825 CASE - MOTIONS

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL, Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

MAY IT PLEASE THE COURT,

SUMMARY OF ARGUMENT AS TO PART I OF MOTION

Defendant, Jim Guy Tucker, moves to dismiss this indictment for lack of jurisdiction, and for violations of his rights under the Grand Jury and due processes of Amendment V to the Constitution of the United States, and under Rule 6, FRCrP.

We acknowledge that the language of the order which defines the jurisdiction of Mr. Starr as Independent Counsel contains the words "James McDougal's" on a parity with the names of the President and his First Lady. It will be argued that the Special Division of the District of Columbia Court of Appeals, the administrative body which the Act (28 USC §591, et seq.) authorizes to appoint independent counsel and define his jurisdiction, has designated that James McDougal a "certain covered person" under the Statute, 28 USC §591(a), and that the order cannot be questioned. We submit to the contrary: that the Special Division and the Attorney General have no power to make a non-person into a "certain covered

person" because the statute that creates the entire process does not allow its application beyond "certain covered persons".

The statute was passed to provide for the investigation and prosecution of high officials of the Executive Branch. Morrison v. Olson, 487 US 654, 659 (1988). McDougal is not such a high official. If McDougal acts in a manner which is not in concert with any actions of the President, then Independent Counsel should be found to have no jurisdiction.

Independent Counsel should not, by his ability to persuade a Grand Jury to return an indictment, be accorded powers which he simply does not have - whether or not the Special Division has said that he has those powers. His powers come from the statute, and this statute does not provide any powers to independent counsel to handle criminal cases which are not related to an investigation or prosecution of a statutory "certain covered person", which, in this case, can mean only the President.

This case involves an Independent Counsel appointed, lawfully, to look into the relationship between the President (a "certain covered person"), two financial institutions and the Whitewater Developement Co. This is as far as the Act can carry. This indictment is beyond the borders of that inquiry.

SUMMARY OF ARGUMENT AS TO PART II OF THE MOTION

Our second claim for dismissal arises from the fact that

it has been adjudicated by another Judge of this Court that Independent Counsel went before the same Grand Jury that returned this indictment on another matter which became indictment number LR-CR-95-117 - U.S. v. Tucker, Marks, and Haley. That first indictment was returned June 7, 1995, and this indictment was returned August 17, 1995. If Independent Counsel had no jurisdictional right to be before that Grand Jury on the matter of the first indictment, then an unauthorized person, and his deputies, and his witnesses, have spent months before the Grand Jury attacking Tucker, as to matters not involved in this indictment, but nevertheless defamatory of Tucker. We submit the first indictment as our proof that these appearances were prejudicial - because they caused an indictment. The subject matter which was unlawfully before the Grand Jury is reflected in the first indictment. Many witnesses, including [redacted] were called before that Grand Jury.

This is a plain violation of Rule 6(d), FRCrP, and operated to deprive Tucker of his right to a fair presentment under the grand jury clause of Amendment V, as well as under the due process clause of that Amendment.

For these reasons, we submit that this indictment should be dismissed.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

I.

THE "INDEPENDENT COUNSEL" ACT DOES NOT PROVIDE THE SPECIAL DIVISION WITH UNLIMITED AUTHORITY.

The Special Division, an administrative body consisting

of judges, has the duty of selecting Independent Counsel on petition of the Attorney General, and of setting forth the "scope of prosecutorial jurisdiction". (28 USC, §593(b)(2)(3)). It has no powers other than those granted to it by the Act.

In this case, the jurisdictional statement, quoted in our motion, says:

> "Whether any individuals or entities have committed a violation of any federal criminal law...relating in any way to James B. McDougal's, President...Clinton's or Mrs....Clinton's relationship with Madison Guaranty..., Whitewater Development Corp., or Capital Management Services, Inc."

This grant of jurisdiction exceeds the authority of the Special Division.

The Special Division has only the authority to grant jurisdiction which is given to it by both the Act and the application of the Attorney General.

The Act begins with the words "Preliminary investigation with regard to <u>certain covered persons</u>". 28 USC, §591(a). (emphasis supplied).

The entire authority of the Attorney General and of the Special Division is derived from the Act, which, after providing for preliminary investigation in §591(a) has a section "b" which says "<u>Persons to whom subsection (a) applies</u>". 28 USC §591(b).

That subsection (b) has as item 1 "The president and vice-president". Neither is involved in this case.

The purpose of the Act is to provide an independent counsel to prosecute people in the Executive Department who, by their position, would have an apparent conflict of interest with the Attorney General.

The Act mentions other people of a high executive level at the executive office of the President, it covers cabinet members, assistant attorneys general, the Director of CIA and his deputy, the Commissioner of Internal Revenue and the chairman and treasurer of the National Campaign Committee for the President. All of these officials are within the definition of "certain covered persons".

The Act also provides for the circumstance in which the attorney general decides not to make an investigation because of a personal conflict of interest. (28 USC, §591(c)). This case involves no recusal of the Attorney General.

In this case, the Independent Counsel announced, with the return of this indictment, that the President of the United States was not involved. (See Press Release, Ex. "2" to Motion). The affidavit of Tucker, attached to the motion, establishes that neither Tucker, nor either of the other two defendants, has even been or is a member of the Executive Branch of the United States government. No defendant is a "certain covered person".

It is therefore plain that neither the Attorney General nor the Special Division can make James McDougal into a "certain covered person" as defined in Section 591(b). Mr.

McDougal is simply not eligible to be included within the definition of "certain covered persons" found in Section 591(b) of the statute. His status cannot be changed from ordinary to extraordinary simply by a signature.

The purpose of this statute was made plain in the only Supreme Court case on this subject, Morrison v. Olson, 487 U.S. 654 (1988). In upholding the statute, in a limited way, the Morrison court described the statute in these words at page 659:

> "(The Act) allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high ranking government officials for violations of federal criminal laws."

The Morrison court made it plain that it did not "think that Congress may give the Division unlimited discretion to determine the independent counsel's jurisdiction." (p. 679).

The Court also noted that "...the Special Division has no authority to take any action or undertake any duties that are not authorized by the Act." (p,. 682).

The Act is narrowly construed, because, as the Supreme Court stated in Morrison (682):

> "...it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities...and to that end we think a narrow construction is appropriate here."

The Act was held constitutional in Morrison, but only with a narrow construction that confined it precisely to its terms.

The Act, in §591(b), answers the question "who may be

the subject of the actions of independent counsel. The persons to whom independent counsel may pay his attentions are those listed in Section 591(b). Neither McDougal, nor Tucker, nor Ms. McDougal are among that class of persons subject to the Act.

It could be argued that non-persons may be indicted if they act in concert with a "certain covered person". But, there must be a concerted action, and no such action is alleged here. Upon filing this indictment Independent Counsel issued a press release which stated that the "certain covered person" he was appointed to investigate was not involved. (Ex."2").

In In re Olson, 818 F.2d 34 (Spec. Div. 1987) Olson, a high official and a statutory "certain covered person" had some connection to lesser officials, Schmults and Dinkins. The Court commented, at page 48, that:

> "...the independent counsel has continuing jurisdiction to investigate the actions of Schmults and Dinkins only insofar as they were part of a concert of action with Olson, in violation of federal criminal law."

Independent counsel may not indict purported criminal conduct simply because he chances across some person he would like to indict while acting as the Independent Counsel. U.S. v. Tucker, et al., Eastern Dist. of Arkansas, 9/5/95 (Opinion attached to motion). There must be some connection between the acts alleged in the indictment and a "certain covered person". There must be some concert of action between the

defendant and the "certain covered person". Olson, supra, 818 F.2d at 48.

Here, Independent Counsel announced with the filing of this indictment that there is no connection between this case and Mr. Clinton. (Ex. "2") No other "certain covered person" is or ever has been mentioned in the Whitewater publicity.

Whatever Whitewater may be, there is no allegation in the indictment that this case is part of "Whitewater", and it appears affirmatively that it is not. The Whitewater prosecutor is not a general agent of the Attorney General for the purpose of the enforcement of all the criminal laws. His authority is restricted and narrow, and there must be some demonstrable relationship between this indictment and Whitewater for this action of Independent Counsel to be within his jurisdiction. There is no demonstrable relationship, and our motion should be granted. See, U.S. v. Secord, 725 F.Supp. 563, 567 (DDC 1989) (defines the required demonstrable relationship between a wrongful act and the jurisdiction of an independent counsel).

II.

JURISDICTION MAY BE PROPERLY DECIDED BY THIS COURT AT THIS TIME.

Independent Counsel will contend that this Court has no authority to make the jurisdictional decision as to the jurisdiction of this Court. The jurisdiction depends on the status of Mr. McDougal as a "certain covered person".

This exact point was raised in U.S. v. Tucker, cited above, and was rejected by the Court.

This argument was correctly rejected; the Court before whom a case is to be tried has the right and power to decide whether or not a person before the Court is such a person as is described in the statute.

The Supreme Court so held in Gutierrez v. Lamagno, 515 US ___, 132 L.Ed.2d 375 (1995).

In Gutierrez there was an automobile accident in Columbia in which a DEA employee injured certain Columbian citizens. The injured Columbians brought suit in the United States. The United States Attorney, under the Federal Tort Claim Act, certified that the government employee was acting within the scope of his employment at the time of the accident. This had the effect of terminating the case, because the Federal Tort Claim Act does not waive sovereign immunity as to accidents which occur overseas.

Gutierrez contested the certification, because Lamagno, the agent was out for the evening with a lady when the accident occurred. Gutierrez argued that the determination as to scope of employment was "groundless and untrustworthy". 132 L.Ed.2d at 383.

The trial court held that the certification was unreviewable, substituted the United States for Lamagno and dismissed the case on the ground of sovereign immunity.

The Supreme Court saw the question as who decides on

which side of the line the case falls: the local U.S. Attorney, unreviewably or, when that official's decision is contested, the Court.

The Supreme Court held that the court must decide the question, declining to find that Congress intended the federal court to be "a rubber stamp" (p. 387, note 6). The court had the jurisdiction to decide the statutory status of the litigant before it.

The Eighth Circuit Court of Appeals held the same way in U. S. v. Juvenile Male, 923 F.2d 614 (8th Cir. 1991). In that case the Attorney General certified a juvenile for prosecution as an adult on the basis that he had committed "a crime of violence". The Attorney General argued that his decision on the "crime of violence" question was conclusive and that his decision could not be questioned in court. The Eighth Circuit held to the contrary, although it did hold that the juvenile involved had committed a "crime of violence".

In this case, the question is whether or not James McDougal is a "certain covered person". A reading of Section 591(b) of the Act, defining "person" shows that he is not. Judge Woods, in U.S. v. Tucker, supra, the Supreme Court in Gutierrez, and the Eighth Circuit in Juvenile Male all hold that the question of an individual's status before the law is not to be decided ex parte by the Attorney General, and is to be decided by the court before whom the case comes.

In this case, at this time, this Court must decide whether not Mr. McDougal is a "certain covered person" even though he is mentioned in the order of the Special Division. The fact itself, that he is not a "certain covered person", could not be questioned. He simply is not.

The indictment should be dismissed for want of jurisdiction.

IN SUPPORT OF PART TWO OF THE MOTION TO DISMISS

I.

RULE 6(e) FORBIDS PERSONS WITH NO AUTHORITY FROM THE PRESENCE OF THE GRAND JURY.

Rule 6(d) of the Federal Rules of Criminal Procedure answers the question "Who may be present" before the grand jury; the Rule says:

> "d. Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer...may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

In this case, it has been adjudicated, by the decision in U.S. v. Tucker, LR-CR-95-117, decided September 5, 1995, that Mr. Starr and his deputies had no authority whatever to be in the grand jury or to present that case. They were acting outside their jurisdiction, which means, in substance, that they had no authority whatever to be in the Grand Jury room presenting evidence.

What the grand jury heard in that prior case is set forth in the prior indictment (Ex. 3). The prior indictment

details a series of transactions and an allegedly fraudulent bankruptcy in Texas, and charges that those transactions amounted to criminal acts. We know, therefore, that the Independent Counsel deputies who appeared before the grand jury presented evidence and made the contention that Tucker was a criminal. We also know that twelve grand jurors accepted those contentions and voted to indict.

And, Independent Counsel was beyond his jurisdiction when he sent his deputies into that Grand Jury.

And then, as we know from the present indictment, Independent Counsel persuaded the same grand jury to return an indictment against Tucker, which, while unrelated to the matters stated in the first indictment, involves allegations of illegal transactions with Capital Management Services, and other alleged crimes of a financial nature.

The prejudice to Tucker is plain. The grand jury that should have considered his case fairly had to consider it after months of derogatory hearings on an unrelated subject, all relating to and directed at Tucker.

This is unfair, and it is not the purpose of guaranteeing the right to presentment by a grand jury to limit that right to an unfair grand jury. See Amendment V, Grand Jury Clause. It amounts to the use of an authorized special prosecutor, and therefore violates due process of law. East v. Scott, 55 F.3d 996 (1995).

Unauthorized persons in the grand jury, whether to the

prejudice of the target or not, resulted in the dismissal of indictments on a per se basis for a long time. See, Latham v. United States, 226 Fed. 420, 424 (5th Cir. 1915); U.S. v. Braniff Airways, Inc., 428 F.Supp. 579, 589 (WD Tex. 1977) and U.S. v.. Lill, 511 F.Supp. 50 (SD WVa. 1980).

In 1988, the Supreme Court changed the law, to say that there must be a showing of prejudice before a Rule 6(d) violation would invalidate a conviction after trial. Bank of Nova Scotia v. U.S., 487 US 250 (1988). But, the concurring Justices noted that the application of the harmless error standard, following the case of U.S. v. Mechanik, 475 US 66 (1986) would lead to reversal

> "...if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations."

It is necessary only to conclude that the violation "may have had substantial influence on the outcome of the proceeding.". Bank of Nova Scotia v. U.S., supra, 487 US at 256. And, Nova Scotia, if reversed, would have required a re-trial of a long case that had been tried once. We are not in that situation.

We contend that there is surely "grave doubt" that a grand jury could hear evidence on the complex case revealed in the first indictment and then bring to the task of considering the charges in the second indictment a clear and unbiased mind so as to accord Tucker a fair presentment and

due process of law.

Even under the "harmless error" type of analysis, this unauthorized presence in the grand jury is wrong and needful of inquiry. See, U.S. v. Busch, 795 F.Supp. 866 (ND Ill. 1992).

Grand jury abuse does occur, and it has occurred in this circuit. Brown v. U.S., 245 F.2d 549 (8th Cir. 1957).

Brown followed U.S. v. Icardi, 140 F.Supp. 383 (DC DC 1956) in holding that an untrue statement before a grand jury in the presence of what amounted to an unauthorized prosecutor could not be prosecuted as perjury. The conviction was reversed because anything done in a grand jury beyond the authority of the prosecutor is nullified.

We contend that prejudice is obvious from the face of the record; the first indictment reveals what the grand jury heard. The grand jury was persuaded by the prosecutor, acting beyond his jurisdiction, to indict as to those allegations. The same grand jury brought this indictment.

Should it be argued, and should the Court be convinced, that grave doubt as to prejudice is not obvious from the record, then the way could be pointed by U.S. Busch, supra, 795 F.Supp. 866, which faced a minor breach of Rule 6(d), and handled the matter by making an inquiry of the grand jury foreperson and the sworn alternate juror who had not been impaneled but who had been in the grand jury room.

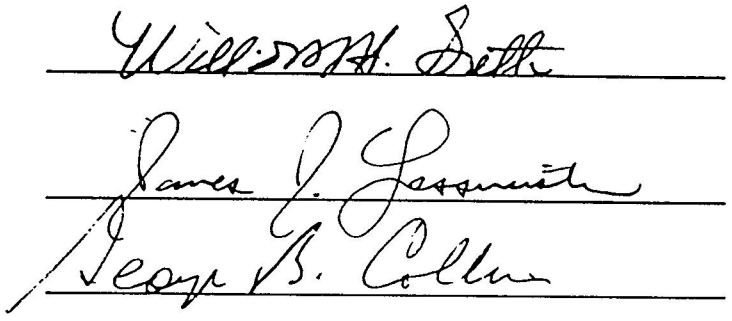
We recognize that the decision of Judge Woods of

September 5th, holding that the prosecutor acted beyond his jurisdiction, has been appealed by Independent Counsel to the Court of Appeals for the Eighth Circuit. We cannot, of course, represent that it will be affirmed, but neither can Independent Counsel represent that it will be reversed. As it stands today, that opinion is precedent and is an adjudication and it does establish that the Whitewater prosecutor was wrongly in the presence of the grand jury on the subject of Tucker for months before this indictment was returned.

This contention is made as Part II because we contend, in Part I, that this indictment, too, was an unlawful exercise of the jurisdiction of Independent Counsel, beyond the authority of the statute.

We pray, for the reasons set forth above and in our motion, that the indictment be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

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STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

AFFIDAVIT OF JIM GUY TUCKER

Jim Guy Tucker, on oath, states as follows:

1. I am one of the defendants in U.S. vs. McDougal, et al, LR-CR-95-173.

2. I am not, and have never been, an officer or member of the Executive Department of the United States Government.

3. I know the co-defendants in this case. To my certain knowledge, neither is or has ever been an officer or member of the Executive Department of the United States Government.

Further affiant sayeth not

Jim G. Tucker

Subscribed and sworn to
before me this 25th day
of September, 1995.

Paulette B Craig

EXHIBIT

1

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August 17, 1995

FOR IMMEDIATE RELEASE

The following statement was issued by Independent Counsel Kenneth W. Starr from his office in Little Rock, Arkansas:

James B. McDougal, Jim Guy Tucker, and Susan H. McDougal were charged today by a federal grand jury in Little Rock, Arkansas in a 21-count indictment. The Indictment charges the defendants with respect to transactions involving Madison Guaranty Savings and Loan Association ("MGSL") and Capital Management Services, Inc. ("CMS"), a small business investment company licensed by the Small Business Administration and owned by David L. Hale.

At the time material to the charges in the Indictment, James B. McDougal was an owner of MGSL and president and chairman of the board of directors of Madison Financial Corporation, a wholly-owned subsidiary of MGSL. Jim Guy Tucker was an attorney in Little Rock who represented MGSL and CMS. Susan H. McDougal was the wife of James B. McDougal and an owner of MGSL.

Mr. McDougal was indicted on 19 felony counts: Conspiracy in violation of 18 U.S.C. § 371 (Count One); Wire Fraud in violation of 18 U.S.C. § 1343 (Counts Two and Three); Bank Fraud in violation of 18 U.S.C. § 1344 (Count Four); Mail Fraud in

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violation of 18 U.S.C. § 1341 (Counts Five, Eight, Twelve and Thirteen); Fraudulent Participation in violation of 18 U.S.C. § 1006 (Count Six); Making or Causing the Making of a False Statement to a Financial Institution in violation of 18 U.S.C. § 1014 and § 2 (Counts Seven, Eleven and Sixteen); Misapplying Financial Institution Funds in violation of 18 U.S.C. § 657 and § 2 (Counts Nine, Fourteen, Seventeen and Eighteen); Making or Causing the Making of a False Entry in the Reports and Statements of a Small Business Investment Company in violation of 18 U.S.C. § 1006 and § 2 (Counts Ten, Fifteen, and Nineteen).

Mr. Tucker was indicted on 11 felony counts: Counts One through Four, and Counts Eight through Twelve, described above, as well as Misapplying Financial Institution Funds in violation of 18 U.S.C. § 657 and § 2 (Count Twenty); and Making or Causing the Making of a False Entry in the Reports and Statements of a Small Business Investment Company in violation of 18 U.S.C. § 1006 and § 2 (Count Twenty-One).

Ms. McDougal was indicted on 8 felony counts: Counts One through Three, and Counts Twelve through Sixteen, described above.

Conviction on each count of the Indictment is punishable by imprisonment of up to five years, a fine of up to $250,000, and a special assessment of $50, excepting conviction for Making or Causing the Making of a False Statement to a Financial Institution (18 U.S.C. § 1014), which is punishable by imprisonment of up to two years, a fine of up to $250,000, and a

special assessment of $50.

An indictment is merely an accusation and a defendant is presumed innocent unless and until proven guilty.

The Indictment does not charge criminal wrongdoing by President William Jefferson Clinton or First Lady Hillary Rodham Clinton.

The Independent Counsel's investigation is continuing.

NOTE: Copies of the Indictment are available in the Independent Counsel's offices in Little Rock, Arkansas and Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	No. LR-CR-95-117
	)	
v.	)	
	)	18 U.S.C. § 371
JIM GUY TUCKER,	)	18 U.S.C. § 1014
WILLIAM J. MARKS, SR.,	)	18 U.S.C. § 2
and JOHN H. HALEY	)	

INDICTMENT

The Grand Jury charges:

COUNT ONE

Introduction

At various times material to this Indictment:

1. In 1987, Defendant JIM GUY TUCKER was a practicing attorney in Little Rock, Arkansas. During 1987, Defendant JIM GUY TUCKER represented Capital Management Services, Inc. He was also involved in the cable television business.

2. In 1987, Defendant WILLIAM J. MARKS, SR. was a businessman involved in the cable television industry.

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3. Betty Tucker was the wife of Defendant JIM GUY TUCKER.

4. The Small Business Administration ("SBA") was an agency of the United States Government with responsibility for licensing and providing capital to small business investment companies ("SBICs") in order to aid SBICs in lending money to small business concerns.

5. Capital Management Services, Inc. ("CMS"), was a privately-owned SBIC, licensed by the SBA under the Small Business Investment Act of 1958, and located in Little Rock, Arkansas. CMS specialized in making loans to socially or economically disadvantaged small business concerns.

6. D&L Telecommunications, Inc., ("D&L") was a Florida corporation in which Defendant WILLIAM J. MARKS, SR. was a 50 percent shareholder. Defendant WILLIAM J. MARKS, SR. had less than 50 percent voting rights, and he was not an officer or director of D&L.

7. Fleet National Bank ("Fleet") was a commercial bank headquartered in Providence, Rhode Island.

8. State Street Bank and Trust Company was a commercial bank headquartered in Boston, Massachusetts.

9. In June 1987, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. arranged to borrow personally $8.5 million from Fleet and State Street (collectively "Fleet") for use in a joint cable television venture.

10. Fleet required that Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. pledge $500,000 cash as part of the collateral for the loan. Fleet required that the cash be placed into an escrow account at Fleet.

The Conspiracy

11. From on or about June 5, 1987, continuing through about September 1988, in the Eastern District of Arkansas and elsewhere, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR., did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury to commit an offense against the United States, namely, to knowingly make false material statements for the purpose of influencing the actions of Capital Management Services, Inc. ("CMS"), a federally licensed small business investment company, in connection with a $300,000 loan from CMS, in violation of Title 18, United States Code, Section 1014.

The Purpose of the Conspiracy

12. The purpose of the conspiracy was to make false statements and submit fraudulent documents to CMS for the purpose of influencing CMS to lend $300,000 for the personal use of the Defendants in connection with a joint cable television venture.

Manner and Means of the Conspiracy

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

13. It was a part of this conspiracy that the Defendants would and did apply to CMS for a loan of $300,000.

14. It was a further part of this conspiracy that the Defendants would and did represent to CMS that the borrower and beneficiary of the $300,000 loan would be D&L Telecommunications, Inc.

15. It was a further part of this conspiracy that Defendant JIM GUY TUCKER would and did represent to CMS that D&L was beginning business in Arkansas, when in fact D&L never did business, intended to do business, or applied to do business in Arkansas.

16. It was a further part of this conspiracy that Defendant WILLIAM J. MARKS, SR. would and did sign CMS loan documents as president of D&L, when in fact he was neither an officer of D&L nor authorized to act as an officer of D&L.

17. It was a further part of this conspiracy that the Defendants would and did arrange for Betty Tucker to sign a promissory note to CMS as secretary of D&L, when in fact she was neither an officer of D&L nor authorized to act as an officer of D&L.

18. It was a further part of this conspiracy that, instead of using the proceeds of the CMS loan to benefit D&L, the Defendants would and did arrange for the proceeds of the CMS loan to be placed into an escrow account at Fleet as collateral for the Fleet personal loan to the Defendants.

19. It was a further part of this conspiracy that the Defendants later would and did create false documentation to make it appear that D&L had ratified retroactively the actions of Defendant WILLIAM J. MARKS, SR. and Betty Tucker.

20. It was further part of this conspiracy that the Defendants would and did repay the CMS loan with proceeds of the sale of cable television systems acquired with the proceeds of the Fleet loan.

21. It was a further part of this conspiracy that the Defendants would and did cause CMS to submit a document to the SBA representing falsely that the $300,000 lent by CMS was for working capital of D&L Telecommunications, Inc.

22. It was a further part of this conspiracy that the Defendants would and did cause CMS to represent falsely to the SBA that the stock of D&L was owned 50 percent by Defendant WILLIAM J. MARKS, SR. and 50 percent by Betty Tucker, that Defendant WILLIAM J. MARKS, SR. was president of D&L, and that Betty Tucker was secretary of D&L.

Overt Acts

In furtherance of the conspiracy, and to effect the objects and purposes of the conspiracy, the following overt acts were committed in the Eastern District of Arkansas, and elsewhere:

23. In or about early June 1987, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER asked the president of CMS for a loan of $300,000 to D&L.

24. On or about June 5, 1987, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER caused the president of CMS to transfer proceeds of the CMS loan to an escrow account at Fleet.

25. In or about June 1987, the exact date unknown, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER caused to be sent to the president of CMS a promissory note for $300,000, which promissory note was signed by Defendant WILLIAM J. MARKS, SR. as president of D&L, by Betty Tucker as secretary of D&L, and by Defendant JIM GUY TUCKER, Defendant WILLIAM J. MARKS, SR., and Betty Tucker as individual guarantors.

26. In or about June 1987, the exact date unknown, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER caused to be sent to the president of CMS a letter dated June 4, 1987, stating that "D&L is beginning business in Arkansas" and that D&L would be doing extensive work in underground cable construction in West Pulaski County.

27. On or about August 5, 1987, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER caused to be sent to CMS a loan document labeled "Size Status Declaration," which was signed by Defendant WILLIAM J. MARKS, SR., and a loan document labeled "Assurance of Compliance," which was signed by Defendant WILLIAM J. MARKS, SR. and attested by Defendant JIM GUY TUCKER, both of which identified D&L as the borrower of the $300,000 loan.

28. On or about August 7, 1987, in the Eastern District of Arkansas, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. caused to be created a letter to the actual president of D&L

purporting to confirm an agreement that Defendant WILLIAM J. MARKS, SR. and Betty Tucker were authorized to have acted as officers of the corporation to secure the loan from CMS, and that D&L would apply for authority to do business in Arkansas.

29. On or about January 5, 1988, Defendant JIM GUY TUCKER caused to be sent to CMS a check for $300,000, signed by Defendant JIM GUY TUCKER and Betty Tucker, to repay the loan to D&L.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

1. Paragraphs 1 through 10 of Count One are hereby realleged and incorporated by reference as though set forth herein.

2. On or about June 5, 1987, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER and Defendant WILLIAM J. MARKS, SR., aided and abetted by each other, knowingly made a false material statement and caused the making of a false material statement for the purpose of influencing the actions of Capital Management Services, Inc. ("CMS"), a federally licensed small business investment company, in connection with a $300,000 loan from CMS, in that the Defendants represented to CMS that the borrower and beneficiary of the $300,000 loan was a company called D&L Telecommunications, Inc., when in truth and in fact, as the Defendants well knew, the proceeds of the loan would not be used for D&L Telecommunications, Inc., but rather as collateral for a personal loan from Fleet National Bank to Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR.

All in violation of Title 18, United States Code, Section 1014, and Title 18, United States Code, Section 2.

COUNT THREE

Introduction

At various times material to this indictment:

1. Defendant JIM GUY TUCKER was a practicing attorney in Little Rock, Arkansas. He was also a businessman involved in the cable television industry. In early 1987, he owned 100 percent of the stock of an Arkansas corporation called Cablevision Management, Inc., and was the individual general partner of County Cable Limited Partnership.

2. Defendant WILLIAM J. MARKS, SR. was a businessman involved in the cable television industry. In early 1987, he owned 18 percent of the stock of Planned Cable Systems Corporation, and he was president of that corporation.

3. Defendant JOHN H. HALEY was a practicing attorney in Little Rock, Arkansas.

4. Donna Marks was the wife of Defendant WILLIAM J. MARKS, SR.

5. The Internal Revenue Code is legislation passed by Congress that governs the ascertainment, computation, assessment

and collection of revenue, including income taxes, by the United States Government, and the Internal Revenue Service is the agency of the United States Government that administers the Internal Revenue Code.

6. The "basis" of an asset for income tax purposes generally is the amount that the owner paid for the asset. Basis may be adjusted upward to reflect subsequent capital expenditures on the asset, or downward to reflect deductions for depreciation of the asset.

7. The "gain" on the sale of an asset is the sale price paid for the asset reduced by the adjusted basis. Generally, the seller of an asset must pay tax on the gain.

8. Subchapter C of the Internal Revenue Code treats corporations as independent tax-paying entities. A corporation operating under subchapter C rules is referred to as a "C corporation." Income earned by a C corporation is taxed to the corporation. If the income is distributed later to shareholders of the corporation, the same income generally is subject to taxation again as income to the shareholder.

9. Subchapter S of the Internal Revenue Code applies to "small business corporations," which are defined as certain domestic corporations with no more than 35 shareholders or more

than one class of stock. An eligible corporation may elect to be treated as an "S corporation" under the Internal Revenue Code. If such an election is made, the corporation generally is not subject to the corporate income tax. Corporate income, whether or not distributed to the shareholders, is taxed only once as income to the shareholders.

10. At the beginning of 1987, Cablevision Management, Inc., ("CMI"), was an Arkansas S corporation owned 100 percent by Defendant JIM GUY TUCKER. CMI managed cable television systems in Arkansas owned by County Cable Limited Partnership.

11. At the beginning of 1987, Planned Cable Systems Corporation ("PCS") was an Iowa C corporation owned 82 percent by Meredith Corporation and 18 percent by Defendant WILLIAM J. MARKS, SR.

12. In 1987, Meredith Corporation ("Meredith") was an Iowa corporation. In addition to owning 82 percent of the stock of PCS, Meredith held an income note ("the Income Note") that obligated PCS to pay Meredith $7.9 million, plus interest, for money lent by Meredith to PCS. In early 1987, Meredith wanted to sell its 82 percent of PCS stock and the Income Note for approximately $6 million.

13. Fleet National Bank ("Fleet") was a commercial bank

headquartered in Providence, Rhode Island.

14. State Street Bank & Trust Company was a commercial bank headquartered in Boston, Massachusetts.

15. Landowners Management Systems, Inc., ("LMS") was a Texas C corporation. Prior to November 1987, LMS had issued no shares, had done no business, and had owned no tangible assets.

16. Mikado Leasing Company ("Mikado") was an Arkansas corporation incorporated in 1971. Defendant JOHN H. HALEY was president of the company from 1972 to 1987. Mikado's primary business was leasing automobiles.

17. American Cablesystems of Florida ("ACF") was a cable television company with headquarters in Massachusetts.

18. The Plantation cable system was a cable television system located in Plantation, Florida. At the beginning of 1987, it was owned by PCS.

19. The Trophy Club, Roanoke, Las Brisas, and Carrollton cable systems were located in Texas. At the beginning of 1987, these systems were owned by PCS.

20. In 1987, Sattech, Inc. was an Ohio corporation owned 50

percent by Defendant WILLIAM J. MARKS, SR.

21. In early 1987, Defendant JIM GUY TUCKER and Defendant WILLIAM J. MARKS, SR. met and agreed to undertake a joint venture in the cable television business in which they would divide equally their profits.

22. On or about March 1, 1987, Meredith and Defendant JIM GUY TUCKER signed a "Stock Purchase Agreement" in which Defendant JIM GUY TUCKER agreed to purchase from Meredith for $6 million its 82 percent of the stock in PCS and the Income Note.

23. On or about May 15, 1987, Defendant JIM GUY TUCKER caused to be sent to Fleet a Debt Placement Memorandum stating that the Plantation cable system had a value of over $10 million, and that the market value of that system could be increased to $12 million or more in the next year.

24. On or about June 10, 1987, Fleet and State Street (collectively "Fleet") lent to Defendant JIM GUY TUCKER and Defendant WILLIAM J. MARKS, SR. the sum of $8.5 million. Approximately $6 million of the proceeds of this loan were used to purchase Meredith's stock in PCS and the Income Note. As part of the collateral for the loan, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. pledged to Fleet all of the cable television assets of PCS and CMI. As additional collateral,

Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. pledged $500,000 cash (placed in an escrow account at Fleet), a portion of which was funded by a $300,000 loan purportedly made to D&L Telecommunications, Inc. by Capital Management Services, Inc. ("CMS").

25. On or about June 10, 1987, in accordance with the Stock Purchase Agreement of March 1, 1987, Meredith sold, assigned, and transferred to Defendant JIM GUY TUCKER its 82 percent of the stock of PCS.

26. On or about June 10, 1987, in accordance with the Stock Purchase Agreement of March 1, 1987, and an Assignment by Defendant JIM GUY TUCKER to Defendant WILLIAM J. MARKS, SR., of part of his rights under that Stock Purchase Agreement, Meredith endorsed the Income Note to Defendant JIM GUY TUCKER in the amount of about $3.3 million, and to Defendant WILLIAM J. MARKS, SR. in the amount of approximately $4.6 million.

27. On or about June 10, 1987, in accordance with the provisions of the loan agreement with Fleet, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. caused the merger of PCS into CMI. After the merger, Defendant WILLIAM J. MARKS, SR. was president of CMI, and Defendant JIM GUY TUCKER was secretary of CMI.

28. On or about June 10, 1987, in accordance with the provisions of the loan agreement with Fleet and as part of the merger of PCS into CMI, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. contributed to CMI all of the stock of PCS and the Income Note.

29. On or about June 10, 1987, after the merger of PCS into CMI, the surviving entity, CMI, was owned 50 percent by Defendant JIM GUY TUCKER and 50 percent by Defendant WILLIAM J. MARKS, SR. As a result of the merger, CMI owned the Plantation cable system in Florida and several systems in Texas.

30. On or about August 24, 1987, following discussions over several months, American Cablesystems of Florida wrote to Defendant WILLIAM J. MARKS, SR. and formally offered to buy the Plantation cable system from CMI for $15 million.

31. On or about August 31, 1987, Defendant JIM GUY TUCKER wrote to accountants in Dallas, Texas, saying "[w]e are contemplating a sale of the Plantation, Florida assets to occur on or about October 1, 1987. We urgently need a calculation of the tax consequences. The sale price will be $15 million."

32. On or about September 3, 1987, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. discussed a prospective sale of the Plantation cable system. They said that they would make a

profit of $13 million from the sale, and that they did not want to pay a tax of $4 million on the sale.

33. On or about September 25, 1987, ACF and Defendant WILLIAM J. MARKS, SR., on behalf of CMI, signed an "Agreement of Purchase and Sale of Assets" in which ACF agreed to purchase the Plantation cable system from CMI and Sattech, Inc., for a total of $14.75 million: $12.75 million, plus $1 million each in non-competition payments to Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR.

34. On or about October 9, 1987, accountants in Dallas, Texas, notified accountants in Little Rock, Arkansas, working with Defendant JIM GUY TUCKER that the tax basis of the Plantation cable system was approximately $1.75 million, and that the gain on a sale of the system for $15 million would be over $13 million.

35. On or about November 18, 1987, Defendant JIM GUY TUCKER received from accountants in Dallas, Texas, a facsimile reflecting that a corrected calculation showed a basis in the Plantation cable system of approximately $1.26 million, and gain on a sale of the system for $15 million of over $13 million.

The Conspiracy

36. Beginning no later than October 1987, the exact date being unknown to the Grand Jury, and continuing thereafter up to and including about October 1990, in the Eastern District of Arkansas and elsewhere, Defendants JIM GUY TUCKER, WILLIAM J. MARKS, SR., and JOHN H. HALEY, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with each other and with other individuals both known and unknown to the Grand Jury, to defraud the United States for the purpose of impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment and collection of the revenue: to wit, income taxes.

The Purpose of the Conspiracy

37. The purpose of the conspiracy was to transfer the Plantation cable system owned by PCS to Defendant JIM GUY TUCKER through a fraudulent bankruptcy proceeding in Texas that was designed to (1) increase the basis in the system, (2) avoid corporate tax on the sale of the system, and (3) impede the ability of the Internal Revenue Service to collect taxes that would be due on any subsequent sale of the system. It was a further purpose of this conspiracy to transfer to individuals or S corporations other cable systems owned by PCS as of June 1,

1987, in order to impede the ability of the Internal Revenue Service to collect taxes that would be due on any subsequent sales of those systems.

Manner and Means of the Conspiracy

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

38. It was a part of this conspiracy that the Defendants would and did engage in fraudulent and sham transactions, including a sham bankruptcy, for the purpose of wrongfully avoiding taxes on the sale of the Plantation cable system and other cable systems.

39. It was a further part of this conspiracy that Defendants JOHN H. HALEY and JIM GUY TUCKER would and did devise a "ten step chart" to demonstrate a "rescission" of the merger between PCS and CMI, a merger of PCS into another corporation, a bankruptcy of the merged entity, and the distribution of the cable television assets of PCS to Defendant JIM GUY TUCKER and CMI.

40. It was a further part of this conspiracy that in an agreement rescinding the merger of PCS and CMI, the Defendants would and did declare that the 82 percent of the stock of PCS

that was purchased from Meredith by Defendant JIM GUY TUCKER was transferred without consideration to, and thereafter owned by, Donna Marks.

41. It was a further part of this conspiracy that in the rescission of the merger between PCS and CMI, the Defendants would and did cause the Income Note to be recreated and assigned completely to Defendant JIM GUY TUCKER.

42. It was a further part of this conspiracy that as a result of the rescission of the merger between PCS and CMI, the Defendants would and did make it appear that Defendant JIM GUY TUCKER was only a creditor of PCS and not a shareholder of PCS.

43. It was a further part of this conspiracy that the Defendants would and did attempt to locate and acquire a "shelf corporation," namely, a corporation that has been incorporated but has no assets or operations.

44. It was a further part of this conspiracy that Defendant JOHN H. HALEY would and did acquire control of a "shelf corporation" in Texas called Landowners Management Systems, Inc. ("LMS").

45. It was a further part of this conspiracy that the Defendants would and did cause 82 percent of the stock of LMS to

be issued to Mikado Leasing Company, and 18 percent of the stock of LMS to be issued to Defendant WILLIAM J. MARKS, SR.

46. It was a further part of this conspiracy that the Defendants would and did designate Donna Marks as president of Mikado Leasing Company.

47. It was a further part of this conspiracy that the Defendants would and did cause the merger of PCS into LMS.

48. It was a further part of this conspiracy that the Defendants would and did cause LMS to file a fraudulent petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Texas, Wichita Falls Division ("bankruptcy court").

49. It was a further part of this conspiracy that the Defendants would and did create a fraudulent "pre-packaged" Plan of Reorganization that was approved prior to filing of the petition in bankruptcy court by all purported creditors who were listed in the bankruptcy schedules.

50. It was a further part of this conspiracy that Defendant WILLIAM J. MARKS, SR. would and did sign bankruptcy pleadings as president of LMS, and testify in bankruptcy court as the president of LMS.

51. It was a further part of this conspiracy that the Defendants would and did cause Defendant JIM GUY TUCKER to appear in bankruptcy court as the only secured creditor of LMS with a claim of approximately $8.85 million based on the recreated Income Note.

52. It was a further part of this conspiracy that the Defendants would and did propose a Plan of Reorganization to the bankruptcy court that would transfer ownership of the Plantation cable system from LMS to Defendant JIM GUY TUCKER in exchange for cancellation of the Income Note.

53. It was a further part of this conspiracy that the Defendants would and did cause CMI to appear in bankruptcy court as an unsecured creditor of LMS with a claim of $1.15 million based in part on funds advanced pursuant to a Management Agreement dated "effective June 10, 1987," but which was created in November 1987.

54. It was a further part of this conspiracy that the Defendants would and did propose a Plan of Reorganization to the bankruptcy court that would transfer ownership of certain Texas cable systems from LMS to CMI in exchange for cancellation of the debt of $1.15 million purportedly owed by LMS to CMI.

55. It was a further part of this conspiracy that the

Defendants would and did represent falsely to the bankruptcy court that Meredith sold 82 percent of the stock of PCS to Mikado Leasing Company for $1, when the Defendants knew that Meredith sold 82 percent of the stock of PCS and the Income Note to Defendant JIM GUY TUCKER for $6 million.

56. It was a further part of this conspiracy that the Defendants would and did represent falsely to the bankruptcy court that the fair market value of the Plantation cable system was $8.85 million, when the Defendants knew that the fair market value was $14.75 million, because American Cablesystems of Florida had signed an agreement to purchase the Plantation cable system for $12.75 million, plus an additional $1 million each in non-competition payments to Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR.

57. It was a further part of this conspiracy that the Defendants would and did represent falsely to the bankruptcy court that there had been arms-length negotiations between Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. that led to the Plan of Reorganization proposed in the bankruptcy, when the Defendants knew that Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. were partners in the cable television business.

58. It was a further part of this conspiracy that the Defendants would represent falsely to the bankruptcy court that

Defendant JIM GUY TUCKER held the only security interest in the assets held by LMS, when the Defendants knew that Fleet National Bank had a first lien on all the assets held by LMS, that is, all those cable systems owned by PCS as of June 1987 that were later transferred to LMS in the merger of PCS into LMS.

59. It was a further part of this conspiracy that the Defendants would not and did not disclose to Fleet National Bank that the merger of PCS and CMI was rescinded, that PCS was merged into LMS, or that LMS filed for bankruptcy.

60. It was a further part of this conspiracy that the Defendants would not and did not disclose to the buyer of the Plantation cable system, American Cablesystems of Florida, that ownership of the system had been transferred in a bankruptcy.

61. It was a further part of this conspiracy that the Defendants would and did cause to be signed a new Agreement for the Purchase and Sale of the Plantation cable system in which Defendant JIM GUY TUCKER was named as one of the sellers of the Plantation cable system, and American Cablesystems of Florida agreed to pay $11.75 million to Defendant JIM GUY TUCKER and CMI, plus $3 million in non-competition payments to Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR.

62. It was a further part of this conspiracy that of the

$14.75 million paid by ACF for the Plantation cable system, Defendant JIM GUY TUCKER would and did receive $11.75 million, and Defendant WILLIAM J. MARKS, SR., would receive the $3 million in non-competition payments.

63. It was a further part of this conspiracy that Defendants JIM GUY TUCKER would and did pay Defendant JOHN H. HALEY at least $100,000.00 in legal fees.

64. It was a further part of this conspiracy that the Defendants would and did cause 1987 tax returns to be filed for PCS and LMS that would not report as income the gain from the sale or transfer of the Plantation cable system or any other cable system, and that no corporate tax would be paid on the sale or transfer of any of the cable systems owned in 1987 by PCS or LMS.

65. It was a further part of this conspiracy that Defendant JIM GUY TUCKER would and did report the sale or transfer of the Plantation cable system on his 1988 individual tax return.

66. It was a further part of this conspiracy that as a result of the distribution of the Plantation cable system to Defendant JIM GUY TUCKER in the bankruptcy, Defendant JIM GUY TUCKER would and did claim a basis in the Plantation system of approximately $7.28 million and a gain of approximately $4.47

million from the sale of the system to ACF, when Defendant JIM GUY TUCKER knew that the actual basis of the Plantation cable system computed for PCS prior to the bankruptcy was approximately $1.26 million and that the pre-bankruptcy basis would have resulted in substantially more taxable gain.

67. It was a further part of this conspiracy that Defendant WILLIAM J. MARKS, SR. would and did report on his individual tax return for 1988 the sale of the Carrollton cable system.

68. It was a further part of the conspiracy that Defendant WILLIAM J. MARKS, SR. would and did report on his individual tax returns for 1988 and 1989 non-competition payments made by ACF in connection with the purchase of the Plantation cable system.

69. It was a further part of this conspiracy that in 1990 Defendant JIM GUY TUCKER would and did cause to be represented to agents of the Internal Revenue Service examining the tax return of CMI for 1988 that there was no relationship between Defendant JIM GUY TUCKER and PCS, when Defendant JIM GUY TUCKER knew that he had owned 82 percent of the stock of PCS.

70. It was a further part of this conspiracy that in 1990 Defendant JIM GUY TUCKER would and did cause agents of the Internal Revenue Service examining the tax return of CMI for 1988 to be provided with documents from the LMS bankruptcy proceeding

to support entries on the CMI tax return.

71. It was a further part of the conspiracy that Defendant JIM GUY TUCKER would and did attempt to cause the destruction of documents referring to the tax computations on the sale of the Plantation cable system.

Overt Acts

In furtherance of the conspiracy, and to effect the objects and purposes of the conspiracy, the following overt acts were committed in the Eastern District of Arkansas, and elsewhere:

72. On or about October 12, 1987, in the Eastern District of Arkansas, Defendants JOHN H. HALEY and JIM GUY TUCKER devised a "ten step chart" to demonstrate the rescission of the merger between PCS and CMI, a merger of PCS into another corporation, a bankruptcy of the merged entity, and the distribution of the assets of PCS to Defendant JIM GUY TUCKER and CMI.

73. On or about October 12, 1987, in the Eastern District of Arkansas, Defendants JOHN H. HALEY and JIM GUY TUCKER presented the "ten step chart" to accountants in Little Rock, Arkansas.

74. On or about November 5, 1987, in the Eastern District

of Arkansas and elsewhere, Defendant JOHN H. HALEY conferred by telephone with a bankruptcy attorney in Texas, concerning a possible Chapter 11 bankruptcy filing in Texas.

75. On or about November 7, 1987, in the Eastern District of Arkansas, Defendant JOHN H. HALEY caused to be transmitted to the Texas bankruptcy attorney a draft "Rescission Agreement," which showed that 82 percent of the stock of PCS would be transferred to an entity called "PCS II."

76. On or about November 8, 1987, in the Eastern District of Arkansas, Defendants JIM GUY TUCKER and JOHN H. HALEY met with the Texas bankruptcy attorney and with two attorneys from Defendant JOHN H. HALEY's law firm concerning a Chapter 11 bankruptcy proceeding.

77. On or about November 9, 1987, in the Eastern District of Arkansas, Defendant JOHN H. HALEY caused to be sent to the Texas bankruptcy attorney a diagram that depicted a bankruptcy and the distribution of the Plantation cable system to Defendant JIM GUY TUCKER.

78. On or before November 9, 1987, Defendant JOHN H. HALEY advised the Texas bankruptcy attorney that the debtor in the bankruptcy proceeding would be named Neighborhood Communication Systems, Inc., or NCS, Inc.

79. On or about November 9, 1987, Defendant JOHN H. HALEY indicated to the Texas bankruptcy attorney that the owner of 82 percent of the debtor corporation would be the stepson of Defendant JIM GUY TUCKER.

80. On or about November 9, 1987, Defendant JOHN H. HALEY spoke to an individual in Texas and arranged to acquire an inactive "shelf corporation" called Landowners Management Systems, Inc.

81. On or about November 9, 1987, in the Eastern District of Arkansas, Defendant JOHN H. HALEY caused another member of his law firm to notify the Texas bankruptcy attorney that the name of the debtor would be Landowners Management Systems, Inc., rather than "Neighborhood Cable Systems."

82. On or about November 12, 1987, Defendant JOHN H. HALEY caused the drafting of a Disclosure Statement concerning a bankruptcy of Landowners Management Systems, Inc., which draft Disclosure Statement said that 82 percent of LMS was owned by a stepson of Defendant JIM GUY TUCKER, and 18 percent of LMS was owned by Defendant WILLIAM J. MARKS, SR.

83. On or about November 13, 1987, in the Eastern District of Arkansas, Defendant JOHN H. HALEY caused another member of his law firm to send to the Texas bankruptcy attorney a draft

"Management Agreement" between PCS and CMI, which said that the agreement was "entered into as of June 10, 1987."

84. On or about November 13, 1987, Defendant WILLIAM J. MARKS, SR. signed as president of PCS a "Bill of Sale and Assignment" that conveyed the ownership of the Carrollton cable system to Defendant WILLIAM J. MARKS, SR. individually.

85. On or about November 16, 1987, Defendants JIM GUY TUCKER and JOHN H. HALEY conferred by telephone with the Texas bankruptcy attorney.

86. On or about November 18, 1987, in the Eastern District of Arkansas, Defendants JIM GUY TUCKER and JOHN H. HALEY met with the Texas bankruptcy attorney regarding the bankruptcy action of Landowners Management Systems, Inc.

87. On or about November 19, 1987, Defendant JIM GUY TUCKER conferred by telephone with the Texas bankruptcy attorney regarding financial information related to the LMS bankruptcy.

88. On or about November 20, 1987, Defendant JIM GUY TUCKER conferred by telephone with the Texas bankruptcy attorney regarding revisions to the Plan of Reorganization and the Disclosure Statement to be filed in the LMS bankruptcy action.

89. On or about November 20, 1987, Defendant WILLIAM J. MARKS, SR. signed "Minutes of Special Joint Meeting of Shareholders and Board of Director of Planned Cable Systems Corporation," which identified the shareholders of PCS as Defendant WILLIAM J. MARKS, SR. and "Donna Marks, individually and as representative of the shareholder Mikado Leasing Company, Inc.," and which stated that the shareholders of PCS approved a merger of PCS into Landowners Management Systems, Inc.

90. On or about November 20, 1987, Defendant WILLIAM J. MARKS, SR. signed a "Corporate Resolution" that identified Mikado Leasing, Inc. as a shareholder of Landowners Management Systems, Inc. and Donna Marks as President of Mikado Leasing, Inc., and that authorized Defendant WILLIAM J. MARKS, SR. to take actions necessary to prepare and execute a petition for Chapter 11 bankruptcy and other necessary documents on behalf of Landowners Management Systems, Inc.

91. In or around late November 1987, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. signed a document entitled "Rescission Agreement" that, among other things, purported to (1) rescind the merger of Planned Cable Systems and Cablevision Management, Inc., (2) transfer to Donna Marks ownership of the 82 percent of the stock in PCS that was purchased from Meredith by Defendant JIM GUY TUCKER, and (3) grant to Defendant JIM GUY TUCKER exclusive rights to the recreated Income Note owed by PCS.

92. In or around late November 1987, Defendant WILLIAM J. MARKS, SR. signed, as president of PCS, a Management Agreement between PCS and CMI that was "effective as of June 10, 1987."

93. On or about November 22, 1987, Defendants JIM GUY TUCKER and JOHN H. HALEY conferred by telephone with the Texas bankruptcy attorney.

94. On or about November 24, 1987, Defendant WILLIAM J. MARKS, SR. signed an "Agreement of Merger of Planned Cable Systems Corporation and Landowners Management System, Inc."

95. On or about November 24, 1987, Defendant JIM GUY TUCKER met with the Texas bankruptcy attorney regarding pleadings to be filed with the bankruptcy court.

96. On or about November 24, 1987, Defendant JOHN H. HALEY conferred by telephone with the Texas bankruptcy attorney.

97. On or about November 24 or 25, 1987, Defendant JOHN H. HALEY caused to be deleted from a draft Statement of Financial Affairs a statement that accounts and other receivables of LMS had been assigned as security "[t]o Fleet National Bank for the benefit of Jim Guy Tucker."

98. On or about November 25, 1987, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. met with the Texas bankruptcy attorney regarding revisions to the Disclosure Statement and Plan of Reorganization to be filed with the bankruptcy court.

99. On or about November 25, 1987, Defendant WILLIAM J. MARKS, SR. executed a final Disclosure Statement to be filed with the bankruptcy court, which stated, among other things, that (1) the shares of LMS were owned 82 percent by Mikado Leasing, Inc., and 18 percent by Defendant WILLIAM J. MARKS, SR., (2) "management believes" the fair market value of the Plantation cable system is $8,850,000, and (3) LMS had "negotiated" to sell the Plantation cable system to "J. G. Tucker" in lieu of foreclosure on the recreated Income Note held by Defendant JIM GUY TUCKER.

100. On or about November 27, 1987, Defendant JIM GUY TUCKER conferred by telephone with the Texas bankruptcy attorney regarding the Statement of Financial Affairs and other documents to be filed with the bankruptcy court.

101. On or about November 27, 1987, Defendant WILLIAM J. MARKS, SR. executed, under penalty of perjury, a final Statement of Financial Affairs and accompanying Schedules to be filed with the bankruptcy court, which stated, among other things, that (1) "Meredith Corporation sold its 82% stock in the corporation to

Mikado Leasing Company, Inc., for $1," and (2) Defendant JIM GUY TUCKER was the sole secured creditor of LMS with a claim of approximately $9,000,000.

102. On or about November 30, 1987, the Defendants caused to be filed in United States Bankruptcy Court for the Northern District of Texas, Wichita Falls Division, various pleadings captioned In re: Landowners Management Systems, Inc., Tax Identification No. 75-2001914, including an Original Petition Under Chapter 11, a Statement of Financial Affairs, a Disclosure Statement and Solicitation of Ballots to Plan of Reorganization to be Filed Under Chapter 11 of the United States Bankruptcy Code, and a Debtor's Plan of Reorganization.

103. On or about December 9, 1987, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER caused to be sent to a representative of American Cablesystems of Florida a letter proposing that the contract for sale of the Plantation cable system be modified to list Defendant JIM GUY TUCKER as one of the sellers.

104. On or about December 18, 1987, Defendant WILLIAM J. MARKS, SR. testified on behalf of the debtor, LMS, at a hearing in the bankruptcy court that the debtor's Plan of Reorganization was proposed in good faith, and that his purpose in proposing the Plan was "[t]o keep Mr. Tucker from foreclosing on the assets."

105. On or about December 18, 1987, Defendant JIM GUY TUCKER appeared as the only secured creditor at a hearing in the bankruptcy court to confirm the Plan of Reorganization proposed by LMS.

106. On or about December 18, 1987, Defendant JOHN H. HALEY appeared in the bankruptcy court as the attorney for Defendant JIM GUY TUCKER.

107. On or about December 28, 1987, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. signed an Agreement with ACF that a new Agreement of Purchase and Sale of Assets for the Plantation cable system would supersede the earlier agreement of September 25, 1987.

108. On or about December 28, 1987, Defendant JIM GUY TUCKER signed a new Agreement of Purchase and Sale of Assets in which ACF agreed to purchase the Plantation cable system from Defendant TUCKER and CMI for a total of $14.75 million: $11.75 million, plus $3 million in non-competition payments to Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR.

109. On or about February 8, 1988, Defendant JIM GUY TUCKER wrote a check for $100,000 to Defendant JOHN H. HALEY's law firm for "Plantation & LMS -- partial payment of legal fees & expenses."

110. On or about March 30, 1988, in the Eastern District of Arkansas, Defendant JIM GUY TUCKER wrote a memorandum to Defendant JOHN H. HALEY and three accountants, with a copy to Defendant WILLIAM J. MARKS, SR., stating that responsibility for preparation and filing of tax returns for PCS, LMS, and Mikado Leasing should be determined as soon as possible.

111. On or about August 2, 1988, Defendant JIM GUY TUCKER wrote to his tax return preparer in Little Rock stating that he purchased the Income Note from Meredith in June 1987, and that "I owned no stock" in PCS.

112. On or about August 25, 1988, Defendant WILLIAM J. MARKS, SR. caused to be filed with the Internal Revenue Service tax returns for Landowners Management Systems, Inc., for the years 1987 and 1988, neither of which reported taxable gain on the sale or transfer of the Plantation cable system or other cable systems.

113. On or about August 26, 1988, Defendant WILLIAM J. MARKS, SR. caused to be filed with the Internal Revenue Service two 1987 tax returns for PCS, neither of which reported sales or transfers of cable systems.

114. On or about August 25, 1988, Defendant JIM GUY TUCKER caused to be filed with the bankruptcy court a Chapter 11 Post-

Confirmation and Accounting regarding the LMS bankruptcy.

115. On or about January 12, 1989, Defendants JIM GUY TUCKER and WILLIAM J. MARKS, SR. signed a Memorandum of Understanding stating that they "both wish to share equally in the profits and losses from the previous sales as well as profits and losses from future operations," and that the agreement "may be termed a 'phantom' stock or partnership interest of Marks."

116. On or about June 12, 1989, in the Eastern District of Arkansas and elsewhere, Defendant JIM GUY TUCKER caused to be filed a United States Individual Income Tax Return for 1988.

117. On or about October 19, 1989, Defendant WILLIAM J. MARKS, SR. caused to be filed a United States Individual Income Tax Return for 1988.

118. In or around July 1990, when agents of the Internal Revenue Service asked what was the ownership/relationship of PCS to CMI or Defendant JIM GUY TUCKER, Defendant JIM GUY TUCKER caused his accountant to represent to agents of the Internal Revenue Service, "None. CMI managed certain cable properties for this entity."

119. On or about October 22, 1990, Defendant WILLIAM J. MARKS, SR. caused to be filed a United States Individual Income

Tax Return for 1989.

120. In about the fall of 1990, Defendant JIM GUY TUCKER attempted to cause the destruction of documents in Texas relating to the sale of the Plantation cable system, including one page that calculated the gain and tax on the post-bankruptcy sale of the Plantation cable system, and one page that stated:

Risk

Basis claimed = 7

Actual basis = 1

Risk = 6

.32

1.926 + penalties + interest

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL.

FOREMAN

KENNETH W. STARR
INDEPENDENT COUNSEL

Dated: June 7, 1995.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

V.

NO. LR-CR-95-117

JIM GUY TUCKER, WILLIAM J. MARKS, SR., and JOHN H. HALEY

MEMORANDUM OPINION

Separate defendant Jim Guy Tucker has moved to dismiss the indictment in this case on the ground that the Independent Counsel exceeded his jurisdiction. The Independent Counsel, by way of response, asserts: (1) that the indictment of the defendants in this case falls within the scope of his prosecutorial jurisdiction; and (2) that even if does not, the referral of the matter to him, as independent counsel, is not subject to judicial review.

I. The Original Authorization for the Investigation of the Defendants.

The Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599 (hereinafter the "Independent Counsel Act"), permits the Attorney General to request that independent counsel be appointed when preliminary investigation discloses that certain high officials in the Executive Department may have violated the law. 28 U.S.C. § 591(b). Other persons can come within the ambit of the Act if they cannot be investigated and prosecuted by an officer of the Department of Justice without the appearance of a personal, financial, or political conflict of interest. 28 U.S.C. § 591(c)(2).

EXHIBIT
4

An independent counsel is appointed by a special three-judge court of the United States Courts of Appeals for the District of Columbia, called the "Special Division." It is significant that the Special Division defines the independent counsel's prosecutorial jurisdiction. This is clear from the first sentence of 28 U.S.C. § 593(b)(3): "In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter." (Emphasis added.)

Congress reauthorized the original Ethics in Government Act on June 30, 1994, with a few changes. However, prior to the reenactment of the Independent Counsel Act, the Attorney General had conducted an investigation into a land development venture called "Whitewater" in which President Bill Clinton and Mrs. Hillary Rodham Clinton were investors, along with another partner, James McDougal. Because there was no independent counsel act in effect at the time, the Attorney General herself named Robert B. Fiske, Esquire, as independent counsel to further investigate the Whitewater venture.

After the reenactment of the Independent Counsel Act, the Special Division replaced Mr. Fiske with Kenneth Starr, Esquire, and authorized a continuation of the Whitewater investigation in the following terms:

> Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and

> obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is
>
> ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with offices at Kirkland and Ellis, 655-15th Street, NW, Washington, DC 20005, be and he is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.
>
> The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation. (See Exhibit A.) (Emphasis added.)

Such was the jurisdictional authority defined by the Special Division, which had the sole statutory duty to define such jurisdiction.

In affixing this limitation on the jurisdictional grant, the Special Division was undoubtedly mindful of the *caveat* of the Supreme Court of the United States in Morrison v. Olson:

> [W]e do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

487 U.S. 654, 679 (1988) (Emphasis original).

What "gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case" was that the President was a "person" requiring appointment of an Independent Counsel. [28 U.S.C. § 591(b)(1).]

The subject matter of the indictment at issue here bears no relation whatsoever to the Clintons or James McDougal or their relationship with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. The following affidavit of Governor Tucker, dated July 7, 1995, and attached to his motion to dismiss the indictment on jurisdictional grounds has not been controverted:

> Jim Guy Tucker, on oath, states as follows:
> 1. I am not and have never been a part of the Executive Branch of the United States Government.
> 2. I have examined the indictment in this case. To my certain knowledge no member of the Executive Branch of the United States Government participated in any transaction to which the indictment refers.
> 3. To my certain knowledge neither the President of the United States nor his First Lady have had any connection whatever with the business matter called, in the indictment, "LMS," Cablevision Management, Inc. ("CMI") or any other entity to which the indictment refers.
>
> Further Affiant sayeth not. /s/ Jim Guy Tucker. (See Exhibit B.)

The Independent Counsel has come forward with no evidence to refute facts recited in the affidavit. Nor has he alleged a connection of any kind between Governor Tucker and President Clinton. This is not surprising. The Court takes judicial notice of the fact that President Clinton and Governor Tucker were political opponents during the years covered by this indictment. In 1982, Tucker opposed Clinton in the Democratic primary for Governor of the State of Arkansas. In 1990, when President Clinton made his last race for Governor of Arkansas, Tucker threatened to oppose him until virtually the last moment and then decided to run for Lieutenant Governor. The fact that these two men have been leaders of opposing factions in the Democratic party in Arkansas is well-known. That they would have been connected in any type of business venture in the period covered by the indictment would be highly unlikely, and Tucker's uncontroverted affidavit establishes this.

In fact, in his response to defendant's motions attacking jurisdiction, independent counsel conceded that there is no connection between the facts alleged in the indictment and the Clintons, McDougal and Capital Management Services, Inc. "Although the facts do not link Defendants to a specific relationship among CMS, the Clintons, or James B. McDougal, the Attorney General reasonably concluded that the LMS [Landowners Management System, subject of Count III of the indictment] matter was 'related to the independent counsel's prosecutorial jurisdiction' under Section 594(e) sufficiently to fall within that jurisdiction." (Response of the United States to Defendants' Motion to Dismiss Indictment for Lack of Jurisdiction, p.38.) How can it be said that the Attorney General reasonably concluded that

there was a connection between the matter in the indictment and the Clintons and McDougal, if there was no actual connection? The position of the Independent Counsel is that whether the Attorney General's conclusion was reasonable or not, such conclusion is not subject to review by a district court, or by any court for that matter. This issue will be dealt with *infra*.

II. The Grant of Supplemental Authorization.

The Independent Counsel went back to the Attorney General with the request that the Attorney General seek authorization under 28 U.S.C. § 594(e) from the Special Division to investigate matters alleged in Count III of the indictment.[1] For some unknown reason, no request was ever made regarding the allegations contained in Counts I and II of the indictment. The Attorney General responded to the Independent Counsel by letter dated September 2, 1994:

> The Attorney General has received your letter of August 31, 1994 requesting that the Department of Justice refer to the Office of Independent Counsel/Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your Office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matters to your Office:
>
> (1) Whether any person committed any federal crime relating to the bankruptcy action entitled In Re: Landowners

[1]Section 594(e) deals with referral of "other matters" to an independent counsel.

> Management System, Inc., Tax Identification No 75-2001914, Debtor, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11). . . (See Exhibit C.)

The Special Division issued an order of December 19, 1994, and this order provided in pertinent part as follows:

> Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal, it is
>
> HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. § 594(e):
>
> Whether any person committed any federal crime relating to the bankruptcy action entitled In Re: Landowners Management System, Inc., Tax Identification No 75-2001914, Debtor, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11)... (See Exhibit D.)

However, this order contained the following limitations after the grant of authority mentioned above:

> IT IS FURTHER ORDERED that, as a result of the referral of the above-described matters and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Authorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

> The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation. . . (See Exhibit D.)

Obviously, from the Special Division's own order, the supplemental investigation was required to be "connected with or arising out of that investigation." "That investigation" is the investigation of the Clintons and McDougal mentioned in the preceding paragraphs.

In placing such a limitation on the jurisdiction of the independent counsel, the Special Division may well have had in mind the Supreme Court's interpretation of 28 U.S.C. § 594(e) in Morrison v. Olson,:

> In our view, this provision does not empower the court to expand the original scope of the counsel's jurisdiction; that may be done only upon request of the Attorney General pursuant to § 593(c)(2). At most, § 594(e) authorizes the court simply to refer matters that are "relate[d] to the independent counsel's prosecutorial jurisdiction," as already defined.

487 U.S. 654, 680, n.18 (1988)(Emphasis added).

III. The Power to Review the Attorney General's Referral of the Matters Contained in Count III to the Independent Counsel.

It is obvious that the matters contained in Count III of the indictment, which the Attorney General has referred to the Independent Counsel, are completely unrelated to the Clintons and McDougal. Even though 28 U.S.C. § 594(e) under which the referral was made requires that the Attorney General "refer to the independent counsel matters related to the

independent counsel's prosecutorial jurisdiction," the Attorney General and Independent Counsel argue that the referral is not reviewable. It is not reviewable even if completely wrong and without support in the statute or in the order of the Special Division.

I cannot accept the proposition that a citizen can be put on trial in my court for a loss of his liberty and that no court has the power to determine whether there is jurisdiction to proceed in the matter.

The Attorney General argues on page 18 of her brief: "Under the terms of Section 594(e), the process does not even require the involvement of the Special Division." While the wording of 28 U.S.C. § 594(e) may be susceptible to such an interpretation, the Supreme Court has indicated that referrals under this section are a part of the powers and duties of the Special Division:

> The Act also vests in the Special Division various powers and duties in relation to the independent counsel that, because they do not involve appointing the counsel or defining his or her jurisdiction, cannot be said to derive from the Division's Appointments Clause authority. These duties include . . . referring matters to the counsel upon request, § 594(e). . . .

Morrison v. Olson, 487 U.S. 654, 680.

But even assuming that the Independent Counsel is correct and that it is not necessary for the Attorney General to seek approval of the Special Division before referring matters to the Independent Counsel, the Attorney General faces the same jurisdictional obstacles as the Special Division. 28 U.S.C. § 594(e) requires referral only as to "matters related to the

independent counsel's prosecutorial jurisdiction."

Significantly, the Attorney General, through Mr. Keeney, the Acting Assistant Attorney General, made the following statement in the letter of September 2, 1994, to Mr. Starr, in regard to the bankruptcy matter:

> To the extent you determine that aspects of these matters which might fall technically within the broad scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may refer those aspects back to the Department of Justice for handling pursuant to 28 U.S.C. § 597(a).

Thus, we have clear recognition by the Attorney General that the matters in the indictment must be "sufficiently related to your mandate." Not only were the matters contained in the indictment insufficiently related to the mandate, they were not related at all.

In the matter at bar, the Attorney General did not attempt to proceed without the involvement of the Special Division. Even so, there are limits on the scope of prosecutorial jurisdiction which the Special Division can confer:

> We emphasize, nevertheless, that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications. . . . [T]he Division's exercise of unauthorized powers risks the transgression of the constitutional limitations of Article III that we have just discussed.

Morrison v. Olson, 487 U.S. 654, 684-685 (Emphasis original). In a footnote to the last sentence, the Court stated: "After all, in order to decide whether to refer a matter to the

counsel, the court must be able to determine whether the matter falls within the scope of the original grant. See n.18, *supra*." 487 U.S. at 685 n.18. (Footnote 18 is quoted in its entirety, *supra*.) Surely the Independent Counsel and Attorney General do not suggest that there can be no judicial review of prosecutorial jurisdiction of an independent counsel. If this were so, the Special Division would be virtually the only court in American jurisprudence, save the Supreme Court of the United States, whose decisions are subject to no judicial review whatsoever, regardless of whether those decisions are patently contrary to law. Such a precedent would be both novel and dangerous.

The Independent Counsel finds a nexus to the Clintons and McDougal to satisfy the above requirements in the fact that, while investigating their relationship to Capital Management Services, Inc., counsel fortuitously stumbled across the defendants' alleged violation of the law. (See Response of United States to Defendants' Motions to Dismiss Indictment for Lack of Jurisdiction. p.36.) In support, the Independent Counsel quotes from United States v. Secord,: "To determine that one occurrence is 'related' to another, one need only show that there is a reasonable causal or logical connection between the two, some tenable correlation between events." 725 F.Supp. 563, 566 (D.D.C. 1989). The relation between the indictment herein and McDougal or the Clintons falls far short of this test.

The facts demonstrating the alleged relationship are stated by the Independent Counsel as follows: "Information that Defendant Tucker may have asserted a claim as a creditor in a fraudulent bankruptcy filed by Landowners Management Systems, Inc., was first

provided to Independent Counsel Fiske by a witness in the investigation of Capital Management Services, Inc. Additional investigation determined that an allegedly fraudulent loan from Capital Management Services was used as collateral to finance the purchase of cable television interests. . . ." (See Response of United States, *supra*, p. 37.)

This argument is without merit because the "original jurisdiction order" only deals with Capital Management Services, Inc. in the following context: ". . .whether any individuals or entities have committed a violation of federal criminal law. . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." (See Exhibit A, order of Special Division, dated August 5, 1994.)

The original grant thus was only in reference to the Clintons' and McDougal's relationship to Capital Management Services, Inc., not to anyone else's relation to this entity. For another individual or entity to be related, such individual or entity would necessarily have to be involved in the Clintons' or McDougal's relationship to Capital Management Services, Inc.

The Independent Counsel goes on to say: "These facts show that the matters under indictment are related to the subject matter of the Independent Counsel's investigation." These facts show nothing of the kind, which Independent Counsel concedes in the next sentence: "Although the facts do not link Defendants to a specific relationship among CMS,

the Clintons or James B. McDougal. . . ."

In a footnote on page 38 of his brief on jurisdiction, the Independent Counsel argues that there is a relation in the fact that Capital Management Services, Inc. is one of the entities listed in the grant of original jurisdiction and the Count III allegations were discovered during the investigation of this entity. As stated above, the record is devoid of evidence of any relationship or connection between the Clintons and McDougal and any of the matters alleged in the indictment.

Admittedly, certain actions of the Attorney General are not subject to review. The decision to refer or not to refer a matter to the Independent Counsel is not subject to review. Whether to investigate a person and whether to require appointment of an independent counsel is not subject to review. The cases cited on this issue are not on point and are thus not persuasive. Dellums v Smith, 797 F. 2d 817 (9th Cir. 1986) involved a suit by a member of Congress and two private citizens over the Attorney General's failure to conduct a preliminary investigation of a particular allegation. The Ninth Circuit held that, "failure to discharge these duties is not subject to federal court challenge by private citizens." In Banzhaf v. Smith, 737 F. 2d 1167, 1170 (D.C. Cir. 1984), the question was whether refusal to conduct a preliminary investigation is reviewable.

All of these situations are a far cry from the question of whether the trial court has jurisdiction -- whether the Attorney General and the Special Division completely exceeded their authority in referring a non-related matter to the Independent Counsel. In at least one

instance, the action of the Attorney General in referring a matter to the independent counsel was reviewed by the Special Division. The Special Division found that the matter had been improperly referred by the Attorney General because of lack of prosecutorial jurisdiction. See, In Re: Meese, 907 F. 2d 1192, 1199-1201 (D.C. Cir. 1990). The Meese Opinion includes a quote from the Application to Define Jurisdiction of Independent Counsel made by James C. McKay, independent counsel in that case:

> It does not appear [under the Act], however, that the Acting Attorney General has the power to define the *prosecutorial jurisdiction* of an independent counsel, See 28 U.S.C. § 593(c). That power is vested only in this court, which has not formalized a definition of Independent Counsel McKay's prosecutorial jurisdiction in the Meese matter.
>
> Application to Define Jurisdiction of Independent Counsel, *In re Nofziger/Meese*, Div. No. 87-1 (Aug. 6, 1987). . . .

Meese, 907 F.2d at 1200-01 (Emphasis original). This comports with the plain meaning of the statute, as examined and noted earlier in this opinion.

IV. Conclusion.

The Independent Counsel, in his brief at page 29, asks: What is the harm if the Independent Counsel handles this investigation rather than the Attorney General? What difference does it make? It makes a great deal of difference if the statute and the Supreme Court plainly state that only matters related to the Independent Counsel's original

prosecutorial jurisdiction are to be handled by him. In the first place, criminal statutes and criminal procedures must be faithfully followed. To gloss over and shortcut the requirements of criminal statutes is the first step toward tyranny. If the statute says that the Independent Counsel should not make the decision to prosecute in an unrelated matter, but that this decision shall be made by the Attorney General, it makes a great deal of difference.

Few would disagree with Justice Scalia's statement in his dissent in Morrison v. Olson, *supra*, at 708 that: ". . .the balancing of various legal, practical and political considerations, none of which is absolute, is the very essence of prosecutorial discretion." The vast power and immense discretion the Independent Counsel seeks to wield in this case must find its genesis in the statute or in the courts' interpretation of the statute. I do not find it here.

The words of Justice Robert Jackson, in an address, *The Federal Prosecutor*, delivered at the Second Annual Conference of United States Attorneys April 1, 1940, were quoted by Justice Scalia in his dissent in Morrison v. Olson, *supra*, at 728. These words bear repeating here:

> What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm -- in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself. . .

It is certainly true that the United States Attorney or the Attorney General may find in their discretion that these defendants have violated the law and that they should be indicted and prosecuted. However, such discretion is theirs to exercise. It is not granted to an independent counsel under the statutes or decisions of our courts in this particular matter.

While the Supreme Court has upheld the constitutionality of the Ethics in Government Act, Morrison v. Olson, *supra*, cannot be read without drawing the conclusion that the Supreme Court meant that the authority and jurisdiction of an independent counsel should be confined to a narrow channel and not be expanded beyond the explicit wording of the statute. A thoughtful commentator has pointed out that:

> . . . congressional committee requests for independent counsel investigations of *particular named* executive officials bear a frightening

> resemblance to Bills of Attainder. Bills of Attainder, however, traditionally required at least the approval of the entire legislature (like all other "legislation"). In contrast, independent counsel requests may be triggered by just a few members of Congress serving on a particular committee with an axe to grind. See 28 U.S.C. § 592(g)(1) (1988). Once a partisan request for the appointment of an independent counsel has been made, the Attorney General and the Special Division which oversees such investigations may find it very difficult to avoid appointing a counsel just to clear up the "impressions" that were created by the request having been made. And once a counsel is appointed, the pressures to prosecute or to force a plea bargain (as happened with Michael Deaver and Webster Hubbell) are not insignificant. Accordingly, the EIGA independent counsel system is not as far removed from the traditionally hated and unconstitutional Bill of Attainder as many may think.

S.G.Calabresi, "Some Normative Arguments for the Unitary Executive," 48 Ark.L.Rev., p.93, n.164. (This statement is attributed to Walter Dellinger, III.)

Since its original enactment, the Independent Counsel Act has been used extensively, some would say, including Justice Scalia, that it has been abused. The *Arkansas Law Review* article, cited *supra*, at n.163, points out its wide use:

> During the two years of the Carter Administration that the Ethics in Government Act was in effect, two Independent Counsels were appointed: Arthur Christy investigated White House Chief of Staff Hamilton Jordan and Gerald Gallinghouse investigated White House staffer Timothy Kraft. During the eight years of the Reagan Administration, seven Independent Counsels were appointed: Leon Silverman investigated Secretary of Labor Raymond Donovan; Jacob Stein investigated White House Counselor Edwin Meese III; Alexia Morrison investigated Assistant Attorney General Theodore Olson; Whitney North Seymour investigated White House aide Michael Deaver; Laurence Walsh investigated a number of officials for their involvement in Iran-Contra; James McKay investigated Lynn Nofziger, Attorney General Edwin Meese III, and others; and former Judge Arlin

> Adams investigated HUD Secretary Samuel Pierce, Jr. During the three years and 11 months of the Bush Administration that the statute was in effect, one additional Independent Counsel was appointed: Joseph DeGenova investigated Secretary of State James Baker and other State Department aides involved in the illegal search of Bill Clinton's passport file. Independent Counsels Laurence Walsh and Arlin Adams continued their investigations throughout this period. During the first two months of the Clinton Administration that the statute has been back in effect, Attorney General Janet Reno has sought the appointment of two Independent Counsel: the first request concerned the Whitewater Investigation and led to the appointment of Kenneth Starr to replace Robert Fiske; the second request concerned Agriculture Secretary Mike Espy and led to the appointment of Donald Smaltz.

During the Clinton Administration, citizens of the State of Arkansas have undergone wide-ranging investigations by two independent counsel. Some of these, on the surface at least, would seem to have dubious connection with the original or supplemental grant of prosecutorial jurisdiction.

The history of independent counsel investigations is not reassuring to this Court. Perhaps the most questionable example was the indictment of Defense Secretary Weinberger in the Iran-Contra investigation by an independent counsel. Weinberger was one of two cabinet officials who opposed the Reagan Administration's involvement in the Iran-Contra affair. Yet, he was the only cabinet official who suffered an indictment.

While Justice Scalia's dissent did not carry the day in Morrison v. Olson, *supra*, he made some highly pertinent observations about the officials having supervision over the independent counsel. He or she is responsible to no elected officials, but only to a panel of

three appointed members of the Federal Judiciary.

As Justice Scalia points out the highly successful Teapot Dome and Watergate investigations were carried out by independent counsel named by the Attorney General. Elected members of the Executive Department were ultimately responsible to the electorate for the manner in which these investigations were carried out. Not so with the independent counsel under the current statute. "It seems to me not conducive to fairness. But even if it were entirely evident that unfairness was in fact the result - the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration - *there would be no one accountable to the public to whom the blame could be assigned.*" (Morrison v. Olson, *supra*, at 731, Scalia, J., dissenting) (Emphasis original.)

I am not suggesting that there has been unfairness in the case at bar on the part of the Independent Counsel or the Special Division. I do believe, as does Justice Scalia, that the potential is present in the Independent Counsel Act. I have no idea what the proof will be on this indictment. I am firmly convinced, along with the majority in Morrison v. Olson, *supra*, that the prosecutorial jurisdiction of the Independent Counsel must be strictly contained within its statutory bounds.

There are, undoubtedly, situations that may justifiably call for the appointment of independent counsel. At any rate, Congress has made such a determination. The wisdom of this statute is not for me to decide. This does not mean that the judiciary is not the proper

department of our government to delineate the bounds of the statute's prosecu jurisdiction. [redacted] at least empowered initially to make this determination. If we are to remain a government of laws and not of men, it must ever be so.[2]

It is evident from this opinion that I am convinced that the Independent Counsel had no jurisdiction to present the matters contained in this indictment to the grand jury. In my view, this jurisdiction was vested in the Attorney General or the United States Attorney for the Eastern District of Arkansas. It was within their sole jurisdiction to exercise their discretion as to whether the indictment should be obtained in this matter.

It, therefore, follows that this indictment must be quashed as to all defendants. Parenthetically, I add that I deal with an important issue in this case. Fortunately, all my decisions are subject to higher review.

I will do everything in my power to have an expeditious appeal of this decision to the Court of Appeals and to the Supreme Court. In this endeavor, I can pledge the support of my clerk and court reporter. The defendants have stated that they seek a quick disposition of this matter. I am sure the government joins in these sentiments. I can assure all concerned that I am also anxious for a quick resolution.

It would be foolish to put these parties to an extensive and expensive trial when there exists a serious, and in my view, fatal defect of jurisdiction. Lack of jurisdiction can be

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[2] I had never realized until reading Justice Scalia's opinion in Morrison v. Olson, *supra*, that the origin of this principle is to be found in the Massachusetts Constitution of 1780. [487 U.S. at 697.]

successfully raised at any point in litigation. How patently unfair would it be after the stress and expense of a long trial to have a determination made at a later stage of the proceedings that there was no jurisdiction in the first place?

An order will be entered in conformity with this opinion quashing this indictment in its entirety as to the three defendants. All other motions except those relating to jurisdiction are rendered moot.

DATED this 5th day of September, 1995.

UNITED STATES DISTRICT JUDGE

EXHIBIT
1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty
Savings & Loan Association

Division No. 94-1

Order Appointing
Independent Counsel

Before: SENTELLE, *Presiding*, and BUTZNER and SNEED, *Senior Circuit Judges*.

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with offices at Kirkland and Ellis, 655-15th Street, NW, Washington, DC, 20005, be and he is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the

maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any

federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. The Court, having reviewed the motion of the Attorney General that Robert B. Fiske, Jr., be appointed as Independent Counsel, has determined that this would not be consistent with the purposes of the Act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the Act contemplates an apparent as well as an actual independence on the part of the Counsel. As the Senate Report accompanying the 1982 enactments reflected, "[t]he intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the

Department of Justice. Throughout our system of justice, safeguards exist against actual or *perceived* conflicts of interest without reflecting adversely on the parties who are subject to conflicts." S. Rep. No. 496, 97th Cong., 2d Sess. at 6 (1982) (emphasis added). Just so here. It is not our intent to impugn the integrity of the Attorney General's appointee, but rather to reflect the intent of the Act that the actor be protected against perceptions of conflict. As Fiske was appointed by the incumbent administration, the Court therefore deems it in the best interest of the appearance of independence contemplated by the Act that a person not affiliated with the incumbent administration be appointed.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592(e) and of the ongoing public proceedings and interest in this matter, that it is in the best interests of justice for the identity and prosecutorial jurisdiction of the Independent Counsel to be disclosed,

IT IS SO ORDERED.

Per Curiam
For the Court:

Ron Garvin

Ron Garvin, Clerk

STATE OF ARKANSAS)
) §§
COUNTY OF PULASKI)

Exhibit B

AFFIDAVIT OF JIM GUY TUCKER

Jim Guy Tucker, on oath, states as follows:

1. I am not and have never been a part of the Executive Branch of the United States Government.

2. I have examined the indictment in this case. To my certain knowledge no member of the Executive Branch of the United States Government participated in any transaction to which the indictment refers.

3. To my certain knowledge neither the President of the United States nor his First Lady have had any connection whatever with the business matter called, in the indictment, "LMS", Cablevision Management, Inc. ("CMI") or any other entity to which the indictment refers.

Further Affiant sayeth not.

Jim Guy Tucker

SUBSCRIBED AND SWORN to me before this the 7th day of July, 1995.

Linda J. West
Notary Public

My Commission Expires:

OFFICIAL SEAL
LINDA J. WEST
NOTARY PUBLIC - ARKANSAS
PULASKI COUNTY
My Commission Expires JUNE 30, 2003

Exhibit C

GOVERNMENT EXHIBIT 2

Department of Justice
Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 2, 1994

Mr. Kenneth W. Starr
Two Financial Centre
10825 Financial Centre Parkway
Suite 134
Little Rock, Arkansas 72211

Dear Mr. Starr:

The Attorney General has received your letter of August 31, 1994 requesting that the Department of Justice refer to the Office of Independent Counsel/Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the the course of the investigation conducted by the Office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your Office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matters to your Office:

(1) Whether any person committed any federal crime relating to the bankruptcy action entitled In Re: Landowners Management System, Inc., Tax Identification No 75-2001914, Debtor, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11); and

REDACT

REDACT REDACT

Your jurisdiction affords you necessary flexibility in structuring your investigation. To the extent you determine that aspects of these matters which might fall technically within the broad scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may refer those aspects back to the Department of Justice for handling pursuant to 28 U.S.C. §597(a).

Should you wish at any time to consult with the Department of Justice concerning Departmental policies with respect to these criminal tax or other matters, 28 U.S.C. § 594(f)(1), I invite you to contact Lee J. Radek, Chief, or Jo Ann Farrington, Deputy Chief, Public Integrity Section, Criminal Division, who will put you in touch with the appropriate Departmental officials. They can be reached at (202) 514-1412.

To complete our files, I would appreciate your providing Mr. Radek with a copy of your notification to the Special Division of the Court of this referral. 28 U.S.C. § 594(e). Please let me know if I can be of any further assistance to you in the course of your investigation.

Sincerely,

John C. Keeney

John C. Keeney
Acting Assistant Attorney General
Criminal Division

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division of the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty
Savings & Loan Association

Division No. 94-1

UNDER SEAL

ORDER

Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal, it is

HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. § 594(e):

REDACT REDACT REDACT

REDACT REDACT REDACT

REDACT REDACT REDACT

[redacted] whether any person committed any federal crime relating to the bankruptcy action entitled In re: Landowners Management Systems, Inc., Tax Identification No. 75-2001914, Debtor, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11);

REDACT REDACT REDACT

REDACT REDACT REDACT

REDACT REDACT REDACT

REDACT REDACT REDACT

IT IS FURTHER ORDERED, that, as a result of the referral of the above-described matters and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel

Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or [redacted] misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation, including, but not limited to:

REDACT REDACT REDACT

REDACT REDACT REDACT

REDACT REDACT REDACT

Whether any person committed any federal crime relating to the bankruptcy action entitled In re: Landowners Management Systems, Inc., Tax Identification No. 75-2001914,

Debtor, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11);

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

The Independent Counsel has jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel has jurisdiction and authority to seek indictment and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an

unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel has all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

The Independent Counsel, as authorized by 28 U.S.C. § 594, has prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

IT IS FURTHER ORDERED, that the Independent Counsel may disclose, to those persons who are the subject of the matters referred to the Independent Counsel and their counsel, those portions of this Order relating to such subjects provided that:

(1) A person to whom disclosure is permitted to be made shall receive a copy of this Order from which all matters will be redacted from pages 1 through 4 except those pertaining to the person to whom disclosure is made; and

(2) Each recipient of the redacted Order shall sign a Statement of Acknowledgement and Consent in the form attached hereto.

Per Curiam
For the Court:

IT IS SO ORDERED.

Dated: December 19, 1994

Ron Garvin
Ron Garvin, Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

ORAL ARGUMENT REQUESTED

MOTION OF DEFENDANT TUCKER TO DISMISS INDICTMENT

William H. Sutton - AR #59018
FRIDAY, ELDREDGE & CLARK
400 W. Capitol, Suite 2000
Little Rock, AR 72201
(501) 376-2011

George B. Collins - AR #53032
COLLINS & BARGIONE
#1 North LaSalle Street, #2235
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James J. Lessmeister - AR #94038
ARNOLD, GROBMYER & HALEY
124 W. Capitol, Suite 875
Little Rock, AR 72201
(501) 376-1171

ATTORNEYS FOR JIM GUY TUCKER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. LR-CR-95-173
	)	
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL,	)	
	)	
Defendants.	)	

MOTION OF DEFENDANT TUCKER TO DISMISS INDICTMENT

Comes Jim Guy Tucker, by counsel, and for his motion to Dismiss the Indictment for lack of jurisdiction in Independent Counsel and, in the alternative, for violations of Rule 6 of the Federal Rules of Criminal Procedure and the Grand Jury clause of Amendment V to the Constitution of the United States states:

PART I: LACK OF JURISDICTION

1. The Independent Counsel Act (28 USC Sec. 591, et seq, the "Act") begins with a definition of those persons to whom the Act applies: it applies to those "certain covered persons" listed in 28 USC 591(b). Those persons, defined by the offices they hold, are the President, the Vice President, certain high officials of cabinet level, the Director of Central Intelligence, the Commissioner of Internal Revenue, and the chairman and treasurer of the President's most recent campaign.

2. The Act also provides that, upon investigating a "certain covered person", the Attorney General may petition the Special Division to appoint an independent counsel. The Special Division is a panel of three judges appointed for the sole purpose of acting

under the Act. The "Special Division" must then select independent counsel, and must define his or her jurisdiction. (28 USC §593)

3. The Attorney General, the Special Division, and the resulting independent counsel have only those powers granted by the Act in performing their duties under the Act. The Act has been narrowly construed so as to preserve its constitutionality (in a prior form). Morrison v. Olson, 487 US 654 (1988).

4. None of the Defendants in this case have ever been part of the Executive branch of the United States Government. (Affidavit, Tucker, Ex. 1).

5. Independent Counsel was appointed under the Act to investigate;

> "Whether any individuals or entities have committed a violation of any federal criminal law...relating in any way to James B. McDougal's, President...Clinton's or Mrs....Clinton's relationship with Madison Guaranty..., Whitewater Development Corp., or Capital Management Services, Inc."

6. This case does not involve the President. The President is the only "certain covered person" mentioned in the order quoted in paragraph 5. Independent Counsel made an announcement as to the fact that President Clinton was not involved in this case in the press release that announced this indictment. (Ex. 2). That announcement is factually binding on Independent Counsel.

7. The factual allegations of the Indictment do not demonstrate or even indicate any relation between the matters alleged in the indictment and any official of the Executive Department of the United States. No reference is made in the Indictment to the President. No allegation is made as to any

connection or concert of action between any defendant or any event and the President.

8. Independent Counsel is required, upon the return of any indictment, to publish his authority. Mr. Starr has filed a jurisdictional statement in this case. That jurisdictional statement does not demonstrate any connection between this case and any "certain covered person" as defined in Act, Sec. 591(a) and (b), and especially Mr. Clinton.

9. The prosecution of cases beyond the scope of the Act and the Whitewater Order violates the constitutional rights of this Defendant under the Appointments Clause of the Constitution, Article II, Section 2, clause 2, and the limitations of Article III, and such prosecution interferes with the President's authority under Article II and is in violation of the constitutional principle of separation of powers, as set forth in the memorandum filed with this motion.

WHEREFORE, for the reasons stated in this part of this motion, and in the Memorandum which we file in support of this motion, we do respectfully pray that the Indictment be dismissed for want of jurisdiction.

PART II: FOR PREJUDICIAL INTERFERENCE WITH THE GRAND JURY

(In the alternative to part I)

9. Independent Counsel did, upon his appointment, convene a Grand Jury here. Mr. Starr, and his deputies, brought evidence before this Grand Jury so as to cause the return of the indictment in this case.

10. Independent Counsel also presented evidence to the same Grand Jury relating to other, unrelated, matters, leading to the return of the indictment filed in this court under number LR-CR-95 -117. A copy of that first indictment is attached to this motion as Exhibit 3. The first indictment (Ex. 3) was returned June 7, 1995, and this indictment was returned August 17, 1995. Evidence was presented by deputies of Independent Counsel on both cases at times prior to June 7, 1995.

11. In the first indictment Mr. Tucker was accused of a conspiracy to obtain and repay a loan unlawfully, submitting a false document to Capital Management Services, Inc., and conspiracy to engage in a fraudulent bankruptcy, all as set forth in the first indictment. In connection with obtaining that first indictment, and to the knowledge of Tucker and his counsel, Independent Counsel did:

a. Call witnesses before the Grand Jury.

b. Present evidence relating to every substantive allegation of the indictment, all of which evidence was intended to be unfavorable to Tucker, as shown by the first indictment itself.

c. Present the arguments of the prosecutors to the effect that an indictment should be returned, all of which arguments necessarily accused Tucker of wrongdoing, as alleged in the first indictment, and all of which necessarily depreciated Tucker.

12. On September 5, 1995, another Judge of this Court ruled that Independent Counsel had no jurisdiction to proceed in the first case. A copy of the Court's ruling is attached as Exhibit 4. The Court's ruling establishes, as a matter of law, that each appearance before the Grand Jury by Independent Counsel or his

deputies in obtaining the first indictment was without authority, beyond the jurisdiction of Independent Counsel, unauthorized by law, and therefore in direct violation of Rule 6(d), FRCrP.

13. The effect of those ex parte appearances by Independent Counsel and his deputies before the Grand Jury, in excess of their jurisdiction, and the presentation of witnesses by lawyers acting without jurisdiction was sufficiently prejudicial to Tucker that Tucker was indicted, as set forth in Exhibit 3. Those same grand jurors were then obliged to consider whether or not probable cause existed to indict Tucker in this, second, indictment. Those grand jurors had received testimony and exhibits and argument to the effect that Tucker was a lawbreaker on unrelated matters.

14. The appearances of Mr. Starr and his deputies before the Grand Jury was beyond their jurisdictional authority (Ex. 4), and in violation of Rule 6(d) of the Federal Rules of Criminal Procedure, in that the persons before the Grand Jury were not "Attorneys for the Government" but attorneys acting without jurisdiction. They had no right to be in the Grand Jury.

15. Defendant Tucker was deprived his right to a fair presentment by the Grand Jury by the actions of Independent Counsel acting beyond his authority appearing before the Grand Jury and presenting evidence as to crimes which he had no authority to prosecute. Defendant was prejudiced, in that the charging decision in this case was made by a grand jury that was necessarily influenced by the evidence presented in the matter of the first indictment.

16. The presence of these unauthorized persons before the Grand Jury was conduct which, in this case, may have influenced substantially the Grand Jury's decision to indict.

17. The actions of Independent Counsel described in this part of this Motion violated Rule 6(d) of the Federal Rules of Criminal Procedure, in that unauthorized persons were before the Grand Jury. His actions violated the Grand Jury clause of Amendment V to the United States Constitution, in that the prejudice from the presentation of the first case (Ex.3) operated to prejudice Tucker in the consideration of this case. Mr. Starr's actions also violated the due process clause of Amendment V to the United States Constitution in that Mr. Starr was making charging decisions in a case while not an attorney with jurisdiction to act for the prosecuting entity.

WHEREFORE, and in the alternative to Part I of this motion, Defendant prays that the Indictment be dismissed for violation of the rights of Tucker under Rule 6, FRCrP, and Amendment V to the United States Constitution.

Respectfully submitted,

William H. Sutton - AR #59018
FRIDAY, ELDREDGE & CLARK
400 W. Capitol, Suite 2000
Little Rock, AR 72201
(501) 376-2011

George B. Collins - AR #53032
COLLINS & BARGIONE
#1 North LaSalle Street, #2235
Chicago, Illinois 60602
(312) 372-7813

James J. Lessmeister - AR #94038
ARNOLD, GROBMYER & HALEY
124 W. Capitol, Suite 875
Little Rock, AR 72201
(501) 376-1171

CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

Mr. Kenneth W. Starr
Mr. Hickman Ewing
Mr. Steve Colloton
Office of Independent Counsel
10825 Financial Centre Parkway
Two Financial Centre, Suite 134
Little Rock, AR 72211

Mr. Bobby McDaniel
400 S. Main
Jonesboro, Arkansas 72401
Attorney for Susan McDougal

Ms. Jennifer Horan
Federal Public Defender
600 W. Capitol, Room 108
Little Rock, Arkansas 72201
Attorney for Susan McDougal

Mr. Sam T. Heuer
425 W. Capitol, Suite 3821
Little Rock, AR 72201
Attorney for James McDougal

James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

MOTION TO DISMISS BASED ON THE UNCONSTITUTIONALITY OF THE UNDERLYING ACT

ORAL ARGUMENT REQUESTED

By: William H. Sutton - AR #59018
FRIDAY, ELDREDGE & CLARK
400 W. Capitol, Suite 2000
Little Rock, AR 72201
(501) 376-2011

George B. Collins - AR #53032
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124 W. Capitol, Suite 875
Little Rock, AR 72201
(501) 376-1171

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

MOTION TO DISMISS BASED ON THE UNCONSTITUTIONALITY OF THE UNDERLYING ACT

Comes Jim Guy Tucker, by counsel, and states:

1. Pursuant to 28 U.S.C. § 596(b)(2) the Special Division has the power to terminate independent counsel.

2. In Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court held § 596(b)(2) under the Act of 1987 was constitutional provided the provision was given a narrow construction.

3. Under the Act of 1987, § 596(b)(2) was interpreted to only allow the Special Division the power to remove an independent counsel who was unwilling to acknowledge his or her duties are complete.

4. Under the Act of 1994, § 596(b)(2) was revised so the Special Division now has the power to periodically review and reappoint an already existing independent counsel.

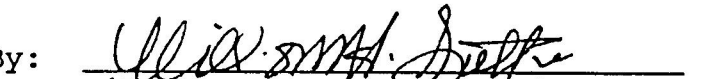
5. Thus, this new power given to the Special Division violates the limitations of Article III by compromising the independence of the judiciary under the Doctrine of Separation of Powers.

6. Section 594(l)(2) provides that the Administrative Office of the United States Courts shall provide administrative support and guidance to the Independent Counsel.

7. Section 594(l)(2) violates the Separation of Powers under Article III by compromising the independence of the judiciary.

WHEREFORE, Jim Guy Tucker prays that the indictment be dismissed because the underlying act is unconstitutional.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

By: 

William H. Sutton - AR #59018
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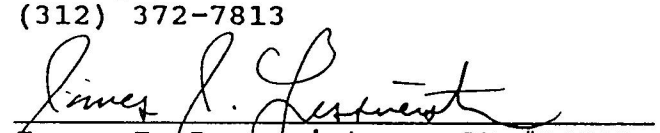

James J. Lessmeister - AR #94038
ARNOLD, GROBMYER & HALEY
124 W. Capitol, Suite 875
Little Rock, AR 72201
(501) 376-1171

CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

Mr. Kenneth W. Starr
Mr. Hickman Ewing
Mr. Steve Colloton
Office of Independent Counsel
10825 Financial Centre Parkway
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Mr. Bobby McDaniel
400 S. Main
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Attorney for Susan McDougal

Ms. Jennifer Horan
Federal Public Defender
600 W. Capitol, Room 108
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Attorney for Susan McDougal

Mr. Sam T. Heuer
425 W. Capitol, Suite 3821
Little Rock, AR 72201
Attorney for James McDougal

James J. Lessmeister

zjj1117

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

MEMORANDUM BRIEF IN SUPPORT OF MOTION TO DISMISS BASED ON THE UNCONSTITUTIONALITY OF THE UNDERLYING ACT

I. THE 1994 REVISION OF 28 U.S.C. § 596(b)(2) IS UNCONSTITUTIONAL

Comes Jim Guy Tucker, by counsel, asserts that the Independent Counsel Reauthorization Act of 1994 (hereinafter "Act of 1994") is unconstitutional as a matter of law. In the Act of 1994 Congress specifically revised 28 U.S.C. § 596(b)(2). The new § 596(b)(2) under the Act of 1994 grants the Special Division more power than is constitutionally permissible under the holding of Morrison v. Olson, 487 U.S. 654 (1988).

The Independent Counsel Reauthorization Act of 1987 (hereinafter "Act of 1987") § 596(b)(2) provided:

> Termination by division of the court. The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under § 594(e) [28 U.S.C. § 594(e)], and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of

> such termination, the independent counsel shall file the final report required by § 594(h)(1)(B) [28 U.S.C. § 594(h)(1)(B)].

In order for this provision to be constitutional, Justice Rehnquist in Morrison v. Olson held the provision was subject to a narrow interpretation.

In determining the validity of § 596(b)(2) under the Act of 1987, Chief Justice Rehnquist was concerned that the provision granted the Special Division the power to "terminate" the office of the independent counsel. Such a power is not typically "judicial" and is not analogous to a court's more traditional powers. The Special Division's power to terminate the independent counsel under § 596(b)(2) is administrative in nature. Morrison, 487 U.S. at 682. In order for § 596(b)(2) to be constitutional the Chief Justice held "to save it [§596(b)(2)] from constitutional infirmities...we think a narrow construction is appropriate here." Morrison, 487 U.S. at 682 (citation omitted). Justice Rehnquist interpreted the provision only as a safety mechanism to remove from the public payroll an independent counsel who has served his or her purpose but is unwilling to resign. Id., 487 U.S. at 683.

In scrutinizing the constitutionality of § 596(b)(2) under the Act of 1987, Justice Rehnquist made the following observations:

> First, the Act as it currently stands gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Second, the Act prevents members of the Special Division from participating in 'any judicial proceeding concerning

> a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.'

Id., 487 U.S. at 683-84 citing 28 U.S.C. § 49(f) (other citation omitted) (emphasis in original).

Furthermore, Chief Justice Rehnquist accentuated:

> We emphasize, nevertheless, that the Special Division has no authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications.

Id., 487 U.S. at 684 (emphasis in original).

Thus the majority in Morrison v. Olson held that provided § 596(b)(2) under the Act of 1987 be given a narrow construction the provision would not compromise the independence of the Judiciary and exceed the limits of Article III of our Constitution.

Under the Act of 1994 § 596(b)(2) has been revised to state:

> Termination by division of the court. The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of such termination, the independent counsel shall file the final report required by section 594(h)(1)(B). If the Attorney General has not made a request under this paragraph, the division of the court shall determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.

In a conference report, the House of Representatives stated they were aware of the Supreme Court's narrow construction of § 596(b)(2) in Morrison v. Olson and declared that the revision of this provision did not violate the Supreme Court's narrow interpretation. H.R. Conf. Rep. No. 103-511, 103 Cong., 1st Sess. at 23 reprinted in 1994 U.S.C.C.A.N. 748, 806. It is a fallacy for Congress to state the revised § 596(b)(2) under the Act of 1994 is consistent with the restrictions in Morrison v. Olson. For as Abraham Lincoln once said, just calling a tail a leg does not make it a leg. If so, "how many legs does a dog have, five?"

Moreover, Attorney General Reno did not join in Congress' confidence that the revised § 596(b)(2) did not violate the Supreme Court's narrow interpretation in Morrison v. Olson. In her prepared statement Attorney General Reno stated:

> The Senate bill next proposes that there be a periodic reappointment of Independent Counsel by the Special Division of the Court, based on an assessment of the status of the investigation. We believe that this procedure would constitute too great an intrusion by the Court into the investigative responsibilities of the Independent Counsel. While the current limited role of the Court in appointing the Independent Counsel is appropriate, any continuing oversight function, particularly oversight of the progress or scope of the investigation, is constitutionally suspect and unwise as a matter of policy. The Department therefore recommends against this provision.

S. 24, The Independent Counsel Reauthorization Act of 1993, Hearing before the Committee on Governmental Affairs, United States Senate, to reauthorize the independent counsel law for an additional 5 years, and for other purposes, S. Hrg. 103-437, 103 Cong., 1st Sess. at p. 29 (prepared statement of Honorable Janet Reno, United States Attorney General).

The new § 596(b)(2) under the Act of 1994 is unconstitutional

because it compromises the independence of the judiciary and exceeds the limits of Article III. The Special Division now has the statutory power to review any of the actions of the independent counsel which gives the Special Division the power to participate in the investigation. This is an unwarranted intrusion on the separate power of the Executive, and is an unconstitutional expansion of the powers of the Special Division to matters not within its constitutional scope. In effect the revised § 596(b)(2) gives the special division the "broad sword and rapier" which will enable the division to control the pace and depth of the independent counsel's activities. See Morrison, 487 U.S. at 682 citing In re Sealed Case, 838 F.2d 476, 515 (DC Cir. 1988). Under the 1987 Act, § 596(b)(2) was triggered by a lingering independent counsel. Now, § 596(b)(2) is triggered by time and the discretion of the Special Division, regardless of the actions of the independent counsel. This is a change which takes the Act beyond the confines of Morrison.

II. THE 1994 ADDITION OF § 594(l)(2) IS UNCONSTITUTIONAL

In 1994 Congress added for the first time the following provision:

> **(l) Cost controls and administrative support**
> (2) Administrative support. The Director of the Administrative Office of the United States Courts and shall provide administrative support and guidance to each independent counsel. No officer or employee of the Administrative Office of the United States Courts shall

disclose information related to an independent counsel's expenditures, personnel, or administrative acts or arrangements without the authorization of the Independent Counsel.

Both the Senate and House acknowledge in a conference agreement report that "The 1987 law did not address the issue of administrative support for independent counsels." H.R. Rep. No. 103-511, 103 Cong., 2d Sess., p.1 at 21 (May 19, 1994). Thus, the Supreme Court has not ruled upon this issue. See Morrison v. Olson, 487 U.S. 654 (1988).

Congress gives three reasons for having the Administrative Office of the United States Courts provide administrative support and guidance to independent counsel. First, Congress notes that the administrative office has been doing this for many years but there has not been any explicit statutory basis for the administrative offices' duties. Congress feels § 594(l)(2) clarifies the administrative offices' responsibility. Second, Congress believes the provision makes it clear that the administrative office should not only provide administrative services but give guidance on complying with federal personnel, administrative and procurement requirements. Congress believes this guidance is "sorely needed." Yet, Congress states that although 594(l)(2) uses the words "support and guidance" the administrative office cannot exercise decision making authority for specific actions. Congress states "actions taken by an Independent Counsel's office remain the responsibility of the Independent

Counsel in charge." Id., H.R. Rep. No. 103-511 at 21-22.

Third, Congress asserts § 594(l)(2) shields the Administrative Office from conflicts that may arise when Congress, the press or others seek information about Independent Counsel's activities. Id., H.R. Rep. No. 103-511 at 22.

Essentially, by rationalizing, Congress is simply saying since the Administrative Office has done this it should continue to do this. Such reasoning is absurd. By having the Administrative Office of the United States Courts provide administrative support and guidance to Independent Counsels § 594(l)(2) violates the doctrine of Separation of Powers under Article III of our Constitution by compromising the independence of the judiciary.

In his prepared statement, L.Ralph Mecham, the Director of the Administrative Office of the United States Courts stated

> In essence, this bill would task an entity within the Judicial Branch of government to support an entity - the Independent Counsel - that has a prosecutorial function. The Judicial Conference has concluded, and I concur, that this is an inappropriate function for the Administrative Office to perform and we respectfully request that you delete us from the bill...the Administrative Office, on a volunteer basis, has provided administrative support to Independent Counsels for several years. This was carried out under an agreement between subordinates and my predecessor and the Justice Department. I am sure this agreement was entered into in an effort to accommodate the Justice Department and provide a temporary service. **However, in practice, it has not worked well at all, especially in recent years.**
>
> The administrative office is caught in a 'Catch 22' position. First, we have no authority whatsoever to enforce compliance with Federal laws and Executive Branch regulations as they apply to Independent Counsels on such matters as payment for hotel accommodations, per diem, first-class travel, contract laws, personal regulations, accounting procedures, and an array of other regulatory

> requirements. Yet, the first audit report of the General Accounting Office on the Independent Counsel program criticized the Administrative Office for not enforcing the laws and regulations, even though we have no lawful power to enforce them.
>
> We have taken a series of steps to correct the administrative deficiency cited by GAO. But the fundamental problem is that the Independent Counsels are not answerable to the Administrative Office and cannot be compelled to follow any guidance we might give them. Yet, we are expected to issue checks and to keep the balances and the Independent Counsels are completely free to ignore any questions that we might raise.
>
> We are concerned that the proposal to involve a Judicial Branch entity, the Administrative Office, in a typically Executive Branch function, prosecutions, at the very least rubs up against traditional notions of separation of powers between the branches.

S.24, The Independent Counsel Reauthorization Act of 1993, Hearing before the Committee on Governmental Affairs, U.S. Senate, S.Hrg. 103-437, 103rd Cong., 1st Sess., p.1 at 99-100. (May 14, 1993)(Statement of L. Ralph Mecham)(Emphasis Supplied).

Mr. Mecham states three reasons why the Administrative Office is ill-suited to provide administrative support and guidance to the Independent Counsels:

> First, statutes, regulations, policies and procedures of the Executive Branch differ in significant ways from those of the Judicial Branch. Our staff are not experts on the Executive Branch regulations and it is costly to require them to be trained to apply two sets of laws and regulations. Second, the Administrative Office has no means of enforcing compliance with the applicable regulations. It cannot supervise, regulate, or compel compliance with law and regulations by the Independent Counsels. Finally, even if the legislation is revised to place more responsibility and accountability with the Office of the Independent Counsel itself, there is no way, short of establishing an ongoing, independent support unit, to build in the needed internal controls within each Office of Independent Counsel.

Id., S.Hrg. 103-437, 103rd Cong., 1st Sess., p.1 at 100.

Congress is wrong for rationalizing that since the Administrative Office has done this in the past, as a matter of convenience, it should do it in the future. For (1), the Administrative Office candidly states it has not worked well. Second, the Administrative Office has suggested other entities such as the Justice Department, GSA, GAO, the Clerk of the U.S. Court of Appeals for the District of Columbia, or a newly created agency are better suited to handle the Office of Independent Counsel administrative needs. See S.Rep. 103-101, 103rd Cong., 2d Sess., p.1 at 22 (May 19, 1994) reprinted in 1994 U.S.C.C.A.N. 748, 767.

It is self evident that the codification of the improper practice of the Administrative Office violates the Separation of Powers by compromising the independence of the Judiciary and the Act should be declared unconstitutional. Congress' rationalization that the Administrative Office should continue to provide administrative services and guidance to Independent Counsels because it is a matter of convenience was admonished by Justice Brandeis:

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. U.S., 272 U.S. 52, 293 (1926)(Brandeis, J. dissenting)

WHEREFORE, Jim Guy Tucker prays that the indictment be dismissed on the grounds that the Act of 1994 violates the limitations of Article III by compromising the independence of the

judiciary.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

By: William H. Sutton

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CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL, Defendants.	)	

MOTION TO ADOPT MOTION OF J. MCDOUGAL
TO DISMISS INDICTMENT

Comes Jim Guy Tucker, by counsel, and moves to adopt the motion filed in this cause by James McDougal to dismiss the indictment on the ground that the Independent Counsel Act, 28 USC Sec. 591 et seq., was not validly re-enacted, but was an amendment to an expired law, and therefore is not a valid and existing Act of Congress. In support hereof, this defendant states:

1. The motion, and its brief, are before the Court. Further briefing by this defendant would be redundant.

Respectfully submitted,

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James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. LR-CR-95-173
	)	
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL,	)	
	)	
Defendants.	)	

MOTION AND MEMORANDUM OF DEFENDANT JIM GUY TUCKER FOR PRODUCTION OF ALLEGED CO-CONSPIRATOR STATEMENTS AND FOR SUPPRESSION OF ANY SUCH STATEMENTS WHICH FAIL TO MEET THE CRITERIA OF F.R.EVID., RULE 801(d)(2)(E)

Comes the Defendant, Jim Guy Tucker, by counsel, and moves the Court for an order requiring the Independent Counsel to produce all alleged co-conspirator statements and to suppress any such statements that fail to meet the criteria of Rule 801(d)(2)(E) of the Federal Rules of Evidence and, in support hereof states:

1. This Defendant anticipates that the Independent Counsel will utilize numerous alleged co-conspirator statements during the course of its case.

2. Such statements are not admissible unless made during the course and in furtherance of the conspiracy.

3. This motion requests that the Court allow discovery of these statements in advance of trial to avoid needless interruption at trial and to suppress any such statements as to this Defendant not meeting the requirements above.

MEMORANDUM

Rule 801(d)2)(E) of the Federal Rules of Evidence provides:

> "A statement is not hearsay if...a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

This Defendant anticipates that the prosecutor's case will contain statements of alleged co-conspirators in Count One of its indictment. In order for these statements to be admissible against this Defendant, the Independent Counsel must satisfy the court that these statements were made in the course of, and in furtherance of, the conspiracy as required by Rule 801(d)2)(E).

The "during the course of" requirement is generally held to mean that the statements made as the conspiracy continues are admissible, whereas statements made after the conspiracy has failed or its goals have been achieved, are not admissible. Krulevitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949). Similarly, statements made in furtherance of attempts to prevent detection are not admissible. United States v. Smith, 520 F.2d 1245 (8th Cir. 1975).

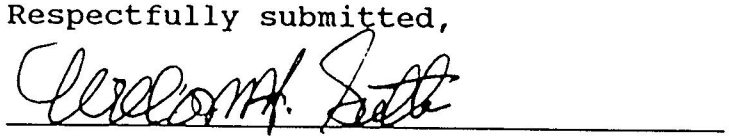
The more difficult question to be addressed, however, is the meaning of "in furtherance of the conspiracy." The Eighth Circuit has held that the "in furtherance" requirement is satisfied only when the statement somehow advances the objective of the conspiracy (i.e., something more than merely informing the listener of the declarant's activities). United States v. Snider, 720 F.2d 985 (8th Cir. 1983). The courts have also held that to be admissible, the statements must be more than merely "casual comments" not

intended to further the conspiracy. United States v. Green, 600 F.2d 154 (8th Cir. 1979); United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979).

It should be noted, however, that this motion to have produced any alleged co-conspirator statements for a review by the court to determine their admissibility is not to be construed as an admission that the other elements of admissibility are present. Moreover, in order for alleged co-conspirator statements to be admissible, there must be established preliminarily that (a) there is a connection of the defendant to it; (b) that the statement was made during the course of the conspiracy; and (c) that it was made in furtherance of the conspiracy. Eubanks, supra, at 519. Furthermore, it is the responsibility of the court, rather than the jury, to determine if this foundation has been laid sufficient to admit the testimony. Id. Thus, even if the statements are produced pre-trial in furtherance of the alleged conspiracy, this Defendant does not waive and hereby asserts any and all other defenses to the admissibility of such evidence.

WHEREFORE, the Defendant, Jim Guy Tucker, requests that the Court order pre-trial disclosure of co-conspirator statements which the government intends to introduce, and to suppress all such statements that do not satisfy the requirements of Rule 801(d)(2)(E).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

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James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

DEFENDANT TUCKER'S MOTION TO RESERVE THE RIGHT TO FILE ADDITIONAL PRETRIAL MOTIONS OR REQUESTS

Comes now Defendant Jim Guy Tucker ("Tucker"), by and through his attorneys, and hereby files his motion to reserve the right to file additional pretrial motions and requests and as grounds, therefore, states:

1. The allegations in this case concern alleged criminal acts occurring over a significant period of time. The indictment was returned by the grand jury for the Western District of Arkansas on August 17, 1995.

2. Thereafter, the United States Magistrate set September 12, 1995 as the date when Tucker's pretrial motions were to be filed. On September 6, 1995 Tucker filed a Motion to Extend Time of Filing to September 25, 1995. Tucker has now filed several pretrial motions and has begun the task of reviewing voluminous information, documents and other material, developed in the Independent Counsel's case in preparation for trial. After reviewing the materials and investigating the case, it may become necessary for Tucker to assert additional motions

including, but not limited to, further requests for disclosure, motions to dismiss, and other motions that may arise from the Independent Counsel's responses.

3. This Defendant is now filing the instant motion in an effort to preserve his right to seek leave of Court to file additional pretrial motions after the motion date, if necessary.

WHEREFORE, for the foregoing reasons, Tucker respectfully requests that the Court permit him additional time, after the Independent Counsel has provided responses to Tucker's pretrial motions and after Tucker has investigate the case, to file additional motions as may be deemed appropriate, and for any and all other proper relief.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

By: _____

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	
v.	)	LR-CR-95-173
	)	
JAMES B. MCDOUGAL,	)	
JIM GUY TUCKER, and	)	
SUSAN H. MCDOUGAL	)	
	)	
Defendants	)	

MOTION TO SET RETURN DATE FOR TRIAL SUBPOENAS PRIOR TO DATE OF TRIAL

Comes the Defendant, Jim Guy Tucker, by counsel and for his motion pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure states as follows:

1. This Defendant may seek to subpoena certain documents for use at trial, which documents, it is anticipated, will require inspection and examination so as to be able to complete trial preparation.

WHEREFORE, this Defendant asks the Court, in accordance with Rule 17(c), to set a date prior to trial, upon which documents may be submitted by the subpoenaed parties, to be inspected by counsel before trial. Defendant prays that the return date be at least thirty days before trial.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	
v.	)	LR-CR-95-173
	)	
JAMES B. MCDOUGAL,	)	
JIM GUY TUCKER, and	)	
SUSAN H. MCDOUGAL	)	
	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF MOTION FOR DISCLOSURE OF EVIDENCE FAVORABLE TO DEFENDANT

MAY IT PLEASE THE COURT:

Since Brady v. Maryland, 3737 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959) the prosecution has been required to disclose evidence favorable to the defendant. The failure to disclose favorable evidence is error, and the circumstances under which that error is prejudicial are outlined in U.S. v. Bagley, 473 U.S. 667 (1985).

The Brady rule has continuing life. Miller v. Angliker, 848 F.2d 1312, 1319 (2d Cir. 1988) sums it up when it says:

> "It is by now well established that a person accused of a crime has a due process right to require the prosecution to turn over to him any material or exculpatory evidence in its possession."

This applies to all issues in which a defendant has an interest, including the credibility of the witnesses and even including, as in Miller evidence of a special defense available to the defendant.

We do not write at inordinate length on our Brady motion; we

are certain that the Court has had long experience with Brady, and believe that the prosecutors will understand their duty under the due process clause of Amendment V to our Constitution, pursuant to which we bring this motion.

We respectfully pray that our Brady motion be granted.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

MOTION FOR DISCLOSURE OF EVIDENCE FAVORABLE TO DEFENDANT

Comes Jim Guy Tucker ("Tucker"), Defendant, by counsel, and for his Motion for Disclosure by Independent Counsel of Evidence Favorable to these defendants, as required by Brady v. Maryland, 373 U.S. 83 (1963) and Amendment V to the United States Constitution, states:

1. Independent Counsel has conducted a lengthy investigation in this cause before, it is believed, two different grand juries and involving many witnesses and well over 100,000 pages of documents, obtained from defendants and from other sources, by subpoena and informally.

2. In addition, Independent Counsel has interviewed many witnesses who are not called before the Grand Jury, whose evidence was either not considered of benefit to Independent Counsel or whose evidence was adverse to Independent Counsel's contentions and favorable to or exculpatory of a defendant. Under the law of conspiracy evidence exculpatory of any "defendant" is also exculpatory of this defendant.

3. Defendants believe, and allege, that much of this evidence is exculpatory to defendants under the test of Brady v. Maryland, supra, and therefore specifically request;

(a) All evidence, including statements of individuals, Forms 302, handwritten notes, or documents of any kind which contradict any of the specific allegations of the indictment.

(b) All documents obtained from any source by Independent Counsel which tend to contradict any of the specific allegations of the indictment.

(c) All witness statements taken from witnesses as to matters related in Counts I, II, III, IV, VIII, IX, X, XI, XII, XX, XXI which contradict the eventual testimony of those witnesses before the grand jury or in any final statement taken from the witnesses, including the initial field notes prior to preparation of Form 302 statements taken by agents of Independent Counsel.

(d) All evidence indicating that any prospective Independent Counsel witness has a criminal record.

(e) All evidence indicating that any prospective Independent Counsel witness has committed a crime under the laws of any jurisdiction or government for which the proposed witness has not been convicted.

(f) All evidence indicating that any document purporting to bear the signature of any defendant or the wife of any defendant does not actually bear the genuine signature of that defendant, or the wife of that defendant.

(g) All evidence indicating that any prospective Independent Counsel witness may have lied under oath on any occasion.

(h) All evidence indicating that any prospective Independent Counsel witness told inconsistent stories to Independent Counsel.

(i) Redacted and filed separately.

(j) All evidence relating to any voir dire questions to the grand jury.

(k) All other evidence of any kind or description favorable to or exculpatory of the defendant.

(l) All documents including any oral or written testimony and interviews conducted by agents of Independent Counsel and Resolution Trust Corporation ("RTC") of persons charged in Counts I, II, IV, X, XI, XII of the Indictment which;

(i) Indicate or demonstrate Tucker did not have a fiduciary duty to David L. Hale, Capital Management Services, Inc. ("CMS") or Madison Guaranty Savings & Loan ("MGSL");

(ii) Indicate or demonstrate that David L. Hale made a case by case determination of eligibility of each borrower;

(iii) Indicate or demonstrate that David L. Hale personally and solely determined and reported the "use of proceeds" information as reported on SBA Form 1031.

(iv) Indicates that Tucker had no knowledge or involvement in information allegedly submitted to SBA on a Form 1031.

(v) Indicate or demonstrate that David L. Hale solicited qualified borrowers from his Small Business Investment Corporation ("SBIC").

(vi) Indicate or demonstrate that the loans from MGSL to Tucker were bona fide.

(vii) Indicate or demonstrate that Tucker had no fiduciary duty to Deal Paul, Ltd. regarding the $825,000 loan to Dean Paul, Ltd. from MGSL.

(viii) Indicate or demonstrate that Tucker did not make or cause to be made any alleged false entries with the intent to defraud in the books, reports and statements of MGSL. Specifically, any oral or written statements by, but not limited to, John Latham, Steve Cuffman, Greg Young, Don Denton, and Sarah Hawkins.

(ix) Indicate or demonstrate that Tucker did not make or cause to be made any alleged false entries with the intent to defraud in the books, reports and statements of CMS. Specifically, any oral or written statements by, but not limited to, David L. Hale, Caron Ross, William Watt, Steve Smith and any accountants or auditors.

(x) Indicate or demonstrate that Tucker did not make or cause to be made alleged false statements for the purpose of making fraudulent loans at CMS, specifically any oral or written statements by, but not limited to, David L. Hale, Caron Ross, William Watt, Steve Smith and any accountants or auditors.

(xi) Indicate or demonstrate that Tucker was not a nominee for the property at 1308 Main Street, Little Rock, Arkansas or indicating that he legally owned the property.

(xii) Indicate or demonstrate that after March, 1985 Tucker had no involvement or knowledge of transfers of ownership of 1308 Main Street, Little Rock, Arkansas property.

(xiii) Indicate or demonstrate that Tucker had no knowledge or involvement of the $825,000 Dean Paul Ltd. loan including but not limited to alleged overvalued appraisals, fraudulent real estate transactions or loan funds being used to increase the capitalization of CMS.

(xiv) Indicate or demonstrate that Tucker had no knowledge of an involvement in the $143,000 loan from CMS to Larry E. Kuca d/b/a Campobello Realty Co.

(xv) Indicate or demonstrate that Tucker had no knowledge or involvement in the $65,000 loan from CMS to Steve Smith, d/b/a The Communication Company.

(xvi) Indicate or demonstrate that Tucker had no knowledge or involvement in the alleged generated inflated profits for Madison Finance Corporation ("MFC") from the $1.05 million loan from MGSL to CSW.

(xvii) Indicate or demonstrate that Tucker had no knowledge that Susan H. McDougal received a commission on the sale including any document purporting to bear the signature of Tucker which does not actually bear the genuine signature of Tucker.

(xviii) Indicate or demonstrate that Tucker had no knowledge or involvement in a loan of $300,000 from CMS to Susan H. McDougal d/b/a Master Marketing.

(xix) Indicate or demonstrate that MGSL knew and approved of how the loan proceeds would be used or disbursed in the $260,000 loan from MGSL to Tucker for 145th Street property including payment to Savers Bank.

(xx) Indicate or demonstrate that Tucker was not a participant in the alleged October, 1985 meeting with Jim McDougal and David L. Hale wherein the alleged infusion of approximately $500,000 of capital into CMS was allegedly discussed.

(xxi) Indicate or demonstrate that Tucker had no knowledge or involvement regarding David L. Hale's receipt of $502,000 in net proceeds from the alleged fraudulent Dean Paul Ltd. real estate transaction.

(xxii) Indicate or demonstrate that Tucker had no knowledge or involvement regarding alleged fraud in the $100,000 loan from CMS to Southloop.

m. All documents including any oral or written testimony and interviews conducted by agents of Independent Counsel and RTC of persons relating to charges Count II of the indictment which:

(i) Indicate or demonstrate that Tucker did not cause or cause to be made an alleged wire transfer of funds from the United States Department of Treasury to CMS' account at Pulaski Bank & Trust in Little Rock, Arkansas on or about May 20, 1986.

n. All documents including any oral or written testimony and interviews conducted by agents of Independent Counsel and RTC of persons relating to charges in Count III of the indictment which:

(i) Indicate or demonstrate that Tucker did not cause or cause to be made an alleged wire transfer of funds from the United States Department of Treasury to CMS' account at Pulaski Bank & Trust in Little Rock, Arkansas on or about September 11, 1986.

o. All documents including any oral or written testimony and interviews conducted by agents of Independent Counsel and RTC of person relating to the charges in Count VIII of the indictment which:

(i) Indicate or demonstrate that Tucker had no knowledge or involvement in obtaining an alleged

fraudulent loan from CMS to pay off the Kings River note at Worthen.

(ii) Indicate or demonstrate that Tucker had no knowledge or involvement in the submission of the alleged false and fictitious loan proposal to CMS.

p. All documents including any oral testimony and interviews conducted by agents of Independent Counsel and RTC of persons relating to the charges in Count IX of the indictment which:

(i) Indicate or demonstrate that Tucker had no knowledge or involvement in the alleged misapplication of monies and funds belonging to CMS.

q. All documents including any oral or written testimony or interviews conducted by agents of Independent Counsel and RTC of persons relating to the charges in Count X of the indictment which:

(i) Indicate or demonstrate that Tucker had no knowledge or involvement in the alleged false entry (hiring a new employee) as to the purpose of the loan to Steve A. Smith d/b/a The Communication Company.

r. All documents including any oral or written testimony or interviews conducted by agents of Independent Counsel and RTC of persons relating to the charges in Counts XX and XXI of the indictment which:

(i) Indicate or demonstrate that Tucker did not knowingly or willfully "allow" David Hale to retain any proceeds from the sale of the 32 Pine Manor property.

(ii) Indicate or demonstrate that the Southloop Construction Company, Inc. loan is a legitimate loan with legitimate terms and interest rates and was not a personal payback from Hale to Tucker.

(iii) Indicate or demonstrate that the loan proceeds purportedly to be a personal payback from Hale to Tucker were used for legitimate business expenses and that Tucker did not retain the proceeds personally.

(iv) Indicate or demonstrate that Tucker did not deceive CMS or the SBA auditors.

4. This motion is supplementary to the motion to require Independent Counsel to disclose arrangements and deals with witnesses, filed this date. "Independent Counsel" is intended to refer to any agent or associate of Independent Counsel, or of Mr Fiske, a non-statutory predecessor of Independent Counsel.

WHEREFORE, Defendants respectfully pray that Independent Counsel disclose all "Brady material" in its possession, in accord with the requirements of Brady v. Maryland, supra, and Amendment V to the United States constitution, both as specifically requested and as it may exist.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

By: _____

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_____

James J. Lessmeister - AR #94038
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Little Rock, AR 72201
(501) 376-1171

CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

Mr. Kenneth W. Starr
Mr. Hickman Ewing
Mr. Steve Colloton
Office of Independent Counsel
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Attorney for Susan McDougal

Mr. Sam T. Heuer
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Little Rock, AR 72201
Attorney for James McDougal

James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL, Defendants.	)	

DEFENDANT JIM GUY TUCKER'S RULE 16 DISCOVERY REQUEST

Comes now Defendant, Jim Guy Tucker, (hereinafter "Tucker"), by and through his undersigned attorneys of record, requests the Independent Counsel to do the following, in accordance with Rule 16 of the Federal Rules of Criminal Procedure:

A. STATEMENT OF DEFENDANT:

1. Disclose to Tucker and make available for inspection, copying, or photographing: any relevant written or recorded statements made by Tucker or any persons claimed to have been a co-conspirator or agent of Tucker, or copies thereof, within the possession, custody, or control of the Independent Counsel, the existence of which is known, or by the exercise of due diligence may become known, to the Independent Counsel; that portion of any written record containing the substance of any relevant oral statement made by Tucker or any alleged co-conspirator or agent in response to interrogation by any person acting for the Plaintiff, and the transcript or recording of the Grand Jury testimony of any alleged co-conspirator or agent of Tucker.

2. Disclose to Tucker the substance of any other relevant oral statement made by Tucker or any alleged co-conspirator of

Tucker in response to interrogation by any person employed by or acting for the benefit of Plaintiff if the Independent Counsel intends to use that statement at trial.

B. DEFENDANT'S PRIOR RECORD: Furnish to Tucker such copy of the any criminal record of any person claimed to be a co-conspirator or agent of Tucker, if any, as is within the possession, custody or control of the Independent Counsel, the existence of which is known, or by the exercise of due diligence may become known, to the Independent Counsel. Tucker particularly requests the criminal record of David L. Hale.

C. DOCUMENTS AND TANGIBLE OBJECTS: Permit Tucker to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the Independent Counsel, and which are material to the preparation of Tucker's defense or are intended for use by the Independent Counsel as evidence in chief at the trial, or were obtained from or belong to Tucker or to any person alleged to have been a co-conspirator or agent of Tucker.

D. REPORTS OF EXAMINATIONS AND TESTS: Permit Tucker to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, including handwriting analyses, or copies thereof, which are within the possession, custody, or control of the Independent Counsel, the existence of which is known, or by the exercise of due diligence may become known, to the Independent Counsel, and which are

material to the preparation of the defense or are intended for use by the Independent Counsel as evidence in chief at the trial.

E. EXPERTS: Disclose to Tucker a written summary of expert testimony the Independent Counsel intends to use during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications. Tucker also requests copies of any explanatory exhibits prepared by any expert witness for trial use or demonstration.

F. CONTINUING DUTY TO DISCLOSE: In accordance with Rule 16 of the Federal Rules of Criminal Procedure, if, prior to or during trial, the Independent Counsel discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under Rule 16, the Independent Counsel shall promptly notify Tucker's Attorneys or the court of the existence of the additional evidence or material. Tucker further prays that compliance by the Independent Counsel be completed at least forty-five days prior to trial.

Respectfully submitted,

JIM GUY TUCKER, Defendant

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(501) 376-1171

CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

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Mr. Hickman Ewing
Mr. Steve Colloton
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Attorney for Susan McDougal

Mr. Sam T. Heuer
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Little Rock, AR 72201
Attorney for James McDougal

James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)
)
v.) LR-CR-95-173
)
JAMES B. MCDOUGAL,)
JIM GUY TUCKER, and)
SUSAN H. MCDOUGAL)
Defendants)

DEFENDANT JIM GUY TUCKER'S MOTION TO REQUIRE INDEPENDENT COUNSEL TO GIVE NOTICE OF ITS INTENTIONS TO INTRODUCE RULE 404(b) AND RULE 608(b) EVIDENCE

Comes now Defendant Jim Guy Tucker ("Tucker") by and through his undersigned attorneys of record, request the Independent Counsel to provide Tucker with notice of intention to introduce Rule 404(b) and Rule 608(b) evidence in its case-in-chief:

1. That the Independent Counsel provide to Tucker reasonable notice in advance of trial of its intention to offer into evidence any 404(b) character evidence that goes to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and the general nature of any such evidence it intends to introduce at trial.

2. That the Independent Counsel provide to Tucker its notice of intent to introduce into evidence any 608(b) material regarding the witness concerning the witness' character for truthfulness or untruthfulness, or concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.

3. That the Independent Counsel provide to Tucker notice of intention to introduce Rule 404(b) and Rule 608(b) evidence in its case-in-chief, and to provide to Tucker, if intended to be used, with the following:

(a) The specific details of any such alleged conduct;

(b) Statements of any participants;

(c) Any document contending or evidencing such conduct;

(d) With respect to 404(b) evidence, the issues on which the Independent Counsel believes the evidence is relevant.

4. Defendant Tucker requests said information so as to prevent prejudicial surprise at trial.

WHEREFORE, Defendant Tucker prays for an order granting his motion and for all other relief to which he is entitled to.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

By: 

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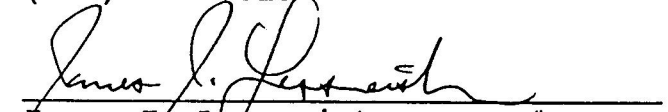

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James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

MOTION FOR BILL OF PARTICULARS

Comes Defendant, Jim Guy Tucker ("Tucker"), by counsel, and for his Motion for Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure prays that Independent Counsel be required to furnish to this Defendant the following particulars:

AS TO COUNT ONE

As to paragraph 1(i): Set forth the manner as to which the Defendants are alleged to have conspired to cause an increase in the lending limit of Capital Management Services, Inc. ("CMS").

As to paragraph 1(k): Set forth whether or not it is the contention of Independent Counsel that Tucker provided legal representation to David L. Hale, CMS or Madison Guaranty Savings & Loan ("MGSL") and any of the alleged counts in the indictment.

As to paragraph 1(k): Set forth the specific matters in which it is alleged Tucker had a fiduciary duty to David Hale, CMS or MGSL.

As to paragraph 2: Set forth the persons, other than David L. Hale, with whom Defendants are alleged to have conspired who were known to the Grand Jury at the time of the indictment.

As to paragraph 2: Set forth the date, time and place of the contention of Independent Counsel as to the formation of the alleged conspiracy.

As to paragraph 2(a): Set forth the date, time and place of the contention of Independent Counsel as to the Defendant's alleged intended fraud or misapplication of monies, funds and credits of Madison Guaranty Savings & Loan Association ("MGSL").

As to paragraph 2(b): Set forth the date, time, place and manner as to which the Defendants are alleged to have knowingly and willfully made or caused to be made false entries in the books and records of MGSL with the intent to defraud the institution and deceive the Federal Home Loan Bank Board ("FHLBB").

As to paragraph 2(c): Set forth the time, place, date and manner in which the Defendants allegedly knowingly and willfully received directly and indirectly, the money, profit, property and benefits of the alleged transaction of MGSL with the intent to defraud the institution, and the United States and an agency thereof.

As to paragraph 2(d): Set forth the date, time, place and manner in which the Defendants allegedly knowingly and willfully misapplied or cause to misapply, the monies, funds and credits of CMS.

As to paragraph 2(e): Set forth the time, date, place and manner in which the Defendants allegedly knowingly and willfully made or caused to be made false entries in the books, reports and statements of CMS with the intent to defraud the United States, common agency thereof, and officers, examiners and auditors thereof.

As to paragraph 2(f): Set forth the specific loan applications in which the Defendants allegedly knowingly and willfully made and caused to be made false statements for the purpose of influencing the actions of CMS and the making of fraudulent loans.

As to paragraph 3: Set forth the date, time, place and manner in which the Defendants allegedly decided to fraudulently conduct the affairs of MGSL and CMS to generate readily available funds to be used by them, the joint ventures or those who assisted them.

As to paragraph 3: Set forth those persons who would and did allegedly assist the Defendants in their business ventures.

As to paragraph 4: Set forth the specific financial dealings which were allegedly fraudulently structured by the Defendants.

As to paragraph 4: Set forth the names of the examiners, auditors and others.

As to paragraph 4: Set forth the manner as to which the Defendants allegedly conspired to structure fraudulent financial dealings with MGSL and CMS.

As to paragraph 5: Set forth the specific nominee transactions which were allegedly fraudulent for the purpose of generating fraudulent profits or disguising from examiners and auditors the true ownership of the assets.

As to paragraph 5: Set forth the names of examiners and auditors.

As to paragraph 5: Set forth the time, date, place and manner in which the Defendants allegedly conspired to engage in fraudulent nominee transactions.

As to paragraph 6: Set forth the time, date, place and manner in which the Defendants allegedly conspired to engage in "land flip" and other fraudulent transactions.

As to paragraph 7: Set forth the date, time, place and manner in which the Defendants allegedly conspired to have James B. McDougal and Susan H. McDougal control the majority of the stock of MGSL and direct, influence and control the business affairs of MGSL and Madison Financial Corporation ("MFC").

As to paragraph 8: Set forth the date, time, place and manner in which the Defendants allegedly conspired to have David L. Hale control the majority of the stock of CMS and direct its business affairs.

As to paragraph 9: Set forth the specific "various business dealings and investments that were of mutual interest or involved opportunities for share profits."

As to paragraph 10: Set forth the specific transactions in which the Defendants allegedly conspired to generate fraudulent

paperwork so as to make the transactions appear to be consistent with the sound business practices and existing regulations.

As to paragraph 11: Set forth any and all alleged steps in which the Defendants allegedly conspired to have CMS make fraudulent loans.

As to paragraph 11: Set forth the specific alleged fraudulent loans which benefited the Defendants, their friends or business associates of the Defendants.

As to paragraph 11: Set forth specifically the alleged "false and fraudulent loan applications and proposals, submitted on behalf of nominee, borrowers, and secured by insufficient collateral."

As to paragraph 12: Set forth the specific alleged fraudulent loan the Defendants allegedly conspired to arrange.

As to paragraph 12: State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of the alleged fraudulent loan.

As to paragraph 13: Set forth the specific "various business ventures."

As to paragraph 13: State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of CMS's application to the SBA for matching funds.

As to paragraph 15: Set forth any and all alleged "fraudulent financial transactions with MGSL, MFC, and CMS."

As to paragraph 15(a): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge

of the alleged transfers of 1308 Main Street, Little Rock, Arkansas property from one nominee to another.

As to paragraph 15(a): Set forth the persons with whom Defendants are alleged to have conspired who are known to the grand jury at the time of the indictment.

As to paragraph 15(b): Set forth the persons with whom Defendants are alleged to have conspired who are known to the grand jury at the time of the indictment.

As to paragraph 15(c): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge or involvement with a loan of $143,000 from CMS to Larry E. Kuca, d/b/a Campobello Realty Company.

As to paragraph 15(d): Set forth specifically the benefit to Tucker from a loan of $65,000 from CMS to Steven Smith, d/b/a The Communication Company.

As to paragraph 15(d): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of the alleged fraudulently misrepresented loan application.

As to paragraph 15(e): Set forth the date, time, place and manner in which the Defendants allegedly conspired to have a loan of $1.05 million from MGSL to Castle Sewer & Water ("CSW") generate inflated profits for MFC and commissions to Defendant Susan H. McDougal.

As to paragraph 15(h): Set forth the date, time, place and manner in which the Defendants allegedly conspired to create a loan of $100,000 from CMS to Southloop to conceal and hide Defendant Jim Guy Tucker's interest in the loan.

As to paragraph 16(b): Set forth the specific alleged deed conveyed by Tucker for the property at 1308 Main Street.

As to paragraph 16(b): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of the nominee selected by James B. McDougal.

As to paragraph 16(d): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of the alleged preparation of fraudulent appraisals of real estate by James B. McDougal and David L. Hale.

As to paragraph 16(f): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of a loan of $143,000 from CMS to Larry E. Kuca d/b/a Campobello Realty Company.

As to paragraph 16(g): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of a loan in the amount of $65,000 from CMS to Steven A. Smith, d/b/a The Communication Company.

As to paragraph 16(h): State whether or not it is the contention of Independent Counsel that Tucker had knowledge of an $825,000 loan from MGSL to Dean Paul Ltd. and the alleged subsequent purchase of falsely appraised real estate from David L. Hale.

As to paragraph 16(k): State whether or not it is the contention of Independent Counsel that Jim Guy Tucker had any knowledge that David L. Hale received $502,000 in net proceeds from the alleged fraudulent Dean Paul Ltd. real estate transaction.

As to paragraph 16(l): State whether or not it was the contention of Independent Counsel that Tucker had any knowledge that David L. Hale caused CMS to apply to SBA for leverage funding.

As to paragraph 16(m): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of the alleged false and fraudulent loan application by James B. McDougal for $300,000 loan from CMS to Susan McDougal d/b/a Master Marketing.

As to paragraph 16(n): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of the alleged proceeds of the fraudulent $300,000 loan from CMS to Susan McDougal d/b/a Master Marketing.

As to paragraph 16(o): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge of James B. or Susan H. McDougal's alleged deposit of proceeds of the fraudulent Master Marketing loan into their joint account at MGSL.

As to paragraph 16(p): State whether or not it is the contention of Independent Counsel that Tucker had any knowledge that Susan H. McDougal received $85,000 in commissions for her role in the sale of MFC Sewer & Water System through CSW.

As to paragraph 16(q): Set forth the persons, other than David L. Hale, with whom the Defendants are alleged to have conspired who were known to the Grand Jury at the time of the indictment.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

By: William H. Sutton

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)
v.) LR-CR-95-173
)
JAMES B. MCDOUGAL,)
JIM GUY TUCKER, and)
SUSAN H. MCDOUGAL)
Defendants)

AFFIDAVIT IN SUPPORT OF MOTION FOR BILL OF PARTICULARS

STATE OF ILLINOIS)
)
COUNTY OF COOK)

I, George B. Collins, being duly sworn, state:

1. I am the attorney for Jim Guy Tucker ("Tucker"), one of the defendants in the above entitled action, and make this affidavit in support of the motion of Defendant Tucker for an order directing the Independent Counsel to file a bill of particulars.

2. The indictment filed in this case on August 17, 1995, alleges that Defendant Tucker, together with co-defendant James B. McDougal and Susan H. McDougal and an unstated number of unindicted co-conspirators, conspired to violate 18 U.S.C. § 371 and other specific statutes.

3. The indictment further alleges that such conspiracy existed during the period from 1985 through 1987.

4. The indictment fails to state with particularity the locations at which, and the dates and times when, the various

defendants and co-conspirators joined the conspiracy and committed the alleged overt acts in furtherance thereof.

5. The indictment further fails to state with particularity which defendants or co-conspirators committed which alleged overt acts, which objects of the alleged conspiracy th overt acts were committed in furtherance of the conspiracy, and whether the Independent Counsel intends to introduce evidence of other overt acts not alleged in the indictment.

6. The indictment further fails to provide with particularity the other information requested in the motion for the bill of particulars.

7. There has been no preliminary examination in this case, and Defendant Tucker is presumed innocent.

8. In a case of this nature, the Independent Counsel might proceed to trial under any one of several theories which he could select at the time of presentation of evidence. The indictment fails to inform Defendant Tucker as to the specific theory or theories on which the Independent Counsel intends to rely in this specific case, and therefore fails to adequately inform him of the nature and scope of the charge against him.

9. The indictment also fails to inform Defendant Tucker of whether or not Independent Counsel intends to present evidence of other so-called similar offenses.

10. The information requested is essential to enable defendant Tucker adequately to prepare for and proceed to trial in this case.

11. Without the requested information, Defendant Tucker and defense counsel will be compelled to expend great amounts of time and money in attempting to investigate every possible Independent Counsel evidentiary issues, regardless of which theory and which evidence the Independent Counsel actually intends to rely on and present. The requested information will enable Defendant Tucker and defense counsel to avoid such unnecessary expenditures of time and money, and will therefore facilitate Defendant Tucker's preparation for trial and the introduction of defense evidence at trial. The granting of the motion will focus the parties on the actual issues to be tried, and will save significant trial time.

12. The requested information will enable Defendant Tucker to avoid surprise at trial. Without such information, it is extremely likely that there will be long periods of delay during the trial, due to surprise, and there is a substantial possibility that the defense would have to request a continuance during trial.

FURTHER AFFIANT SAYETH NOT.

Dated: 9/23/95

George B. Collins

SUBSCRIBED AND SWORN to before me, a Notary Public, this 23rd day of September, 1995.

Darlene Collamore
Notary Public

My Commission Expires:

Nov. 23 1997

"OFFICIAL SEAL"
Darlene Collamore
Notary Public, State of Illinois
My Commission Expires Nov. 23, 1997

zjjl-113

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)
v.) LR-CR-95-173
)
JAMES B. MCDOUGAL,)
JIM GUY TUCKER, and)
SUSAN H. MCDOUGAL)
Defendants)

MEMORANDUM IN SUPPORT OF DEFENDANT
TUCKER'S MOTION FOR BILL OF PARTICULARS

MAY IT PLEASE THE COURT:

Rule 7(f) of the Federal Rules of Criminal Procedure provides that the Court may "direct the filing of a bill of particulars".

There is no requirement of a showing of cause, that provision having been eliminated by amendment following the decision in U.S. vs. Smith, 16 F.R.D. 372 (WD Mo. 1954) (Judge, later Justice, Whittaker).

Justice Whittaker wrote that the presumption of innocence requires an assumption that the defendant "is ignorant of the facts upon which the pleader founds his charges". Smith, 16 F.R.D. at 372. See, also, Fontana vs. U.S., 262 Fed. 283, 286 (8th Cir. 1919).

The most obvious use of the Bill of Particulars is to identify unindicted co-conspirators. See, e.q., U.S. vs. Longo, 793 F.Supp. 57, 60 (N.D.N.Y. 1992); U.S. vs. White, 753 F.Supp. 432, 434 (D.Conn. 1990); U.S. vs. Williams, 113 F.R.D. 177, 179 (MD Fla. 1986). These precedents would apply particularly to

paragraphs of Count One which charges Defendants Jim Guy Tucker, James B. McDougal and Susan H. McDougal with conspiring with persons both known and unknown to the Grand Jury.

The identity of "co-conspirators" defines the alleged conspiracy, and non disclosure until trial would be both prejudicial and of no use to Independent Counsel except surprise at trial.

The complexity of this case also demonstrates the need for a Bill of Particulars. An equally complex case was U.S. vs. Recognition Equipment, Inc., 711 F. Supp. 1 (D.D.C. 1989). The prosecution there was required to give particulars as to each payment claimed, including names and accounts. In this case we should be informed as to the exact charges, the persons involved, and the dates involved. The vagueness of claims that defendants did some act at some undefined time cannot be adequately defended without information.

This point is supported by the opinion of Judge Miller in U.S. vs. Anderson, 254 F.Supp. 177 (W.D. Ark. 1966). Judge Miller, following the opinion of Justice Whittaker in Smith, supra, required the prosecution to identify the payor and amount of each item claimed to have been omitted from the tax return of an attorney charged with a tax crime.

We submit that the Bill of Particulars requested is necessary to prepare for and defend against this indictment, and ask that the Court require Independent Counsel to furnish the particulars requested.

Respectfully submitted,
JIM GUY TUCKER, Defendant

By: _____

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CERTIFICATE OF SERVICE

I, James J. Lessmeister, do hereby certify that I have served a copy of the foregoing pleading by U.S. Mail, postage prepaid to the below named parties on this 25th day of September, 1995.

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James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL, Defendants.	)	

MOTION FOR DISCLOSURE OF ARRANGEMENTS WITH WITNESSES

Comes the Defendant Jim Guy Tucker ("Tucker") and for his Motion to require the Independent Counsel to disclose its arrangements, deals, transactions, and immunities with witnesses, states as follows:

1. The indictment is regarding transactions with: Capital Management Services, Inc. ("CMS") and/or Madison Guaranty Savings & Loan Association ("MGSL") and/or Madison Financial Corporation ("MFC"). CMS was a small business investment corporation controlled by David L. Hale. MGSL was a state chartered, federally insured savings & loan association owned by Defendant James B. McDougal. MFC was a wholly owned subsidiary of MGSL. Defendant James B. McDougal was President and Chairman of the Board of Directors of MFC and Defendant Susan H. McDougal was a licensed real estate broker who worked for Madison Real Estate Company, a division of MFC.

2. David L. Hale was known to have entered a plea of guilty to crimes relating to CMS, upon which he has not yet been sentenced, although a significant period of time has passed. Further, Hale has resided away from his usual place of abode for

more than a year, and is believed to be living at Independent Counsel's expense with promises of immunity and other benefits from Independent Counsel.

3. Hale has committed serious offenses in the operation of CMS, unrelated to Defendant Tucker, for which he will face significant criminal penalties, unless relieved of those penalties as compensation for testimony to be given against Defendant Tucker.

4. The Independent Counsel should be required to disclose all of its financial and immunity or other arrangements with Hale. The disclosure should be complete, and should include <u>all</u> benefits conferred upon Hale by Independent Counsel, including specifically, but not limited to;

a. Immunity from prosecution for any crime or from the use of any evidence, whether formal or informal.

b. Financial benefits or payments, including tax benefits or tax deferrals.

c. Any benefits by way of services, such as transportation to visit a friend, legal services or other services of any kind.

d. Any benefits by way of intervention by any person acting for the prosecution with other prosecutorial authorities, including specifically the Prosecuting Attorney of Pulaski County, and including any other Federal or State authority (of any State) with which Hale would or might have legal difficulty. This paragraph is intended to include, but not limited to the Internal Revenue Service

("IRS"), Small Business Administration ("SBA"), Resolution Trust Corporation ("RTC"), Federal Deposit Insurance Corporation ("FDIC"), and to any Federal or State prosecutor anywhere.

e. Any evidence relating to any attempts by Independent Counsel to protect David Hale from prosecution by other prosecuting authorities for crimes committed by Hale against the citizens of Arkansas.

f. Any negotiations undertaken by Independent Counsel with any prosecuting authorities in which the purpose was to obtain deferral of prosecution of Hale pending his continued cooperation with Independent Counsel.

g. Any communications to David Hale or his counsel of the efforts made on Hale's behalf by Independent Counsel to protect Hale from prosecution by any other prosecuting authority, whether said communications are in writing or oral.

h. Any communications by, to or with Hale or his counsel relating to the subject of efforts or intervention by Independent Counsel on behalf of Hale with other prosecuting authorities.

i. [In responding, please consider "other prosecuting authorities to include any official having the right or duty to investigate or prosecute any criminal act in any jurisdiction before any court in the United States.]

j. Any benefits by way of shielding Hale from civil

liabilities, whether by assisting in concealment of assets, concealment of Hale, or assisting Hale in the avoidance of service of civil process, or assistance to Hale with the IRS.

k. Any payment of expenses or reimbursement for expenses claimed to have been incurred or actually incurred by Hale, or any payment as compensation or for living expenses.

l. Any act done by Independent Counsel, or any agent or employee of Independent Counsel, which is, or was, or may be of benefit to Hale.

m. Any medical benefits or coverage of any kind to Hale.

5. Hale is believed to have committed numerous violations of the SBA Act, all of which are known to the SBA and, therefore, to Independent Counsel. Defendant Tucker requests information as to settlements, assurances or negotiations relating to such matters between Hale and SBA, or RTC as successor or receiver of CMS.

6. Defendant Tucker also requests all information as to Independent Counsel's deals or arrangements with other witnesses as to all counts of the indictment, including but not limited to the following:

Bessie Aunspaugh
Lisa Aunspaugh
Robert Betts
Steve Cuffman
Don Denton
Jim Gardner
Richard Grasby
Pat Harris
Bill Henley and any other relative of Susan McDougal
Pat Heritage

Larry Kuca
John Latham
Guy Maris
Sheffield Nelson
Robert Palmer
Dean Paul
Caren Ross
Steve Smith
Sue Strayhorn
Thomas Trantham
Seth Ward
William Watt
Greg Young
Any other person upon whom the Independent Counsel plans to rely for evidence herein.

7. These requests are made pursuant to due process clause of Amendment V to the United States Constitution, and pursuant to the decisions in U.S. v. Giglio, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963). The information is required so as to allow Defendant Tucker to cross-examine Hale and other witnesses, and demonstrate bias, interest and lack of credibility.

WHEREFORE, Defendant Tucker respectfully prays that this Court order Independent Counsel to produce, set forth and identify all of its deals and arrangements with witnesses, whether written or oral, and whether formal or informal, and whether by binding contract or simple assurance.

Respectfully submitted,
JIM GUY TUCKER, Defendant

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James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA)
Plaintiff)
)
v.) LR-CR-95-173
)
JAMES B. MCDOUGAL,)
JIM GUY TUCKER, and)
SUSAN H. MCDOUGAL)
Defendants)

MEMORANDUM BRIEF IN SUPPORT OF
JIM GUY TUCKER'S MOTION FOR DISCLOSURE
OF GRAND JURY VOIR DIRE QUESTIONS

I. APPLICATION OF LAW TO THE CASE AT BAR

The issue at bar is unique because Jim Guy Tucker ("Tucker") is not requesting traditional Grand Jury material and evidence which are governed by F.R.Cr.P. 6. Rather Tucker is requesting only Independent Counsel's voir dire.

Every citizen is entitled to an unbiased and legally constituted grand jury. Costello v. United States, 350 U.S. 359, 363 n.7 (1956) citing Pierre v. State of Louisiana, 306 U.S. 354 (1939). The Supreme Court has warned:

> If the Grand Jury is to accomplish either of its functions, independent determination of probable cause that a crime has been committed and protection of citizens against unfounded prosecutions, limits must be set on the manipulation of grand juries by overzealous prosecutors.

United States v. Samango, 607 F.2d 877, 882 (9th Cir. 1979).

As Justice Brandeis stated over fifty years ago, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928)(Brandeis, J. dissenting).

Tucker is entitled to an unbiased grand jury. The voir dire will reveal the fairness of the selection process. The ex parte voir dire of the grand jurors only increases the Independent Counsel's opportunity to obtain what they wish to obtain from the grand jury. Disclosure of the Independent Counsel's voir dire is necessary to allow Tucker to assess the validity of the voir dire by determining whether or not impermissible racial, social or political factors were used in the selection of the grand jury. By preventing the release of the voir dire the Independent Counsel will prevent an inquiry which is constitutionally required.

As stated by the Supreme Court "...intentional discrimination in the selection of grand jurors is a grave constitutional trespass." See Vasquez v. Hillery, 474 U.S. 254, 262 (1986). The voir dire is possibly an "arbitrary and oppressive governmental action" especially if controlled by Independent Counsel. United States v. Gold, 470 F.Supp. 1336, 1345 (N.D. Ill. 1979) citing United States v. Calandra, 414 U.S. 338, 343 (1974).

We anticipate that Independent Counsel may be tempted to argue that Tucker must satisfy the three step test established by the Supreme Court in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). The Douglas test is

irrelevant in the present case since Tucker is not requesting traditional grand jury material and evidence. Tucker is only asking for a transcript of Independent Counsel's voir dire. There is a difference.

II. TUCKER HAS AN UNQUALIFIED RIGHT TO INSPECT THE INDEPENDENT COUNSEL'S VOIR DIRE QUESTIONS PURSUANT TO 28 U.S.C. § 1867(f)

The Supreme Court has stated:

> This provision [1867(f)] makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the 'preparation' of motions challenging jury selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.'

Test v. United States, 420 U.S. 28, 30 (1975) citing 28 U.S.C. § 1861.

In United States v. Alden, 776 F.2d 771 (8th Cir. 1985) the district court denied the defendant's amended motion for information regarding the grand jurors actually chosen, disqualified or excluded. Id., 776 F.2d at 773. Relying on Test, the Eighth Circuit reversed and stated the defendant is entitled to inspect and copy jury records in order to make his motion to stay or dismiss under § 1867(a) and to comply with § 1867(d)'s requirement of a sworn statement of facts. Moreover, the Eighth Circuit stated the defendant's motion cannot be denied on the basis the alleged facts fail to show a probability of merit in the proposed jury challenge. Id., 776

F.2d at 773-74 (citation omitted). By analogy, the voir dire questions, and answers, should be supplied.

III. ALTERNATIVELY, THE COURT IS ENTITLED TO FIRST INSPECT THE TRANSCRIPT OF VOIR DIRE

In United States v. Jim Guy Tucker, William J. Marks, Sr. and John H. Haley, Case No. LR-CR-95-117, United States District Judge Henry Woods ordered on August 9, 1995 "While the Court will not require, at this time, that the transcript of the voir dire be furnished to Tucker, the government is herewith directed to furnish to the Court a transcript of the grand jury voir dire for in camera inspection by the Court." See Exhibit "1".

In the alternative, if the Court decides that Tucker is not initially entitled to a transcript of the voir dire then Tucker respectfully requests the Court do an in camera inspection of Independent Counsel's grand jury voir dire.

WHEREFORE, Tucker prays that this Court release the voir dire of the Grand Jury and for any other relief to which he is entitled to.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

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James J. Lessmeister

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

V. NO. LR-CR-95-117

JIM GUY TUCKER, WILLIAM J. MARKS, SR., and JOHN H. HALEY

ORDER

Defendant Jim Guy Tucker has moved for a disclosure of the grand jury *voir dire*. The government has now responded to this motion. While the Court will not require, at this time, that the transcript of the *voir dire* be furnished to Tucker, the government is herewith directed to furnish to the Court a transcript of the grand jury *voir dire* for *in camera* inspection by the Court.

DATED this 9 day of August, 1995.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

ORAL ARGUMENT REQUESTED

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ATTORNEYS FOR JIM GUY TUCKER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

JIM GUY TUCKER'S MOTION FOR DISCLOSURE
OF GRAND JURY VOIR DIRE QUESTIONS

Comes the Defendant, Jim Guy Tucker ("Tucker"), and for his motion for disclosure of grand jury voir dire questions states as follows:

1. Tucker has reason to believe that voir dire questions were asked of the grand jurors in March, 1994.

2. Questions can have a prejudicial effect, and can be used to eliminate grand jurors who might have been fair to Tucker.

3. Unfair grand jury questions and an unfair selection of grand jurors by the Independent Counsel, ex parte, can only be intended to improve the Independent Counsel's opportunities to obtain what they wished to obtain from the grand jury.

4. The material sought by Tucker is not evidence that was presented to the Grand Jury. Rather, Tucker is requesting the transcript of voir dire questions and responses of potential and actual grand jurors.

5. Only by disclosure of the grand jury questions will Defendant Tucker be able to determine whether or not to make a motion to dismiss the indictment by way of challenging its makeup and its selection. To deny Tucker access to the questions would be to deny him the substance of the right to be charged by a fair grand jury, as guaranteed by Amendment V to the United States Constitution.

WHEREFORE, Jim Guy Tucker prays that this Court disclose the questions asked by Independent Counsel.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

By: _____

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EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

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ATTORNEYS FOR JIM GUY TUCKER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL Defendants	)	

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WHEREFORE, Jim Guy Tucker prays that this Court disclose the questions asked by Independent Counsel.

Respectfully submitted,
JIM GUY TUCKER,
Defendant

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