

United States Court of Appeals  
District of Columbia Circuit

FILED JAN 16 2002

Special Division

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

Division No. 95-1

IN RE: HENRY G. CISNEROS

Before: SENTELLE, *Presiding*, FAY and CUDAHY, *Senior Circuit Judges*

**UNDER SEAL**

**ORDER**

This matter comes before the court upon an application by the Office of Independent Counsel ("OIC") requesting that we refer to the OIC for investigation and possible prosecution a matter purportedly related to its prosecutorial jurisdiction. For the reasons stated in the accompanying memorandum opinion, it is hereby

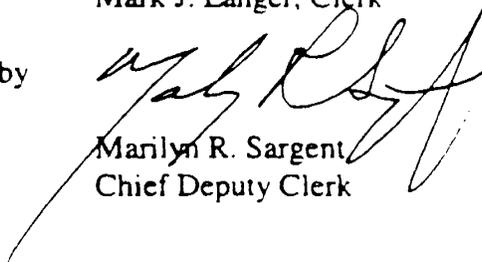
**ORDERED** that the application be denied.

Per Curiam

For the Court:

Mark J. Langer, Clerk

by

  
Marilyn R. Sargent  
Chief Deputy Clerk

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MEMORANDUM OPINION

Opinion of the Special Division filed *PER CURIAM*.

*PER CURIAM*: The Office of Independent Counsel ("OIC") has filed an application requesting that, pursuant to § 594(e) of the Ethics in Government Act of 1978, as amended, 28 U.S.C. §§ 591-599 (1994) ("the Act"), we refer to the OIC for investigation and possible prosecution a matter purportedly related to its prosecutorial jurisdiction. Apparently, the OIC claims that it "has developed evidence of a sustained effort . . . to ward off or limit the Independent Counsel investigation of Cisneros." Although the Act has expired, *see* § 599, the OIC argues that since the sunset provision makes an exception for continuance of independent counsel investigations "with respect to then pending matters before an independent counsel," and since the referral request encompasses matters already within the OIC's prosecutorial jurisdiction and is only an interpretation of that jurisdiction, *see In re Espy*, 80 F.3d 501, 507 (D.C. Cir., Spec. Div., 1996), then the referral may be considered a "pending matter" not subject to the

sunset provision and one which can therefore be referred by us to the OIC. We disagree.

The Supreme Court has emphasized “that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act.” *Morrison v. Olson*, 487 U.S. 654, 684 (1987) (emphasis in original). Pursuant to § 599, the Act “cease[d] to be effective” on June 30, 1999. Consequently, we have no authority under the Act to grant the OIC’s request.

We do not agree with the OIC that we may nevertheless continue to refer matters under the statute because “any matter that this Court may properly refer under 28 U.S.C. § 594(e) . . . is certainly a ‘pending matter’ under § 599.” It would not appear logical for “the court to refer to the independent counsel [a] matter[] related to the independent counsel’s prosecutorial jurisdiction.” § 594(e), and also for that matter to be considered as one of that independent counsel’s “pending matters” before the referral was made. If it was indeed a “pending matter” then it would not need to be referred.

Furthermore, the exception to the Act’s sunset provision cited to by the OIC was made only for “*then* pending matters before an independent counsel.” (Emphasis added.) On November 30, 2001, two years and five months after the Act’s expiration, the OIC filed its referral request with us. We do not perceive, and the OIC does not explain, how these essentially new allegations may be considered as “pending” before the OIC almost two and one-half years ago and are only now being requested as a referral.

For the reasons stated above, the application by the OIC for referral of a related matter is denied.