

FILED FEB 28 1997

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
INDEPENDENT COUNSEL DIVISION  
Special Division

In re Henry G. Cisneros

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No. ~~95-1~~ 95-1

NOTIFICATION TO THE COURT PURSUANT TO 28 U.S.C. § 592(a)(1)  
OF THE INITIATION OF A PRELIMINARY INVESTIGATION,  
APPLICATION TO THE COURT PURSUANT TO 28 U.S.C. § 593(c)(1)  
FOR THE EXPANSION OF THE JURISDICTION OF AN INDEPENDENT COUNSEL  
AND OPPOSITION TO REQUEST FOR REFERRAL OF RELATED MATTER

In accordance with the Independent Counsel Reauthorization Act of 1994, I hereby notify the Special Division of the Court that on January 29, 1997, I commenced a preliminary investigation pursuant to the request of Independent Counsel David M. Barrett for an expansion of his jurisdiction to investigate, and, if appropriate, to prosecute any violations of federal criminal law, other than a Class B or C misdemeanor or infraction, by former Secretary of Housing and Urban Development Henry G. Cisneros,<sup>1</sup> with respect to certain of Mr. Cisneros's income tax obligations for tax years 1989 and 1991 through 1993. I have completed the abbreviated 30-day preliminary investigation provided for under the Act, 28 U.S.C. § 593(c)(2), and have given great weight to the views of the Independent Counsel. I have concluded that an expansion of Mr. Barrett's jurisdiction is appropriate for tax year 1992. I further have determined that there are no

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<sup>1</sup>Pursuant to 28 U.S.C. § 591(b)(7), Mr. Cisneros remains a covered person under the provisions of the Independent Counsel Act for one year after leaving his position as Secretary. Mr. Cisneros's last day in office was January 20, 1997.

reasonable grounds to believe that further investigation is warranted for tax years 1989, 1991 and 1993.

Background. On March 13, 1995, I caused to be filed an "Application to the Court Pursuant to 28 U.S.C. § 592(c)(1) for Appointment of an Independent Counsel" (Attorney General's Application) requesting that this Court appoint an Independent Counsel to investigate and if appropriate prosecute allegations that former Secretary Cisneros made false statements to the FBI with respect to the amount and timing of payments he had made to his former mistress, Linda Medlar. In addition, the filing included a Notification to the Court pursuant to section 592(b)(1) that the preliminary investigation had failed to develop any evidence of any income tax violations by Mr. Cisneros, and concluded as a result that further investigation of whether or not there had been any tax violations in connection with this matter was not warranted.

The Special Division appointed Independent Counsel David M. Barrett to investigate whether Mr. Cisneros should be prosecuted for his alleged false statements concerning his payments to Ms. Medlar as described in the Application of the Attorney General. The Independent Counsel has informed me that as part of his investigation he has investigated Mr. Cisneros's finances in detail, including "all funds received by Cisneros between 1989-1993" and tax return information obtained from the Internal Revenue Service (IRS), and has now concluded that

Mr. Cisneros may have failed to report income for tax years 1989, 1991, 1992 and 1993.

In simultaneous requests, he has requested that I seek an expansion of his jurisdiction to include income tax violations relating to funds specifically used to make payments to Ms. Medlar<sup>2</sup> (Letter from Independent Counsel Barrett to Attorney General Janet Reno of January 28, 1997), and that this Court refer to him as related matters income tax violations that do not relate to funds used to make payments to Ms. Medlar (Sealed Application for the Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) (Sealed Application)).

As will be explained in more detail below, it is impossible to parse out jurisdictional responsibility for tax violations as Mr. Barrett suggests. Because an investigation of a tax violation is based on an audit or analysis of all reportable income, allowable deductions, and taxes due and owing for a particular year, and not solely on the basis of particular items or deductions, it is not meaningful or practical to analyze these matters in terms of "Medlar-Related Income" and "non-Medlar Related Income." This is all the more so in this case where the individual items of income have allegedly been used in part to make payments to Ms. Medlar and in part for other purposes. This Notification to the Court therefore discusses and resolves the totality of Mr. Barrett's request. It is my conclusion, as more

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<sup>2</sup> The Independent Counsel refers to this as "Medlar-Payment Income," a phrase that will also be used herein for ease of reference.

fully described below, that based on the record available to the Department of Justice at this time, further investigation is warranted for tax year 1992 alone.

Given the unique procedural posture of this matter, which also will be discussed below, it is possible that through the normal course of the IRS's administrative procedures, additional information will become available in the future to the Department of Justice that might alter this conclusion. That possibility is expressly contemplated in the Independent Counsel Act, 28 U.S.C. § 592(c)(2), and should it occur, I will reassess my current conclusions at that time.

The Procedural Posture of this Matter. It came to the attention of the Department of Justice, during the course of the first preliminary investigation of Mr. Cisneros in late 1994, that agents of the IRS were inquiring into Mr. Cisneros's tax situation. It now appears, as reflected in documents provided and representations made by the Independent Counsel, that these agents have concluded their review.

It is the understanding of the Department of Justice that the agents' recommendation is now under administrative review by the Chief Counsel's Office of the IRS, pursuant to the standard procedures followed in any tax matter. The purpose of that review is to examine closely the factual and legal sufficiency of the case, and to apply the established enforcement policies of the IRS to the particular facts of the case. Following that review, depending on the facts of the case, the IRS may determine

that the case has no merit; that the case has merit but should be resolved through the civil enforcement authority of the IRS; or that the case should be referred to the Department of Justice for consideration for criminal investigation or prosecution. In the ordinary course of events, the Department would assess the matter at that time based on a full development of the facts and the professional views of the IRS with respect to these tax matters.

In spite of the fact that the Independent Counsel appears to have been aware of the administrative posture of the matter, at the very time the final IRS review was underway, he chose to seek this expansion of jurisdiction from the Department of Justice, thereby forcing, because of the extremely compressed timetable of section 593(c)(2), a review of this matter without fully developed facts and without the benefit of the expertise of the IRS. Although it was proposed to the Independent Counsel's Office that this request for expansion be withdrawn to permit the administrative process to come to completion, allowing consideration of this matter based on a properly developed tax record, the Independent Counsel's Office declined.

While I might have prematurely terminated the administrative review by requesting that the IRS refer this matter to me now, pursuant to the provisions of 26 U.S.C. § 6103(h)(3)(B), thereby obtaining some insight into the factual materials developed by the IRS, that option would have had the effect of terminating the review process. The Department of Justice has considerable respect for and takes great care to avoid interfering with the

administrative processes of the IRS, and I have concluded that it would be inappropriate for me to do so here. I recognize that as a result, it may be necessary for me to reconsider my conclusions reached here at some point in the future, should the IRS conclude that referral of this matter to the Department of Justice for consideration of criminal prosecution is warranted. However, I have concluded that accepting that possibility and letting the administrative process proceed to its natural conclusion is the best course at this time.

#### **FACTS AND ANALYSIS**

##### **I. Tax Year 1989**

**The Allegation and Information Received.** The evidence suggests that during tax year 1989, Mr. Cisneros received an \$80,000 check from First Gibraltar, F.S.B., a Texas Bank. Mr. Cisneros had entered into a contract with First Gibraltar, which provided that he would be paid that amount for consulting services. Bank deposit records establish that when this check was negotiated, \$64,000 was deposited into two Cisneros bank accounts, a personal account and a business account; it appears that the remaining \$16,000 was received back in cash. Tax records suggest that only \$64,000 was declared on Mr. Cisneros's 1989 tax return as income. The Independent Counsel alleges that the remaining \$16,000 was undeclared and was income to

Mr. Cisneros, and that Mr. Cisneros therefore evaded taxes on the \$16,000 of undeclared income.<sup>3</sup>

**The Results of the Preliminary Investigation.** Mr. Cisneros's 1989 tax return was prepared by an accountant named Rene Gonzalez. In the course of the preliminary investigation, Mr. Gonzalez's work papers were examined, the results of previous interviews of Mr. Gonzalez were reviewed, and Mr. Gonzalez was reinterviewed.

The work papers clearly establish that Mr. Cisneros's accountant was aware of the full amount of the check at the time he prepared the tax returns. The full fee and the fact of the split deposit is referenced repeatedly in his work papers, and Mr. Gonzalez's files included a tax form 1099 from First Gibraltar reporting the \$80,000 as income. Mr. Gonzalez reports that he has no memory of anyone instructing him not to report the \$16,000.

Thus, based upon the evidence available to us, it appears that Mr. Cisneros's accountant was in possession of all the facts and that nothing was withheld from him with respect to this item of income. Nor is there any evidence that Mr. Cisneros gave any instructions or took any action that led to the failure to report the \$16,000; indeed, all of the witnesses interviewed testify clearly that Mr. Cisneros left the management of his finances to

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<sup>3</sup> According to the Independent Counsel, \$3000 of this \$16,000 cash was paid to Ms. Medlar.

others. There is nothing to suggest that the underreporting of income was anything more than, at worst, an accountant's error.

It is my conclusion that the mere fact of an error in a financial form prepared by an accountant on behalf of an individual, without any evidence to suggest the knowledge of or participation in the error by the individual, does not provide grounds to conduct a criminal investigation of that individual, particularly when the error is relatively minor. Since the Department of Justice possesses no evidence that attributes the failure to include the \$16,000 on Mr. Cisneros's tax return to Mr. Cisneros, even after giving the requisite great weight to the recommendation to the Independent Counsel, I find no grounds on which to investigate further whether Mr. Cisneros committed a tax violation in connection with this tax year.

I hereby notify this Court that no further investigation of tax year 1989 is warranted.

## II. Tax Year 1991

**Allegation and Facts Received.** During tax year 1991, as in other years, Mr. Cisneros's primary source of income was payments for numerous speaking engagements. The affidavit attached to the Independent Counsel's request represents that Mr. Cisneros's accountant for the 1991 tax year and thereafter, Luis Hernandez, stated that he prepared Mr. Cisneros's 1991 tax return based on the Form 1099s received from organizations before which Mr. Cisneros had spoken. The affidavit represented that a comparison of known speaking engagements and fees against the

Form 1099s received from the payor organizations suggests that a number of organizations did not provide Form 1099s, and that "a discrepancy exists between the amount of income earned and the amount of income reported on Mr. Cisneros's 1991 tax return." As a result, the affidavit alleges, Mr. Cisneros underreported his income by approximately \$126,000.<sup>4</sup> The Independent Counsel further alleged that the underreporting resulted from a scheme by Mr. Cisneros to conceal income from his accountant to make those funds available to pay Ms. Medlar.

**The Results of the Preliminary Investigation.** During the course of the preliminary investigation, the Department of Justice requested that the Office of Independent Counsel provide it with the figures, calculations and analysis to support the allegations in the affidavit. We were informed that the Office of Independent Counsel was relying on an interim assessment by the IRS agents reviewing Mr. Cisneros's tax liability, prepared in the spring of 1996, that stated that Mr. Cisneros's unreported income for tax year 1991 was \$126,000, but that provided no support for that calculation.

The Federal Bureau of Investigation (FBI) Special Agent who prepared the affidavit in support of the request for expansion did not provide any substantiation for the conclusion that income went unreported. The Special Agent informed the Department that his sworn affidavit was based entirely upon the interim findings

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<sup>4</sup> On February 27, 1997, the Independent Counsel informed us that he now believed the amount of unreported income was \$114,000.

of the IRS agents' administrative investigation. Attempts to verify limited information provided by the IRS agents to the Independent Counsel in support of this figure demonstrates that the figures provided are not reliable.<sup>5</sup> Even giving great weight to the views of the Independent Counsel, I cannot recommend expansion of his jurisdiction to include purported tax violations when I have no facts to support a conclusion that income was not reported. I, therefore, at this point, possess no specific or credible evidence of the violation of a federal criminal law in Mr. Cisneros's submission of his 1991 tax return.

### III. Tax Year 1992

**Allegation and Information Received.** During tax year 1992, the Independent Counsel alleges that Mr. Cisneros underreported his income by approximately \$158,000, in three different ways. First, the Independent Counsel alleges that the accountant's work papers suggest that the tax return does not include income received for speeches during the period from October 5, 1992, through December 31, 1992, in the amount of approximately \$75,000. Second, approximately \$53,000 in checks received from organizations before which Mr. Cisneros had spoken during 1992 was cashed without depositing the checks, and since the accountant relied on bank deposits to report income, that income allegedly was not reported. Finally, the tax return reflects a

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<sup>5</sup> We were provided a chart of approximately \$50,000 in allegedly unreported income, but review of the chart quickly demonstrated that most or all of this income was actually reported.

\$30,000 deduction for payments for an annuity, which the Independent Counsel alleges was not a deductible retirement fund.

**The Results of the Preliminary Investigation.** Mr. Cisneros's accountant, Mr. Hernandez, has been interviewed numerous times by the FBI and the IRS in the course of this matter, and Mr. Hernandez gave a sworn deposition to Mr. Cisneros's counsel. All of these previous interviews were reviewed in the course of the preliminary investigation, and Mr. Hernandez was interviewed again with respect to remaining questions. In addition, Mr. Hernandez's work papers, various financial records generated by Mr. Cisneros's bookkeeper to track income and expenses, and Mr. Cisneros's tax documents were reviewed. Additional witnesses were also interviewed in connection with our examination of tax year 1992.

Our preliminary investigation has developed little, if any evidence of a willful failure to report income on the part of Mr. Cisneros. Indeed, there is substantial evidence to suggest that Mr. Hernandez had available to him accurate information about Mr. Cisneros's income, and that responsibility for the failure to report income accurately rests with Mr. Hernandez. However, due to the abbreviated preliminary investigation period and statutory limitations on our access to IRS investigative materials, I have been unable to complete my exploration of the issue of Mr. Cisneros's intent. I therefore am unable, at this time, to conclude by clear and convincing evidence that Mr. Cisneros lacked the intent to commit tax crimes for tax year

1992, 28 U.S.C. § 592(a)(2)(B)(ii). I therefore am compelled to recommend that further investigation of tax year 1992 be placed into the hands of an Independent Counsel.

I recommend that David Barrett, Independent Counsel in the matter of former Secretary Cisneros's alleged false statements to the FBI during the course of his background investigation, be appointed to conduct this investigation through an expansion of his jurisdiction. Expansion of jurisdiction rather than appointment of a new Independent Counsel with respect to this matter is appropriate because Independent Counsel Barrett's current investigation involves the same individuals and time period. The Independent Counsel has expressed his willingness to accept this new matter if his jurisdiction is expanded.

#### IV. Tax Year 1993

**The Allegations Received.** The Independent Counsel's request alleges that early in 1993, Mr. Cisneros received approximately \$33,500 in distributions from two different Massachusetts Mutual Life Insurance Company Individual Retirement Accounts. The Independent Counsel alleges, and examination of Mr. Cisneros's 1993 tax return confirms, that this distribution was not reported as taxable income, as it appears should have been done.<sup>6</sup>

**Results of the Preliminary Investigation.** In the course of the review of the allegations concerning the 1993 tax year, in addition to the facts provided by the Independent Counsel, we

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<sup>6</sup> The Independent Counsel does not allege that any of this money was paid to Ms. Medlar.

interviewed several witnesses and examined the documentary evidence. The evidence suggests that Massachusetts Mutual mailed Form 1099s for the distributions in 1994, over a year after Mr. Cisneros had moved to the Washington, D.C., area to assume his responsibilities as Secretary of HUD. The forms were mailed to his former business and personal addresses, respectively, in San Antonio.

There is no evidence that Mr. Cisneros received the forms. Instead, it appears likely that the form mailed to his home was returned to the Post Office by Mr. Cisneros's sister-in-law, who was housesitting for the Cisneros family; she stated that it was her consistent practice to return all mail delivered to the home to the Post Office rather than forwarding it to Mr. Cisneros. We were unable to determine whether the Post Office still had a forwarding order in place for Mr. Cisneros at the time this form was mailed. Thus we are unable to determine what became of the 1099; there is, however, no evidence that Mr. Cisneros ever received it or took any steps to keep it from his accountant.

The other Form 1099 was addressed to a company with which Mr. Cisneros had formerly been associated. Representatives of that company stated that during the time in question, it was their practice to "bundle" mail that came addressed to Mr. Cisneros, and periodically forward it to his confidential assistant at HUD. She, in turn, stated that it was her practice to forward all tax-related documents directly to the accountant. There is no evidence, however, that the accountant ever received

this particular 1099. Thus, again, we are unable to determine what became of the second 1099, but also again, there is no evidence that Mr. Cisneros ever received it or took any steps to keep it from his accountant. Indeed, it appears that he established a system designed to ensure to the extent possible that all tax documents were promptly forwarded to the accountant.

Additionally, in view of the significant amount of other annuity and IRA income that was reported on Mr. Cisneros's 1993 tax return, I find no grounds to conclude that even had Mr. Cisneros perused each entry on his tax return, he likely would have recognized that the entries for annuity and IRA distribution income were too low and that something therefore must be missing. This conclusion is bolstered by the consistent testimony of all witnesses in this matter that Mr. Cisneros had entrusted his financial affairs to his bookkeepers and accountant, and did no independent monitoring of his finances on an ongoing basis. It is also bolstered by Mr. Hernandez's statement that he did not review the 1993 return carefully with Mr. Cisneros or discuss in detail the calculations he used to arrive at the figures on the return.

To summarize, at this time, I possess no evidence linking Mr. Cisneros to the failure to report the two distributions, and no evidence to suggest that he likely would have independently recognized the error without detailed review of the underlying paperwork on which his accountant had relied. Even giving the required great weight to the views of the Independent Counsel, in

the absence of any evidence suggesting that Mr. Cisneros bore any responsibility for the failure to report these distributions, I hereby notify this Court that no further investigation of tax year 1993 as a criminal matter is warranted.

OPPOSITION TO THE REQUEST FOR REFERRAL OF RELATED MATTERS

By Order of January 30, 1997, the Special Division of the Court for the Appointment of Independent Counsels requested the views of the Department of Justice with respect to an Application filed with the Court by the Independent Counsel. The Independent Counsel has requested that the Special Division grant him jurisdiction to investigate and prosecute Mr. Cisneros for alleged tax violations arising from tax years 1989 and 1991-1993, involving unreported income that was not paid to Linda Medlar. He requests this referral on the grounds that these tax allegations are "related to" his investigation of possible false statements by Mr. Cisneros to the FBI concerning the amount and frequency of his payments to Ms. Medlar. 28 U.S.C. § 594(e).<sup>7</sup>

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<sup>7</sup> Section 594(e) of the Independent Counsel Act provides:

**Referral of other matters to an independent counsel.--** An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the

I have considered the facts underlying the referral request, as part of my examination of the Independent Counsel's request for expansion of his jurisdiction as set out above, and herein have notified this Court of my conclusion that further investigation is not warranted. This Court therefore lacks jurisdiction to refer these matters to the Independent Counsel. 28 U.S.C. § 592(b)(1), In re Olson, 818 F.2d 34 (D.C. Cir. 1987); see discussion, *infra*.

Even were this matter being considered by this Court outside the context of my conclusions reached herein, the Court would lack jurisdiction to refer these tax matters to the Independent Counsel. The question of whether there existed grounds to investigate whether Mr. Cisneros committed tax violations that related to his alleged false statements to the FBI was considered in the course of the original preliminary investigation of this matter in 1995. At the time, there was no evidence to suggest that Mr. Cisneros had committed criminal tax violations in connection with this matter.<sup>8</sup>

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Attorney General's own initiative, the independent counsel shall so notify the division of the court.

The Independent Counsel did not consult with the Department of Justice or request referral of this matter from the Attorney General.

<sup>8</sup> Developing the full facts which might support a conclusion that a criminal tax investigation is warranted is a task that is normally entrusted to the IRS. At the time, the Department was aware that the IRS was inquiring into Mr. Cisneros' tax situation. If that inquiry developed sufficient evidence of potential criminal tax violations, the IRS would refer it to the Department, at which time, given that Mr. Cisneros was a covered person, it would be handled as an Independent Counsel matter, and

Accordingly, I specifically notified this Court that "no further investigation of this matter is warranted as a criminal tax matter." As a result, by operation of statute, "the division of the court shall have no power to appoint an independent counsel with respect to the matters involved." 28 U.S.C. § 592(b)(1).

As this Court made clear in In re Olson, 818 F.2d 34 (D.C. Cir. 1987), this express statutory limitation cannot be avoided simply by treating the matter as "related" and therefore subject to referral by the Court pursuant to section 594(e):

To suggest that the division of the court can bring about this result acting alone, upon the sole request of the independent counsel, would undercut the plain intent of § 592(b)(1) and permit the accomplishment by indirect means of a result that the statute prohibits being accomplished by direct means. Section 594(e) cannot be read to achieve such an unreasonable result.

Id., at 47.

However, the Independent Counsel seeks to evade this absolute bar by arguing that when the Notification concluded that "no further investigation of this matter is warranted as a criminal tax matter," and that there was insufficient evidence to support a conclusion that any tax laws had been violated "in connection with" Mr. Cisneros's payments to Ms. Medlar, I was only referring to what the Independent Counsel has described as

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likely referred to the Independent Counsel as an expansion of jurisdiction. Although it appears that the Independent Counsel was aware of the pending IRS matter, he has chosen not to wait for its completion, nor did he consult with the Department concerning its practices in such a situation. Cf., 28 U.S.C. § 594(f).

the Medlar-Payment Income; i.e., whether Mr. Cisneros had committed any federal tax violations involving the specific funds he had paid to Ms. Medlar. The Independent Counsel concedes that this Court cannot refer the Medlar-Payment Income tax allegations as related matters.

This argument demands that this Court ignore the plain meaning of the words used in my Notification. It also would defeat the very conclusion the Court must reach before it can refer these matters. In order to support referral of an investigation concerning the Non-Medlar Payment Income tax allegations pursuant to section 594(e), that tax investigation must be "related to" the current jurisdiction of the Independent Counsel -- i.e., alleged false statements concerning Mr. Cisneros's payments to Ms. Medlar. However, the reference in the Notification to "this matter" clearly meant the allegations that Mr. Cisneros made false statements concerning his payments to Ms. Medlar.<sup>9</sup> Therefore, any tax violations that "relate to" the alleged false statements by Mr. Cisneros within the meaning of section 594(e) by definition involve "this matter" and are "in connection with" his payments to Ms. Medlar or false statements concerning those payments. They are thus encompassed by my Notification.

The Independent Counsel cannot argue that the Non-Medlar Payment Income "relates to" Mr. Cisneros's alleged false

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<sup>9</sup> I stated, "I conclude that no further investigation of this matter is warranted as a criminal tax matter." Attorney General's Application at 4.

statements concerning his payments to Ms. Medlar for purposes of section 594(e) but do not "relate to" Mr. Cisneros's false statements concerning his payments to Ms. Medlar for purposes of my prior Notification. Therefore, referral of the Non-Medlar Payment Income tax allegations as related matters by this Court has been specifically foreclosed by the 1995 Notification.

**REFERRAL AS A RELATED MATTER BY THE COURT IS NOT WARRANTED**

Even apart from this jurisdictional bar, referral by this Court of Non-Medlar Payment Income tax allegations to the Independent Counsel as a related matter would not be appropriate.<sup>10</sup> Any attempt by the Court to separate Medlar-Payment Income from Non-Medlar Payment income and to conclude that the latter is "related" to the Independent Counsel's jurisdiction is impossible, given the factual context in which these allegations arise.

First of all, as indicated above, it is not practical to investigate part of a tax year. Because a criminal tax investigation is based on an audit and analysis of an entire tax year, the Independent Counsel's request that this Court carve out a piece of the tax picture for any given year and refer it to him

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<sup>10</sup> In addition, the Department of Justice has not abandoned and hereby reasserts for the record its view that under the careful balance of constitutional roles struck under the Independent Counsel Act, this Court lacks the authority to unilaterally refer a matter to an independent counsel without the concurrence of the Attorney General. However, recognizing that this Court found to the contrary in In re Espy, 80 F.3d 501 (D.C.Cir., Spec. Div. 1996), the Department will not repeat herein its statutory and constitutional arguments with respect to that point.

is unworkable. The proposal that this Court divide up Mr. Cisneros's income for four separate tax years and refer parts of it to him for tax prosecution would create a tax non sequitur.

Even were his request a hypothetical possibility, the Independent Counsel concedes that he cannot now distinguish the Medlar-Payment Income from the Non-Medlar Payment Income with any clarity. Sealed Application at 7. This alone suggests that even if my prior Notification could be read as making such a peculiar and unprecedented distinction, it should not be.<sup>11</sup> The Court would be in the position of having no idea what was being referred to the Independent Counsel and the Independent Counsel would have no idea what he was authorized to investigate.

In addition, analyzed in isolation and separate from the Medlar-Payment Income allegations, the matters as to which the Independent Counsel seeks referral cannot be concluded to be "demonstrably related to the factual circumstances," Espy, supra at 507, that underlie the Independent Counsel's current jurisdiction. The allegedly false income tax forms for two of the four years referenced by the Independent Counsel were not filed until after Mr. Cisneros's alleged false statements were made to the FBI. It is difficult to argue that his false statements to the FBI about his payments to Ms. Medlar in late

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<sup>11</sup> The Independent Counsel's argument would require that the Court engage in a hypertechnical semantical analysis of what I had in mind when I provided this Court with my Notification concerning tax violation, a clearly inappropriate exercise that can only lead to awkward and unworkable results. The Court should decline the Independent Counsel's invitation.

1992 were intended in any way to hide or disguise future tax violations unrelated to his payments to her.

Approaching the argument from the other perspective, the Independent Counsel seeks to argue that the later allegations concerning taxes relate to the false statements concerning the payments to Ms. Medlar because "underreporting his income helped hide the existence and amount of funds that were used in part to pay Medlar." Application at 14. This argument defies logic; it would be full disclosure of his income that would tend to defuse any possible concerns over his payments to Ms. Medlar, because that would suggest that he had ample income to make the payments; underreporting would suggest just the opposite. There is no logical link between a lower income and lower payments to Ms. Medlar that would support an argument that falsely claiming a low income would in any way tend to hide false assertions that the payments were less than they in fact were. In any event the Independent Counsel offers no explanation of how tax evasion in documents filed with the IRS in 1993 and 1994 tends to hide false statements made to the FBI in 1992 concerning unrelated payments.

To summarize, this Court lacks the authority to refer the matters requested by the Independent Counsel to him as related matters pursuant to section 594(e). It is barred from doing so both by my findings herein that further investigation is not warranted, and by my parallel findings in my 1995 Notification to

the Court. In addition, the referral requested by the Independent Counsel is impossible, because income tax violations related to payments to Ms. Medlar cannot be separated from potential income tax violations related to income that was not used to make payments to Ms. Medlar.

Recommended Jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), I recommend and request that the Special Division of the Court expand the Independent Counsel's jurisdiction to permit investigation of tax year 1992 and determine whether prosecution of tax violations arising from the income tax returns filed in that tax year is warranted. In this connection, I have appended hereto a recommended statement of expansion of prosecutorial jurisdiction for the Independent Counsel.

Disclosure. I request that the Court authorize disclosure of this filing only to Independent Counsel Barrett and his staff, pursuant to 28 U.S.C. § 592(e), and to Mr. Cisneros and his counsel. Although the Independent Counsel's current investigation is a well publicized matter, these new allegations are not. I have no reason to conclude that the public interest will be served by disclosure.

Respectfully submitted,



Janet Reno  
Attorney General of the United States

DATED: FEB. 28, 1997

### Expanded Statement of Jurisdiction

The Independent Counsel shall continue to enjoy the full jurisdiction initially conferred upon him as a result of the May 24, 1995, order of the Special Division of the Court. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Henry G. Cisneros, former Secretary of the United States Department of Housing and Urban Development, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by underreporting income on his personal income tax return for tax year 1992 or conspiring with others to do so.

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 individual or entity as necessary to resolve the matter described above.

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 provide by the Independent Counsel Reauthorization Act of 1994.

