CA8 - TUCKER BANKRUPTCY CASE

1516C 1¼" EXPANSION
1526E 3½" EXPANSION
1536G 5¼" EXPANSION

6TH CASE of Level 1 printed in FULL format.

1995 JUDICIAL STAFF DIRECTORY

Beam, C. Arlen

BIOGRAPHY:

BIOGRAPHIES OF JUDGES AND STAFF

Beam, C. Arlen, Circuit Judge, U.S. Court of Appeals for the Eighth Circuit, Federal Bldg., Lincoln, NE 68508. Appointed to the Eighth Circuit Nov. 9, 1987. Born Jan. 14, 1930 to Clarence W. and Cecile M. Beam. Married July 22, 1951 to Betty L. Fletcher. Children: Randal A., James F., Thomas L., Bradley A. and Gregory J. Education: Univ. of Nebraska, B.S., J.D.; Delta Theta Phi, Alpha Gamma Rho. Admitted to Nebraska Bar, 1965; U.S. Supreme Court, 1975; U.S. Court of Appeals for the Eighth Circuit, 1976; U.S. Tax Court, 1979. Military Service: entered active duty, U.S. Army in 1951; released as Captain in 1953 after Korean War service; U.S. Army Reserve until 1964. Career Record: 1965-82, practicing attorney; 1982-86, Judge, 1986-87, Chief Judge, U.S. District Court for the District of Nebraska. Member: Judicial Conference Comm. on Court and Judicial Security, 1989-93; Conf. of Commissioners on Uniform State Laws, 1979-present; Nebraska and Lincoln Bar Assns. Presbyterian.

TO: STEVE C.

TO: STEVE C.

FROM: BRETT K.

11-7-95
1:15 pm

DRAFT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3268EALR

UNITED STATES OF AMERICA,

Appellant,

vs.

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

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION
HONORABLE HENRY WOODS, JUDGE

REPLY BRIEF OF APPELLANT

KENNETH W. STARR
Independent Counsel
10825 Financial Centre Parkway; Suite 134
Little Rock, AR 72211
(501) 221-8700

ATTORNEY FOR APPELLANT

TOO LONG AN INTRO - SKIP IT OR COMBINE IT W/ TEXT

In their briefs, appellees and their amicus, Sun Diamond Growers, articulate a detailed, elaborate vision of the independent counsel statute ~~and its proper administration~~. That vision is highly technical; it portrays a complex administrative regime that looks to the judiciary to check closely its ~~operations, lest the constitutional separation of powers be violated~~.

who or what is "its"? "the regime" → seems circular b/c judiciary is part of regime → change to the Attorney General as she implements that statute."

That vision fails at a fundamental level. It rides roughshod over the straightforward system carefully created by Congress. What Congress envisioned was this: An orderly process of dialogue between the key Executive Branch official -- the Attorney General of the United States -- and the Independent Counsel. That system is both uncomplicated and practical. It contemplates precisely what happened here -- that the Independent Counsel would repair to the Attorney General for direction and guidance to determine whether to proceed on a particular investigatory path; that the Attorney General would, as here, then come to judgment as to whether the Independent Counsel should proceed on that path; that such day-to-day, operational judgments by the Attorney General would not be subject to (long) after-the-fact judicial reexamination; and that such Executive Branch judgments would raise no separation-of-powers concerns that would be created were an Article III court (the Special Division) to exercise Executive power.

Morrison v. Olson ~~was a separation-of-powers watershed. It continues to~~ loom large in appellees' (and Sun Diamond's) vision of the post-Morrison world of independent counsels. ~~Harmoniously with his co-defendants, Appellee Tucker, for example, takes us to task for ignoring Morrison and trumpets its high importance to a proper~~

~~analysis of the issues before this Court~~. But Appellees and their amicus ~~profoundly~~ misunderstand Morrison. That decision -- including Justice Scalia's vigorous dissent -- is ~~all~~ primarily about the degree to which the Judiciary can exercising Executive power. When the Special Division grants jurisdiction to an Executive Branch official (the independent counsel), the separation-of-powers issue is whether the Article III branch has strayed beyond its appropriate province and invaded the territory of a coordinate branch. For that reason, the Morrison Court took pains to emphasize the limited role of the Judiciary (through the Special Division) and the centrality of the Attorney General in determining an independent counsel's jurisdictional reach. Here, the Attorney General's role has been assiduously respected (as symbolized by her amicus brief in support of the United States' position). It was ~~She~~ the Attorney General who decided ultimately whether jurisdictional authority over the LMS bankruptcy would be referred to the independent counsel. That basic point is what appellees and their amicus are willfully ignoring. ~~Their tub-thumping cannot mask this decisive point~~: Executive power (the assignment of jurisdiction to a federal prosecutor) was exercised by the Attorney General of the United States. That simple, salient fact should end any separation-of-powers concern treated by the Morrison Court.

~~Freeing the Attorney General's referral decision from~~ inevitably time-consuming judicial review breaks no new ground. Just as independence is the hallmark of the Article III function, so too in our system of separated powers the tradition of prosecutorial discretion is long established and well understood. ~~It is part of the legal culture in which Congress acted in~~

NO - also about the degree to which Congress can restrict ability of Executive to have control over prosecution of federal crimes

IP

The Supreme Court thus made clear that the Special Division could not deviate greatly from the factual circumstances giving rise to the AG's request for an IC. The decision did not purport to address the AG's authority to define an IC. The decision or consider the jur

in defining the jurisdiction of an IC,

~~establishing an independent counsel system, with its obvious need for time-sensitive investigations.~~

At bottom, this case involves a discretionary call by the Attorney General, made over a year ago, that the fraudulent bankruptcy eventually charged by the grand jury was appropriately investigated by the federal prosecutor who (building upon the prior work of special counsel Robert Fiske, Jr.) had developed sufficient information concerning violations of federal law to report the matter to the Attorney General in the first instance. This system of communication and tasking between the Attorney General and the Independent Counsel is the precise routing and decisional mechanism ordained by Congress. And what is clear beyond peradventure -- and what virtually all 117 cumulative pages of appellee-amicus briefs have flagrantly ignored -- is that Congress was explicit in its intent that the Attorney General's traffic-flow determinations (as to which federal prosecutor would investigate and prosecute federal crimes) would be insulated from judicial review. Appellees' ~~Their~~ studied silence about legislative intent, conveyed by Congress with exquisite precision in the Conference Committee report, only compounds the failure of Judge Woods' opinion to treat in any manner the manifest Congressional intent that the Attorney General's referral be afforded the respect due the prosecutorial decisions of the nation's ~~highest~~ law enforcement officer.

I. THE INDEPENDENT COUNSEL'S AUTHORITY TO PROSECUTE THIS INDICTMENT WAS ESTABLISHED CONCLUSIVELY BY THE ATTORNEY GENERAL'S REFERRAL.

Like Judge Woods, Appellees Tucker and Haley fail to acknowledge the specific legislative history of the Ethics in Government Act. That history demonstrates congressional intent

to make unreviewable the Attorney General's referral determinations under the independent counsel provisions of the Act. Appellees turn instead to judicial decisions under other statutes -- the Juvenile Justice Delinquency and Prevention Act and the Westfall Act -- and the Supreme Court's separation-of-powers decision in Morrison v. Olson to support their bid for judicial review. None of those decisions bolsters the conclusion by Judge Woods.

Appellees incorrectly argue that review of the Attorney General's referral is required by the Supreme Court's decision in Morrison. They rely on the Court's holding that the jurisdiction defined by the Special Division 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." 487 U.S. at 679. Appellees and their amicus go so far as to suggest that a referral by the Attorney General could implicate the constitutional issues discussed in Morrison.

The Court's decision in Morrison did not address prosecutorial judgments by the Attorney General, the chief law enforcement officer of the Executive Branch. The passage of Morrison cited by appellees concerned the question whether the Act contravened Article III of the Constitution by placing certain powers in the Special Division, an Article III court. The Supreme Court held that Congress could constitutionally vest the Special Division with authority to define an Independent Counsel's jurisdiction as an incident to the Special Division's power to appoint the counsel. The Court reasoned, however, that

"[i]n 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." Id. at 679.

The passage from Morrison cited by appellees ~~begs~~ does not purport to address the question presented in this case. The controversy in this case involves a decision by the Attorney General, not the Special Division. There is no dispute about the propriety of the Special Division's grant of jurisdiction to this Independent Counsel. In accordance with Section 593(b)(3) of the Act upheld in Morrison, the Special Division defined the Independent Counsel's jurisdiction to include the subject matter of the Attorney General request (the relationships of the President, Hillary Rodham Clinton and McDougal with Madison, CMS, and Whitewater) and "all matters and individuals whose acts may be related to that subject matter." (App. 41).

~~The~~ this case concerns the Attorney General's subsequent determination that the LMS bankruptcy matters were "related" to the Independent Counsel's jurisdiction as originally defined. The case therefore does not implicate the constitutional issues discussed in Morrison: the limited power of federal courts under Article III, the strictures of the constitutional separation of powers, or the scope of the Appointments Clause. The Attorney General's referral is an action by a principal officer of the Executive Branch to confirm the prosecutorial authority of an inferior officer of the Executive Branch. ~~It~~ raises no constitutional question.

repetitive of pp. 1-3

Judicial review certainly is not necessary to guard the Justice Department's prosecutorial jurisdiction. In adopting the Ethics in Government Act, Congress did not intend to burden the courts with the task of protecting the Attorney General against the unlikely possibility that she would rashly delegate her own prosecutorial authority. The Attorney General should be trusted to exercise her discretion appropriately, subject to congressional oversight.

Appellees also rely heavily on this Court's decision in United States v. Juvenile Male, 923 F.2d 614 (8th Cir. 1990), which considered reviewability of a certification by the Attorney General under a provision of the Juvenile Justice Delinquency and Prevention Act. That provision, Section 5032 of Title 18, provides in part:

> "[a] juvenile alleged to have committed an act of juvenile delinquency . . . shall not be proceeded against unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that
>
> (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency,
>
> (2) the State does not have available programs and services adequate for the needs of juveniles, or
>
> (3) the offense charged is a crime of violence that is a felony . . . and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

Three courts of appeals, including this Court, have considered whether various certifications by the Attorney General under Section 5032 are subject to judicial review. Contrary to appellees' assertion, however, those decisions do not support the

conclusion that judicial review of the Attorney General's decision is available here.

In United States v. Vancier, 515 F.2d 1378 (2d Cir. 1975), the Second Circuit held that the Attorney General's certification that there was not an "appropriate" state court to prosecute the juvenile was final and unreviewable. The court explained that Section 5032 "does not provide for judicial review of the Attorney General's certification." Id. at 1380. In addition, the court reasoned, the statute does not "set out standards by which the court could determine the correctness of a certification," either on the issue whether an appropriate State court has jurisdiction over the juvenile's alleged act of delinquency, or the issue whether the State has adequate programs and services for the needs of juveniles. Id. at 1380-81.

In United States v. C.G., 736 F.2d 1474 (11th Cir. 1984), the Eleventh Circuit followed the decision in Vancier. The court held that absent a showing of bad faith, a certification of the Attorney General under Section 5032 is reviewable only to determine whether the form of the certification complied with the statute. Id. at 1477. Absent bad faith by the Attorney General, the court "may not inquire into the correctness of the statements made in the certification." Id.

This Court in United States v. Juvenile Male did not disagree with the holdings in Vancier or C.G. At issue in Juvenile Male was a certification of the Attorney General under Section 5032 that relied on the third prong of the statute, i.e., that the offense charged against the juvenile was a "crime of violence." This Court held that the judiciary could review

whether the Attorney General had certified that one of the crimes of violence specified by Congress had been alleged. Id. at 617.

The decision in Juvenile Male does not control this case. ~~The Juvenile Justice Act and the Ethics in Government Act are different statutes with different legislative histories.~~ The history of the ~~former~~ Juvenile Justice Act does not contain the powerful evidence of congressional intent to preclude judicial review that is present with respect to Section 594(e). Suppose, for example, the legislative history of Section 5032 stated explicitly (like that of the independent counsel law) that "[a]n Attorney General's determinations . . . are not subject to judicial review." See H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. at 22 (1987). Or suppose that Congress (as with the independent counsel law) had decided not to codify prior decisions that some Attorney General decisions under the Act were unreviewable, because "the conferees did not wish to suggest . . . that judicial review might be available of other Attorney General decisions" under the Act. See H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. at 22 (1987). Under those circumstances, the decision in Juvenile Male likely would have been different.

Just as important, this Court in Juvenile Male stressed that "no question exists as to the standard we should apply to determine whether the crime alleged is one of the crimes that Congress has determined merits the intervention of the federal courts." 923 F.2d at 617. In contrast, the standard for determining "relatedness" under Section 594(e), and the application of the statutory term "related" to a particular set of circumstances, is subject to dispute among the parties and the

Attorney General. The determination of "relatedness" in any particular instance is a prosecutorial decision that requires the exercise of judgment by the Attorney General. It is quite different from the straightforward question in Juvenile Male -- whether the crime charged against the defendant was among the "crimes of violence" specified by Congress in Title 18, United States Code, Section 16 -- which involved no exercise of prosecutorial judgment.

IS THAT REALLY TRUE - WERE ALL THE CRIMES OF VIOLENCE SPELLED OUT BY TITLE 18?

Tucker also relies on the Supreme Court's recent decision concerning the Westfall Act in Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227 (1995). Gutierrez involved a certification by the Attorney General that a federal employee was acting within the scope of his office or employment at the time of an incident that gave rise to a tort action against the employee. The Court held that the federal courts may review such a certification to determine whether the employee was acting within the scope of his employment.

~~The decision in Gutierrez also involved an entirely different statute. It is distinguishable on numerous grounds, two of which are highlighted in the Court's opinion~~. The Court stressed at the outset two considerations that "weigh[ed] heavily" in its analysis of the Westfall Act. First, the Court noted that Attorney General herself urged judicial review of her delegate's certification under the Westfall Act, because she recognized that her delegate had an incentive to certify in most cases. Second, the Court observed that under general principles of administrative law, there is a strong presumption that Congress intends judicial review of a government official's

determination of a dispositive fact or circumstance. 115 S. Ct. at 2231.

Those considerations are ~~dramatically inverted~~ absent in the case of Section 594(e). The Attorney General has urged this Court not to endorse judicial review of her determinations of "relatedness" under Section 594(e), explaining that such review is contrary to the statutory scheme and would create serious practical problems for the administration of the Act. Second, the normal presumption of judicial review is absent here, where the administrative action involved is the Attorney General's exercise of prosecutorial discretion. As we noted in our opening brief, there is a long tradition of deference to prosecutorial judgments of the Executive Branch, and the presumption in that context is against judicial review. That presumption is buttressed by specific legislative history rejecting judicial review of the Attorney General's determinations under the Ethics in Government Act.

Appellee Marks continues his quest to frame this case as one that does not turn ~~at all~~ on judicial review of a determination by the Attorney General. He argues that the propriety of the Attorney General's action in referring matters to the Independent Counsel is not at issue, because Section 594(e) states that the Independent Counsel "may accept such a referral if the matter relates to the independent counsel's jurisdiction."

The Attorney General's referral, however, is central to this case. Before a matter can be referred to the Independent Counsel by the Attorney General under Section 594(e), she must determine that it is related to the Independent Counsel's jurisdiction.

The Attorney General made such a determination in this case, and it is her determination that Appellees have attacked.[1]

Marks also relies on the district court decision in United States v. Secord, 725 F. Supp. 563 (D.D.C. 1989), to establish that the Attorney General's referral decision is subject to judicial review. But Marks mischaracterizes Secord as "the only case where a court has reviewed the validity of a referral under 28 U.S.C. § 594(e)." (Marks Brief at 36). Secord did not involve a referral by the Attorney General to the Independent Counsel under Section 594(e). Rather, the Independent Counsel proceeded against General Secord based only on the jurisdictional authority specified in the original order from the Special Division. The district court reviewed whether the perjury and obstruction allegations were "arising out of" or "related to" the jurisdiction granted to the Independent Counsel, and concluded that the Independent Counsel had jurisdiction to prosecute. Id. at 566-67. Contrary to Marks' assertion that the court in Secord "dismissed part of an indictment on the ground that the referred matter was not within the independent counsel's jurisdiction," (Marks Brief at 37), Judge Robinson held that the Independent Counsel had authority to proceed with the prosecution. 725 F.

---

[1] Amicus Sun Diamond Growers argues that the Attorney General's referral is flawed because it states that the LMS bankruptcy is related to the Independent Counsel's "investigation" rather than his "prosecutorial jurisdiction." This distinction, not raised by any of the appellees, is immaterial. The Attorney General's designate cited the relevant statute, Section 594(e), in his letter and concluded that referral would be appropriate. Read in context, it is evident that the Justice Department used "investigation" as a shorthand for "prosecutorial jurisdiction."

Supp. at 567.

Properly stated, the reasoning of Secord illustrates the wisdom of the statutory design adopted by Congress. The statute creates a strong incentive for the Independent Counsel (criticized by appellees as unaccountable) to return to the politically-acccuntable Attorney General before proceeding with respect to related matters. If an Independent Counsel proceeds in a related matter without a referral from the Attorney General, the Independent Counsel's jurisdiction may be reviewed by the district court under the Secord approach. But the Independent Counsel can avoid that jurisdictional litigation by requesting and receiving a referral from the Attorney General. Thus, with respect to matters that are not ~~plainly~~ obviously within the subject matter of the Independent Counsel's jurisdiction, ~~but which are related to that subject matter~~, there is a built-in ~~stimulus~~ mechanism for the Independent Counsel to obtain confirmation by seeking a referral from the Attorney General.

Unlike Tucker, Haley, and Judge Woods, Marks and amicus Sun Diamond Growers ~~at least~~ acknowledge the ~~clear~~ legislative history stating congressional intent to preclude review of the Attorney General's determinations under the Act. Marks attempts to create a dichotomy, however, between cases where the Attorney General "exercised her discretion under Section 594(e)" and cases where a defendant contends that she exceeded her authority under Section 594(e). (Marks Brief at 31). He contends that the decision in Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984), which held unreviewable the Attorney General's decision not to conduct a preliminary investigation under the Act, dealt only with "discretionary actions by the Attorney General that were

clearly within the bounds of his statutory-decision making authority." (Marks Brief at 31-34).

Marks' distinction is inconsistent with Banzhaf itself. Banzhaf made precisely the type of claim advanced by appellees here. He asserted that the Attorney General acted outside his statutory authority by declining to investigate allegations of wrongdoing by officials of the Reagan Administration. Nonetheless, the D.C. Circuit, sitting en banc, unanimously held that the Attorney General's decision was not reviewable. Congress endorsed that holding when making the 1987 revisions to the Act.

Banzhaf submitted to the Attorney General what the district court found to be specific and credible evidence that high government officials may have violated criminal laws. See Banzhaf v. Smith, 588 F. Supp. 1498, 1500-01 & n.8 (D.D.C. 1984). He argued the Act commanded that the Attorney General "shall" conduct a "preliminary investigation" upon receipt of such information. See id.; Banzhaf v. Smith, 737 F.2d at 1168. The district court held that it had authority to review the Attorney General's decisions, and ordered the Attorney General to apply to the Special Division for the appointment of a counsel. 588 F. Supp. at 1510.

The D.C. Circuit reversed. Without expressing any opinion whether the factual information in the possession of the Attorney General was sufficiently specific and credible "to trigger the Attorney General's statutory duty to investigate allegations about persons covered by the Act," 737 F.2d at 1168, the Court held that Congress precluded judicial review of the Attorney

General's decision. Id. at 1169. In other words, even if the Attorney General has specific and credible information about violations of federal law, and thus has a "statutory duty" to investigate those allegations, the Attorney General's decision not to conduct an investigation is unreviewable.

The 1987 legislative history specifically endorsed the decision in Banzhaf that whether the Attorney General acted outside his decisionmaking authority is not subject to judicial review. (Compare Marks Brief at 31, 34). The conferees in 1987 went further to state that they also intended to preclude review of "other Attorney General decisions under the Act." H.R. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987). Nowhere did Congress suggest an exception to the tradition of unreviewable exercise of prosecutorial discretion in cases where the litigant artfully framed his contention as a claim that the Attorney General acted beyond the confines of her statutory authority.

II. EVEN IF THE DISTRICT COURT HAD POWER TO REVIEW THE ATTORNEY GENERAL'S REFERRAL, JUDGE WOODS ERRED IN CONCLUDING THAT THE INDEPENDENT COUNSEL LACKS JURISDICTION.

To support their contention that the district court correctly reviewed and overruled the Attorney General's referral decision, Appellees present a caricature of the Independent Counsel's position concerning relatedness. Quoting a ~~snippet~~ line from the government's pleading filed in district court, Haley contends that the Independent Counsel has conceded that the matters charged in the indictment are not related to the prosecutorial jurisdiction granted by the Special Division. (Haley Brief at 6). Similarly, Marks asserts that "[t]he Independent Counsel has repeatedly admitted that the instant case

has nothing to do with [the] subject matter [of the appointment]." (Marks Brief at 20).

These assertions distort the OIC's position. We have urged consistently that the June 7 indictment is related to the OIC's jurisdiction. The very sentence fragment of the Independent Counsel's pleading cited repeatedly by Tucker continues that "the Attorney General reasonably concluded that the LMS matter was 'related to the independent counsel's prosecutorial jurisdiction' under Section 594(e) sufficiently to fall within that jurisdiction." (R. **). The preceding sentence maintained after a discussion of factual background, that "[t]hese facts show that the matters under indictment are related to the subject matter of the Independent Counsel's investigation." (Id.). At oral argument, the Independent Counsel explained, based on the August 17 indictment which had become public since the filing of briefs, that "there is a factual relationship" and that the indictments in the public domain "show an abundance of factual relatedness." (Tr. 34).

If the Court were to conclude that the Attorney General's referral determination is reviewable, then the dispute among the parties centers on the definition of the statutory term "related." Appellees defend the inordinately narrow construction adopted by the district court. Judge Woods held the indictment must allege that the defendants' conduct directly involves the relationship of James McDougal, the President, or Hillary Rodham Clinton to CMS, Madison, or Whitewater. (Opinion at 12). On appeal, Tucker appears to advance an even narrower position. He asserts that a matter is not "related" to the OIC's jurisdiction

FN

unless the indictment alleges that the President also participated in the charged transactions. (Tucker Brief at **). We have candidly acknowledged that the June 7 indictment does not allege that the President or James McDougal participated in the specific transactions alleged.

None of the appellees explains, however, why the Attorney General's construction of "related," which encompasses several salient decisionmaking factors, is inconsistent with the statute. Tucker belittles the Attorney General's considerations as mere "administrative convenience." But the Attorney General explains convincingly why these factors are important to the effective conduct of complex white-collar criminal investigations. There is no evidence that Congress intended to reject this sensible construction of the statute.

Indeed, the constructions urged by appellees and adopted by Judge Woods would render meaningless the "related matters" portion of the Independent Counsel's jurisdiction. The Special Division is required to confer jurisdiction over the "subject matter" of the Attorney General's request, and "all matters related to that subject matter." 28 U.S.C. § 593(b)(3). The "subject matter" in this case is "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." (App. 39). Any case that alleged direct involvement of the Clintons or James McDougal with any of the three named entities (the full scope of jurisdiction as viewed by Judge Woods and appellees) would be plainly within the "subject

matter" of the Independent Counsel's jurisdiction. But that category of cases cannot be the full scope of the jurisdiction, because the statute requires that the Independent Counsel be granted authority to investigate and prosecute additional matters that are not within the subject matter, but which are related to the subject matter.

Marks argues that none of the factors advanced by the OIC or the Attorney General establishes relatedness. His analysis is flawed in two important respects. First, Marks isolates each aspect of relatedness and, in a divide-and-conquer approach, contends that none establishes relatedness. But the determination of "relatedness" must consider at once the constellation of factors that bear on that decision. The June 7 indictment is not, as Marks and Tucker would have it, "related" merely because the Independent Counsel "learned about it at work."[2] (Tucker Brief at 16; Marks Brief at 24). It is related because ~~the Independent Counsel learned about it at work, and~~ it arises out of the same underlying facts as the primary jurisdiction of the OIC, and it involves similar conduct by one of the same parties (Tucker) investigated in connection with the

THAT'S TRUE, I SUPPOSE, BUT I THINK IT'S BECAUSE OF THE UNIQUE WAY OUR ORIGINAL JUR WAS DEFINED IN TERMS OF RELATIONSHIPS

[2] Marks asserts that the Special Division was not authorized to confer jurisdiction over crimes "developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation." (App. 40). He says this is made clear by the decision in Morrison. (Marks Brief at 22). Morrison actually makes clear that the disputed grant of jurisdiction is consistent with the Act and the Constitution. The jurisdictional order upheld in Morrison provided the Independent Counsel with jurisdiction "to investigate any other allegations of evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation . . ." 487 U.S. at 667 (emphasis added) (quoting Order, Div. No. 86-1 (CADC Special Division, April 23, 1986)).

OIC's primary jurisdiction, and it implicates a defendant (Tucker) who is also a target in another case within the OIC's jurisdiction, and it relies in part on testimony from a key witness in the balance of the OIC's investigation (Hale), and it involves allegations against a defendant (Tucker) who is a key witness in the OIC's ongoing investigation,[3] and it is most efficiently investigated and prosecuted by the OIC, which continued the investigation of Robert Fiske, rather than another attorney within the Executive Branch.

Second, neither Marks nor any of the other appellees acknowledges that any deference should be accorded the Attorney General's referral decision. Even if this Court concludes that some judicial review of the Attorney General's determination is permitted, general principles of administrative law and the tradition of deference to prosecutorial judgments dictate that the review must be deferential. The parsing of facts in which Marks engages does not accord appropriate deference to the Attorney General's judgment. If there is to be judicial review

---

[3] Tucker represents to the Court that he "offered to confirm by interview or testimony the lack of presidential involvement in matters charged against Tucker, but the offer was never taken up by Independent Counsel." Tucker Brief at 25. We note that it was publicly reported earlier this year that Tucker confirmed he was subpoenaed to testify before the grand jury; that Tucker released publicly a letter stating that he would invoke his Fifth Amendment privilege against self-incrimination if called to testify and asking to be excused; and that Tucker was released from the subpoena. See Arkansas Democrat-Gazette, May 27, 1995, at 1A, 8A; June 2, 1995, at 1A; see also United States Attorney's Manual § 9-11.154 (target of grand jury investigation ordinarily should be released from grand jury subpoena if he states in writing that he will invoke privilege against self-incrimination). In response to Tucker's brief, we represent to the Court that this office offered the Governor an opportunity to make any statement he wished to the grand jury -- without questioning by attorneys -- but that he declined even that offer.

of referral decisions, and reasonable minds may differ as to "relatedness" in a particular circumstance, the uniform determination of the Attorney General, the Special Division, and the Independent Counsel should control.

Appellees complain that our opening brief cited materials that were not in the record before the district court. The primary issue in this case -- reviewability of the Attorney General's decision -- is purely legal, and the factual record does not bear on that analysis. Moreover, all of the factual materials cited in our opening brief to support a finding of "relatedness" were presented to Judge Woods.

Appellees' argument that the August 17 indictment was not properly presented to Judge Woods is ~~specious~~ erroneous. That indictment was a public document filed in the Eastern District of Arkansas. It was specifically cited to Judge Woods at the September 5 hearing. The Independent Counsel explained how the heretofore secret grand jury investigation made public on August 17 demonstrated further factual relationship between the June 7 indictment and the OIC's jurisdiction. (Tr. 33-34). Given this specific reference to a public document filed in the same district court, it would have been an abuse of discretion for Judge Woods not to consider the August 17 indictment. A certified copy of the indictment is included in the Appendix, and Appellees do not dispute its accuracy. We respectfully submit that this Court can and should take judicial notice of the August 17 indictment and make it part of the record on appeal. See Fed. R. Evid. 201(b); Gustafson v. Cornelius Company, 724 F.2d 75, 79 (8th Cir. 1983) ("[a]n appellate court may take judicial notice

TOO STRONG / AFTER WE MADE UP THE ARG. ON SEPT. 1

of a fact for the first time on appeal"); United States v. Jordan, 913 F.2d 1286, 1287 (8th Cir. 1990) (court may take judicial notice of authenticated public records, because they are "capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned").

Marks' suggestion that the August 17 indictment was improperly raised at "the last minute" is without merit. (Marks Brief at 25). The indictment was returned after the completion of briefing on the motion to dismiss, and a hearing was set for only two weeks hence. Judge Woods clearly contemplated that the parties might raise new issues at oral argument, and indeed, he asked that counsel "confine yourselves to new matters." (Tr. 4). The government was not required to predict that Judge Woods would either have his opinion written before the hearing, or that he would produce a 21-page memorandum within four hours of the hearing without consideration of new information specifically discussed during the hearing.

The materials before the district court thus included the connection between the June 7 and the August 17 indictments. They showed that Tucker was a common defendant in the two cases. Appellees' own pleadings in the district court acknowledged that David Hale was cooperating with the government and would be a key witness in the trial of the June 7 indictment. (R. **). Hale was likewise identified as a named coconspirator in the August 17 indictment. It was apparent from the two indictments that Tucker, as an alleged coconspirator, was a potential key witness himself. And the Independent Counsel advised the Court at oral argument that the June 7 indictment was the culmination of an

investigation begun by Robert Fiske and continued by the OIC. (Tr. 29-30). See generally Appellant's Opening Brief at 39-42.

We acknowledge that certain materials in the public domain -- the Attorney General's application for appointment of an independent counsel, the United States Attorney's recusal letter, and newspaper articles recounting the history of the "Whitewater" investigation -- were not cited to Judge Woods. Their inclusion in the opening brief and appendix (App. 53-58, 107) is prompted by extra-record observations by Judge Woods that are controverted by information in the public domain. We do not cite them to urge reversal of Judge Woods based on information that was not presented to him, except to the extent that the public materials undermine factual statements by the court that are themselves unsupported by the record below.

We do submit that it is appropriate, however, for this Court to take judicial notice of the materials in the public domain that contradict factual conclusions reached by Judge Woods without any support in the record. That is particularly so, given that the district court defined the hearing as encompassing "purely a legal matter, a question of law." (Tr. 4).

Judge Woods' holding, for example, relied in part on the conclusion that "[w]hat '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)]." (Opinion at 4). The record below contained no request of the Attorney General that supported Judge Woods' factual statement. To the contrary, as described in our

opening brief, the Attorney General's request relied on a "political conflict of interest" that would arise from an investigation by the Justice Department. See 28 U.S.C. § 591(c)(1). (App. 53-59). A certified copy of the Attorney General's request is included in the Appendix, and we respectfully submit that this Court should take judicial notice of that public document.

So too, Judge Woods incompletely described the scope of Robert Fiske's investigation, contrary to information included in the record. (Opinion at 2; Tr. 29-30). More remarkably, he relied on personal knowledge and opinion to reach a factual conclusion about the likelihood of a business relationship between Tucker and President Clinton. (Opinion at 5). The published history of this investigation demonstrates that the relationship among Tucker, the President, and James McDougal is a matter central to the Independent Counsel's highly publicized investigation. It certainly is not a matter that can be resolved in the district court by judicial notice and personal knowledge. We respectfully submit, therefore, that this Court should take judicial notice of published accounts of the history of this investigation, so that the district court's unsupported factual assertions are placed in proper context.[4]

---

[4] Marks' objection to inclusion in the appendix of Chief Judge Reasoner's order in the grand jury proceeding is frivolous. (App. 108). The order is legal authority, not evidence, and it may be cited like the Federal Supplement. The government promptly moved to unseal a redacted version of the order after it was issued on August 17, but that relief was not granted until after the decision by Judge Woods on September 5. Nonetheless, the order includes relevant legal authority that may inform this Court's decision.

The state of the record in the district court does reinforce the wisdom of a congressional decision to preclude judicial review of the Attorney General's referral decisions. The strictures of grand jury secrecy and the need for confidentiality in ongoing criminal investigations will, as here, prevent the Independent Counsel from making the sort of factual record that would be required under the regime ushered in by Judge Woods' opinion. In this very case, the Independent Counsel was forced to advise the district court that a complete discussion of factual relatedness at the hearing was not possible within the confines of Federal Rule of Criminal Procedure 6(e). (Tr. 34). We respectfully submit that even the limited public record that could be presented to the district court and to this Court supports the Attorney General's determination. But the serious problems attendant evidentiary hearings on "relatedness" further illustrate the sensibility of the congressional decision to insulate from review the Attorney General's decisions under the Act.

III. THIS CASE SHOULD BE REASSIGNED TO A DIFFERENT DISTRICT JUDGE ON REMAND.

Appellees' principal response to our request that this case be reassigned to a different district judge on remand is that it is untimely. The authorities cited by appellees in support of their contention, however, are inapposite to the relief sought. We do not urge, as Marks suggests, that the district court's order dismissing the indictment should be reversed because Judge Woods should have recused. (See Marks Brief at 39). To the contrary, we urge reversal on the ground that the dismissal was

wrong as a matter of law. Nor do we rely on 28 U.S.C. § 144, which is the focus of Tucker's response. (Tucker Brief at 34-35).

Our request is that if the Court agrees with our legal position that the indictment should be reinstated, then the case should be remanded for trial before a different district judge pursuant to 28 U.S.C. §§ 1651(a) and 2106, informed by the principles of 28 U.S.C. § 455(a). Contrary to Marks' flat statement that it is "obviously premature and improper" to advance this request for the first time on appeal, this Court has approved that procedure in Dyas v. Lockhart, 705 F.2d 993 (8th Cir. 1983). There, this Court held that "while we do not believe that District Judge Roy's failure to sua sponte recuse herself suggests any impropriety on her part, we nevertheless conclude that a remand to another district judge in the Eastern District of Arkansas would be in accordance with the purpose behind 28 U.S.C. § 455(a) (1976) of assuring the 'appearance of impartiality.'" 705 F.2d at 997-98. The Court noted that Dyas never raised the issue of Judge Roy's possible disqualification in the district court. Id. at 997 n.5. See also Reserve Mining Company v. Lord, 529 F.2d 181, 184, 188 & n.6 (8th Cir. 1976) (reassignment ordered where petitioner made request for the first time at oral argument before this Court).

The Ninth Circuit in United States v. Sears, Roebuck & Co., 785 F.2d 777 (9th Cir. 1985), explained the flaw in appellees' timeliness argument in the course of reassigning a case to a different district judge:

We are not acting under the disqualification

> statutes, which a party must first invoke before the district court. Instead, this court is being asked in the first instance to exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment. We do not believe that the statutory provisions concerning disqualification are either exhaustive or the exclusive method whereby a judge may be removed from hearing a case. . . . [T]he appellate court's authority to reassign exists apart from the judicial disqualification statutes. There is simply nothing in the disqualification statutes to prohibit this court from taking appropriate action in the first instance.

785 F.2d at 780-81 (emphasis added) (citing United States v. Robin, 553 F.2d 8, 11 (2d Cir. 1977) (en banc)) (citation omitted).

In any event, there was abundant good cause for the government not to file a recusal motion in the district court: Judge Woods' own publicly reported statements demonstrated that the issue of an appearance of bias had been brought to his attention, but that he would not recuse.[5] Any motion to recuse would have been futile. Cf. Pearson v. Norris, 52 F.3d 740, 742-43 (8th Cir. 1995) (habeas petitioners must normally present issues first to state court but "are not required to pursue

---

[5] Other judges have recused themselves sua sponte during this investigation. Judge William Wilson recused from the sentencing of former Associate Attorney General Webster Hubbell, noting the need to preserve "the appearance of doing justice." Arkansas Democrat-Gazette, Dec. 9, 1994, at 1A; New York Times, Dec. 9, 1994, at A13. It has been publicly reported that Chief Judge Richard Arnold of this Court has stated he will not sit on any case in which this Independent Counsel appears. Wall Street Journal, Oct. 4, 1995, at A14; Washington Post, Nov. 4, 1995, at A13.

obviously futile state court remedies"); Sioux Valley Hospital v. Bowen, 792 F.2d 715, 723 (8th Cir. 1985) (where an administrative appeal would be futile, normal exhaustion of remedies requirement not required).

Where the opinion of the district court itself provides additional basis for reassignment, it is appropriate to raise that matter for the first time on appeal. E.g., United States v. Microsoft Corporation, 56 F.3d 1448 (D.C. Cir. 1995). In this case, moreover, even since the since the preparation of our opening brief, additional information has appeared in the public domain that accentuates the need for reassignment. The Washington Times recently reprinted a letter from Judge Woods to the Deputy Counsel to the President Vincent Foster, Jr., dated June 16, 1993, which read as follows:

> Dear Vince:
>
> Reference is made to our telephone conversation earlier this week about Nina Martin, a reporter for Mother Jones magazine, who is seeking to interview me about Hillary. I have not responded to her telephone calls, as I mentioned to you on the phone. Today I received the enclosed letter. Would you take this up with Hillary or her press secretary and give me instructions as to whether this interview should be granted?
>
> Very truly yours,
>
> Henry Woods.[6]

This published correspondence -- showing an effort by Judge Woods to obtain "instructions" from "Hillary" concerning how to respond to a press inquiry about the First Lady -- is further reason for an informed observer to question the impartiality of Judge Woods

---

[6] Washington Times, Oct. 10, 1995, at A19.

in cases involving the "Whitewater" Independent Counsel.[7]

Marks complains that the publicly reported information about Judge Woods should not be considered by this Court because it is presented for the first time on appeal. This contention is premised largely on his faulty assumption, rejected by this Court in Dyas and by the Ninth Circuit in Sears, Roebuck & Co., that a request for reassignment may not be raised before the court of appeals in the first instance. To the extent that Marks' objection to these materials goes beyond that flawed premise, it is established that this Court may take judicial notice of matters in the public domain. Gustafson v. Cornelius Company, 724 F.2d 75, 79 (8th Cir. 1983). Courts have considered news articles that shed light on the appearance of bias by the trial judge, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 97 (3d Cir. 1992), including articles that recount interviews with the judge himself. In re IBM, 45 F.3d 641, 642-43 (2d Cir. 1995); In re Continental Airlines Corp., 901 F.2d 1259, 1261 & n.1, 1263 n.3 (5th Cir. 1990).

A remand for further proceedings on the question of reassignment is unnecessary. Appellees do not dispute Judge Woods' publicly reported acknowledgement of a close personal relationship with Hillary Rodham Clinton or his statement that he would recuse "if anything came up regarding President Clinton." Nor do they question the public statements of the President and

---

[7] A Washington Times columnist reported that Judge Woods spoke to the Associated Press after the filing of the government's opening brief on this appeal, and stated in response: "I have no connection with Tucker, and the Clintons, in my opinion, are not involved in this matter. I don't know what he's talking about." Washington Times, Oct. 13, 1995, at A4.

Governor Tucker quoted in the opening brief.[8] The opinion below, of course, is part of the record and speaks for itself. The need for reassignment to preserve the appearance of justice is manifest, and this Court may act upon the information in the public domain.

---

[8] Marks complains, ostensibly quoting from our opening brief, that "[t]he Independent Counsel simply asserts, based on no credible evidence whatsoever, that President Clinton and Governor Tucker are 'political allies.'" (Marks Brief at 41). The words "political allies" do not appear in our brief. Our point was that Governor Tucker has openly aligned his interests in this case with those of the Clintons, and that Judge Woods has acknowledged a personal relationship with Hillary Rodham Clinton that requires recusal in matters regarding the President. Tucker's further portrayed his interests as aligned with the President in a reported statement on June 2, 1995:

> "As I have said from the beginning, this has nothing to do with Whitewater or with the President of the United States, except that they don't want the President of the United States elected again in 1996 and they want to get the coonskin cap of some reasonably high Democratic official to hang on the wall."

Arkansas Democrat-Gazette, June 2, 1995.

Memorandum **Office of the Independent Counsel**

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury
FOIA(b)(7) - (C)

To : Judge Starr
All OIC Attorneys

Date 1/26/96

From : Tim Mayopoulos

Subject: Conference call regarding attached prosecution memorandum

A conference call to discuss this matter has been scheduled for Monday, January 29, 1996, at 4:00 p.m. eastern time.

If you will not be able to participate, please feel free to call me with your views or comments.

HIGHLY CONFIDENTIAL
CONTAINS RULE 6(e) MATERIAL

MEMORANDUM

To: Kenneth W. Starr
Independent Counsel

All OIC Attorneys

From: Jackie M. Bennett, Jr.
Timothy J. Mayopoulos
Associate Counsel

Date: January 26, 1996

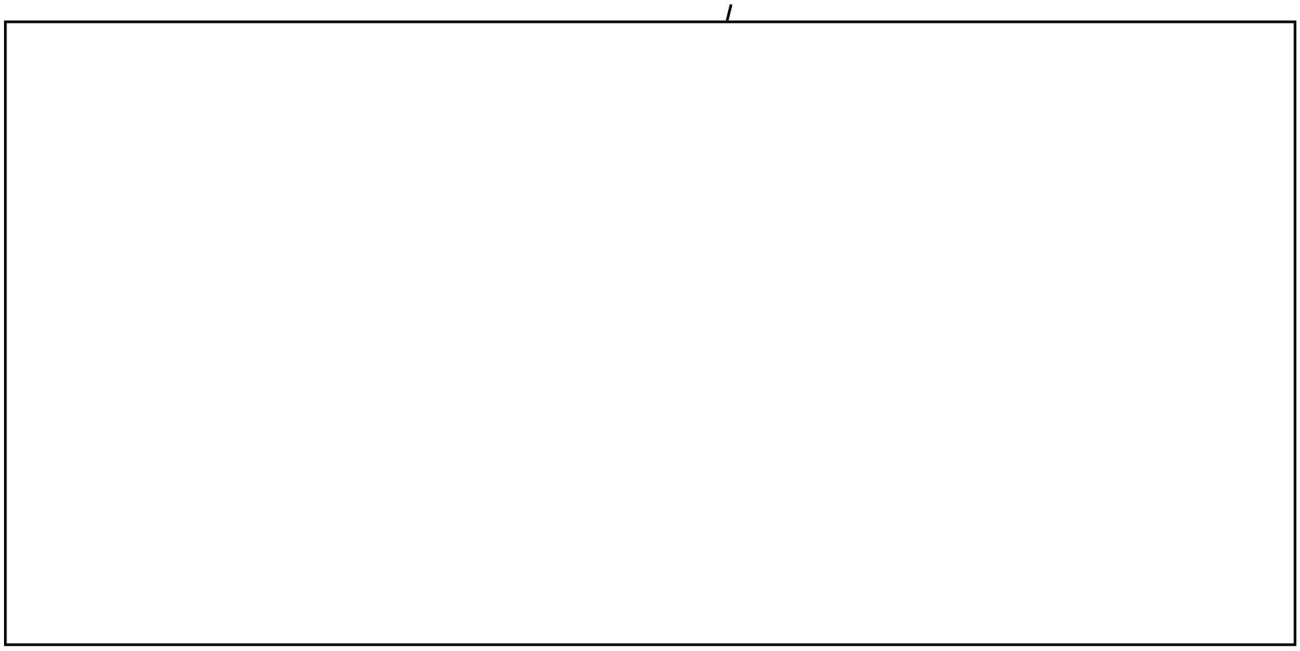
Re: Perry County Bank Investigation

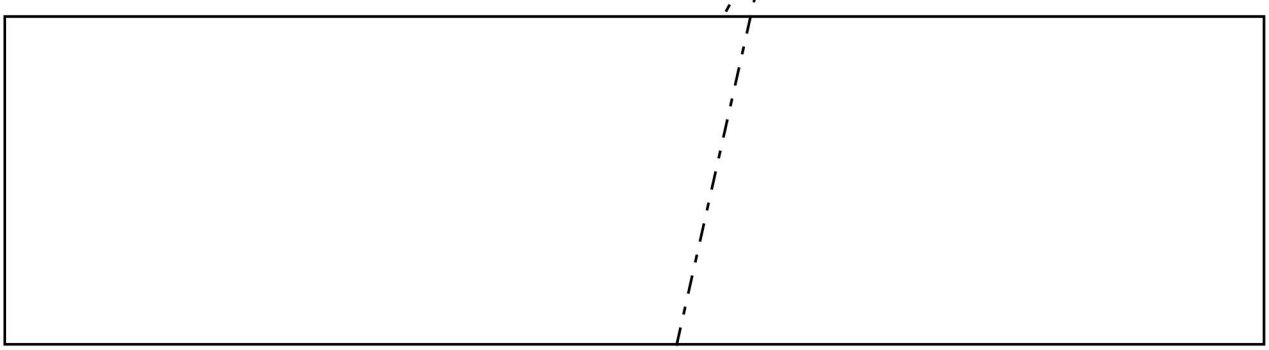
FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury
FOIA(b)(7) - (C)

INTRODUCTION

We are in the final stages of our investigation of the matters involving the Perry County Bank, including our investigation of campaign contributions made by the two owners of the Bank, Robert M. Hill and Herby Branscum, Jr.

We expect to circulate shortly a memorandum updating our November 1, 1995 memorandum setting forth the evidence we have gathered. Barring unforeseen developments, we expect to recommend that we seek an indictment of Branscum and Hill during the grand jury's February 13-15 session.





E. Applicable Law

violating 18 U.S.C. § 1623(a), which prohibits false declarations before a federal court or grand jury. It provides:

> Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . , shall be fined under this title or imprisoned not more than five years, or both.

The Eighth Circuit has held that to establish a false declaration case under Section 1623, the government must prove that (1) while under oath, and (2) testifying in a proceeding before a court or grand jury of the United States, (3) the defendant knowingly made, (4) a false statement, and (5) the testimony was material to the proof of the crime. United States v. Sablosky, 810 F.2d 167, 168 (8th Cir.), cert. denied, 484 U.S. 833 (1987).

While materiality was historically held to be a question of law for the court, and not the jury, the Supreme Court held last year that materiality is a jury issue. United States v. Gaudin, 115 S.Ct. 2310 (1995). We would probably call the grand jury foreman to establish materiality.

The test for materiality is "whether the alleged false testimony was capable of influencing the tribunal on the issue before it . . . . The perjured statement need not be material to any particular issue, but may be material to any proper matter of inquiry, including the credibility of a witness." Sablosky, 810 F.2d at 169. "It is well settled in this circuit that the test for materiality in the context of a violation of 18 U.S.C. Section 1623 is whether the allegedly perjurious statement tends to impede or hamper the course of the investigation by the grand jury." United States v. Ashby, 748 F.2d 467, 470 (8th Cir. 1984). See also Gaudin, 115 S.Ct. at 2313 (parties agreed on definition of materiality: "the statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed'").

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

[redacted] testimony was material under this test. Her testimony was capable of influencing the investigation. Her answers could influence additional questions to be asked of her and others, and could influence whether charges were ultimately brought against others. As the Eighth Circuit stated in United States v. Williams,

> [Defendant's] false denials of involvement impeded the inquiries as the involvement of others and also frustrated the inquiry into the extent of his own involvement. The fact that the grand jury had other evidence before it of [defendant's] involvement in one instance does not affect the materiality of his testimony. In a similar case, this Circuit has recently held that a lawyer's denial that he told his clients he could fix a case for them was material even though the grand jury had already heard tapes of conversations between the lawyer and his clients.

552 F.2d 226, 230 (8th Cir. 1977) (citing United States v. Beitling, 545 F.2d 1106, 1110 (8th Cir. 1976), cert. denied, 430 U.S. 918 (1977)).

[redacted] under 18 U.S.C. § 1621, the general perjury statute, for two fundamental reasons.

First, Section 1621 has a higher mens rea requirement ("willfully") than Section 1623(a), which requires proof only that the defendant "knowingly" made a false statement. See United States v. Slawik, 548 F.2d 75, 84, 87 (3d Cir. 1977) ("knowingly" is a lower standard of proof than "willfully").

Second, Section 1621 requires the government to comply with the so-called "two witness" rule, but Section 1623 does not. The two-witness rule is a judge-made rule that the uncorroborated oath of one witness is not enough to establish that the defendant's testimony is false. It requires the government to produce two independent witnesses, or one witness and corroborating documents or other circumstances. Weiler v. United States, 323 U.S. 606, 607 (1945).

Section 1623(e) expressly abrogates the two-witness rule in Section 1623(a) prosecutions. It provides: "Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

F. Proposed Indictment

A copy of a draft proposed indictment is attached as Exhibit 3. It contains three counts: Count One concerns false declarations regarding the 1990 contributions; Count Two concerns

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

the exploratory committee contributions; and Count Three concerns general statements not specifically relating to one of the two sets of transactions.

G. Factors In Favor Of and In Opposition to the Proposed Indictment

We believe that there are several important factors supporting the proposed indictment.

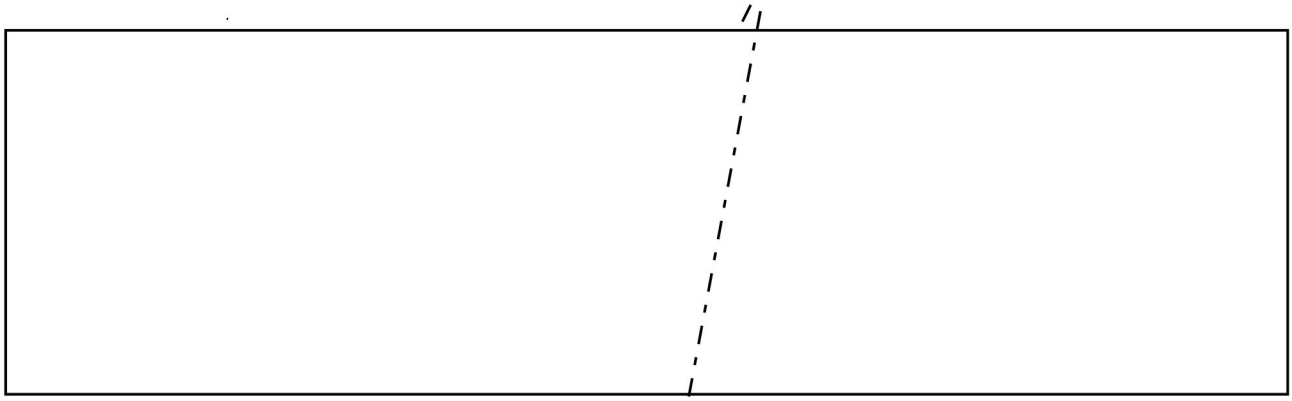
First, many witnesses have lied to the grand jury in the course of our investigation. This pattern appears to be the result of concerted action. A false declarations indictment would send a clear message that we will not tolerate such mendacity in the Perry County investigation, or in our Office's investigations generally.

Second, the grand jury has been offended by witnesses repeatedly lying to them, and some grand jurors have asked us if we could not seek perjury indictments to try to deter this behavior.

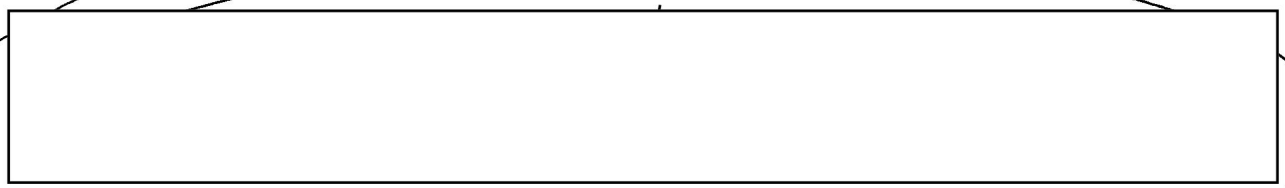
[redacted]

On the other side of the balance are several factors. Juries are generally loath to convict on perjury charges, in part on the theory that witnesses may simply be mistaken, as opposed to intentionally lying.

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



There are also all of the environmental factors we have faced in all of the prosecutions we have brought, including our status as outsiders, and the efforts of some to characterize us as politically motivated.



H. Conclusion and Recommendation

With the understanding that this would be difficult case to win, we nonetheless believe that prosecution is appropriate, and we recommend that we ask the grand jury to return the attached indictment.

[3] Of course, Branscum will quite likely be under indictment, or will have been under indictment, by the time this matter would go to trial, and his willingness to testify may be influenced accordingly.