing the fund-raising calls, he (Knight) was not an official at the DNC and was still an attorney at a law firm. Vice President Gore stated that he was confident that the DNC may have given Knight or Strauss some type of feedback regarding the status of his fund-raising calls. He advised that he did not receive this information directly, nor did he receive it from Strauss or Knight.

Vice President Gore was shown a copy of a memorandum dated December 20, 1995, from Marvin Rosen and Richard Sullivan

to Harold Ickes and Karen Hancox. Vice President Gore stated he has no recollection of this memo.

Vice President Gore was shown a copy of a DNC finance call sheet dated November 27, 1995, referencing Dr. C.J. Wang. Vice President Gore stated that upon reviewing the call sheet, he only remembered the general conversation, but no verbatim discussion during the call.

Vice President Gore was shown a copy of a DNC finance call sheet, dated December 1, 1995, in the name of Peter May. Vice President Gore stated that the handwriting for the two paragraphs on the call sheet was that of Peter Knight. He stated that reading this handwriting refreshes his memory as May wanted to honor him for the Simon Wisenthal Center. Vice President Gore stated he did make an appearance at the Center as requested in May's letter. Vice President Gore stated he had no knowledge that May was an overnight guest at the White House prior to receiving this fund-raising call.

Vice President Gore was shown a copy of a DNC call sheet dated April 22, 1996, in the name of Peter Angelos. Vice President Gore stated he does not specifically remember the conversation with Angelos, only that he remembers some type of confusion occasionally occurred on the part of the DNC. The DNC would sometimes ask the Vice President to call someone who had just given money or had already committed to give money. Peter Angelos may have already made it clear that he had already given money or was about to give money.

Vice President Gore was shown a copy of a DNC finance call sheet, dated February 1, 1996 in the name of Bob Johnson. Vice President Gore stated he has no independent recollection of the call, even though he does remember the call. Vice President Gore advised that he seems to remember Johnson making a point of insisting that it would be of benefit to the DNC to spend some of the money related to the media fund with black-owned or African-American owned radio and television stations. Vice President Gore stated that the attached "thank you letter" was probably prepared by the DNC finance division. Vice President Gore opined that the DNC finance division probably sent the thank you letters over to Heather Marabeti who would then bring the letters for him (Gore) to sign.

Vice President Gore was shown a copy of a DNC finance call sheet, February 1, 1995, in the name Eric Becker. Vice President Gore stated that the handwriting on this call sheet was that of David Strauss. In regards to the writing "soft $ is permitted," Vice President Gore stated this was only brought up to ease the sale of contributing to the media fund to Becker. Vice President Gore stated that not only did he not understand "hard" and "soft" money but that there is considerable doubt about the same topic in the donor community.

Vice President Gore was shown a copy of a DNC finance call sheet, dated February 1, 1995, in the name Jack Bendheim and directed to the writing "soft & corporate ok." Vice President Gore stated this language would always be found (referring to the "soft and corporate ok")on the call sheets when he made this distinction as a selling point. He stated the terms "need hard money" would never be found on the call sheets because he never brought that topic up in his discussion with the donor.

Vice President Gore stated he had no independent recollection of when he made the last fund-raising calls for the media fund. However, in preparation for this interview, he could place the date that the last calls were made as May 2, 1996. Vice President Gore advised that he was unsure of the reason that the fund-raising calls stopped. One reason may have been that there was always a need for a clear delineation between issue ads and candidate specific ads. In an issue ad, the ad cannot specifically ask people to vote for an individual campaign. Some of the DNC lawyers may have thought that closer to the time of the campaign, the issue ads had to be discontinued. Vice President Gore opined that another reason that the calls may have stopped, was that it was about time for the President and himself to turn their attention to the campaign.

Vice President Gore stated he never inherited any fund-raising calls the President was not able to make. He stated that he never knew whether or not the President made fund-raising calls. He stated that from the knowledge that he has now, during the period of fall 1995 to spring 1996, he (Gore) made approximately forty-six calls, with possibly four additional calls made. Vice President Gore spoke with thirty-six people. Fourteen of those were not solicited (ie. Angelos). Twenty-two of the thirty-six people were called and asked for a

contribution. However, fourteen of the twenty-two actually gave money as a result of the call.

Vice President Gore stated that his independent recollection of the fund-raising calling sessions was there were a few occasions and a grand total of possibly two to three dozen people contacted. However, after the newspaper accounts about his fund-raising calls were issued, the numbers were inflated because the media took into account any calls more than one minute in duration and assumed these were fund-raising calls.

Vice President Gore stated that both he and the President took an active role in reviewing the ads run for the media campaign. He and the President reviewed rough copies of the ads, which were usually presented to the group attending the Wednesday meetings. He stated that both he and President Clinton were active participants in reviewing and changing the ads as they saw fit.

Vice President Gore stated no one educated him on "hard/soft" money. There may have been a lawyer or someone from the DNC, possibly Lynn Utricht, that was knowledgeable about the topic. Vice President Gore stated he never reached out for this information because he felt that he had been in the political game for years and there was no need for further advice on the topic.

Vice President Gore stated he remembers talking with Noah Liff. However, he was not sure if it was part of the fund-raising call program. Liff is identified as a Republican, although he has given to Vice President Gore in the past when Gore was a candidate.

Vice President Gore stated he never said anything to a potential contributor that would produce a feeling or impression of being uncomfortable on the donor's part. This was reported in Bob Woodward's article through the quotation of an anonymous person. Vice President Gore stated he absolutely would not say or do anything to produce that type of feeling or impression, nor had anyone conveyed such a feeling to him.

Vice President Gore advised he can speculate on how the DNC finance division prepared the list of people to be included

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on the call sheets. He stated that the DNC finance division may have spoke with Peter Knight to determine who would be especially responsive to a call from the Vice President. He advised that all the call sheets he received for the media fund project specifically requested money to be raised for the media fund.

Vice President Gore stated that in regards to a call to David Cofrin, he does not think he (Gore) would suggest that Cofrin contribute to a coordinated campaign. A coordinated campaign is used to describe a mutuality of effort between local, state and federal candidates for projects such as "get out the vote." Vice President Gore stated he never asked for any money for the coordinated campaign during his fund-raising calls for the media fund.

Vice President Gore stated that it was his understanding that the money resulting from his fund-raising calls was being deposited as soft money into the DNC media fund. He stated that he believes the DNC was logging contributions as received. For example, if a contribution came in as "soft" money the DNC logged it as "soft" money and likewise if the contribution was a "hard" money contribution the money was logged as "hard" money. The DNC would adjust the types of fund-raising events depending on their need for "soft" and "hard" money.

Vice President Gore stated that his understanding of federal or "hard" money was within the $1,000 per candidate limitation, per election cycle. This amount could be expanded if there were both a primary and general election for the candidate. Any additional family member of the contributor could add another $1,000 toward the outer limit of $25,000. This $25,000 was the cumulative total of these $1,000 and $2,000 limits. A person can raise federal money in the amounts of $5,000 or $10,000, by asking other individuals to contribute $1,000 for a candidate. However, the individual contributions would still be attributed to the individual donors and the total of those contributions would only be credited to the solicitor for DNC fund-raising purposes. This would not count against the solicitors "hard" money limits. Vice President Gore stated that his knowledge of the sources of "hard" money was from direct mail or from a fund-raising event. Federal money can only be spent toward specific candidates.

Vice President Gore stated that his understanding of non-federal or "soft" money was either corporate money or money from an extremely wealthy individual. "Soft" money given by an individual was extremely rare but technically possible. Most of the "soft" money from individuals was obtained through the smaller fund-raising events. He stated that the way "soft" money was used depended on an archaic formula that was best left up to Miss Utricht and others to determine. The media fund was clearly non-candidate related and this was one of the "markers" that designated the media fund as a "soft" money expenditure.

Vice President Gore was shown a copy of a memorandum dated February 22, 1996 and an attached memo dated February 21, 1996, from Harold Ickes to the President and the Vice President. Vice President Gore stated he did not see this memo, however, if he had seen the memo he would have noted that the DNC had a zero balance in the non-federal individual account and that until more "soft" money was raised the DNC would be unable to put the ads on the air. He advised this was well into the period of time that he was not reading the Harold Ickes memos. The interviewing agent directed Vice President Gore's attention to the February 21, 1996 and the last paragraph stating "federal money is the first $20,000 given by an individual." Vice President Gore stated that even if he had seen this memo, it would not have brought to mind that the contributions resulting from his fund-raising calls were going to be split according to that formula. However, it certainly would have challenged his understanding of "hard" and "soft" money. Vice President Gore stated that his belief of how the DNC treated contributions changed when he read about it in the newspaper a few weeks ago. The newspaper article was written about that specific memo.

Vice President Gore stated when he was in the House of Representatives from approximately January 1977 through January 1983, he never had a hard election race and doubts that he ever had a fund-raising event. However, when it became known that incumbent Senator Baker from Tennessee was not going to seek reelection, Vice President Gore decided to run for that Senate position and began fund-raising in support of his campaign. As a result of declaring his Senate campaign, he began to receive briefings from the Democratic Senatorial Campaign Committee(DSCC) and the Ethics Committee. The Ethics Committee would provide sessions for incumbents who were engaged in campaigns. One of

the rules that was stated regarded the use of telephones. There was no law against using an official telephone for fund-raising calls. However, the Ethics Committee suggested that it would make a better forum to leave your office to make such calls. In response to questions from Congressmen regarding leaving a call back number when the potential contributor was not home, the Ethics Committee advised that the Congressmen could leave their office number for the caller to return the telephone call. If the caller returned the call it was "ok" to receive it at the office and ask for a solicitation. Vice President Gore stated that this was the advice that he received during his time in the House and Senate. When he got to the Senate, Vice President Gore followed the same advice. It was irrelevant where he was seated when the call was made. However, he did make fund-raising calls from an apartment in the Methodist Building which was rented by his parents. In the event that Vice President Gore attempted to contact someone for a solicitation and they were not available, he would leave his office number for them to call back. When the people called back to his office, if he (Gore) had placed the call to solicit a contribution, he would then make a solicitation to the caller. Vice President Gore said that from this understanding, it made perfect sense to him relating to the calls made during the spring of 1995, since they were being transferred to him from Peter Knight's office and resulted in no expense to the government.

Vice President Gore advised he did make fund-raising calls from the DNC on approximately October 28, 1994. This was immediately preceding the 1994 election, when the Democrats were facing a landslide defeat. There were many young people working at the DNC at the time who were facing morale problems because of the impending elections. Terry McAuliffe asked the Vice President to come over to the DNC to cheer up the DNC employees and "show the flag." Vice President Gore stated that while he was there he did make fund-raising calls to raise money for the party.

Vice President Gore was directed to a reference to David Strauss memorandum notes dated the fall of 1994. Vice President Gore stated he never saw the Strauss memo/notes until it came out in the newspaper. He stated it appears to be a set of notes that Strauss made during a meeting of political advisors. He advised he does not recall any discussion of where

to make calls or to make calls from the residence. Vice President Gore stated he thinks that Terry McAuliffe directly asked him to come to the DNC to make the fund-raising calls. Vice President Gore was not aware of any conversation that Harold Ickes may have had regarding the topic of where the calls could be made from.

Vice President Gore stated his press conference was held on Monday, March 3, 1997. The day before, there was an article about the Vice President and the fund-raising calls on the front page of the Washington Post. However, the article, which had been written by Bob Woodward, did not say where the Vice President had made the calls from. Woodward said that it was not becoming of the office of the Vice President to solicit contributions. Vice President Gore stated that it was not until later that day on several talk shows, that some of the panelists mentioned that there may have been a problem with where the calls were made from.

Vice President Gore's attention was directed to his press briefing, dated March 3, 1997. Vice President Gore stated he said he was a candidate for reelection simply because as a candidate he should be able to and was asking for contributions. Vice President Gore stated that six months before the Woodward article came out, Woodward had asked him to help in writing a book about the campaign. Vice President Gore stated he turned down Woodward's request because he felt that providing information to Woodward would test his confidences to the President. He advised that he thought after he declined to assist Woodward, that Woodward would therefore "come after me." Vice President Gore advised he felt relieved when the article actually appeared in the newspaper, because Woodward had spent six months and nothing of substance was listed in the article.

Vice President Gore stated it was from the Sunday talk shows that he first became aware that there may have been a problem if the calls were made from his office. In the period of 24 to 36 hours before his press conference, he wanted to find out as much about his fund-raising calls so that he could make a clear explanation of what he had done to the press media. Vice President Gore advised that his staff did not want him to have a press conference so early before they had a chance to research his fund-raising calls. On one of the talk shows, George

Stephanoupolis had stated that the White House had established a separate phone line for these types of fund-raising calls. Vice President Gore stated he knew that this was not the truth and that he wanted to lay out his position regarding the fund-raising calls he had made.

Vice President Gore stated he became aware of the press media's interest in his fund-raising calls through a Monday (March 3, 1997) meeting with the President and a Head of State. The press came in after the meeting and were asking questions about the fund-raising calls. Vice President Gore stated he told the press media that he would address their questions at a later time.

Vice President Gore stated he then went to his counsel, Charles Burson, and asked Burson for the backup information that he (Gore) needed so that he could say that everything that he did in regards to the fund-raising calls was correct. At that point in the interview, Attorneys Neal and Frampton raised a possible attorney client privilege regarding the discussions between the Vice President and Burson. However, Vice President Gore waived a limited attorney client privilege and agreed to answer questions regarding his discussions with Burson. Vice President Gore stated that Burson did the requested research and concluded that no law had been violated. Vice President Gore stated that until the articles about his fund-raising calls appeared in the newspaper, he did not know any of the title or section numbers of any possible violation, nor did he know what the term "Pendleton Act" meant. Vice President Gore stated that he did have a vague impression from the Ethics Committee training in Congress that Section 607 did not apply to telephone calls.

Vice President Gore stated the reason that he said the calls were placed on the DNC calling card was because in his rush to issue a statement to the press, he did not listen to his staff's advise to fully research the calls. He did clarify in a later statement that the fund-raising calls were placed on a Clinton/Gore calling card instead of a DNC calling card. Vice President Gore stated the first time he knew about the calling card was when he asked about the change in the way the fund-raising calls were initiated and dialed from his office. Vice President Gore asked Heather Marabeti if it was alright to make the fund-raising calls and she explained it was because they had

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a calling card. Vice President Gore stated that his conversation with Marabeti possibly took place in the presence of Liz Cotham and Joel Velasco, or close enough to them that they may have overheard the conversation. Vice President Gore was unaware that the Clinton/Gore calling card was issued in his name or that Marabeti had obtained the calling card.

Vice President Gore stated there were fund-raising events where the ticket price for the event was more than $1,000. He opined that either this would be "soft" money or the person who had paid the ticket had raised the money from other contributors to go to the event.

Vice President Gore stated it was his belief that making the calls from his office was completely legal and proper and was not based on the "hard/soft" distinction. He stated the reason he was asking for only "soft" money had nothing to do with the "hard/soft" legality issues. Vice President Gore stated he assumed that there were no legal issues associated with the fund-raising calls because of the intense vetting process that occurs in placing events on his schedule. He stated the competition for both the President's and his time is so intense that each request is vetted by the Chief of Staff, Legal Counsel and staff advisors.

Vice President Gore stated the Clinton/Gore re-elect operation was able to put together the maximum fund-raising amount without the personal solicitations for contributions from the President and himself.

FEDERAL ELECTION COMMISSION,
Washington, DC, June 21, 2000.

Hon. ARLEN SPECTER,
711 Hart Senate Office Building,
Washington, DC.

DEAR SENATOR SPECTER: In response to your invitation to us on Monday, both Vice Chairman Danny McDonald and I will be pleased to attend the hearing of the Judiciary Subcommittee on Oversight on Wednesday afternoon, June 21.

We understand the purpose of our appearance is primarily to respond to questions from the Committee concerning the Commission's application of the provisions of the Federal Election Campaign Act, including in the context of the 1996 Presidential campaigns. We will of course be glad to answer any questions that the Committee has.

In advance of the hearing, I thought it might be helpful to provide some brief written materials that may assist the Committee in putting the issues that it is concerned within the context of the provisions of the FECA.

The limitations of the FECA on the amount and sources of contributions to candidates, political parties, and other entities for the purpose of influencing a federal election are well known as the "hard money" limits of the FECA. These "hard money" limits have two aspects: limitations on the amount of contributions, and prohibitions against contributions from certain sources.

The first attachment shows the limitations imposed by the FECA on the amount of contributions.

The second aspect of hard money, the prohibitions on sources, prohibits contributions from three sources that are well-known: corporations, labor organizations, and foreign nationals. Other prohibited sources include national banks, and federal contractors.

A key question, however, is when recipients must use only hard money, and when they may use soft money.

The second attachment describes many of the more common circumstances in which hard money must be used, and when soft money may be used. I caution that this chart is a general description only, and is subject to a number of caveats, including those mentioned in the endnotes.

I hope that these materials and other materials that the Commission has provided in response to your earlier requests will be helpful. I look forward to seeing you this afternoon.

Sincerely,

DARRYL R. WOLD,
Chairman.

CONTRIBUTION LIMITS UNDER THE FECA

Donor	Recipient					Special Limits
	Candidate Committee	PAC[1]	Local Party Committee[2]	State Party Committee[2]	National Party Committee[3]	
Individual or Partnership	$1,000 per election[4]	$5,000 per year	$5,000 per year combined limit		$20,000 per year	$25,000 per year overall limit[5,8]
Local Party Committee[2]	$5,000 per election[4] combined limit	$5,000 per year combined limit	unlimited transfers to other party committees			
State Party Committee[2] (Multicandidate)[6]			unlimited transfers to other party committees			
National Party Committee[3] (Multicandidate)[6]	$5,000 per election[4]	$5,000 per year	unlimited transfers to other party committees			$17,500 to Senate candidate per campaign[7]
PAC[1] (Multicandidate)[6]	$5,000 per election[4]	$5,000 per year	$5,000 per year combined limit		$15,000 per year	
PAC[1] (Not Multicandidate)[6]	$1,000 per election[4]	$5,000 per year	$5,000 per year combined limit		$20,000 per year	

1 *These limits also apply to* nonconnected committees. Affiliated committees *share the same set of limits on contributions received and made.*

2 *A* state party committee *shares its limits with local party committees in that state unless a local committee's independence can be demonstrated.*

3 *A party's national committee, Senate campaign committee and House campaign committee are each considered* national party committees, *and each have separate limits, except with respect to Senate candidates. See Special Limits column.*

4 *Each of the following is considered a separate* election *with a separate limit: primary election, caucus or convention with authority to nominate, general election and special election.*

5 *A contribution to a* party committee *or a PAC counts against the annual limit for the year in which the contribution is made. A contribution to a candidate counts against the limit for the year of the election for which the contribution is made.*

6 *A multicandidate committee is a political committee that has been registered for at least 6 months, has received contributions from more than 50 contributors and—with the exception of a state party committee—has made contributions to at least 5 federal candidates.*

7. *This limit is shared by the national committee and the Senate campaign committee.*

8. *The $25,000 yearly limit does not apply to partnerships.*

Source: *Campaign Guide for Congressional Candidates and Committees*, Federal Election Commission, 1999.

USE OF HARD MONEY AND SOFT MONEY UNDER THE FECA [i]

RECIPIENT / USE	FECA HARD $ ONLY [ii]	SOFT $ PERMITTED [iii]
FEDERAL CANDIDATES		
CANDIDATE'S CAMPAIGN	100 %	
POLITICAL PARTIES		
CONTRIBUTIONS TO FEDERAL CANDIDATES		
DIRECT CONTRIBUTIONS [iv]	100 %	
COORDINATED EXPENDITURES [v]	100 %	
EXPRESS ADVOCACY (INDEPENDENT EXPENDITURES)	100 %	
PARTY BUILDING (VOTER REGISTRATION, VOTER TURNOUT)	65 % [vi]	35 %
ISSUE/LEGISLATIVE ADVOCACY [vii]	65 % [viii]	35 %
STATE AND LOCAL CANDIDATE SUPPORT [ix]		100 %
PACS; ADVOCACY ORGANIZATIONS		
CONTRIBUTIONS TO FEDERAL CANDIDATES		
DIRECT CONTRIBUTIONS	100 %	
COORDINATED EXPENDITURES	100 %	
EXPRESS ADVOCACY (INDEPENDENT EXPENDITURES)	100 %	
ISSUE/LEGISLATIVE ADVOCACY [x]		100 %
STATE AND LOCAL CANDIDATE SUPPORT [xi]		100 %

[i] The FECA is the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 et seq. This chart is not an exhaustive description of the treatment of all contributions and expenditures under the Act, and is not a complete statement of the applicable law. The term "hard money" refers to contributions that comply with the limitations and prohibitions of the Act on the amount and permissible sources of contributions made for the purposes of influencing a federal election. The term "soft money" refers to donations that do not comply with those limitations and prohibitions.

[ii] Expenditures must be made with hard money, to the extent indicated in this column.

[iii] Expenditures can be made with soft money to the extent indicated in this column. (Hard money can also be used.)

[iv] The amount of direct contributions that a party may make to its candidates is limited by 2 U.S.C. § 441a, subdivisions (a)(2)(A) and (h).

[v] The amount of expenditures that a party may make in coordination with its candidates is limited by 2 U.S.C. § 441, subdivision (d)(3). The constitutionality of this limit is being challenged in *FEC v. Colorado Republican Federal Campaign Committee*. The 10th Circuit Court of Appeals recently held the limit unconstitutional (___ F.3d ___, 2000 WL 554688 (10th Cir. May 5, 2000). The Commission will be seeking review by the Supreme Court.

[vi] The ratios shown apply to national party committees, other than Senate and House campaign committees, during a presidential election year. In other years, the ratio for those committees is 60% hard money to 40% soft money. For Senate and House campaign committees of the national parties, the hard money percentage is the greater of 65% or the percentage calculated on the funds expended basis. For state parties, the ratio is calculated by the ballot composition method. See 11 C.F.R. § 106.5.

[vii] The constitutionality of the requirement that a portion of a party's expenditures for issue/legislative advocacy be made from hard money is being challenged in *Republican National Committee, Redmon v. FEC* (D.D.C. No. 98-CV-1207).
If an expenditure for issue/legislative advocacy is coordinated with a candidate, and is for the purpose of influencing a federal election, then it is deemed to be a contribution to that candidate, and therefore must be made 100% with hard money (see line for coordinated expenditures, above).

[viii] As in the case of expenditures for party building (above), the ratios vary depending on the type of party committee making the expenditure, and whether it is an election year or not. See 11 C.F.R. § 106.5; Advisory Opinion 1995-25.

[ix] The use of "soft money" for support of state and local candidates may be limited by provisions of state or local law.

[x] As in the case of such expenditures by party committees, if an expenditure for issue/legislative advocacy is coordinated with a candidate, and is for the purpose of influencing a federal election, then it is deemed to be a contribution to that candidate, and therefore must be made 100% with hard money (see line for coordinated expenditures, above).

[xi] The use of "soft money" for support of state and local candidates may be limited by provisions of state or local law.

This chart is not an official publication of the Federal Election Commission. This chart alone should not be relied on as a definitive guide to permissible contributions or expenditures. The provisions of the FECA and the Commission's regulations should be consulted in every instance.

Prepared by the Office of
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FEDERAL ELECTION COMMISSION,
Washington, DC, July 28, 2000.

Hon. ARLEN SPECTER,
U.S. Senator, Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, Washington, DC.

DEAR SENATOR SPECTER: During the hearing before the Senate Judiciary, Subcommittee on Administrative Oversight and the Courts on June 21, 2000, you asked the Commission to supplement the record with information on two matters. First, you requested the Commission's views on possible legislative amendments to expedite the enforcement process by authorizing the Commission to seek injunctive relief earlier in the enforcement process. And, second, you asked whether a seventh Commissioner is advisable to remedy deadlocked votes at the Commission.

With respect to seeking timely injunctive relief, the Commission made a recommendation on this subject as part of its legislative recommendation package submitted to Congress in 1998. A copy of that recommendation is enclosed, including the dissent of one Commissioner. In 1999, however, that recommendation did not receive four affirmative votes for inclusion in our legislative recommendation package, and has not been included since.

With regard to the FEC's structure, the Commission never has taken a position, or discussed this issue as a policy matter. As you know, Congress carefully structured the Agency by requiring that no more than three of the six members may be from the same political party. In addition, the statute requires at least four votes to pursue a violation or issue a ruling. This precludes either party from gaining control of the FEC and using the Commission for partisan purposes. Commissioners work hard to avoid 3–3 deadlocks. As Vice Chairman McDonald noted during the hearing, however, while all Commissioners have a thorough knowledge of the law, we legitimately differ over a number of fundamental issues.

Under the current structure, to the extent 3–3 votes occur, there is a system in place to review the issue when it reaches the enforcement stage. As provided by the statute, a complainant who is aggrieved by the FEC's failure to pursue a complaint can sue the Agency in U.S. District Court. If the court concludes the position of those voting not to pursue the matter is contrary to law, the court may order the FEC to act on the matter, and may even allow the complainant to sue the respondent directly. Thus, the courts can resolve 3–3 deadlocks of the enforcement process under these circumstances.

As the public record reflects, however, these 3–3 deadlocks along partisan lines on controversial matters are rare occurrences. For example, a study the Commission conducted last year concluded about 2.56% of Commission votes resulted in some sort of split or deadlock vote. Specifically, of the 4,725 Commission votes cast from 1993 through early 1999, only 121 (2.56%) resulted in a 3–2 or 3–3 deadlock. IN addition, for your information, I have enclosed a response submitted to the House Appropriations Subcommittee answering questions for the record last year which address the Clinton and Dole Audits specifically.

Thank you for giving the Commission the opportunity to appear before the Committee. If the Committee has additional questions, please do not hesitate to contact me.

Sincerely,

DARRYL R. WOLD,
Chairman.

Expedited Enforcement Procedures and Injunctive Authority
Section: 2 U.S.C. §437g

Recommendation: The Commission recommends that Congress consider whether the Act should provide for expedited enforcement of complaints filed shortly before an election, permit injunctive relief in certain cases, and allow the Commission to adopt expedited procedures in such instances.[2]

Explanation: The statute now requires that before the Commission proceeds in a compliance matter it must wait 15 days after notifying any potential respondent of alleged violations in order to allow that party time to file a response. Furthermore, the Act mandates extended time periods for conciliation and response to recommendations for probable cause. Under ordinary circumstances such provisions are advisable, but they are detrimental to the political process when complaints are filed immediately before an election. In an effort to avert intentional violations that are committed with the knowledge that sanctions cannot be enforced prior to the election, and to quickly resolve matters for which Commission action is not warranted, Congress should consider granting the Commission some discretion to deal with such situations on a timely basis.

Even when the evidence of a violation has been clear and the potential impact on a campaign has been substantial, without the authority to initiate a civil suit for injunctive relief, the Commission has been unable to act swiftly and effectively in order to prevent a violation. The Commission has felt constrained from seeking immediate judicial action by the requirement of the statute that conciliation be attempted before court action is initiated, and the courts have indicated the Commission has little if any discretion to deviate from the administrative procedures of the statute. *Perot '96 and Natural Law Party v. FEC et al.*, Nos. 96-2196 and 96-2132 (D.D.C. 1996), *aff'd*, 97 F.3d 553, (D.C. Cir. 1996); *RNC v. DNC and FEC*, No. 96-2494 (D.D.C. 1996); *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir. 1980); *Common Cause v. Schmitt*, 512 F.Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982); *Durkin for U.S. Senate v. FEC*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶9147 (D.N.H. 1980).

If Congress allows for expedited handling of compliance matters, it should authorize the Commission to implement changes in such circumstances to expedite its enforcement procedures. As part of this

[2] Commissioner Elliott filed the following dissent:

The Act presently enables the Commission to seek injunctive relief after the administrative process has been completed and this is more than sufficient. (See 2 U.S.C. §437g(a)(6)(A).)

I am unaware of any complaint filed with the Commission which, in my opinion, would meet the four standards set forth in the legislative recommendations. Assuming a case was submitted which met these standards, I believe it would be inappropriate for the Commission to seek injunctive relief prior to a probable cause finding.

First, the very ability of the Commission to seek an injunction, especially during the "heat of the campaign," opens the door to allegations of an arbitrary and politically motivated enforcement action by the Commission. The Commission's decision to seek injunction in one case while refusing to do so in another could easily be seen by candidates and respondents as politicizing the enforcement process.

Second, the Commission might easily be flooded with requests for injunctive relief for issues such as failure to file an October quarterly or a 12-day pre-general report. Although the Commission would have the discretion to deny all these requests for injunctive relief, in making that decision the Commission would bear the administrative burden of an immediate review of the factual issues.

Third, although the courts would be the final arbiter as to whether or not to grant an injunction, the mere decision by the Commission to seek an injunction during the final weeks of a campaign would cause a diversion of time and money and adverse publicity for a candidate during the most important period of the campaign.

For these reasons, I disagree with the recommendation to expand the power of the Commission to seek injunctive relief except as presently provided for the Act.

effort, Congress should consider whether the Commission should be empowered to promptly initiate a civil suit for injunctive relief in order to preserve the status quo when there is clear and convincing evidence that a substantial violation of the Act is about to occur. Congress should consider whether the Commission should be authorized to initiate such civil action in a United States District Court, under expressly stated criteria, without awaiting expiration of the 15-day period for responding to a complaint or the other administrative steps enumerated in the statute. The person against whom the Commission brings the action would enjoy the procedural protections afforded by the courts.

The Commission suggests the following legislative standards to govern whether it may seek prompt injunctive relief:

1. The complaint sets forth facts indicating that a potential violation of the Act is occurring or will occur;

2. Failure of the Commission to act expeditiously will result in irreparable harm to a party affected by the potential violation.

3. Expeditious action will not result in undue harm or prejudice to the interests of other persons; and

4. The public interest would be served by expeditious handling of the matter.

CLINTON AND DOLE AUDITS

Mr. HOYWER. You read in the Washington Post that this 3–3 vote cost us $25 million in recompense from the Dole and the Clinton campaigns. Could you comment on that. What about the Washington Post premise (editorial)—and other premises that, because you have this 3/3 split, you really have a toothless tiger that can't do anything when it readlly gets tough because the parties will sort of block up, lock up and confirm one another and no resolution will be forthcoming. My view is it can work if we have six honest people who want to do a job to enforce the law. Please respond.

[The information follows:]

With respect to the recent votes in the Clinton and Dole campaign audits, it is true the commissioners did reduce substantially the staff's recommended public funding repayment determinations. The staff recommended that the Dole primary campaign repay about $2.5 million and that the Dole general campaign repay about $14.5 million. The staff recommended that the Clinton primary campaign repay about $7 million and that the Clinton general campaignn repay less than $.5 million.

The vast majority of the staff's recommended repayment amounts stemmed from spending by the party committees assertedly in coordination with or in support of the candidate committees. The staff believed: (1) the party spending should be attributed to the candidates' spending limitations in the nomination phase or general phase, (2) this caused the candidates to exceed the limitations, and (3) the candidates thereby incurred repayment obligations regarding the "non-qualified" excessive spending.

The commissioners unanimously agreed that most of the party spending at issue should be attributed to the primary phase based on when it occurred. This by itself reduced the total potential Dole repayment from about $17 million to about $8 million. Then, however, the commissioners failed by a vote of 3–2 (and 1 absention) to pass a motion to interpret the primary funding statute in a way that would preclude the FEC from ordering repayment based on excessive primary spending. Thus, the bulk of the remaining repayment recommended by the staff fell short of the 4 vote majority required. The adjusted potential Dole primary repayment for excessive spending was reduced from about $5.5 million to $zero, and the potential Clinton campaign repayment for excessive spending went from about $7 million to $zero. A copy of materials explaining the alternative viewpoints on the issue that led to the 3–2 vote can be found at Attachment 3 at the end of the questions.

It must be noted that one of the most controversial elements of the potential repayment amounts involved party spending for ads that included reference to one or the other of the presidential candidates. After the 3–2 vote referred to above, there was a unanimous vote rejecting the staff recommendation to require repayment from the primary campaign committees stemming from all of the ads identified in the audit reports. Different commissioners voiced different reasons for supporting the motion, however. Clearly, at least three believed the FEC had no legal authority to seek repayment; some believed that some, but not all, of the ads should generate a repayment; and some believed that none of the ads should generate a repayment.

There were remaining repayment obligations, even after the foregoing votes. The Commission approved repayments for the Dole campaign totaling about $3.7 million and for the Clinton campaign totaling about $140,000.

With respect to whether the FEC's structure—with 3 Democrats and 3 Republicans, historically—results in a "toothless tiger," there are proponents on either side of the debate. Perhaps the following would help assess this oft-reported charge.

Many, including Republican and Democratic party representatives, have argued the FEC is too tough. For example, when in 1991 the FEC required parties to use set allocation formulas for party building expenses, forbade non-federal account advance payments, and required disclosure of national party "soft money" receipts, many party officials were not pleased. Moreover, given the number of compliance cases the FEC has pursued against Republican or Democratic party entities over the years, it would be difficult to argue the FEC has been "toothless." See, e.g., MUR 4398 ($82,000 civil penalty regarding Republican Party of Florida receiving prohibited contribution); MUR 3620 ($75,000 civil penalty regarding DSCC's tally system).

On the other hand, the FEC has been unable to reach a 4-vote consensus on several difficult, controversial issues affecting party entities or other players in the political process. For example, the FEC split 3–3 on whether the NRSC's practice of routing donors' funds to particular candidates was a form of "direction or control" that should affect the NRSC's own contribution limits. See, *FEC* v. *National Republican Senatorial Committee,* 966 F.2d 1471 (D.C. Cir. 1992). The FEC also split 3–3 on whether certain contributions the 1992 Clinton campaign received after the

nomination were improperly treated by the campaign as general election compliance fund proceeds. See, *Gottlieb* v. *FEC,* 143 F.3d 618 (D.C. Cir. 1998).

The structure of the FEC is designed to assure that no one political party can force its will on other parties regarding FEC matters. The importance of that goal probably outweighs the problems generated by occasional 3–3 split votes. It should be noted, moreover, that 3–3 votes in enforcement matters can be brought to the courts by an aggrieved complainant. See 2 U.S.C. § 437g(a)(9).

On balance over the years, the FEC has shown an ability to reach consensus on most of the issues that come before it. The Commission has conducted 4,725 votes since 1993. Only 121 (2.56%) of these votes resulted in a 3–3 or 3–2 margin. While we have not attempted to analyze each of the 3–3 and 3–2 votes, they have not always been along party lines. These figures indicate that the phenomenon of split votes is a relatively rare occurrence in the Commission's overall operations. The fact that commissioners of more than one party approve any majority vote lends credibility to FEC decisions.

Compared to the situation that existed before the FEC's creation, the attention to enforcement of the law is certainly greater. Whereas before the FEC's creation thousands of referrals of violations to the Department of Justice were simply ignored, the FEC has activated over 4,000 compliance cases and conducted over 500 full-scope audits. Over the last 10 years the FEC has collected over $7 million in civil penalties. The auditing of publicly funded committees has yielded over $10 million in repayments. These actions, against persons and entities of all political stripes, have proceeded with majority votes reflecting a political consensus among the six commissioners.

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