

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**



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

Division No. 95-1



FINAL REPORT OF THE INDEPENDENT COUNSEL

In Re:

HENRY G. CISNEROS

DAVID M. BARRETT
Independent Counsel

barrett.oic.gov

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District of Columbia Circuit

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Division for the Purpose of
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DEC 13 2005

Division No. 95-1

IN RE: HENRY G. CISNEROS

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

ORDER

In this Court's October 24, 2005, Opinion and accompanying Order, we directed that the Final Report in this matter be released: 1) to the public, excluding that portion of the Report designated as Section V; and 2) to certain members of the Congress, including that portion of the Report designated as Section V. However, the Congress has subsequently directed that

The division of the court shall release to the Congress and to the public not later than 60 days after the date of enactment of this Act all portions of the final report of the independent counsel of the investigation of Henry Cisneros made under section 594(h) of title 28, United States Code. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution.

Judiciary Appropriations Act, 2006, Pub. L. No. 109-115, Title IV, § 408(a), 119 Stat. 2396 (November 30, 2005). Consequently, it is hereby

ORDERED that the version of the Final Report scheduled to be released to certain

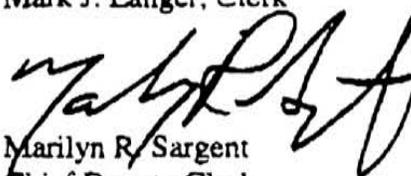
members of the Congress pursuant to this Court's Order of November 4, 2005, shall also be released to the public.

Per Curiam

For the Court:

Mark J. Langer, Clerk

by

A handwritten signature in black ink, appearing to read 'Marilyn R. Sargent', written over the printed name.

Marilyn R. Sargent
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED OCT 24 2005

Filed October 24, 2005

Special Division

Division No. 95-1

IN RE: HENRY G. CISNEROS

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

Before: SENTELLE, *Presiding*, FAY and REAVLEY, *Senior Circuit Judges*.

ORDER

It is **ORDERED, ADJUDGED, and DECREED** that the motion of the Independent Counsel to release the Final Report and all comments not directed to Section V is granted in part and denied in part; and that the motion of certain individuals named in the Report to order that the Report not be released is granted in part and denied in part. Specifically, the Court orders that the Independent Counsel, with all deliberate speed, prepare for release and make release of the now pending Final Report, except for that portion designated as Section V.

It is **FURTHER ORDERED** that the Independent Counsel prepare a sealed appendix consisting of Section V as ordered modified in the accompanying opinion and the comments directed to that Section for retention in the archives of the Court and for release to the Congress of the United States as hereinafter ordered.

Specifically, the Independent Counsel shall prepare for delivery copies of the sealed appendix for the use of the Majority and Minority Leaders of the United States Senate; the Speaker, Majority and Minority Leaders of the United States House of Representatives; the Chairman and Ranking Minority Member of the Senate Judiciary Committee; and the Chairman and Ranking Minority Member of the Judiciary Committee of the United States House of Representatives for circulation to such of their members and staff as they deem necessary in the pursuit of their legislative and oversight functions. Should the Congress or its officials deem it necessary to circulate the contents of the appendix beyond the members and staff of the Congress, it is requested that the Congress give the Special Division of the United States Court of Appeals for the District of Columbia Circuit du

notice of such intent, in order that the Court may give notice to the Independent Counsel and parties named in the Report as may be necessary under the circumstances. Should the Special Division have ceased to function by such time, it is then requested that the notice be delivered to the Clerk of the United States Court of Appeals for the District of Columbia.

On the Court's own motion, the Court concludes that while the complete termination of the Office of the Independent Counsel in the above-captioned matter is not currently appropriate under the standards set forth in 28 U.S.C. § 596(b)(2), the substantive duties of the Independent Counsel are complete, and it is therefore ordered that the Independent Counsel shall continue the operation of his office only to the extent necessary to fulfill the following duties: (1) respond to application for attorneys' fees; (2) publish the Final Report; (3) complete archiving responsibilities; (4) perform any remaining administrative functions attendant to closing down his office.

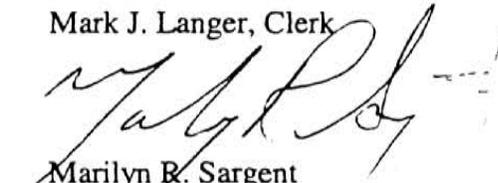
The effects of this order to release shall be stayed for ten days or until such time as the Supreme Court shall act upon an application for stay, whichever shall last occur. The purpose of this decretal paragraph is to permit any party desiring to do so to seek a stay from the Supreme Court. If no such stay is sought within the period granted by this paragraph, then this stay shall be lifted. To achieve these ends, it is ordered that counsel for any party seeking a stay from the Supreme Court shall notify the Clerk of the United States Court of Appeals for the District of Columbia Circuit of that fact upon the filing of application for such stay, and shall further notify the Clerk promptly upon learning of the disposition of such application.

PER CURIAM

For the Court:

Mark J. Langer, Clerk

By:

A handwritten signature in black ink, appearing to read 'Marilyn R. Sargent', written over a faint, larger signature that is partially obscured.

Marilyn R. Sargent
Chief Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 24, 2005

Division No. 95-1

IN RE: HENRY G. CISNEROS

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 24 2005

Special Division

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

Before: SENTELLE, *Presiding*, FAY and REAVLEY, *Senior Circuit Judges*.

Opinion for the Special Division filed by *Presiding Judge* SENTELLE.

SENTELLE, *Presiding Judge*: This matter comes before us on the motion of the Independent Counsel ("IC") appointed by the Court for the investigation of matters concerning former Secretary of Housing and Urban Development, Henry G. Cisneros, to authorize public release of the Final Report of his investigation. Other movants have sought an order of the Court sealing the Report of the Independent Counsel in toto or in part. The IC prepared the Report in question pursuant to 28 U.S.C. § 594(h), which requires that "before the termination of the independent counsel's office," the independent counsel shall "file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." 28 U.S.C. § 594(h)(1)(B).

Background

By way of background, on May 24, 1995, the Special Division appointed David M. Barrett

as Independent Counsel to investigate and, if necessary, prosecute offenses arising from allegedly false statements that Secretary Cisneros had made to the Federal Bureau of Investigation during the background investigation leading to his appointment as HUD Secretary. In September of 1997, the Independent Counsel obtained an indictment of Linda Medlar, Cisneros's mistress, for making false statements to the Independent Counsel and the FBI. The same indictment charged relatives of Medlar with bank fraud and making false statements to federally insured financial institutions. All defendants ultimately pleaded guilty.

In December of 1997, the Independent Counsel obtained indictments of Cisneros, Medlar, and two of Cisneros's employees for making false statements to federal officials in the 1992-93 background investigation, and conspiring to make false statements. After Medlar agreed to cooperate with the prosecution in return for a dismissal of the charges against her, Cisneros pleaded guilty to a misdemeanor count of lying to the FBI. Charges against the remaining defendants were then dismissed at the OIC's request.

Based on evidence developed during the investigation to that date, the Independent Counsel continued investigation as to possible obstruction of justice offenses committed during the investigation. The continuing investigation also concerned tax matters for the year 1992, over which the Independent Counsel had gained jurisdiction by an amending order in March of 1997.¹ The investigation ended recently. At the close of those investigations, the Independent Counsel is obligated to file the Report presently before the Court. Section V of the current Report covers investigations of alleged obstructions of justice and tax-related matters conducted largely after the

¹While the Attorney General supported the proposed expansion for the year 1992, the Independent Counsel also sought jurisdiction to investigate tax offenses in the tax years 1989, 1991, and 1993. The Independent Counsel did not obtain those expansions of his jurisdiction.

conclusion of all plea and sentencing provisions under the original grant of jurisdiction.

The IC and the parties address their motions to this Court pursuant to § 594(h)(2), which authorizes the Court to “release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the Division of the Court considers appropriate.”

On at least two prior occasions, we have noted that this “reporting requirement is a unique feature of the now-lapsed statute creating the unique office of independent counsel.” *In re Espy*, 259 F.3d 725, 728 (D.C. Cir., Spec. Div., 2001). *See also In re North*, 16 F.3d 1234, 1239 (D.C. Cir., Spec. Div., 1994). Investigations conducted by other federal prosecutors normally result in indictments, informations, or no official document of any sort. The issuance of the unique independent counsel report, a document issued by a prosecutor not under the aegis of either the court or a grand jury, yet potentially harmful to the reputations of persons investigated but not indicted or otherwise charged, is “certainly troubling,” and in our prior considerations of motions for release like the one before us today we have found those considerations most vexing. *In re Espy*, 259 F.3d at 728; *see also In re North*, 16 F.3d at 1236. This problem is especially vexatious considering that such reports, as in *North*, *Espy*, and the present case, often contain grand jury material governed by the confidentiality provisions of Fed. R. Crim. P. 6(e).

Rule 6(e) Problems

Rule 6(e) declares that “an attorney for the government” “must not disclose a matter occurring before the grand jury,” “unless these rules provide otherwise.” Fed. R. Crim. P. 6(e)(2). As the independent counsel is an attorney for the government, any release of grand jury material by him, including his final report, falls within the protective provisions of Rule 6(e). *In re Espy*, 259 F.3d at 728; *In re North*, 16 F.3d at 1242. Under that rule, insofar as the report exposes grand jury

material, the material so exposed may not be released to the public, except as provided for in the Federal Rules of Criminal Procedure. On prior occasions we have found authority for release in Fed. R. Crim. P. Rule 6(e)(3)(C): “Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made (I) when so directed by a court preliminary to or in connection with a judicial proceeding.” *In re Espy*, 259 F.3d at 728.² Noting that this exception to the grand jury secrecy rule “empowers courts to authorize release of otherwise secret material governed by Rule 6(e) in judicial proceedings,” we have ruled that the court’s function in determining whether to release such reports is a judicial proceeding. *Id.*; *see also In re North*, 16 F.3d at 1244. Thus, we may order the release of the material in the report before us “if we find such release to be otherwise lawful and appropriate.” *In re Espy*, 259 F.3d at 728; *see also Morrison v. Olson*, 487 U.S. 654, 681 (1988) (comparing “the functions that the Special Division is empowered to perform . . . to functions that federal judges perform in other contexts, such as deciding whether to allow disclosure of matters occurring before the grand jury”).

Therefore, as in *In re North* and *In re Espy*, we are satisfied that we have jurisdiction to enter the order prayed by the Independent Counsel. This does not, however, end the inquiry as to whether we should grant the order releasing the material; that is, we must still determine whether such release would be otherwise lawful and appropriate.

Propriety of Disclosure

On the prior occasions on which we have issued opinions governing the propriety of

²Subsequent to *In re Espy*, Congress amended Rule 6(e) several times. *See, e.g.*, Pub. L. No. 107-56, 115 Stat. 272, § 203(a)(1) (the Patriot Act). The current text of Rule 6(e) differs in form but not in substance. *See* Fed. R. Crim. P. 6(e)(3)(E)(i) (“The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter preliminarily to or in connection with a judicial proceeding.”).

disclosure of independent counsel reports, and more specifically of grand jury materials contained in such reports, we have applied an analysis weighing four not necessarily exclusive factors:

[1] whether the subjects of the investigations have already been disclosed to the public;

[2] whether the subjects do not object to the filings being released to the public;

[3] whether the filings contain information which is already publicly known; and

[4] whether the court filings consist of legal or factual rulings in a case which should be publicly available to understand the court's rules and precedents or to follow the developments in a particular matter.

In re North, 16 F.3d at 1237 (quoted and applied in *In re Espy*, 259 F.3d at 729). We again apply those factors to the Cisneros Report.

We first ask “whether the subjects of the investigations have already been disclosed to the public.” In both *In re North* and *In re Espy* we found that the subjects had been officially disclosed in the course of criminal trials. Therefore, in those cases we found that the first factor weighed in favor of release. In the present investigation, at least as to the parts of the investigation contained in Section V of the Report, the same is not true. Some subjects may have been disclosed; others have not. That part of the investigation did not result in indictments, certainly fostered no trials, and concerned individuals whose identities have not been generally disclosed to the public. The only appearances of the subjects in any proceedings were to the grand jury under the secrecy rule of 6(e). In the present case, factor one weighs against disclosure, at least as to Section V.

The second factor asks “whether the subjects do not object to the filings being released to the public.” In *In re North*, *In re Espy*, and the present investigation, as well as other independent counsel investigations, we have provided opportunity for comment. In *In re North* and *In re Espy*, we found that by far the greatest number of subjects had not used that commenting opportunity to

object to the release of the Report. In the present case many commenters, either implicitly or explicitly, question the propriety of release. We therefore find that the second factor weighs against a release of that portion of the Report dealing with matters not explored in the criminal proceedings against Secretary Cisneros or anyone else indicted as a result of the investigation. Thus, we find that as to Section V of the Report, but not the balance of the Report, that factor weighs against release. As to the portions not contained in Section V, we do not find sufficient objection to warrant withholding of the Report.

Our reasoning with respect to the third factor overlaps that applicable to the second factor. That factor asks “whether the filings contain information which is already public known.” In *In re North*, we noted that “[n]ot only is the information widely known, it is widely known incorrectly.” *In re North*, 16 F.3d at 1240. We therefore concluded “that a more complete version of the information coupled with the opportunity for comment by the persons named created a strong impetus for release.” *In re Espy*, 259 F.3d at 729. Applying that reasoning in *In re Espy*, we noted that the only objecting commenter in that case himself pointed out that “most of the story” about which the commenter was concerned “was disclosed in a public forum, Secretary Espy’s trial.” *Id.* Again, the same is not true as to the matters contained in Section V of the Report. As to those matters directly concerned with Secretary Cisneros and persons associated with him which were disclosed in the criminal proceedings against Cisneros, those generally fall outside Section V of the Report. As to them, this factor weighs in favor of release. However, the matters contained in Section V generally concern investigations that were conducted and grand jury material that came into being or was accumulated after the Cisneros proceedings. Therefore, this factor weighs against the release of Section V of the Report.

The fourth factor, “whether the court filings consist of legal or factual rulings in a case which should be publicly available to understand the court’s rules and precedents or to follow the developments in a particular matter,” was of little weight in either the *In re North* or *In re Espy* cases. See *In re Espy*, 259 F.3d at 730; *In re North*, 16 F.3d at 1241. As we noted in those cases, if that factor had generated an affirmative answer, it might strongly weigh in favor of release. However, in this case, as in *In re Espy*, we determine that “[b]y no means does the Report consist entirely or even marginally of such rulings.” 259 F.3d at 730. This is especially true of the Section V material. Therefore, while this may not be the most important of the four factors, it weighs little with respect to most of the Report, but weighs negatively with respect to Section V.

While we concluded in *In re North* and *In re Espy* that the motions for publication of the Independent Counsel’s Report, together with comments filed by the persons named in the Report, should be granted, here we make that ruling as to the greater portion of the Report, that is, the parts contained in all sections except Section V. We therefore order that the Report of the Independent Counsel, together with commenters named in parts of the Report other than Section V, should be published to the public. With respect to Section V, the motion of the Independent Counsel is denied, and we order that Section V of the Report be not publicly disclosed. This same ruling applies to those comments directed to the material in that section.

Release to Congress

As noted above, the statute provides that “the court may release *to the Congress*, the public, or any appropriate persons such portions of the report made under this subsection as the Division of the Court considers appropriate.” 28 U.S.C. § 594(h)(2) (italics supplied). We are aware that there is congressional interest in the contents of this Report. See Editorial, *10 Years and Counting*, N.Y.

Times, Oct. 6, 2005, at A36; Jonathan Weisman, *Cisneros Convicted in '99, But the Probe Goes On*, Wash. Post, Oct. 1, 2005, at A1. The continuing expenditure of government funds and resources under the now-lapsed statute is obviously a matter within the responsibility and concern of the Congress. We therefore have provided in the accompanying order that the entire Report, inclusive of Section V, be provided to appropriate officials of the Congress for such distribution to other Members as they deem necessary in the pursuit of congressional duties. We note that in a separate order directed to the Independent Counsel, we have provided for discrete deletions from all versions of the Final Report in order to protect extremely confidential information.

Conclusion

In summary, we grant the Independent Counsel's motion to publish his Report to the extent of the material concerning the investigation of Secretary Cisneros and persons associated with him; we however deny the motion as to the publication of material contained in Section V of the Report except to the extent set forth above as to the publication of the Report to the Congress of the United States.

So ordered.

ACKNOWLEDGMENTS

My Office was extremely fortunate in the number of exceptional people who served in this extraordinarily complex and lengthy investigation. These persons brought their considerable talents and skills to an assignment that was difficult and often thankless.

As has been pointed out by other Independent Counsels, we start from ground zero. When an Independent Counsel begins, he or she has no office, no personnel, not even a pencil. It is like creating a law firm from nothing. Recruiting lawyers is the first and the most important task for any Independent Counsel. Identifying those lawyers who possess the special skills, talents and experience is only part of this task. Such lawyers must be willing to have their careers interrupted for an uncertain assignment. The sacrifices I asked people to make were substantial. In many cases, families were uprooted and often the financial sacrifice was considerable. Nevertheless, the people who did agree to sign on were some of the most talented in the country and have gone on to significant positions in the public or private sectors.

I wish to acknowledge one of the most exceptional individuals I have ever met. Deputy Independent Counsel Mark V. Jackowski is an extraordinary combination of integrity, brilliance and dedication. His capacity for hard work and long hours set an example for everyone in this Office. This report and much of the

work of this Office would not have been possible without him. I have never worked with a finer lawyer.

The initial Deputy Independent Counsel was Lawrence F. Scalise, the former Attorney General of Iowa. His service helping to guide our efforts from the initial stages of the investigation to the plea by Secretary Cisneros, was exceptional. Additionally, he employed his skills in building this Office and organizing its efforts. He was the very first person I asked to serve in this endeavor.

Marjorie Kicak, our Administrative Officer, became the second person hired. She came highly recommended by two former Independent Counsels in whose offices she held the same position. She fulfilled all our expectations and served with integrity, hard work, and a firm hand managing all business matters of this Office. Her efforts were outstanding in all aspects.

I want to cite another individual, Judge Louis J. Freeh, a man of the highest integrity and personal character. His courage made him indispensable in his leadership of the Federal Bureau of Investigation at a very difficult time. I am deeply indebted to him professionally and personally for his support.

This Office was extremely fortunate to have the services of several Associate Independent Counsels, who were given great responsibility for the conduct of this investigation. They performed their responsibilities with dedication and high professionalism.

Assistant United States Attorney Ed Page took responsibility for the successful prosecution in Lubbock, Texas. His broad experience and ability made it possible to take charge of matters in Lubbock with my total confidence.

Assistant United States Attorney Mathew Rosengart was responsible for drafting a wide range of pleadings. He prepared and argued an important appeal to the United States Court of Appeals for the District of Columbia. His efforts resulted in a unanimous decision of the Court upholding the position of my Office.

Michael C. Conway served this Office with experience, professionalism and skill from the very beginning. He brought to this Office his experience both as a prosecutor and as one of the country's most effective defense counsels. He made very substantial contributions to the preparation and content of this Final Report.

I particularly point out Daniel F. Hall who began his service while still a law student. He later became a Senior Associate Independent Counsel and was a stalwart in the preparation of the Report of this Office and in many other assignments. His writing and analytical skills are notable.

I also wish to recognize the special contribution Charles M. Kagay made to this Office. He served as Chief Appellate Counsel. He, along with his colleague Wayne M. Liao, brought their unsurpassed analytical and writing skills to bear on the drafting of the Final Report and many other critical matters.

I highly commend the service of the following Associate Independent

Counsels: Assistant United States Attorney John Dominguez, Tim Griffin, Bill Hurlock, John Irving, and Richard Stanton, all of whom served in the early stages of the investigation. Subsequently, a number of individuals also served as Associate Independent Counsels who I also wish to commend: Joseph Derbis, Paul Engh, Edward Eynon, James Fleissner, Asa Hutchinson, III, Pamela Mackey, Andy McCarthy, Alexia Pappas, and Philip Police.

I am very proud of the following individuals who attended law school while working in my Office performing many tasks, including organizing the incredible amounts of paperwork that came into this Office: Carlton Curry, Devin Doolan, Jr., Lauren Gillen, and Amy Molloy, all whom have gone on to practice law.

The investigative work of this Office was done by an extremely effective group of investigators, who pursued their responsibilities with the highest degree of professionalism and experience. The agents came principally from the Federal Bureau of Investigation and the Internal Revenue Service.

I particularly wish to recognize the contributions made by the following Agents from the Federal Bureau of Investigation: Daniel Gallagher, Christopher Graham, Alan Holzgraf, Claude Martin, Craig Meyer, George Parks, T.J. Roberts, Dennis Terry and John Truhitt. They were led by Supervisory Special Agent Karen Spangenberg.

From the Internal Revenue Service's Criminal Investigation Division, I

commend the contributions of Special Agents Dorman Barrows, Sheila Colbenson, Kesha Lange and John Filan. The late John Filan was a career employee of the Internal Revenue Service where he served for almost 30 years. He will be long remembered for his integrity and extraordinary courage in the most difficult of circumstances. The American people owe John Filan their most profound gratitude for his service in this investigation.

From the Department of the Treasury's then-Office of Inspector General, I commend the service of Special Agent Carl Hoecker.

I would particularly like to note the contributions of two individuals who have established substantial reputations at two of this country's finest law schools: David T. Link, who for over twenty-five years led the Law School at the University of Notre Dame as its Dean, and Richard Alan Gordon, the Assistant Dean of the Georgetown University Law Center for many years. Each gave valuable guidance to the Office of Independent Counsel. Dean Link was particularly helpful to me, because of his experience as an enforcement lawyer with the Internal Revenue Service before becoming a Professor at Notre Dame. It should be pointed out that both men served at their own expense and refused any compensation from this Office.

I would like to thank The Honorable Charles Wilson, now a distinguished Judge on the United States Court of Appeals for the 11th Circuit who, while United

States Attorney for the Middle District of Florida, permitted me to “borrow” three of his most experienced prosecutors, Mark V. Jackowski, Ed Page, and Mathew Rosengart.

I also benefitted greatly from the contributions of a distinguished group of lawyers and investigators who served in my Office. My deepest gratitude and appreciation to:

Joseph Barletta, Bradford Berenson, Bruce Conklin, Bruce E. Koenig, Jerris Leonard, John Mamoulides, Robert Mazur, Alfred Moran, James O’Neill, Paul S. Rosenzweig, Edmund W. Searby, and Anne Voegele. I wish to particularly note the contributions of Robert Mazur. He is an individual of unprecedented experience and skill, brought the highest levels of professionalism and intelligence to this Office.

There is no way to fully thank the secretaries who worked in this Office. There were a number over the years and they served with great professionalism

and integrity. Three secretaries stand out. Peggy Thume, who has already distinguished herself by service to two other Independent Counsels, Jan Ways and Loren Smith. They worked long hours and their work was among the best I have ever seen. They have been loyal to the goals of this Office and have served with integrity and distinction.

I wish to point out the hard work and diligence of two individuals whose support for this Office was invaluable – Joseph Burns and James Reid.

I also wish to thank the citizens of the District of Columbia who sat on the grand juries that investigated the matters referred to in the Final Report. They served with diligence and focus.

A handwritten signature in black ink, appearing to read "David M. Barrett", with a long horizontal flourish extending to the right.

David M. Barrett
Independent Counsel

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I. INDEPENDENT COUNSEL'S INTRODUCTION

This Final Report sets out, in detail, what this Office learned as it investigated the subject matter within its jurisdiction, how it learned what it did, and what actions it took on the basis of that knowledge. At the outset, I set three overriding goals for our efforts – to bring to light any wrongdoing that occurred within the perimeter of my mandates, to redress such wrongdoing to the extent possible, and to exculpate any person or entity who, after a full and thorough investigation, proved not to have done anything meriting prosecution. This Report chronicles these efforts.

The Report tells one story in two parts, each part essential to the other. The first part concerns the investigation of Henry Cisneros and Linda Medlar in connection with his appointment as Secretary of Housing and Urban Development. The second part, wholly unanticipated when we began our work, concerns the apparent efforts of certain high-ranking government officials to insulate Henry Cisneros from independent counsel investigation or prosecution.

At the core of our investigation was the allegation that Cisneros lied to the Federal Bureau of Investigation on the road to his appointment as HUD Secretary, an accusation first leveled by his erstwhile mistress Linda Medlar. The story of Cisneros and Medlar on its face was a personal tragedy for the participants and their families, not in and of itself meriting public scrutiny. It became a problem of national concern when they and their associates decided that Cisneros's appointment was more important than obeying the laws that are intended to ensure that important government decisions are grounded on full and honest information. This first part of our investigation was able, I believe, to uncover most of the essential facts behind these actions and to redress the serious criminal offenses involved appropriately, and therefore met the goals that I set.

The second part of our investigation was directed at the serious and unsettling possibility that certain high-ranking officials of the Department of Justice and the Internal Revenue Service had improperly attempted to shield Cisneros from independent counsel scrutiny for tax offenses. This Office was not alone in perceiving these potential problems; numerous dedicated officials within those agencies raised alerts, largely unheeded, about possible failures to pursue meritorious claims involving Cisneros. If nothing else, this portion of the story emphasizes the need to guarantee both the appearance and the reality that everyone, regardless of their status, is treated the same by their government when it comes to matters of criminal conduct. There are no parts of our government that touch more closely the

individual citizens than the Internal Revenue Service and the Department of Justice, and the integrity and the reputation for integrity of both are critical to the operation of our government.

The story told in this Report about this latter phase of the investigation is incomplete. The Department of Justice and the individuals under scrutiny resisted our efforts to investigate, and the Independent Counsel Act lapsed under its sunset provisions, leaving our Office in operation but with an escalating need to complete its business. In the end, we saw that it was necessary to cease investigative operations before we had pursued the matter to its conclusion. In other words, we were only partially successful in pursuing the goals of the Office in this phase of our work. Although we are not able to say with certainty whether any criminal laws were broken, it is clear, I think, that there was questionable activity – as well as inactivity – by a number of government officials.

The work of this Office took a long time to complete, even by the standards of an independent counsel investigation, which typically meets more resistance and resultant delay than a normal criminal investigation. One reason was that Medlar, who was a key witness in the investigation and prosecution of Cisneros, suffered from the misconception that commitments to federal law enforcement officials need not be treated seriously – an error in judgment that cost the Office much time, effort and expense, and ultimately cost her dearly as she was prosecuted and incarcerated for her actions. The other principal reason is that we had to take on the unanticipated line of inquiry involving possible obstruction of justice by government officials; the recalcitrance of the officials under scrutiny made for slow going.

In the end, although our efforts fulfilled the goals that I set in full for only part of our investigation, and only in part for the remainder, I believe they can serve as an example of the need for independent scrutiny of official actions. Most of what is related in this Report would likely never have seen the light of day if an independent counsel had not been appointed. This Report is an opportunity to measure the value of such efforts.

David M. Barrett

Independent Counsel

II. EXECUTIVE SUMMARY

In the latter half of 1994, accusations surfaced that then-Secretary of Housing and Urban Development Henry G. Cisneros had made false statements to the Federal Bureau of Investigation (“FBI”) in late 1992 and early 1993, when the agency was conducting a routine background investigation for his appointment and confirmation. The false statements concerned monetary payments he had made to Linda Medlar,¹ with whom he had had an extramarital affair in the late 1980s. Cisneros allegedly had seriously misstated the amount and frequency of the payments he had made to her.

The controversy over Cisneros’s false statements came into the public eye in 1994 when Medlar filed a lawsuit against Cisneros and soon afterward revealed that she had secretly taped many of their telephone conversations. In some of the tapes she had made, she and Cisneros had discussed Cisneros’s false statements to government officials and related actions.

The false statement accusations prompted the Attorney General to initiate a preliminary investigation pursuant to the Independent Counsel Act, 28 U.S.C. § 591 *et seq.*, to determine whether to ask for the appointment of an independent counsel. Following an extended investigation, the Attorney General applied to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels (“Special Division”) for the appointment of an independent counsel. She made this application against the recommendation of the Department of Justice’s (“DOJ”) Public Integrity Section (“Public Integrity”) and other senior DOJ staff.

The Special Division appointed David M. Barrett as Independent Counsel on May 24, 1995. It gave him the power and duty to investigate fully and, if necessary, to prosecute offenses arising from any false statements that Cisneros had made to the FBI during the background investigation leading to his appointment as HUD Secretary. The appointment order also gave the Independent Counsel jurisdiction to investigate and prosecute any person or entity for conspiracy to make such false statements, any related offenses, and any criminal interference with the Independent Counsel’s (“OIC”) investigation.

¹ Medlar changed her last name back to her maiden name, Jones, in June 1995. GJ 97-1 Ex. 308. However, for purposes of this Report, she will be referred to as Medlar.

The jurisdiction that the Special Division delineated did not include any tax offenses, because the Attorney General had determined that there were no grounds for requesting that an independent counsel be appointed to address tax matters. She made this determination even though DOJ had in its possession evidence suggesting that Cisneros had not paid taxes on income he diverted into the payments to Medlar.

In January 1997, after the OIC's investigation had uncovered further evidence that tax offenses might be related to the false statement offenses already under investigation, the Independent Counsel formally asked the Attorney General to expand his jurisdiction to include tax offenses in four different years. She granted the request for one year only, and the Independent Counsel's jurisdiction was expanded accordingly. The Independent Counsel also asked the Special Division to refer certain tax offenses to him as related matters, but the court found itself legally precluded from doing so by the Attorney General's determinations that appointment of an independent counsel for tax matters in other years was not warranted.

Medlar was the key witness in the Cisneros investigation, but she proved to be both untruthful and uncooperative. In September 1997, the OIC obtained an indictment of Medlar for making false statements to the OIC and the FBI in their investigation of Cisneros's false statements. The same indictment charged Medlar and her sister and brother-in-law with bank fraud and false statements made to a federally-insured financial institution. All defendants ultimately pleaded guilty.

Three months later, in December 1997, the OIC obtained indictments of Cisneros, Medlar, and two of Cisneros's employees for making false statements to federal officials in the 1992-93 investigation leading to Cisneros's appointment and confirmation as HUD Secretary, and for conspiring to make these false statements. In March 1999, Medlar agreed to cooperate with the OIC in the prosecution, in exchange for dismissal of the charges pending against her and a reduction of the sentence she had received for her previous conviction pursuant to her guilty plea. In September 1999, following an evidentiary hearing at which the trial court ruled that almost all of Medlar's tape recordings of her conversations with Cisneros would be admissible at trial, Cisneros and the OIC entered into a plea agreement. Cisneros pleaded guilty to a misdemeanor count of lying to the FBI. The charges against the remaining defendants were then dismissed at the OIC's request.

The Cisneros plea bargain concluded the OIC's investigation of Cisneros's false statements, the core subject of its jurisdiction. The OIC did not end its investigatory activities at that point, because it perceived serious unresolved

questions concerning the Attorney General's decision to grant the OIC almost no jurisdiction over tax offenses. By statute, the delineation of the OIC's jurisdiction was committed to the Attorney General's unreviewable discretion. However, the evidence available to the OIC strongly suggested that officials in both DOJ and the Internal Revenue Service ("IRS") had undermined the Attorney General's exercise of discretion by actively working to block any investigation or prosecution of Cisneros for tax offenses, regardless of the merits. At worst, these activities could have represented criminal obstruction of justice. Since part of the OIC's charge was to investigate any interference with its own investigation, its work could not be complete until it had fully examined this possibility.

Beginning in the Summer of 1997, the OIC developed, to the extent it could, evidence concerning efforts by officials of DOJ and the IRS to contain and limit the investigation of Cisneros's actions. This inquiry into possible obstruction of justice continued past June 30, 1999, the sunset date of the Independent Counsel Act. In late 2001, in the face of resistance from DOJ, the OIC attempted to resolve any doubts about its power to proceed on this issue by applying to the Special Division for a referral of the obstruction of justice question as a matter contained within its existing mandates. The Special Division declined to act, holding that its power to make such referrals had ended with the sunset of the Independent Counsel Act.

Without a clear resolution of the jurisdiction question, the OIC continued to press its obstruction investigation by subpoenaing documents from DOJ in early 2002. DOJ responded by filing a motion to quash the subpoena, which the District Court gave no sign of resolving at any early date. While the motion was pending, the Special Division issued an order indicating that it was looking for a prompt completion of the OIC's investigative activities and the closing of its operations.

With no imminent prospect of cooperation from DOJ, enforcement of the subpoena by the District Court, or support by the Special Division for the OIC's exercise of jurisdiction, and with statutes of limitations on the relevant offenses looming or already passed, the OIC elected to end its investigation. Consequently, this Report is necessarily incomplete in its discussion of these obstruction of justice allegations, because the OIC was unable to resolve the issue with finality – either through prosecution or a determination that prosecution was not warranted.

The following Report discusses all of the OIC's investigative and prosecutorial activities and sets out in detail the facts uncovered relevant to the Independent Counsel's mandate. The Report does not set forth in detail the OIC's activities

relating to areas of inquiry that it did not pursue at length – those that proved upon limited examination to be clearly without merit or to be clearly outside the Independent Counsel’s mandate.

III. APPOINTMENT AND MANDATES

In September 1994, Linda Medlar publicly accused Henry Cisneros, the Secretary of Housing and Urban Development, of having made false statements to the FBI in late 1992 and early 1993 while under investigation for his appointment.² The false statements concerned payments he had made to her over the course of several years. She backed these accusations with audio recordings she had secretly made of numerous telephone conversations with Cisneros, and with bank records.

At that time, 28 U.S.C. § 591(a), a provision of the Independent Counsel Act, directed the Attorney General to initiate a preliminary investigation whenever she “receive[d] information sufficient to constitute grounds to investigate whether [a member of the President’s Cabinet] may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.” The Act gave the Attorney General 30 days from the receipt of such information to determine whether it was sufficiently specific and credible to warrant a preliminary investigation.³ The preliminary investigation allowed the Attorney General to determine whether further investigation of the matter was warranted and, if so, to request, pursuant to 28 U.S.C. § 592, that an independent counsel be appointed.

In September of 1994, the Attorney General began an inquiry to decide whether to commence a preliminary investigation of Medlar’s accusations that Cisneros had made false statements to the FBI. On October 14, 1994, the Attorney General opened a preliminary investigation into Cisneros’s alleged false statements.

About five months later, on March 13, 1995, the Attorney General applied to the Special Division for the appointment of an independent counsel in the Cisneros matter.⁴ In her application, the Attorney General stated:

I conclude that “there are reasonable grounds to believe that further investigation is warranted” into whether Secretary Cisneros may have violated a federal criminal law other than a Class B or C misdemeanor

² *Inside Edition* Tr. 9/12/94 at 5.

³ 28 U.S.C. § 591(d)(2).

⁴ GJ 00-001 Ex. 3 (Application for Appointment of an Independent Counsel 3/13/95).

or an infraction when he made false statements to the FBI during his background investigation.

• • •

RESULTS OF THE PRELIMINARY INVESTIGATION

A. Alleged False Statements to the FBI. Our investigation developed evidence that Secretary Cisneros made false statements to the FBI during an interview conducted as part of his background investigation. . . . He . . . told the FBI that he had been paying support to Medlar for some time; however, he also stated to the FBI that he had paid her no more than \$2,500 at a time, and no more than \$10,000 a year.

• • •

Although not all false statements are material as a matter of law, the materiality of Secretary Cisneros's false statements to the FBI is a close and difficult factual and legal issue that must be resolved by an Independent Counsel. An Independent Counsel must also evaluate whether there was an agreement between Medlar and Secretary Cisneros to conceal information concerning his payments to Medlar during the confirmation process, in violation of the conspiracy statute, 18 U.S.C. § 371.

B. Potential Tax Violations. Our investigation developed no evidence that Secretary Cisneros failed to pay any income or gift taxes due in connection with his payments to Medlar. . . . I conclude that no further investigation of this matter is warranted as a criminal tax matter.

• • •

C. Potential Solicitation or Acceptance of Gratuities. Our investigation also disclosed that, after Secretary Cisneros had been in office for several months, he was seeking ways to provide for Medlar, without having to continue making regular payments himself. In one transcribed conversation, Secretary Cisneros told Medlar that he had asked a friend who was a businessman and past political supporter

whether he could arrange for a job or other assistance for Medlar. Medlar later told Secretary Cisneros that the businessman had sent her \$5,000. In addition, we obtained evidence that the businessman later arranged for the provision of approximately \$11,000 more to Medlar.

[W]e have found no evidence that the money provided by the businessman had any connection to “any official act” that had been or might have been taken in the future by Cisneros as Secretary of HUD. Indeed, a review of the public records concerning the businessman’s financial holdings has not disclosed even a hypothetical potential for Secretary Cisneros to take action as the head of HUD which would affect the businessman. Therefore, I conclude that no further investigation of this matter is warranted.⁵

Attached to the Application was a proposed delineation of the Independent Counsel’s jurisdiction.⁶

On May 24, 1995, the Special Division acted on this Application by appointing David M. Barrett to conduct an investigation of Henry G. Cisneros. The Appointment Order’s jurisdictional grant tracked the Attorney General’s proposal, giving to the Independent Counsel:

[F]ull power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Henry G. Cisneros, Secretary of Housing and Urban Development, committed a violation of any federal criminal law . . . by making false statements with respect to his past payments to Linda Medlar to the Federal Bureau of Investigation during the course of his background investigation or conspiring with others to do so.

[J]urisdiction and authority to investigate other related allegations or evidence of violation of federal criminal law . . . by any organization or individual as necessary to resolve the matter described above.

⁵ *Id.* at 2-5.

⁶ *Id.* at 2.

[J]urisdiction 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 statement or testimony in violation of federal criminal law, in connection with or arising out of the investigation of the matters described above.

[J]urisdiction 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 person or entities who have engaged in unlawful conspiracy or who have aided or abetted any federal offense.

• • •

[P]rosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes . . . that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence and intimidation of witnesses.⁷

About a year and a half later, on January 29, 1997, the Independent Counsel formally requested the Attorney General pursuant to 28 U.S.C. § 593(c)(2) to expand the Independent Counsel's jurisdiction to include the investigation and prosecution of federal income tax violations that Cisneros might have committed in tax years 1989, 1991, 1992, and 1993, related to income used to make payments to Medlar.⁸ Simultaneously, the Independent Counsel formally asked the Special Division pursuant to 28 U.S.C. § 594(e) to refer, as a related matter, jurisdiction to investigate and prosecute federal income tax violations that Cisneros might have committed in

⁷ GJ 00-001 Ex. 4 (5/24/95 Order Appointing Independent Counsel).

⁸ GJ 00-001 Ex. 51A (Office of Independent Counsel's Request for an Expansion of Prosecutorial Jurisdiction Pursuant to 28 U.S.C. § 593(c)).

tax years 1989, 1991, 1992, and 1993, related to income not used to make payments to Medlar.⁹

The Attorney General supported the proposed expansion for tax year 1992, but otherwise opposed any expansion or referral of jurisdiction.¹⁰ In her February 28, 1997 filing to the Special Division, the Attorney General stated:

[O]n 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, with respect to certain of Mr. Cisneros's income tax obligations for tax years 1989 and 1991 through 1993. . . . 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 reasonable grounds to believe that further investigation is warranted for tax years 1989, 1991 and 1993.

• • •

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.

• • •

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

⁹ GJ 00-001 Ex. 50 (Office of Independent Counsel's Sealed Application for the Referral of Related Matters Pursuant to 28 U.S.C. § 594(e)).

¹⁰ GJ 00-001 Ex. 87 (2/28/97 Notification to the Court re: Expansion of Jurisdiction).

year 1992 and determine whether prosecution of tax violations arising from the income tax returns filed in that tax year is warranted.¹¹

The Attorney General's filing included a proposed Expanded Statement of Jurisdiction.

By Order entered March 18, 1997, the Special Division expanded the Independent Counsel's jurisdiction essentially as the Attorney General had recommended, amending his jurisdiction to include tax offenses in 1992, as follows:

[J]urisdiction 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, or any person or entity acting in concert with him, has committed a violation of any federal criminal law . . . arising from or relating to the filing or preparation of his federal income tax returns for tax year 1992 or conspiring with others to do so.

• • •

[J]urisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Henry G. Cisneros or any other person or entity . . . developed during the Independent Counsel's investigation of the matters referred to above, and arising out of such investigation.

• • •

[J]urisdiction and authority to investigate other allegations or evidence of violation of federal criminal law . . . by any individual or entity as necessary to resolve the matter described above.

• • •

[J]urisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any

¹¹ *Id.* at 1, 16, 22.

material false statement or testimony in violation of federal criminal law, that may arise out of the investigation of the matters described above.

• • •

[J]urisdiction 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 person or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.¹²

On March 26, 1997, on its own motion, the Special Division amended the March 18, 1997 Order to specify that the Independent Counsel had:

[P]rosecutorial jurisdiction to fully investigate and prosecute the subject matters with respect to which the Attorney General requested appointment of independent counsel, and the expansion of such independent counsel's jurisdiction, as hereinbefore set forth, and all matters and persons and entities whose acts may be related to those subject matters, inclusive of authority to investigate and prosecute federal crimes . . . that may arise out of the above described matters, including perjury, obstruction of justice, destruction of evidence and intimidation of witnesses¹³

The Special Division denied the OIC's referral request by Order dated April 10, 1997 because it found itself unable to make the requested referral as a result of the Attorney General's prior determinations on the tax issue.¹⁴

¹² GJ 00-001 Ex. 91 (3/18/97 Order Amending Independent Counsel's Jurisdiction).

¹³ GJ 00-001 Ex. 92 (3/26/97 Order Further Amending Independent Counsel's Jurisdiction).

¹⁴ GJ 00-001 Ex. 105 (Order Denying Request for Referral of Related Matters 4/10/97).

The Special Division did not modify or reinterpret the Independent Counsel's jurisdiction after March of 1997. The jurisdictional grants quoted above governed the Independent Counsel's activities for the remainder of his investigation.

IV. THE FALSE STATEMENTS INVESTIGATION

A. Introduction

The Independent Counsel's core jurisdiction gave him the power and duty to investigate whether Cisneros had made false statements to the FBI during his background investigation. This matter, together with certain closely related allegations that emerged in the course of the OIC's investigation, was the focus of the OIC's initial investigation and all of its prosecutions.

There was never any serious doubt that Cisneros had lied to the FBI and to the President-elect's Transition Team about his payments to Medlar, while he was under consideration for appointment as Secretary of the Department of Housing and Urban Development ("HUD"). Still, the OIC needed to pinpoint what lies Cisneros had told, to whom he had told them, and when. This required the OIC to scrutinize thoroughly the transition and appointment procedures to which Cisneros was subject, detailing the statements he had made and had not made throughout the process. It also required the OIC to establish the facts behind Cisneros's payments to Medlar, for comparison with the representations he had made about them. Because the payments had been secret, the OIC examined Cisneros's finances in their entirety to track them down.

The OIC also investigated Cisneros's efforts to conceal the payments and continue to keep Medlar quiet after he was confirmed as HUD Secretary, including large payments from Cisneros, efforts to get Medlar a job, and money given to Medlar by Cisneros's friend and influential Texas businessman Morris Jaffe. Furthermore, the OIC investigated the possibility that Medlar and her relatives had sought and received favors from HUD in lieu of Cisneros's payments to Medlar.

The most important question on which the legality of Cisneros's false statements turned was whether they had been material to the governmental decisionmakers for whom they were intended. False statements to government officials are illegal only if they are "material" to the officials' duties.¹⁵ Consequently, an important part of the OIC's investigation lay in gauging the materiality of the false statements.

¹⁵ A false statement is material if it "has a natural tendency to influence, or [is] capable of influencing, the decision of the tribunal' charged with making the decision." *United States v. Cisneros*, 26 F. Supp. 2d 24, 40 (D.D.C. 1998) (quoting *United States v. Diggs*, 613 F.2d 988, 999 (D.C. Cir. 1979)).

The OIC also followed substantial leads concerning closely related allegations. It discovered that some of Cisneros's payments to Medlar were used for Medlar to buy a house, and that Medlar's relatives committed criminal bank fraud to help her conceal the source of the funds.

The OIC's investigations resulted in two indictments, each of several persons. The first was brought in Lubbock, Texas, where the OIC indicted Medlar for false statements she had made in the course of the OIC's investigation. In the same case, the OIC brought indictments against Medlar and some of her family members for bank fraud and conspiracy to commit bank fraud in a transaction made with funds supplied by Cisneros. All of the indictments resulted in guilty pleas.

The second prosecution was conducted in Washington, D.C. The OIC brought an indictment against Cisneros, two of his employees, and Medlar for conspiring to impede the work of the Senate and the FBI in the course of Cisneros's appointment and confirmation process. The indictment also charged Cisneros and one of his employees with making false statements in the course of Cisneros's confirmation process.

The linchpins of the Washington, D.C. prosecution were the admissibility of the audiotapes that Medlar had made of her conversations with Cisneros, and Medlar's credibility as a witness against Cisneros. Following a pivotal evidentiary hearing, during which Cisneros's defense counsel called Medlar's credibility into serious question, the court ruled that most of the tapes would be admitted at trial. Subsequently, Cisneros and the OIC reached a plea agreement under which Cisneros pleaded guilty to a misdemeanor, and the charges against the other Washington, D.C. defendants were dismissed.

B. Facts and Circumstances

1. Preface – Evidentiary Limitations

The following factual narrative presents the OIC's best assessment of what the evidence shows concerning Cisneros's false statements and related offenses. Because none of the matters the OIC investigated went to trial, there has been limited judicial determination of these facts. In some instances, the evidence is contradictory or incomplete.

One of the principal witnesses to many of these events described in this Report is Linda Medlar. Although she cooperated at times with the OIC's investigation, and ultimately became a witness for the government, Medlar is known to have lied repeatedly to government agents and others, and to have lied under oath. Evidence derived from Medlar's statements and testimony is therefore presented cautiously, and it should be regarded cautiously, in light of all available evidence.

2. Introduction

The Independent Counsel's primary charge was to determine whether Henry Cisneros had broken the law by making false statements, or by conspiring with others to do so, during the background investigation conducted for his appointment and confirmation as HUD Secretary. The alleged false statements concerned payments that he had made and was making to his former mistress, Linda Medlar. The case was unusual in that Medlar had secretly tape-recorded many of her conversations with Cisneros while the events to be investigated took place.

The OIC's investigation revealed that Cisneros had knowingly made false statements to the FBI and others, and had actively worked with Medlar to conceal information about his payments to and relationship with her. The investigation showed that these false statements had had, at the least, the potential to undermine the process. And the investigation indicated that Cisneros's efforts to continue making payments to Medlar after he was in office, and thus secure her continued silence, had entailed a number of questionable transactions.

3. Background Facts

a. Cisneros Biography

Henry Cisneros was born and raised in San Antonio, Texas where he became a leading political figure. He obtained a bachelor's degree in 1968, and a masters degree in urban and renewal planning in 1970, from Texas A&M University.¹⁶ In 1971, he was selected as a White House Fellow and worked as an assistant to Elliot Richardson, the Secretary of Health, Education, and Welfare.¹⁷ He obtained a second masters degree, in public administration, from Harvard University's Kennedy School

¹⁶ GJ 00-001 Ex. 20 at 6.

¹⁷ GJ 00-001 Ex. 20 at 6; GJ 97-1 Ex. 376 at 94.

of Government in 1973, and a doctorate degree in public administration from George Washington University in 1976.¹⁸ From April 1975 to May 1981, he served as city councilmember for San Antonio, Texas, where he was involved in the planning and management of the city budget, asset, and pension plans, among other responsibilities.¹⁹ He was a professor at the University of Texas at San Antonio from 1974 to 1985, teaching public administration and urban planning.²⁰ After that, he taught urban planning at Trinity University in San Antonio from 1985 until January 1987.²¹

In May 1981, Cisneros, a Democrat, was elected Mayor of San Antonio, the nation's tenth largest city, becoming the first Hispanic mayor of a major U.S. city.²² As a four-term mayor of San Antonio from 1981 to 1989, Cisneros led efforts to rebuild the city's economic base – recruiting convention business, attracting high tech industries, expanding housing opportunities, increasing tourism, and creating jobs in downtown San Antonio.²³ In 1983, Cisneros was appointed to the National Bipartisan Commission on Central America.²⁴

As a rising political star, Cisneros achieved national recognition when Walter Mondale interviewed him as a potential candidate for Vice President in the 1984 Presidential election.²⁵ In 1986, he was named “Outstanding Mayor ‘All Pro’ City Financial Team” by *City and State Magazine* in recognition of his efforts relating to

¹⁸ GJ 00-001 Ex. 20 at 6.

¹⁹ GJ 00-001 Ex. 20 at 7-8.

²⁰ GJ 97-1 Ex. 376 at 84.

²¹ GJ 97-1 Ex. 376 at 84.

²² GJ 97-1 Ex. 376 at 93.

²³ GJ 97-1 Ex. 376 at 93.

²⁴ GJ 97-1 Ex. 376 at 93.

²⁵ GJ 00-001 Ex. 20 at 7.

San Antonio's economic development.²⁶ During his time as Mayor, Cisneros was seen as a possible candidate for Governor of Texas or for the United States Senate.²⁷

From June 1989 until January 1993, following his tenure as mayor, Cisneros served on the board of directors for as many as 35 companies, including a savings and loan association.²⁸ In 1991, Cisneros became a director of the Federal Reserve Bank of Dallas.²⁹ He was later made deputy chairman of its board.³⁰ He also was a board member of the Rockefeller Foundation, chairman of the National Civic League, and chairman of the Advisory Committee on the Construction of San Antonio's Alamodome.³¹

Cisneros started five private for-profit businesses after serving as Mayor. On June 1, 1989, he opened Cisneros Communications ("CISCOM") as a vehicle for his private speechmaking.³² On June 2, 1989, Cisneros and two others started Cisneros Asset Management Company ("CAMCO"), a national fixed-income asset management firm for public pension plans.³³ In 1990, he started Cisneros Benefit Group, Inc. ("CBG") to broker various insurance policies and investment opportunities for individuals.³⁴ He also was involved with Cisneros Metro Air

²⁶ GJ 97-1 Ex. 376 at 86.

²⁷ GJ 97-1 Ex. 376 at 97 (*USA Today*, "Cisneros has been on cities 'battle lines'" 1/11/93).

²⁸ GJ 00-001 Ex. 20 at 10.

²⁹ GJ 00-001 Ex. 20 at 11.

³⁰ GJ 00-001 Ex. 20 at 11; *see also* GJ 97-1 Ex. 376 at 83.

³¹ GJ 97-1 Ex. 376 at 82-83.

³² GJ 00-001 Ex. 20 at 9.

³³ GJ 00-001 Ex. 20 at 9; *see also* GJ 97-1 Ex. 348 at 18a.

³⁴ GJ 00-001 Ex. 20 at 9; *see also* GJ 97-1 Ex. 348 at 18b.

Service, Inc., a charter airplane service company,³⁵ and Group CMK, which worked with companies in Mexico.³⁶

In spite of his several private sector ventures, Cisneros continued to harbor political aspirations, even though previous political campaigns had reportedly left him as much as \$180,000 in debt.³⁷

b. Cisneros's Relationship with Linda Medlar

In 1986, while he was the Mayor of San Antonio, Cisneros hired Linda Medlar as a fundraiser.³⁸ In the decade preceding her employment with Cisneros, Medlar had risen from secretary to high-powered political fundraiser.³⁹ From about 1975 until the early 1980's, she had worked as an administrative assistant in the Greater San Antonio Chamber of Commerce, where she took part in fundraising campaigns.⁴⁰ In 1986, she worked as finance director for U.S. Representative Lamar Smith's successful campaign for Congress.⁴¹ She was married to jewelry store owner Stan Medlar⁴² and had one daughter, Kristan.⁴³

³⁵ GJ 00-001 Ex. 20 at 10; *see also* GJ 97-1 Ex. 348 at 18c.

³⁶ GJ 00-001 Ex. 20 at 10.

³⁷ IRS Interview Report Medlar 11/21/94 at ¶ 4; *see also San Antonio Express-News*, "Linda Medlar tells her side" 4/22/90.

³⁸ *Washington Post*, "Regarding Henry" 10/12/94; *San Antonio Express-News*, "Medlar's professionalism respected by associates" 10/16/88.

³⁹ *San Antonio Express-News*, "Medlar's professionalism respected by associates" 10/16/88.

⁴⁰ *San Antonio Express-News*, "Medlar's professionalism respected by associates" 10/16/88.

⁴¹ *Id.*

⁴² *Washington Post*, "Regarding Henry" 10/12/94.

⁴³ *Medlar v. Cisneros*, Medlar Depo. Tr. 9/27/94 at 148.

In March 1987, Cisneros and Medlar traveled to New York City to attend a fundraising event.⁴⁴ While there, they began an affair.⁴⁵ At the time, Cisneros had two teenage daughters, and his wife Mary Alice Cisneros was pregnant with the couple's third child.⁴⁶ Cisneros and Medlar professed to have fallen in love with one another.⁴⁷ It was widely known in the San Antonio area that Cisneros was having an extramarital affair; however, the press did not immediately report the fact.⁴⁸

In September 1988, Cisneros unexpectedly announced that he would not seek a fifth term as Mayor of San Antonio.⁴⁹ Cisneros had already withdrawn from the 1990 Texas gubernatorial race, in which he had been considered an early favorite.⁵⁰ Cisneros cited the poor health of his infant son John Paul, who had been born with a heart defect, and the need to make more money, as the reasons for his decisions.⁵¹

⁴⁴ *Washington Post*, "Regarding Henry" 10/12/94.

⁴⁵ *Washington Post*, "Regarding Henry" 10/12/94; *see also* Suppression Hearing Tr. Medlar 6/21/99 at 60.

⁴⁶ *Washington Post*, "Regarding Henry" 10/12/94.

⁴⁷ *Washington Post*, "Regarding Henry" 10/12/94.

⁴⁸ *Washington Post*, "Regarding Henry" 10/12/94 (stating "Unbeknown to Medlar, Cisneros began talking about the affair to San Antonio reporters, swearing them to secrecy These confessions bought the pair 19 months of public silence."); *Washington Post*, "The tumult of Mayor Cisneros" 10/24/88 (discussing how reporters encountered rumors of the affair "[d]ay after day, month after month" at church, the grocery store, cocktail parties, etc.); *San Antonio Express-News*, "The facts vs. the rumors in the Cisneros-Medlar story" 10/15/88 (with the author stating "I had been privy for three months to the details of the relationship").

⁴⁹ *San Antonio Express-News*, "Cisneros won't run for Mayor" 9/13/88.

⁵⁰ *New York Times*, "Mayor's admission of infidelity brings pain to San Antonio and questions on press" 10/16/88.

⁵¹ *San Antonio Express-News*, "Cisneros won't run for Mayor" 9/13/88.

In the meantime, Medlar had opened her own political consulting and fundraising company, Linda Medlar and Associates.⁵² According to Medlar, her clients included United States Senator Lloyd Bentsen, Texas State Senator Frank Tejeda, and San Antonio City Councilman Jimmy Hasslocher.⁵³ She also worked as a coordinator and fundraiser on the campaign to construct the Alamodome in San Antonio, Texas.⁵⁴

In October 1988, media reports about the affair between Cisneros and Medlar first appeared.⁵⁵ According to Medlar, because of her affair with Cisneros, she almost immediately lost her job with Tejeda and one other client, who claimed to be too close to the Hispanic community to continue employing her.⁵⁶ Medlar also claimed that the adverse publicity prompted Bentsen's campaign to reassign her, giving her less responsibility.⁵⁷ Medlar said she was told by a friend working in Texas politics that she was "the most hated woman in Texas."⁵⁸

By late October 1988, Medlar was suffering from depression.⁵⁹ She began to see a psychiatrist and was prescribed the sedative Ativan to help relieve her anxiety.⁶⁰ On October 31, 1988, after she had been drinking wine and taking Ativan, Medlar

⁵² Suppression Hearing Tr. Medlar 6/21/99 at 60-61; *San Antonio Express-News*, "Medlar's professionalism respected by associates" 10/16/88.

⁵³ *San Antonio Express-News*, "Linda Medlar tells her side" 4/22/90.

⁵⁴ Suppression Hearing Tr. Medlar 6/21/99 at 61; *see also San Antonio Express-News*, "Linda Medlar tells her side" 4/22/90.

⁵⁵ *San Antonio Express-News*, "Linda Medlar tells her side" 4/22/90; *see also San Antonio Express-News*, "Cisneros confesses deep love for Medlar" 10/14/88.

⁵⁶ OIC Interview Notes Medlar 3/30/99 at 5; *see also Medlar v. Cisneros*, Medlar Depo. Tr. 9/27/94 at 137-38.

⁵⁷ OIC Interview Notes Medlar 3/30/99 at 5.

⁵⁸ *Medlar v. Cisneros*, Medlar Depo. Tr. 9/27/94 at 136.

⁵⁹ *Id.* at 24-27.

⁶⁰ OIC Interview Notes Medlar 3/30/99 at 1. In 1999, Medlar admitted to the OIC that she had abused Ativan. *Id.*

went to the Cisneros home.⁶¹ She stayed in her car but left when the police drove up.⁶² On her doctor's recommendation, Medlar subsequently checked into a hospital for several days to receive psychiatric care.⁶³

In November 1988, Medlar's husband filed for divorce.⁶⁴ In about December 1988, Cisneros moved in with Medlar.⁶⁵ Cisneros and Medlar discussed marriage,⁶⁶ and Cisneros publicly represented that his marriage to Mary Alice Cisneros could no longer work.⁶⁷

In January 1989, an article entitled "The Mayor's Torment" appeared in *Vanity Fair* magazine.⁶⁸ Cisneros was interviewed for the article and was quoted as saying, among other things, that he had fallen in love with Medlar and that his marriage to Mary Alice had been "miserable."⁶⁹ Cisneros also hinted at a future run in politics, including trying to become the first Mexican-American Governor of Texas.⁷⁰

Also in January 1989, San Antonio's Alamodome referendum passed, authorizing a half-cent sales tax increase to finance the facility publicly.⁷¹ Cisneros

⁶¹ OIC Interview Notes Medlar 6/16/99 at 3; 3/30/99 at 11.

⁶² OIC Interview Notes Medlar 6/16/99 at 3.

⁶³ *Id.*; OIC Interview Notes Medlar 3/30/99 at 11.

⁶⁴ Suppression Hearing Tr. Medlar 6/21/99 at 71.

⁶⁵ *Id.* at 67.

⁶⁶ *Id.* at 71.

⁶⁷ *San Antonio Express-News*, "Cisneros does a flip-flop goes national with story" 10/27/88.

⁶⁸ *Vanity Fair*, "The Mayor's torment" January 1989.

⁶⁹ *Id.* at 47-48.

⁷⁰ *Id.*

⁷¹ *San Antonio Express-News*, "Linda Medlar tells her side" 4/22/90; *Texas Monthly*, "About face: Everyone thought Henry Cisneros would replace Lloyd
(continued...)

had supported the project and campaigned for the passage of the referendum.⁷² Medlar also worked on the campaign and helped to raise approximately \$750,000 in support of the campaign.⁷³ However, according to Medlar, Cisneros wanted to keep her involvement in the campaign a secret because it might lead to the public discovering that they were living together.⁷⁴ He asked Medlar not to attend the party celebrating the passage of the referendum.⁷⁵

In or about April 1989, Medlar and her husband divorced.⁷⁶ (This was their second divorce; they had divorced and remarried before the Cisneros affair.)⁷⁷ According to Medlar, Cisneros did not want to be named as a co-respondent in the divorce proceedings,⁷⁸ fearing that his future political career could be affected.⁷⁹ At the same time, Medlar claimed, Cisneros stated that he would leave his wife and marry her within the next year.⁸⁰ For these reasons, Medlar did not contest the

⁷¹(...continued)
Bentsen in the Senate – including Henry Cisneros” 3/93.

⁷² Suppression Hearing Tr. Medlar 6/21/99 at 61, 67.

⁷³ *Id.* at 68.

⁷⁴ *Id.* at 70-71.

⁷⁵ OIC Interview Notes Medlar 6/16/99 at 4.

⁷⁶ Divorce Decree; *Medlar v. Cisneros*, Medlar Depo. Tr. 9/27/94 at 62-63.

⁷⁷ *Medlar v. Cisneros*, Medlar Depo. Tr. 9/27/94 at 92.

⁷⁸ OIC Interview Notes Medlar 6/16/99 at 4.

⁷⁹ OIC Interview Notes Medlar 6/16/99 at 4.

⁸⁰ *Id.* at 4.

divorce or the settlement.⁸¹ As a result, Medlar did not receive any child support or alimony from her ex-husband.⁸²

In November 1989, Cisneros traveled to Houston to have surgery.⁸³ Without telling Medlar, Cisneros left the hospital with his wife and moved back in with his family.⁸⁴ Medlar learned that Cisneros had returned to his wife from a local news broadcast.⁸⁵

After Cisneros's parting, Medlar went to Lubbock, Texas and did not return to San Antonio until around Christmas 1989.⁸⁶ She was so upset that she refused to speak with Cisneros, who she said called her constantly and left Christmas presents for her and her daughter on their doorstep.⁸⁷

Medlar eventually agreed to speak with Cisneros in January 1990.⁸⁸ She told Cisneros that she could not get a job⁸⁹ and that she needed to support her daughter

⁸¹ *Medlar v. Cisneros*, Cisneros Depo. Tr. 10/17/94 at 139-40 (Cisneros denied ever putting pressure on Medlar regarding the divorce settlement, stating "I did not attempt to influence the settlement of her divorce"); *see also Washington Post*, "Regarding Henry" 10/12/94; OIC Interview Notes Medlar 6/16/99 at 4.

⁸² Suppression Hearing Tr. Medlar 6/21/99 at 72.

⁸³ *Id.* at 73-74.

⁸⁴ *Id.* at 74.

⁸⁵ *Id.*; OIC Interview Notes Medlar 6/16/99 at 4.

⁸⁶ Suppression Hearing Tr. Medlar 6/21/99 at 74-75; *see also* OIC Interview Notes Medlar 3/30/99 at 2.

⁸⁷ Suppression Hearing Tr. Medlar 6/21/99 at 74-75; *see also Washington Post*, "Regarding Henry" 10/12/94. Medlar claimed that Cisneros came to her house with a diamond ring. OIC Interview Notes Medlar 3/30/99 at 2. She claimed that she refused to see him and gave the ring away. *Id.*

⁸⁸ Suppression Hearing Tr. Medlar 6/21/99 at 75.

⁸⁹ Suppression Hearing Tr. Medlar 6/21/99 at 76; *see also* OIC Interview Notes
(continued...)

and maintain her lifestyle.⁹⁰ Cisneros then, she claimed, agreed to pay her \$3,000 per month to cover her expenses.⁹¹

Medlar further asserted that, by the Spring of 1990, she and Cisneros had reached an understanding that Cisneros would pay her \$4,000 per month until her daughter Kristan finished school.⁹² Medlar wanted the agreement in writing, but Cisneros refused.⁹³ A friend of Medlar's advised her to tape her phone conversations with Cisneros to document the true nature of their relationship and to prove the existence of the payment agreement.⁹⁴ Furthermore, Medlar testified that she wanted to make tapes in the event she needed to counter what she considered to be inaccuracies in the press about her relationship with Cisneros.⁹⁵ Medlar began to tape her calls with Cisneros in or about March 1990.⁹⁶

On April 22, 1990, the *San Antonio Express-News* published an article entitled "Linda Medlar Tells Her Side."⁹⁷ The article quoted Medlar to the effect that she

⁸⁹(...continued)

Medlar 6/16/99 at 4. Medlar claimed that she managed to get a job working on a political campaign during this time period, but that Cisneros called the candidate and told him that Medlar had a young daughter and could not travel for the campaign. OIC Interview Notes Medlar 3/30/99 at 6. Medlar claimed that, as a result of this call, she lost the job. *Id.*

⁹⁰ OIC Interview Notes Medlar 6/16/99 at 4.

⁹¹ *Id.*; OIC Interview Notes Medlar 3/30/99 at 3.

⁹² OIC Interview Notes Medlar 6/16/99 at 5; *Medlar v. Cisneros*, Plaintiff's Original Petition 6/29/94 at 4; *see also* FBI-302 Medlar 9/28-29/94 at 1; *Medlar v. Cisneros*, Medlar Depo. Tr. 9/27/94 at 147-48.

⁹³ OIC Interview Notes Medlar 6/16/99 at 5.

⁹⁴ *Id.*; OIC Interview Notes Medlar 3/30/99 at 2.

⁹⁵ Suppression Hearing Tr. Medlar 6/21/99 at 88, 92-94.

⁹⁶ Suppression Hearing Tr. Medlar 6/22/99 at 127.

⁹⁷ *San Antonio Express-News*, "Linda Medlar tells her side" 4/22/90.

loved Cisneros and believed that Cisneros still loved her.⁹⁸ She also said that her career had been damaged and that she was talking to the press after 18 months of silence because she wanted to correct misinformation about herself and the affair that had appeared in prior reports.⁹⁹

Medlar claimed that she had told Cisneros that she was going to speak to the press before she did so, and that Cisneros had opposed the idea and tried to discourage her from going public.¹⁰⁰ According to Medlar, Cisneros was not pleased when the article was published.¹⁰¹

A few weeks later, in May 1990, Medlar met with an attorney, Pat Maloney, to discuss her rights in the event that Cisneros stopped making the payments.¹⁰² Medlar chose Maloney because she had been told that Mary Alice Cisneros had previously consulted with him.¹⁰³ According to Medlar, Henry Cisneros was “scared” of Maloney.¹⁰⁴

Medlar told the OIC that, when she informed Cisneros she had consulted Maloney, he responded that he would never stop paying her and that he intended to marry her.¹⁰⁵ Medlar also related that Cisneros had told her a lawsuit would ruin him,

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ OIC Interview Notes Medlar 6/16/99 at 5; OIC Interview Notes Medlar 3/30/99 at 4.

¹⁰¹ OIC Interview Notes Medlar 6/16/99 at 5.

¹⁰² *Id.*; *see also* OIC Interview Notes Medlar 3/30/99 at 4.

¹⁰³ OIC Interview Notes Medlar 6/16/99 at 5; OIC Interview Notes Medlar 3/30/99 at 4.

¹⁰⁴ OIC Interview Notes Medlar 3/18/99 at 2.

¹⁰⁵ OIC Interview Notes Medlar 3/30/99 at 4; OIC Interview Notes Medlar 6/16/99 at 5.

rendering him unable to continue the payments,¹⁰⁶ and that he would stop paying her \$4,000 a month if she filed suit against him.¹⁰⁷ Medlar never consulted with Maloney again after this conversation.¹⁰⁸

Cisneros made the payments to Medlar in various ways. Sometimes he diverted the checks he received from his speechmaking and deposited them directly into Medlar's bank account.¹⁰⁹ At other times, he withdrew cash from his own account and deposited cash into Medlar's account.¹¹⁰ He occasionally asked some of his employees, including Alfred Ramirez¹¹¹ and Sylvia Arce-Garcia,¹¹² to make the deposits to Medlar's account. Cisneros also delivered cash directly to Medlar.¹¹³

Cisneros made 13 payments to Medlar in 1990, for a total of \$44,500.¹¹⁴ The following table catalogues those payments:

Cisneros's 1990 Payments To Medlar

Payment Date	Payment Amount
January 2, 1990	\$2,500

¹⁰⁶ OIC Interview Notes Medlar 6/16/99 at 5; OIC Interview Notes Medlar 3/30/99 at 4.

¹⁰⁷ OIC Interview Notes Medlar 3/30/99 at 4.

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *See* FBI-302 Arce-Garcia 2/16/95 at 4.

¹¹⁰ *See* OIC Charts of 1990-93 Payments to Medlar.

¹¹¹ GJ 97-1 Tr. Ramirez 11/19/97 at 40-41; IRS Interview Report Ramirez 8/21/99 at 21, 22, 31; *see* FBI-302 Arce-Garcia 2/16/95 at 4 (Arce-Garcia stated that before she began making the deposits, the deposit slips were given to Ramirez).

¹¹² FBI-302 Arce-Garcia 2/16/95 at 4-5.

¹¹³ *Medlar v. Cisneros*, Medlar Depo. Tr. 9/27/94 at 161-62.

¹¹⁴ OIC Chart of 1990 Payments to Medlar.

Payment Date	Payment Amount
February 1, 1990	\$3,000
March 5, 1990	\$2,500
April 10, 1990	\$2,500
May 3, 1990	\$2,500
May 31, 1990	\$4,500
June 29, 1990	\$3,000
September 13, 1990	\$3,900
October 5, 1990	\$4,000
October 12, 1990	\$5,100
November 1, 1990	\$3,000
December 4, 1990	\$4,000
December 8, 1990	\$4,000
TOTAL	\$44,500

By April 1991, Cisneros had told Medlar that he had moved out of his house and was living in an apartment.¹¹⁵ When Medlar discovered that Cisneros actually had not fully moved out of his house, she went there to confront him.¹¹⁶ She arrived at approximately one o'clock in the morning and spoke with both Cisneros and his wife Mary Alice.¹¹⁷ Mary Alice told Cisneros that he had to make a decision,¹¹⁸ and,

¹¹⁵ OIC Interview Notes Medlar 3/30/99 at 7; *see also* FBI-302 Mary Alice Cisneros 1/8/93 at 1 (stating that Cisneros lived both at home and in an apartment between April 1991 and October 1991).

¹¹⁶ OIC Interview Notes Medlar 3/30/99 at 7.

¹¹⁷ FBI-302 Mary Alice Cisneros 1/8/93 at 1; *see also* OIC Interview Notes Medlar 3/30/99 at 7.

¹¹⁸ FBI-302 Mary Alice Cisneros 1/8/93 at 1; OIC Interview Notes Medlar
(continued...)

according to Medlar, he said that he loved Medlar.¹¹⁹ Medlar further claimed, however, that she decided she wanted the Cisneroses out of her life,¹²⁰ and she asked Cisneros for \$8,000 to help her move to Lubbock, Texas.¹²¹

Medlar moved to Lubbock in May 1991, feeling that her employment prospects and social life in San Antonio had been destroyed.¹²² According to Mary Alice, Cisneros paid \$8,000 for Medlar's relocation.¹²³ Medlar and Cisneros continued to see each other, although Medlar now lived in Lubbock. Medlar stated that Cisneros bought an airplane so he could visit her in Lubbock without anyone knowing. He started a company named Cisneros Metro Air Service, which his employees referred to as "Medlar Airlines" or the "Medlar Express."¹²⁴

The relationship and the payments continued. In 1991, Cisneros made it publicly known that he might run for a statewide office in the late 1990s.¹²⁵ On October 18, 1991, Mary Alice Cisneros filed for divorce, although she stated that she

¹¹⁸(...continued)
3/30/99 at 7.

¹¹⁹ OIC Interview Notes Medlar 3/30/99 at 7.

¹²⁰ *Id.*

¹²¹ FBI-302 Mary Alice Cisneros 1/8/93 at 1.

¹²² OIC Interview Notes Medlar 6/16/99 at 6.

¹²³ FBI-302 Mary Alice Cisneros 1/8/93 at 1.

¹²⁴ IRS Interview Report Medlar 11/21/94 at ¶ 14; OIC Interview Notes Medlar 4/23/99 at 7.

¹²⁵ *San Antonio Express-News*, "Marriage breakup likely to make little impact, political experts say" 10/22/91.

was open to reconciliation.¹²⁶ She dropped the divorce action on November 18, 1991.¹²⁷

Throughout 1991, Cisneros made 20 payments to Medlar totaling \$73,024.21.¹²⁸ The following table summarizes those payments.

Cisneros's 1991 Payments to Medlar

Payment Date	Payment Amount
January 9, 1991	\$6,000.00
February 2, 1991	\$4,000.00
February 7, 1991	\$1,000.00
February 26, 1991	\$12,000.00
April 17, 1991	\$4,000.00
April 18, 1991	\$4,000.00
May 1, 1991	\$4,000.00
May 31, 1991	\$4,000.00
July 3, 1991	\$4,582.00
July 18, 1991	\$2,500.00
August 2, 1991	\$4,000.00
August 29, 1991	\$2,000.00

¹²⁶ Mary Alice Cisneros claimed also that Medlar's continued threats to go on a television talk show to talk about her relationship with Cisneros was a factor in her filing for divorce. At the time, there were rumors that Medlar might appear on a nationally-syndicated television talk show. *San Antonio Express-News*, "Mary Alice Cisneros petitions for divorce" 10/22/91.

¹²⁷ *San Antonio Express-News*, "Mary Alice Cisneros drops divorce action" 11/19/91.

¹²⁸ OIC Chart of 1991 Payments to Medlar.

Payment Date	Payment Amount
September 5, 1991	\$2,017.21
October 2, 1991	\$4,500.00
November 5, 1991	\$3,925.00
November 20, 1991	\$2,000.00
December 2, 1991	\$4,000.00
December 7, 1991	\$1,000.00
December 13, 1991	\$1,000.00
December 31, 1991	\$2,500.00
TOTAL	\$73,024.21

Cisneros's payments to Medlar continued into 1992. However, in July 1992, William Jefferson Clinton became the Democratic nominee for President,¹²⁹ and Cisneros resigned from the board of the Federal Reserve Bank of Dallas in August 1992 to join the Clinton campaign.¹³⁰ Medlar considered this action to be a sign that Cisneros was serious about getting back into politics and that their financial arrangement might thereby be jeopardized.¹³¹

During September 1992, Cisneros began work on Clinton's presidential campaign. He served as a member of the Clinton Transition Board.¹³² The Transition Board was responsible for preparing for the change in administration that would take place if Clinton won the November 1992 general election.¹³³

¹²⁹ *Washington Post*, "Clinton vows to 'Change America' in accepting party's nomination" 7/17/92.

¹³⁰ *Dallas Morning News*, "Cisneros: Move not a return to politics" 8/16/92.

¹³¹ OIC Interview Notes Medlar 5/21/99 at 3-4.

¹³² OIC Depo. Tr. Christopher 9/17/97 at 19.

¹³³ OIC Depo. Tr. Christopher 9/17/97 at 16.

Cisneros traveled extensively on behalf of the Clinton campaign¹³⁴ and, as a result, was forced to cut back on the paid speechmaking that had served as his principal source of income for several years.¹³⁵ Cisneros already had a relatively serious cash flow problem in 1992, and his assets were steadily declining,¹³⁶ but he continued to make regular payments to Medlar, further straining his finances.¹³⁷

Cisneros made another 23 payments to Medlar, totaling \$43,150, from January 1992 to the beginning of November 1992.¹³⁸ From the earliest payment in January 1990 to November 3, 1992, he paid her about \$160,000.¹³⁹ The following table summarizes Cisneros's 1992 payments to Medlar through the beginning of November.¹⁴⁰

Cisneros's January 1992 - November 3, 1992 Payments To Medlar

Payment Date	Payment Amount
January 9, 1992	\$1,200
January 21, 1992	\$1,000
February 5, 1992	\$1,700
February 5, 1992	\$700

¹³⁴ See, e.g., Cisneros's 1992 calendar indicating Cisneros's involvement in Clinton campaign activities across the country: 9/3/92 (press conference), 9/5/92 (Santa Fe fundraiser), 9/8/92, 9/17/92 (Minneapolis rally), 9/18/92, 9/19/92 (Hartford rally), 9/25/92, 9/26/92 (El Paso luncheon & rally), 9/27/92 (Houston).

¹³⁵ GJ 00-001 Ex. 20 at 29, 54.

¹³⁶ Roberts Affidavit at 5.

¹³⁷ OIC Chart of 1992 Payments to Medlar.

¹³⁸ OIC Chart of 1992 Payments to Medlar.

¹³⁹ OIC Charts of 1990-92 Payments to Medlar.

¹⁴⁰ OIC Chart of 1992 Payments to Medlar.

Payment Date	Payment Amount
February 11, 1992	\$1,600
March 2, 1992	\$3,000
March 10, 1992	\$1,000
April 3, 1992	\$2,500
April 10, 1992	\$1,500
April 15, 1992	\$500
May 5, 1992	\$4,000
June 1, 1992	\$1,900
June 2, 1992	\$2,500
July 6, 1992	\$2,500
July 14, 1992	\$2,000
August 3, 1992	\$4,000
August 24, 1992	\$2,000
September 2, 1992	\$2,500
October 2, 1992	\$2,000
October 7, 1992	\$1,900
October 15, 1992	\$650
October 19, 1992	\$500
November 3, 1992	\$2,000
TOTAL	\$43,150

4. Cisneros's False Statements to Government Officials

On November 3, 1992, William Jefferson Clinton was elected the forty-second President of the United States. Cisneros immediately became involved in the ensuing transition process, first as a member of the President's Transition Team and then as a candidate for a Cabinet position. Cisneros eventually became President-elect Clinton's choice to become HUD Secretary. As a result, aspects of his background, and particularly his relationship with Medlar, came under scrutiny. At numerous points in this process, he concealed facts about his payments to and relationship with Medlar and lied about these subjects. He enlisted the help of Medlar and others in maintaining these falsehoods.

a. The Appointment Process

Principal officers of the United States, including Cabinet heads such as the Secretary of Housing and Urban Development, must be nominated by the President and confirmed by the Senate.¹⁴¹ Both have before them the candidate's qualifications and personal history for use in their reviews.

Prospective Cabinet members, like most federal employees, are subject to some form of background check commensurate with their responsibilities to determine their suitability before hiring.¹⁴² A principal factor considered in a suitability review is an "[i]ntentional false statement or deception or fraud in examination or appointment."¹⁴³

Positions allowing access to classified information also require a security determination,¹⁴⁴ and sensitive positions that may involve national security, such as Cabinet-level appointments, require a full-field background investigation.¹⁴⁵ This investigation is typically conducted by the FBI; it covers the individual's entire adult

¹⁴¹ U.S. Const., art. II, § 2.

¹⁴² Federal Personnel Manual, Ch. 731, Subch. 2-1 (1991).

¹⁴³ Federal Personnel Manual, Ch. 731, Subch. 3-1b (1991).

¹⁴⁴ Executive Order 10450; *see also* Federal Personnel Manual, Ch. 732, Subch. 1-1 and 1-3a (1991).

¹⁴⁵ Executive Order 10450.

life, focusing on character, associations, reputation, and loyalty.¹⁴⁶ Largely on the basis of the resulting background investigation report, the appropriate authority determines whether to grant a security clearance to the individual in question.¹⁴⁷

For a new administration, the process of nominating federal officers begins before the President-elect is sworn into office.¹⁴⁸ After the November general election, but before the January inauguration, the President-elect typically puts together a Transition Team. The Transition Team helps the President select and evaluate high-ranking nominees to ensure their suitability to serve in the incoming administration, and to formulate policies to be implemented during the new administration.¹⁴⁹

After the President has nominated a candidate to become a principal officer of the United States, the Senate confirmation process begins. This stage of the appointment process typically involves questionnaires, interviews, and a hearing before the Senate committee with jurisdiction over the prospective Cabinet officer's department.¹⁵⁰

The Senate in its confirmation function relies in part on the FBI's background investigation reports.¹⁵¹ Each Senate committee has its own rules governing access to background investigation reports.¹⁵² The committee chairman may review a summary of the report to determine whether it contains anything that would warrant the attention of the full committee.¹⁵³ Some committees also allow the ranking

¹⁴⁶ GJ 97-1 Ex. 403 (Memorandum re Nomination and Confirmation at 2).

¹⁴⁷ *United States v. Cisneros*, 169 F.3d 763, 765 (D.C. Cir. 1999).

¹⁴⁸ *United States v. Cisneros*, 169 F.3d 763, 764-65 (D.C. Cir. 1999).

¹⁴⁹ GJ 97-1 Tr. Calamaro 9/9/97 at 22.

¹⁵⁰ Senate Confirmation Process: Overview; *see also* GJ 97-1 Ex. 403 (Memorandum re Nomination and Confirmation at 7).

¹⁵¹ Senate Confirmation Process: Overview at 2, 3.

¹⁵² Senate Confirmation Process: Overview at 3.

¹⁵³ *Id.* at 3.

minority member to see the report.¹⁵⁴ Committee members and Senators who do not serve on the committee with jurisdiction over the nominee may also request access to the report.¹⁵⁵

After it conducts the appropriate hearings, the responsible Senate committee votes on the candidate.¹⁵⁶ A simple majority is sufficient for the nomination to proceed from committee to the full Senate, where a simple majority is sufficient for confirmation.¹⁵⁷ A single Senator can, however, indefinitely delay the entire process by filibustering or by putting a “hold” on the nomination.¹⁵⁸

As President-elect Clinton’s choice to serve as Secretary of Housing and Urban Development, Cisneros was subject to a review by the President-elect’s vetting team; a full-field background investigation by the FBI; a review by a component of the Department of Justice (“DOJ”) to determine his eligibility for a security clearance; and examination by the Senate for confirmation after nomination.

b. The Clinton Transition Process

Following his election, President-elect Clinton put together a Transition Team co-chaired by Warren Christopher and Vernon Jordan.¹⁵⁹ This team was divided into approximately 18 vetting teams of four to six individuals, generally supervised by

¹⁵⁴ *Id.* at 3.

¹⁵⁵ Senate Confirmation Process: Overview at 3.

¹⁵⁶ Senate Confirmation Process: Overview.

¹⁵⁷ *See* Const., Art. II, Sect. 2, cl. 2.

¹⁵⁸ A “hold” describes a Senator’s request to the Senate Majority Leader that a nomination not be considered on the Senate floor. (Holds are not part of the Senate’s written rules or standing orders.) The Majority Leader need not honor the Senator’s request, but is put on notice that the Senator may filibuster any motion to consider the nomination. *See* U.S. Senate Website; Glossary Definition of “Hold” <http://www.senate.gov/reference/glossary_term/hold.htm>.

¹⁵⁹ OIC Depo. Tr. Christopher 9/17/97 at 15.

Clinton's friend, the Washington, D.C. attorney, James Hamilton.¹⁶⁰ Each vetting team had a potential nominee to assess.¹⁶¹ Their role was to determine whether there were any reasons the individual in question should not be nominated for a position in the new administration.¹⁶² Every vetting team had a captain who reported the results of the vetting process to Hamilton.¹⁶³ Hamilton, in turn, reported the results to Christopher,¹⁶⁴ and Christopher reported to the President-elect.¹⁶⁵

In early November 1992, President-elect Clinton, Christopher, and then-Attorney General William Barr executed a Memorandum of Understanding ("MOU") modeled after previous agreements between incoming and outgoing Presidents.¹⁶⁶ It provided the following:

The Federal Bureau of Investigation (FBI) will conduct file reviews or background investigations . . . at the request of the President-elect or his designated representative, of applicants, employees or other persons engaged by contract or otherwise to perform services for the President-elect.

• • •

Requests for investigations by the FBI shall be made in writing from the President-elect or his designated representative to the Director of the FBI enclosing a completed Standard Form 86 (SF-86) questionnaire (Questionnaire for Sensitive Positions) and its accompanying Authority for Release of Information.

• • •

¹⁶⁰ GJ 97-1 Tr. Hamilton 11/6/97 at 23.

¹⁶¹ GJ 97-1 Tr. Hamilton 11/6/97 at 24.

¹⁶² FBI-302 Hamilton 11/10/94 at 4.

¹⁶³ GJ 97-1 Tr. Hamilton 11/6/97 at 26, 27.

¹⁶⁴ GJ 97-1 Tr. Hamilton 11/6/97 at 26-27.

¹⁶⁵ OIC Depo. Tr. Christopher 9/17/98 at 98-100.

¹⁶⁶ *United States v. Cisneros*, 169 F.3d 763, 765 (D.C. Cir. 1999).

During the period in which the FBI is conducting its investigation, the FBI will inform the President-elect or his designated representative of any significant adverse information developed The FBI will also furnish summary memoranda or investigative reports and/or supporting materials . . . containing the results of its investigation to the President-elect or his designated representative and retain a record of the identity of the person to whom such reports are furnished.¹⁶⁷

Pursuant to the MOU, the DOJ Personnel Security Office (“DOJ-PSO”) was designated to determine whether Clinton’s Cabinet selections would be granted the requisite security clearances.¹⁶⁸

Thus, acting under the authority of President Bush, the Attorney General – and, by extension, the FBI and the DOJ-PSO – assisted President-elect Clinton in the transition process. Pursuant to the MOU, the FBI agents assigned to conduct background investigations of the applicants did not formally work under the supervision or control of the Transition Team.¹⁶⁹ Instead, they took their instructions from the FBI Director who, in turn, acted pursuant to arrangements struck by the head of his Department, the Attorney General.¹⁷⁰ In executing the MOU, the Attorney General acted under the direction of President Bush and pursuant to his own obligations as a government officer to promote the smooth transfer of executive power pursuant the Presidential Transition Act.¹⁷¹

The selection process for nominees to positions in the new Clinton administration generally included the following steps. At the outset, each prospective nominee filled out four forms: 1) a Personal Data Questionnaire developed by the Transition Team; 2) a Questionnaire for Sensitive Positions (SF-86); 3) a Financial

¹⁶⁷ MOU 11/92 at 1-3.

¹⁶⁸ GJ 97-1 Tr. Rubino 7/30/97 at 5-6.

¹⁶⁹ *Id.*

¹⁷⁰ MOU 11/92 at 1.

¹⁷¹ MOU 11/92.

Disclosure Form (SF-278); and 4) a Senate Committee Questionnaire.¹⁷² Each individual also completed a Memorandum for Prospective Appointees, consenting to an FBI background investigation.¹⁷³ The FBI then conducted a full-field background investigation and completed investigative reports for each prospective nominee.¹⁷⁴ The FBI provided the reports to designated transition officials during the transition period,¹⁷⁵ and, where appropriate, to the DOJ-PSO, which determined whether to grant security clearances.¹⁷⁶ Dominic Jerry Rubino, the head of DOJ-PSO, advised Hamilton and other Transition Team members to impress on Clinton's Cabinet selections the importance of telling the truth during the process.¹⁷⁷

c. Cisneros's Vetting – The First Stage

In November 1992, Cisneros was named a member of the Clinton Transition Team.¹⁷⁸ About the same time, he was put on the short list for a position in the Clinton Administration.¹⁷⁹ Before he was nominated for a Cabinet post, the Transition Team assessed his fitness for office. On November 22, 1992, Cisneros signed an "Authorization For Release of Information," allowing the Transition Team and the FBI access to information relating to his academic, residential, employment, and criminal history, among other things.¹⁸⁰ By November 24, 1992, Clinton had

¹⁷² Senate Confirmation Process: Overview at 2, 3.

¹⁷³ See Cisneros's Memorandum for Prospective Appointees, signed and dated 12/14/92.

¹⁷⁴ MOU 11/92 at 1.

¹⁷⁵ MOU 11/92 at 2.

¹⁷⁶ *United States v. Cisneros*, 169 F.3d 763, 765 (D.C. Cir. 1999).

¹⁷⁷ GJ 97-1 Tr. Rubino 7/30/97 at 23-24.

¹⁷⁸ OIC Depo. Tr. Christopher 9/17/97 at 18-19.

¹⁷⁹ OIC Depo. Tr. Christopher 9/17/97 at 40-41 (stating Cisneros was in the running for five to six different Cabinet positions "from the very first").

¹⁸⁰ See Cisneros SF-86 - Authorization for Release of Information 11/22/99. Transition Team Director Warren Christopher described this portion of the vetting
(continued...)

indicated that Cisneros should be considered for a Cabinet position.¹⁸¹ Cisneros later told Medlar that Clinton wanted two Hispanics in the Cabinet.¹⁸²

Throughout the transition process, Cisneros continued to make payments to Medlar. On November 9, 1992, Cisneros made two separate \$1,000 payments to Medlar.¹⁸³ On November 13, 1992, he made a \$2,000 payment to Medlar.¹⁸⁴

In late November 1992, Cisneros told Medlar that he had discussed with Clinton certain “considerations” that had the potential to preclude Cisneros from being a member of Clinton’s Cabinet. Medlar recorded the conversation.¹⁸⁵ The discussion included the following.¹⁸⁶

¹⁸⁰(...continued)

process as the first stage. According to Christopher, the first stage included narrowing down a list of potential candidates for a position to five to ten people about whom a five to ten page memorandum was prepared with information drawn from public records. OIC Depo. Tr. Christopher 9/17/97 at 20-21.

¹⁸¹ Christopher notes 11/24/92; *see also* OIC Depo. Tr. Christopher 9/17/97 at 87.

¹⁸² Medlar Tape Transcript Q-16 12/24/92 at 3.

¹⁸³ OIC Chart of 1992 Payments to Medlar.

¹⁸⁴ OIC Chart of 1992 Payments to Medlar.

¹⁸⁵ The OIC secured transcripts of all of the relevant conversations that Medlar had taped and retained. In preparation for a June 1999 hearing regarding the admissibility of Medlar’s tapes, the OIC had Medlar review the tape transcripts against the tapes and make the needed corrections to transcripts. The OIC offered the transcripts containing Medlar’s corrections during the hearing. This Report quotes exclusively from those transcripts. All portions of the transcripts quoted in this Report were ruled admissible at trial, *United States v. Cisneros*, 59 F. Supp. 2d 58 (D.D.C. 1999), unless otherwise noted. The court also ruled that Medlar would be allowed to testify at trial about the portions of the transcripts held inadmissible.

¹⁸⁶ In the transcripts presented in this Report, the following abbreviations are used: HC – Henry Cisneros; LM – Linda Medlar; US – Unidentified sound; UI – (continued...)

HC: . . . We talked about . . . what considerations there were that would prevent me from . . . serving.

¹⁸⁶(...continued)
Unintelligible.

The transcriptions of the recorded phone calls between Cisneros and Medlar are the product of analysis by the OIC and the FBI. The IRS obtained purportedly original tapes during an interview of Medlar. Suppression Hearing Tr. Medlar 6/22/99 at 39. None of the tapes was an original; all were actually copies that Medlar made while editing the tapes to redact conversations she feared would implicate her or embarrass someone (other than Cisneros). Suppression Hearing Tr. Medlar 6/23/99 at 11-14.

Medlar made the redacted tapes with a boom box that had two tape decks. She played the original tape on one deck while using the second deck to create a redacted copy, using the second recorder's pause or stop control to eliminate "problematic" portions of her calls with Cisneros. Medlar then destroyed the original tapes. Suppression Hearing Tr. Medlar 6/21/99 at 177-78; 6/22/99 at 8-9, 39; 6/23/99 at 11-14.

Expert audio engineering examination of Medlar's tapes established them to be copies. *See United States v. Cisneros*, 59 F. Supp. 2d 58, 61 (D.D.C. 1999). The analyst found "events within the telephone conversations, where the tape recorder(s) was stopped and/or started while in the record mode." Letter from BEK/TEK to OIC 11/16/96 at 6.

The OIC's audio engineering expert reviewed the investigators' transcriptions of Medlar's tapes and suggested some changes. Letter from BEK/TEK to OIC 12/8/97. The investigators who listened to the tapes and helped prepare the cited transcripts reported that sometimes Cisneros or Medlar spoke in lowered voices. There might be instances when the voice-activation feature of one of Medlar's recorders truncated the recording or did not start the recorder in time to capture all of the speaker's words. The transcripts' notations of "US" or "UI" may indicate such instances. The expert also determined that the chronology of the conversations was unchanged and that passages were not moved about to achieve a different meaning or sequence of events. Suppression Hearing Tr. Koenig 6/30/99 at 71-72; *United States v. Cisneros*, 59 F. Supp. 2d 58, 62 (D.D.C. 1999).

LM: And what'd you tell him?

HC: I told him, John Paul [Cisneros's son, who had health problems] first. And, uh . . . the business issues, and uh . . . and - and - and then the concerns about the impact it would have for everyone with respect to the personal things.

LM: What personal things?

HC: Well, all the . . . issues that would . . . could conceivably . . . be raised.

LM: And what'd he say?

HC: Well he had . . . thoughts on it, on all.

LM: I'm sure he did, since he's . . . just been through something like that . . .

HC: Exactly.

• • •

LM: And so what was his thought?

HC: Well, that, that the, he couldn't, he really couldn't really speak to the issue of John Paul. And as far as the business, it kind of depends on what you're appointed to, whether you have to divest or just put it in a blind trust And as for the personal, he said he . . . didn't think it would be there because . . . they had treated him that way as an elected person running for the highest office, but he didn't think they would do that to people in, in, you know, in an appointed position . . .

LM: Hmm.

HC: An opponent might in a race. But, anyway.

LM: And so what implications are there here?

HC: Uh, for you?

LM: Uhm-hmm.

HC: I think probably none.

LM: I don't want to think probably, I have to know, Henry.

HC: But there's no way to know.

LM: What, what are the scenarios here?

HC: One scenario is there's, uh, no implication at all. They just refer to my situation in generic terms. And another . . . is . . . that they actually mention your name in ss-some story somewhere.

LM: So, you've already decided to take something, haven't you?

HC: No, I said I had not. You asked me to play out scenarios; scenarios means hypotheticals.¹⁸⁷

Cisneros went on to tell Medlar the importance to him of returning to politics:

HC: Uhm, I . . . concluded, as you know, over these weeks, or rather months and years, that I needed to be there for John Paul. And . . . that's what I'm doing, and that's what I've done. And, if . . . it is possible to, you know, serve and be attentive to that obligation, as well as my obligations financially and to you, and so forth, then I'd like the opportunity to do that. But if it's not possible, then it's not possible.

LM: And, Henry, what about all those times you, you just absolutely couldn't do anything like that with Mary Alice?

HC: Well, it's a problem. But . . . my alternative is to die on the vine.¹⁸⁸

¹⁸⁷ Medlar Tape Transcript Q-7 11/22/92 at 7-8. The OIC believes this conversation actually took place on November 24, 1992. *See* OIC Corroboration Chart for Q-7.

¹⁸⁸ Medlar Tape Transcript Q-7 11/22/92 at 15.

Medlar disagreed with the assessment that a person under consideration for an appointment as a Cabinet officer would have to endure less public scrutiny than a candidate in an election:

LM: . . . And I quite frankly don't see why Clinton thinks that an appointed, someone who's appointed, is gonna be any less . . . scrutinized, since they have been in the past.

HC: Well, let me just tell you . . . on that, if I may speak to you frankly without your getting upset, I don't think it's, I don't think . . . it's gonna be an issue just because it's something I addressed earlier, and so did you, and . . . and, uh. They will refer to the incident, but they're not gonna get into it unless, you know, unless . . . one of us feels compelled to talk about it, and . . . so, it's really in our own hands.¹⁸⁹

Medlar and Cisneros also discussed whether he should worry that past financial dealings with his friend, San Antonio businessman Morris Jaffe, undertaken when Cisneros was the Mayor of San Antonio, might be disclosed:

LM: I mean, there is a disaster, and it's not me, sitting there waiting to happen. And if you don't know that . . .

HC: (Sigh) Uhm-hmm.

LM: . . . you know. I can't believe that you don't know that, that the scrutiny that you will come under, and you go ahead and do it, the scrutiny that you will come under will be about you, will be about your past, will be about your financial dealings, your dealings as a politician, say i.e., Morris Jaffe . . .

HC: First, there's no problem there.

LM: There no problem there?

HC: Uhm-hmm.

LM: Henry, you took cash from him.

¹⁸⁹ *Id.* at 17-18.

HC: Uhm-hmm.

LM: You did, too!

HC: Uhm-hmm.

LM: I'm sorry, Henry, but you did.

HC: I'm sorry.

LM: (Sighs) Henry, you gave me the cash.

HC: I don't believe from my campaigns . . .

LM: You would . . .

HC: . . . it may have been for some cause or something . . .

LM: . . . no, for your campaigns.

HC: . . . bonds or something, I don't know.

LM: You would go over there. You would have to, you would have to sit in his office, and you would bring an envelope back with ten thousand dollars in it.

HC: Mhm, hmm.

LM: (Sigh) Now, you can try to . . . tell me that that's not true, but I'm sorry. Henry, I was there. Now, I don't know that anybody else knows about that except Shipley¹⁹⁰ . . . and whoever Shipley's told. 'Cause I never told anybody. Shipley told me when I was first working for you . . . that you accepted cash to pay off your . . . uh, credit card bills.

¹⁹⁰ George Shipley worked on some of Cisneros's political campaigns as a consultant. OIC Interview Report Shipley 2/12/97 at 3. He also attended the December 1992 meeting between Cisneros and Governor Richards, discussed below, during which Cisneros discussed his affair with Medlar and the payments. *Id.* at 2. Shipley denied any knowledge of the \$10,000 transaction mentioned by Medlar on the tape. *Id.* at 6.

HC: Absolutely not.

LM: That's what Shipley said.

HC: Well . . .

LM: How many . . .

HC: . . . it doesn't make it true.

LM: How many people has Shipley told?

HC: I don't have any idea, but there's no truth to that. I never ever, ever, ever, have used pr-, public money for private purposes. Ever.¹⁹¹

In the same conversation, Medlar threatened to fight if she again came under public scrutiny:

LM: But I - I don't Un- unless it gets, unless they come and start, and - and this could happen too, Henry, if they start pulling me through the mud again.

HC: Yeah, I know.

LM: . . . then I'll come out fighting.

HC: I understand.

LM: You know, and I'll fight Mary Alice, and I'll fight you, and I'll fight everybody who's concerned . . .

HC: (Clears throat)

LM: . . . because they're not gonna drag me through the mud again.

HC: Right.

¹⁹¹ Medlar Tape Transcript Q-7 11/22/92 at 21-23.

LM: And that's the other consideration . . .¹⁹²

Earlier in the same conversation, Cisneros assured Medlar that he was prepared to assist her financially in the purchase of a house in Lubbock, Texas:

HC: All right. On the house . . . what do we need to talk about?

LM: Well, basically, (laughs) you know, I'm supposed to close within thirty days of when I sign the contract.

• • •

HC: . . . I'll go to work on it.

LM: You know (sigh), you say that you're gonna take out a loan, right?

HC: Correct. That's the only thing, only thing I can do.¹⁹³

According to Medlar, she and Cisneros agreed that the Lubbock house would not be in Medlar's name because Cisneros was going through the confirmation process.¹⁹⁴ Medlar told the OIC that putting the house in her name might have stirred up negative publicity for Cisneros.¹⁹⁵

Medlar enlisted her sister and brother-in-law, Patsy and Allen Wooten, to act as straw purchasers of the house in Lubbock; the Wootens bought the house in their names with money that Cisneros supplied to Medlar.¹⁹⁶ On November 30, 1992, the

¹⁹² *Id.* at 29-30.

¹⁹³ *Id.* at 4-5. On December 10, 1992, Cisneros applied for a \$30,000 loan from First Interstate Bank. *See* First Interstate Banks Credit Authorization prepared 12/10/92 for \$30,000 unsecured note.

¹⁹⁴ *Medlar v. Cisneros*, Medlar Depo. Tr. 9/27-28/94 at 44.

¹⁹⁵ OIC Interview Report Medlar 4/27/96 at 1.

¹⁹⁶ OIC Interview Report Medlar 1/30-31/96 at 1-2.

Wootens signed a document evidencing their intention to purchase the house.¹⁹⁷ On the same day, they submitted a check for \$1,000 to Stewart Title Company as a deposit on the house.¹⁹⁸

As the transition process got under way, Cisneros was also being considered for Lloyd Bentsen's soon-to-be-vacated United States Senate seat,¹⁹⁹ which Texas Governor Ann Richards would fill by appointment.²⁰⁰ Cisneros and Richards met on December 1, 1992, and they discussed, among other things, his affair with Medlar and the payments he had been making to her.²⁰¹ Richards told Cisneros that there was no way that he could "make a race" for the Senate when he stood for election, because the public would disapprove of both the affair and payments.²⁰² Richards also told Cisneros that everything in his life would come out in a political race, that the affair and the payments were like "a door slamming shut" on Cisneros's Senate re-election aspirations, and that he would be foolish to run for the Senate in light of his payments to Medlar.²⁰³

On the next day, December 2, 1992, Cisneros called Medlar and discussed his meeting with Richards:

¹⁹⁷ Residential Earnest Money Contract 11/30/92.

¹⁹⁸ Check #637 dated 11/30/92 for \$1,000 drawn on Patsy Wooten's Special Account at Southwest Lubbock National Bank ("SWLNB").

¹⁹⁹ One of Texas's Senate seats was opening up because of the pending nomination of Senator Lloyd Bentsen as Secretary of the Treasury. *Roll Call*, "The Bentsen buzz: stakes for Richards couldn't be higher" 12/7/92.

²⁰⁰ *Roll Call*, "The Bentsen buzz: stakes for Richards couldn't be higher" 12/7/92.

²⁰¹ FBI-302 Richards 1/2/95 at 1.

²⁰² FBI-302 Richards 1/2/95 at 1-2.

²⁰³ *Id.* at 2. *See Roll Call*, "The Bentsen buzz: stakes for Richards couldn't be higher" 12/7/92 ("Former San Antonio Mayor Henry Cisneros is frequently mentioned, but his highly publicized extramarital affair is widely thought to have made him potential mincemeat").

HC: Mmm. And uh, uh, I don't . . . think she can do this. . . . Uhm, there are several aspects of this that worry her deeply.

LM: Like what?

HC: One . . . she's concerned about . . . the money . . . and convinced that that's, that's a killer. And . . . that it would eventually be known, because the press wouldn't let it stop; I mean, they'd want to find out wha-what is your support . . .

LM: How does she know?

HC: That, about the money?

LM: Uh-huh.

HC: Because it's . . . I mean, it, I mean, there she, I mean, you can put two and two together, you don't have a job . . . and uhh . . .

LM: Henry, my, ya know, my Mom could be supporting me. You had to have told somebody . . .

HC: No, I haven't told any . . . it's not in my interest to tell people.

LM: I know that, but, I mean . . .

HC: I mean, she asked me point blank, and I told her that I had helped.

. . .

HC: Yeah . . . Uhm, and she just figures, you know, they'll shake enough trees . . . that that probably is . . . the veto. She's really worried about that, because it sounds like . . . corruption or something, on my part.

LM: Corruption?

HC: Well, people don't normally have that kind of money. And where would I get it? And . . . so forth.²⁰⁴

The conversation continued with Cisneros telling Medlar that, according to Richards, his payments to Medlar were bound to become publicly known:

HC: Let me ask you something, she said we can't keep the money quiet . . .

LM: Uhm-hmm.

HC: . . . because you, because somebody else knows Somebody is just bound to know.²⁰⁵

In another call to Medlar on the same day, December 2, 1992, Cisneros indicated that an appointed position posed fewer problems than one for which he would eventually have to stand for election:

HC: Because, see what - what brings out the hatred is when you're in a race. What - what has people working against you, and consultants going into your background, and, and - and runners going to the papers and leaving confidential packages on desks, and all that, is a race. They won't do that, you know, if you're just . . . an appointee. But what brings out the - the - the - the (US), you know, the intensity and the hate, and so forth, is . . . is a race.²⁰⁶

Cisneros told Medlar that, because the Democrats controlled Congress, he knew that he would be confirmed to a Cabinet position:

HC: (Laughing) But the difference there is the Democrats control Congress. . . .

• • •

²⁰⁴ Medlar Tape Transcript Q-8 12/2/92 at 2-3.

²⁰⁵ *Id.* at 12.

²⁰⁶ Medlar Tape Transcript Q-9 12/2/92 at 3.

HC: . . . the point is you'd be, you'd be confirmed anyway. I mean, I, people have told me that. They can do what they want; you're gonna confirmed. The Democrats control the Congress, they're not gonna turn back a President's nominee. And I, and - and - and . . . and (clears throat), and Clinton's not gonna put up with that crap. I mean, he's not gonna let that blow somebody away.

• • •

HC: What I gotta do . . . is decide . . . and my life in this stuff is over, because this is as close as I'm ever gonna come . . . and, it can't be done.

LM: What do you mean, this is as close? You mean . . .

HC: This brush with the Senate and the Cabinet.

LM: Well, did, uh, uh . . .

HC: . . . and if I can't do it, then I can't do it. I just need to get it out of my damn system and just . . . go on and do something else.²⁰⁷

d. Cisneros's Vetting – The Second Stage

By December 3, 1992, Cisneros had entered the “second stage” of the vetting process,²⁰⁸ which included interviews with members of the vetting team.²⁰⁹ On the same day, \$4,000 from Cisneros was deposited into Medlar's bank account.²¹⁰

Also on December 3, 1992, Cisneros and Medlar spoke by phone about Medlar's potential impact on Cisneros's nomination prospects. At first, Medlar attempted to reassure Cisneros that she did not intend to cause him problems:

²⁰⁷ *Id.* at 4-5.

²⁰⁸ Christopher notes 12/3/92.

²⁰⁹ OIC Depo. Tr. Christopher 9/17/97 at 21.

²¹⁰ 12/3/92 BNB Deposit Slip for \$4,000 in currency; 12/21/92 BNB Account Statement showing \$4,000 deposit on 12/3/92.

LM: I said, I, I'm, you, that you, you know, you're mulling over your opportunities right now, and that's fine. You know, I, there's nothing I can do about any of the things that have happened or will happen in the future. And I don't intend to be, you know, any kind of a problem to you, uhm And you know that, don't you?

• • •

HC: . . . I'm not, I'm not concerned about it, am I? ²¹¹

Cisneros discussed how he would still be able to pay Medlar if he went to Washington, D.C.:

HC: Okay. Bottom line is, I am going to make sure that you're financ-, it's a very, very, very, very, very tough problem for me. But I work on it all the time.

LM: Is that what you wanna do, come up with a lump sum?

HC: I cannot do that. It doesn't exist; it will not be that way.

LM: Well, if that's tr-, true, then when you divest yourself, and you're only on a salary, how on earth do you think anything could work?

HC: Well, the, when I divest, the company's worth whatever it's worth. They will give me ss-, a- a - a - a, like a stream of payments, 'cause they don't have the cash. And I'll just have to direct that part of that stream of payments goes to you.

LM: And if you're in Washington for eight years?

HC: Well, I don't know, I mean, I don't know how long you, uh, (UI) . . . I mean, uh, . . . I mean, we've never talked about long this is supposed to run, except that you've told me that . . . you wanted to get through Kristan, and have some money for her college, and then you were prepared to wo-, you know, look at your career options We can talk about that at some point about just, you know . . .

²¹¹ Medlar Tape Transcript Q-10 12/3/92 at 4.

LM: About what?

HC: About, about the length of time that you think you need this particular stream of revenues in this, this level.

LM: Well, all I know is that you'll be going to . . . Washington, one way or the other . . .

HC: . . . no, that's not necessarily correct, but go ahead.

LM : (Sigh)

HC: It's not, nothing is decided.

LM: It is decided, Henry.

HC: No, it isn't.

LM: One - one way or the other, it will be decided. I personally think probably the Senate and I think that that's probably wise. I'm not telling you not to do it.

HC: Now, Linda, if I can't work this out, I can't go!

LM: If you can't work what out?

HC: The money! And that's the truth.²¹²

Medlar told the OIC that she had excerpted a portion of the tape at this point, because it concerned threats she made to Cisneros. Medlar represented to the OIC that the following conversation, in substance, had been erased:

HC talks about me threatening to go to the press & how it would ruin him & do me no good because if he is not able to make money, that

²¹² *Id.* at 6-7.

would hurt me. HC had not been able to talk to me because I got so angry.²¹³

During the same conversation, Medlar also told Cisneros that she had decided to remain out of the public eye while he was in Washington, D.C.:

LM: I mean, whatever I feel has, is gonna have to come second . . . you know. And that's, uh, when I made the decision that whatever you decided to do, I would support completely. And by support, I mean, I'm as underground as I can get, Henry.

²¹³ Medlar Redaction Log at 1. Medlar prepared this log at the OIC's request after she began to cooperate with the OIC on March 18, 1998. Medlar listened to the tapes, identified the portions she had redacted, and reconstructed, where she could, the conversations that had been redacted. The relevant portion of her log is quoted here verbatim. In ruling on the admissibility of the Medlar tapes, the court noted Medlar's log and indicated that she would be able to testify about the deleted conversations:

Certain portions of these tapes contain noticeable breaks in the recording and flow of the conversation that indicate obvious alteration. As to these particular portions, the government has failed to demonstrate that the possibilities of misidentification and adulteration have been eliminated as a matter of reasonable probability. [Footnote 13: In ruling that the OIC has met its burden it is important to point out that the OIC did not create the tapes in question. The Independent Counsel had no opportunity, therefore, to ensure their absolute accuracy. Rather, the OIC took the evidence as it found it.] The portions of the tapes containing these breaks may not be introduced in the OIC's case in chief. Medlar may, however, testify as to her recollection of the omitted conversation and the defendant may, of course, cross-examine her.

United States v. Cisneros, 59 F. Supp. 2d 58, 65 (D.D.C. 1999) (quotation marks, ellipses, and some footnotes omitted).

HC: I know, I know, I know, I know.²¹⁴

During the same conversation, Cisneros acknowledged to Medlar that she had the ability to destroy him anytime she chose to do so, if he became a Cabinet officer:

LM: I'm trying not to hold you down, Henry, at all.

HC: Well, if you do, you do, I mean, you know . . .

LM: . . . I'm not trying to.

HC: . . . I mean, if you do, just do it! Just tell me, "Henry, I'm not gonna let you do this, I have the potential . . . to destroy you anytime I want."

LM: But I'm not going to.

HC: But if you, if you, if you (UI)

LM: . . . but I never have, so why would I do it now, Henry?

HC: Because the - the - the - the destructive potential grows. Uh, when I'm a private citizen, nobody cares. If I'm a Cabinet officer, you got something.

LM: Henry, I love you, I don't . . .

HC: . . . I know, but what I'm saying . . .

LM: . . . I don't . . . honestly . . .

HC: I'm not saying you would, Darling; I'm not saying you would, I'm just saying, I'm just saying . . . you do have the power!²¹⁵

On December 4, 1992, Medlar's sister and brother-in-law, Patsy and Allen Wooten, applied for financing on a house from the Plains National Bank in Lubbock,

²¹⁴ Medlar Tape Transcript Q-10 12/3/92 at 8.

²¹⁵ *Id.* at 11-12.

Texas, a federally insured bank.²¹⁶ The Wootens falsely claimed on their application that they intended “to occupy the property as their primary residence.”²¹⁷ Patsy Wooten later admitted to the OIC that she and her husband falsified bank documents to conceal the fact that Medlar, using funds from Cisneros, was the true buyer of the house.²¹⁸ Patsy Wooten told the OIC that she and her husband had agreed to the scheme because Medlar had assured them that she would be able to make all payments on the house with money she received from Cisneros.²¹⁹

On December 7, 1992, Cisneros completed and executed a “Questionnaire for Sensitive Positions (For National Security),” commonly referred to as a Standard Form-86 (“SF-86”).²²⁰ On its face, the SF-86 said that the purpose of an FBI background investigation was to ensure that candidates “are eligible for a required security clearance or for performing sensitive duties,” and that the information supplied on the SF-86 would be used “primarily” to determine the candidate’s qualifications for a national security position.²²¹ It also warned that “knowingly falsifying or concealing a material fact is a felony which may result in fines up to \$10,000 or 5 years imprisonment, or both” and that “Federal agencies generally fire, do not grant a clearance, or disqualify individuals who have materially and deliberately falsified these forms.”²²²

Cisneros was already familiar with the purpose and potential penalties associated with the process for applying for sensitive government positions.²²³ His

²¹⁶ Plains National Bank Customer Notice 12/4/92.

²¹⁷ Wooten’s Uniform Residential Loan application, signed and dated 1/18/93.

²¹⁸ OIC Interview Report Patsy Wooten 6/30/96 at 11.

²¹⁹ *Id.*

²²⁰ SF-86 - Questionnaire for Sensitive Positions (for National Security), signed and dated 12/7/92.

²²¹ Cisneros SF-86 12/7/92.

²²² *Id.*

²²³ Authority to Release Information, signed and dated 8/8/83; White House Letterhead Memo dated 8/16/83; White House Consent Letter for FBI Background
(continued...)

August 1983 appointment to the National Bipartisan Commission on Central America was preceded by an FBI background investigation.²²⁴ As part of the 1983 background investigation, Cisneros signed an “Authority to Release Information.”²²⁵ Pursuant to the release, Cisneros was informed of the following:

Willfully making a false statement, or concealing a material fact, may constitute a violation of Section 1001, Title 18, of the U.S. Code.

If you provide any information which indicates a violation of the law, whether civil, criminal or regulatory in nature, it will be referred to the appropriate Federal, state, local, or foreign agency.²²⁶

Also on December 7, 1992, Cisneros completed a Transition Questionnaire entitled “Employment and Funding Disclosure Statement” required of members of the Transition Team.²²⁷ Among other things, the questionnaire asked “Have you ever had any association with any person, group or business venture that could be used, even unfairly, to impugn or attack your character and qualifications for a government position?”²²⁸ Cisneros answered, “No.”²²⁹ The questionnaire also asked, “Do you know anyone who might take any steps, overtly or covertly, to attack your appointment? If so, please identify and explain the basis for the potential attack.”²³⁰

²²³(...continued)
Investigation, signed and dated 8/22/83.

²²⁴ Memorandum from Bourke to Hamilton 12/10/92.

²²⁵ Authority to Release Information, signed and dated 8/8/83.

²²⁶ White House Consent Letter for FBI Background Investigation, signed and dated 8/22/83.

²²⁷ GJ 97-1 Ex. 323.

²²⁸ GJ 97-1 Ex. 323 at 9 (Question 63).

²²⁹ GJ 97-1 Ex. 323 (Cisneros’s Public Disclosure Report).

²³⁰ GJ 97-1 Ex. 323 at 9 (Question 64).

Cisneros again answered, “No.”²³¹ Finally, the questionnaire asked Cisneros to “Please provide any other information that could be a possible source of embarrassment to you, your family or the President, if publicly known.”²³² Here, Cisneros responded by referencing the October 1988 article in the *San Antonio Express-News*, regarding his affair with Medlar, as well as the fact that his wife had filed, then withdrawn, a divorce petition in 1991.²³³

On the same day, December 7, 1992, as part of the vetting process, Hamilton requested that the FBI conduct a “name check” of Cisneros consisting of a search of the candidate’s name through the FBI records system.²³⁴ The next day, vetting team member Elizabeth Arky sent copies of Cisneros’s Transition Questionnaire, SF-86, financial statements, tax returns, and other documents relevant to the vetting process to Vetting Team Captain Raymond Calamaro and fellow vetter, Michael Veve.²³⁵ A day later, on December 9, 1992, Hamilton was orally advised that the FBI’s name check of Cisneros had revealed “no pertinent information” except that Cisneros had been subject to a prior background investigation in August 1983.²³⁶

Also on December 9, 1992, several members of the vetting team, including Calamaro, Veve, and Arky, met with and interviewed Cisneros.²³⁷ Cisneros informed them that he had made payments to Medlar.²³⁸ Specifically, he said that he had paid

²³¹ GJ 97-1 Ex. 323 (Cisneros’s Public Disclosure Report).

²³² GJ 97-1 Ex. 323 at 9.

²³³ GJ 97-1 Ex. 323 (Cisneros’s Public Disclosure Report).

²³⁴ GJ 97-1 Ex. 404 (DOJ Guide for Conducting and Reporting Special Inquiry Investigations 10/1/91) at 3.

²³⁵ Memorandum from Arky to Paper, Christian, and Veve 12/8/92.

²³⁶ Memorandum from Bourke to Hamilton 12/10/92.

²³⁷ Cisneros personal daily calendar for 12/9/92; Cisneros Event Chronology at 28.

²³⁸ GJ 97-1 Tr. Arky 10/2/97 at 115; GJ 97-1 Ex. 331 at 2.

Medlar \$2,500 per month over a period of several years.²³⁹ Cisneros advised the vetting team that Medlar was unstable²⁴⁰ and expressed his desire to make a final “lump sum” payment to Medlar before taking office.²⁴¹ Cisneros also discussed the fact that he might have had as many as ten extramarital affairs during his 20-year marriage,²⁴² and he informed the vetting team that his wife was not aware of his affairs with women other than Medlar or the true extent of the payments to Medlar.²⁴³

²³⁹ FBI-302 Calamaro 11/15/94 at 2 (noting that Calamaro stated that Cisneros estimated the Medlar payments as between \$1,000-5,000 per month and that \$2,500 per month for five years “could be right”); FBI-302 Arky 12/20/94 at 2 (noting that Cisneros estimated the payments to Medlar were approximately \$2,500 per month); GJ 97-1 Ex. 331 at 2, 3 (Calamaro notes with the entries: “3½ yrs x 2500/mo ? * this on high side” and “2500/mo sev yrs”); Calamaro notes 9/8/97 (with entry “2.5 on high side per HC’s”); Arky notes (with entry: “\$2,500 for 3½ yrs -- high side”); FBI-302 Hamilton 11/10/94 at 3 (noting Calamaro’s quote of \$2,500 per month over five years); GJ 97-1 Ex. 332 (Hamilton notes with entry: “\$2,500 a mo. - managed to handle”); FBI-302 Hubbell 2/8/95 at 2-3, 6 (discussing Transition Team’s knowledge of payments); Hubbell notes at 2, 4, 6 (with entries: “payments to woman affair Lubbock 2500 a month,” “\$2500 a month over several years, but helped as needed,” and “3½ × 2500”).

²⁴⁰ FBI-302 Arky 12/20/94 at 2; FBI-302 Hubbell 2/8/95 at 2, 5, 7, 11 (reporting description of Medlar as “unstable,” “erratic in her conduct,” and as having a “fatal attraction”).

²⁴¹ FBI-302 Arky 12/20/94 at 2; GJ 97-1 Ex. 331 at 6 (Calamaro notes with entry: “How pay? Lump sum?”); GJ 97-1 Ex. 332 at 4 (with entry “lump sum”).

²⁴² GJ 97-1 Ex. 331 at 4, 11 (Calamaro notes (with entries: “[approximately] 10,” “more on the affair,” and “other affairs?”); Arky notes (with the entries: “Others = less than ten,” and “She [Medlar] knows about others, but learned all from candidate.”); GJ 97-1 Ex. 332 (Hamilton notes with entries: “other affairs-10 others over 20 yr. marriage” and “Vanity Fair article-number around 10-from HC”); Hubbell notes at 3 (with entry: “personal side – 10 affairs – Natasha”) and 9 (with entry “other affairs – 10 range”).

²⁴³ FBI-302 Hubbell 2/8/95 at 6 (relating Hubbell’s understanding that “Cisneros’ wife does not know about other women with whom Cisneros may have had affairs”); GJ 97-1 Ex. 332 at 5 (Hamilton notes with entry: “Wife didn’t know
(continued...)”)

Cisneros spoke with Medlar on the telephone numerous times on the days he was meeting with the vetters.²⁴⁴

Calamaro relayed the results of the vetting team's interviews of Cisneros to Transition Team Counsel James Hamilton.²⁴⁵ Hamilton passed the interview information to Transition Team Co-Chairman Warren Christopher and Clinton advisor Webster Hubbell,²⁴⁶ who reported directly to the President-elect.²⁴⁷

Hubbell was a friend to both Bill and Hillary Clinton. They became friends in 1977, after Hillary Clinton took a position at the Rose Law Firm in Little Rock, Arkansas.²⁴⁸ Hubbell was a partner at the firm.²⁴⁹ Hubbell later advised Bill Clinton on his gubernatorial campaigns and played an unofficial role in Governor Clinton's administration.²⁵⁰ When Clinton decided to run for President, Hubbell worked on the campaign and served as the spokesperson for the Rose Law Firm.²⁵¹ He continued to serve as a Clinton advisor on a variety of matters during the presidential campaign, including vice presidential candidates.²⁵²

²⁴³(...continued)
amt of payments”).

²⁴⁴ Cisneros Event Chronology at 27 (12/8/92 call from Cisneros to Medlar for 76 minutes); *Id.* (12/8/92 call from Medlar to Cisneros for 46 minutes); *Id.* (12/8/92 call from Medlar to Cisneros for 41 minutes); *Id.* (12/9/92 call from Medlar to Cisneros for 6 minutes); *Id.* at 28 (12/9/92 call from Medlar to Cisneros for 1 minute).

²⁴⁵ FBI-302 Hamilton 11/10/97 at 2-3.

²⁴⁶ FBI-302 Hamilton 11/10/97 at 1-4.

²⁴⁷ OIC Depo. Tr. Christopher 9/17/98 at 98-100.

²⁴⁸ GJ 97-1 Tr. Hubbell 10/13/97 at 12-13.

²⁴⁹ *Id.* at 8.

²⁵⁰ *Id.* at 14-15.

²⁵¹ *Id.* at 9.

²⁵² *Id.* at 22.

On December 10, 1992, Hamilton requested that the FBI conduct a Level 1 full-field background investigation of Cisneros.²⁵³ This investigation was critical to Cisneros's obtaining the security clearance required for the position of HUD Secretary. That same day, the press reported that Cisneros had met with Clinton on December 9, 1992, that the Transition Team had recommended that Cisneros be nominated for HUD Secretary, and that Cisneros was likely to accept the nomination.²⁵⁴

Like Governor Richards, the Transition Team had concerns over how Cisneros's relationship with Medlar and the payments he had been making to her would affect a possible appointment. Christopher testified that the relationship issue, including the payments made to Medlar, was significant and posed a "difficult problem"²⁵⁵ potentially affected the vetting inquiry.²⁵⁶ Hamilton testified that he had considered the "relationship" with Medlar to be the most "troublesome" issue²⁵⁷ with respect to the nominee and considered the Cisneros nomination to be the one he "was most worried about . . . in terms of confirmation,"²⁵⁸ and he felt that the relationship had the potential to "disqualify" Cisneros from being nominated for a Cabinet position.²⁵⁹ According to Calamaro, the Medlar issue was "relevant . . . [and] of

²⁵³ GJ 97-1 Tr. Hamilton 11/6/97 at 92; Guide for Conducting and Reporting Special Inquiry Investigations 10/1/91 at 4.

²⁵⁴ *Houston Chronicle*, "Cisneros Likely to Take HUD Post, Sources Say" 12/10/92.

²⁵⁵ OIC Depo. Tr. Christopher 9/17/97 at 43-48, 61-64.

²⁵⁶ *Id.* at 59.

²⁵⁷ GJ 97-1 Tr. Hamilton 11/6/97 at 79.

²⁵⁸ GJ 97-1 Tr. Hamilton 11/6/97 at 28; *see also* GJ 97-1 Tr. Hamilton 11/2/97 at 133(stating "he was the one I was principally concerned with"); GJ 97-1 Tr. Hamilton 11/2/97 at 137 (stating "this was the one that concerned me the most").

²⁵⁹ GJ 97-1 Tr. Hamilton 11/12/97 at 55-56.

potential significance,”²⁶⁰ and “raised questions and possible problems.”²⁶¹ Calamaro further acknowledged that the amount of the payments potentially had a tendency or capability to affect the vetting inquiry.²⁶² Calamaro also stated that the payments did affect the Cisneros vetting inquiry because it “became an issue that required attention . . . [and] slowed down the process.”²⁶³

Hamilton and members of the Cisneros vetting team were particularly concerned that the payments to Medlar, which were not public knowledge during the vetting and confirmation process, could be construed as “hush money.”²⁶⁴ They feared that the press would discover the payments as a result of a leak or some action by a disgruntled Medlar.²⁶⁵ Hamilton was also “very nervous” that Medlar knew other information, besides the affair, which would be damaging to Cisneros. Hamilton regarded Cisneros’s affair as politically sensitive, particularly because parallels could be drawn to allegations of extramarital affairs that had been leveled against President-elect Clinton.²⁶⁶ Other members of the vetting team were also concerned that the payments would become public knowledge and attempted to

²⁶⁰ GJ 97-1 Tr. Calamaro 9/9/97 at 89.

²⁶¹ *Id.* at 69, 90-91.

²⁶² *Id.* at 89-90; GJ 97-1 Tr. Calamaro 9/25/97 at 22, 27.

²⁶³ GJ 97-1 Tr. Calamaro 9/9/97 at 90.

²⁶⁴ FBI-302 Calamaro 11/15/94 at 2; FBI-302 Arky 12/20/94 at 2; FBI-302 Hamilton 11/20/94 at 3; FBI-302 Hubbell 2/3/95 at 1-2; GJ 97-1 Tr. Hamilton 11/6/97 at 28; GJ 97-1 Tr. Hamilton 11/12/97 at 57-58, 67, 199-202; GJ 97-1 Tr. Arky 10/2/97 at 137; GJ 97-1 Tr. Arky 10/16/97 at 3-4, 66; GJ 97-1 Tr. Calamaro 9/9/97 at 110; GJ 97-1 Tr. Calamaro 9/25/97 at 11.

²⁶⁵ GJ 97-1 Tr. Hamilton 11/12/97 at 160-61; GJ 97-1 Tr. Hamilton 11/6/97 at 117.

²⁶⁶ GJ 97-1 Tr. Hamilton 11/6/97 at 28; GJ 97-1 Tr. Hamilton 11/12/97 at 59, 65-66, 68; FBI-302 Hubbell 2/8/95 at 4; Hubbell notes at 5 (with entries: “Jim Hamilton - Very Sticky, Field Day on this . . .”; “Reflection on Bill ”; and “Very Nervous”).

obtain assurances from Cisneros that Medlar would not go to the press.²⁶⁷ Some members of the vetting team raised the tax implications of Cisneros's payments, including whether Cisneros should have paid or would owe gift taxes.²⁶⁸

As the Transition Team authorized the FBI background investigation of Cisneros, Cisneros was "checking signals" with Medlar. He started by telling Medlar that, because he was on a wireless phone, they had to be careful what they discussed:

HC: . . . and uh, I want, I need to . . .

LM: (Sneeze)

HC: . . . visit with you, you know, just to kinda check signals. I'm on the car phone right now, and it's probably not the best idea for this kind of, you know . . . some of the other, some of the sensitive stuff that we're talking about. Uhm, whoa, hang on just a second.²⁶⁹

Cisneros then told Medlar that his payments to her were dampening his prospects for a Cabinet appointment:

LM: And so . . . did you make the decision on the Cabinet?

HC: (Sigh) Uhhh (laugh), I don't think so (UI) . . . Truthfully?

LM: Yeah.

²⁶⁷ GJ 97-1 Tr. Arky 10/2/97 at 37-38, 146; GJ 97-1 Tr. Calamaro 9/9/97 at 109-10.

²⁶⁸ FBI-302 Arky 12/20/94 at 3 (noting that the vetting team did research to determine if Cisneros had violated gift tax laws); GJ 97-1 Ex. 331 at 8 (Calamaro notes with entries: "10k need to file" and "Lifetime [gift tax] exemption of 600k"); GJ 97-1 Ex. 332 at 4 (Hamilton notes with entry: "Webb - gift tax - only 91-92 had he paid \$10,000").

²⁶⁹ Medlar Tape Transcript Q-11 12/10/92 at 1. The OIC believes this conversation actually took place on December 11, 1992. See OIC Corroboration Chart for Q-11.

HC: I think we may be talking about nothing.

LM: Ohhhh, you are not.

HC: No, I am. I swear I am.

LM: Why?

HC: Uh, that, that's what I need to share with you. The . . . finances of the past, doesn't go down. And (US) they just . . . well, I don't want to talk about it on this phone, ya know?

LM: Yeah. . . . Why did they have to know about that?

HC: Because they would. It's pretty obvious when you, when you, when you, when you, you know, probe (US) . . . visible means of support and that kind of thing, ya know?

LM: (US) And what about the Senate?

HC: Well, if it's gonna be a problem in the Cong-, ya know, if it'd be a problem in one, it's be a problem in the other, so²⁷⁰

Cisneros then told Medlar that they needed to resume the conversation on a secure phone:

HC: All right. I'm rushing to Corpus. Uh, I do need to talk to you. Uh, it's nothing to worry about, it's just, I need to . . .

LM: Are they going to call me?

HC: No. No, no, no, nothing like that, nothing like that; I'll call you (US) from a secure phone.²⁷¹

²⁷⁰ Medlar Tape Transcript Q-11 12/10/92 at 3-4.

²⁷¹ Medlar Tape Transcript Q-11 12/10/92 at 14.

Before ending the call, Cisneros raised the possibility that the press might contact Medlar:

LM: Is it bad?

HC: No, it's not bad. It's . . . just . . . I kinda need to know where you really stand in order to . . . know (US) what to do, and I truly need your best judgment. I truly need your best, non-emotional . . . what you can truly think you can . . . stand (US) by me to do. And that really is what it comes down to, what you really think you could . . . take, and, uh . . .

LM: (US) What do you mean take?

HC: Well, I mean, you know, what - what - what you really (UI). We'll, we'll, we'll talk (UI), what you really . . . I'll lay out, you know, sorta worst case, and you tell me . . .²⁷²

As the vetting proceeded, Webster Hubbell conveyed the vetting team's concerns to the President-elect.²⁷³ Hubbell and Clinton discussed the Medlar issue, including whether Cisneros had had other extramarital affairs, and the fact that there was still a lot that they did not know about Cisneros, Medlar, and the payments.²⁷⁴ Hubbell testified that Clinton was concerned about Medlar's purported instability,²⁷⁵ and that, as a result, the Cisneros nomination was a "tough problem, a tough issue, a tough call,"²⁷⁶ that was "still up in the air."²⁷⁷

²⁷² *Id.* at 14.

²⁷³ GJ 97-1 Tr. Hubbell 10/23/97 at 57.

²⁷⁴ *Id.* at 55-60; Hubbell notes at 3, 5-7, 9.

²⁷⁵ GJ 97-1 Tr. Hubbell 10/23/97 at 72.

²⁷⁶ *Id.* at 53.

²⁷⁷ *Id.* at 65.

Clinton personally dispatched Hubbell to San Antonio to speak with Cisneros on December 11, 1992.²⁷⁸ This was the only time during the vetting process that Hubbell was summoned to handle a problem with a potential Cabinet nominee.²⁷⁹

The same day, December 11, 1992, Cisneros informed Medlar that he was going to be questioned further about the payments:

HC: Uhm-hmm, but I wanted to call and just see I - I would like to call you a little later and just, you know, maybe have about a . . . twenty minute, half-hour (US) conversation or so . . . uh . . . before five because, uh, they're sending a couple of lawyers from - from . . . from out of town . . .

LM: Yeah.

HC: . . . to sit down with . . . with me, you know, and kind of look at . . . uhm . . . at - at (US) both what has occurred and what needs to occur. You see what I'm saying?

LM: Uh-huh.²⁸⁰

Cisneros again told Medlar that he wanted to "check signals" before the questioning occurred:

HC: And uh . . . uh, I'd like to, you know, just kinda check signals with ya, so (US) I have some confidence in talking to them. You see what I'm saying?

LM: Yeah, I - I don't know what what you mean by what needs to happen. What do you mean?

HC: Well, I mean, ya know, what we've talked about for the future and so forth.

LM: You told them about that?

²⁷⁸ Hubbell AMEX records; FBI-302 Hubbell 2/3/95 at 1.

²⁷⁹ GJ 97-1 Tr. Hubbell 10/23/97 at 80; *see also* OIC Depo. Tr. Christopher 9/17/97 at 60.

²⁸⁰ Medlar Tape Transcript Q-12 12/11/92 at 1-2.

HC: We have to.

LM: Why?

HC: Because, uh . . . It's - it's the ki- (US), well, I didn't actually tell them about that per se, but, I mean, I got to think . . . anything that has or will occur . . . is likely to be addressed. You just can't, ya know, . . . there's just no way not to.²⁸¹

Cisneros then told Medlar that he needed to be sure that she would stick to an agreed-upon story about the payments because, according to the vetters, the payment issue was a potential reason not to proceed with his appointment:

HC: There's . . . ah . . . okay. Uh - uh - uh . . . let's talk, ya see, because then I ca-, I know kinda what I'm dealing with, ya know what I'm saying? Because, uh, like the conversation we had the other day was, ya know, was sufficiently angry and so forth that I can't speak with any confidence about would or wouldn't happen. Ya see what I'm saying?

LM: (US) And what are they saying?

HC: Well, this a potential . . . reason not to go forward.

LM: That's what they're telling you?

HC: Yeah.

LM: Wha-, are they gonna talk to me?

HC: No. I don't think so. I - I, ya know, that we, I have . . . the guy they're sending is a, is a real good guy, and, uh, the guy they had me with in Washington is also a good guy and, uh, . . . I trust 'em and I think they're decent folks and they deal with a lot of human situations, and so forth, and so, it's not like they're judgmental people or anything like that. So, I would have no problem if you were willing to do that, but I don't know that they wo-, would want to do that, you know.

²⁸¹ *Id.* at 2.

LM: (Laughing) ‘Cause I’m the pariah right?

HC: No, that’s not it, it’s not it. It’s that, it’s that - that, uh, . . . they might have problems then later if it’s under oath or something like that, you know.²⁸²

During the same conversation, Medlar told Cisneros that the house she was buying with Cisneros’s money was in her sister’s name, not her own:

LM: But, Henry, ya know, basically I’m doing everything so that noth-, I mean, even the . . .

HC: Yeah.

LM: . . . the house . . .

HC: Yeah.

LM: . . . is not in my name.

HC: Yeah.

LM: Do ya understand?

HC: Yeah.

LM: It’s in my sister.

HC: Okay. Okay.²⁸³

Hubbell and Cisneros met in San Antonio on December 11, 1992.²⁸⁴ Hubbell later testified to the OIC grand jury that he “wanted to make sure that every question

²⁸² *Id.* at 3-4.

²⁸³ *Id.* at 2-3.

²⁸⁴ Hubbell AMEX records; FBI-302 Hubbell 2/3/95 at 1.

had been asked and that [the Transition Team] had good information.”²⁸⁵ Therefore, he advised Cisneros “to be candid”²⁸⁶ and to tell him everything.²⁸⁷ Cisneros assured Hubbell that the payments were made out of a sense of “moral obligation” to Medlar and were not hush money.²⁸⁸ He also told Hubbell that he had told his wife about the details of the affair and the payments.²⁸⁹

Hubbell and Cisneros also discussed the amount of his payments to Medlar. Cisneros indicated that he had paid Medlar approximately \$2,500 per month for three and a half years.²⁹⁰ Cisneros told Hubbell that on one occasion he had paid Medlar the sum of \$15,000.²⁹¹ Cisneros also admitted giving Medlar approximately \$20,000 to assist in her move to Lubbock, Texas.²⁹²

Cisneros expressed to Hubbell his willingness to make a final lump sum payment to Medlar,²⁹³ whom he said he regarded as unstable.²⁹⁴ Hubbell testified that he had believed Cisneros’s representation that a lump sum payment would be enough to prevent an unstable Medlar from going to the press.²⁹⁵

²⁸⁵ GJ 97-1 Tr. Hubbell 10/23/97 at 10.

²⁸⁶ *Id.* at 118.

²⁸⁷ *Id.* at 104, 118.

²⁸⁸ FBI-302 Hubbell 2/3/95 at 2.

²⁸⁹ FBI-302 Hubbell 12/15/94 at 2.

²⁹⁰ FBI-302 Hubbell 12/15/94 at 2; FBI-302 Hubbell 2/3/95 at 2.

²⁹¹ FBI-302 Hubbell 2/8/95 at 9.

²⁹² *Id.*; FBI-302 Hubbell 12/15/94 at 2.

²⁹³ FBI-302 Hubbell 2/3/95 at 2.

²⁹⁴ FBI-302 Hubbell 2/8/95 at 2, 5, 7, 11.

²⁹⁵ GJ 97-1 Tr. Hubbell 11/4/97 at 84-85.

Hubbell advised Cisneros that, if he had paid Medlar more than \$10,000 in any given year, there might be gift tax laws ramifications.²⁹⁶ According to Hubbell, Cisneros appeared to be totally surprised when Hubbell mentioned that there may be gift tax consequences to his payments.²⁹⁷ Before concluding the meeting, Hubbell told Cisneros not to make any public statements about Medlar until the Transition Team had worked out all the details.²⁹⁸

Cisneros called Medlar after his meeting with Hubbell, and Medlar taped the conversation:

LM: What were the obvious questions?

HC: No, I mean, the obvious question for him is the subject matter was - was - was, was you obviously Uhm, the big problem'll be . . . let me just be, just direct, the big problem is future payments. The big problem is, uh . . .

LM: Why did you say anything to him?

HC: No, I didn't, I'm telling ya . . . I'm telling ya, you know, the question would be "Well, the problem is if," an' this is his words . . . "the problem, well, the problem would be, if you had to be supported at particular points," and I did do that, I've changed it from, you know, I mean . . . I - I clearly gave the impression we're not talking about an absolute monthly stipend at . . .

LM: Yeah.²⁹⁹

Cisneros and Medlar then discussed Hubbell's concern about what would happen if Cisneros did not make payments to Medlar after he became a Cabinet official:

²⁹⁶ FBI-302 Hubbell 2/8/95 at 9.

²⁹⁷ FBI-302 Hubbell 2/8/95 at 9.

²⁹⁸ *Id.* at 10-11.

²⁹⁹ Medlar Tape Transcript Q-13 12/12/92 at 2. The OIC believes this conversation actually took place on December 11, 1992. See OIC Corroboration Chart for Q-13.

HC: Uh. So, the question becomes, “If you have helped periodically, then why won’t you be have to, having to help periodically in the future?”

LM: Uhm-hmm.

HC: And what would happen if you didn’t?³⁰⁰

Medlar told the OIC that she had excerpted portions of the tape at this point because they contained threats she made to Cisneros. Medlar represented that the following conversations, in substance, had been erased:

HC said the Clinton team wanted to know what kind of person I was and if I would go to the press. They thought that since he had helped me in the past, they assumed he would help me in the future if needed. HC told them he had never given me over \$2,500 at any one time and never more than 10-15,000 in one year. He said that when I threatened him, he didn’t know if he could be confident in what he was telling them.³⁰¹

• • •

I tell him I thought he made a mistake by telling them anything. I do not understand why this is so important to everyone. I thought he was trying to make me feel guilty or box me in somehow.³⁰²

The recorded conversation continued as follows:

[HC: What - what else can I do?

LM: I’m serious, you made a mistake.

HC: Okay.

LM: What did he say when he left?

³⁰⁰ *Id.* at 3.

³⁰¹ Medlar Redaction Log at 2.

³⁰² Medlar Redaction Log at 2-3.

HC: Well, he was more comfortable than what he thought, which was . . . you know kind of . . .

LM: He doesn't know anything about the monthly?

HC: Uh-uh.

LM: And he thinks that what you . . .

HC: . . . that - that - that you have needs that revolve around . . . the start of school, or the Christmas season, or a summer camp, or things like that, you know, that you need . . . the high points.]]³⁰³

Cisneros further informed Medlar that Clinton had specifically sent Hubbell to discuss the payments:

[[HC: Well, it was a long conversation. But, uh . . . Clinton personally sent him, this is one of his personal people . . .

LM: Uhm-hmm.

HC: . . . to look me in the eye, and find out these things.]]³⁰⁴

Cisneros then told Medlar that he believed he might not be nominated because of the payments:

[[LM: Why do you feel you're not gonna be nominated since you think he was . . . more comfortable?

HC: Because, I think Clinton has problems, will have problems, with the . . .

³⁰³ Medlar Tape Transcript Q-13 12/12/92 at 4. The OIC believes this conversation actually took place on December 11, 1992. See OIC Corroboration Chart for Q-13. The bracketed portion of this transcript was held to be inadmissible at trial. *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 (D.D.C. 1999).

³⁰⁴ *Id.* at 4-5. This bracketed portion of the transcript was held to inadmissible at trial. *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 (D.D.C. 1999).

(US)

LM: . . . (UI) You're not gonna tell them about . . . the monthly or the . . .

HC: Mhm-hmm.

LM: . . . or the house or anything like that, right?

HC: Mhm-hmm. But, I mean, he was, he was, they - they worry about things like, would the tellers at the bank who've seen you make the deposit be one place (UI) . . . (US) . . . (UI) vulnerable (UI) . . .

LM: Is that, did you tell them about that?

HC: What? I mean, he asked me how it was made.

LM: Henry, you are so dumb. (Sighs) (US) I could just brain you for that.

HC: Well, what am I supposed to do? You want me to tell lies?]]

LM: No, but I - I don't, I mean, all you should've said was directly.

HC: I mean, am I making it directly? How did I do that?

LM: (Lau ghs) You know, you could have said directly to her, or something like that, or . . .

HC: . . . that won't get it, that won't get it.

LM: What? That you haven't Fed Ex'ed, uh, money to me before?

HC: Well, then that would probably worry 'em more, maybe. They'd yo-, they'd - they'd, they'd have, you'd have my handwriting and a stack of Fed Ex sheets.

LM: Oh, for pity sakes So, you don't think you'll be nominated?

HC: Uh-huh.

LM: You really don't?

HC: Uh-huh. I don't think he can afford it.³⁰⁵

Cisneros then acknowledged to Medlar that the payments looked like hush money:

LM: I don't understand why this would cause a problem. I mean, Henry, if . . .

HC: . . . because it looks like a payoff.

LM: . . . if you had never said anything about it . . .

HC: I can't afford to do that

. . .

HC: And - and - and, and it would be very much worse if (US) everybody's teeth fell out of their mouths when that came up at the Senate hearing . . . because I was asked a direct question. It's a big deal in the sense that it looks like hush money.

LM: Is that what they said?

HC: No, but, I mean, I'm te- (US), that's what it sounds like.

(US)

LM: . . . (UI) believe that, you know, I mean, unless you or I one . . . confirmed it . . .

HC: Probably a bunch of people know.

LM: Who?

³⁰⁵ *Id.* at 5-6. The bracketed portions of this transcript were held to be inadmissible at trial. *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 (D.D.C. 1999).

HC: Tammy.^[306] Whoever she talked to: boyfriends, husband, in-laws. You just (US), I mean, you cannot keep something like that quiet. See, the operative rule around here is if it happened, somebody knows, whatever it is. If it happened, somebody knows.

LM: Uhm, you get that from Shipley.

HC: No. Uh-uh. The lawyers here.³⁰⁷

Cisneros told Medlar that Hubbell was going to report to Clinton with incomplete information:

LM: Well, when are they supposed to let you know?

HC: He's probably gonna talk to Clinton tomorrow, but tomorrow Clinton is resigning the governorship, so that may be difficult, but Sunday at the latest.

(US)

LM: They only know . . . about parts of it, right?

HC: Yeah.

LM: And they don't know about the rest, right?

HC: Uhm-hmm.

LM: And he felt bet-, he felt better when he left?

HC: Yeah, much better.

LM: Is that what he said?

³⁰⁶ This refers to Tammy Wooten, the ex-wife of Medlar's nephew Michael Wooten. *See* OIC Interview Report Marcella Wooten 9/12/96 at 1.

³⁰⁷ Medlar Tape Transcript Q-13 12/12/92 at 7-8. The OIC believes this conversation actually took place on December 11, 1992. *See* OIC Corroboration Chart for Q-13.

HC: (UI)

LM: Well, then why do you have a, a bad feeling?

HC: Because, I think that he is gonna tell Clinton, and then Clinton's gonna, "Well . . . how come . . ."

(US)

[[LM: How does he know that?

HC: Probably, well, he asked me, that's easy to check.]

LM: Henry, can't you just say, couldn't you just say, "I, you know. . . ."

HC: . . . I said your fa - family helps you, and Stan helps you some, and that you worked occasionally: special projects and things. I mean, had to say that, because they wanted to know the total amount of what I had done in these increments, you know. I told them, "Well, it came to ten thousand dollars, fifteen thousand dollars over a year," you know. That's not enough to live on.³⁰⁸

Medlar told the OIC she erased portions of the tape at this point because it contained discussions about threats she had made to go to the press. Medlar reconstructed the erased conversation, in substance as follows:

HC thought Clinton would ask Hubel about how I supported myself and Kristan & what I would do if the payments stopped. HC talked about me threatening him (about going to the press & the fact they did not know of this.³⁰⁹

The conversation continued as follows:

³⁰⁸ *Id.* at 8-9. The bracketed portion of this transcript was held to be inadmissible at trial. *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 (D.D.C. 1999).

³⁰⁹ Medlar Redaction Log at 3.

HC: They were trying to get down to just exactly how you, you know, how it's going to be explained, you know. (Chuckles)

LM: Did you tell him I didn't have a house? I mean, that I didn't . . . own a house?

HC: I told him it was a townhouse . . . in a suburban setting . . . you know, like many, nothing high-, high-falutin'.

LM: Did they want to know how you knew? (Laughs)

HC: No, I - I told them that I'd seen it.

LM: Did they ask you if you still saw me?

HC: I told them I didn't.

LM: Did they ask you about your plans for the future or anything?

HC: No. Um-um. We didn't talk that. Uh, they did want to know how we would stay in touch. I told them Shirly³¹⁰ . . . would you, would - would be, you know, would I think they were concerned that, that you might call on a government line and that's traceable an' . . . and, uh, then that kind of thing, you know. Or I might call on a government line.³¹¹

Cisneros and Medlar continued to discuss Cisneros's disclosures about the payments to Hubbell and the vetters. Medlar told the OIC she erased a portion of the tape at this point because she was urging Cisneros to lie. Medlar represented that the following conversation, in substance, had been erased:

³¹⁰ This refers to Shirley Thomas, who worked with Cisneros when he was Mayor of San Antonio and became his Special Assistant at HUD from 1993 to 1996. OIC Interview Report Thomas 8/21/96 at 1. During an interview with the OIC, Thomas described Cisneros and Medlar as her friends and stated that she was a confidante to Cisneros. *Id.* at 1-3.

³¹¹ Medlar Tape Transcript Q-13 12/12/92 at 9-10. The OIC believes this conversation actually took place on December 11, 1992. *See* OIC Corroboration Chart for Q-13.

We talked about what we could tell them about future payments. I told him I just wanted to come up with a lump sum & tell them there would be no future payments. He said he couldn't do that but that he would come up with something. I was urging him to tell them anything he had to, but to keep them away from me.³¹²

When the taped conversation resumed, Cisneros represented to Medlar, falsely, that he had told the vetters that she was stable:

LM: You still just laid it out as every once in a while, right?

HC: Uh-hmm. On, you know, when their special needs arise and that it (US) total of (UI) the largest sum I've ever given you was twenty-five hundred dollars and a total . . .

(US)

LM: . . . (UI) amazed that you told them that we would at all.

HC: Well, I mean, the question, the question was, "What if," you know, "she gets angry or frustrated because she can't get ahold of you," you know, "how would you communicate (US) . . . if there's a problem that needs to be addressed," you see. It's a natural question. If we communicated before about special needs, you know . . . then the operative situation might arise again when you need . . . (US) . . . went to great lengths to describe your stability. This is not a person who's going to go flying off the handle. (US) Because I think you have been pretty responsible, and the discussion in the, in the press . . .

LM: Pretty responsible? (Laughs)

HC: And it shows great, very responsible, and it shows, and it shows, a frame of mind that after you've blown your stack, you settle into . . . uh, a thoughtful response.³¹³

³¹² Medlar Redaction Log at 3.

³¹³ Medlar Tape Transcript Q-13 12/12/92 at 14. The OIC believes this conversation actually took place on December 11, 1992. *See* OIC Corroboration (continued...)

Cisneros told Medlar that, although he recognized there was some chance that the issue of his payments to her could emerge before the Senate, he thought Clinton would appoint him if he could tell the Senate that he would not make any future payments:

LM: Do you think you'll hear for a couple of days?

HC: Uhm-hmm. Probably mid-week, next week. I would say after the economic summit. Uh, the key problem . . . I think he could live with everything, including the business about the future, if the future could be timed so that at confirmation time I would say . . . that there was nothing ahead.

LM: (US) I've always said that.

HC: At confirmation time, I could honestly look these people in the face, and I'd say, "There's no intent to provide payment in the future."

(US)

LM: That's what I was talking to you about today.

HC: Right. But that means then divesting before confirmation.

LM: Well, Henry, that has to be done anyway.

HC: But the company wanted to wait and see if I was confirmed or not. (Sigh) Okay.

LM: All right.

HC: Tell you what I think I might do.

LM: What?

³¹³(...continued)
Chart for Q-13.

HC: Send you the money for the house, and then just . . .³¹⁴

Medlar told the OIC that she had excerpted a portion of the tape at this point because it concerned threats she made to Cisneros. Medlar represented that the following conversation, in substance, had been erased:

HC was going to tell them he had given me \$30,000 for any future needs and that would be the last payment. I urged him to do that. HC said in order to do that I would have to stand by him & not scare him with threats when I got angry.³¹⁵

The conversation continued as follows:

[HC: . . . at last . . .

(US)

LM: Don't tell them anything about that.

HC: I have to now. Uh, they, they, I mean, now they think that there's, they got to be a party to some plan to . . . (UI) continue something.

LM: Just tell them that you've, you've talked with me and . . . that, uh, there would be no future increments.

HC: Okay.]

LM: You know. I mean, that's all you have to tell them. But, in order for you to do that at the confirmation hearing, uh, like I said, it has to be divested first, it has to be done before then, and then they can't do - - they can't say anything. It can't be a standing thing going on after you're in office though, do you understand?

HC: Yeah, of course.

³¹⁴ Medlar Tape Transcript Q-13 12/12/92 at 19-20.

³¹⁵ Medlar Redaction Log at 4.

LM: Well, but that's what you were talking about.³¹⁶

Cisneros then expressed his concern that the IRS would discover a large payment to Medlar:

HC: See, the thing is, I don't think you can move those sums of money around without the IRS or the bank examiners or somebody taking a note of those volumes.³¹⁷

Cisneros and Medlar then discussed what could happen if the payments became publicly known:

[[LM: Yeah, I know. I know. I - I truly do believe, though, that the best thing to do is a way . . . to, when you divest, some way to move the money in lump-, in the lump sum.

HC: (Laughs)

LM: No, I'm being very serious with you, Henry. As opposed to any payments going out, because even after you get in there, do you think they wouldn't love to have a scandal?

HC: All right. (Sigh)

(US)

LM: . . . (UI) tell you that absolutely no more payments can be made.]]³¹⁸

³¹⁶ Medlar Tape Tr. Q-13 12/12/92 at 20-21. The OIC believes this conversation actually took place on December 11, 1992. See OIC Corroboration Chart for Q-13. The bracketed portion of this transcript was held to be inadmissible at trial. *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 (D.D.C. 1999).

³¹⁷ *Id.* at 21.

³¹⁸ *Id.* at 22. The bracketed portion of this transcript was held to be inadmissible at trial. *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 (D.D.C. 1999).

Medlar told the OIC that she erased a portion of the tape at this point because it concerned threats she made to Cisneros. Medlar represented that the following conversation, in substance, had been erased:

He says he would always make the payments because he loved me even though I had threatened to destroy him & he knew I could. That should give me confidence.³¹⁹

Cisneros and Medlar then discussed coming up with a story he could tell Hubbell at their next meeting about a final payment he would make to her:

[[LM: I thought that's what you were gonna, I mean, I thought that's what you totally intended to do anyway. Will you do that and then call me?

HC: Well, let me think on it because it may not be possible, but, yeah. Okay.

LM: What, what won't be possible?

HC: It may not be, it may not be believable.

LM: Honey.

HC: . . . (UI) the only thing I can tell them is, this, this is the only thing that would be believable. I did tell them that I thought I had some resources to deal with the final . . . payment, and so what I would say is, "Look, I went into those . . ." (US) . . . and then I just would have to struggle to take . . .]]³²⁰

Medlar told the OIC that she had excerpted a portion of the tape at this point because it concerned threats she made to Cisneros. Medlar represented that the following conversation, in substance, had been erased:

HC is explaining what he could say to Huble that would be believable. He said he would tell him he went into his resources & came up with

³¹⁹ Medlar Redaction Log at 4.

³²⁰ Medlar Tape Transcript Q-13 12/12/92 at 26. The bracketed portion of this transcript was held to be inadmissible at trial. *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 (D.D.C. 1999).

\$30,000 final payment & then he would just find some way to get the money to me either before or after confirmation. He wanted to make sure I would stand by him & not threaten to do anything when I got angry.³²¹

Cisneros then told Medlar he was thinking about how a final payment to her could be made:

HC: No, I'm just trying to figure how . . .

LM: . . . to move it around?

HC: Uhm-hmm.

LM: Okay. All right.

HC: Okay. (Sigh) Lord Almighty.

(US)

LM: I don't want you to not do this because of me.

HC: Well, Linda, don't say that, because, you know, I have to do the - the - the money, you don't have an alternative.

(US)

LM: . . . (UI) should be a consideration here.

(US)

HC: If this phone's tapped, we're sunk anyway.

LM: (Laughs) That, nobody even knows . . . where I am.

³²¹ Medlar Redaction Log at 6.

HC: Okay.³²²

Hubbell reported the results of his December 11, 1992 meeting with Cisneros directly to the President-elect.³²³ Hubbell testified that, after he had briefed Clinton on the results of the Cisneros meeting, Clinton was favorably inclined to nominate Cisneros on the condition that Cisneros consult a “good lawyer” about the lump sum payment and any tax issues that might arise from it or from past payments.³²⁴

Cisneros and his attorney, Seagal Wheatley, traveled to Little Rock, Arkansas on December 13, 1992, to meet with Hubbell and to discuss the legal arrangements for Cisneros’s payment of a lump sum to Medlar.³²⁵ Hamilton told the OIC that the Transition Team was concerned that Medlar was volatile and might go public with information regarding the payments from Cisneros.³²⁶ Hamilton testified that, in weighing the risks associated with Medlar’s volatility and the likelihood that she would talk to the press, the fact that Cisneros had worked out a lump sum payment arrangement with Medlar “clearly was a relevant factor.”³²⁷ (He further testified, “before you suggest that there’s something evil about that . . . it is a different matter to make arrangements so the press and the public don’t know something and to make arrangements so that the FBI or the Senate doesn’t know something.”³²⁸) Cisneros spoke with Medlar on the phone numerous times on December 13, 1992.³²⁹

³²² Medlar Tape Transcript Q-13 12/12/92 at 27.

³²³ FBI-302 Hubbell 12/15/94 at 2; FBI-302 Hubbell 2/7/95 at 1-2; GJ 97-1 Tr. Hubbell 11/4/97 at 44-45.

³²⁴ GJ 97-1 Tr. Hubbell 10/23/97 at 175; 11/4/97 at 52-54, 61-62.

³²⁵ FBI-302 Hubbell 2/3/95 at 2; GJ 97-1 Ex. 406.

³²⁶ GJ 97-1 Tr. Hamilton 11/12/97 at 160-62.

³²⁷ *Id.* at 162-63.

³²⁸ *Id.* at 163.

³²⁹ Cisneros Event Chronology at 31 (Cisneros call to Medlar for 5 minutes); *Id.* (Cisneros call to Medlar for 52 minutes); *Id.* (Medlar call to Cisneros at Excelsior Hotel for 4 minutes); *Id.* (Medlar call to Cisneros at Excelsior Hotel for 11 minutes); *Id.* (Cisneros call to Medlar for 25 minutes). Medlar also attempted to reach Cisneros
(continued...)

Before going to Little Rock, Cisneros had a telephone conversation with Medlar, which she taped. During the conversation, Medlar asked Cisneros if the vetters and Hubbell knew about his dealings with Morris Jaffe:

LM: . . . Do they know anything about your dealings with Jaffe?

HC: (UI) Mhm-hmm.

LM: Because that comes under ethics.

HC: Answer's no.

LM: Okay.

HC: There is no dealings with Jaffe.

LM: Okay.

(US)

LM: I'm asking you from me to you.

HC: There is, there is - is, there's nothing, there's nothing there.

• • •

LM: . . . I understand that, but I also know Shipley, and I also know Robert,^[330] and that I, they both know . . . that, I, Robert was the one who told me how the deal worked.

HC: What deal?

³²⁹(...continued)
on December 14, 1992. *Id.* at 32 (indicating seven calls from Medlar to the Excelsior Hotel on 12/14/92).

³³⁰ This refers to Robert Marbut, Jr., an aide to Cisneros when he was Mayor of San Antonio. OIC Interview Report Marbut 12/17-18/96 at 2. Marbut introduced Medlar to Cisneros. *Id.* at 7.

LM: Henry, when you went over to Jaffe's and came back with ten thousand dollars in cash that one, was never reported by him and never reported by us.

HC: Not true. (*Whispering*)

LM: Henry, let me tell you something. It happened during the Dome, and you know it. And it happened subsequently before that. All I'm saying is, "Is there a problem there?" You know, the people at the Dome, if Robert knew about it, then Valero^[331] knew about it, you see what I mean?

HC: (UI) . . . I don't recall any such thing on the Dome.

(*Whispering*)

LM: Huh?

HC: I don't recall any such thing on the Dome.

LM: (Laughs)

HC: I really don't.

LM: You gave it to me.

HC: For what purpose?

LM: (Laughs) It eventually, you said, went to Shipley.

HC: I truly don't remember that. (*Whispering*)

LM: But it was, it was pure . . .

HC: I mean, but it, but it, but you're not suggesting that I used it for personal (UI), are you?

³³¹ This refers to Valero Energy Corporation, a refining company based in San Antonio. Medlar worked for Valero in 1988, at the same time as the Alamodome campaign. IRS Interview Report Medlar 11/21/94 at ¶ 19. According to Medlar, Valero contributed \$10,000 to the campaign. *Id.*

LM: No. I - I, Hon - Honey, I'm not suggesting anything like that. I'm saying, is it a problem?

HC: I didn't think so.

LM: . . . because, quite frankly, I know it was never reported.

HC: Yeah, I don't believe so. (Sighs) I don't believe so.

LM: You know, and I don't (US), I don't know what happened to it, but I know it also happened, uh, during your campaign. You were the one who explained it to me.

HC: (UI)

LM: (UI) Well (US) don't you, eh . . .

HC: (UI)

LM: Yes, you do, too, and I know you don't . . . want to admit it right now, but I'm just asking you point blank, "Is there a problem there?"

HC: (UI)

(US)

LM: Even though it wasn't reported?

HC: No.

LM: What, does it have to be such and such amount before there is a problem?

HC: (Laughing) (UI) I'm not going to talk about this.

LM: Why? . . . I'm just . . . (US) I was just saying . . .

HC: (UI) tape recorder?

LM: My tape recorder? Henry, I don't even have a tape recorder in the house.

HC: You told me before you taped Mary Alice.

LM: Oh, I taped Mary Alice a long time ago.

HC: (Laughs)

LM: (Laughs) I did. (Laughs) Ba-basically, I got tired of the garbage, you know, it's what . . .

HC: How'd you tape her?

LM: Off of a telephone³³²

Later that night after Cisneros arrived in Little Rock, he and Medlar had another telephone conversation that Medlar taped. Cisneros again expressed his concern that Medlar might be taping him and reiterated that Medlar was not to tell anyone about his dealings with Jaffe:

LM: Just tell me that you love me, okay?

HC: (Laughs) I (UI) Baby Doll, Baby Doll, you're taping me.

• • •

HC: Listen to me, that conversation about Jaffe and stuff, I mean, that didn't happen, okay?

LM: Okay, it didn't happen.

HC: (Laughing)

LM: (Sigh) I mean, I don't know what that proves, but okay . . .

HC: (Laughing)

³³² Medlar Tape Transcript Q-14 12/15/92 at 5-9. The OIC believes this conversation actually took place on December 13, 1992. See OIC Corroboration Chart for Q-14.

LM: . . . whatever you say.

HC: This is silly.

LM: No, uh, there are some, there - there's some other things, you know, that I could bring up too, but . . .

HC: Bring 'em up.

LM: . . . you evidently don't want to talk about 'em.

HC: Well, I'll talk to you about anything you want to in person.

LM: (Laughs) Well, considering that you're in Little Rock, and I'm here, that's kind of hard.

HC: Okay.³³³

On or about December 13, 1992, Wheatley and Cisneros advised Hubbell that they had an accountant available to work out the arrangement for Cisneros to give Medlar a lump sum.³³⁴ Wheatley also recalled briefing Hubbell on the status of the divorce suit filed by Mary Alice Cisneros.³³⁵

³³³ *Id.* at 15-16.

³³⁴ FBI-302 Hubbell 2/3/95 at 3; OIC Interview Report Wheatley 11/21/97 at 1; 12/13/92 Excelsior Hotel guest records showing Wheatley and Cisneros as guests; 12/14/92 Excelsior Hotel guest records showing Wheatley checking out.

³³⁵ The Cisneros and Medlar divorce suits were evidently a matter of concern for the vetters and Transition Team. Cisneros employee John Rosales faxed the divorce petition filed by Mary Alice Cisneros to Arky on December 14, 1992. GJ 97-1 Ex. 356. Arky in turn faxed the petition to Veve on the same day. *Id.* Wheatley also faxed the petition to Hubbell on December 16, 1992, along with Henry Cisneros's Original Answer, Mary Alice's Motion for Nonsuit, and the court order dismissing the suit. GJ 97-1 Ex. 398. The divorce petition filed by Stan Medlar had already been faxed to Hubbell and Calamaro on December 11, 1992. GJ 97-1 Ex. 388.

According to Hamilton, the “second layer of vetting,” as evidenced by the Hubbell visit, distinguished Cisneros from other candidates.³³⁶ Christopher called the additional vetting an unusual, extra step that signified the Cisneros vetting had been “raised out of an ordinary level.”³³⁷

On December 14, 1992, Cisneros completed and executed a Supplement to the SF-86.³³⁸ Question 10S of the Supplement asked, “Is there anything in your personal life that could be used by someone to coerce or blackmail you?” In response, Cisneros cited “no reason for coercion or blackmail.”³³⁹ Cisneros then signed the document, immediately following the statement that read: “I understand that the information being provided on this Supplement to the SF-86 is to be considered part of the original SF-86 . . . and a false statement on this form is punishable by law.”³⁴⁰

Cisneros’s SF-86, which he had executed on December 7, 1992, indicated to the applicant that the purpose of an FBI background investigation was to ensure that candidates “are eligible for a required security clearance or for performing sensitive duties” and that the information supplied by each candidate would be used “primarily” to determine the candidate’s qualifications for a national security position.³⁴¹ The form also notified the applicant that “knowingly falsifying or concealing material is a felony which may result in fines of up to \$10,000 or five years imprisonment, or both” and that “Federal agencies generally fire, do not grant a clearance, or disqualify individuals who have materially and deliberately falsified these forms.”³⁴²

³³⁶ GJ 97-1 Tr. Hamilton 11/6/97 at 29, 136; GJ 97-1 Tr. Hamilton 11/12/97 at 138-39.

³³⁷ OIC Depo. Tr. Christopher 9/17/97 at 59-60, 94-95.

³³⁸ Cisneros Supp. to SF-86 12/14/92. The SF-86 Supplement was provided to the Transition Team on December 15, 1992. GJ 97-1 Ex. 332(b).

³³⁹ Cisneros Supp. to SF-86 12/14/92.

³⁴⁰ Cisneros Supp. to SF-86 12/14/92.

³⁴¹ Cisneros SF-86 12/7/92.

³⁴² *Id.*

Cisneros also completed a Memorandum for Prospective Appointees on December 14, 1992.³⁴³ In signing the memorandum, Cisneros consented to an FBI background investigation, including “the collection and use of relevant information concerning [his] personal history.”³⁴⁴ Soon afterward, Hamilton requested that the results of all background investigations be forwarded directly to him.³⁴⁵

On December 15, 1992, on the eve of Clinton’s designating Cisneros as his HUD Secretary, Medlar called Cisneros in Little Rock, Arkansas, from Methodist Hospital in Lubbock³⁴⁶ where she was awaiting surgery. The next day, Medlar had the surgery.³⁴⁷

e. Cisneros as Designated Nominee

On December 17, 1992, President-elect Clinton publicly announced his intention to nominate Cisneros for the position of Secretary of Housing and Urban Development.³⁴⁸

As of December 17, 1992, the vetting team had spoken with Cisneros’s accountant, Luis Hernandez.³⁴⁹ The vetting team had also ordered and received an analysis of Cisneros’s tax returns undertaken by a tax attorney.³⁵⁰ It confirmed that Cisneros should have filed a gift tax return for the Medlar payments and that Cisneros

³⁴³ Memorandum for Prospective Appointees 12/14/92.

³⁴⁴ *Id.*

³⁴⁵ GJ 97-1 Ex. 409.

³⁴⁶ Cisneros Event Chronology at 33.

³⁴⁷ *Medlar v. Cisneros*, Medlar Depo. Tr. Ex. 155 at 4, 6, 10, 11; Medlar Medical Records.

³⁴⁸ *Washington Post*, “Cisneros chosen for HUD” 12/18/92.

³⁴⁹ GJ 97-1 Tr. Arky 10/2/97 at 182-83.

³⁵⁰ *Id.* at 91-92, 184-85; GJ 97-1 Ex. 331 at 8.

had been “sloppy” in filing his income tax returns.³⁵¹ On that day, another tax attorney reviewing Cisneros’s tax returns for the vetting team informed them that gifts over \$10,000 required the filing of a federal gift tax return and that Cisneros might have violated state gift tax law as well.³⁵²

At about the same time, according to Medlar, she and Cisneros agreed to tell the FBI, contrary to what Cisneros had told the Transition Team, that his single largest payment to her had been \$2,500 and that his payments to her had never totaled more than \$10,000 to \$15,000 a year.³⁵³ Medlar said that they also agreed to tell the story that Cisneros would be paying Medlar a \$30,000 lump sum as a final payment.³⁵⁴ This story, they agreed, would allow Cisneros to claim during his confirmation hearings that he did not intend to make any future payments.³⁵⁵ Cisneros closed on a \$30,000 loan from First Interstate Bank on December 17, 1992.³⁵⁶

On the day before, December 16, 1992, \$8,000 from Cisneros had been deposited into Medlar’s Broadway National Bank account, documented as “currency.”³⁵⁷ Then, on December 18, 1992, a check for \$10,200 payable to and endorsed by Cisneros was deposited into Cisneros’s First Interstate Bank account.³⁵⁸ On the same day, Cisneros employee Sylvia Arce-Garcia withdrew \$10,200 in

³⁵¹ GJ 97-1 Tr. Arky 10/2/97 at 184-85; GJ 97-1 Ex. 331 at 8.

³⁵² GJ 97-1 Ex. 331 at 8.

³⁵³ IRS Interview Report Medlar 11/21/94 at ¶¶ 33-34; FBI-302 Medlar 12/27/94 at 2; Suppression Hearing Tr. Medlar 6/21/99 at 126.

³⁵⁴ Suppression Hearing Tr. Medlar 6/21/99 at 126-27; *see also* FBI-302 Medlar 12/27/94 at 2.

³⁵⁵ *Id.*

³⁵⁶ First Interstate Bank Credit Authorization 12/10/92.

³⁵⁷ 12/16/92 Medlar BNB deposit slip for \$8,000; 12/16/92 BNB receipt for \$8,000.

³⁵⁸ 12/8/92 European-American Bank & Trust Co. check #10440 for \$10,200; 12/18/92 Cisneros FIB deposit slip for \$10,200.

currency from the same account.³⁵⁹ The Bank Secrecy Act required that a Currency Transaction Report (“CTR”) be filed for any withdrawal or deposit of currency of \$10,000 or higher.³⁶⁰ First Interstate Bank filed a CTR on this transaction, reflecting that Arce-Garcia had made the withdrawal on behalf of Cisneros.³⁶¹ That same day, another \$8,000, also documented as “currency,” was deposited into Medlar’s Broadway National account. The deposit was documented as consisting of “coin,” and brought the two-day total of Cisneros’s transfers to Medlar to \$16,000.³⁶²

If either of these cash deposits into Medlar’s account had exceeded \$10,000, a CTR would have been required. The CTR would have identified the source and the recipient of the deposited funds³⁶³ and therefore could have linked Cisneros to a large payment that Medlar received in the days surrounding his designation as HUD Secretary. By splitting the funds into deposits of less than \$10,000, Cisneros evaded the \$10,000 threshold for filing a CTR and concealed his ongoing payments to Medlar. Splitting the deposits and not declaring them on a CTR was itself a criminal offense known as “structuring.”³⁶⁴

In fact, Cisneros’s trusted employee and confidante, Alfred Ramirez, had been required to fill out a CTR almost two years earlier on February 26, 1991, when he

³⁵⁹ 12/18/92 FIB withdrawal slip for \$10,200.

³⁶⁰ 31 U.S.C. § 5311 *et seq.* The Act required a financial institution within the United States to file a CTR, Internal Revenue Service Form 4789, for each transaction in currency over \$10,000. One of the principal purposes of CTRs is to alert banks and law enforcement agencies to the movement of large amounts of cash that may be associated with the drug trade, money laundering, or other illegal activities. 31 U.S.C. § 5311.

³⁶¹ CTR 12/18/92.

³⁶² 12/18/92 Medlar BNB deposit slip for \$8,000; 12/21/92 BNB account statement showing receipt of deposit.

³⁶³ *Id.*

³⁶⁴ In certain cases, transactions spread over a number of days may also constitute a transaction requiring the filing of a CTR. *See* 31 U.S.C. § 5324 (governing the “structuring” of transactions to evade the reporting requirement).

deposited \$12,000 from Cisneros into Medlar's bank account.³⁶⁵ Besides listing Ramirez's and Medlar's names, the CTR disclosed that Ramirez was the manager of one of Cisneros's companies.³⁶⁶ Ramirez testified to the grand jury that having to fill out the CTR was "very unexpected."³⁶⁷ He also informed the grand jury that he had previously taken steps to avoid anyone connecting Cisneros and Medlar to the deposits he was making.³⁶⁸ Those steps included never disclosing that the deposits were being made on Cisneros's behalf and using the drive-up teller to lessen the chance that someone would recognize him or identify him as a Cisneros employee.³⁶⁹

According to Medlar, Ramirez was very upset after he had to complete the CTR.³⁷⁰ Medlar also stated that Cisneros told Ramirez to keep the deposits under a certain amount so that no forms would have to be filled out.³⁷¹

In a conversation Medlar taped about a week later, Cisneros mentioned the \$16,000 he had deposited for her – apparently referring to the two recent \$8,000 deposits:

HC: No, I'm not talkin' about that. I'm talkin' 'bout my motives with respect to you. I mean, you say I don't ever think of it, or I don't ever . . . I mean, Lord, it's not easy to come up with sixteen thou-, I had to stretch and pull and . . . do all kinds . . . I did it.

LM: You got a loan, Henry. And you got a thirty thousand dollar loan because you were short at the office. You told me.

³⁶⁵ GJ 97-1 Ex. 429.

³⁶⁶ *Id.*

³⁶⁷ GJ 97-1 Tr. Ramirez 11/19/97 at 81.

³⁶⁸ *Id.* at 82-83.

³⁶⁹ *Id.*

³⁷⁰ IRS Interview Report Medlar 5/31/95 at 3.

³⁷¹ *Id.*

HC: Linda, don't make light of it. It's big money. Real money.³⁷²

In the same conversation, Cisneros expressed his awareness of the CTR filing requirements by stating that a lump sum payment to her would raise "massive problems" because of "things like the drug laws and so forth."³⁷³

By December 20, 1992, Cisneros was receiving congratulations on his nomination.³⁷⁴ In the meantime, Medlar had checked out of the hospital following her surgery and was put on pain medication.³⁷⁵ She stayed at the her mother's home in Lubbock, Texas to recuperate.

On December 22, 1992, Cisneros met with Howard Pastor, who was in charge of preparing the incoming administration's cabinet nominees for confirmation.³⁷⁶ Pastor considered the relevance of Cisneros's affair with Medlar to have been diminished by the fact that Cisneros had reconciled with his wife.³⁷⁷ Pastor, unlike Hamilton and Christopher, did not consider Cisneros's payments to Medlar to be "particularly significant" because their affair was well known to the public.³⁷⁸ As a result, Pastor did not expect the subject to come up at Cisneros's confirmation

³⁷² Medlar Tape Transcript Q-16 12/24/92 at 10-11.

³⁷³ *Id.* at 12.

³⁷⁴ OIC Depo. Tr. Christopher 9/17/97 at 91-93; *see also Washington Post*, "Cisneros chosen for HUD" 12/18/92.

³⁷⁵ *Medlar v. Cisneros*, Medlar Depo. Ex. 155 at 10-11; Medlar Medical Records.

³⁷⁶ Cisneros Calendar 12/22/92; GJ 97-1 Ex. 332 at 3; GJ 97-1 Tr. Pastor 11/24/97 at 22-23. Pastor was responsible for preparing potential nominees for their Senate confirmation hearings. GJ 97-1 Tr. Pastor 11/24/97 at 46-48. He met with each designee and tried to anticipate what issues the Senate might raise in the confirmation hearing. *Id.* at 47. When it came to controversial information, Pastor would try to "manage the circumstances" by sharing information with relevant Senators in an attempt to convince them that the controversy "should not be disqualifying." *Id.* at 47-48.

³⁷⁷ *Id.* at 73-74.

³⁷⁸ *Id.* at 78.

hearing.³⁷⁹ By the time of this meeting, Cisneros had received expressions of support from Senators Phil Gramm (R-TX) and Pete Domenici (R-NM), as well as then-HUD Secretary Jack Kemp.³⁸⁰

Also on December 22, 1992, a draft of Cisneros's "Statement for Completion by Presidential Nominees" was faxed to Arky and Calamaro.³⁸¹ The statement called for written answers to a variety of questions regarding Cisneros's education, professional qualifications, personal life, and finances.³⁸² In response to a request that he "[l]ist sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services and firm memberships or from former employers, clients, and customers," Cisneros stated that he expected to receive \$30,000 from "lecture income."³⁸³

Cisneros did not include dates or sources for this "lecture income" in his Statement.³⁸⁴ Beginning in the last quarter of 1992, Cisneros had greatly curtailed his paid speechmaking in order to work on the Clinton campaign.³⁸⁵ However, on December 17, 1992, five days before submitting this Statement, Cisneros had received a \$30,000 loan from First Interstate Bank.³⁸⁶ Thirty thousand dollars was the

³⁷⁹ *Id.* at 112-13.

³⁸⁰ OIC Depo. Tr. Christopher 9/17/97 at 93-94.

³⁸¹ Fax to Arky/Calamaro 12/22/92.

³⁸² *See* GJ 97-1 Ex. 358.

³⁸³ GJ 97-1 Ex. 358.

³⁸⁴ GJ 97-1 Ex. 358.

³⁸⁵ GJ 00-001 Ex. 20 at 54.

³⁸⁶ First Interstate Bank Credit Authorization 12/10/92.

amount of the lump sum payment that Cisneros was representing that he intended to pay Medlar.³⁸⁷ Cisneros began to draw on the \$30,000 loan on December 28, 1992.³⁸⁸

In the meantime, Medlar was funneling the money she received from Cisneros to the Wootens so that they could purchase a house for her. On December 22, 1992, shortly after Cisneros's two \$8,000 cash deposits into Medlar's account, Patsy Wooten deposited a check from Medlar for \$7,495 into her account at Southwest Lubbock National Bank.³⁸⁹ Later that day, Patsy Wooten wrote a check in the same amount to Stewart Title Company as part of the transaction to purchase the house in the Wootens' name.³⁹⁰

On December 23, 1992, Cisneros met with Senator Donald Riegle (D-MI),³⁹¹ the Chairman of the Senate Committee on Banking, Housing, and Urban Affairs ("Banking Committee") responsible for conducting Cisneros's confirmation hearing.³⁹² During the meeting, Cisneros gave Riegle the impression that he was in the process of resolving the Medlar issue so that it would not be a concern at the confirmation hearings.³⁹³ Cisneros also told Riegle that the payments were made out of a sense of moral obligation to Medlar.³⁹⁴ They did not discuss the precise amount of the payments.³⁹⁵

In a conversation recorded December 24, 1992, Cisneros and Medlar argued about his payments to her. Cisneros told Medlar that, if he did testify before the

³⁸⁷ Suppression Hearing Tr. Medlar 6/21/99 at 126-27.

³⁸⁸ First Interstate Bank Credit Advice 12/28/92.

³⁸⁹ Check #1332 dated 12/22/92 drawn on Medlar's BNB account.

³⁹⁰ Check #540 dated 12/22/92 drawn on Patsy Wooten's Special Account at SWLNB.

³⁹¹ Cisneros Calendar 12/23/92.

³⁹² GJ 97-1 Ex. 376 at 1 (Cisneros Confirmation Hearing Tr. 1/12/93).

³⁹³ FBI-302 Riegle 11/30/94 at 3.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

Senate in the way they had agreed, she would have the power to expose him to criminal penalties for contempt of Congress:

HC: Alright. I didn't call to argue with you. Look, I . . . intend . . . to get that money there for you. Now, if you're telling me . . . that you don't want me to, and you want to throw in the towel, and you want to pursue some other option, . . . then I guess you need to tell me.

LM: What other option?

HC: I don't know . . .

LM: . . . what are you talking about?

HC: . . . what you're talking about. I don't know what you're talking about. I didn't know yesterday whether you're . . . I don't, I - I don't know what you're saying. If you're saying to me, you want me to make this work, I promise you I will.

LM: Henry, you are gonna be going through confirmation where they're gonna be asking you questions.

HC: The subject probably is not even gonna come up.

LM: And what if it does?

HC: If it does, I'll tell them what we agreed . . . and the only person in the world . . . who can sink me at that point, and I mean serious, I'm talking con - con - contempt of Congress, jail, is you. . . . But it didn't even - I mean, you know, what, I mean, I know what purpose that would serve. Beca-, I intend to do right.

LM: Henry, I seriously don't . . .

HC: Okay. Linda, you have a . . . there is a flaw in your thinking . . . and it has to do with the value of money. I have busted my ass, I would, I mean, I cannot tell you how much money. . . . But damn, give me a little credit for doing it all these years. . . . And give me a little credit, 'cause I have a plan in my mind.

(US in background)

LM: Well, maybe your plan isn't what . . . I mean, it, just because it's your plan, maybe it's not what I need.³⁹⁶

Medlar told the OIC that she had excerpted a portion of the tape shortly past this point because it concerned threats she made to Cisneros. Medlar represented that the following conversation, in substance, had been erased:

Argument about HC divesting and his waffling as to how to make the payments to me. (Some threats from me)³⁹⁷

The recorded conversation continued acrimoniously:

LM: Things have changed dramatically from where we were three or four weeks ago . . . from your attitude. You think I don't know that; you think I don't feel that.

HC: No, that's not true.

LM: Don't give me that, Henry!

HC: All right. Look, don't get upset, and, uh, please, I mean, I, it - it's so hard to call you when I know that every conversation is gonna end this way.

LM: Well, I'm sorry Henry, but you're the one who's . . .

HC: . . . no, you don't have to be this way.

LM: . . . you are the one who's changed, not me.

HC: You don't have to be this way.

LM: You're the one who's changed, not me.

HC: I haven't changed a bit.

³⁹⁶ Medlar Tape Transcript Q-16 12/24/92 at 11-12.

³⁹⁷ Medlar Redaction Log at 9.

LM: Yes, you have. You've changed in - in . . . just about every way.

HC: Linda, if you, if you don't, I haven't changed a bit. Don't make me change by runnin' me through the . . . ringer every time I pick up the phone to call you.

LM: I don't . . .

HC: . . . don't make me dread calling you because I know it's gonna be an emotional harangue.

LM: Well, nobody's making you call me. ³⁹⁸

f. The FBI Background Investigation

On December 29, 1992, the Director of the FBI instructed the agency's Washington Main Field Office ("WMFO") to interview Cisneros in accordance with usual FBI protocols.³⁹⁹ Moreover, the WMFO was directed to gather information concerning any and all extramarital affairs Cisneros might have had, determining in particular the names of individuals with whom he was having or had had an affair, when each affair ended, and why it ended.⁴⁰⁰ The San Antonio Division was to interview each individual identified by the WMFO, confirming the facts about the duration of the affair and the reasons for the break-up, and further developing the WMFO's list of identified affairs.⁴⁰¹

According to Cisneros employee John Rosales, on December 29, 1992, Medlar called and left a message for Cisneros, threatening that she would "have to take

³⁹⁸ Medlar Tape Transcript Q-16 12/24/92 at 13-14.

³⁹⁹ Routing Slip from FBI Director 12/29/92.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

action” if Cisneros did not return her call.⁴⁰² Cisneros called Medlar on December 29, 1992 and again on December 30, 1992.⁴⁰³

FBI Special Agents interviewed Cisneros on December 30, 1992.⁴⁰⁴ The agents informed Cisneros that they were conducting a background investigation on him in connection with his nomination for HUD Secretary.⁴⁰⁵ They also told him that the purpose of the interview was to gather complete, current, and accurate information about him.⁴⁰⁶ The agents provided Cisneros a copy of his completed SF-86 and Supplement, and they asked him to review the documents and advise them of any changes.⁴⁰⁷ Cisneros told the agents that his disclosures on the forms were accurate and correct to the best of his knowledge and recollection.⁴⁰⁸

Cisneros’s answers to the FBI’s questions differed in several material respects from those he had given the Transition Team. In discussing his affair with Medlar with the FBI, Cisneros made no mention of his past or ongoing payments to her.⁴⁰⁹ Cisneros stated that he was unaware of anything that could, would, or should prevent him from receiving a position with the United States Government, or that could be used to coerce or compromise him if he were to receive a position.⁴¹⁰ He also told the

⁴⁰² FBI-302 Rosales 12/31/92 at 2.

⁴⁰³ Cisneros Event Chronology at 49 (12/29/92 call from Cisneros to the residence of Medlar’s mother for 4 minutes); *Id.* (12/30/92 call from Cisneros to the residence of Medlar’s mother for 20 minutes).

⁴⁰⁴ FBI-302 Cisneros 12/30/92.

⁴⁰⁵ *Id.* at 1.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 2.

FBI that Medlar was a “stable” individual and that he had had only one extramarital affair aside from his relationship with Medlar.⁴¹¹

The FBI also interviewed Cisneros’s accountant, Luis Hernandez, on December 30, 1992.⁴¹² Hernandez requested confidentiality, and the FBI reports refer to him as “SA T-1.”⁴¹³ Hernandez told the agents that certain monies Cisneros had received from paid lectures had not been deposited into Cisneros’s business or personal accounts.⁴¹⁴ Hernandez estimated that Cisneros had not deposited as much as \$60,000 per year and “considered the possibility” that the money might be going to Linda Medlar.⁴¹⁵ Hernandez also noted that, as of November 1992, Cisneros was continuing not to deposit all of his lecture income.⁴¹⁶

Cisneros called Medlar after these interviews to tell her about his FBI interview and to alert her that the FBI would try to contact her; Medlar taped the conversation:

HC: . . . I’m at the airport, and I am a little short, but, and I don’t want you to get upset, but I did want to tell you that the FBI came to see me today in the course of the regular investigation that they’re supposed to do.

LM: Yeah.

HC: And, uh (clears throat), they, uh, you know, asked me about us because we’re public and, uh, asked me a whole series of questions . . . th - the money was not raised, but it might be. Uh, they did talk about, uh, you know, kind of the date that it was, that it was public, and the date that you moved to Lubbock, and things like that. . . . And they’re gonna be trying to get a hold of you. And you should talk to ‘em. Uh, uh, they, you know, know that your mother’s name is Jones and so forth. I didn’t have her address, uh, and I don’t want ‘em to

⁴¹¹ *Id.* at 3.

⁴¹² FBI-302 Hernandez 12/30/92.

⁴¹³ *Id.* at 1.

⁴¹⁴ *Id.* at 2.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

bother you there, because I told 'em that, you know, you were recovering from surgery and so forth, but they can easily get a telephone number. And, uh, it - it is the FBI after all. And, but it - it shouldn't be anything, you know, you worry about or panic over or anything like that . . . uhm They, I - I, you know, you're very mature about these things and, you know, under fire you handle 'em well. Uhm, but I just needed to let you know that that will happen and when it comes, don't - don't panic.

LM: Don't panic? They didn't say anything about the money?

HC: No, but I - I - I talked to Sylvia, and she said that, uh, they talked to Louis Hernandez, who is an accountant, and asked him today whether, uh, he knew of any payments and, uh, he said no, he didn't because he doesn't. . . . He, I, doesn't get involved in that. He accounts with, he accounts for the money that we put into the . . . system, and the money that I help you with comes before that, comes out of that before it gets to him.

LM: Uh-huh.

HC: Uh . . . frankly, the line that I have been . . . holding to, you know . . .

LM: Uh-huh.

HC: . . . is - is - is - is, I think, the, the right answer. Uhm, I've made sure that they know that you were a private person, and wanted your privacy, and so forth. Uh, and - and let me just say that - that, how this works, just so you have a feel for it. The FBI was brought into this for executive level persons, for security reasons, uhm, that's primarily what they're interested in. Their report is not made available generally to the Committee, to the Senate, or anyone else. (UI)

LM: Then why are they doing it?

HC: It is made available to, I think, the Chairman of the Committee, and that's it. Uhm, and the Chairman of the Committee can, uh, then determine whether, you know, there is something problematic. Now, our good fortune is the Chairman of the Committee is a Democrat, it is Senator Riegle, who has had some very severe personal problems that were . . . abused by the press. He, uh, had a relationship, and, uh, a tape recording was made of a . . . a, literally a private conversation, intimacy, you know, lovemaking.

• • •

LM: What did they ask you about us?

HC: Well, they wanted to know, uh, uhm, roughly when, uhm, we were together . . . questions about dates, uhm, questions about your status.

LM: What did you say there?

HC: Well, that you were a private person living in Lubbock. Uh, but I think they just want us, uh, what they're after is, uh . . . uh, evidence of stability . . . and - and blackmailability, those are two issues, words he used . . . you know, is this a, a stable person and also is there here the potential for blackmail which is what the money issue will come up. Uh, and, uh, I don't think it's gonna be a problem. But, you know, some people when you hear "F-B-I," you know, all of a sudden panic, and I just think, you just need to know, stay as steady as you can. And but I felt I had to tell you about it just in case it happens as early as tomorrow. They're, they're at it now, and they're gonna try to finish it . . . by . . . what'd they say? I forget, the seventh or something like that, so . . .

LM: And what if they find out about the money? I mean, I'm just . . . asking.

HC: Well, I . . . uhhh . . . they asked me whether I had told Clinton, and I told them that I had . . . in transition (UI).^[417] I mean, you know, this is not a discovery we're now making, uh, we're not making some kind of a discovery here of any kind . . . Uhm, you know, about our, about the relationship, and, of course, it was public. Uh . . . what if they find out? . . . I don't think there's a problem, and I think I'm gonna, I will continue to . . . say what I've . . . said all along about this.

LM: What'd you tell Clinton? . . . And you assured them that the relation-, did they ask you if you were still in contact with me?

HC: I forget the words exactly, it wasn't "in contact," never mentioned "in contact" or anything like that, but it was something like . . . uh . . . you know, "Are you,

⁴¹⁷ According to the FBI report of this interview, the payments to Medlar were not actually discussed. FBI-302 Cisneros 12/30/92.

are you still seeing each other,” or something like that. I mean, it was, it was easy to say no, because it was the truth.

LM: Okay.

HC: Don't worry, please.

LM: (Sighs)

HC: Don't worry, don't worry. It's uh I mean, number one, nothing's gonna happen to you. Number two, if it happens to me, it's my own doing, and I won't let you get hurt, so . . . okay?

LM: All right.

• • •

HC: Thank you.

LM: Thank me for what?

HC: Just for being a . . . steady girl when, uh . . . like when we get into the clinches.⁴¹⁸

On December 31, 1992, the FBI interviewed three of Cisneros's employees—Sylvia Arce-Garcia, John Rosales, and Maria Elena Delgado.⁴¹⁹ These employees were familiar with Cisneros's relationship with Medlar. Arce-Garcia had made payments to Medlar on behalf of Cisneros beginning in early 1992 by

⁴¹⁸ Medlar Tape Transcript Q-17 12/30/92 at 2-6. The next day, December 31, 1992, Cisneros spoke with Medlar at least twice. Cisneros Event Chronology at 54 (12/31/92 call from CISCOM to the residence of Medlar's mother for approximately 32 minutes); *Id.* (12/31/92 call from CISCOM to residence of Medlar's mother for approximately 28 minutes).

⁴¹⁹ GJ 97-1 Tr. Delgado 11/24/97 at 19.

transferring cash from Cisneros's account to Medlar's account.⁴²⁰ Delgado had answered calls from Medlar and, following the instructions of her supervisors, transferred them to Arce-Garcia and Rosales regardless of whether Cisneros was available.⁴²¹ On one occasion, she had overheard Arce-Garcia and Rosales discussing threats that Medlar had made to the effect that she would destroy Cisneros.⁴²²

According to Delgado, Cisneros met with the three employees jointly before their FBI interviews. He told them that there was no need to tell the FBI about the payments to Medlar.⁴²³ In the same meeting, Arce-Garcia and Rosales reiterated this suggestion to Delgado.⁴²⁴

The FBI then interviewed the three employees and, as Cisneros had instructed them, no one disclosed the payments to Medlar. When the FBI asked Arce-Garcia about Medlar directly, she denied having any knowledge of the payments and stated that she was not aware of any individuals receiving financial support from Cisneros, with the exception of his family.⁴²⁵ Rosales told the agents that he was not aware of Cisneros's payments to Medlar, although he did say that Medlar told him that she would "have to take action" if Cisneros did not return her calls.⁴²⁶ Delgado did not mention the payments and told the FBI that she had no derogatory information about Cisneros.⁴²⁷ She later testified that she did not tell the FBI about Cisneros's payments to Medlar because "it would hurt him."⁴²⁸

⁴²⁰ FBI-302 Arce-Garcia 2/16/95 at 4.

⁴²¹ GJ 97-1 Tr. Delgado 11/24/97 at 11; FBI-302 Arce-Garcia 2/16/95 at 5.

⁴²² GJ 97-1 Tr. Delgado 11/24/97 at 12-13.

⁴²³ *Id.* at 19-20; GJ 97-1 Tr. Delgado 9/10/97 at 212-15.

⁴²⁴ GJ 97-1 Tr. Delgado 11/24/97 at 20.

⁴²⁵ FBI Investigative Insert Arce-Garcia 12/31/92 at 2.

⁴²⁶ FBI-302 Rosales 12/31/92 at 2.

⁴²⁷ FBI Investigative Insert Delgado 12/31/92.

⁴²⁸ GJ 97-1 Tr. Delgado 9/10/97 at 212-214. Delgado was very reluctant to provide information about Cisneros. She was served with a grand jury subpoena but
(continued...)

Delgado also said that, after her interview, Arce-Garcia had asked her what she had told the FBI about Medlar and the payments.⁴²⁹ Delgado said she had told the FBI that she “didn’t know anything about that.”⁴³⁰

On the same day as her FBI interview, Arce-Garcia completed an Application for Federal Employment (SF-171) for the position of Special Assistant to the Secretary of HUD.⁴³¹ About two weeks later, Rosales completed an SF-171 for the position of Special Assistant to the Secretary of HUD.⁴³² Both were subsequently hired.⁴³³

The FBI also interviewed Cisneros’s friend, Frank Wing, on December 31, 1992.⁴³⁴ Wing stated that Cisneros was a highly ethical person with excellent character.⁴³⁵ Wing described Cisneros as a very frugal individual who lived well

⁴²⁸(...continued)

filed a motion to quash it (GJ 97-1 Ex. 322) and failed to appear to testify. The OIC filed a motion asking that Delgado be held in contempt and opposing her motion to quash. The court issued an order directing her to show cause why she should not be held in contempt for failing to appear before the grand jury. Order to Show Cause 8/28/97. When Delgado failed to appear at the show cause hearing, the court issued a bench warrant for her arrest. Warrant for Arrest of Witness Maria Elena Delgado 9/4/97. Delgado then appeared before the grand jury and invoked her privilege against self-incrimination. GJ 97-1 Tr. Delgado 9/10/97 at 10. She was then compelled to testify pursuant to an order of immunity under 18 U.S.C. §§ 6002 and 6003. *See* GJ 97-1 Ex. 333.

⁴²⁹ GJ 97-1 Tr. Delgado 11/24/97 at 21.

⁴³⁰ *Id.* at 21-22.

⁴³¹ Arce-Garcia SF-171 12/31/92.

⁴³² Rosales SF-171 1/19/93.

⁴³³ GJ 97-1 Tr. Delgado 9/10/97 at 65-66.

⁴³⁴ FBI-302 Wing 12/31/92.

⁴³⁵ *Id.* at 1.

within his financial means.⁴³⁶ Wing was later hired as Cisneros's Senior Advisor at HUD.⁴³⁷

The FBI assigned the task of interviewing Medlar to its Dallas Division.⁴³⁸ On January 1, 1993, the FBI contacted Medlar's mother regarding an interview with Medlar.⁴³⁹ She advised them that Medlar was recovering from major surgery and had been instructed by her doctors to rest for a minimum of six weeks.⁴⁴⁰ She further stated that Medlar's mental and nervous condition was extremely poor and that the FBI should not attempt to contact Medlar until January 8, 1993 or, preferably, at the end of her six-week recovery period.⁴⁴¹

The FBI interviewed Cisneros's marriage counselor, Dr. Robert Jimenez, on January 5, 1993.⁴⁴² Jimenez stated that he began counseling Cisneros and his wife once Cisneros's affair with Medlar became public.⁴⁴³ He said that Cisneros's marriage had survived several separations and as many as four to six "one night stands" by Cisneros.⁴⁴⁴ Jimenez further stated that the Cisneroses had made a decision to make the marriage work and that Cisneros's wife was determined to

⁴³⁶ *Id.*

⁴³⁷ Wing SF-85P 1/23/93; FBI-302 Wing 1/2/95 at 1. Wing's application was expedited so that he could report to HUD on February 1, 1993. Note from Walker to Vobis 1/23/93 (asking Vobis to "rush this and grant interim clearance" for Wing).

⁴³⁸ FBI Teletype 12/31/92.

⁴³⁹ FBI Memorandum 1/6/93.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² FBI-302 Jimenez 1/5/93. Cisneros and his wife had signed an Authority to Release Medical Information on January 4, 1993. *Id.*

⁴⁴³ *Id.* at 1.

⁴⁴⁴ *Id.* at 1-2.

support his political career.⁴⁴⁵ The FBI report of Jimenez's interview contained no information concerning Cisneros's payments to Medlar.⁴⁴⁶

In November 1996, Cisneros's attorney Cono Namorato informed the OIC that he had interviewed Jimenez, whom he deemed a "very credible witness." According to Namorato, Jimenez claimed that during Cisneros's background investigation he (Jimenez) had told the FBI the exact amount that Cisneros had paid to Medlar.⁴⁴⁷ Namorato said that he had seen Jimenez's notes concerning the interview and characterized them as very interesting.⁴⁴⁸

The OIC obtained Jimenez's files concerning Cisneros and his wife Mary Alice, and subsequently interviewed him. Jimenez told the OIC that, during one of her counseling sessions, Mary Alice had told him that Cisneros had paid Medlar between \$200,000 and \$400,000, and that the payments amounted to approximately \$4,000 per month.⁴⁴⁹ Jimenez was unable to recall when Mary Alice had told him this.⁴⁵⁰ According to Jimenez, Mary Alice had supposedly learned of the payments through telephone calls with individuals whose identities were unknown to him, some of them complete strangers to Mary Alice.⁴⁵¹

According to Jimenez, after the FBI interviewed him on January 5, 1993, he made notes of the interview. Jimenez showed these notes to the OIC.⁴⁵² They

⁴⁴⁵ *Id.* at 2.

⁴⁴⁶ *Id.* at 1-4.

⁴⁴⁷ OIC Memorandum of Meeting with Defense Counsel 11/26/96 at 2.

⁴⁴⁸ *Id.*

⁴⁴⁹ OIC Interview Report Jimenez 7/11/97 at 8.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 17.

indicate that Jimenez had told the FBI that Mary Alice knew about the payments to Medlar.⁴⁵³

Although Jimenez produced to the OIC notes for two joint therapy sessions conducted with Cisneros and Mary Alice,⁴⁵⁴ he did not produce notes of any counseling sessions which on their face or by his characterization related only to sessions with Mary Alice. He did not produce any notes of counseling sessions referencing the payments. Jimenez claimed that no notes were taken at many of the interview sessions with her because they were informal.⁴⁵⁵

One page of Jimenez's notes did bear the following notations:

Session directed L. Medlar . . . payment of 4000 Medlar discussed (unintelligible). Mary Alice suspects major amounts \$300,000 already had to do it obligated can't get job ruined because office ostracized (unintelligible) (unintelligible) earned it no burden to them.⁴⁵⁶

These notes follow other notes of a counseling session Jimenez had with Cisneros. There is no other indication of who the source of this information was, nor is there any indication of when the session occurred or when Jimenez made the notes. The report of Jimenez's OIC interview reflects no information offered by Jimenez concerning these entries.⁴⁵⁷

The OIC also interviewed Homero Rivera and Michelle Castor, the FBI Special Agents who had interviewed Jimenez. Castor stated that the FBI-302 memorializing the Jimenez interview—which has no reference to Cisneros's payments to Medlar—was accurate.⁴⁵⁸ Both agents confirmed that Jimenez did not take notes

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 13, 15.

⁴⁵⁵ *Id.* at 18.

⁴⁵⁶ *Id.* at 16.

⁴⁵⁷ *Id.*

⁴⁵⁸ OIC Interview Report Castor 12/18/96 at 2.

during the interview.⁴⁵⁹ They reported that Jimenez did not state in the interview that Cisneros had been making payments to Medlar,⁴⁶⁰ and never specifically stated that Cisneros had paid Medlar \$200,000 to \$400,000.⁴⁶¹ Rivera told the OIC that such a revelation would have been a “major red flag”;⁴⁶² Castor said that it would have been “a major find.”⁴⁶³ Both said that, if Jimenez had told them about Cisneros’s payments to Medlar, they would have included it in the FBI-302 and would have notified their supervisor.⁴⁶⁴

Also on January 5, 1993, the FBI interviewed Cisneros’s trusted employee and confidante, Alfred Ramirez.⁴⁶⁵ Ramirez told the FBI that he did not know any derogatory information about Cisneros⁴⁶⁶ and that, except for the affair with Medlar, he had no information about Cisneros’s private or public life that would jeopardize Cisneros’s appointment or embarrass the United States government.⁴⁶⁷ When the FBI attempted to probe Ramirez further about his knowledge of the affair with Medlar, he declined to make further comment and stated that any other questions regarding the affair should be directed to Cisneros.⁴⁶⁸

⁴⁵⁹ *Id.*; OIC Interview Report Rivera 12/18/96 at 2.

⁴⁶⁰ OIC Interview Report Castor 12/18/96 at 3; OIC Interview Report Rivera 12/18/96 at 3.

⁴⁶¹ OIC Interview Report Castor 12/18/96 at 3; OIC Interview Report Rivera 12/18/96 at 3.

⁴⁶² OIC Interview Report Rivera 12/18/96 at 3.

⁴⁶³ OIC Interview Report Castor 12/18/96 at 3.

⁴⁶⁴ OIC Interview Report Castor 12/18/96 at 3; OIC Interview Report Rivera 12/18/96 at 3.

⁴⁶⁵ FBI-302 Ramirez 1/5/93.

⁴⁶⁶ *Id.* at 2.

⁴⁶⁷ *Id.* at 3.

⁴⁶⁸ *Id.* at 4.

On January 6, 1993, the FBI conducted a second interview of Luis Hernandez, Cisneros's accountant.⁴⁶⁹ Hernandez said that he had heard gossip in Cisneros's office that payments were being made to Medlar in 1992.⁴⁷⁰ Hernandez stated that the gossip was prompted by some of Medlar's calls to the office, and that the last call of which he was aware had come into Rosales's office on about December 30, 1992.⁴⁷¹ Hernandez said that he had noticed withdrawals of \$2,000 per month from Cisneros's deposits, at least through October 1992.⁴⁷² He also indicated he believed that the accounting methods used by Cisneros's former accountant, Rene Gonzalez, were too risky and questionable.⁴⁷³

The FBI reinterviewed Hernandez the next day, January 7, 1993.⁴⁷⁴ Hernandez reiterated that Cisneros regularly withheld \$2,000 per month from deposits to his account, and stated that, on some occasions, Cisneros had withheld as much as \$4,000 to \$6,000.⁴⁷⁵ (After Hernandez's first interview with the FBI, Cisneros had told Medlar: "[Hernandez] doesn't get involved in that. He accounts with, he accounts for the money that we put into the . . . system, and the money that I help you with comes before that, comes out of that before it gets to him."⁴⁷⁶) Hernandez claimed, however, that there was "nothing unusual or improper" about these transactions because Cisneros paid income tax on all money that came into the business.⁴⁷⁷ Hernandez also

⁴⁶⁹ FBI-302 Hernandez 1/6/93.

⁴⁷⁰ *Id.* at 1.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.* at 2.

⁴⁷⁴ FBI-302 Hernandez 1/7/93.

⁴⁷⁵ *Id.*

⁴⁷⁶ Medlar Tape Transcript Q-17 12/30/92 at 3.

⁴⁷⁷ *Id.*

stated that he was aware that gifts in excess of \$10,000 in a year were subject to gift tax requirements but that he had never discussed the gift tax with Cisneros.⁴⁷⁸

The FBI also reinterviewed Cisneros's employee John Rosales on January 6, 1993.⁴⁷⁹ Rosales had answered several telephone calls from Medlar to Cisneros at CISCOM.⁴⁸⁰ Rosales advised that the calls from Medlar never indicated a sense of urgency or antagonism.⁴⁸¹ (Rosales had previously told the FBI that Medlar had called CISCOM on December 29, 1992, and that he recalled her saying that if Cisneros did not return her call she would "have to take action."⁴⁸²) Rosales said that he did not keep a written record of Medlar's calls or of any messages that she left.⁴⁸³

Cisneros and Medlar were in frequent telephone contact while the FBI conducted the background investigation. On January 4, 1993, Cisneros paid Medlar \$4,000. On the same day, Medlar and Cisneros had a phone conversation that Medlar recorded. During this call, Cisneros expressed his concern over the FBI's ongoing background investigation:

HC: Yeah, okay. Uhm . . . oh boy, . . . it's gonna be dicey.

LM: Why is it gonna be dicey?

HC: The FBI's crawling all over everything.

LM: The what?

HC: The FBI.

LM: What are they crawling all over?

⁴⁷⁸ FBI-302 Hernandez 1/7/93.

⁴⁷⁹ FBI-302 Rosales 1/6/93 at 1.

⁴⁸⁰ *Id.*; see also FBI-302 Rosales 12/31/92 at 2.

⁴⁸¹ FBI-302 Rosales 1/6/93.

⁴⁸² FBI-302 Rosales 12/31/92 at 2.

⁴⁸³ FBI-302 Rosales 1/6/93 at 1.

HC: Well, the business about whether or not . . . money was paid, and so forth.

LM: Who are they talking to?

HC: Well, talking to just about everybody I've ever known in my life.

LM: Well, then how do you know that, they haven't talked to me, so how do you know they're . . .

HC: They haven't talked to you?

LM: No.⁴⁸⁴

Medlar told Cisneros that the FBI had tried to contact her but that her mother had told the FBI that she could not be interviewed:

LM: Uh, but they haven't talked to me. They called and Mother told (UI) . . .

HC: That was when?

LM: Uhh.

HC: Over the weekend?

LM: It was, the - the first. It was the . . .

HC: The first?

LM: Yeah, it was on Friday, the first, and, I was asleep and she . . .

HC: They will. They'll talk to you.

LM: . . . she told them in, in no uncertain terms that I had just had surgery, and she didn't feel it was appropriate that they call. I mean, that's exactly what she told them.

HC: (Chuckles)

⁴⁸⁴ Medlar Tape Transcript Q-19 12/2/92 at 1-2.

LM: And she was really upset about it.

HC: Yeah.⁴⁸⁵

Medlar and Cisneros also discussed how the FBI had learned about the payments:

LM: . . . So, I mean, they haven't talked to me, so where would they be getting the thing about the money?

HC: I don't know. I truly don't know.

LM: Well, what had, what has been said?

HC: Well (sigh), they had a meeting, for example, with one of the lawyers today from the transition. And they said, "Well, what - what can you tell us about, you know, the payments. Uh, you know, amount or frequency or whatever," you know, and . . . and uh, it was as if they knew, and they were just trying to confirm, you know, with other people.

LM: Umm. No, they haven't even talked to me.

HC: Yeah. (UI)

LM: And probably they won't.

HC: I don't know whether the FBI can look at your bank records without you even knowing that they are? I just don't know.

LM: I don't think so.

HC: Yeah.

LM: I think that's an invasion of privacy. Now, they can probably look at yours.

HC: Yeah.

⁴⁸⁵ *Id.* at 3-4.

LM: But I don't think they can look at mine.

HC: Okay.

LM: Because that's an invasion of privacy, I mean, I can . . .

HC: I put the money in there personally today for the month.

LM: I could go . . .

HC: And I'm working on the other. But the, but your money for the month is there, so, if you have to pay bills the next few days or whatever.⁴⁸⁶

The conversation then turned to how Medlar should deal with the FBI:

LM: You know . . . but, uh, I - I really, unless the FBI just makes me talk to them, I'm not gonna talk to them. I really and truly don't understand why it would have anything to do, you know, unless, unless, they were trying to get me to say something about you, I mean . . .

HC: You know, I think you might be, you can get away with that.

LM: I'm going to.⁴⁸⁷

Cisneros then expressed concern that the contents of the FBI Background Investigation Report would have an adverse impact on his upcoming Senate confirmation hearing:

LM: The hearing, are you nervous about this hearing?

HC: Yep. (Laughs)

LM: Why? I - I didn't, I - I had heard, maybe on TV, I said, I guess CNN, that they, you're not one of the ones they're goin' after . . .

⁴⁸⁶ *Id.* at 4-5.

⁴⁸⁷ *Id.* at 13.

HC: Well, when they get the FBI report . . .

LM: . . . goin' after Ron Brown.^[488]

HC: . . . when they get the FBI report, it's all gonna change.

LM: They're goin' after Ron Brown.

HC: When they get the FBI report on Thursday . . .

LM: Uh-huh.

HC: . . . it will all change.

LM: I thought only the Chairman got it.

HC: Yep, that's true but . . . uh, I 'spect, I 'spect if there's something questionable (clears throat), that he has to bring in the minority . . . ranking member, and . . . you know, it's just a question how they wanna interpret it.

LM: You know, I also don't understand that. How on earth can they ask you questions if they haven't seen the FBI report?

HC: Well, they're asking policy questions for the most part . . . I think, well, we'll see, my life's gonna become a little bit more complicated . . . by about Friday of this week.

LM: Why?

HC: Because that's when the Chairman will have reviewed the report and feel compelled to . . . you know, maybe put a hold on this or something.⁴⁸⁹

⁴⁸⁸ Brown was President Clinton's nominee to be Secretary of Commerce. Statement on the Nomination of Ron Brown 1/21/93, 139 Cong. Rec. S164-02.

⁴⁸⁹ A "hold" describes a Senator's request to the Senate Majority Leader that a nomination not be considered on the Senate floor. (Holds are not part of the Senate's written rules or standing orders.) The Majority Leader need not honor the
(continued...)

LM: And if he doesn't, then do you feel comfortable with it?

HC: No, no, 'cause, you know, I mean, it can leak at any time, you know.

LM: Leak what?

HC: To the press.

LM: Ab-, about the payments you mean? Is, is this all you're talk-, is that what you're talking about?

HC: Yeah. Mm-hmm. Yeah.

LM: And you think because the FBI has asked something about it Well, they asked your own staffer about it, didn't they?

HC: Right.

LM: So, it's not . . . so, this is, I mean, this isn't something that just came up?

HC: No, they shouldn't be acting surprised about it, but . . . we'll see.

LM: Who shouldn't be acting surprised?

HC: The FBI.

LM: Well you said that the guy, and I've forgotten his name Who's the Chairman of the Committee?

HC: Riegle?

LM: . . . yeah, had had personal problems.

HC: Big time.

⁴⁸⁹(...continued)

Senator's request, but is put on notice that the Senator may filibuster any motion to consider the nomination. *See* U.S. Senate Website; Glossary Definition of "Hold" <http://www.senate.gov/reference/glossary_term/hold.htm>.

LM: And so, you don't feel like he'll bring up any of that.

HC: Well, I don't think he will, he's a Democrat.

LM: Well, then who else could, if nobody else gets the FBI report?

HC: Uh, the - the, that's a good point. But, but, I guess, if there's something truly questionable, he's honor-bound, probably, to share it with like the ranking minority member, you know.

LM: (Laughs) Henry, I have a little bit of a problem with that, "he's honor-bound?"

HC: Hmm.

LM: You really believe that?

HC: I don't know, I just truly don't know how - how, I - I'll, I have to find out more about, how, what, what exactly he would do, if he had, if there was something in there that, you know, he felt he had (UI).

LM: How do you know nobody else sees that report?

HC: Well, it's the way it's supposed to work. But that's not the way it worked with - with Tower,^[490] they kept leaking pieces, you know?

LM: You know, I absolutely cannot believe that the other members don't see that report.

HC: They don't.⁴⁹¹

Cisneros then reviewed with Medlar what he was going to tell the FBI about the payments if he was asked:

⁴⁹⁰ This refers to former Senator John Tower, whom the Senate failed to confirm as Secretary of Defense in 1989 amid allegations of misconduct. *See* GJ 97-1 Ex. 395.

⁴⁹¹ Medlar Tape Transcript Q-19 12/2/92 at 15-18.

LM: So, when is the FBI gonna come back to you, first of all?

HC: Probably Wednesday.

LM: Wednesday?

HC: I would think so.

LM: And do you think they'll ask you anything on that?

HC: Mhm-hmm

LM: All right. You're going to tell them the same thing?

• • •

HC: What we, what - what we spoke before.

LM: All right, well, I need to know what is said.

HC: Okay. You can reach me at the Jefferson [Hotel in Washington, D.C.] if you need me, okay?

LM: Yeah, okay.

HC: And if that gets, if it's, if it's in the middle of the day, and I'm not here from morning to night . . . then the transition . . . and I don't have the number, but Sylvia [Arce-Garcia] or John [Rosales] will have it.⁴⁹²

Cisneros then emphasized to Medlar the trust he was placing in her:

HC: I'll call you tomorrow.

LM: All right.

HC: Okay.

⁴⁹² *Id.* at 23-24.

LM: But we're straight on everything, right?

HC: I think so.

LM: Until after this hearing or what?

HC: No, no, no, no, no.

LM: And if I don't talk to the FBI, there's no downside to that, is there?

HC: Uh, no.

LM: You'd really prefer that I didn't.

HC: I - I want you, uh, I'm gonna tell you something you're not gonna believe here. I trust you, I trust your judgment, I trust you. After all we've been through and everything that's been said, I think you're an intelligent . . . person. I trust you with my life.

LM: No, I wouldn't go that far.

HC: Well, this is my life. It's on the line. If they knock me out, man I am wiped. All that board stuff I was gonna do, . . . the company, I probably need to divest anyway . . . become a liability there, I mean, I am wiped. I might as well cash in everything I've got, pay off all my bills, and just . . . get outta town.⁴⁹³

Finally, Medlar and Cisneros again discussed the upcoming Senate confirmation hearing, and his anxiety about the proceedings:

LM: . . . and then the only reason that they would wanna get in touch with me is to see if I would confirm it. Is the only thing I can figure out. Right?

HC: Yeah.

LM: But if they, if it comes up in hearing, and you fade it, then it's all right. Or if it comes up, if it doesn't come up at all, then you feel comfortable, right?

⁴⁹³ *Id.* at 31-32.

HC: That's right.

LM: Then the Senate . . . cannot go back and ask anymore questions, right?

HC: Oh, yeah. That's why I say I'm not asking anybody to make any moves . . . until the Senate actually votes.

LM: Well, when will you go up there?

HC: Well, I'll be in and outta there. And then I'm suppose to go to work the morning of the twenty-first as Acting, even if I'm not confirmed by the Senate yet.

• • •

HC: Yeah. Okay. I'm gonna let you go, and I'll talk to you tomorrow.

LM: All right.

HC: Get some rest, you need the rest.

LM: (Laughs) I need all of this to be over with.

HC: Uhm-hmm. Me, too. Believe me nobody is wrestling with this more than, my stomach's upset, I feel like I got a knot, and I feel like quitting about every few . . . few hours.

LM: But you won't. . . .⁴⁹⁴

On January 7, 1993, because of the inconsistencies in the information it had received from Cisneros, his staff, and Hernandez, the FBI decided to interview Cisneros for a second time.⁴⁹⁵ In the FBI memorandum directing the interview, the interviewing agents were instructed to:

⁴⁹⁴ *Id.* at 33-35.

⁴⁹⁵ FBI Routing Slip 1/7/93 (instructing agent to reinterview Cisneros).

Advise Mr. Cisneros that he should be completely candid during this interview, that he should provide any information not previously provided, and that if there is any other information such as other affairs, payments made to any other individuals, etc., that it would be in his best interest to come forth with that information now.⁴⁹⁶

The agents were also instructed to ask Cisneros about whether he was making or had ever made payments to Medlar, the amount of the payments, his last contact with Medlar, Medlar's threats to him, his wife's knowledge of the payments, the reasons his wife filed for divorce, and his other extramarital affairs.⁴⁹⁷

In this interview, Cisneros acknowledged to the FBI that he had financially "assisted" Medlar, but he claimed, as he had earlier agreed with Medlar, that he had never paid her more than \$10,000 in a single year or more than \$2,500 at any one time.⁴⁹⁸ He also claimed that he had paid taxes on all of his salary from his speechmaking,⁴⁹⁹ and stated that he understood that the gift tax laws would apply to any payments to Medlar that exceeded \$10,000 annually.⁵⁰⁰

In reality, Cisneros had paid Medlar approximately \$189,000 between January 1990 and January 7, 1993. His total annual payments had exceeded \$10,000 in 1990 (\$44,500), 1991 (\$73,000), and 1992 (\$67,500). Twenty-eight of the 64 payments he had made had exceeded \$2,500 – the last of these occurring on January 4, 1993, just three days before Cisneros's second FBI interview.

**Payments from Cisneros to Medlar in Excess of \$2,500
January 1990-January 7, 1993**

Payment Date	Payment Amount
February 1, 1990	\$3,000

⁴⁹⁶ FBI Routing Slip 1/7/93 at ¶ 1.

⁴⁹⁷ *Id.* at ¶¶ 3-15.

⁴⁹⁸ FBI-302 Cisneros 1/7/93 at 2.

⁴⁹⁹ *Id.* at 1.

⁵⁰⁰ *Id.* at 2.

Payment Date	Payment Amount
May 31, 1990	\$4,500
June 29, 1990	\$3,000
September 13, 1990	\$3,000
October 5, 1990	\$4,000
October 12, 1990	\$5,100
November 1, 1990	\$3,000
December 4, 1990	\$4,000
December 8, 1990	\$4,000
January 9, 1991	\$6,000
February 2, 1991	\$4,000
February 26, 1991	\$12,000
April 17, 1991	\$4,000
April 18, 1991	\$4,000
May 1, 1991	\$4,000
May 31, 1991	\$4,000
July 3, 1991	\$4,582
August 2, 1991	\$4,000
October 2, 1991	\$4,500
November 5, 1991	\$3,925
December 2, 1991	\$4,000
March 2, 1992	\$3,000
May 5, 1992	\$4,000
August 3, 1992	\$4,000
December 3, 1992	\$4,000

Payment Date	Payment Amount
December 16, 1992	\$8,000
December 18, 1992	\$8,000
January 4, 1993	\$4,000

Cisneros also told the agents that he did not make the payments on a regular basis,⁵⁰¹ and that he was not then making payments to Medlar.⁵⁰² He asserted that Medlar had never threatened, coerced, or otherwise tried to obtain money from him,⁵⁰³ and that the payments were not “hush money.”⁵⁰⁴ He said that he had not had any substantive conversations with Medlar since early 1991.⁵⁰⁵ He maintained that he had had only one affair with a woman other than Medlar.⁵⁰⁶ Cisneros also assured the FBI agents that his payments to Medlar had been fully discussed at the highest levels of the Clinton Transition Team.⁵⁰⁷

The FBI contacted Medlar on January 8, 1993.⁵⁰⁸ She told them that she had recently undergone major surgery and was neither physically nor emotionally capable of being interviewed at that time, and that she did not understand why she should answer any questions from the FBI.⁵⁰⁹ She then requested that the FBI not contact her

⁵⁰¹ *Id.* at 1.

⁵⁰² *Id.* at 2.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 1.

⁵⁰⁵ *Id.* at 3.

⁵⁰⁶ *Id.* at 3, 4, 5.

⁵⁰⁷ *Id.* at 1.

⁵⁰⁸ FBI-302 Medlar 1/8/93.

⁵⁰⁹ *Id.* at 1.

again concerning Cisneros.⁵¹⁰ Medlar's rebuff of the FBI was preceded by at least two calls from Cisneros on the same day.⁵¹¹

The FBI interviewed Cisneros's wife Mary Alice Cisneros on January 8, 1993.⁵¹² She informed the FBI that she was aware that Cisneros had paid money to Medlar on various occasions in the past and stated that Cisneros may still be giving money to Medlar.⁵¹³ Mrs. Cisneros specifically recalled that Cisneros gave Medlar \$8,000 so that Medlar could move to Lubbock, Texas.⁵¹⁴ Mrs. Cisneros stated that her husband paid Medlar out of sympathy and because Medlar claimed that she could not get a job.⁵¹⁵ Mrs. Cisneros disclosed that she filed for divorce in October 1991 but then withdrew the divorce petition when her husband decided "to stand by his moral upbringing and stay with his family."⁵¹⁶ Mrs. Cisneros also stated that she was aware of the fact that Cisneros had had more than two extramarital affairs in the past.⁵¹⁷

On January 15, 1993, Cisneros and Medlar had a taped telephone conversation regarding Mrs. Cisneros's FBI interview:

LM: And what did she say to them?

⁵¹⁰ *Id.*

⁵¹¹ Cisneros Event Chronology at 70 (1/8/93 call from Cisneros/Jefferson Hotel to residence of Medlar's mother at 12:12 AM for 10 minutes); *Id.* (1/8/93 call from Cisneros/Jefferson Hotel to residence of Medlar's mother at 8:24 AM for six minutes).

⁵¹² FBI-302 Mary Alice Cisneros 1/8/93.

⁵¹³ *Id.* at 1-2.

⁵¹⁴ *Id.* at 1. Mrs. Cisneros stated that this payment was preceded by Medlar appearing at the Cisneros home at 1:00 AM in April 1991. When she answered the door, Medlar said "We've got to talk," and the Cisneroses and Medlar then had a "meeting." *Id.*

⁵¹⁵ *Id.* at 2.

⁵¹⁶ *Id.* at 1.

⁵¹⁷ *Id.*

HC: She . . . played along like she knew. And, ah . . . because she knew that if she didn't, it would be blackmail.

LM: What do you mean it'd be blackmail?

HC: Their main concern about the money . . . was that there was illegality involved. That - that you were . . . would be threatening me with something, and that's why I was giving you the money.

LM: Uhm-hmm.

HC: So that, and the main thing would be disclosure to spouse and so forth. And, also I guess, you know, just generally. So, uhm, you know, she understood that and had to acknowledge that she knew . . . so that it wouldn't have been cast as an illegal thing.⁵¹⁸

g. Transition Team Reaction to the FBI Report

On January 11, 1993, Transition Team Counsel Hamilton received a copy of the FBI's summary memorandum containing the results of the Cisneros background investigation ("FBI Report").⁵¹⁹ The summary memorandum expressly incorporated the reports of Cisneros's FBI interviews.⁵²⁰ Copies of the FBI reports of the Cisneros interviews and the Hernandez interview, among other things, were enclosed with the summary memorandum.

The reports of Cisneros's FBI interviews reflected his misstatements to the interviewing agents about the frequency and amount of his payments to Medlar, the number of his extramarital affairs, and his view of Medlar's mental stability.⁵²¹ Some of the information in the interview reports was inconsistent with information known to Hamilton and other Transition Team members. For example, Transition Team documents reflect that Cisneros advised them that he had paid Medlar approximately

⁵¹⁸ Medlar Tape Transcript Q-20 1/15/93 at 4.

⁵¹⁹ GJ 97-1 Ex. 375 at 41010462.

⁵²⁰ GJ 97-1 Ex. 375 at 41010477.

⁵²¹ See GJ 97-1 Ex. 375 at 41010497, 41010499-503.

\$2,500 per month for about three and one-half years.⁵²² Moreover, according to Hubbell, Cisneros told him that he had, on at least one occasion paid Medlar the sum of \$15,000.⁵²³ In contrast, according to the report of Cisneros's January 7, 1993 FBI interview attached to the FBI Report, he claimed never to have given Medlar more than \$2,500 at a time or \$10,000 in a single year.⁵²⁴ Similarly, Cisneros indicated to the Transition Team that Medlar was unstable, but the FBI interview report attached to the FBI Report indicated that Cisneros had said that she was stable.⁵²⁵

The FBI Report itself does not contain Cisneros's false statements; the enclosed and incorporated interview reports do. The Report does, however, relate the comment from Cisneros's accountant, Luis Hernandez (who is not identified in the Report because he had requested confidentiality), that he had perceived that about \$60,000 per year of Cisneros's lecture income was not being deposited in Cisneros's personal or business bank accounts.⁵²⁶ The report states that Hernandez speculated that these funds might be going to Medlar.⁵²⁷

Hamilton reviewed the FBI Report when he received it.⁵²⁸ Testifying before the grand jury, Hamilton did not recall what parts he had read carefully but acknowledged that he likely had read the references to Medlar and the payments.⁵²⁹ He further testified that he could not recall whether he had noticed any inconsistencies between the FBI Report, with its attachments, and the information

⁵²² Hubbell notes at 4, 6.

⁵²³ GJ 97-1 Tr. Hubbell 10/23/97 at 130.

⁵²⁴ GJ 97-1 Ex. 375 at 4101500.

⁵²⁵ Arky notes at 4 (noting Medlar was "unstable"); GJ 97-1 Tr. Arky 10/2/97 at 122 (indicating that Medlar was "mentally unstable"); GJ 97-1 Ex. 375 at 4101497.

⁵²⁶ GJ 97-1 Ex. 375 at 41010466.

⁵²⁷ GJ 97-1 Ex. 375 at 41010466.

⁵²⁸ GJ 97-1 Tr. Hamilton 11/12/97 at 177-78.

⁵²⁹ GJ 97-1 Tr. Hamilton 11/12/97 at 178.

Cisneros had given the Transition Team.⁵³⁰ Hamilton acknowledged that the information he had been provided by the vetting team regarding the payments was, in and of itself, inconsistent.⁵³¹ He further acknowledged that, if the payments had been \$60,000 per year, his concern would have been increased, and he might have reported the matter to Christopher.⁵³²

Hamilton told the OIC grand jury that he wanted “everyone in the decision-making process to know about the payments,”⁵³³ and that the decisionmakers included Clinton, Gore, Christopher, and the FBI.⁵³⁴ He also testified that he would have been concerned if he thought that a candidate was lying to him about anything.⁵³⁵

Hamilton’s deputy, Gary Ginsberg, also reviewed the FBI Report in early January 1993. Ginsberg testified that the reporting of Cisneros’s payments to Medlar “did stick out” and was “certainly going to make you question the contents.”⁵³⁶ Furthermore, Ginsberg testified that he considered the payments to be a “significant” issue.⁵³⁷

Ginsberg testified to the grand jury that it was his regular practice to discuss the contents of FBI reports with Hamilton, particularly when the reports raised sensitive questions.⁵³⁸ Ginsberg presumed that he discussed the Cisneros FBI Report

⁵³⁰ GJ 97-1 Tr. Hamilton 11/12/97 at 179-80, 182-83, 188-90, 192-93, 196-97.

⁵³¹ GJ 97-1 Hamilton Tr. 11/12/97 at 192, 194.

⁵³² *Id.* at 201-03.

⁵³³ *Id.* at 110.

⁵³⁴ *Id.* at 110, 114-15.

⁵³⁵ *Id.* at 204.

⁵³⁶ GJ 97-1 Tr. Ginsberg 10/7/97 at 64-65.

⁵³⁷ *Id.* at 76.

⁵³⁸ *Id.* at 65-66.

with Hamilton insofar as it related to Medlar and the payments.⁵³⁹ Ginsberg testified that he might have called Hamilton to relay information about the payments contained in the Report, only to find out that Hamilton already knew about it.⁵⁴⁰

Ginsberg met with Cisneros to review the contents of the FBI Report.⁵⁴¹ Ginsberg testified that Arky was also present while he briefed Cisneros on the contents of the Report.⁵⁴² According to Ginsberg, the meeting was memorable to him because Cisneros was visibly agitated and nervous.⁵⁴³ As a result, Ginsberg was able to recall the meeting in detail, including the timing of the meeting and the location of Cisneros and Arky in the room when he gave the briefing.⁵⁴⁴

Ginsberg testified that he orally read or summarized the relevant portions of the Report during the meeting.⁵⁴⁵ Ginsberg testified that the briefing he gave Cisneros most likely included the details and specifics in the Report relating to Medlar and the payments.⁵⁴⁶ He told the grand jury that he assumed he went over everything in the Report relating to the payments.⁵⁴⁷ He also testified that it would have been his normal practice to convey this type of information and that he had no reason to

⁵³⁹ *Id.* at 65.

⁵⁴⁰ *Id.* at 75.

⁵⁴¹ *Id.* at 64, 66.

⁵⁴² *Id.* at 67. Arky had assumed the role of assisting Cisneros with scheduling in preparation for his confirmation hearings. GJ 97-1 Tr. Arky 10/16/97 at 92. Following Cisneros's confirmation, she took a job as his Special Assistant at HUD and was later made his Deputy Assistant in HUD's Congressional Affairs Office. GJ 97-1 Tr. Arky 10/2/97 at 130. She worked at HUD until June 1995. *Id.* at 133.

⁵⁴³ GJ 97-1 Tr. Ginsberg 10/7/97 at 72.

⁵⁴⁴ *Id.* at 67-68, 70.

⁵⁴⁵ *Id.* at 67-68.

⁵⁴⁶ *Id.* at 68-69, 76.

⁵⁴⁷ *Id.* at 79-80.

believe that he deviated from that practice in the meeting with Cisneros and Arky.⁵⁴⁸ Ginsberg acknowledged before the grand jury that the information he related could have included an FBI estimate of \$60,000 in total payments (which Cisneros mentioned to Medlar in a taped telephone conversation on January 15, 1993).⁵⁴⁹ Ginsberg also identified Hamilton as a possible source of the \$60,000 reference.⁵⁵⁰

Arky testified that she “assumed [the information regarding the payments] would be disclosed to the FBI as it was disclosed to [the vetting team] and that it would be in the FBI report and part of the confirmation process.”⁵⁵¹ During the vetting process, Cisneros had told Arky that he had paid Medlar approximately \$30,000 a year over a three and a half year period.⁵⁵² Therefore, if Ginsberg followed his regular practice of going over the specifics in an FBI Report, and relayed the \$60,000 figure during his briefing, Arky would have known that the FBI Report contained information that was inconsistent with what Cisneros had told the vetters.

Arky disclaimed any knowledge of the inconsistencies and said she did not know what Cisneros told the FBI.⁵⁵³ Contrary to Ginsberg’s detailed recollection of the meeting, Arky claimed that she was not present when Ginsberg read or summarized the contents of the Report.⁵⁵⁴ Furthermore, according to Arky, Ginsberg specifically stated that it would be inappropriate to tell her what was in the FBI Report.⁵⁵⁵

Hamilton authorized the FBI to release the Report to the Personnel Security Office of the DOJ (“DOJ-PSO”) to determine whether to grant Cisneros a security

⁵⁴⁸ *Id.* at 68-69.

⁵⁴⁹ *Id.* at 69-70; Medlar Tape Transcript Q-20 1/15/93 at 6.

⁵⁵⁰ GJ 97-1 Tr. Ginsberg 10/7/97 at 70.

⁵⁵¹ GJ 97-1 Tr. Arky 10/16/97 at 66.

⁵⁵² FBI-302 Arky 12/20/94 at 2; Arky notes (with entry: “\$2,500 for 3 ½ yrs – high side”).

⁵⁵³ GJ 97-1 Tr. Arky 11/20/97 at 11-12, 36.

⁵⁵⁴ GJ 97-1 Tr. Arky 11/20/97 at 9-10.

⁵⁵⁵ *Id.* at 10-11.

clearance.⁵⁵⁶ Cisneros anticipated this use of the FBI Report; on December 30, 1992, he told Medlar: “The FBI was brought into this for executive-level persons, for security reasons, uhm, that’s primarily what they’re interested in.”⁵⁵⁷ Thus, the FBI was unaware of what Cisneros had told the Transition Team and, therefore, did not know that his statements to the Transition Team conflicted with the information in the Report. The FBI furnished the Report to DOJ-PSO on January 14, 1993 unaware that it was inconsistent with the enclosed and incorporated interview reports and with the information Cisneros had given the Transition Team.

Dominic Jerry Rubino, the DOJ-PSO official responsible for making the ultimate decision on Cisneros’s security clearance, told the OIC that he would not have granted clearance to Cisneros if he had known that Cisneros had intentionally lied to the FBI – at least not without getting further information.⁵⁵⁸ Rubino indicated that Cisneros’s lies to the FBI regarding when he had spoken to Medlar and how much he had paid her would have been very serious matters bearing on his decision to grant Cisneros a top secret security clearance.⁵⁵⁹ Rubino also stated that a subject’s making large payments to a former girlfriend would require further scrutiny before clearance could be granted.⁵⁶⁰ Rubino further indicated that, if information about a discrepancy in the amount of Cisneros’s payments to Medlar became known after he was granted a security clearance, it possibly or even probably would have meant that the clearance would have been suspended immediately, pending further investigation.⁵⁶¹

DOJ-PSO Security Specialist Carol Snyder, who also reviewed the Cisneros matter, testified that whether a person had lied to the FBI during his or her background investigation was the most important thing that DOJ-PSO looked at in

⁵⁵⁶ Letter from Hamilton to Bourke 1/11/93.

⁵⁵⁷ Medlar Tape Transcript Q-17 12/30/92 at 3.

⁵⁵⁸ GJ 97-1 Tr. Rubino 7/30/97 at 26-27.

⁵⁵⁹ *Id.* at 20, 37.

⁵⁶⁰ *Id.* at 20.

⁵⁶¹ *Id.* at 32. DOJ-PSO ceded the authority to investigate or re-investigate Cisneros or to suspend or revoke his security clearance to HUD on January 20, 1993, the first day of the Clinton administration. *Id.* at 30-31.

determining whether to grant a security clearance.⁵⁶² According to Snyder, the FBI report was “very important” because DOJ-PSO had to make a security determination solely on the basis of the information provided to the FBI.⁵⁶³ Snyder also testified that, beyond the significance of Cisneros’s lying to the FBI, the substance of the lie – concealing the true amount of his payments to Medlar – would have caused DOJ to deny him security clearance.⁵⁶⁴

Ginsberg testified that he vaguely recalled that DOJ-PSO had expressed concern about granting Cisneros clearance in light of his payments to Medlar.⁵⁶⁵ Ginsberg further testified that, although he did not recall the specifics of his response, “it would not surprise me if I communicated back to them . . . that it was the determination of the Clinton Transition Team to move forward with the nomination.”⁵⁶⁶ Similarly, Hamilton informed the OIC grand jury that “the fact that [Cisneros] was a Hispanic and the fact that he was an extremely attractive, forceful, intelligent guy, when weighed in the balance outweighed these negatives, at least as far as the people in Little Rock who made the decisions were concerned.”⁵⁶⁷ Hamilton also testified to the grand jury that “unless it had been discovered that [Cisneros] had committed some very heinous crime, you know, something that spoke of moral turpitude or something that was really totally damning . . . he was going to get appointed.”⁵⁶⁸

DOJ-PSO personnel recalled informing Hamilton and/or Ginsberg that, on the basis of their review of the Report, DOJ-PSO was concerned about Cisneros’s payments to Medlar. The DOJ-PSO personnel were informed that the Transition Team was aware of the payments and, since the affair was public and Cisneros’s wife was aware that Cisneros had made payments to Medlar, the Transition Team was not

⁵⁶² GJ 97-1 Tr. Snyder 7/30/97 at 31.

⁵⁶³ *Id.* at 30.

⁵⁶⁴ *Id.* at 41-42.

⁵⁶⁵ GJ 97-1 Tr. Ginsberg 10/7/97 at 90-91.

⁵⁶⁶ *Id.* at 91. Ginsberg testified that this determination was probably relayed to him by either Hamilton or Pastor. *Id.*

⁵⁶⁷ GJ 97-1 Tr. Hamilton 11/12/97 at 139-40.

⁵⁶⁸ *Id.* at 136.

concerned about Cisneros's fitness for office or eligibility to receive his security clearance.⁵⁶⁹ The DOJ-PSO personnel were informed that the Transition Team wanted Cisneros's clearance granted as quickly as possible.⁵⁷⁰ Cisneros received his clearance on January 20, 1993.⁵⁷¹

Shortly after Clinton was sworn in, all documents received or created by DOJ-PSO during its review of various Clinton Cabinet and other high-ranking appointees (including notes) were returned to the White House. DOJ-PSO's files were delivered to Ginsberg, then employed by the White House Counsel's Office ("WHCO"), and to Beth Nolan, another WHCO attorney.⁵⁷² As DOJ-PSO personnel understood it, pursuant to the MOU executed between the incoming and outgoing Administrations, these files were to become part of Clinton's Presidential Papers.⁵⁷³

The OIC subpoenaed from the White House all documents concerning Cisneros's FBI background investigation, security clearance, and vetting.⁵⁷⁴ The White House failed to produce the DOJ-PSO files concerning Cisneros or identify them in a log of documents that were being withheld from the grand jury on grounds of privilege.⁵⁷⁵ Before the grand jury, Ginsburg was unable to account for the documents; similarly, Nolan had no recollection concerning them.⁵⁷⁶

⁵⁶⁹ OIC Interview Report Synder 7/1/97 at 3; OIC Interview Report Alliman 6/30/97 at 3; OIC staff notes (undated).

⁵⁷⁰ OIC staff notes (undated).

⁵⁷¹ Letter from Rubino to Hamilton 1/20/93.

⁵⁷² GJ 97-1 Tr. Snyder 7/30/97 at 54-55; OIC Interview Report Snyder 5/17/99; GJ 97-1 Ex. 377.

⁵⁷³ GJ 97-1 Ex. 371 at 2.

⁵⁷⁴ OIC Subpoena to White House (F-252) issued 10/23/96.

⁵⁷⁵ White House Privilege Logs 12/20/93 and 7/16/97.

⁵⁷⁶ GJ 97-1 Tr. Nolan 11/18/97 at 85-86.

h. The Senate Committee Evaluation

The Transition Team provided the FBI Report, but not the attached FBI interview reports, to the Chairman of the Senate Banking Committee responsible for holding Cisneros's confirmation, without disclosing any additional or inconsistent information the Transition Team had received from Cisneros.⁵⁷⁷ The FBI Report related Hernandez's observation that Cisneros was diverting as much as \$60,000 a year from his lecture income, possibly to Medlar, but did not otherwise discuss the amount of the payments. Arky then arranged for Cisneros to make personal courtesy calls to other Senators on the Banking Committee,⁵⁷⁸ none of whom were provided with the FBI Report or informed of the inconsistencies in Cisneros's story.⁵⁷⁹

Arky testified to the grand jury that the courtesy calls presented "the opportunity for the Senators to raise their concerns and their issues."⁵⁸⁰ However, according to Arky, the Senators did not raise the issue of the affair, the payments, or the tax implications of the payments.⁵⁸¹ Moreover, neither Cisneros nor Arky raised the issues themselves.⁵⁸² When asked why she did not inform the Senators about the derogatory information surrounding Cisneros's pending nomination, Arky replied that her only obligation was to the vetting team and that it would have been up to Cisneros to relay the information "if he was asked."⁵⁸³

In a similar vein, Hamilton testified that it would not have been legitimate for the Transition Team "to keep certain matters from people who have an official reason to know."⁵⁸⁴ With respect to the Senate in particular, he testified that "given their official role, they had a right to an honest answer, if a question were asked," but that

⁵⁷⁷ GJ 97-1 Tr. Ginsberg 10/7/97 at 84; FBI-302 Ginsberg 11/22/97 at 2.

⁵⁷⁸ GJ 97-1 Tr. Arky 10/16/97 at 92.

⁵⁷⁹ *Id.* at 131-32.

⁵⁸⁰ *Id.* at 132.

⁵⁸¹ *Id.*

⁵⁸² *Id.* at 131-32.

⁵⁸³ *Id.* at 133-34.

⁵⁸⁴ GJ 97-1 Tr. Hamilton 11/12/97 at 116.

“[i]t doesn’t mean that you have to provide every piece of information in your background to the Senate that somebody might in some context be interested in.”⁵⁸⁵

However, after allegations about Cisneros’s false statements became publicly known, several Senators indicated that accurate information about the payments would have been important to them. For example, on October 11, 1994, Senator Lauch Faircloth, a member of the Banking Committee, sent a letter to FBI Director Louis Freeh.⁵⁸⁶ Faircloth wrote that he was “extremely disturbed by continuing press reports concerning Secretary Henry Cisneros” and requested an opportunity to examine the original FBI Report.⁵⁸⁷

Several other Senators on the Banking Committee later told the OIC that both the amount and circumstances of Cisneros’s payments, and the fact that he had lied about them, would have been material to their consideration of Cisneros’s nomination. For example, Senator Richard Shelby (R-AL) told the OIC that he had relied on the belief that Banking Committee Chairman Riegle had carefully reviewed the FBI Report and that the report was accurate and complete.⁵⁸⁸ According to Shelby, if he had been made aware of the discrepancies between the actual amount of the payments and the amount which Cisneros disclosed to the FBI, and it had been determined that Cisneros had lied to the FBI during the background investigation regarding the true amount, he would not have voted to confirm him.⁵⁸⁹ Shelby would have wanted to know where the money came from and whether it was “hush money.”⁵⁹⁰ He also told the OIC that the amount of the payments, and not just the fact that Cisneros lied regarding those amounts, would have been important to him.⁵⁹¹

⁵⁸⁵ GJ 97-1 Tr. Hamilton 11/12/97 at 117.

⁵⁸⁶ GJ 00-001 Ex. 351.

⁵⁸⁷ GJ 00-001 Ex. 351.

⁵⁸⁸ OIC Interview Report Shelby 11/6/97 at 1.

⁵⁸⁹ *Id.* at 2.

⁵⁹⁰ *Id.* at 2.

⁵⁹¹ *Id.*

Shelby also noted that, if Cisneros had structured payments to avoid the filing of a CTR, that would have compounded the issue in his confirmation.⁵⁹²

Likewise, the ranking minority member of the Banking Committee, Senator Alfonse D'Amato (R-NY), told the OIC that a lack of candor on the part of Cisneros would have been unacceptable and that he would not have supported Cisneros's nomination if he was aware of the fact that Cisneros was not fully candid during the confirmation process.⁵⁹³ D'Amato further stated that the fact that Cisneros had made two \$8,000 payments to Medlar in a two-day period would have been a "red flag" to everyone that Cisneros was attempting to avoid the CTR filing requirements, and that neither he nor any other members of the Banking Committee would have voted to confirm Cisneros had they known about this.⁵⁹⁴ D'Amato further stated that other disqualifying factors would have included evidence that the payments were hush money and evidence that Cisneros attempted to avoid the payment of gift taxes.⁵⁹⁵

At the conclusion of his OIC interview, D'Amato was shown a copy of a December 1994 letter he had sent in response to a letter from Cisneros's attorney, Cono Namorato. The Senator wrote that "the specific amount of the payment made by Secretary Cisneros to the person in question would not have changed my judgment concerning Secretary Cisneros' qualifications for confirmation."⁵⁹⁶ Regarding the apparent conflict between his position in the letter and his comments to the OIC, D'Amato stated that he would never have indicated that the amount of the payments did not matter to him had he been aware that Cisneros had intentionally withheld the true amount.⁵⁹⁷

However, information about Cisneros's inconsistent statements, or about the true extent of his payments, was not made available to the members of the Senate Banking Committee in January 1993. On January 12, 1993, the Senate Banking

⁵⁹² *Id.*

⁵⁹³ OIC Interview Report D'Amato 12/1/97 at 1.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.* at 2.

⁵⁹⁶ GJ 97-1 Ex. 514.

⁵⁹⁷ OIC Interview Report D'Amato 12/1/97 at 2.

Committee held Cisneros's confirmation hearing.⁵⁹⁸ The Committee raised neither Cisneros's relationship with Medlar nor his payments to her.⁵⁹⁹ In fact, Medlar was not mentioned at all during the hearing.⁶⁰⁰

On January 15, 1993, in a taped conversation, Cisneros and Medlar discussed what the FBI had uncovered about the payments:

LM: And so, what, did they have any amounts?

HC: I don't know. I don't know what they But, it's just amazing to me, they talked to sixty-five people, and most of 'em about this. So they picked up bits and pieces and they, and, I mean, they had me dead to rights on some things. They asked me, for example, in the interview with me . . . last week, latter part of last week, "When (US) is the last time you talked to her?" And I said, "Well, we talked, you know, through late 1992."

LM: (Laughs) Why do you lie to them?

HC: Well, I wudn't lying. It was true. I talked to you in late nin-, you know, late 1992. I mean, this was like the first week of January. And - and he said, "Well, we have uh, we have uh, we learned that she called your office on December 29 and said that if you didn't call her back, she would take action."

LM: Well, that must've been from Sylvia [Arce-Garcia].

HC: No, it was from John [Rosales]. See John's a journalist. And he felt that if they asked him direct questions he could not lie. So, being the amateur that he is, I mean he just spilled his guts. (Laughs)

LM: Hum.

⁵⁹⁸ GJ 97-1 Ex. 376.

⁵⁹⁹ See GJ 97-1 Ex. 376 (Confirmation Hearing Tr. 1/12/93).

⁶⁰⁰ *Id.*

HC: And they asked everybody. They went through Rene the accountant.⁶⁰¹ And when they couldn't get it from him, they went to Luis the accountant. And they finally figured out the discrepancy between what comes in and what goes to other expenditures.

LM: Mhm-hmm.

HC: And they did have that figure.

LM: And what did they ask you?

HC: They, they didn't ever talk to me . . . well, they did, I guess, they talked amounts, and I gave 'em the same fact situation that I had given 'em before. So it was real delicate.

LM: Is that basically why it didn't come up in the hearing?

HC: No, let me tell you something. It's in the report. It's in the FBI report.

LM: Uh-huh.

HC: The FBI report is . . . like forty pages.

LM: Yeah.

HC: (Sighs) And, in the FBI report is . . . not, ah, a full discussion of our situation and also the money. And it estimates . . . sixty thousand dollars Because that's the discrepancy. See, they took, they had an interview, they had FBI agents here in San Antonio, they had FBI agents in Washington. When I talked to you last week and you were so angry with me, I thought I was dead. I mean, I thought it was over. And it wasn't what you would do, it's was already, it's what the FBI was already getting. . . .⁶⁰²

⁶⁰¹ This refers to Rene Gonzalez, Cisneros's former accountant, who preceded Luis Hernandez. OIC Interview Report Gonzalez 11/16/95 at 1-2.

⁶⁰² Medlar Tape Transcript Q-20 1/15/93 at 4-6.

Cisneros then described to Medlar the discussions he had in Washington, D.C. with the Transition Team regarding the contents of the FBI Report:

HC: . . . I went, I had a private meeting with the lawyers in Washington, where they worked me over with every possible follow-up, prosecutorial question.

LM: And so what did you tell 'em?

HC: I told 'em, you know, I told 'em, I, well, finally what it boils down to is the truth. I mean, the fact of the matter is, I have helped you all along, because I wanted you to have what you needed. Not because, as I've told you many, many, many, many times, because I was afraid of what you would do.

LM: But how much do they think you've given?

HC: What?

LM: What do they think you've given?

HC: Well they don't know, I mean, the FBI thinks, I mean, the FBI has virtually the truth, because they just figured it out. So it's in the report. Now, on Monday afternoon, my, my, my thing is Tuesday, on Monday evening, I get a call from the Clinton ethics people . . .

LM: Mhm-hmm.

HC: . . . to tell me that they just have been through the FBI report, and that as far as they have read it, at that moment they've read about half of it, there's nothing in there that hasn't been known, or I haven't been forthright about, that hasn't been public, or that can't be faded.

LM: (Sighs)

HC: Now, the FBI report is supposed to go to the Senate on Thursday afternoon. But they're still working on it on Monday.

LM: Mhm-hmm.⁶⁰³

In another January 15, 1993 telephone conversation taped by Medlar, Cisneros and Medlar continued discussing the FBI background investigation and his confirmation hearing:

HC: . . . Uhhh . . . anyway I was telling you, where was I?

LM: The FBI report on Monday.

HC: Yeah. So on Monday, now they worked all week, they dispatched extra agents over the weekend on this.

LM: Oh, is that why they came to see me?

HC: Uh-huh. I mean, see, what happened is this: The FBI was complaining; there was a story in the *Washington Post* that the FBI was complaining that . . . they hadn't been given enough time with the first round of people who went to hearings, like Ron Brown last week. The FBI is complaining that they usually get, by law they're supposed to have two weeks notice, but they were ten days and a weeks notice and less. And Ron Brown came up, and Ron Brown ended up being very controversial; he's been in trouble all the way. Okay?

LM: Uhm-huh.

HC: So. With me, they got more than two weeks because I was on the transition, and I've been talked about as possible Cabinet for a long time, and they've had my forms for, you know, since I went on the transition thing. So they started on me pretty early. And the FBI loves things that have to with . . . sex and intimacy and so forth. They're real bad at tracking down financial things 'cause they're not accountants and so forth, but they just, they're, they're just righteous guys who love to get into this stuff. I mean, they're just gossipers and (takes breath) scandalizers like everybody else, you know. So, by the way, the FBI is, I have found out, is heavily, well, who knows, never mind. Anyway. I don't want to talk on this phone, if it's tapped, I don't want to say anything that . . . (laughs)

⁶⁰³ *Id.* at 6-7.

LM: On your phone? Why would they tap your phone?

HC: Uh. People tell me my phone's been tapped all along, so . . .

LM: Oh, I don't believe that.

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HC: . . . So anyway, so then Monday afternoon rolls around, and I'm, I'm, I'm cooked. I mean, I figure, first of all the Committee's supposed to have it on Thursday. The Senate Committee is supposed to have it on Thursday; it goes to the Chairman. The ranking minority member has an opportunity to see it. But it doesn't go to the Chairman in my case, 'til Monday night, like eleven o'clock at night. It could have stalled the hearing if he had wanted it, but he's a Democrat, and he's a pro, and got his own problems and so forth. But he is pretty stringent about the FBI reports. So, I go into the Committee and, to my knowledge, he hasn't seen it, but he scanned it, and D'Amato hasn't seen it . . . Okay. But D'Amato's got his own problems too. He's up for an ethics investigation. . . . So it doesn't come up in the hearing at all . . . at all. But . . . which surprised me a little bit, except that the Republicans have all been saying positive things in the press . . . and D'Amato had been saying "Bullshit, we're not gonna get into the personal stuff," and-and Phil Gramm's got . . . that investigation on him in Maryland, so he's not anxious to get into ethics stuff . . .

LM: Just wait though, that could come back to haunt you.

HC: That they didn't bring it up?

LM: Uhm-hmm.

HC: Well, yes it could. And frankly I would have preferred a question, so I could get it out on the record . . . and answer it.

LM: But . . . what were you gonna say if they'd said something about the amount?

HC: Well, I was gonna do my very best to-to-to answer the way we had agreed, which is what, the position I've taken all along.⁶⁰⁴

Cisneros then told Medlar about a conversation he had had with Riegle regarding the payments two days after his confirmation hearing:

HC: I - I forgot to tell you, I mean, I, uh, I - I, we got off the subject. On, two days after the hearing, I called Senator Riegle, because he's the Chairman of the Committee and I'm gonna have to deal with him a lot. I called to share with him some of my thinking about Assistant Secretaries, and I said, "I - I need to talk about something sensitive with you," and it was a person that I'm thinking of hiring who's coming off of their staff . . . for Chief of Staff. And, uh, he said, "Well, I'm glad you're showing that kind of candor with me, because I want to talk about something sensitive with you, too." And then we got into the payments question . . .

LM: Uhm-hmm.

HC: . . . from the FBI report . . .

LM: Uhm-hmm . . .

HC: . . . and he, uh said, "Look, I - I - I need your explanation, and I need, uh, I need it," and he said, "I may send you some questions in writing, because, uh, obviously if it comes up again in the future, uh, someone may ask whether or not the FBI knew it, and they did, and then they may ask, 'Well, if the FBI knew it, why didn't the Senate Committee pursue it,' and I wanna be able to say that I did."

LM: And so what did you tell him?

HC: I told him, uh, I didn't - he didn't get into numbers or anything like that. Now, the only question standing at this moment is whether D'Amato is going to, uh, want it. He's the only person who has access to it . . .

LM: I wouldn't think he would.

⁶⁰⁴ Medlar Tape Transcript Q-21 1/15/93 at 1-4.

HC: Well, he has said he doesn't give a shit. I mean, he has said that to me in those words, you know . . .⁶⁰⁵

Cisneros and Medlar continued to discuss the contents of the FBI Report and what Cisneros had told Riegle about the payments:

HC: I told him that . . . why I did it.

LM: And that's all that was said about it?

HC: Uhm-hmm. The FBI report makes clear it was not hush money. The FBI report itself in this, in the, in the paragraph that deals with the issue, says it was not hush money.

LM: What did they say it was?

HC: Assistance . . . understandable under the circumstances . . . your move to Lubbock . . . and so forth.

LM: But he doesn't know any dollar amount?

HC: It's in the, it's in There, there are speculations in the report.

LM: Sixty thousand dollars in assistance?

HC: That's what it says? It says, you know, it doesn't actually assu-, uh, you know, uh, estimate the sixty, but it says that that's the, that's the amounts . . . that it could be, judging from the way our accounting is.

LM: And so what did the Clinton people say when they . . . read that?

HC: They, uh, that's, I mean, they, they said it was not a problem, because it's characterized as, as assistance.

LM: Did anybody remark that, uh, I didn't talk to the FBI?

HC: I don't know.

⁶⁰⁵ *Id.* at 9-10.

LM: See, because they had wanted to get back in touch . . .

HC: Oh yes, yes, the FBI report says you were, uh, ill . . . it does.

LM: Hmm.⁶⁰⁶

Cisneros and Medlar then discussed threats that Medlar had made to Cisneros and Medlar's decision not to provide information damaging to Cisneros to the FBI or the press:

LM: . . . And on top of everything, Henry, you have not been that con-, you haven't been concerned about me. I didn't get any flowers from you; I didn't get a card; I didn't get a note.

HC: Yeah. You don't understand, I mean, every time I do something like that, you end up, you threatening me with it.

LM: Huh?

HC: You do.

LM: Henry.

HC: You do.

LM: Henry, if I was gonna do anything to you, don't you think that FBI report would have been the . . .

HC: Look, ya know . . .

LM: I mean . . .

HC: If you're me, how could you separate 'em? I mean, how could you separate when you're serious and when you're not serious, and when you're threatening, and when you're just angry, ya know?

⁶⁰⁶ *Id.* at 12-13.

LM: Well, in the first place if I'd ever done it before, I guess, ya know. I mean, Honey, I'm sm-, as smart, as they come; I know exactly what would do you in. I've always known that. I knew exactly who I could have called and all this other stuff. I'm not dumb. I wouldn't have called the press, you know, but the FBI report could have done you in. It could have done you in with Clinton . . . I mean, and - and certain things like that, which I told you I wouldn't do. You know, and I've never done it before. I haven't gone to the press, even when the press has called me. You and Mary Alice have been the ones who have bad mouthed me.

HC: No.

LM: Hon . . .

HC: Okay, okay, okay, okay. I gotta go.⁶⁰⁷

As the conversation continued, Cisneros expressed his concern that the "scandal" would be revealed:

HC: I'll call you in the next couple of days.

LM: No, you won't either.

HC: I promise you I will. The only reason I didn't . . . was - was the last conversation you had, you busted me good, I mean, I was wiped. I figured it was gonna be gone that day; (US in background) and I was gonna embarrass Clinton and the whole country, and have lost everything.

LM: You figured what?

HC: That I had lost everything, I mean, company, boards, honoraria, John Paul, all of it, because I was gonna self-destruct before the whole country in a white flot- white hot flash of scandal - it's over. I just, you know, I just, I mean, I was sick.⁶⁰⁸

⁶⁰⁷ *Id.* at 25-26.

⁶⁰⁸ Medlar Tape Transcript Q-21 1/15/93 at 30.

On the same day as this conversation, January 15, 1993, Cisneros executed a request to liquidate his Lincoln Benefit Life insurance annuity.⁶⁰⁹ He submitted the request two days later.⁶¹⁰

On January 18, 1993, Patsy and Allen Wooten received a mortgage loan of \$78,100 from the Plains National Bank and closed on the house they were purchasing on Medlar's behalf with funds she had received from Cisneros.⁶¹¹ One condition of the loan was that they occupy the property they were purchasing.⁶¹² Although they were actually purchasing the house for Medlar to occupy, the Wootens signed numerous bank documents in which they falsely declared their intention to occupy the property. The Wootens affirmed that they intended to occupy the house as their "primary residence" on a "Uniform Residential Loan Application."⁶¹³ They signed an "Affidavit and Agreement" stating that they would in "good faith . . . occupy the Property."⁶¹⁴ They signed a "Deed of Trust" which stated that the "[b]orrower shall occupy, establish, and use the Property as Borrower's principal residence."⁶¹⁵ They further indicated that they "intend[ed] to occupy the premises as our home" on an "Owner Occupancy Affidavit."⁶¹⁶

Furthermore, to obtain the loan, Patsy Wooten falsified information on two "Request for Verification of Employment" ("VOE") forms to be completed by the Wootens' company, West Texas Lighting ("WTL"). She misstated her husband's salary and made up a monetary bonus to "beef up the application."⁶¹⁷ Patsy Wooten then forged Marcella Wooten's signature on both forms on behalf of WTL, as the

⁶⁰⁹ GJ 97-1 Ex. 466 at 2.

⁶¹⁰ GJ 97-1 Ex. 466 at 1.

⁶¹¹ Bank Note 1/18/93 (signed by Allen & Patsy Wooten).

⁶¹² Fannie Mae Affidavit and Agreement 1/18/93 at representation 7.

⁶¹³ Uniform Residential Loan Application 1/18/93.

⁶¹⁴ Affidavit & Agreement 1/18/93.

⁶¹⁵ Deed of Trust 1/18/93 at ¶6.

⁶¹⁶ Owner Occupancy Affidavit 1/18/93.

⁶¹⁷ OIC Interview Report Patsy Wooten 1/6-8/98 at 11.

Wootens' employer.⁶¹⁸ Marcella Wooten was married to Patsy Wooten's son Michael and was nominally a WTL employee.⁶¹⁹

A few days later, on January 19, 1993, two days before Cisneros took office, payments from Cisneros for \$845 and for \$1,000 were deposited into Medlar's Broadway National Bank account.⁶²⁰ These payments brought the number of Cisneros's payments to Medlar during the less than three months of the transition and confirmation process to ten, and the total to \$31,845.

5. Secretary Cisneros's Continuing Relationship with Medlar

After Cisneros became the Secretary of Housing and Urban Development, his relationship with Medlar posed a continuing problem for him. He no longer had the financial means to keep up his payments to her at their previous levels. However, because she knew about the false statements that Cisneros had made throughout the appointment process, she was well positioned to cause considerable harm to his reputation and, by extension, to that of the Clinton administration, if she became dissatisfied with Cisneros. The investigation uncovered various efforts to exploit Cisneros's position as HUD Secretary, and to tap his political supporters outside the government, to provide Medlar with financial support.

a. Continuing Payments to Medlar

William Jefferson Clinton was sworn in as the forty-second President of the United States on January 20, 1993. That same day, Cisneros's nomination for Secretary of HUD was officially submitted,⁶²¹ and DOJ-PSO granted Cisneros's

⁶¹⁸ *Id.*; OIC Interview Report Patsy Wooten 8/20/97 at 2; OIC Interview Report Marcella Wooten 7/16/97 at 2.

⁶¹⁹ OIC Interview Report Marcella Dillard Wooten 9/12/96 at 1, 3. Marcella Wooten informed the OIC that she did not really work for WTL, even though she drew a salary. *Id.*

⁶²⁰ OIC Chart of 1993 Payments to Medlar.

⁶²¹ GJ 97-1 Ex. 452.

security clearance.⁶²² On January 21, 1993, the Senate confirmed Cisneros's nomination, and he was formally appointed to the position.⁶²³

On January 21, 1993, before the Senate confirmation vote, Medlar and Cisneros spoke about his continuing payments to her and the possible legal ramifications of his false statements to the FBI:

LM: You don't feel like you have any problems?

HC: Umm . . . (clears throat) I don't think so. I mean, alls I'm working with the Senators on the problems in their states and stuff, you know, and they're all being very positive. And it could be as early as tonight that the Senate votes . . . and uh, if that's the case, uh, they're talking about maybe a mass swearing in over the weekend, just swearing everybody together . . . all the cabinet officers together that are ready.

LM: When will you be back to San Antonio?

HC: I won't.

LM: Henry! Then how is this other gonna work?

HC: What?

LM: The money?

HC: Oh, it - it - it - it's, it will be fine.

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LM: How are you going to do that from Washington?

HC: Well, Sylvia [Arce-Garcia] is still there.

⁶²² Letter from Hamilton to Rubino 1/20/93.

⁶²³ GJ 97-1 Ex. 452; *Washington Post*, "Senate votes to confirm all but two of Clinton's Cabinet nominees" 1/22/93.

LM: Oh, please! Don't do it through Sylvia.

HC: Well, in that case she'll just wire, fo-, wire me the money, and I'll take care of it. I mean, if - if, (UI) they do it from here. Uh . . . and uhm . . . and - and then I'm still cashing in these annuities and stuff, but they - they haven't come in yet. But when they do, I mean, I'm gonna take that full amount and put it in an account. We gotta - gotta figure out how you have access to that account, you know, to draw it down.

. . .

LM: Uhm, she [Mary Alice Cisneros] has no idea about any of the money that's coming . . .

HC: Uhm

LM: . . . or anything like that?

HC: No, I mean, she doesn't have any idea of the amounts involved, no.

LM: But she doesn't think you're still giving me money, does she?

HC: No.

LM: So what would they do, I mean, what would the . . . well, never mind.

HC: What would happen if . . . if it were not a Republic-, is that what you're saying?

LM: Yeah. What would happen if the FBI . . .

HC: Came back?

LM: . . . came back?

HC: I don't know You know, blackmail or something like that. That, that'd be the only . . . illegality. I mean, they can't say I lied to 'em, because it's in, it's in the FBI report, you know.

LM: Yeah, but it's in, it's, you had told them that it was . . .

HC: The FBI report talks in terms of sixty thousand dollars.

LM: I know, but you told them point blank that it was less than that.

HC: Yeah, but the FBI report speculates as to what it is.

LM: And did Clinton or any of the attorneys ever say anything to you?

HC: Mm-mm.

LM: And do you, do you think that can be construed as some sort of cover up?

HC: No . . .

LM: Because . . .

HC: . . . because it's in the FBI report and it went to the Senate.

LM: That's what I mean, because Riegle or none of the Senators even asked you about it.

HC: No. They regard it as uh, th-, I, yeah, Riegle talked to me about it, I told you that.

LM: Uhm-hmm.

HC: And he was satisfied with the explanation. And he wanted to make sure that we talked about it. It's in the realm of personal . . . as opposed to overtly . . . eth-, unethical conduct, you know. It's in the realm of personal. It may be inappropriate, it may have been unwise, all of that. But it's not illegal, and it was my, it was my call as to what I did with my money lawfully gained, and I paid taxes on it, you know. (US)

LM: I guess you got everything figured out.⁶²⁴

⁶²⁴ Medlar Tape Transcript Q-23 1/21/93 at 8-14.

Seven days later, on January 28, 1993, \$5,000 was deposited in Medlar's Broadway National Bank account.⁶²⁵

Medlar repeatedly attempted to contact Cisneros in Washington, D.C. in early February 1993.⁶²⁶ When Cisneros called Medlar from his office during this time period, he sometimes used a private credit card on his office phone, and sometimes even used a HUD pay phone.⁶²⁷ Medlar also exchanged calls with Frank Wing, Cisneros's friend and Senior Advisor at HUD, on numerous occasions during this period.⁶²⁸

In February 1993, Cisneros cashed out some of his retirement accounts to provide funds for Medlar. On February 9, 1993, Cisneros opened a checking account at Crestar Bank in Washington, D.C. with \$29,686.06 he had received from his

⁶²⁵ OIC Chart of 1993 Payments to Medlar.

⁶²⁶ In fact, Medlar made 13 calls to HUD within a 20-minute period on February 1, 1993. Cisneros Event Chronology at 99-100. Medlar also called six Washington, D.C. hotels during a 16-minute period on February 1, 1993. *Id.* at 101.

⁶²⁷ Medlar Tape Transcript Q-25 3/93 at 1-2.; *see, e.g.*, Cisneros Event Chronology at 98 (1/29/93 call from Cisneros's calling card (via HUD pay phone) to Medlar for 4 minutes).

⁶²⁸ Cisneros Event Chronology at 100 (2/1/93 Medlar call to Wing for 1 minute); *Id.* at 101 (2/2/93 Medlar call to Wing (HUD) for 1 minute); *Id.* (2/2/93 Wing call (from home) to Medlar for 22 minutes); *Id.* (2/2/93 Wing call (from home) to Medlar for 23 minutes); *Id.* at 102 (2/3/93 Medlar call to Wing (HUD) for 1 minute); *Id.* (2/4/93 Wing call (from home) to Medlar for 9 minutes); *Id.* at 103 (2/6/93 Medlar call to Wing (at home) for 1 minute); *Id.* (2/6/93 Medlar call to Wing (at home) for 19 minutes); *Id.* (2/7/93 Medlar call to Wing (at home) for 1 minute); *Id.* (2/7/93 Medlar call to Wing (at home) for 1 minute); *Id.* (2/7/93 Wing call (from home) to Medlar for 27 minutes); *Id.* at 104 (2/7/93 Medlar call to Wing for 4 minutes); *Id.* (2/7/93 Medlar call to Wing for 8 minutes); *Id.* (2/8/93 Medlar call to Wing (HUD) for 3 minutes); *Id.* at 105 (2/8/93 Medlar call to Wing (HUD) for 1 minute).

Lincoln Benefit Life annuity.⁶²⁹ Cisneros also opened a Money Market account at Crestar Bank with another \$20,000 he had received from Lincoln Benefit Life.⁶³⁰

On the same day, February 9, 1993, Cisneros called Medlar; he informed her that he had had begun wiring her funds in increments of about \$7,500:

HC: Ah, I just want to tell you. I - I, I went to the bank, deposited the money that I have in an account (clears throat) here, and then wired you, ah, seventy-five hundred dollars . . .

LM: (Sighs)

HC: . . . which, ah, is the most that I could wire given that it's the first day that I opened the account. And, ah, that is now in your account, ah, for use to pay, you know, what bills you need to, and I will wire you an additional sum, ah, either tomorrow, or day after tomorrow, as soon as they let me and they tell me that the bank is clear. The, in other words, the - the bank had a problem because the - the check has to clear. And I had to get special permission from the manager in order to even send the seventy-five hundred.

LM: All right, now, you wired it to my bank?

HC: Correct.

LM: So, it's in my account?

HC: It- it will be as soon as it goes through the Federal Reserve this afternoon. But certainly by morning you'll have it. In other words, if it's not done this afternoon, it will be available for spending in the morning. You - you're - you're safe to write a check today, I think, but . . . ah, because it'll be there.

LM: And when will the rest come?

⁶²⁹ Crestar Account Summary 2/9/93 deposit of \$29,686.06.

⁶³⁰ Crestar Account Summary 2/9/93 deposit of \$20,000.

HC: Well (clears throat), that's the only question . . . is how long it takes the bank to be comfortable that my check has cleared. But I gue-, I'll, I'll send it to you, ah, let's see, what's today? Tuesday? I'll send it to you Thursday or Friday.

LM: And you'll send the whole sum?

HC: Uhm (clears throat), why don't I send another amount similar.

LM: Why?

HC: Because I can't send you increments of - of larger than about that size.

LM: Henry, I want this all done so that I don't have to call you on things and you don't have to call me.

HC: Okay. All right.

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LM: . . . but I'm just saying, this does not include the medical.

HC: Right, correct.

LM: And when do think you'll need, you'll have that?

HC: I don-, right now I don't have it. I'm waiting on those annuities and so forth that I've cashed in - those insurance and retirement and all that . . . to come in.

LM: I thought that's what this was.

HC: This is one.

LM: And so when do you think that'll be? I mean, I need to get this all straight in my head.

HC: Uhm, Anna Marie Ornelas, who is the insurance person in San Antonio, tells me that it was being sent today, so another few days.

LM: So you'll be able to send all of it . . . within about a week?

HC: Yeah.

LM: And then it . . . our communication will be over with until next January?

HC: Well, that's up to you. I mean, I'm here if you need me.⁶³¹

Cisneros then told Medlar that liquidating his retirement assets to pay her would probably result in adverse tax consequences for him, and that he had to be careful not to transfer large sums of money to her at any one time because doing so would set off "alarms":

LM: All right, so you will call me no later than Friday morning?

HC: Correct. Friday during the day. But I knew you had some bills to pay right away, so I - I thought you needed this. So I got permission from the manager, even though they don't do this, because they wait for the check to clear before they let a person, you know, take money. But it was a check from an insurance bank company and, you know, so he assumed it was a good check, even though it will take a few days to clear.

LM: All right. And there's no problem in doing that?

HC: Well, I'm sure it's a big tax problem for me probably, but, but, but, but . . . and then I don't know what other, you know, now-a-days anytime a big chunk hits a . . . a bank it, ah, sets off all kinds of alarms because of drugs an' . . . and so forth. So, but I just don't know, I mean, I . . . this is different than what I could do in San Antonio, when I could go and take cash and put it in there myself.⁶³²

On the next day, February 10, 1993, \$7,500 was wired from Cisneros's Crestar checking account to Medlar's First National Bank of Lubbock account.⁶³³

⁶³¹ Medlar Tape Transcript Q-24 2/6/93 at 1-3. The OIC believes this conversation actually took place on February 9, 1993. See OIC Corroboration Chart for Q-24.

⁶³² *Id.* at 4.

⁶³³ Crestar Bank General Ledger 2/10/93 showing \$7,500 transfer from
(continued...)

On February 12, 1993, three checks totaling over \$36,000 were forwarded to Cisneros, following his complete surrender of his Mass Mutual IRA annuities.⁶³⁴ The letter accompanying the checks advised Cisneros that “these are taxable proceeds as Mass Mutual will report these distributions to the IRS. Inform your CPA of this transaction when you file your taxes for 1993.”⁶³⁵ Cisneros’s insurance representative Annamaria Ornelas told the OIC that she had previously advised Cisneros not to make the withdrawals because he would have to pay a penalty, but that Cisneros had told her, “I need it, I want to do it.”⁶³⁶

On February 16, 1993, \$15,000 was wired from Cisneros’s Crestar checking account to Medlar’s First National Bank of Lubbock account.⁶³⁷ Then, on February 24, 1993, another \$15,000 was wired from Cisneros’s Crestar money market account to Medlar’s First National Bank of Lubbock account.⁶³⁸ (Telephone records show that Medlar called both Cisneros and Wing on this day.⁶³⁹) A \$10,873.45 payment followed on March 15, 1993.⁶⁴⁰ Cisneros then paid Medlar \$15,000 on July 16, 1993,⁶⁴¹ \$4,000 on October 12, 1993, and \$1,300 on December 3, 1993.⁶⁴²

⁶³³(...continued)

Cisneros to Medlar; Medlar Bank Statement 2/10/93 showing \$7,500 deposit.

⁶³⁴ Letter from Ornelas to Cisneros 2/12/93.

⁶³⁵ *Id.*

⁶³⁶ IRS Interview Report Ornelas 10/3/96 at 2.

⁶³⁷ Crestar Bank General Ledger 2/16/93 showing \$15,000 transfer from Cisneros to Medlar; Medlar Bank Statement 3/15/93 showing \$15,000 deposit on 2/16/93.

⁶³⁸ Crestar Bank General Ledger 2/24/93 showing \$15,000 transfer from Cisneros to Medlar.

⁶³⁹ Cisneros Event Chronology at 112 (2/24/93 call from Medlar to Cisneros (HUD) for 2 minutes); *Id.* (2/24/93 call from Medlar to Wing (HUD) for 1 minute).

⁶⁴⁰ Crestar Bank General Ledger 3/15/93 showing \$10,873.45 transfer from Cisneros to Medlar.

⁶⁴¹ 7/8/93 Frost National Bank Cashier’s Check #2889749 for \$15,000; 7/16/93
(continued...)

Cisneros made the July 16, 1993 payment of \$15,000 by signing over to Medlar a cashier's check from his attorney, Seagal Wheatley. On January 15, 1993, Cisneros received a check for \$200,000 as payment for his common stock in CAMCO.⁶⁴³ On July 1, 1993, Cisneros deposited the check into his Washington Federal Savings Bank account, which was in his wife's name as well as his own.⁶⁴⁴ On July 1, 1993, Cisneros wrote a check on that account for \$25,000 to Wheatley's law firm, with the notation "Legal."⁶⁴⁵ On July 2, 1993, the check was deposited, with \$10,000 going into the firm's operating account and \$15,000 going into the firm's Interest on Lawyer Trust Account ("IOLTA").⁶⁴⁶ (IOLTAs are intended to house client funds, including advances for costs and expenses. They are not intended for funds belonging totally to the attorney or the law firm.⁶⁴⁷) Six days later, on July 8, 1993, Wheatley withdrew \$15,000 from the IOLTA Trust Account and purchased a cashier's check for \$15,000 payable to Cisneros.⁶⁴⁸ Cisneros endorsed the check over to Medlar, who deposited it into her FNB Lubbock account on July 16, 1993.⁶⁴⁹ Because the transaction was executed in this manner, the bank records accessible to Cisneros's wife showed only a payment to his attorney, with no indication that \$15,000 had gone to Medlar.

⁶⁴¹(...continued)
FNB Lubbock Deposit Slip for \$15,000.

⁶⁴² OIC Chart of 1993 Payments to Medlar.

⁶⁴³ 6/15/93 Texas Commerce Bank check #4608 for \$200,000.

⁶⁴⁴ Washington Federal Savings Bank Statement ("Washington Federal")
7/30/93.

⁶⁴⁵ 7/1/93 Washington Federal check #0154 for \$25,000.

⁶⁴⁶ 7/2/93 Frost National Bank Deposit Ticket for \$10,000 to Wheatley & Sharpe LLP account; 7/2/93 Frost National Bank Deposit Ticket for \$15,000 to IOLTA Trust Account.

⁶⁴⁷ See Model Rules of Professional Conduct Rule 1.15.

⁶⁴⁸ 7/8/93 Frost National Bank check #1013 for \$15,000; 7/8/93 Frost National Bank Cashier's Check #2889749 for \$15,000.

⁶⁴⁹ 7/8/93 Frost National Bank Cashier's Check #2889749 for \$15,000; 7/16/93 FNB Lubbock Deposit Slip for \$15,000.

Medlar told the OIC that, in July 1993, Cisneros said that Wheatley would be sending her \$15,000.⁶⁵⁰ However, according to Medlar, Cisneros later told her that Wheatley was nervous about sending money directly to her and that he (Cisneros) would get a check and endorse it over to her.⁶⁵¹

During a November 21, 1997 interview, the OIC asked Wheatley about this transaction. Wheatley denied acting as a conduit of funds from Cisneros to Medlar.⁶⁵² He then claimed attorney-client privilege on all information surrounding the July 8, 1993 cashier's check for \$15,000.⁶⁵³

Overall, Cisneros's payments to Medlar in 1993 totaled almost \$80,000.

Cisneros's 1993 Payments to Medlar

Payment Date	Payment Amount
January 4, 1993	\$4,000.00
January 19, 1993	\$845.00
January 19, 1993	\$1,000.00
January 28, 1993	\$5,000.00
February 10, 1993	\$7,500.00
February 16, 1993	\$15,000.00
February 24, 1993	\$15,000.00
March 15, 1993	\$10,873.45
July 16, 1993	\$15,000.00
October 12, 1993	\$4,000.00

⁶⁵⁰ OIC Interview Report Medlar 4/27/96 at 3.

⁶⁵¹ *Id.*

⁶⁵² OIC Interview Report Wheatley 11/21/97 at 4.

⁶⁵³ *Id.*

December 3, 1993	\$1,300.00
TOTAL	\$79,518.45

b. Medlar’s Efforts to Exploit Cisneros’s Position

In December 1992 or early 1993, Medlar, her sister Patsy Wooten, and Patsy’s son Michael Wooten discussed the possibility of starting a HUD management company.⁶⁵⁴ Patsy Wooten stated that the idea came from either Michael Wooten or Medlar as a means of “getting in on the HUD money,” and that Medlar said that she would look into it and contact Cisneros.⁶⁵⁵ Michael Wooten said that the idea of using HUD contacts originated with Medlar, who wanted a cut.⁶⁵⁶ Patsy Wooten said that Medlar was concerned about her compensation for opening doors through her relationship with Cisneros, and that Michael Wooten told Medlar she would be paid a commission.⁶⁵⁷ Michael Wooten told the OIC that Cisneros became a “definitive door” to HUD business opportunities after his confirmation,⁶⁵⁸ and that he had suggested that Medlar use her relationship with Cisneros to the benefit of the proposed company.⁶⁵⁹ Michael Wooten also informed the OIC that, without Medlar’s contacts at HUD, he would have never pursued any HUD contracts.⁶⁶⁰

According to Medlar and Michael Wooten, any income that Medlar earned from the business venture was meant to offset money Cisneros otherwise would have

⁶⁵⁴ OIC Interview Report Patsy Wooten 6/30/96 at 11-12; OIC Interview Report Michael Wooten 7/11/96 at 10.

⁶⁵⁵ OIC Interview Report Patsy Wooten 6/30/96 at 12.

⁶⁵⁶ OIC Interview Report Michael Wooten 7/12/96 at 1.

⁶⁵⁷ OIC Interview Report Patsy Wooten 6/30/96 at 12.

⁶⁵⁸ OIC Interview Report Michael Wooten 7/12/96 at 3.

⁶⁵⁹ OIC Interview Report Michael Wooten 6/29/96 at 4; *see also* OIC Interview Report Patsy Wooten 6/30/96 at 12.

⁶⁶⁰ OIC Interview Report Michael Wooten 7/12/96 at 1.

paid her.⁶⁶¹ Medlar testified that she and Cisneros discussed the fact that, if the company were formed, she could work for the company and be paid for the work she did.⁶⁶²

According to Michael Wooten, Medlar told him to telephone Cisneros when he became Secretary of HUD.⁶⁶³ Medlar contacted Cisneros on January 15, 1993 to set up Wooten's call. Before bringing up the business venture, she discussed the substantial cost to Cisneros of her medical bills and described how Michael Wooten would be helping her with health insurance in the future:

LM: The hospital bill, well, I can send you a copy of it, the hospital bill is seventy-nine hundred. That's just the hospital. The doctor's a little over three thousand. The ER is something, it seems like, six hundred or something like that.

HC: Uhm-hmm.

LM: But it's not done . . .

HC: I understand.

LM: . . . because the, of the . . . some, you know, other things going on.

HC: Okay.

LM: So, anyway, uhm . . . I think you're in for a rocky road.

HC: Looks like it, dudn't it?

LM: Yeah.

⁶⁶¹ OIC Interview Report Michael Wooten 7/15/97 at 1; Suppression Hearing Tr. Medlar 6/21/99 at 151-52.

⁶⁶² Suppression Hearing Tr. Medlar 6/21/99 at 152.

⁶⁶³ OIC Interview Report Michael Wooten 6/29/96 at 10; OIC Interview Report Michael Wooten 7/11/96 at 11.

HC: I'm gonna be flat busted when this thing's done.

• • •

LM: . . . Oh, by the way, Michael has put me on his insurance plan.

HC: That's good.

LM: So, hopefully this will never happen again.

HC: But you have to pay a premium.

LM: Yeah, I have to pay it monthly, but at least it's a good plan.

HC: Yeah, that's good.⁶⁶⁴

Medlar then immediately raised the issue of the property management company:

LM: And, uh, he's starting a management company, that, uh, Patsy is gonna be . . .

HC: Property management?

LM: Yeah, he wants to do some management.

HC: That's good.

LM: And Patsy's gonna be the head of it, so it'll be a minority.

HC: Woman-owned?

LM: Yeah.

HC: That's great!

⁶⁶⁴ Medlar Tape Transcript Q-22 1/16/93 at 5-8. The OIC believes this conversation actually took place on January 15, 1993. See OIC Corroboration Chart for Q-22.

• • •

HC: What - what - what will it do?

LM: . . . Truthfully? I'm - I'm not really sure. It's something to do, his attorney has - has done this before, and it has, it does have something to do with HUD.

HC: Is that right?

LM: Uh-huh. Has something to do with management of . . .

HC: Of - of - of properties.

LM: . . . of the HUD properties, yeah.

• • •

LM: . . . Uh, Michael wanted me to talk to you and ask you exactly, you know, kind of what the ins and outs are of it.

HC: I'll find out.

LM: You know, and who he has to talk to, and But he's doing me a great favor just by doing the insurance and . . . said he'd try to work a deal where he can get my car insurance done through the company or something.

HC: That's great.

LM: . . . you know, because they've seen what I've gone through this time. And then Patsy, naturally, is putting everything in her name. So, I told them if they needed any questions ask-, answered at least I could get the answers for them.

HC: Sure.

LM: Ya know.

HC: Yep.⁶⁶⁵

After Cisneros took office, Medlar and the Wootens continued their efforts to use him as their management company's entry to HUD. Michael Wooten told the OIC that he called Cisneros at Medlar's direction, knowing that Medlar had already spoken to him, and Cisneros told him that starting a HUD management company was a good idea.⁶⁶⁶ According to Wooten, Cisneros told him that his Senior Advisor Frank Wing would return the call to discuss the necessary steps.⁶⁶⁷ Wooten then spoke to Wing more than once to discuss HUD regulations and sources of information, and his proposed property management company.⁶⁶⁸ Wing and Wooten discussed an upcoming HUD contract that was to be awarded by HUD's Dallas office.⁶⁶⁹

Wooten further stated that Wing told him that it would be virtually impossible and would look too suspicious for a new company to win a lucrative HUD contract.⁶⁷⁰ On the basis of this information from Wing, Michael Wooten said, he decided to work through an established management company instead of creating a new one.⁶⁷¹ Wooten also said that he abandoned the idea of creating a HUD property management company because it proved to be too complicated administratively; an easier route was to provide consulting and brokering services for established companies.⁶⁷² According to Wooten, Medlar was concerned about bringing in an outsider because

⁶⁶⁵ *Id.* at 8-10.

⁶⁶⁶ OIC Interview Report Michael Wooten 6/29/96 at 10.

⁶⁶⁷ *Id.*

⁶⁶⁸ *Id.*; OIC Interview Report Michael Wooten 7/12/96 at 2.

⁶⁶⁹ OIC Interview Report Michael Wooten 7/11/96 at 11-12.

⁶⁷⁰ OIC Interview Report Michael Wooten 7/11/96 at 11.

⁶⁷¹ OIC Interview Report Michael Wooten 6/29/96 at 11; OIC Interview Report Michael Wooten 7/11/96 at 12.

⁶⁷² OIC Interview Report Michael Wooten 6/29/96 at 11.

she wanted to be sure she got paid, but she gave in to the idea because she needed the help.⁶⁷³

Even before Wooten talked to Wing about starting a management company, his attorney Michael Carper had put him into contact with another Carper client, John Condit, who was the president of Domicile Property Management Company (“Domicile”), an experienced HUD contractor.⁶⁷⁴ According to Condit, Domicile was the largest HUD property management company in South Texas.⁶⁷⁵ Condit and Michael Wooten discussed the business of HUD property management on the telephone.⁶⁷⁶ Wooten said that Carper told Condit about Wooten’s relationship with Medlar.⁶⁷⁷

However, Condit told the OIC that, although he knew that Medlar had had an affair with Cisneros, he “never knew,” before the date of his OIC interview, that Michael Wooten was Medlar’s nephew.⁶⁷⁸ Condit claimed that, if he had known about Wooten’s relation to Medlar, he would not have dealt with him.⁶⁷⁹ Condit also claimed that Wooten never made any guarantees or offered to assert any influence in getting the HUD contract.⁶⁸⁰

After one of his telephone discussions with Frank Wing, Wooten had a lunch meeting with Condit.⁶⁸¹ According to Wooten, Condit said at the meeting that he

⁶⁷³ OIC Interview Report Michael Wooten 7/12/96 at 4.

⁶⁷⁴ OIC Interview Report Michael Wooten 6/29/96 at 10; OIC Interview Report Michael Wooten 7/11/96 at 10.

⁶⁷⁵ OIC Interview Report Condit 8/28/96 at 2.

⁶⁷⁶ OIC Interview Report Michael Wooten 7/11/96 at 10-11.

⁶⁷⁷ *Id.*

⁶⁷⁸ OIC Interview Report Condit 8/28/96 at 3.

⁶⁷⁹ *Id.*

⁶⁸⁰ *Id.*

⁶⁸¹ OIC Interview Report Michael Wooten 7/11/96 at 10-11; OIC Interview (continued...)

wanted to have ten minutes of access to Cisneros to discuss a proposed HUD policy change.⁶⁸²

At the lunch meeting, Wooten and Condit discussed the upcoming HUD management contract in West and South Texas that Domicile was bidding on.⁶⁸³ Wooten told the OIC that he proposed that his company do refurbishing work for Domicile, but Condit was not willing to give up the lucrative refurbishing work, which was done by another of his companies.⁶⁸⁴ Instead, according to Wooten, they conceived the idea of Wooten's company entering into a consulting contract for which it would receive a fee for helping Domicile with introductions, so that Domicile could be the vehicle through which he and Medlar would be paid on a percentage basis.⁶⁸⁵

After the lunch meeting, Wooten called Cisneros more than once and told him Condit would call him about Domicile.⁶⁸⁶ According to Wooten, Cisneros said he would check out Domicile and get back to him or Medlar.⁶⁸⁷ Wooten told the OIC that Cisneros later got back to him directly or through Medlar and said that Domicile was a good company.⁶⁸⁸

Medlar said she wanted something in writing before she spoke further to Cisneros. She reviewed a draft contract between Domicile and Michael Wooten's company, and then said she would tell Cisneros about the bid, presumably referring

⁶⁸¹(...continued)

Report Michael Wooten 6/29/96 at 10.

⁶⁸² OIC Interview Report Michael Wooten 7/11/96 at 10; OIC Interview Report Michael Wooten 7/12/96 at 4.

⁶⁸³ OIC Interview Report Condit 8/28/96 at 2.

⁶⁸⁴ OIC Interview Report Michael Wooten 7/11/96 at 12; OIC Interview Report Michael Wooten 7/12/96 at 1-2.

⁶⁸⁵ OIC Interview Report Michael Wooten 7/11/96 at 12.

⁶⁸⁶ OIC Interview Report Michael Wooten 6/29/96 at 11.

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.*

to the upcoming HUD South and West Texas management contract.⁶⁸⁹ She later told Wooten that Cisneros was going to look at the Domicile bid.⁶⁹⁰

Domicile faxed a contract between itself and Wooten's company Oasis Energy Development and Services, Inc. ("Oasis") to Wooten on March 31, 1993.⁶⁹¹ The contract referenced a specific HUD bid solicitation for the South and West Texas Contract Areas.⁶⁹² The Domicile/Oasis contract provided that Oasis would receive a "consulting fee" if Domicile were the successful bidder; the fee was to be 20% of Domicile's net income received for management service on the projects awarded, or 5% of gross income, whichever was higher.⁶⁹³

When he was interviewed by the OIC, Condit initially said that Wooten was simply interested in obtaining rehabilitation and construction work from Domicile, and that he never heard from Wooten after the lunch meeting.⁶⁹⁴ Condit also said that he had only entered into a short agreement with Wooten for finder's fees on properties that Domicile purchased.⁶⁹⁵ When he was confronted with the actual contract between Domicile and Oasis, Condit was unable to provide specific details of the agreement or to explain why he entered into it; he acknowledged that it "looks bad."⁶⁹⁶

Despite the signed contract, Michael Wooten claimed in his OIC interview that the plan of a HUD-related venture never got past the telephone call phase because it

⁶⁸⁹ OIC Interview Report Michael Wooten 7/12/96 at 5.

⁶⁹⁰ GJ (Lubbock) Tr. Michael Wooten 7/16/97 at 139-40.

⁶⁹¹ OIC Interview Report Michael Wooten 6/29/96 (attachment).

⁶⁹² *Id.*

⁶⁹³ *Id.*

⁶⁹⁴ OIC Interview Report Condit 8/28/96 at 1-2.

⁶⁹⁵ OIC Interview Report Condit 8/28/96 at 2.

⁶⁹⁶ OIC Interview Report Condit 8/28/96 at 3.

was going to be too much of a business “hassle.”⁶⁹⁷ He stated that Medlar did not want her name on any of the documents associated with the business because she was worried that her connection to Cisneros would be discovered.⁶⁹⁸ Patsy Wooten told the OIC that the idea of obtaining HUD business through Medlar’s relationship never came to fruition, and she denied taking the matter seriously.⁶⁹⁹

Sometime after the Domicile contract was faxed to Michael Wooten,⁷⁰⁰ Medlar received and taped a telephone call from Frank Wing that appears to address issues related to a pending HUD bid:⁷⁰¹

FW: Need to just give you a real quick update on something that the secretary has asked me to kind of uh look into.

LM: The secretary, okay. (laughing). Okay.

(Call breaks)

FW: Domicile. An excellent company.

LM: M-huh.

FW: Has done uh, uh, exceptional work in, uh, in San Antonio and other areas. (call breaks) An excellent chance of the uh, with the uh, the uh, proposal they have before the uh, regional office.

LM: Oh for Fort Worth.

FW: Mhuh.

LM: Okay.

⁶⁹⁷ OIC Interview Report Michael Wooten 6/29/96 at 11.

⁶⁹⁸ *Id.*; GJ 97-1 Tr. Michael Wooten 7/16/97 at 147-48.

⁶⁹⁹ OIC Interview Report Patsy Wooten 6/30/96 at 12.

⁷⁰⁰ OIC Interview Report Michael Wooten 7/11/96 at 11.

⁷⁰¹ In this transcript, “FW” stands for Frank Wing.

FW: And, uh, as I uh, as I go through this a little bit more . . .

LM: Mhuh.

• • •

FW: . . . then I'll be able to uh, this is just uh, a preliminary thing that we did uh, so that we could report back right away then uh, we're going to follow up on it, as it, as it goes up the process.

LM: Okay, okay, well. I thank you for the information and uhm, then Henry's gonna, or you're gonna follow up on it.

FW: Yes, I, I'll be doin' it. Yeah.

• • •

LM: That's okay. Do, do you have any idea when a decision will be made on this region, uhm, on the Fort Worth Regional Proposal.

FW: No, that's my next follow-up.

LM: Okay.

FW: Okay, I uh, I uh, I have to, you know, kinda gingerly (laughs).

LM: I know.

FW: Win my way through those things.

LM: I know.

FW: If you know what I mean.

LM: Yeah I do. Okay, well.

FW: But I'll, I'll do it as soon as possible, okay.

LM: Okay.

FW: Alrighty.

LM: I thank you.⁷⁰²

After reviewing the transcript of this conversation between Medlar and Wing, Wooten told the OIC that he did not know that the matter had become that serious, that he did not have additional contact with Domicile after the contract was executed, and that he never received money from the company.⁷⁰³ Wooten said that he quit pushing HUD business and that Medlar “dropped the ball.”⁷⁰⁴ According to Condit, Domicile eventually dropped out of the bidding for the HUD contract for reasons unrelated to Wooten or Medlar.⁷⁰⁵

The FBI interviewed Wing on January 2, 1995 as part of DOJ’s preliminary investigation.⁷⁰⁶ Wing recalled that Medlar was looking for business for a family lighting company he described as “W T.”⁷⁰⁷ This was clearly a reference to the Wootens’ company, West Texas Lighting (“WTL”).⁷⁰⁸ Wing said that he told Medlar

⁷⁰² Medlar Tape Transcript Q-18 (Undated) at 1-3. While undated, this transcript contains a reference to Cisneros traveling to Florida. After being shown the transcript, Wing told the FBI that he thought this could refer to Cisneros’s trip to Florida after Hurricane Andrew struck. FBI-302 Wing 1/2/95 at 5. The FBI-302 put the probable date of the conversation as occurring between February and May 1993. *Id.* Hurricane Andrew actually hit South Florida in late August 1992, before Cisneros took office. *Washington Post*, “Hurricane rips Miami area, aims at Gulf States” 8/25/92. However, Cisneros traveled to South Florida to assess the situation in late February or early March 1993. White House Transcript of Interview of President Clinton by Southern Florida Press 3/13/93.

⁷⁰³ OIC Interview Report Michael Wooten 6/29/96 at 11.

⁷⁰⁴ OIC Interview Report Michael Wooten 7/11/96 at 12.

⁷⁰⁵ OIC Interview Report Condit 8/28/96 at 2.

⁷⁰⁶ FBI-302 Wing 1/2/95.

⁷⁰⁷ *Id.* at 4.

⁷⁰⁸ WTL was the Wootens’ lighting company with an office in Lubbock, Texas. Medlar was an employee of WTL for short periods of time, including a few months
(continued...)

that he would look into a HUD contract in the Fort Worth area that was of interest to her but claimed that he had never traveled to or contacted the Fort Worth Regional Office to look into the matter on behalf of Medlar.⁷⁰⁹ Wing informed the FBI that he had never intended to assist Medlar through his HUD connections, but instead had just told Medlar what she wanted to hear to calm her down.⁷¹⁰

On December 12, 1996, the OIC interviewed Frank Wing regarding Domicile and other matters.⁷¹¹ Wing told the OIC that he was not familiar with Oasis or Michael Wooten.⁷¹² He stated that he was uncertain about Michael Wooten's connection to WTL.⁷¹³ Wing further stated that had never heard of Domicile and was uncertain about its principals, business purpose, or location.⁷¹⁴ He claimed that he had never had any dealings with Domicile, directly or indirectly, and did not recall speaking with Medlar regarding any matter involving Oasis or Domicile.⁷¹⁵ He maintained that he knew nothing of Medlar's involvement in any business dealings

⁷⁰⁸(...continued)

in early 1993 and another period in late 1993 or early 1994. OIC Interview Report Michael Wooten 6/29/96 at 5; OIC Interview Report Patsy Wooten 6/30/96 at 2.

⁷⁰⁹ *Id.* at 5.

⁷¹⁰ *Id.*

⁷¹¹ Wing was represented by counsel when DOJ interviewed him on January 2, 1995 during its preliminary investigation before the appointment of the Independent Counsel. FBI-302 Wing 1/2/95. The OIC determined that, because it was conducting an investigation separate from DOJ's, it did not need to notify Wing's counsel before interviewing Wing in January 1996. Wing did not request that counsel be present at the OIC interview. Wing's counsel later objected to the fact that he had not been informed in advance of the interview.

⁷¹² OIC Interview Report Wing 12/16/96 at 6.

⁷¹³ *Id.*

⁷¹⁴ *Id.*

⁷¹⁵ *Id.*

involving Oasis, Domicile, and HUD.⁷¹⁶ He also stated (contrary to what he told the FBI on January 2, 1995) that did not recall discussing any HUD matter with Medlar, including potential bids on HUD contracts, or any matter concerning a business transaction she was contemplating with her family members that involved HUD properties or their management.⁷¹⁷ He further asserted that he had not, at any time, assisted Medlar with any matter involving HUD or Domicile, including meetings and telephone calls.⁷¹⁸

In his 1996 OIC interview, Wing admitted that he had met with Condit on one occasion (possibly the Summer of 1996), but claimed that he did not know that Condit was affiliated with Domicile.⁷¹⁹ According to Wing, the meeting was fairly short and concerned a “perceived problem” that Condit then had with HUD concerning a property located in Del Rio, Texas.⁷²⁰ Wing informed the OIC that he had not felt that Condit’s problem had any connection to HUD and did not take any action on Condit’s behalf.⁷²¹ The meeting was arranged by Roger Perez, who was Cisneros’s brother-in-law.⁷²² According to Wing, Perez described Condit as a friend.⁷²³

The OIC agents interviewing Wing advised him that, in 1993, Medlar had taped one of their phone conversations – the conversation quoted above concerning Domicile and a pending HUD proposal.⁷²⁴ Wing read the transcript of the call and

⁷¹⁶ *Id.*

⁷¹⁷ *Id.* at 6-7; FBI-302 Wing 1/2/95 at 4-5.

⁷¹⁸ *Id.* at 6.

⁷¹⁹ OIC Interview Report Wing 12/16/96 at 6.

⁷²⁰ *Id.*

⁷²¹ *Id.*

⁷²² *Id.*

⁷²³ *Id.*

⁷²⁴ *Id.* at 13; Medlar Tape Transcript Q-18 (Undated). Although undated, the OIC believes this conversation actually took place around March 1993.

claimed he could not recall speaking with Medlar regarding that subject matter.⁷²⁵ Wing was also advised that the OIC had obtained phone records indicating that he had called the Wootens' place of business, WTL, where Medlar was an intermittent employee.⁷²⁶ Wing claimed that he could not recall ever, at any time, speaking with Michael Wooten regarding any matter.⁷²⁷ However, Wing acknowledged that Medlar had asked him to use his political influence and contacts to obtain business for WTL.⁷²⁸

Domicile submitted a bid on the same HUD proposal referenced in the Oasis contract.⁷²⁹ The bids were evaluated at HUD's Source Evaluation Board ("SEB") in Fort Worth, Texas.⁷³⁰ On July 30, 1993, the SEB narrowed the field to three bidders.⁷³¹ Domicile was not one of them and, in fact, was specifically listed as one of the contractors not in the competitive range.⁷³² However, Medlar said that Wing

⁷²⁵ OIC Interview Report Wing 12/16/96 at 13.

⁷²⁶ *Id.*; Report of Calls From Wing at 78 (12/6/93 call from Wing to WTL for 2 minutes); *Id.* at 79 (12/18/93 call from Wing to WTL for 1 minute); *Id.* (12/20/93 call from Wing to WTL for 1 minute); *Id.* at 87 (8/14/94 call from Wing to WTL for 10 minutes). Wing also called Michael Wooten on 4/1/93. *Id.* at 71. Furthermore, Wing received numerous calls from WTL. Report of Calls to Wing at 67 (4/1/93 call from WTL to Wing for 1 minute); *Id.* at 76 (10/21/93 call from WTL to Wing for less than 1 minute); *Id.* (11/1/93 call from WTL to Wing for less than 1 minute); *Id.* at 77 (11/15/93 call from WTL to Wing for less than 1 minute); *Id.* at 78 (12/6/93 call from WTL to Wing for less than 1 minute); *Id.* at 79 (12/17/93 call from WTL to Wing for 1 minute); *Id.* (12/21/93 call from WTL to Wing for less than 1 minute).

⁷²⁷ OIC Interview Report Wing 12/16/96 at 6.

⁷²⁸ *Id.* at 9.

⁷²⁹ HUD Reply Letter to Domicile 11/5/93.

⁷³⁰ Initial Report of SEB 7/30/93.

⁷³¹ *Id.*

⁷³² *Id.*

had told her that, although Domicile had not made the “first cut,” there would be another review of the matter in which they would make the cut.⁷³³

Less than one month later, HUD employee Sandra Carson lowered the cutoff score to include Domicile and another bidder.⁷³⁴ On August 26, 1993, Carson wrote Domicile asking for additional information.⁷³⁵ Ultimately, Domicile did not receive the contract.

Carson told the OIC that she alone determined that it was necessary to lower the competitive range on the HUD contract and claimed that she did so without any instructions or pressure from anyone.⁷³⁶ When asked by the OIC about lowering the cutoff score in the face of the SEB recommendations, Carson responded that it was not uncommon for her to expand the competitive range to include additional contractors that might be able to raise their scores.⁷³⁷ However, when asked to identify another occasion when she lowered or expanded the competitive range, Carson could not specifically recall another instance in which it had occurred.⁷³⁸ Carson also claimed that her August 26, 1993 letter requesting additional information from Domicile did not “affect the proposal” and stated that “you can always request clarifications” to a proposal that do not alter a proposal.⁷³⁹ Carson, however, could not explain why the letter was prepared and admitted that the letter was “unusual.”⁷⁴⁰

The OIC advised her that phone records obtained by the OIC showed that someone in Carson’s branch (the contracting branch) of the Fort Worth HUD office had called Wing directly 14 times around the period of time that Carson widened the

⁷³³ OIC Interview Notes Medlar 3/30/99 at 1.

⁷³⁴ Determination of Competitive Range 8/24/93; OIC Interview Report Carson 5/6/96 at 2.

⁷³⁵ Letter from Carson to Domicile/Condit 8/26/93.

⁷³⁶ OIC Interview Report Carson 5/6/98 at 2.

⁷³⁷ *Id.*

⁷³⁸ *Id.*

⁷³⁹ *Id.* at 2-3.

⁷⁴⁰ *Id.*

competitive range to include Domicile.⁷⁴¹ Carson stated that she would be “shocked” if that were true; she could not explain why she or anyone in her branch would want to talk to Wing, and stated that calling Wing would “be like calling Cisneros.”⁷⁴² The OIC’s investigation found no similar pattern of calls between Carson’s office and Wing’s office at any other time.⁷⁴³

Although the evidence reviewed above suggests that Cisneros or Wing had improperly sought to divert HUD business to Domicile to benefit Medlar, her family, and Cisneros, there was insufficient evidence to prove beyond a reasonable doubt that such a scheme was implemented. Specifically, there was insufficient evidence that Cisneros or Wing attempted to influence the SEB’s evaluation or selection of proposals for the benefit of Medlar. Therefore, OIC did not bring charges against Cisneros, Wing, Medlar, or the Wootens in connection with the Domicile investigation.

c. Payments to Medlar from Cisneros’s Friend Jaffe

Cisneros paid Medlar over \$79,500 in 1993.⁷⁴⁴ By November 1993, Cisneros’s friend, Morris Jaffe, began to provide assistance to Medlar on Cisneros’s behalf.⁷⁴⁵

⁷⁴¹ Domicile Phone Records at 14-15 (showing 14 calls from HUD’s Fort Worth Office to Wing between 8/17/93 and 9/2/93); OIC Interview Report Carson 5/6/98 at 3.

⁷⁴² OIC Interview Report Carson 5/6/98 at 3.

⁷⁴³ *See generally* Cisneros Event Chronology; Domicile phone records at 14-15.

⁷⁴⁴ OIC Chart of 1993 Payments to Medlar.

⁷⁴⁵ Medlar Tape Transcript Q-27 12/93 at 2-3. The OIC believes this conversation actually took place on November 4, 1993. *See* OIC Corroboration Chart for Q-27.

The Attorney General’s March 13, 1995 Application for the Appointment of an Independent Counsel specifically excluded allegations that Cisneros had received money from Jaffe and others as a gratuity in violation of 18 U.S.C. § 201. GJ 00-001 Ex. 3. The OIC therefore did not investigate possible gratuity offenses involving Jaffe or anyone else. However, the OIC did look into payments Jaffe made to the

(continued...)

In their interviews with the OIC, Medlar and Michael Wooten stated that they understood that Jaffe was willing to give Medlar money to help Cisneros. According to Medlar, in early 1994 Wing told her that Jaffe wanted to help Cisneros and that he would give her \$20,000 to cover five payments.⁷⁴⁶ Michael Wooten stated that he was aware that Jaffe had given Medlar money to benefit Cisneros.⁷⁴⁷

Cisneros was aware of Jaffe's assistance to Medlar. Medlar told the OIC that, in around November of 1993, Cisneros spoke to her of borrowing a large sum of money, maybe \$250,000, from Jaffe to make a final lump sum payment to her; Jaffe spoke to her cryptically about this money when she called him, and then sent her a \$5,000 check marked "loan."⁷⁴⁸ During a recorded telephone conversation that took place on or about November 4, 1993, Medlar told Cisneros that Jaffe had recently sent her a check for \$5,000:

HC: What do you need right this minute?

LM: I don't need anything quite frankly because Morris sent me a check.

HC: Okay. A check?

LM: Yeah.

HC: A check?

LM: A check.

HC: Jesus. (Laughing)

• • •

⁷⁴⁵(...continued)

extent that they related to a possible conspiracy to defraud and commit offenses against the United States, which was within the Independent Counsel's jurisdiction. GJ 00-001 Ex. 4 at 2.

⁷⁴⁶ OIC Interview Notes Medlar 1/30-31/96 at 1.

⁷⁴⁷ OIC Interview Report Michael Wooten 6/29/96 at 8.

⁷⁴⁸ OIC Interview Report Medlar 2/22/96 at 2.

HC: How much was it?

LM: Five. Which I do need this month because I've got some medical bills

• • •

HC: Let me tell you something, can I, I mean, this guy . . . this guy's a savior⁷⁴⁹

The OIC obtained a copy of a check dated November 3, 1993 from Jaffe to Medlar for \$5,000.⁷⁵⁰ The memo section of the check contains the notation "loan."⁷⁵¹ Medlar deposited the check in her bank account.⁷⁵² The OIC also uncovered a December 10, 1993 check from Jaffe to Medlar for \$2,000, likewise designated as a "loan," that Medlar cashed.⁷⁵³

Around the same time, in late 1993 or early 1994, Medlar told Michael Wooten that Cisneros was behind in his monthly payments to her and that Jaffe had agreed to pay Medlar \$20,000 to assist Cisneros.⁷⁵⁴ Medlar told Michael Wooten that the money had to be picked up from Jaffe in person, but that she was scared that if she went herself she would "disappear."⁷⁵⁵ According to Michael Wooten, he agreed to

⁷⁴⁹ Medlar Tape Transcript Q-27 12/93 at 9-10. The OIC believes this conversation actually took place on November 4, 1993. *See* OIC Corroboration Chart for Q-27.

⁷⁵⁰ 11/3/93 Groos Bank, N.A. check #1069 for \$5,000.

⁷⁵¹ *Id.*

⁷⁵² 11/4/93 FNB deposit slip for \$5,000 check designated "Jaffe;" 11/4/93 FNB receipt for \$5,000; 11/15/93 FNB statement.

⁷⁵³ 12/10/93 Groos Bank, N.A. check #1105 for \$2,000; 12/13/93 FNB deposit slip for \$2,000 check from "Jaffe" less \$100 cash.

⁷⁵⁴ OIC Interview Report Medlar 1/30-31/96 at 1; OIC Interview Report Michael Wooten 6/29/96 at 9; OIC Interview Report Michael Wooten 7/11/96 at 3-4.

⁷⁵⁵ OIC Interview Report Michael Wooten 6/29/96 at 9; OIC Interview Report Michael Wooten 7/11/96 at 4.

(continued...)

travel to San Antonio to meet with Jaffe on Medlar's behalf, believing that meeting Jaffe also presented a good business opportunity for WTL.⁷⁵⁶

Michael Wooten traveled to San Antonio on January 12, 1994, and met with Morris Jaffe and his son Doug.⁷⁵⁷ Wooten told the OIC that he delivered a letter from Medlar to Morris Jaffe.⁷⁵⁸ Wooten did not know the contents of the letter, but Morris Jaffe read it in his presence, and stated that it would not be a good idea for Medlar to go public regarding the payments from Cisneros.⁷⁵⁹ According to Wooten, Morris Jaffe then said that he did not want to get into trouble for paying money to Medlar and that he had just spent over \$1,000,000 on the successful defense of Doug Jaffe for an unrelated criminal charge.⁷⁶⁰ Wooten also told the OIC that Morris Jaffe said that he did not want to know how much money Medlar was going to get and that the transaction needed to "look legit."⁷⁶¹ According to Wooten, Jaffe also told him

⁷⁵⁵(...continued)

In Medlar's September 28-29, 1994 interview with the FBI, she stated that she was afraid of Morris Jaffe and what he might do to her and her daughter. FBI-302 Medlar 9/28-29/94 at 3. Medlar also told the OIC she had heard that Jaffe was associated with organized crime and that people who crossed him turned up missing or dead. OIC Interview Notes Medlar 4/7/99 at 6-7. Medlar told the OIC that, when she relayed these stories to Cisneros, he told her that he did not doubt them. *Id.*

⁷⁵⁶ OIC Interview Report Michael Wooten 6/29/96 at 9; OIC Interview Report Michael Wooten 7/11/96 at 3.

⁷⁵⁷ FBI-302 Michael Wooten 10/4/94 at 1.

⁷⁵⁸ OIC Interview Report Michael Wooten 7/11/96 at 4-5; OIC Interview Report Michael Wooten 6/29/96 at 9.

⁷⁵⁹ OIC Interview Report Michael Wooten 6/29/96 at 9; OIC Interview Report Michael Wooten 7/11/96 at 5.

⁷⁶⁰ It appears that Morris Jaffe was referring to the November 1992 acquittal of Doug Jaffe on charges that he violated federal campaign contribution laws. *Houston Chronicle*, "Donors cleared in FEC case" 11/8/92.

⁷⁶¹ OIC Interview Report Michael Wooten 7/11/96 at 5.

that he was doing a “favor” for Cisneros and that Cisneros was a “good man and should not be brought down by this.”⁷⁶²

Michael Wooten also told the OIC that he and Jaffe explored the idea of Jaffe finding work for WTL as a way to channel funds to Medlar and thereby benefit Cisneros.⁷⁶³ According to Wooten, Jaffe suggested that he might have some lighting surveys that WTL could perform, and Wooten and Doug Jaffe went to lunch to work out the details.⁷⁶⁴ Wooten told the OIC that Doug Jaffe said he wanted invoices for the lighting surveys, at which time he would provide Wooten with a check.⁷⁶⁵

According to Wooten, after lunch Doug Jaffe directed him to go to one of the Jaffes’ buildings and talk to the property manager about a lighting survey.⁷⁶⁶ However, Wooten testified that when he arrived at the property the manager told him that Jaffe was a minority holder in the business and did not have the authority to authorize the audit.⁷⁶⁷ According to Wooten, it was clear to him by then that the idea of the lighting surveys was a sham business deal.⁷⁶⁸

Wooten stated to the OIC that Medlar was upset that he did not bring back any money from the Jaffes.⁷⁶⁹ According to Wooten, Medlar subsequently called Doug Jaffe to complain and Doug Jaffe told her that he would mail her a check.⁷⁷⁰ Wooten

⁷⁶² *Id.*

⁷⁶³ GJ (Lubbock) Tr. Michael Wooten 7/16/97 at 62-66.

⁷⁶⁴ OIC Interview Report Michael Wooten 7/11/96 at 6.

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.*

⁷⁶⁸ OIC Interview Report Michael Wooten 7/11/96 at 6.

⁷⁶⁹ *Id.* at 7.

⁷⁷⁰ *Id.*

also claimed to the OIC that Medlar called Cisneros, who told her that he would call Jaffe about the problem.⁷⁷¹

Approximately two weeks later, a check from Morris Jaffe made out to WTL in the amount of \$12,000 arrived at the WTL offices.⁷⁷² The check was deposited into the WTL business account.⁷⁷³ Wooten deducted his travel expenses totaling about \$1,500 from the \$12,000 and gave the remainder to Medlar.⁷⁷⁴ According to Wooten, WTL invoices were subsequently prepared and sent to the Jaffes for the lighting surveys that were never performed.⁷⁷⁵

The OIC also interviewed Morris Jaffe regarding the WTL transaction. Jaffe told the OIC that Medlar had set up his meeting with Michael Wooten to discuss potential lighting work for WTL.⁷⁷⁶ Jaffe maintained that the check to WTL was payment for work performed by WTL and not a loan or advance to Medlar.⁷⁷⁷ When asked if WTL had ever performed the lighting surveys, Jaffe responded that if the surveys had not been performed it was “news to him.”⁷⁷⁸ However, Jaffe also told the OIC that there was “no question” that the WTL transaction was done to help Medlar, in that she had a business interest in WTL,⁷⁷⁹ and because “Henry was our [Jaffe’s and

⁷⁷¹ *Id.*

⁷⁷² *Id.*; OIC Interview Report Michael Wooten 6/29/96 at 9; Check #1556 for \$12,000 dated 1/25/94 made to West Texas Lighting signed by Morris Jaffe.

⁷⁷³ *Id.*

⁷⁷⁴ Check #471 dated 1/26/94 for \$10,648 drawn on WTL’s account at ABC Bank; OIC Interview Report Michael Wooten 6/29/96 at 9; OIC Interview Report Michael Wooten 7/11/96 at 7.

⁷⁷⁵ OIC Interview Report Michael Wooten 6/29/96 at 9-10; OIC Interview Report Michael Wooten 7/11/96 at 7.

⁷⁷⁶ OIC Interview Report Morris Jaffe 5/6/97 at 7.

⁷⁷⁷ *Id.* at 8.

⁷⁷⁸ *Id.* at 9.

⁷⁷⁹ *Id.* Medlar worked intermittently as a salaried employee for WTL in early
(continued...)

Wing's] friend and we didn't want to hurt him."⁷⁸⁰ He also recalled a conversation with Medlar shortly after Wooten's trip to San Antonio, during which Medlar told him that she was no longer involved with WTL and that she had never received any of the money Jaffe paid WTL.⁷⁸¹

Jaffe admitted to the OIC that he had attempted to assist Medlar in finding a job on several occasions. He said he tried to get Medlar a job at a travel agency and sent Medlar an advance of either \$2,000 or \$4,000.⁷⁸² Jaffe also told the OIC that he attempted to get Medlar jobs at a radio station,⁷⁸³ a jewelry store,⁷⁸⁴ and a beer distributor.⁷⁸⁵ Jaffe also stated he contacted a friend, "Spike" Late, about getting

⁷⁷⁹(...continued)

1993 and again in late 1993 or early 1994, but was neither an owner nor a shareholder in the business. OIC Interview Report Patsy Wooten 6/30/96 at 2 (stating Medlar worked at WTL on occasion for several months for approximately \$350 per week); OIC Interview Report Michael Wooten 6/29/96 at 5 (stating Medlar worked for three months for WTL starting in February 1994 for \$250-300 per week).

⁷⁸⁰ OIC Interview Report Morris Jaffe 5/6/97 at 9.

⁷⁸¹ *Id.*

⁷⁸² OIC Interview Report Morris Jaffe 5/6/97 at 3.

⁷⁸³ *Id.* The OIC interviewed William Franklin Warnick regarding this matter. OIC Interview Report Warnick 1/28/97. Warnick did not know Jaffe personally but assumed that Jaffe got his name from one of the politicians that he worked with on the Texas School Land Board. *Id.* at 1. Warnick had also represented an individual in the purchase of a radio station in the late 1970s or early 1980s. *Id.* According to Warnick, Jaffe called him and said he needed Warnick to do Cisneros a favor and "put this lady to work." *Id.* at 1. Warnick recalled Jaffe asking him to get Medlar a job doing public relations work or at a radio station. *Id.* at 1, 2. Warnick told Jaffe he did not need any help at the time. *Id.* at 1. Warnick informed the OIC that Jaffe had said that the hiring of Medlar would benefit Cisneros. *Id.*

⁷⁸⁴ OIC Interview Report Morris Jaffe at 4.

⁷⁸⁵ *Id.* The OIC interviewed Robert Allen Gentry regarding this matter. OIC Interview Report Gentry 1/30/97. Gentry owned Great Plains Distributors and recalled Jaffe telling him, "I have a friend in Lubbock who needs a job." *Id.* at 1-2.

(continued...)

Medlar a job at Late's car dealership.⁷⁸⁶ According to Jaffe, Late said he would hire Medlar, so Jaffe advanced Late \$1,500 in cash to give to Medlar with the instruction that Late was not to tell Medlar that Jaffe was the true source of the money.⁷⁸⁷ Jaffe told the OIC that this was the only cash he had ever given Medlar.⁷⁸⁸

⁷⁸⁵(...continued)

Gentry stated that Jaffe did not mention Cisneros during the conversation. *Id.* at 2. According to Gentry, Medlar contacted him and said that she was interested in position in "public relations and politics." *Id.* Gentry responded that he did not have an opening for someone in those areas. *Id.*

⁷⁸⁶ OIC Interview Report Morris Jaffe 5/6/97 at 4.

⁷⁸⁷ *Id.* The OIC interviewed John Steven Late regarding this matter. OIC Interview Report Late 8/29/96. Late claimed that Jaffe told him that Cisneros was in Washington, D.C. and was "broke." *Id.* at 2. Late told the OIC that Jaffe went on to state that Medlar was "after [Cisneros] all the time" and will not "get off his back." *Id.* According to Late, Jaffe then asked him if he could get Medlar a job. *Id.* Late owned a car dealership and called Medlar on several occasions to see if she would be interested in doing some advertising for the dealership. *Id.* Late stated that he set up several meetings with Medlar, but she always canceled. *Id.* Late told the OIC that, after Medlar had canceled several appointments, Jaffe called him and stated "we have a problem, you haven't found that girl a job." *Id.* Late stated that he explained the situation to Jaffe, Jaffe became angry at Medlar, and told him that he would look to find her a job elsewhere. *Id.* at 2-3. According to Late, a short time later, Jaffe gave him \$1,500 in cash to give to Medlar. *Id.* at 3. Late told the OIC that he sent the money to Medlar but did not tell her that it was from Jaffe; he claimed that he was trying to "protect" Jaffe's identity. *Id.*

⁷⁸⁸ OIC Interview Report Morris Jaffe 5/6/97 at 4.

Jaffe's Payments to Medlar

Payment Date	Payment Amount
Summer 1993	\$1,500 ⁷⁸⁹
November 3, 1993	\$5,000
December 13, 1993	\$2,000
January 25, 1994	\$12,000 ⁷⁹⁰
TOTAL	\$20,500

d. Cisneros's Senior Advisor's Interaction with Medlar and Jaffe

Cisneros's friend and Senior Advisor Frank Wing appears to have become directly involved in the efforts to placate Medlar. Wing told the OIC that, when Medlar asked for his help in finding her a job in March or April of 1993, he contacted Jaffe and asked him to find work for Medlar.⁷⁹¹ According to Wing, Jaffe tried to find Medlar a job as a favor to him, not Cisneros; however, Wing said he "probably mentioned" to Cisneros that he had enlisted Jaffe's assistance.⁷⁹²

⁷⁸⁹ Jaffe was the source of this cash payment even though it was mailed to Medlar through Steve Late. OIC Interview Report Morris Jaffe 5/6/97 at 4.

⁷⁹⁰ As previously discussed, Jaffe made this check out to WTL for lighting services that were never performed. When making the plans that resulted in this check, Jaffe told Michael Wooten that he did not want to know how much money Medlar was going to get. OIC Interview Report Michael Wooten 7/11/96 at 5. Medlar actually received \$10,648 after Wooten subtracted his travel expenses. Check #471 dated 1/26/94 for \$10,648 drawn on WTL's account at ABC Bank.

⁷⁹¹ OIC Interview Report Wing 12/16/96 at 7.

⁷⁹² *Id.* at 8-9.

Jaffe claimed that Wing had asked him to help Medlar find a job because Medlar was giving Cisneros “hell.”⁷⁹³ Jaffe said that Wing told him that Medlar was telephoning HUD every day and that he (Wing) was having to intercept her calls and facsimiles.⁷⁹⁴ Jaffe also told the OIC that Wing had told him that while Cisneros was still living in San Antonio, Medlar had gone to Cisneros’s house in the early morning and attempted to cause a scene.⁷⁹⁵

However, Wing denied that he was a “go-between” for Medlar, Cisneros, and Jaffe regarding any financial matter.⁷⁹⁶ Wing said that on one occasion Jaffe lent Medlar some money, but Wing claimed he did not ask Jaffe to make the loan.⁷⁹⁷ The interviewing agents showed Wing a letter dated September 6, 1996 from Jaffe to Medlar in which Jaffe requested that Medlar repay a loan.⁷⁹⁸ The first sentence of the letter states: “As you are aware, Frank Wing asked me to loan you some money and that you would repay it once you were employed.”⁷⁹⁹ Wing was unable to explain why Jaffe said the loan was made at his request. Wing denied asking Jaffe to give financial assistance to Medlar⁸⁰⁰ and concluded that Jaffe must have made the loan as a favor to Cisneros.⁸⁰¹

The agents also showed Wing a transcript of a phone call between Medlar and Cisneros recorded November 4, 1993 during which Cisneros stated that Wing was

⁷⁹³ OIC Interview Report Jaffe 5/6/97 at 3.

⁷⁹⁴ *Id.*

⁷⁹⁵ *Id.*

⁷⁹⁶ OIC Interview Report Wing 12/16/96 at 8.

⁷⁹⁷ *Id.*

⁷⁹⁸ *Id.*

⁷⁹⁹ Letter from Jaffe to Medlar 9/6/96.

⁸⁰⁰ OIC Interview Report Wing 12/16/96 at 8.

⁸⁰¹ *Id.*

going to meet with Jaffe in San Antonio to discuss ways to help Medlar financially.⁸⁰² Wing's HUD travel records indicate that he visited San Antonio on December 14, 1993.⁸⁰³ Wing could not explain to OIC why his name came up in conjunction with a financial transaction involving Cisneros, Medlar, and Jaffe, and stated that Cisneros never asked him to travel anywhere on any matter involving Medlar.⁸⁰⁴

Wing also told the OIC that he did not learn of Cisneros's payments to Medlar until sometime in 1994.⁸⁰⁵ Wing claimed that, even though Medlar had called him trying to get for money from Cisneros, he had no idea that Cisneros had been making regular monthly payments to her.⁸⁰⁶ According to Wing, Medlar never told him about the payments and he never questioned Cisneros about his financial dealings with Medlar.⁸⁰⁷

The interviewing agents asked Wing to review two facsimiles that Medlar sent to Cisneros at HUD.⁸⁰⁸ The faxes made no explicit mention of the payments, but referred to "the matter at hand," to "a plan you were going to take care of," and, several times, to "our agreement."⁸⁰⁹ One fax also demanded that Cisneros respond to Medlar regarding the agreement personally or through "a representative (F or

⁸⁰² *Id.* at 13; *see* Medlar Tape Transcript Q-27 12/93 at 7-12. The OIC believes this conversation actually took place on November 4, 1993. *See* OIC Corroboration Chart for Q-27.

⁸⁰³ 12/14/93 HUD Travel records including 12/14/93 plane ticket to San Antonio.

⁸⁰⁴ OIC Interview Report Wing 12/16/96 at 9, 14.

⁸⁰⁵ *Id.* at 3. Specifically, Wing claimed that he learned about the payments when Medlar filed her civil lawsuit against Cisneros. *Id.*

⁸⁰⁶ OIC Interview Report Wing 12/16/96 at 5.

⁸⁰⁷ *Id.* at 5.

⁸⁰⁸ Both documents are handwritten, in letter format, and addressed to Henry Cisneros at the "Office of HUD." One letter is labeled "personal-confidential" and addressed to a Washington, D.C. phone/fax number. The other references "my last fax." GJ 97-1 Ex. 490.

⁸⁰⁹ *Id.*

M).”⁸¹⁰ Wing reviewed the faxes and denied ever seeing either document and further denied that he had any knowledge of Medlar faxing, mailing, wiring, or delivering any documents to Cisneros while he was at HUD.⁸¹¹

However, Charlene J. Anderson, a Cisneros staff assistant at HUD, recalled taking a fax from Medlar addressed to Cisneros from the HUD fax machine and delivering it directly to Wing, who had been concerned about who else had seen it.⁸¹² Anderson told the OIC that the fax contained a statement about money and instructions to Cisneros that if he “[did] not comply” with the demand for money, Medlar “[would] have no other choice.”⁸¹³

Anderson also told the OIC that Cisneros telephoned her after she had delivered the fax to Wing; Cisneros asked who had taken the fax from the machine and what had happened to it after it was received.⁸¹⁴ Anderson said that Cisneros had apologized for involving her in his dealings with Medlar.⁸¹⁵

Anderson further related that Wing directed her to transfer all of Medlar’s calls to him instead of Cisneros and instructed her not to log Medlar’s calls into the official HUD message booklet.⁸¹⁶ According to Anderson, Wing wanted Medlar’s messages recorded on plain paper.⁸¹⁷

⁸¹⁰ “F or M” are not identified by Medlar in the fax. However, given their relationship to Cisneros and their role in obtaining money for Medlar, the OIC surmised that “F or M” stood for Frank Wing or Morris Jaffe.

⁸¹¹ OIC Interview Report Wing 12/16/96 at 5.

⁸¹² OIC Interview Report Anderson 8/21/96 at 3; OIC Interview Report Anderson 9/30/97 at 1.

⁸¹³ OIC Interview Report Anderson 8/21/96 at 3.

⁸¹⁴ OIC Interview Report Anderson 9/30/97 at 1.

⁸¹⁵ *Id.*

⁸¹⁶ OIC Interview Report Anderson 8/21/96 at 2.

⁸¹⁷ *Id.*

Wing told the OIC agents that he took it upon himself to deal with Medlar because he did not want Medlar to hurt Cisneros or Cisneros's family.⁸¹⁸ Wing admitted that he instructed Anderson to forward all of Medlar's calls to him, but he denied instructing anyone at HUD not to record Medlar's calls in the official log.⁸¹⁹

6. Disclosure of the False Statements

Cisneros's false statements became public knowledge in 1994 when Medlar stated her case on national television and sued him because his payments to her stopped. By this time, she had edited and rerecorded the audiotapes she had made of her conversations with Cisneros. She later surrendered the tapes to interested government officials without disclosing that they were modified copies.

a. Medlar Sues Cisneros

By January 1994, Medlar had received her last payment from or on behalf of Cisneros.⁸²⁰ Unable to pay her mortgage and facing foreclosure, Medlar was forced to sell her house – through the Wootens, the nominal owners.⁸²¹

In late June 1994, because she had not been receiving money either directly or indirectly from Cisneros since the beginning of the year, Medlar decided to consult with a bankruptcy attorney, Bruce Magness, whom she had chosen from a Yellow Pages advertisement.⁸²² Medlar told Magness that she had received payments from Cisneros for years pursuant to an oral agreement to give her \$4,000 per month until her daughter graduated from college.⁸²³ She also informed Magness that she had

⁸¹⁸ OIC Interview Report Wing 12/16/96 at 4.

⁸¹⁹ *Id.* at 4-5.

⁸²⁰ FBI-302 Medlar 9/28/94 at 5.

⁸²¹ OIC Interview Report Patsy Wooten 1/6-8/98 at 3, 4, 8. Medlar had made all of the monthly mortgage payments on the house until this point. *See* checks dated March 1993 - June 1994 from Medlar's FNB account to Fleet Mortgage Company.

⁸²² Suppression Hearing Tr. Medlar 6/21/99 at 168-71.

⁸²³ GJ (Lubbock) Ex. 1 (Medlar's original petition filed 7/29/94 in *Medlar v.*
(continued...))

recorded conversations with Cisneros.⁸²⁴ Magness suggested that she had a possible lawsuit against Cisneros,⁸²⁵ and Medlar gave some of the tapes to Magness for his review.⁸²⁶

Magness associated Floyd Holder, a trial attorney in Lubbock, Texas, to help advise Medlar.⁸²⁷ Holder listened to some of the tapes,⁸²⁸ and then he and Magness suggested that Medlar could sue Cisneros for breach of contract.⁸²⁹ They also told Medlar that the tapes could be the basis for a story that could be sold to the media.⁸³⁰

On July 29, 1994, Medlar filed a civil lawsuit against Cisneros in the District Court of Lubbock County, Texas.⁸³¹ Medlar's petition sought damages for breach of contract and fraud, arising from Cisneros's alleged promise to support her financially.⁸³² For tactical reasons, the petition did not disclose that she had audio recordings of some of her conversations with Cisneros.⁸³³

⁸²³(...continued)
Cisneros, No. 94-547854) at 6.

⁸²⁴ Suppression Hearing Tr. Medlar 6/21/99 at 168-71.

⁸²⁵ *Id.* at 171-72.

⁸²⁶ *Id.* at 172-73.

⁸²⁷ *Id.* at 174-76.

⁸²⁸ *Id.* at 176-77.

⁸²⁹ Suppression Hearing Tr. Medlar 6/22/99 at 143-44.

⁸³⁰ *Id.* at 144.

⁸³¹ GJ (Lubbock) Ex. 1 (Medlar's original petition filed 7/29/94 in *Medlar v. Cisneros*, No. 94-547854).

⁸³² *Id.*

⁸³³ Suppression Hearing Tr. Medlar 6/21/99 at 187-89.

On the same day, July 29, 1994, Cisneros issued a press release through the HUD Public Affairs Office addressing the suit.⁸³⁴ In the press release, Cisneros acknowledged his former romantic relationship with Medlar and his past financial assistance to her; however, he denied any legal obligation to her.⁸³⁵ The press release further stated, contrary to fact, that “I have not provided any assistance since assuming office in January of 1993.”⁸³⁶ Similarly, Cisneros was subsequently quoted as saying: “There was never any mutual agreement for monthly payments of \$4,000 or any other amount. I couldn’t afford something like that.”⁸³⁷

Press reports soon began to appear suggesting that, contrary to the assertion in his press release, Cisneros had made payments to Medlar while he was still HUD Secretary.⁸³⁸ In one article, Cisneros admitted to sending Medlar \$15,000 in July 1993.⁸³⁹ In reality, Cisneros had made at least eight payments to Medlar, totaling more than \$73,000, since being sworn in as HUD Secretary on January 21, 1993.⁸⁴⁰

b. The *Inside Edition* Broadcast

On September 12, 1994, Medlar appeared on the nationally televised program *Inside Edition*.⁸⁴¹ She was paid \$15,000 for the appearance, of which approximately \$6,000 to \$7,000 went to her attorneys.⁸⁴² In the course of the broadcast, she accused Cisneros of lying to the FBI during his background investigation about the amount

⁸³⁴ Cisneros Press Release 7/29/94.

⁸³⁵ *Id.*

⁸³⁶ *Id.*

⁸³⁷ *The Dallas Morning News*, “Woman sues Cisneros over payments” 7/30/94.

⁸³⁸ See, e.g., *San Antonio Express-News*, “Cisneros is disputed on date payments to ex-lover ended – Medlar’s attorney produces bank records showing late-1993 deposits” 7/31/94.

⁸³⁹ *Houston Post*, “Her life’s in ruins, Cisneros’s former mistress says” 8/8/94.

⁸⁴⁰ OIC Chart of 1993 Payments to Medlar.

⁸⁴¹ *Inside Edition* Tr. 9/12/94.

⁸⁴² Suppression Hearing Tr. Medlar 6/22/99 at 20-21.

of money he had paid her.⁸⁴³ The show featured the playing of excerpts of some of Medlar's taped conversations with Cisneros.⁸⁴⁴ During the program, Medlar also presented deposit slips documenting payments from Cisneros totaling approximately \$150,000, which was about \$90,000 more than the estimates in the FBI's background investigation report.⁸⁴⁵ The deposit slips also documented, contrary to Cisneros's claims to the FBI, individual payments to Medlar larger than \$2,500.⁸⁴⁶

The same *Inside Edition* episode also showed Cisneros's reaction to Medlar's lawsuit.⁸⁴⁷ Cisneros again admitted to giving Medlar financial assistance but stated that "there was no agreement of any kind." He further stated that he had "been forthright in every step . . . from the beginning of when this whole matter occurred," and suggested that any "disagreement" about the exact amounts he had paid to Medlar stemmed from the fact that he had not kept records and was "speaking from memory."⁸⁴⁸

The program also noted that, although Cisneros had claimed in his July 29, 1994 press release that he had not made any payments to Medlar since becoming HUD Secretary, Medlar alleged that Cisneros had paid her \$55,000 in that time period.⁸⁴⁹ According to newspaper stories published shortly after the broadcast, Cisneros acknowledged that his earlier representation that he had not paid Medlar while serving in the Cabinet had been inaccurate. Specifically, Cisneros admitted to making payments to Medlar totaling more than \$50,000 after he was confirmed as HUD Secretary.⁸⁵⁰ Cisneros was also quoted as saying that his press statement had

⁸⁴³ *Inside Edition* Tr. 9/12/94.

⁸⁴⁴ *Id.*

⁸⁴⁵ *Id.*

⁸⁴⁶ *Id.*

⁸⁴⁷ *Id.*

⁸⁴⁸ *Id.*

⁸⁴⁹ *Id.*

⁸⁵⁰ *New York Times*, "Housing Secretary faces new questions," 9/22/94.

been hastily drafted⁸⁵¹ and that he had meant to say that he “did not intend to provide further assistance” to Medlar from that point on.⁸⁵²

c. Medlar Alters the Tapes

Even before Medlar filed her lawsuit against Cisneros, her attorneys Magness and Holder had advised her that the tapes could cause her serious legal problems if they contained threats against Cisneros, defamatory comments, or evidence of blackmail or extortion.⁸⁵³ Medlar testified that the attorneys returned her tapes and told her, in effect, to “go home and make sure . . . that the things I had identified, any threats, anything embarrassing to me personally, or anything embarrassing to other people . . . were not on there.”⁸⁵⁴ Medlar took this to mean that she should erase problematic passages on the tapes.⁸⁵⁵ However, Magness and Holder subsequently testified that they had never intended for her to alter the tapes and did not know that she had done so.⁸⁵⁶

Shortly after her lawsuit was filed, Medlar began to edit the tapes. She purchased a dual-tape cassette recorder and used it to create duplicate tapes from which she omitted passages she considered problematic.⁸⁵⁷ According to Medlar, she destroyed, in their entirety, four or five tapes, containing threats or passages concerning Jaffe and other matters.⁸⁵⁸ Medlar testified that she removed passages from five or six of the tapes that remained; these contained threats that she would go

⁸⁵¹ *Dallas Morning News*, “Cisneros admits apparent contradiction on payments to ex-mistress” 9/22/94.

⁸⁵² *Washington Times*, “Cisneros alters story on paying ex-mistress,” 9/22/94.

⁸⁵³ Suppression Hearing Tr. Medlar 6/21/99 at 175-78.

⁸⁵⁴ *Id.*

⁸⁵⁵ *Id.* at 177-78.

⁸⁵⁶ Suppression Hearing Tr. Holder 6/25/99 at 83-85, 88-89, 98, 103; Suppression Hearing Tr. Magness 7/7/99 at 165-67, 179-85.

⁸⁵⁷ Suppression Hearing Tr. Medlar 6/21/99 at 178-87.

⁸⁵⁸ Suppression Hearing Tr. Medlar 6/23/99 at 14-15; OIC Interview Notes Medlar 4/7/99 at 2.

to Clinton, the press, or the FBI; conversations with persons other than Cisneros; or discussions of a sexual nature.⁸⁵⁹ Medlar told the OIC that she threatened Cisneros about going to the press as many as 25 times.⁸⁶⁰ The subjects of her threatened revelations to the press included Cisneros's other extramarital affairs, the fact that Cisneros had moved out of his home at times, and his lying to the press to portray himself as someone he was not.⁸⁶¹ Medlar told the OIC that she threatened to tell Clinton that Cisneros had lied to the Transition Team, that he had agreed with her to tell lies, that he had paid her a lot more money than he claimed, that he had had other girlfriends, that he had accepted \$10,000 from Morris Jaffe during the Alamodome campaign, and other personal facts that would embarrass Cisneros.⁸⁶² According to Medlar, Cisneros told her that going to Clinton or the press made no sense because it would ruin him, end his income-generating capability, and, thus, render him unable to make payments to her.⁸⁶³

Medlar further informed the OIC that she even re-recorded the tapes from which she had not deleted anything, to make the entire set of tapes look and sound the same.⁸⁶⁴ She destroyed all the original tapes.⁸⁶⁵

After the *Inside Edition* broadcast, Cisneros's payments to Medlar became a matter of public controversy, and both the FBI and the IRS asked Medlar for originals

⁸⁵⁹ Suppression Hearing Tr. Medlar 6/22/99 at 5-7. According to a tape expert who later analyzed the tapes for the OIC, there was no evidence that Medlar added anything to the tapes, moved any passages on the tapes from one location to another, or spliced together words taken from different locations on the tapes. Suppression Hearing Tr. Koenig 6/30/99 at 71-72.

⁸⁶⁰ OIC Interview Notes Medlar 3/18/99 at 1.

⁸⁶¹ OIC Interview Notes Medlar 3/18/99 at 1-2.

⁸⁶² OIC Interview Notes Medlar 4/7/99 at 4.

⁸⁶³ OIC Interview Notes Medlar 4/7/99 at 3; OIC Interview Notes Medlar 4/16/99 at 3.

⁸⁶⁴ Suppression Hearing Tr. Medlar 6/22/99 at 5-6.

⁸⁶⁵ *Id.* at 6; OIC Interview Notes Medlar 3/24/99 at 3.

of her tapes so that they could make copies.⁸⁶⁶ Medlar gave both the FBI and the IRS her redacted copies of the tapes.⁸⁶⁷ In so doing, she falsely represented that the tapes she provided were originals, and she did not tell the agents that they were the product of her systematic efforts to alter them.⁸⁶⁸

d. Resolution of Medlar's Lawsuit

In late May 1995, two months after the Attorney General applied for the appointment of an independent counsel to investigate Cisneros,⁸⁶⁹ Cisneros agreed to pay Medlar \$49,000 to settle her lawsuit against him.⁸⁷⁰ In exchange, Medlar agreed not to make any more claims against Cisneros.⁸⁷¹ She also agreed to allow Cisneros's criminal attorneys to debrief her.⁸⁷² Shortly after the suit was settled, on May 24, 1995, David M. Barrett was appointed Independent Counsel *In re: Cisneros*.⁸⁷³

The IRS interviewed Medlar on May 31, 1995, and she turned over tapes of her conversations with Cisneros.⁸⁷⁴ Medlar knew that the IRS wanted the original tapes, but she provided them with the redacted copies and represented that they were the originals.⁸⁷⁵

⁸⁶⁶ Suppression Hearing Tr. Medlar 6/22/99 at 26-31.

⁸⁶⁷ Suppression Hearing Tr. Medlar 6/22/99 at 26-31.

⁸⁶⁸ Suppression Hearing Tr. Medlar 6/22/99 at 26-31.

⁸⁶⁹ GJ 00-001 Ex. 3.

⁸⁷⁰ GJ 95-2 Ex. 62.

⁸⁷¹ GJ 95-2 Ex. 62.

⁸⁷² GJ 97-1 Tr. Holder 8/20/97 at 133, 149; Suppression Hearing Tr. Medlar 6/23/99 at 149.

⁸⁷³ GJ 00-001 Ex. 4.

⁸⁷⁴ IRS Interview Report Medlar 5/31/95 at 5.

⁸⁷⁵ Suppression Hearing Tr. Medlar 6/22/99 at 39.

Medlar was debriefed by Cisneros's attorneys in June or July 1995.⁸⁷⁶ According to Medlar, Cisneros's counsel told her that she would be better served by helping Cisneros than by cooperating with the OIC because she and Cisneros would "sink or swim" together.⁸⁷⁷

7. Cisneros's Resignation

On November 21, 1996, shortly after President Clinton was re-elected, Cisneros announced that he would resign as Secretary of Housing and Urban Development. The resignation letter to the President stated, in part:

Though I would like to help build on the progress we have made . . . , I have concluded that I cannot ask to be considered for service in the next four years.⁸⁷⁸

Cisneros's last day as HUD Secretary was January 19, 1997.⁸⁷⁹

⁸⁷⁶ GJ 95-2 Tr. Ladd 11/26/96 at 36.

⁸⁷⁷ OIC Interview Notes Medlar 6/20/99 at 2.

⁸⁷⁸ Cisneros resignation letter 11/21/96.

⁸⁷⁹ List of HUD Secretaries and their terms, www.hud.gov.

C. The Lubbock, Texas Prosecutions

1. Medlar's Failure to Cooperate

Linda Medlar was the Government's key witness in the OIC's investigation and prosecution of Cisneros for making false statements about his payments to her. She also proved to be a most difficult witness.

In November 1995, the OIC agreed to grant Medlar immunity from prosecution in exchange for her complete and truthful cooperation.⁸⁸⁰ The "Witness Acceptance" statement attached to the letter agreement, executed by Medlar and her attorney, represented that she had read the agreement and understood it, after consulting with her attorney, who had fully explained to her its meaning and consequences.⁸⁸¹ The document made clear that she was required to answer all questions concerning the subject matter of the investigation truthfully, fully, and completely, could not withhold any information, and could not commit any future state or federal criminal violations.⁸⁸² It also specified that any violations of these provisions would constitute a breach of the agreement and entitle the OIC to use any information she had provided to prosecute her for any criminal offense.⁸⁸³

The OIC began meeting with Medlar to debrief her in January 1996. Although she at times appeared to be emotionally upset, Medlar began to provide the investigation valuable information about Cisneros's false statements and the facts surrounding them. For example, through these interviews, the OIC learned for the first time that Cisneros had given Medlar \$16,000 for the down payment on a house in Lubbock, purchased in the name of her sister and brother-in-law to protect Cisneros during the confirmation process.⁸⁸⁴

Before long, Medlar's cooperation with the investigation deteriorated markedly. In early April 1996, Medlar abruptly canceled scheduled interviews with

⁸⁸⁰ Letter from OIC to Holder re Immunity Agreement 11/13/95.

⁸⁸¹ Letter from OIC to Holder re Immunity Agreement 11/13/95 at 4.

⁸⁸² Letter from OIC to Holder re Immunity Agreement 11/13/95 at 2.

⁸⁸³ Letter from OIC to Holder re Immunity Agreement 11/13/95 at 2-3.

⁸⁸⁴ OIC Interview Report Medlar 1/30-31/96 at 2.

OIC staff and told FBI agents working for the OIC that she no longer wished to honor her agreement.⁸⁸⁵

However, Medlar agreed to meet with the OIC again later that month.⁸⁸⁶ In that interview, she made several representations of fact that proved to be materially false. These false statements included the following:

- That she did not know of anything that could affect the validity of the tapes of her conversations with Cisneros.⁸⁸⁷ (In reality, she had edited the tapes herself and had deleted substantial parts of some of them.)⁸⁸⁸
- That she had given the IRS the original tapes in 1995.⁸⁸⁹ (She had actually given the IRS her edited copies.)⁸⁹⁰
- That she had lost the recorders used to make the tapes, which was important to an expert determination of whether the tapes were authentic, in a recent move.⁸⁹¹ (She had in fact retained them in a storage shed. The moving company informed the OIC that she had later tried to have it corroborate this false story.)⁸⁹²

⁸⁸⁵ See Letter from OIC to Medlar 4/11/96; see also Letter from Jones (Medlar) to OIC 4/12/96; FBI-302 Medlar 4/12/96 at 1.

⁸⁸⁶ See OIC Interview Report Jones (Medlar) 4/26/96.

⁸⁸⁷ OIC Interview Report Jones (Medlar) 4/26/96 at 1-2.

⁸⁸⁸ *United States v. Cisneros*, 59 F. Supp. 2d 58, 59-60 (D.D.C. 1999); Suppression Hearing Tr. Medlar 6/22/99 at 39.

⁸⁸⁹ OIC Interview Report Jones (Medlar) 4/26/96 at 2.

⁸⁹⁰ *United States v. Cisneros*, 59 F. Supp. 2d 58, 60 (D.D.C. 1999); Suppression Hearing Tr. Medlar 6/22/99 at 39.

⁸⁹¹ OIC Interview Report Jones (Medlar) 4/26/96 at 1.

⁸⁹² OIC Interview Report Strait 10/29/96 at 1.

- That she had turned over all relevant records to the OIC.⁸⁹³ (She had in fact withheld evidence, including financial records and correspondence to and from Cisneros.)⁸⁹⁴

The OIC submitted tapes that Medlar claimed were originals to Bruce Koenig, an expert analyst, who determined that the tapes were copies, not originals.⁸⁹⁵ Koenig also determined that some data had been removed from some of the tapes.⁸⁹⁶ Medlar therefore had lied about a crucial evidentiary matter central to the investigation of Cisneros, both when she first surrendered the tapes and after she had entered into her immunity agreement with the OIC.

The OIC subpoenaed Medlar to testify before the grand jury in Washington, D.C. in September 1996.⁸⁹⁷ It then interviewed her again in its D.C. offices in the presence of her counsel a few days before her scheduled grand jury appearance,⁸⁹⁸ which was subsequently canceled. In that interview she again stated, falsely, that the tapes she had given the Government were originals.⁸⁹⁹

At the same September interview, the OIC asked Medlar if she would consent to a search of her home in Lubbock, Texas, as a gesture of good faith, and she did so.⁹⁰⁰ However, just before the search began, the press arrived at the home, tipped off

⁸⁹³ Letter from Medlar to OIC 4/12/96.

⁸⁹⁴ Inventory of items seized 9/17/96 pursuant to search warrant.

⁸⁹⁵ *United States v. Cisneros*, 59 F. Supp. 2d 58, 61 (D.D.C. 1999); Suppression Hearing Tr. Koenig 6/30/99 at 43.

⁸⁹⁶ *United States v. Cisneros*, 59 F. Supp. 2d 58, 61-62 (D.D.C. 1999); Suppression Hearing Tr. Koenig 6/30/99 at 67- 68.

⁸⁹⁷ OIC Grand Jury Subpoena (Medlar) for 9/19-20/96; *see also* FBI-302 Jones (Medlar) 9/10/96.

⁸⁹⁸ OIC Interview Report Jones (Medlar) 9/17/96.

⁸⁹⁹ OIC Interview Report Jones (Medlar) 9/17/96 at 2.

⁹⁰⁰ *Id.* at 12; Consent to Search 9/17/96.

by a neighbor who had identified the FBI agents waiting to conduct the search.⁹⁰¹ Medlar learned from a phone call with her mother about the presence of the press.⁹⁰² The OIC had not contacted the press, and had no advance knowledge of their presence; however, Medlar accused the FBI of leaking information about the search, and Medlar and her attorney left the meeting.⁹⁰³ The agents proceeded with the search by executing a search warrant that they had previously obtained in case she did not consent to the search.⁹⁰⁴ After that, Medlar ceased cooperating with the OIC.⁹⁰⁵

Among other things, the search found two cassette recorders that Medlar had used to make the tapes of her conversations with Cisneros.⁹⁰⁶ Documentary evidence, including copies of bank statements, checks, deposit slips, tax records, transcripts, and notes to and from Cisneros, was also seized.⁹⁰⁷

The OIC remained in communication with Medlar's attorney in an attempt to convince Medlar to cooperate with the investigation. In November 1996, after these efforts failed, the OIC sent Medlar's attorney a letter, stating that the OIC no longer considered her to be a cooperating witness; that she no longer would enjoy any immunized status; and that the OIC could, if it chose, prosecute her, using all the statements and information that she had provided to that date.⁹⁰⁸ Medlar's attorney

⁹⁰¹ OIC Interview Report Medlar 9/17/96 at 20; GJ 97-1 Tr. Graham 8/5/97 at 95- 96.

⁹⁰² OIC Interview Report Medlar 9/17/96 at 20.

⁹⁰³ Suppression Hearing Tr. Medlar 6/24/99 at 33-34.

⁹⁰⁴ OIC Interview Report Medlar 9/17/96 at 20; Sealed Search Warrant issued 9/17/96.

⁹⁰⁵ Suppression Hearing Tr. Medlar 6/24/99 at 33-34.

⁹⁰⁶ Inventory of items seized 9/17/96 pursuant to search warrant.

⁹⁰⁷ *Id.*

⁹⁰⁸ Letter from OIC to David Boyd 11/5/96.

proposed one further attempt to restore Medlar's status as an immunized witness, which the OIC declined.⁹⁰⁹

The OIC then began a thorough investigation of Medlar as a potential defendant. It scrutinized all of her actions as they related to Cisneros's false statements and delved into her false statements to law enforcement agencies. The OIC developed evidence that Medlar and the Wootens had violated federal law by materially misleading a financial institution in the purchase of a house.⁹¹⁰ Specifically, the Wootens had falsely represented that they were buying a house for their own occupancy, when in fact they were purchasing it for Medlar to occupy, using funds secretly supplied by Cisneros.⁹¹¹

Medlar's actions greatly hampered the OIC's efforts to investigate and prosecute Cisneros's false statements. Because she had openly violated the agreement by which she had promised to give complete and truthful testimony in exchange for immunity from prosecution for her past acts, the OIC saw no alternative to prosecuting her for past and continuing violations of law.

2. The Indictment

On September 12, 1997, the OIC brought a 26-count Indictment against Medlar and Patsy and Allen Wooten in the United States District Court for the Northern District of Texas, Lubbock Division.⁹¹² The Indictment named Medlar alone in eight counts charging obstruction of justice; engaging in a scheme to falsify, conceal, and cover up material facts; and making a false statement to IRS Special Agents.⁹¹³ It charged all three defendants with bank fraud, making false statements to a federally insured bank, money laundering, and conspiring to commit these substantive

⁹⁰⁹ Letter from Boyd to OIC via fax 11/6/96.

⁹¹⁰ GJ (Lubbock) Exs. 46-54.

⁹¹¹ OIC Interview Report Patsy Wooten 6/30/96 at 11.

⁹¹² Indictment 9/12/97 (Case No. 5-97CR0074-C).

⁹¹³ Indictment 9/12/97 (Case No. 5-97CR0074-C).

crimes.⁹¹⁴ A First Superseding Indictment adding a money laundering count against all three defendants and a concealment count against Medlar was returned on September 23, 1997.⁹¹⁵

Count One, the conspiracy charge, alleged that the three defendants conspired to commit substantive offenses appearing elsewhere in the First Superseding Indictment – bank fraud, making false statements to a federally insured bank, laundering monetary instruments, and engaging in monetary transactions with funds obtained from the bank fraud and false statement crimes.⁹¹⁶ The conspiracy concerned the Wootens’ purchase of a house in Lubbock, Texas for Medlar.⁹¹⁷ (Although the Indictments did not mention the fact, the house was purchased with funds Medlar received from Cisneros, and the purpose of the conspiracy was to conceal the source of the funds at the time that Cisneros was under scrutiny for his appointment as HUD Secretary.)

The charges in Counts Two through Nine of the Superseding Indictment arose from allegations that the Wootens acted as “straw purchasers” when they obtained a mortgage loan to purchase the house for Medlar.⁹¹⁸ In late 1992 and January 1993, the Wootens claimed in loan papers submitted to the Plains National Bank in Lubbock that they were purchasing the house to live in themselves, knowing that Medlar would reside there.⁹¹⁹ The Wootens also lied to the Plains National Bank about their income and submitted forged documents reporting their employment status and income.⁹²⁰ The Superseding Indictment alleged that these acts amounted to bank fraud and illegal false statements to a bank, undertaken to buy the house for Medlar, who was unemployed at the time, did not want to be associated with the

⁹¹⁴ Indictment 9/12/97 (Case No. 5-97CR0074-C).

⁹¹⁵ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C).

⁹¹⁶ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 15-31.

⁹¹⁷ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 15-31.

⁹¹⁸ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 5, 31-35.

⁹¹⁹ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 5, 31-35.

⁹²⁰ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 5, 31-35.

transaction, and lacked sufficient assets and income to qualify for a mortgage loan to purchase the house.⁹²¹

The money laundering charges, Counts Ten through Nineteen, stemmed from the Wootens' use of the fraudulently obtained loan proceeds to purchase the house and from their subsequent rental and sale of that property.⁹²² According to the Superseding Indictment, after Medlar stopped receiving money from Cisneros, she became financially incapable of keeping up with her mortgage payments, so she sold the house for a profit; the purchaser moved into and rented the house before settlement.⁹²³ The Superseding Indictment alleged that the rental payments, the mortgage payoff, and the sale proceeds represented money laundering transactions, because those funds were proceeds or derivatives of the illegally obtained mortgage loan that the defendants used to purchase the house.⁹²⁴

The remaining counts of the Superseding Indictment were addressed to Medlar alone. Three counts of obstruction of justice, Counts Twenty through Twenty-Two and four counts of concealment, Counts Twenty-Three through Twenty-Seven, arose from the events occurring after Medlar entered into the immunity agreement with the OIC in November 1995, in which Medlar had promised to cooperate with the OIC investigation.⁹²⁵ The Indictment alleged that Medlar obstructed justice by providing false and misleading information to FBI Special Agents who were assisting the grand jury investigation. Specifically, she lied about whether she had produced the originals or copies of tape recordings of certain telephone conversations she had with Cisneros and others, and when she had rented the safety deposit box in which she

⁹²¹ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 5, 31-35.

⁹²² First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 5-6, 11, 36-39.

⁹²³ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 5-6, 11, 36-39.

⁹²⁴ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 5-6, 11, 36-39.

⁹²⁵ Letter from OIC to Holder re Immunity Agreement 11/13/95.

stored those tapes.⁹²⁶ The Indictment further charged that Medlar also obstructed justice by withholding evidence – the devices she used to record those conversations – from the grand jury.⁹²⁷ The concealment charges were founded on her alleged failure to disclose material information to the FBI, including the fact that she had not turned over all records requested by the OIC and that she had lied when she told the FBI that she had provided the original tapes to the IRS when she had in fact provided copies.⁹²⁸

The false statement count, Count Twenty-Eight, concerned Medlar's alleged lie to the IRS that, before she met with them in May 1995, she had stopped by her safety deposit box to retrieve the original tapes.⁹²⁹ The Superseding Indictment alleged that Medlar in fact knew that she had last accessed that box more than two weeks before, and that the tapes she had given the IRS were copies, not originals.⁹³⁰

3. Pretrial Proceedings

The case against Medlar and Patsy and Allen Wooten was assigned to the Honorable Sam R. Cummings, United States District Court Judge. All three defendants pleaded not guilty.⁹³¹ Trial was initially set for November 3, 1997, and later moved to January 15, 1998 on defendants' motions.⁹³²

On January 5, 1998, each defendant filed two motions to dismiss the Indictment. The first set of motions argued that the Independent Counsel Act

⁹²⁶ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 13.

⁹²⁷ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 39-40.

⁹²⁸ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 13-15, 39-41.

⁹²⁹ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 41-42.

⁹³⁰ First Superseding Indictment 9/23/97 (Case No. 5-97CR0074-C) at 13-14, 41-42.

⁹³¹ Arraignment Orders 9/26/97.

⁹³² Arraignment Orders 9/26/97; Order Granting Defendants' Motion for Continuance 12/8/97.

unconstitutionally gave executive power to the Special Division, a part of the Judicial Branch.⁹³³ The second set of motions argued that the charges found in Counts Ten to Nineteen of the Indictment violated an established DOJ policy against prosecuting money laundering cases without prior consultation with DOJ's Asset Forfeiture and Money Laundering Sections.⁹³⁴ The motions also urged that Counts Twenty-three to Twenty-eight violated an established DOJ policy against prosecuting alleged violations of 18 U.S.C. § 1001 absent "significant underlying wrongdoing."⁹³⁵

Medlar also moved to suppress the statements she had given to law enforcement agents on the ground that her consent to cooperate with the Government had not been voluntary.⁹³⁶ She also filed a motion for a judicial determination that she had not breached her immunity agreement,⁹³⁷ coupled with a motion for a judicial determination of whether the Government had an independent source for any evidence to be used against her, which would be required if the immunity agreement had not been breached.⁹³⁸

The court denied all of these defense motions.⁹³⁹

On January 6, 1998, Medlar's attorney filed a motion for a psychiatric or psychological examination to determine Medlar's competency to stand trial.⁹⁴⁰ The motion stated that Medlar appeared "to be suffering from either a mental disease or

⁹³³ Defendants' First Motions to Dismiss 1/5/98.

⁹³⁴ Defendants' Second Motions to Dismiss 1/5/98.

⁹³⁵ Defendants' Second Motions to Dismiss 1/5/98.

⁹³⁶ Motion to Suppress Defendant's Statements (Involuntary) 1/5/98.

⁹³⁷ Motion for Judicial Determination of Breach of Immunity Agreement 1/5/98.

⁹³⁸ Motion for Judicial Determination of Independent Source of Evidence Pursuant to *Kastigar v. United States* 1/5/98.

⁹³⁹ Order Denying Defendants' Second Motion to Dismiss 1/13/98; Order Denying Defendant's Motion for Judicial Determination (*Kastigar* Motion) 1/13/98.

⁹⁴⁰ Motion for Psychiatric or Psychological Examination of Linda Jones to Determine Competency to Stand Trial 1/6/98.

defect or from the side effects of current psychiatric medications,”⁹⁴¹ and that therefore her mental status affected her ability to assist in her defense.⁹⁴² The court granted Medlar’s motion, and set a hearing for January 14, 1998 to consider the results of the examination.⁹⁴³ After hearing testimony from witnesses for Medlar and the Government, including several doctors and a pretrial services officer, all of whom had examined her, Judge Cummings ruled from the bench that Medlar was competent to stand trial.⁹⁴⁴

4. Plea Bargains

On January 15, 1998, all defendants pleaded guilty pursuant to plea agreements.⁹⁴⁵

The Wootens pleaded guilty to conspiracy to commit bank fraud and to make false statements to a federally insured bank.⁹⁴⁶ As part of their agreement, they agreed to cooperate with the OIC. Specifically, each of them agreed:

[T]o cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal Court proceeding or federal grand jury in connection with the charges in this case and other matters, such further cooperation to include a full and complete disclosure of all relevant information,

⁹⁴¹ *Id.* at 1.

⁹⁴² *Id.* at 2. The legal standard for competency is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.” *United States v. Dusky*, 362 U.S. 402 (1960) (internal quotation marks omitted).

⁹⁴³ Order Granting Psychiatric or Psychological Examination 1/6/98.

⁹⁴⁴ Competency Hearing Tr. 1/14/98 at 114. No written opinion was issued.

⁹⁴⁵ Medlar Plea Agreement 1/15/98 at 2.

⁹⁴⁶ Patsy Wooten Plea Agreement 1/15/98 at 2; Allen Wooten Plea Agreement 1/15/98 at 2.

including production of any and all books, papers, documents, and other objects in defendant's possession or control, and to be reasonably available for interviews which the United States may require.⁹⁴⁷

In return, the OIC agreed to dismiss the Indictment and the First Superseding Indictment returned against the Wootens,⁹⁴⁸ and to recommend a two-level downward adjustment for acceptance of responsibility pursuant to United States Sentencing Guideline ("USSG")⁹⁴⁹ § 3E1.1.⁹⁵⁰ The OIC also agreed to consider, at the completion of the Wootens' cooperation, whether the cooperation qualified as "substantial assistance" in accordance with USSG § 5K1.1, warranting a filing of a motion for a downward departure, the imposition of a sentence below the statutory minimum, or a reduction in sentence.⁹⁵¹ As a result of this agreement, sentencing of the Wootens was deferred pending the outcome of the Cisneros litigation.⁹⁵²

Medlar pleaded guilty to all counts in the First Superseding Indictment.⁹⁵³ She also voluntarily waived her "right to appeal and/or contest the conviction, sentence, and/or judgment, directly or collaterally, entered in this case for any reason,"

⁹⁴⁷ Patsy Wooten Plea Agreement 1/15/98 at 4; Allen Wooten Plea Agreement 1/15/98 at 4-5.

⁹⁴⁸ Patsy Wooten Plea Agreement 1/15/98 at 11; Allen Wooten Plea Agreement 1/15/98 at 12.

⁹⁴⁹ The United States Sentencing Guidelines set an allowable range for a sentence imposed for a federal offense, absent special circumstances, and provide for upward and downward departures on a case-by-case basis. 18 U.S.C. § 3553(b).

⁹⁵⁰ Patsy Wooten Plea Agreement 1/15/98 at 4; Allen Wooten Plea Agreement 1/15/98 at 4.

⁹⁵¹ Patsy Wooten Plea Agreement 1/15/98 at 4-5; Allen Wooten Plea Agreement 1/15/98 at 5.

⁹⁵² *See* United States' Motion to Dismiss Charges Against Defendants Patsy J. Wooten and Allen R. Wooten 9/22/99 at 2.

⁹⁵³ Medlar Plea Agreement 1/15/98 at 2.

expressly including the filing of a writ of habeas corpus.”⁹⁵⁴ However, unlike her sister and brother-in-law, Medlar did not agree to cooperate with the OIC.⁹⁵⁵ Her sentencing hearing was set for March 25, 1998.⁹⁵⁶

Judge Cummings sentenced Medlar to 42 months at the Federal Medical Center, Carswell in Fort Worth, Texas, three years of supervised release following her incarceration, and \$1,750 in special assessments.⁹⁵⁷ Judge Cummings also imposed special conditions on Medlar’s supervised release, including requiring her to participate in mental health treatment services until successfully discharged and to provide 100 hours of community service during the first 12 months of the supervisory term.⁹⁵⁸

Medlar began serving her prison sentence on April 15, 1998,⁹⁵⁹ and was still facing the prospect of additional prosecution pursuant to a December 1997 Indictment returned against her, Cisneros, Arce-Garcia, and Rosales in Washington, D.C.⁹⁶⁰ (The District of Columbia proceedings are discussed in detail below.) However, the OIC had determined that Medlar would be a key witness against Cisneros in those proceedings. In March 1999, the OIC and Medlar reached an informal agreement whereby Medlar agreed to cooperate with the OIC in future proceedings in exchange for the OIC dismissing the pending Indictment in Washington, D.C. and recommending a reduction of the sentence she was serving as a result of the Lubbock conviction.⁹⁶¹

⁹⁵⁴ *Id.* at 6.

⁹⁵⁵ *See* Medlar Plea Agreement 1/15/98.

⁹⁵⁶ Order Rescheduling Sentencing Hearing 3/16/98.

⁹⁵⁷ Medlar Judgment Order 3/25/98 at 1-3; Medlar Sentencing Tr. 3/25/98 at 3-4.

⁹⁵⁸ Medlar Judgment Order 3/25/98 at 4.

⁹⁵⁹ *Id.* at 2.

⁹⁶⁰ Indictment (Cr. No. 970485) 12/11/97; GJ 00-001 Ex. 7.

⁹⁶¹ *See* Cooperation Agreement 3/18/99.

On March 23, 1999, in contemplation of Medlar's truthful and complete cooperation in the Washington, D.C. proceedings, the OIC filed a motion for reduction of sentence pursuant to Federal Rules of Criminal Procedure 35(b) in the United States District Court for the Northern District of Texas, Lubbock Division.⁹⁶² Judge Cummings agreed to defer ruling on the motion until Medlar's cooperation with the OIC was complete.

On March 24, 1999, Medlar filed a petition for writ of habeas corpus in the District Court for the Northern District of Texas, seeking to overturn her conviction.⁹⁶³ In the petition, she alleged that her guilty plea was not voluntary, due to her addiction to Ativan; that she had had ineffective assistance of counsel; and that the OIC had engaged in prosecutorial misconduct.⁹⁶⁴ The court dismissed Medlar's petition on her own motion in May 1999.⁹⁶⁵

Medlar cooperated with the OIC in the Washington, D.C. proceedings. In particular, she testified at the evidentiary hearings held in the Summer of 1999 in Washington, D.C., which are discussed in detail below.

On August 16, 1999, the OIC filed a supplement to its earlier Rule 35 motion asking that Medlar's sentence be reduced.⁹⁶⁶ That same day, the OIC filed a motion to dismiss the D.C. Indictment against Medlar.⁹⁶⁷ On September 14, 1999, the D.C. court dismissed the charges with prejudice.⁹⁶⁸ On September 16, 1999, the Lubbock

⁹⁶² United States' Sealed Motion to Reduce Sentence 3/23/99.

⁹⁶³ Petition for Writ of Habeas Corpus by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 3/24/99.

⁹⁶⁴ Petition for Writ of Habeas Corpus by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 3/24/99 at Ex. B (Medlar Decl.).

⁹⁶⁵ Order Granting Motion to Dismiss 5/24/99.

⁹⁶⁶ Letter from OIC to Judge Cummings 8/16/99.

⁹⁶⁷ United States' Motion To Dismiss The Indictment Against Defendant Linda D. Medlar 8/16/99.

⁹⁶⁸ Order Dismissing Indictment 9/14/99.

court ordered that Medlar's sentence be reduced to time served, subject to the three-year period of supervised release that he had previously imposed.⁹⁶⁹

On September 22, 1999, the OIC filed a motion to dismiss the charges against the Wootens.⁹⁷⁰ The motion stated in pertinent part: "Given the cooperation by the [Wootens] with this Office and their good conduct and behavior since the entry of their respective guilty pleas, the United States respectfully requests that all charges against them be dismissed and the prosecution thereby terminated."⁹⁷¹ The Lubbock court immediately ordered that all charges against the Wootens be dismissed with prejudice.⁹⁷²

⁹⁶⁹ Order Reducing Sentence 9/16/99.

⁹⁷⁰ United States' Motion to Dismiss 9/22/99.

⁹⁷¹ Memorandum of Law in Support of Motion to Dismiss 9/22/99 at 2.

⁹⁷² Order 9/22/99 dismissing charges against Patsy and Allen Wooten.

D. The Washington, D.C. Prosecutions

1. The Indictment

On December 11, 1997, a grand jury sitting in the United States District Court for the District of Columbia returned a 21-count Indictment against Henry Cisneros, Linda Medlar, Sylvia Arce-Garcia, and John Rosales.⁹⁷³ The Indictment charged the defendants with, among other things, impeding the appointment and confirmation process by which Cisneros became HUD Secretary.⁹⁷⁴ In particular, it catalogued the defendants' false statements to the Government and the other ways they had concealed Cisneros's payments to Medlar from government officials.⁹⁷⁵

At the time the Indictment issued, the White House Counsel had tentatively agreed to schedule for the OIC an interview with President Clinton. On December 12, 1997, White House Counsel wrote to the Independent Counsel, in reference to the Indictment, "I see no reason why your Office has any continuing need to speak with the President."⁹⁷⁶ The Independent Counsel wrote back and informed the White House Counsel that the OIC continued to require information from the President.⁹⁷⁷ However, the OIC was never allowed to interview the President.

The leading charge of the Indictment, Count One, was that Cisneros, with Medlar, Arce-Garcia, and Rosales, had conspired to obstruct the FBI in investigating Cisneros's background, the Senate in confirming his appointment, and the Department of Justice in deciding on his top-secret security clearance.⁹⁷⁸ The Indictment alleged that the defendants conspired to violate various federal laws, including 18 U.S.C. § 1505 (obstructing governmental proceedings); 18 U.S.C. § 1001 (making false and misleading statements to and concealing information from

⁹⁷³ See Indictment (Cr. No. 97-0485) 12/11/97; GJ 00-001 Ex. 7.

⁹⁷⁴ Indictment (Cr. No. 97-0485) 12/11/97 at 31-49.

⁹⁷⁵ Indictment (Cr. No. 97-0485) 12/11/97 at 49-59.

⁹⁷⁶ Letter from Ruff to Independent Counsel 12/12/97.

⁹⁷⁷ Letter from Independent Counsel to Ruff 2/13/97.

⁹⁷⁸ Indictment (Cr. No. 97-0485) 12/11/97 at 32-33.

government agencies); and 31 U.S.C. § 5324(a)(3) (structuring transactions with a financial institution).⁹⁷⁹

Counts Two through Seventeen of the Indictment charged Cisneros with making false statements and concealing or not disclosing facts on his SF-86 and in his December 30, 1992 and January 7, 1993 FBI interviews.⁹⁸⁰ The Indictment charged that he had made the following false statements:

- That he was aware of no basis upon which he could be subjected to coercion or blackmail;
- That his answers on his SF-86 were accurate and correct;
- That his payments to Medlar were not “hush money”;
- That he was not “currently” making payments to Medlar;
- That the single highest payment he had made to Medlar was about \$2,500;
- That his total payments to Medlar had never exceeded \$10,000 per year;
- That Medlar had never threatened, coerced, or tried to obtain money from him;
- That he had not had substantial at length conversations with Medlar since early 1991; and
- That he had had only one extramarital relationship, other than with Medlar.⁹⁸¹

The Indictment further charged that Cisneros had concealed the following facts:

- That he was making payments to Medlar;

⁹⁷⁹ Indictment (Cr. No. 97-0485) 12/11/97 at 33-34.

⁹⁸⁰ Indictment (Cr. No. 97-0485) 12/11/97 at 49-59.

⁹⁸¹ Indictment (Cr. No. 97-0485) 12/11/97 at 49-53, 55-58.

- That Medlar had threatened to make his payments to her publicly known;
- That he had structured payments to Medlar to avoid making a Currency Transaction Report; and
- That he had not filed informational Gift Tax Returns with the IRS for payments to Medlar in excess of \$10,000 per year.⁹⁸²

The Indictment also charged that he had failed to disclose in his FBI interview that he had directed defendants Arce-Garcia and Rosales not to inform the FBI that he was making payments to Medlar, or the amount of such payments.⁹⁸³

Count Eighteen of the Indictment further charged Cisneros with corruptly influencing, obstructing, and impeding a proceeding of the DOJ Personnel Security Office, by making false statements when it was deciding whether to issue him a security clearance.⁹⁸⁴

Counts Nineteen and Twenty of the Indictment charged Rosales with making false statements to government officials in violation of 18 U.S.C. § 1001. He was charged with falsely stating to the IRS that he did not know of Cisneros's payments to Medlar before he came to D.C., and with falsely stating to the FBI that he did not know of Cisneros's payments to Medlar while he was employed at CISCOM.⁹⁸⁵

Count Twenty-one of the Indictment charged Medlar with violating 18 U.S.C. § 1001 when she falsely stated to the FBI that she had provided the original tapes of her recorded conversations with Cisneros to the IRS.⁹⁸⁶

⁹⁸² Indictment (Cr. No. 97-0485) 12/11/97 at 53-54.

⁹⁸³ Indictment (Cr. No. 97-0485) 12/11/97 at 58-59.

⁹⁸⁴ Indictment (Cr. No. 97-0485) 12/11/97 at 59-62.

⁹⁸⁵ Indictment (Cr. No. 97-0485) 12/11/97 at 62-64.

⁹⁸⁶ Indictment (Cr. No. 97-0485) 12/11/97 at 64-65.

2. Pretrial Proceedings

The District of Columbia proceedings were assigned to the Honorable Stanley Sporkin, United States District Court Judge.⁹⁸⁷ A trial date was set for November 4, 1998.⁹⁸⁸

Defendants attacked the Indictment on multiple grounds through pretrial motions. Judge Sporkin denied all of these motions, and issued three published opinions addressing some of the more important issues defendants raised.⁹⁸⁹ Cisneros appealed one of these adverse decisions, unsuccessfully.⁹⁹⁰ The net effect of these efforts was to delay the trial and ultimate resolution of the prosecutions.

Specifically, in the Spring of 1998, all defendants moved for severance of their cases, each seeking a separate trial.⁹⁹¹ The OIC agreed to the severance of Medlar's case from those of the other defendants, but opposed any further severance.⁹⁹² The court agreed with the OIC and denied severance of the other defendants.⁹⁹³

Cisneros moved to sever Counts Nineteen and Twenty, which accused Rosales of making false statements to the IRS in 1995 and the FBI in 1996 by denying knowledge of Cisneros's payments to Medlar.⁹⁹⁴ The crux of the defense argument was that the conspiracy and false statements charged in Counts One to Eighteen

⁹⁸⁷ Indictment 12/11/97 cover sheet.

⁹⁸⁸ Unopposed Joint Motion for Enlargement of Time for Filing of Pretrial Motions, 3/27/98 at 1.

⁹⁸⁹ *United States v. Cisneros*, 26 F. Supp. 2d 13 (D.D.C. 1998); *United States v. Cisneros*, 26 F. Supp. 2d 24 (D.D.C. 1998); *United States v. Cisneros*, 59 F. Supp. 2d 58 (D.D.C. 1999).

⁹⁹⁰ *United States v. Cisneros*, 169 F.3d 763 (D.C. Cir. 1999).

⁹⁹¹ *United States v. Cisneros*, 26 F. Supp. 2d 13, 16 (D.D.C. 1998).

⁹⁹² *United States v. Cisneros*, 26 F. Supp. 2d 13, 19 (D.D.C. 1998).

⁹⁹³ *United States v. Cisneros*, 26 F. Supp. 2d 13, 19 (D.D.C. 1998).

⁹⁹⁴ Motion of Defendant Cisneros to Sever Counts 19-21 of Indictment (Cisneros Pretrial Motion Number 2) 3/9/98.

(which were alleged to have occurred in 1992 and 1993 during the appointment process) could not have been part of the same scheme to mislead the Government as Rosales's later false statements charged in Counts Nineteen and Twenty (which were alleged to have occurred during the Independent Counsel investigation).⁹⁹⁵ The court denied this motion, holding that all of the false statements were "clearly connected to the common scheme" – i.e., the "scheme among all four defendants to cover-up details about Cisneros [*sic*] affair with Medlar."⁹⁹⁶

Cisneros also challenged on two grounds the OIC's constitutional authority to obtain indictments against him. First, he argued that the Special Division did not have the power to appoint an independent counsel.⁹⁹⁷ The springboard for this motion was the Supreme Court's determination, in *Morrison v. Olson*, that the Special Division had properly been given its appointment power under Article II's Appointments Clause, which allows a "Court of Law" to appoint "inferior officers" of the United States, including independent counsels.⁹⁹⁸ Cisneros argued that the Special Division was not a "Court of Law" within the meaning of the Appointments Clause because of its specialized functions, and therefore could not exercise the appointments power.⁹⁹⁹ The District Court rejected the argument, holding that the Supreme Court had implicitly determined in *Morrison* that the Special Division was a proper entity.¹⁰⁰⁰

Cisneros also argued that the deputies and associates appointed by the Independent Counsel were "officers" of the United States, as that term is used in the Constitution, and that therefore under Article II they could be appointed only by the President, the courts, or the heads of departments, and not by the Independent

⁹⁹⁵ Memorandum in Support of Motion of Defendant Cisneros to Sever Counts 19-21 of Indictment (Cisneros Pretrial Motion Number 2) 3/9/98 at 1.

⁹⁹⁶ *United States v. Cisneros*, 26 F. Supp. 2d 13, 22 (D.D.C. 1998).

⁹⁹⁷ Motion of Defendant Cisneros to Dismiss the Indictment for Lack of Prosecutorial Authority (Cisneros Pretrial Motion Number 3) 4/1/98.

⁹⁹⁸ 487 U.S. 654, 672 (1988).

⁹⁹⁹ Motion of Defendant Cisneros to Dismiss the Indictment for Lack of Prosecutorial Authority (Cisneros Pretrial Motion Number 3) 4/1/98 at 9-17.

¹⁰⁰⁰ *United States v. Cisneros*, 26 F. Supp. 2d 13, 23.

Counsel.¹⁰⁰¹ The court rejected this argument, holding that these persons were employees, not constitutional “officers,” and that the Independent Counsel therefore had the constitutional authority to appoint them.¹⁰⁰²

Cisneros and Rosales filed separate but similar motions to dismiss the counts of the Indictment alleging false statements and acts of concealment in violation of 18 U.S.C. § 1001 (Counts Two to Eighteen against Cisneros and Nineteen and Twenty against Rosales).¹⁰⁰³ The statute prohibits false statements or the concealment of facts only if the statements or concealed facts are “material” to the government officials to whom they are made.¹⁰⁰⁴ Cisneros argued that his false statements to the FBI could not have been material to the President and the Transition Team in the nomination process because they were aware, from other sources, of the truth about his affair with and payments to Medlar.¹⁰⁰⁵ Rosales similarly argued that his false statements about Cisneros’s payments to the FBI and the IRS in their 1995-96 investigation could not have been material because Cisneros and Medlar had already disclosed the relevant information.¹⁰⁰⁶ The court rejected these arguments, noting that “the relevant question is not whether, in fact, the relevant body relied upon the false information in making its determination,” but rather “merely whether that information had the capacity to influence the relevant decisionmaker.”¹⁰⁰⁷ The court also noted that materiality is a question reserved for the jury.¹⁰⁰⁸

In a related motion, Cisneros moved to dismiss Counts One to Eighteen of the Indictment on the ground that adjudicating these charges would violate the

¹⁰⁰¹ *United States v. Cisneros*, 26 F. Supp. 2d 13, 23.

¹⁰⁰² *United States v. Cisneros*, 26 F. Supp. 2d 13, 23.

¹⁰⁰³ *United States v. Cisneros*, 26 F. Supp. 2d 24, 40.

¹⁰⁰⁴ 18 U.S.C. § 1001.

¹⁰⁰⁵ *United States v. Cisneros*, 26 F. Supp. 2d 24, 40.

¹⁰⁰⁶ *United States v. Cisneros*, 26 F. Supp. 2d 24, 40.

¹⁰⁰⁷ *United States v. Cisneros*, 26 F. Supp. 2d 24, 40.

¹⁰⁰⁸ *United States v. Cisneros*, 26 F. Supp. 2d 24, 40-41.

constitutional separation of powers and the political question doctrine.¹⁰⁰⁹ Cisneros argued that these counts, which went to his false statements to and concealment of facts from the executive and legislative branches, would require the judiciary to second-guess whether the statements and concealment were material to the political decisions of those branches.¹⁰¹⁰ In denying the motion, the court disagreed: “[I]t is clear that the relevant question is not what the criteria for presidential nominees should be, but whether the false statements were ‘capable of influencing’ a nomination.”¹⁰¹¹ The court further noted:

[Cisneros’s] position would allow unqualified candidates for high public office to lie their way into extremely sensitive positions of government. It would be unacceptable to place the citizens of this Nation at such risk.¹⁰¹²

Cisneros also argued to the District Court that the prosecution was somehow inconsistent with DOJ policy. The court disagreed, observing that “[i]n this case, the Independent Counsel’s prosecutorial discretion is directly in step with DOJ policies.”¹⁰¹³

In the same decision in which it addressed the materiality, separation of powers, and DOJ policy motions, the court denied 18 other defense motions.¹⁰¹⁴

On August 10, 1998, Cisneros filed an interlocutory appeal of the court’s order denying his motion to dismiss on the grounds that prosecution was prohibited by the separation of powers doctrine.¹⁰¹⁵ On March 9, 1999, the Court of Appeals dismissed

¹⁰⁰⁹ *United States v. Cisneros*, 26 F. Supp. 2d 24, 34-36.

¹⁰¹⁰ *United States v. Cisneros*, 26 F. Supp. 2d 24, 34-36.

¹⁰¹¹ *United States v. Cisneros*, 26 F. Supp. 2d 24, 36.

¹⁰¹² *United States v. Cisneros*, 26 F. Supp. 2d 24, 59.

¹⁰¹³ *United States v. Cisneros*, 26 F. Supp. 2d 24, 47.

¹⁰¹⁴ *United States v. Cisneros*, 26 F. Supp. 2d 24, 56-57.

¹⁰¹⁵ Notice of Appeal 8/10/98.

the appeal as premature because it preceded a final judgment in the case.¹⁰¹⁶ Cisneros's appeal caused significant delay, pushing the trial date back from November 1998 to September 1999.¹⁰¹⁷

3. Renewed Efforts to Obtain Medlar's Cooperation

As the Cisneros trial approached, it was apparent to the OIC that the prosecution would be greatly handicapped if Medlar would not or could not testify truthfully for the prosecution. She was, of course, a percipient witness to much of the activity charged in the Indictment. In their numerous lengthy telephone conversations, Cisneros had described to her in detail his false statements in the appointment process. And she was the crucial authenticating witness for the audiotape recordings of their conversations, particularly since she had not only recorded them but had also redacted and re-recorded them.

Medlar was also, for obvious reasons, a difficult witness for the prosecution. She had earlier lied under oath. Within months of signing an immunity agreement pledging complete and truthful cooperation with OIC, she had lied repeatedly to government agents and refused to cooperate further. She had been indicted for, and pleaded guilty to, obstruction of justice, making false statements, bank fraud, and money laundering in the Lubbock, Texas prosecution.¹⁰¹⁸ She was still serving her sentence for those offenses in early 1999. The OIC had indicted her in 1997 for false statements and conspiracy, with Cisneros, Rosales, and Arce-Garcia, in the very indictment underlying the trial in which she could be an important witness against Cisneros.¹⁰¹⁹

Nevertheless, in early 1999, the OIC again explored the question of whether Medlar could be an effective trial witness against Cisneros. The OIC and the public defender who had represented her in Texas discussed a possible agreement under which she could become a cooperating witness.

¹⁰¹⁶ *United States v. Cisneros*, 169 F.3d 763 (D.C. Cir. 1999).

¹⁰¹⁷ *United States v. Cisneros*, 26 F. Supp. 2d 24, 60 (D.D.C. 1998).

¹⁰¹⁸ See Judgment in a Criminal Case, *United States v. Linda D. Jones (f/k/a) Linda D. Medlar*; see also Sentencing Tr. Medlar 3/25/98.

¹⁰¹⁹ See Indictment 12/11/97.

On March 18, 1999, the OIC and Medlar reached an agreement under which she would provide a full and truthful proffer of evidence and the OIC would move pursuant to Federal Rule of Criminal Procedure 35(b) for a reduction in her Texas sentence to reflect her assistance in the prosecution of Cisneros.¹⁰²⁰ She thereafter provided the OIC with information. The OIC filed its Rule 35 Motion on March 23, 1999, because of the Rule's requirement that the motion be made within a year of her March 25, 1998 sentencing, but asked the court to defer its ruling until a later date when Medlar's cooperation could be gauged.¹⁰²¹ The court agreed to defer its ruling.

To the OIC's total surprise, on March 24, 1999, one day after the OIC filed its motion to reduce Medlar's sentence, Medlar filed a petition for writ of habeas corpus in the federal District Court for the Northern District of Texas, seeking to overturn her conviction in that court.¹⁰²² The OIC received the moving papers on March 29, 1999. The purported grounds for the petition included that her guilty plea was not made voluntarily due to her addiction to the prescription drug Ativan, which supposedly impaired her ability to focus and make decisions; that she had had ineffective assistance of counsel; and that the OIC had illegally used against her evidence obtained through an immunity agreement and had otherwise engaged in prosecutorial misconduct.¹⁰²³ In fact, though, Medlar had been declared competent to stand trial by Judge Cummings before she entered her plea agreement, and she had specifically disclaimed these grounds for relief when questioned by the judge in open court at the time she entered her guilty plea.¹⁰²⁴ Even more shocking was the fact that, the day before the habeas petition was filed, the OIC had filed its Federal Rule of Criminal Procedure 35 motion at her request, seeking a reduction in her sentence in contemplation of her truthful and complete cooperation.¹⁰²⁵ In reaching the proffer

¹⁰²⁰ Cooperation Agreement between OIC and Linda Jones (Medlar) 3/18/99.

¹⁰²¹ United States' Sealed Motion to Reduce Sentence Pursuant to Fed. R. Crim. P. 35(b) 3/23/99.

¹⁰²² Jones (Medlar) Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 3/24/99.

¹⁰²³ *Id.*

¹⁰²⁴ Rearrangement Tr. Jones (Medlar) 1/15/98 at 9.

¹⁰²⁵ *See* OIC Sealed Motion to Reduce Sentence Pursuant to Fed. R. Crim. P. (continued...)

agreement that led to that motion, she had been represented by the same attorney from the Public Defender's Office whom she characterized in the habeas petition as ineffective, and the Government had been represented by the OIC, the same prosecuting body that she attacked in the petition as having taken unfair advantage of her under a previous agreement.

Attached to the habeas petition was a declaration that Medlar had executed under penalty of perjury on March 19, 1999, one day after she had agreed with the OIC that she would provide a full and truthful proffer of evidence.¹⁰²⁶ In that declaration, she swore that her addiction to Ativan had rendered her unable to make reasonable judgements, decisions, or choices, and that she had been under the influence of Ativan when she dealt with the OIC.¹⁰²⁷ She also falsely asserted that she had answered all of the OIC's questions to the best of her ability.¹⁰²⁸ The habeas petition, and in particular the attached declaration, directly undercut even further Medlar's already shaky credibility as a potential trial witness.

Nevertheless, the OIC continued to work toward securing Medlar's cooperation. On April 7, 1999, Medlar and the OIC entered into a further agreement under which the OIC would recommend that the Texas District Court reduce her sentence, and would dismiss the District of Columbia charges against her, if she continued to cooperate with the OIC, in particular by testifying fully and truthfully at the Cisneros trial.¹⁰²⁹ The OIC also agreed not to use her testimony against her¹⁰³⁰ unless she committed perjury, made a false statement, obstructed justice, or committed an act of contempt while serving as a witness in any proceeding relating

¹⁰²⁵(...continued)
35(b) 3/23/99.

¹⁰²⁶ Jones (Medlar) Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 3/24/99 at Ex. B.

¹⁰²⁷ Jones (Medlar) Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 3/24/99 at Ex. B.

¹⁰²⁸ Jones (Medlar) Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 3/24/99 at Ex. B.

¹⁰²⁹ Cooperation Agreement between OIC and Linda Jones (Medlar) 4/7/99.

¹⁰³⁰ *Id.*

to or arising out of the OIC's investigation.¹⁰³¹ On May 25, 1999, the OIC notified Medlar's attorney that it had accepted her proffer, thereby making the April 7, 1999 agreement effective.¹⁰³²

At the end of May 1999, Medlar dismissed her petition for a writ of habeas corpus.¹⁰³³ Even so, the habeas petition continued to be one more blemish on her credibility as a witness in any further proceedings.

4. The Defense Motion to Exclude the Tapes

The pivotal event in the Cisneros prosecution was the court's resolution, following extensive evidentiary hearings, of Cisneros's motion to suppress and exclude from evidence the tape recordings that Medlar had made of her telephone conversations with him.¹⁰³⁴ With a trial date of September 9, 1999 looming, the evidentiary hearings spanned three weeks in late June and early July of 1999.¹⁰³⁵

The OIC proposed to present portions of 26 of Medlar's tapes as evidence at trial.¹⁰³⁶ Of these, four included sections from which Medlar had redacted portions.¹⁰³⁷ She later supplied, from memory, a written version of what had been

¹⁰³¹ *Id.*

¹⁰³² OIC letter dated 5/25/99 accepting proffer pursuant to 3/18/99 agreement.

¹⁰³³ Motion to Dismiss Petition for Writ of Habeas Corpus 5/21/99; *see also* Order Granting Dismissal of Petition 5/24/99.

¹⁰³⁴ *See United States v. Cisneros*, 59 F. Supp. 2d 58 (D.D.C. 1999).

¹⁰³⁵ *See United States v. Cisneros*, 59 F. Supp. 2d 58, 59 (D.D.C. 1999).

¹⁰³⁶ *United States v. Cisneros*, 59 F. Supp. 2d 58, 59 (D.D.C. 1999).

¹⁰³⁷ *United States v. Cisneros*, 59 F. Supp. 2d 58, 59-60 (D.D.C. 1999).

deleted.¹⁰³⁸ However, the tapes to be presented into evidence were copies that Medlar had created from the original tapes, all of which she had discarded.¹⁰³⁹

Cisneros made two principal arguments against the admission of the tapes into evidence. The first was that the tapes were unlawful under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”), which forbids the interception of a wire communication “for the purpose of committing a criminal or tortious act.”¹⁰⁴⁰ Cisneros’s position was that Medlar had created the tapes to blackmail Cisneros or to extort money from him.¹⁰⁴¹ The second argument was that the only extant tapes, all of which were copies and some of which had been redacted, were unauthentic and unreliable.¹⁰⁴²

As a preliminary matter, Cisneros also filed a motion for a court-ordered mental and physical examination of Medlar.¹⁰⁴³ The motion asked the court to order Medlar to undergo mental and physical examinations before the evidentiary hearing on the admissibility of the tapes, to determine whether she was suffering from any mental illness and whether she was addicted to any drugs.¹⁰⁴⁴ The court allowed the hearing on the motion to exclude the tapes to begin without subjecting Medlar to the examinations.¹⁰⁴⁵ On July 20, 1999, after the hearing, it issued an order denying Cisneros’s motion for mental and physical examinations, noting that after four days of testimony “[t]he witness showed no evidence of mental or physical impairment that

¹⁰³⁸ See Medlar Redaction Log; see also *United States v. Cisneros*, 59 F. Supp. 2d 58, 65 n. 14 (D.D.C. 1999).

¹⁰³⁹ See *United States v. Cisneros*, 59 F. Supp. 2d 58, 59 (D.D.C. 1999).

¹⁰⁴⁰ *United States v. Cisneros*, 59 F. Supp. 2d 58, 62 (D.D.C. 1999); see also 18 U.S.C. § 2511(2)(d).

¹⁰⁴¹ *United States v. Cisneros*, 59 F. Supp. 2d 58, 62 (D.D.C. 1999).

¹⁰⁴² *United States v. Cisneros*, 59 F. Supp. 2d 58, 62 (D.D.C. 1999).

¹⁰⁴³ Defense Motion for Court-Ordered Mental and Physical Examination 6/7/99 at 1.

¹⁰⁴⁴ Defense Motion for Court-Ordered Mental and Physical Examination 6/7/99 at 1.

¹⁰⁴⁵ See Suppression Hearing Tr. 6/21/99 at 21-22.

bore on her abilities to recollect or recount information” and that “[t]his court can find no reason to question the witness’s competency to testify based on its own observations and examination of her demeanor.”¹⁰⁴⁶

The factual issues before the court on Cisneros’s motion to suppress concerned the events underlying the creation, duplication, and disposal of the tapes.¹⁰⁴⁷ The evidentiary hearings consisted largely of Medlar’s testimony – in particular, how and why she had recorded and selectively copied the tapes, and then discarded the originals.¹⁰⁴⁸ The court also heard testimony from other witnesses called to impeach portions of Medlar’s testimony, and from the Government’s forensic expert called to explain issues concerning the copying and editing of the tapes.¹⁰⁴⁹

An important issue throughout the hearings was Medlar’s credibility.¹⁰⁵⁰ The defense presented and highlighted the numerous times she had lied – to the public, to her attorneys, to government officials, and under oath to courts of law.¹⁰⁵¹ In particular, the following instances of her earlier untruthfulness were explored at the hearing and urged in support of Cisneros’s suppression motion:

- She had lied under oath repeatedly in the deposition taken in her civil suit to prosecute her breach of contract claim against Cisneros;¹⁰⁵²

¹⁰⁴⁶ Order denying Motion for Mental and Physical Examination of Medlar 7/20/99.

¹⁰⁴⁷ *United States v. Cisneros*, 59 F. Supp. 2d 58 (D.D.C. 1999); *see also* Suppression Hearing Tr. 6/22/99 at 18-19, 28-31.

¹⁰⁴⁸ *See United States v. Cisneros*, 59 F. Supp. 2d at 58, 59, 62.

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *See id.* at 63.

¹⁰⁵¹ *See* Post-Hearing Brief of Defendant Henry G. Cisneros 7/14/99.

¹⁰⁵² Post-Hearing Brief of Defendant Henry G. Cisneros 7/14/99 at 80-81.

- She had knowingly signed under oath an affidavit containing falsehoods in support of her civil suit;¹⁰⁵³
- When she first surrendered copies of the tapes to the FBI and to the IRS, she had falsely represented that she was giving them original tapes, and had not informed them that she had edited the tapes;¹⁰⁵⁴
- She had lied repeatedly to the IRS, the FBI, and the OIC about the nature of the tapes, and other matters, in breach of her agreements with the OIC; and¹⁰⁵⁵
- She had lied in the affidavit attached to her petition for habeas corpus, in which she represented that she had previously answered each question that the OIC had asked her to the best of her ability.¹⁰⁵⁶

The defense also catalogued what it characterized as numerous inconsistencies in the evidence presented in the suppression hearing – mostly, contradictions between Medlar’s testimony at the hearing and either her former attorneys’ testimony or her earlier out-of-court statements.¹⁰⁵⁷ It used these inconsistencies to argue that Medlar had been untruthful in her testimony before the court, and that she therefore could not authenticate the tapes.¹⁰⁵⁸

In opposing the motion to suppress, the OIC did not argue that Medlar had always been truthful. Indeed, it had obtained her conviction in the Texas federal court for making false statements to and concealing facts from the OIC, the FBI, the grand jury, and federal banking institutions.¹⁰⁵⁹ The OIC urged, however, that the key issue in the suppression hearing was not Medlar’s credibility but instead the authenticity of the recordings of her conversations with Cisneros, which was not

¹⁰⁵³ *Id.* at 79-80.

¹⁰⁵⁴ *Id.* at 81-82.

¹⁰⁵⁵ *Id.*

¹⁰⁵⁶ *Id.* at 77-78.

¹⁰⁵⁷ *Id.* at 77-82.

¹⁰⁵⁸ *Id.* at 2-7.

¹⁰⁵⁹ *See* Judgment in a Criminal Case 3/25/98.

under serious challenge except for those instances in which she had edited out portions of the recording.¹⁰⁶⁰

The court issued its decision on July 26, 1999.¹⁰⁶¹ It granted in part and denied in part the defense motion to suppress and exclude the tapes.¹⁰⁶² It excluded none of the 26 tapes in their entirety.¹⁰⁶³ Instead, the court held that a few small portions of the four tapes containing admitted redactions were inadmissible, noting, however, that Medlar would be permitted to testify about her recollection of the omitted conversations.¹⁰⁶⁴

The court found that Medlar did not create the tapes for a criminal or tortious purpose, but that she instead had created them to preserve a record of her financial agreement with Cisneros and to counter possible inaccurate public accounts of their relationship.¹⁰⁶⁵ Because the admissibility of the recordings under Title III was governed by the purpose for which they were made, not by the use to which they are subsequently put, the court held that the recordings could not be excluded on the basis of that statute.¹⁰⁶⁶

The court also held that, save for small portions of the four redacted recordings, the tapes would not be excluded as unauthentic or unreliable.¹⁰⁶⁷ Having listened to the tapes, reviewed the transcripts of the tapes, and conducted an extensive evidentiary hearing, the court concluded that “the vast majority of the tapes contain reliable and accurate representations of the conversations that occurred between

¹⁰⁶⁰ United States’ Post-Hearing Submission Regarding Admissibility of “Medlar Tapes” 7/14/99 at 42-44.

¹⁰⁶¹ *United States v. Cisneros*, 59 F. Supp. 2d 58 (D.D.C. 1999).

¹⁰⁶² *Id.* at 65.

¹⁰⁶³ *Id.* at 64.

¹⁰⁶⁴ *Id.* at 64-65.

¹⁰⁶⁵ *Id.* at 63.

¹⁰⁶⁶ *Id.* at 62-63.

¹⁰⁶⁷ *Id.* at 64-65.

Medlar and Cisneros between April 1990 and December 1993.”¹⁰⁶⁸ According to the court, the most important factor supporting this conclusion was that Cisneros presented no direct evidence that the voice on the tape was not his or that any of the statements attributed to him were inaccurate.¹⁰⁶⁹ In fact, in admitting the vast majority of the tapes offered, the Court found that “all portions of the 22 tapes that do not contain admitted redactions . . . contain intelligible, logically consistent statements by both the witness, Medlar, and the defendant that demonstrate that the tapes are what they purport to be.”¹⁰⁷⁰ The court held that this was the critical determination under the authenticity question before it.¹⁰⁷¹ The court also made clear, however, that it would hold a *voir dire* proceeding if further issues of authenticity of any of the tapes did arise during trial.¹⁰⁷²

In denying Cisneros’s motion to suppress and exclude the tape-recorded discussions, the court specifically observed that the tapes supported some of the allegations of the Indictment:

Several of the indictment’s allegations receive probative support from the tapes. In a way they tend to prove the essence of what the OIC has charged, namely that the payments may well be ‘hush money’ and thus may be deemed the ‘*res gestae*’ of certain of the charges.¹⁰⁷³

5. The Cisneros Plea Bargain

In July 1999, to focus on the pending trial of Cisneros, the OIC agreed to sever the charges against Rosales and Arce-Garcia and defer any prosecutions against them.¹⁰⁷⁴ Accordingly, the OIC and these defendants entered into agreements under 18 U.S.C. § 3161(h)(2), which allows delays in criminal prosecutions for the purpose

¹⁰⁶⁸ *Id.* at 64.

¹⁰⁶⁹ *Id.*

¹⁰⁷⁰ *Id.*

¹⁰⁷¹ *Id.*

¹⁰⁷² *Id.* at 65 n. 15.

¹⁰⁷³ *Id.* at 62-63 (emphasis added).

¹⁰⁷⁴ Agreement with Rosales 6/30/99; Agreement with Arce-Garcia 6/21/99.

of allowing the defendant to demonstrate good conduct.¹⁰⁷⁵ The court approved these agreements.¹⁰⁷⁶

Following the pretrial resolution of the tape admissibility issue, both the Government and Cisneros were in a position to engage in serious plea negotiations. Cisneros knew that the tapes could be used to evidence his false statements;¹⁰⁷⁷ the Government knew that the credibility of its chief witness was subject to serious attack on numerous grounds.¹⁰⁷⁸ As the trial approached, the OIC and Cisneros's counsel explored how the case might be resolved through a negotiated plea.

On September 7, 1999, the Cisneros prosecution was resolved with his plea of guilty to an Information charging him with lying to the FBI in connection with his 1993 appointment to serve as Secretary of HUD,¹⁰⁷⁹ in violation of 18 U.S.C. § 1018, a Class A misdemeanor.¹⁰⁸⁰ Pursuant to the Government's recommendation, the court

¹⁰⁷⁵ Agreement with Rosales 6/30/99; Agreement with Arce-Garcia 6/21/99.

¹⁰⁷⁶ Order (granting severance and deferral of prosecution for defendants Arce-Garcia and Rosales) 7/14/99.

¹⁰⁷⁷ *United States v. Cisneros*, 59 F. Supp. 2d 58 (D.D.C. 1999).

¹⁰⁷⁸ See Post-Hearing Brief of Defendant Henry G. Cisneros 7/14/99.

¹⁰⁷⁹ See *United States v. Cisneros*, 66 F. Supp. 2d 38 (D.D.C. 1999); see also Plea Hearing Tr. Cisneros 9/7/99.

¹⁰⁸⁰ The statute provides:

Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by the law, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1018 (1994).

imposed a sentence of a \$10,000 fine, a \$25 special assessment, and no incarceration or probation.¹⁰⁸¹

Before imposing the sentence, the court reviewed the factual predicate of the guilty plea with Cisneros:

THE COURT: And during [your FBI background investigation] interview that you knowingly and falsely stated to the FBI agent that you had made monthly payments to Linda Medlar of approximately \$2,500 at a time; is that correct?

CISNEROS: Yes, sir.

THE COURT: And that the FBI wrote that down and forwarded it on; you understood that was going to happen?

CISNEROS: Yes, sir.

THE COURT: And that during that time you were actually making payments to Medlar in excess of \$2,500 during the years 1990, 1991, and '92; is that correct?

CISNEROS: Yes, sir.

THE COURT: And you knew that.

CISNEROS: Yes, sir.

THE COURT: Okay. Was there a reason why you didn't tell the FBI the truth at that time?

CISNEROS: I think, sir, it was just that – for one thing, I wasn't sure about the numbers personally. I had never calculated them up. But beyond that, I was trying to protect Mrs. Medlar, who didn't want the information out, and my own wife, who didn't know precisely what the number was. And in the final analysis I've attributed it

¹⁰⁸¹ *United States v. Cisneros*, 66 F. Supp. 2d. 38, 41 (D.D.C. 1999).

to the pressure and confused sort of fog of the moment where I gave a incorrect number.

THE COURT: Well, it wasn't just picking a number out of the air, was it?

CISNEROS: No. The \$2,500 had been a sort of informally agreed to number from sometime in the past, and it was what was in my head; it was what was my obligation, but in fact, it had grown to something more than that.

THE COURT: You knew it?

CISNEROS: Yes, sir. Certainly, when I look at the record, as has been shown to me in the –

THE COURT: No, no. You knew it at the time, didn't you?

CISNEROS: Sure. I knew that I had given her more than that.

THE COURT: You knew you had given, and that you were in effect, not being candid with the FBI?

CISNEROS: That is correct.¹⁰⁸²

The court then gave Cisneros the opportunity to say anything he wanted. Cisneros made the following statement on the record:

Thank you, Judge. I want the Court to know that I accept responsibility for the conduct as outlined in the [summary] that you have just read, and it is my hope that other people who aspire to and follow in public service will also perhaps learn a lesson from this, and that is that truth and candor are important in the process of selecting people for governmental positions.

I appreciate the Court's consideration of this disposition; believe it to be a fair resolution of this matter, and thank the Court for the time

¹⁰⁸² Plea Hearing Tr. Cisneros 9/7/99 at 14-16.

the Judge and the other members of the court team have already spent on this issue.

Obviously, this has been a difficult time, a four-and-a-half-year investigation for me and for my family, and it's my hope that the Court's acceptance of this disposition will allow us to resolve this matter in an equitable way and allow us to proceed with our lives.¹⁰⁸³

Judge Sporkin, who had presided over the case for almost two years, thought it appropriate to comment on the cases's prosecution and disposition. The court's extensive remarks after accepting the defendant's plea serve as an apt summation for the entire Cisneros investigation and prosecution:

I know there will be some second guessing about this plea. There will be some who will say that the sanction is not tough enough and others who will say here is more evidence of the Independent Counsel Act as not serving the public interest. When I was told of the disposition, my first impression was that it was too light.

• • •

On more careful reflection, I came to the conclusion that this disposition, while maybe not perfect, is appropriate. Putting aside the taxing of the judiciary's resources in the short run, in the long term, the public interest is being served.

• • •

Some might say the many millions of dollars the Independent Counsel had to expend is not justified by the seemingly light sanction obtained. But that is not the true measure of success of one of these proceedings. Some commentators have said this case should not have been pursued. I do not agree with this view in any respect.

I want to take this opportunity to commend the parties for their fine work in this case and for the fair resolution they have reached. This

¹⁰⁸³ Plea Hearing Tr. Cisneros 9/7/99 at 20-21.

plea agreement draws to a close, at last, a long and sometimes nasty saga in the private and public life of Henry Cisneros.

This case, at its core, concerns a unique defendant. From everything I know about him through this case, he is a decent human being. He spent a good part of his career as a public servant. He has performed every one of his public positions in commendable fashion.

It is unfortunate that the personal problems that plagued Mr. Cisneros' private life inevitably brought him under the sharp lens of public scrutiny. As the vetting process for Mr. Cisneros' cabinet appointment ran its complicated course, the private details of his past caught up with him, eventually rendering public what he and others clearly wanted and intended to keep private.

Many have been critical of the Office of Independent Counsel for pursuing this case, a case some thought was not worthy of the time and efforts of the OIC. I don't think that the OIC had much choice in the matter. The attorneys at the OIC had an obligation to maintain the integrity of their oath of office, and, in pursuing this matter, they did.

I want to state on the record that counsel for the government and counsel for Mr. Cisneros have performed their duties well. You were zealous advocates in your respective clients' interests. As a result of your extreme diligence and hard bargaining, this disposition has emerged.

Mr. Cisneros, I believe that you deeply regret the pain you have caused your loved ones and that you accept responsibility for the wrongdoing you committed against the American public. What you did was wrong. I know that you have learned from this experience and I hope that future public servants will learn from your ordeal.

• • •

[W]e cannot permit an individual to lie his way into high public office. This clearly would undermine our system of government and would be a tremendous set back for what it means when a person raises his hand

to tell the truth and then does not do so. The work of the Independent Counsel in this case reaffirms the importance of telling the truth.

Mr. Barrett has taken a great deal of criticism for doing nothing more than honoring a call to duty. He obtained no personal gain from his office. He and his outstanding staff have worked diligently, competently and above all in a highly professional manner. There have been no press conferences and the work he has performed has been first rate. I commend him and his staff for a job well done.

From Mr. Cisneros' point of view, he will also benefit from this disposition. I told my staff on a number of occasions that I could not see Mr. Cisneros going to trial in this case. He and his lawyers were too smart to subject Mr. Cisneros to the ordeal of sitting at the defendant's table for some ten weeks. While there are a number of persons who would not mind having a "this is your life" experience, I don't think anyone would want to see his or her life portrayed in public in an adversarial setting. By this disposition, Mr. Cisneros can end a terrible ordeal. Since the appointment of the Special Prosecutor, Mr. Cisneros has been investigated for a period of more than five years.

There is no evidence in this case that Mr. Cisneros in any respect compromised any of his public responsibilities. At all times, he has faithfully discharged the duties of his office.

• • •

I really do not believe the so-called legal pundits got it right. There were a large number of the late night pontificators who said it was a mistake to have brought this case. I do not share that view. As I have already said you cannot permit someone to lie their way into public office.

While I do not believe the commentators had it right, there was something amiss in this case. The problem with this case is that it took too long to develop and much too long to bring to judgment day. Such a day is necessary in order to inject reality into the process. Good defense lawyers doing their job will often attempt to cause the proceedings to be interminable. If I can assign fault to this experience,

it is that this case should have been resolved a long time ago, perhaps even years ago.

I cannot ascribe all of the blame to these very able counsel. Here is where I believe the process is largely at fault. What was needed here was some form of independent objective intervention. Someone who could have evaluated the case at an early stage and suggested an appropriate resolution. In the civil arena we have the mediation process which performs this role. Under Federal Rule of Criminal Procedure 11, such an effort is specifically precluded.

The reason for this provision is well founded. We do not want judges playing a role in bringing about coercive dispositions of criminal cases. Generally speaking, this is excellent public policy. However, experience teaches us that there is virtually always a need to make an exception with respect to even very good and sound rules. This is one case where I believe an exception to the rule could have proved extremely helpful. This is not rocket science. The case cried out for early resolution. Any knowledgeable impartial third party would have realized this was the fact and would have bridged the communication gap between prosecutor and defense counsel that often exists in cases like this. This is because in our adversarial system neither side wants to approach the other because to do so might be considered a sign of weakness in their case. So my parting words are simply to request a review of Rule 11 to allow for the exceptional case intervention by an impartial arbitrator to try to accelerate the criminal process and bring it to a more speedy conclusion.¹⁰⁸⁴

6. Post-Plea Litigation

In September 1999, following the Cisneros guilty plea and sentencing, a Texas-based news organization applied to the District Court for access to the tapes and transcripts that the OIC had proposed to introduce as evidence in the Cisneros trial.¹⁰⁸⁵ The court denied the motion.

¹⁰⁸⁴ *United States v. Cisneros*, 66 F. Supp. 2d 38, 38-41 (D.D.C. 1999).

¹⁰⁸⁵ *In re: Application of A. H. Belo Corp.*, 66 F. Supp. 2d 47 (D.D.C. 1999).

7. Disposition of Charges Against Other Defendants

Because Medlar had cooperated fully with the prosecution in the proceedings leading up to the Cisneros guilty plea, the OIC moved on August 16, 1999, for the dismissal of the charges against her in the D.C. Indictment.¹⁰⁸⁶ By order of September 14, 1999, Judge Sporkin dismissed the charges against her with prejudice.¹⁰⁸⁷ On September 16, 1999, in the Lubbock prosecution, Judge Cummings ordered that Medlar's sentence from the Lubbock prosecution be reduced to time served, subject to a three-year period of supervised release.¹⁰⁸⁸

On March 4, 2000, because Arce-Garcia and Rosales had complied with the terms of their agreements with the OIC under which their prosecutions had been deferred, and because the case against Cisneros had been resolved with a guilty plea, the OIC moved to dismiss the charges against these two defendants.¹⁰⁸⁹ The court granted these motions.¹⁰⁹⁰

8. The Pardons

On January 20, 2001, his last day in office, President Clinton pardoned or commuted the sentence of almost every individual whose conviction had been secured by an independent counsel during his Presidency. Cisneros and Medlar received full pardons for all the offenses to which they had pleaded guilty.¹⁰⁹¹

¹⁰⁸⁶ United States' Motion to Dismiss Indictment Against Defendant Linda D. Medlar 8/16/99.

¹⁰⁸⁷ Order Dismissing D.C. Indictment Against Linda Medlar 9/14/99.

¹⁰⁸⁸ Order Reducing Sentence of Linda D. Jones (Medlar) 9/16/99.

¹⁰⁸⁹ United States' Motion to Dismiss Charges Against Defendants Sylvia Arce-Garcia and John A. Rosales 3/4/00.

¹⁰⁹⁰ Order Granting OIC Motion(s) to Dismiss Sylvia Arce-Garcia and John Rosales 4/19/00.

¹⁰⁹¹ Letter from DOJ Pardon Attorney to OIC re Cisneros pardon 1/20/01; Letter from DOJ Pardon Attorney to OIC re Medlar pardon 1/20/01.

The OIC received no prior notice from the Department of Justice or the White House of the pardons granted to Cisneros or Medlar. The OIC was not consulted about any recommendations it might have had regarding the worthiness of such grants, even though the views of the prosecuting attorney are customarily sought before pardons are recommended.¹⁰⁹²

¹⁰⁹² See 28 C.F.R. § 1.6(a) (2000); United States Attorney's Manual § 1-2.111.

V. The Obstruction Investigation

A. Introduction

From the Summer of 1997 to March 2003, the Office of Independent Counsel (“OIC”) investigated possible criminal offenses, including obstruction of justice and false statements to government officials, relating to the decisions of certain Department of Justice (“DOJ”) and Internal Revenue Service (“IRS”) officials not to authorize the investigation or prosecution of Cisneros for possible tax violations. The OIC’s investigation examined three related activities: (1) DOJ’s 1994-95 preliminary investigation of Cisneros, which resulted in the appointment of an independent counsel without jurisdiction over tax offenses;¹⁰⁹³ (2) DOJ’s 1997 decision to refuse the Independent Counsel’s request for an expansion of jurisdiction to include the authority to investigate and prosecute Cisneros for possible tax offenses in certain tax years;¹⁰⁹⁴ and (3) the IRS’s 1997 decision to decline to refer for prosecution or grand jury investigation allegations that Cisneros committed criminal tax violations, which impacted DOJ’s decision not to expand the Independent Counsel’s jurisdiction.¹⁰⁹⁵

Although Cisneros’s redirection of income to make undisclosed payments to Medlar raised serious questions of whether he failed to declare significant amounts of income on his tax returns, the Attorney General in her initial 1995 appointment request did not ask that the Independent Counsel be given any jurisdiction over tax offenses. When the OIC later presented to the Attorney General further evidence of tax offenses and asked that its jurisdiction be expanded,¹⁰⁹⁶ she requested that the Independent Counsel be given only very narrow tax jurisdiction, effectively preventing any prosecutions for tax offenses.¹⁰⁹⁷

As it conducted its false statement investigation and limited tax investigation, the OIC came upon significant evidence that certain officials of DOJ and the IRS had acted improperly to prevent an independent counsel investigation of Cisneros for tax

¹⁰⁹³ GJ 00-001 Ex. 4.

¹⁰⁹⁴ GJ 00-001 Ex. 87.

¹⁰⁹⁵ GJ 00-001 Ex. 93.

¹⁰⁹⁶ GJ 00-001 Ex. 51A.

¹⁰⁹⁷ GJ 00-001 Ex. 87.

offenses. Because obstruction of the Independent Counsel’s investigation fell squarely within his stated jurisdiction, the OIC investigated whether such obstruction had occurred. The investigation uncovered substantial evidence of questionable actions by certain DOJ and IRS officials but was truncated before the OIC could determine whether these acts constituted obstruction of justice or other criminal offenses.

In spite of these discoveries, the OIC was unable to obtain cooperation from DOJ or a formal referral of jurisdiction from the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels (“Special Division”) as it tried to complete its obstruction investigation. Faced with those impediments, together with the sunset of the Independent Counsel Act and the running of statutes of limitations on possible offenses, the Independent Counsel elected to terminate the obstruction investigation without bringing formal charges.

B. Limitations on Independent Counsel Jurisdiction over Tax Matters

1. The Initial Appointment

The Attorney General’s March 13, 1995 request for appointment of an independent counsel followed a preliminary investigation conducted by DOJ’s Public Integrity Section (“Public Integrity”), which urged that no independent counsel be appointed to investigate Cisneros for any offense. The Special Division’s May 24, 1995 Appointment Order tracked the jurisdiction proposed by the Attorney General’s request. The Appointment Order therefore granted the Independent Counsel jurisdiction to investigate Cisneros’s false statements and related offenses, but not tax matters.¹⁰⁹⁸

Public Integrity, a part of DOJ’s Criminal Division, oversaw the preliminary investigations of all “covered persons” under the Independent Counsel Act, 28 U.S.C. § 591 *et seq.* The basic process for determining whether to appoint an independent counsel was as follows: (1) the Attorney General initiated a 30-day initial inquiry to determine whether to conduct a full-fledged preliminary investigation; (2) if the initial inquiry revealed specific and credible information indicating an offense by a covered person subject to the statute, the Attorney General would initiate a 90-day preliminary investigation, which could be extended by up to 60 days; (3) following

¹⁰⁹⁸ GJ 00-001 Ex. 4.

the Attorney General's initiation of a preliminary investigation, Public Integrity determined the scope and course of the investigation; (4) Public Integrity directed the FBI and others in conducting the investigation; (5) on the basis of the preliminary investigation, the Public Integrity Chief submitted a recommendation to the Attorney General (through his or her immediate supervisor, the Assistant Attorney General for the Criminal Division) as to whether an independent counsel should be requested; and (6) in light of that recommendation, the Attorney General determined whether there were reasonable grounds to believe that further investigation was warranted, and, if so, requested the appointment of an independent counsel.¹⁰⁹⁹

Public Integrity's preliminary investigation of the Cisneros matter culminated in a February 27, 1995 memorandum from Public Integrity Chief Lee J. Radek to Assistant Attorney General Jo Ann Harris, recommending that the Attorney General not seek the appointment of an independent counsel to investigate Cisneros.¹¹⁰⁰ Regarding the tax issue, the memorandum stated that "the evidence clearly established that taxes were paid on the income [directed to Medlar]."¹¹⁰¹ The Attorney General's application did ask for the appointment of an independent counsel with jurisdiction to investigate and prosecute Cisneros's false statements, but also stated:

Our investigation developed no evidence that Secretary Cisneros failed to pay any income . . . taxes due in connection with his payments to Medlar. . . . I conclude that no further investigation of this matter is warranted as a criminal tax matter, see 28 U.S.C. § 592(c)(1)(B).¹¹⁰²

2. The OIC's 1997 Expansion and Referral Requests

From the May 1995 appointment of the Independent Counsel onward, the OIC investigated the allegation that Cisneros had made false statements to the FBI concerning his payments to Medlar.

¹⁰⁹⁹ See 28 U.S.C. § 592(a) - (c).

¹¹⁰⁰ GJ 00-001 Ex. 372.

¹¹⁰¹ *Id.* at 5.

¹¹⁰² GJ 00-001 Ex. 3 at 4.

As the OIC began its investigation of Cisneros's false statements, it became aware that the IRS had been investigating Cisneros for some time and had obtained information relevant to the OIC's investigation. Notably, the OIC learned that the IRS had interviewed Medlar and obtained from her, pursuant to an IRS summons, the purportedly original tapes of the telephone conversations she had recorded.¹¹⁰³ The OIC also learned that the IRS had interviewed other witnesses the OIC intended to interview and that the IRS had obtained documentary evidence from some of these witnesses regarding Cisneros's and Medlar's finances.¹¹⁰⁴

To conduct a complete investigation of Cisneros's false statements, the OIC needed the original tapes of the telephone conversations Medlar had recorded, and it needed to track the payments Cisneros and others acting on his behalf had made to Medlar. The OIC needed to examine Cisneros's and Medlar's finances to determine the nature, extent, and motivation for the payments; the identity of everyone involved in the making of the payments; and the identity and motivation of everyone involved in the concealment of the payments.¹¹⁰⁵ Absent a court order, the IRS was not free to share the materials in its possession.

The Tax Code, at 26 U.S.C. § 6103, provides as a general rule that tax returns and taxpayer return information obtained by the IRS are confidential and can be provided to other government agencies only under certain circumstances, with a court order. One of those circumstances, set forth in 26 U.S.C. § 6103(i)(A), is the disclosure of returns and return information to federal officers or employees for the use in criminal investigations or proceedings not involving tax administration. Independent counsels are specifically listed among the federal officials who may apply to a federal district judge for the disclosure of returns or return information under § 6103(i)(1)(A).¹¹⁰⁶

Pursuant to § 6103(i)(1)(B), an application for disclosure must demonstrate that:

¹¹⁰³ Roberts Affidavit at 5.

¹¹⁰⁴ *Id.*

¹¹⁰⁵ *Id.* at 4-5.

¹¹⁰⁶ 26 U.S.C. § 6103(i)(1)(B).

- (i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
- (ii) there is reasonable cause to believe that the return or return information is or may be relevant to the matter relating to the commission of such act; and
- (iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.¹¹⁰⁷

To obtain the tapes and the information concerning Cisneros's and Medlar's finances in the IRS's possession, the OIC in October 1995 applied for and received an *ex parte* order (i.e., an order obtained by one party without formal notice to other parties) pursuant to 26 U.S.C. § 6103(i), authorizing the IRS to disclose to the OIC certain information the IRS had obtained during its Cisneros investigation. The OIC was authorized to use this information in its false statement investigation.¹¹⁰⁸

Approximately four months later, in February 1996, the OIC applied for and received an amended *ex parte* order authorizing the IRS to disclose additional information to the OIC. The order likewise authorized the OIC to use the information in its false statement investigation.¹¹⁰⁹

As the OIC's examination of the payments to Medlar proceeded, the accumulated evidence strongly suggested that Cisneros had failed to declare and pay taxes on substantial income, including income redirected to Medlar in 1991 and 1992.¹¹¹⁰ By the end of 1996, the Independent Counsel had determined that it was necessary to investigate Cisneros for tax offenses.

Because tax offenses were not within his original mandate, the Independent Counsel decided to make two formal requests that his jurisdiction be enlarged to

¹¹⁰⁷ 26 U.S.C. § 6103(i)(1)(B)(i)-(iii).

¹¹⁰⁸ *Ex Parte* Order 10/24/95.

¹¹⁰⁹ *Ex Parte* Order 2/6/96.

¹¹¹⁰ Roberts Affidavit at 9-16.

include these offenses. On January 29, 1997, he submitted a letter to the Attorney General requesting an expansion of jurisdiction to investigate and, if necessary, prosecute Cisneros for tax fraud or tax evasion involving funds paid to Medlar, for tax years 1989, 1991, 1992, and 1993.¹¹¹¹ Simultaneously, the Independent Counsel applied to the Special Division for a referral of jurisdiction to investigate and prosecute Cisneros for tax fraud or tax evasion involving “unreported income used for purposes unrelated to Medlar” for the same tax years.¹¹¹²

The submissions to the Attorney General and to the Special Division detailed the OIC’s analysis of Cisneros’s finances and tax returns, demonstrating that substantial income appeared to have been unreported for each of the tax years for which jurisdiction was requested. The total amount of unreported income identified by the OIC exceeded \$300,000. In a follow-up letter to the Attorney General dated February 24, 1997, the Independent Counsel detailed evidence indicating that Cisneros’s underreporting of income was willful.¹¹¹³

On February 28, 1997, acting on the OIC’s expansion request, the Attorney General petitioned the Special Division to grant the Independent Counsel authority to investigate Cisneros’s potential tax violations, but only for tax year 1992. For the

¹¹¹¹ GJ 00-001 Ex. 51A. Pursuant to 28 U.S.C. § 593(c), an independent counsel could petition the Attorney General (and only the Attorney General) for an *expansion* of his or her jurisdiction for matters “which are *not covered* by the prosecutorial jurisdiction of the independent counsel.” 28 U.S.C. § 593(c)(2) (emphasis added). Upon receiving an expansion request, the Attorney General had 30 days to conduct a preliminary investigation, giving “great weight to any recommendations of the independent counsel.” 28 U.S.C. § 593(c)(2)(A). If the Attorney General determined that there were reasonable grounds to believe that further investigation was warranted or if the 30-day period elapsed before a determination was made by the Attorney General, the Special Division was required to expand the independent counsel’s jurisdiction or to appoint another independent counsel to investigate the matter. 28 U.S.C. § 593(c)(2)(C).

¹¹¹² GJ 00-001 Ex. 50 at 4. Pursuant to 28 U.S.C. § 594(e), an independent counsel could ask the Attorney General *or* the Special Division to *refer* to the independent counsel “matters *related* to the independent counsel’s prosecutorial jurisdiction.” 28 U.S.C. § 594(e) (emphasis added).

¹¹¹³ GJ 00-001 Ex. 85.

other three years for which the Independent Counsel had requested jurisdiction – 1989, 1991, and 1993 – the Attorney General told the Special Division that there were “no reasonable grounds” to believe that further investigation was warranted.¹¹¹⁴

On March 18, 1997, acting on the Attorney General’s request, the Special Division expanded the Independent Counsel’s jurisdiction to include possible tax offenses by Cisneros, but only for tax year 1992.¹¹¹⁵ On March 26, 1997, the Special Division *sua sponte* entered an order clarifying that the Independent Counsel was being given authority to investigate matters related to possible tax offenses for tax year 1992, including perjury and obstruction of justice.¹¹¹⁶

The Attorney General’s February 28, 1997 petition to the Special Division also opposed the Independent Counsel’s request to the Special Division that it refer to him jurisdiction over tax matters involving funds not paid to Medlar, stating:

[T]his 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 . . . that further investigation is not warranted, and by my parallel findings in my 1995 Notification to the Court.¹¹¹⁷

The OIC filed a reply urging referral.¹¹¹⁸

On April 10, 1997, the Special Division denied the OIC’s referral request in its entirety.¹¹¹⁹

¹¹¹⁴ GJ 00-001 Ex. 87 at 1-2.

¹¹¹⁵ GJ 00-001 Ex. 91 (Order of Special Division 3/18/97).

¹¹¹⁶ GJ 00-001 Ex. 92 (Order of Special Division 3/26/97).

¹¹¹⁷ GJ 00-001 Ex. 87 at 16-17 (*citing In re Olsen*, 818 F.2d 34, 47 (D.C. Cir. 1987)), 21-22.

¹¹¹⁸ Office of Independent Counsel’s Reply to DOJ’s Opposition 3/13/97.

¹¹¹⁹ GJ 00-001 Ex. 105 (Order of Special Division 4/10/97).

3. The IRS's Review of Cisneros's Possible Tax Violations

In her February 28, 1997 petition to the Special Division asking that the OIC be given tax jurisdiction for 1992 only, the Attorney General acknowledged that the Cisneros tax matter was then being reviewed by the IRS, expressed her desire to allow the IRS investigation to “proceed to its natural conclusion,” and stated that she would reassess her determination if the IRS concluded that referral of the Cisneros tax matter to DOJ for “consideration” of criminal prosecution was warranted.¹¹²⁰ The Attorney General also acknowledged that, if the IRS’s inquiry “developed sufficient evidence of potential criminal tax violations,” the IRS would refer it to DOJ. At such time, she wrote, given that Cisneros was a covered person,¹¹²¹ the inquiry “would be handled as an Independent Counsel matter and likely referred to the Independent Counsel as an expansion of jurisdiction.”¹¹²² However, the IRS declined to refer the Cisneros case to DOJ for prosecution, over strong internal dissent.

The IRS began its investigation of Cisneros’s possible tax violations following Medlar’s September 1994 appearance on the *Inside Edition* television program. The case was initially investigated by the IRS’s South Texas Criminal Investigative Division (“CID”) in San Antonio, Texas.¹¹²³ On December 20, 1996, CID forwarded the case, pursuant to normal IRS procedure, to the IRS’s District Counsel’s Office (“District Counsel”) in Austin, Texas, with a prosecution recommendation.¹¹²⁴ District Counsel then began the review, purportedly in “partnership” with the IRS’s Assistant Chief Counsel’s Office for Criminal Tax (“ACC”) in Washington, D.C.¹¹²⁵

In January 1997, before District Counsel had a chance to complete its review, ACC pulled the review of the case from District Counsel in the field into the national

¹¹²⁰ GJ 00-001 Ex. 87 at 6.

¹¹²¹ A person covered by the Independent Counsel Act remained covered by the Act for one year after leaving office. 5 U.S.C. § 5312; 28 U.S.C. § 591(b)(7).

¹¹²² GJ 00-001 Ex. 87 at 16-17 n. 8.

¹¹²³ GJ 00-001 Ex. 87.

¹¹²⁴ GJ 00-001 Ex. 23.

¹¹²⁵ GJ 00-001 Ex. 30.

office.¹¹²⁶ District Counsel forwarded the case to ACC, with a memorandum noting that there was a probability of conviction in the case.¹¹²⁷

Nevertheless, in March 1997, approximately one month after the Attorney General's decision to expand the Independent Counsel's jurisdiction for only the 1992 tax year, ACC declined to refer the Cisneros tax case to DOJ for prosecution or grand jury investigation.¹¹²⁸ The Attorney General apparently took no further action after this decision by the IRS.

C. The OIC Tax Investigation

The OIC began its investigation of Cisneros for tax violations in the Spring of 1997 upon receiving jurisdiction over possible offenses in tax year 1992. The OIC already had in its possession substantial relevant evidence as it began the investigation, much of which is discussed in detail below. That evidence showed, among other things, that Cisneros had underdeclared his income in tax year 1992 and that he should have been aware of the underdeclaration because his expenses greatly exceeded his declared income.

However, the OIC soon came to realize that it was unlikely to prove that Cisneros's underdeclaration of income was willful because it could not show a pattern of similar acts over several years.¹¹²⁹ When it obtained the indictment of Cisneros for

¹¹²⁶ GJ 00-001 Ex. 339B at 3; *see* GJ 00-001 Ex. 94 at 2.

¹¹²⁷ GJ 00-001 Ex. 38.

¹¹²⁸ GJ 00-001 Ex. 93.

¹¹²⁹ Willfulness is defined as the voluntary, intentional violation of a known legal duty. *United States v. Pomponio*, 429 U.S. 10, 11-13 (1976). Willfulness is an essential element of the offenses of tax evasion (26 U.S.C. § 7201) and filing a false return (26 U.S.C. § 7206). It may be inferred from a "concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal." *Spies v. United States*, 317 U.S. 492, 499 (1942). DOJ's own prosecutorial guidelines acknowledge that the courts have consistently held that "[w]illfulness may be inferred from evidence of a consistent pattern of underreporting large amounts of income." United States Attorney's Manual, 8.06[3], Examples:

(continued...)

false statements and conspiracy, in late 1997, the OIC elected not to include any tax counts because of the seemingly insurmountable problem of proving willfulness for a single year. For the same reason, it did not seek to add such charges later.

The plea bargain that resolved the Cisneros prosecution embraced all possible offenses with which the OIC might have charged Cisneros, including any tax offenses.¹¹³⁰

D. Basis of the Obstruction Investigation

The OIC did not know why the Attorney General had declined to recommend that it be given jurisdiction over what appeared to be a *prima facie* case of multi-year tax fraud by a public official. However, the materials the OIC acquired during its false statements and tax investigations included internal IRS and DOJ documents from their investigations. These documents illuminated not only Cisneros's activities but also these agencies' internal actions leading to the Attorney General's decision to request that the Independent Counsel be given only limited jurisdiction to investigate tax offenses. From these materials, the OIC perceived that certain DOJ and IRS officials might have failed to follow normal procedures in investigating, and in making recommendations and decisions relating to, Cisneros's possible tax offenses.

In particular, in May 1997, the OIC received a copy of an internal IRS memorandum entitled "Possible Improprieties by Assistant Chief Counsel (Criminal

¹¹²⁹(...continued)
Proof of Willfulness.

The IRS's Office of Chief Counsel Basic Criminal Tax School Manual states that "[a] pattern of noncompliance is an important factor in Title 26 investigations. A pattern of multiple years is particularly relevant when an indirect method of proof is utilized to establish the offense." Office of Chief Counsel Basic Criminal Tax School Manual (June 1998), Chapter 6-2. Similarly, the IRS's Office of Chief Counsel Tax Crimes Handbook lists "substantial understatement of income in successive years" as an example of conduct from which willfulness can be inferred. 1996 Office of Chief Counsel Tax Crimes Handbook at 10.

¹¹³⁰ Cisneros Plea Agreement 9/7/99 at 2-3.

Tax)” (“Improprieties Memorandum”).¹¹³¹ The memorandum was authored by the San Antonio Chief of CID, whose office had initially investigated the Cisneros tax matter. It strongly accused the head of ACC of improperly working with DOJ to impede a meritorious criminal tax prosecution of Cisneros, “regardless of the evidence.”¹¹³² The memorandum noted that CID had forwarded the Cisneros case to District Counsel with a prosecution recommendation, but that ACC had then intervened by pulling the case into its Washington, D.C. office and subsequently declining to refer it to DOJ for grand jury investigation or prosecution.

The Improprieties Memorandum alleged that ACC’s actions were improper. Specifically, it charged that:

- there had been an “unprecedented deviation” from the IRS’s normal review process in the review of the Cisneros case;¹¹³³
- ACC had pulled the Cisneros case from the field with the apparent intent to “kill” it;¹¹³⁴
- ACC’s decision to decline the case had been made without regard to the evidence or the facts;¹¹³⁵
- the head of ACC, who had made the decision to pull the case from the field and then to kill it, had had a very “cozy” relationship with Cisneros’s attorneys;¹¹³⁶ and

¹¹³¹ GJ 00-001 Ex. 94.

¹¹³² GJ 00-001 Ex. 94 at 2.

¹¹³³ GJ 00-001 Ex. 94 at 2-3.

¹¹³⁴ *Id.* at 2.

¹¹³⁵ *Id.* at 3-5.

¹¹³⁶ *Id.* at 1-2, 5-6.

- ACC had made improper disclosures to DOJ’s Criminal Tax Division (“Tax Division”) in a further attempt to stop the Cisneros case from being prosecuted.¹¹³⁷

Some of the Improprieties Memorandum’s accusations bore directly on the question of how the Independent Counsel’s jurisdiction was determined. The memorandum noted that the Independent Counsel had requested jurisdiction to investigate possible Cisneros tax offenses from both the Attorney General and the Special Division, and that it was awaiting an order from the Special Division.¹¹³⁸ The memorandum attributed to a DOJ official the complaint that CID, which was then trying to keep the case alive, had been “dragging its feet” so that the OIC could take jurisdiction.¹¹³⁹

Furthermore, the Improprieties Memorandum noted that the Attorney General’s written response to the Independent Counsel’s expansion request seemed to mirror ACC’s reasons for killing the Cisneros tax case.¹¹⁴⁰ It concluded that the actions of ACC might have improperly influenced the Attorney General’s decision on whether to grant the Independent Counsel authority to investigate tax matters:

It also appears that the possible disclosure by [ACC], of their intentions to decline the case, has potentially influenced Reno’s decision. Her decision should have been made independently and without knowledge of any tax investigation.¹¹⁴¹

The Improprieties Memorandum thus raised serious questions of whether improper activities within the IRS or DOJ might have wrongfully limited the tax jurisdiction that the OIC received, and thereby obstructed its investigation. It suggested that ACC, working in conjunction with DOJ officials who were attempting to head off a multi-year independent counsel tax investigation, had quashed a strong criminal tax fraud case. The memorandum and other materials available to the OIC

¹¹³⁷ *Id.* at 2, 6-7.

¹¹³⁸ *Id.* at 1.

¹¹³⁹ *Id.* at 6-7.

¹¹⁴⁰ *Id.* at 7.

¹¹⁴¹ *Id.* at 7.

in May 1997 indicated that the Attorney General's initial decision not to request that the Independent Counsel be given tax jurisdiction, and her later decision to request an expansion allowing tax jurisdiction in only one year, might have resulted from activities amounting to obstruction of justice. If so, such activities fell squarely within the Independent Counsel's mandate to investigate any obstruction of his investigation.

E. The OIC's Preliminary Obstruction Investigation

The Independent Counsel's 1995 original mandate and 1997 expansion mandates expressly included jurisdiction over any interference with or obstruction of his investigation, in addition to any matters related to his original jurisdiction. They gave the Independent Counsel:

[J]urisdiction 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 statement or testimony in violation of federal criminal law, in connection with or arising out of [his original false statements investigation or his later 1992 tax investigation].¹¹⁴²

[P]rosecutorial jurisdiction to fully investigate and prosecute the subject matters with respect to which the Attorney General requested appointment of independent counsel, [and the expansion of such independent counsel's jurisdiction] . . . and all matters and persons and entities whose acts may be related to those subject matters, inclusive of authority to investigate and prosecute federal crimes . . . that may arise out of the above described matters, including perjury, obstruction of justice, destruction of evidence and intimidation of witnesses.¹¹⁴³

From these mandates, the OIC determined that it had the authority to proceed with a preliminary investigation of possible obstruction of its investigations. The preliminary investigation addressed whether any laws had been broken in connection with the following: DOJ's 1995 decision not to include tax offenses in the Independent Counsel's original mandate; DOJ's 1997 decision not to expand the Independent Counsel's jurisdiction to include Cisneros's possible tax offenses in

¹¹⁴² GJ 00-001 Ex. 4 at 2; *see* GJ 00-001 Ex. 91 at 2.

¹¹⁴³ GJ 00-001 Ex. 92; *see* GJ 00-001 Ex. 4 at 2-3.

1989, 1991, and 1993; and the IRS's decision not to refer the Cisneros tax case for prosecution or grand jury investigation, which under the Independent Counsel Act would almost certainly have been conducted by an independent counsel.

In the Summer of 1997, at the OIC's request, two FBI Special Agents and a Department of Treasury Office of Inspector General Special Agent were detailed to assist in its preliminary obstruction investigation. The OIC then questioned numerous IRS employees who had worked on or had knowledge of the Cisneros case, including CID agents and ACC attorneys. The OIC also obtained CID's and ACC's Cisneros case files and telephone and e-mail records, as well as various internal FBI documents relating to the Cisneros preliminary investigation.

Evidence the OIC gathered in its preliminary investigation indicated that both DOJ and the IRS had had in their possession evidence showing that Cisneros had substantially underreported his income in several tax years. The OIC also obtained evidence confirming many of the Improprieties Memorandum's allegations, including that ACC's taking over the Cisneros case from a local office deviated from normal IRS procedure.

F. The OIC's Full-Scale Obstruction Investigation

On the basis of its preliminary investigation, the OIC decided in early 1998 to initiate a full-scale investigation into obstruction of justice by DOJ and IRS officials.

1. The 1998 Grand Jury Inquiry

In the Spring of 1998, a federal grand jury in Washington, D.C. began taking evidence in the OIC's obstruction investigation. The witnesses included two ACC attorneys who had reviewed the Cisneros case, Martin Klotz and Martin Needle, both originally represented by DOJ lawyers.¹¹⁴⁴ In May 1998, after their initial appearances before the grand jury and after the OIC had informed DOJ that they were subjects of its investigation,¹¹⁴⁵ both retained private counsel, who informed the OIC

¹¹⁴⁴ See GJ 00-001 Exs. 164, 165, 174; Letter from DOJ to OIC 5/6/98; Letter from DOJ to OIC 5/18/98.

¹¹⁴⁵ A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation. United States Attorneys Manual 9-11.151,
(continued...)

their clients would assert the Fifth Amendment privilege against self-incrimination if asked to testify again.¹¹⁴⁶ Klotz appeared before the grand jury on May 19, 1998, and asserted the Fifth Amendment in response to any and all questions.¹¹⁴⁷ (Both later testified pursuant to grants of immunity.)¹¹⁴⁸

2. Temporary Suspension of the Obstruction Investigation

In the Spring of 1998, United States District Judge Stanley Sporkin set a September 1998 date for the Cisneros false statements trial. Because its resources were limited, the OIC temporarily suspended further investigation of the obstruction of justice allegations pending the completion of the Cisneros trial.

Intensive pretrial activity ensued, and the Cisneros trial date was repeatedly postponed. On the eve of trial, on September 7, 1999, the prosecution was resolved with Cisneros's guilty plea.¹¹⁴⁹

In the interim, on June 30, 1999, the Independent Counsel Act lapsed by its sunset provision.¹¹⁵⁰ However, the provision provided that the Act "shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines that such matters have been completed."¹¹⁵¹ The OIC's obstruction investigation had been pending since the Spring of 1997, and the Independent Counsel determined that it should continue after the Cisneros prosecution concluded, despite the sunset of the Act, because of the gravity of the obstruction allegations.

¹¹⁴⁵(...continued)
Advice of "Rights" of Grand Jury Witnesses.

¹¹⁴⁶ OIC staff notes 5/18/98, 5/20/98; *see* Letter from DOJ to OIC 5/18/98.

¹¹⁴⁷ GJ 97-1 Tr. Klotz 5/19/98.

¹¹⁴⁸ GJ 00-001 Exs. 243, 267.

¹¹⁴⁹ GJ 00-001 Ex. 11 at 20.

¹¹⁵⁰ 28 U.S.C. § 599.

¹¹⁵¹ *Id.*

3. Resumption of the Obstruction Investigation

Following Cisneros's September 1999 guilty plea, the OIC resumed its obstruction investigation.

a. Investigation of Possible IRS Obstruction

Continuing its investigation of possible obstruction by IRS officials, the OIC interviewed IRS agents and attorneys involved in the review of the Cisneros case, including officials from CID, District Counsel, ACC, and other IRS personnel. The OIC also obtained and analyzed additional records from the IRS and the FBI.

Pursuant to an OIC request, a new grand jury was convened in February 2000 to investigate the obstruction allegations. The grand jury heard testimony from a CID agent familiar with the Cisneros case, and from IRS attorneys who had worked on the Cisneros case in the IRS's district, regional, and national offices. The grand jury heard extensively from Barry Finkelstein, the head of ACC, and from his subordinates Martin Klotz and Martin Needle. Finkelstein and Klotz testified pursuant to statutory grants of use immunity under 18 U.S.C. §§ 6002-6003.¹¹⁵² Needle testified pursuant to an informal grant of use immunity conferred upon him by the OIC.¹¹⁵³

b. Investigation of Possible DOJ Obstruction

While the OIC was taking testimony from IRS personnel before the grand jury, it was also investigating possible obstruction of justice by DOJ officials. The OIC analyzed internal FBI documents from the Cisneros background and preliminary investigations, and limited documentation from DOJ relating to the 1994-95 preliminary investigation. The OIC compared this evidence to the information it had obtained from the IRS. The OIC also interviewed current and former FBI agents who had worked on the Cisneros case during DOJ's preliminary investigation leading to the Independent Counsel's appointment. Several of these agents later testified before the grand jury.

¹¹⁵² GJ 00-001 Exs. 146, 243, 267; GJ 00-001 Tr. Finkelstein 5/23/00 at 23-27; GJ 00-001 Tr. Klotz 12/12/00 at 6-9.

¹¹⁵³ GJ 00-001 Ex. 267; GJ 00-001 Tr. Needle 3/8/01 at 5-10.

The OIC determined that the evidence presented through the IRS and FBI witnesses, although substantial, provided an incomplete explanation of DOJ's and ACC's decisions in the Cisneros matter. The OIC therefore concluded that a responsible and thorough investigation would require the grand jury to consider the testimony of DOJ officials and to review DOJ documents.

However, DOJ repeatedly rebuffed the OIC's efforts to obtain its cooperation. Notably, on December 20, 2000, the Independent Counsel met with Assistant Attorney General for the Criminal Division James Robinson and Deputy Assistant Attorney General for the Criminal Division John Keeney.¹¹⁵⁴ At the meeting, the DOJ officials alluded to an October 2000 *Wall Street Journal* article describing the OIC's obstruction investigation.¹¹⁵⁵

The DOJ representatives expressed a concern that an obstruction investigation exceeded the Independent Counsel's jurisdiction, and asserted that DOJ had some supervisory power over the exercise of an independent counsel's jurisdiction.¹¹⁵⁶ They said they had considered raising this concern after the *Wall Street Journal* article appeared but had decided against it, and that they were raising the issue then because the Attorney General wanted to be assured that the Independent Counsel was operating within his jurisdiction due to the forthcoming change in administration.¹¹⁵⁷ They asked the Independent Counsel to disclose the nature of his ongoing grand jury investigation, but he declined to do so.¹¹⁵⁸ They then advised the Independent Counsel that his refusal to divulge the details of his investigation could constitute

¹¹⁵⁴ DOJ requested this meeting days after the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000).

¹¹⁵⁵ *Wall Street Journal*, "Independent Counsel Barrett probes IRS, Justice Department on Cisneros tax case" 10/3/00. The article stated: "An independent counsel is investigating whether the Internal Revenue Service and Justice Department obstructed his probe of former Housing Secretary Henry Cisneros, lawyers familiar with the matter said."

¹¹⁵⁶ OIC notes 12/20/00 at 1.

¹¹⁵⁷ *Id.* at 1.

¹¹⁵⁸ *Id.* at 1-2.

“good cause” for his removal from office.¹¹⁵⁹ They also told him that a continuation of the investigation might lead to civil suits against him and his staff.¹¹⁶⁰

The Independent Counsel responded by offering to meet privately and confidentially with the Attorney General to apprise her of the nature of the investigation to the extent he was able.¹¹⁶¹ The OIC told the DOJ officials that it had informed the Special Division of the nature of its investigation. The DOJ officials indicated that DOJ would accept a ruling from the Special Division that the matter was within the Independent Counsel’s jurisdiction, but the Independent Counsel said he wanted to make sure that a Special Division referral would satisfy the Attorney General.¹¹⁶² On January 19, 2001, her penultimate day in office, Attorney General Reno wrote to the Independent Counsel to tell him that she was passing the matter on to her successor.¹¹⁶³

In early February 2001, the Independent Counsel met with the newly-appointed Attorney General John D. Ashcroft and disclosed to him the nature of the ongoing grand jury investigation. Thereafter, during the late Winter and early Spring of 2001, the OIC had informal discussions with DOJ concerning whether the new Attorney General would be willing to provide a referral of the obstruction matter as a “related matter” under 28 U.S.C. § 594(e).

In May 2001, DOJ sent the Independent Counsel a draft letter unofficially declining to refer the matter.¹¹⁶⁴ The letter stated: “Because of the limited nature of our review, this letter does not represent an official Department position on your formal request.”¹¹⁶⁵ Noting that “there is no express statutory language that dictates how to evaluate a ‘related matter’ referral,” DOJ chose “to use a similar standard as

¹¹⁵⁹ OIC notes 12/20/00 at 3; *see* 28 U.S.C. § 596(a)(1).

¹¹⁶⁰ OIC notes 12/20/00 at 2.

¹¹⁶¹ *Id.* at 4.

¹¹⁶² *Id.* at 7-9.

¹¹⁶³ GJ 00-001 Ex. 258.

¹¹⁶⁴ Draft Letter from DOJ to Independent Counsel 5/2001 at 1.

¹¹⁶⁵ *Id.* at 1-2.

for requests for appointment of an Independent Counsel under 28 U.S.C. § 591 and 592.”¹¹⁶⁶ The unofficial denial was based on DOJ’s position that:

[T]here are no reasonable grounds to believe the further investigation is warranted. We have seen no actual evidence supporting a conclusion that any employee of this Department or of the IRS violated a criminal law in connection with the prosecutive determination made by either the Attorney General or the Assistant Chief Counsel of the IRS.¹¹⁶⁷

The letter also stated that “notwithstanding our preliminary view that the new allegations should not be referred to you . . . it is within your discretion to request such a referral from the Special Division.”¹¹⁶⁸

Despite DOJ’s unofficial position that a referral was not appropriate, the OIC continued its obstruction investigation. However, by the end of the Summer of 2001, the OIC had determined that the investigation could not be completed until the jurisdictional issue was resolved. To advance the investigation and frame the jurisdiction issue, the OIC requested, in a September 10, 2001 letter to the Attorney General, that DOJ produce certain records crucial to the resolution of the obstruction investigation.¹¹⁶⁹ As of November 2001, the OIC had not received any response to this request. (The OIC recognized that this request came immediately before the events of September 11, 2001, which placed more pressing obligations on DOJ in the weeks immediately following.)

4. The Application for a Referral of Jurisdiction over the Obstruction Allegations

The OIC anticipated that DOJ would continue to ignore or resist any request for the production of records and that any subpoenas issued to DOJ or others would result in jurisdictional challenges. To avoid the significant delay such challenges

¹¹⁶⁶ *Id.* at 4-5.

¹¹⁶⁷ Draft Letter from DOJ to Independent Counsel 5/2001 at 6 (internal quotation marks omitted).

¹¹⁶⁸ *Id.* at 9.

¹¹⁶⁹ Letter from Independent Counsel to Attorney General Ashcroft 9/10/01.

would have caused, the OIC decided in late 2001 to seek a formal referral of the obstruction matter from the Special Division pursuant to 28 U.S.C. § 594(e).

As interpreted by the Special Division, § 594(e) was essentially a means by which the court could clarify an independent counsel's existing jurisdiction over matters related to the independent counsel's core jurisdiction. Specifically, in making a § 594(e) referral, the Special Division was "interpreting, but not expanding, the independent counsel's original prosecutorial jurisdiction, thus permitting this Court to make explicit the independent counsel's jurisdiction over a matter that was implicitly included in the original grant."¹¹⁷⁰ On November 30, 2001, the OIC filed an Application for a Referral of a Related Matter with the Special Division, urging the Special Division to interpret the Independent Counsel's jurisdiction to encompass the obstruction of justice issue as a related matter.¹¹⁷¹

The Application explained why the OIC believed the obstruction matter was related to the jurisdiction already granted to the Independent Counsel. It also noted that the Independent Counsel Act's sunset date of June 30, 1999 had passed.¹¹⁷² The Application urged that the obstruction matter, which had been under investigation on June 30, 1999, should be continued because it met the statutory criteria – it was pending on the sunset date and the Independent Counsel had determined that it should be completed.¹¹⁷³

The Special Division entered an order on January 16, 2002, denying the Application for a Referral.¹¹⁷⁴ The accompanying Memorandum Opinion indicated that the denial was on non-substantive grounds and proved, upon examination, to be somewhat cryptic. The Special Division held that the 1999 sunset of the

¹¹⁷⁰ *In re Espy*, 80 F.3d 501, 506 (D.C. Cir. [Spec. Div.] 1996).

¹¹⁷¹ Office of Independent Counsel's Application for Referral of a Related Matter Pursuant to 28 U.S.C. § 594(e) 11/30/01.

¹¹⁷² 28 U.S.C. § 599.

¹¹⁷³ Office of Independent Counsel's Application For Referral Of A Related Matter Pursuant to 28 U.S.C. § 594(e) 11/30/01 at 31-32.

¹¹⁷⁴ Special Division Order and Opinion 1/16/02.

Independent Counsel Act precluded it from granting the requested referral.¹¹⁷⁵ Its Opinion hinted, but did not clearly state, that it viewed the obstruction investigation as barred by the sunseting of the statute.¹¹⁷⁶ However, the court noted that the question of whether the obstruction investigation survived the sunseting of the Act had not been squarely put before it.¹¹⁷⁷ The court also stated that “[i]f [the obstruction investigation] was indeed a ‘pending matter’ [under 28 U.S.C. § 599] then it would not need to be referred.”¹¹⁷⁸

5. The Subpoena to DOJ

Because the Independent Counsel believed that the obstruction allegations should be fully investigated, the OIC decided to press ahead with the obstruction investigation without a formal referral, in light of the Special Division’s directive that a pending matter did not need to be referred.

The next logical step in the investigation was to obtain information from DOJ, which had already indicated that it would not provide documents voluntarily. Therefore, on February 4, 2002, the OIC served on DOJ a grand jury subpoena for documents related to the obstruction investigation.¹¹⁷⁹ In an accompanying letter to the Attorney General, the Independent Counsel requested cooperation with the investigation and pledged to “complete the investigation as quickly and discreetly as possible” and “not . . . to examine conduct unnecessary to the completion of my investigation.”¹¹⁸⁰ The OIC then began informal discussions with DOJ concerning the subpoena and granted DOJ’s request for an extension of time to respond.

The OIC disclosed to DOJ the fact that it had filed with the Special Division an earlier Application for Referral. However, because the Application and the Special Division’s Order and Opinion had been filed under seal, the OIC could not

¹¹⁷⁵ Special Division Opinion 1/16/02 at 2.

¹¹⁷⁶ *Id.*

¹¹⁷⁷ *Id.*

¹¹⁷⁸ *Id.*

¹¹⁷⁹ OIC Subpoena to DOJ 2/4/02.

¹¹⁸⁰ Letter from Independent Counsel to Attorney General Ashcroft 2/4/02.

disclose the particulars of the Application or the Special Division’s disposition of it. On February 8, 2002, the OIC requested the Special Division’s permission to disclose the Application and the Order and Opinion to DOJ.¹¹⁸¹ By an order dated February 21, 2002, the Special Division granted this request, with the proviso that “[t]his ORDER is not to be construed as conveying an opinion of this Court about the jurisdiction of Independent Counsel Barrett with respect to any aspect of the investigation, In re: Henry G. Cisneros.”¹¹⁸²

The OIC then gave DOJ a copy of the Application and the Order denying the Application. On March 26, 2002, DOJ filed with the Special Division a “Motion for Clarification of Independent Counsel’s Jurisdiction.”¹¹⁸³ The motion asked the Special Division to “find that [the Independent Counsel] is not authorized to conduct these new lines of inquiry.”¹¹⁸⁴ The OIC’s Response argued that there was no statutory basis for such a motion.¹¹⁸⁵ Nevertheless, the Response urged the Special Division to resolve the substantive question underlying the DOJ motion. Specifically, it noted that the OIC had the implicit authority to request a reconsideration of the earlier denial of its referral application, and it expressly asked the Special Division to entertain the DOJ motion as an OIC request for reconsideration.¹¹⁸⁶ The OIC further urged that, if the Special Division did address the motion, it should hold that the OIC did indeed have the jurisdiction to proceed with the obstruction investigation.¹¹⁸⁷

¹¹⁸¹ Independent Counsel’s Sealed Motion for Limited Disclosure of Its Application for Referral of a Related Matter and the Court’s Order Denying the Application 2/8/02.

¹¹⁸² Special Division Order 2/21/02 at 2.

¹¹⁸³ Motion For Clarification Of Independent Counsel’s Jurisdiction 3/26/02.

¹¹⁸⁴ Motion For Clarification Of Independent Counsel’s Jurisdiction 3/26/02 at 2.

¹¹⁸⁵ Office of Independent Counsel’s Response To Department of Justice’s “Motion For Clarification Of Independent Counsel’s Jurisdiction” 4/2/02 at 1, 5-7.

¹¹⁸⁶ *Id.* at 7-8.

¹¹⁸⁷ *Id.* at 7-18.

On April 16, 2002, the Special Division rejected this new invitation to address the jurisdictional question, stating in its Memorandum Opinion that “we lack jurisdiction to entertain the DOJ’s motion.”¹¹⁸⁸ The Opinion further stated that “[w]e note in passing that it is well established that to obtain review of a subpoena, a party must refuse to comply with the subpoena, be held in contempt by the trial court, and appeal the finding of contempt to the appellate court.”¹¹⁸⁹

On April 30, 2002, DOJ filed with the United States District Court for the District of Columbia a Motion to Quash the OIC subpoena.¹¹⁹⁰ The motion principally argued that the OIC did not have jurisdiction to conduct the obstruction investigation, and that any jurisdiction the OIC did have had lapsed with the sunset of the Independent Counsel Act. The OIC responded on May 20, 2002, arguing that it did have jurisdiction over the obstruction matter and that this jurisdiction survived the sunset of the Act because it was pending on June 30, 1999, as required by 28 U.S.C. § 599.¹¹⁹¹ The District Court did not immediately take action on the Motion to Quash and gave no indication of when it would rule.

6. The Show Cause Order

The District Court had taken no action on the Motion to Quash by the end of May 2002, which marked the seventh anniversary of the Independent Counsel’s appointment. The anniversary triggered 28 U.S.C. § 596(b)(2), which required the Special Division to determine annually, on its own motion, whether to terminate the office of an independent counsel:

[O]n the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel . . . and any resulting prosecutions, have been so completed or substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.

¹¹⁸⁸ Special Division Opinion 4/16/02 at 1.

¹¹⁸⁹ *Id.* at 2 (internal quotation marks omitted).

¹¹⁹⁰ Motion To Quash Grand Jury Subpoena Duces Tecum 4/30/02.

¹¹⁹¹ Office Of Independent Counsel David M. Barrett’s Opposition To Department Of Justice’s “Motion To Quash Grand Jury Subpoena Duces Tecum” 5/20/02.

On May 29, 2002, referring to § 596(b)(2), the Special Division sent its annual request to the Independent Counsel for an update on the status of pending matters in his investigations.¹¹⁹² The Independent Counsel responded on June 5, 2002, with a letter describing the status of the obstruction investigation, including the OIC's efforts to obtain needed information from DOJ.¹¹⁹³

On June 21, 2002, the Special Division issued an Order requiring the Independent Counsel to “show cause on or before 30 days why the Court should not order that any remaining investigations and prosecutions be transferred to the Department of Justice, and the Office of Independent Counsel terminated.”¹¹⁹⁴ The accompanying Special Division Order further stated that “the Court is unable to determine definitively whether the investigation of all matters within the prosecutorial jurisdiction of the Independent Counsel . . . and resulting prosecutions have been completed or substantially completed.”¹¹⁹⁵ The Order to Show Cause marked a departure from the Special Division's past practice of annually authorizing the OIC to continue for a period of one year after receiving his annual status letter.

The OIC responded to the Order to Show Cause on July 10, 2002.¹¹⁹⁶ Its Response described the obstruction investigation, explained why the obstruction investigation was within the Independent Counsel's jurisdiction, and demonstrated that the obstruction investigation had been pending before the sunset date of the Act. The Response urged that the Special Division's termination powers, pursuant to 28 U.S.C. § 596(b)(2), were limited to those situations where “all matters within the prosecutorial jurisdiction of [the] independent counsel . . . have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.”¹¹⁹⁷ The Response asserted that:

¹¹⁹² Letter from Special Division to Independent Counsel 5/29/02.

¹¹⁹³ Letter from Independent Counsel to Special Division 6/5/02.

¹¹⁹⁴ Special Division Order 6/21/02 at 1-2.

¹¹⁹⁵ Special Division Order 6/21/02 at 2.

¹¹⁹⁶ Office of Independent Counsel's Response To Order To Show Cause 7/10/02.

¹¹⁹⁷ *Id.* at 2.

[T]his is not “the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities under this chapter are completed.” The investigation is neither complete nor substantially complete, and DOJ cannot appropriately continue it in OIC’s place.¹¹⁹⁸

On September 3, 2002, the Special Division issued an Order on the termination issue. The court concluded that termination was “not currently appropriate under the standards set forth in 28 U.S.C. § 596(b)(2).” However, it further ordered that “within six (6) months of the date of this order, the Independent Counsel again show cause why his office should not be terminated, and that his response to this show cause order include new developments since the date of this order.”¹¹⁹⁹ The accompanying Memorandum further explained that, “because of the unique status of this investigation . . . we expect that this matter will be brought to a close in the foreseeable future.”¹²⁰⁰

7. The Decision to Terminate the Obstruction Investigation

Following the Special Division’s September 3, 2002 Order, after thorough review and deliberation, the Independent Counsel decided to terminate the obstruction investigation and to confine the OIC’s activities to the completion of this Final Report. DOJ, through its resistance to the subpoena, had signaled its intention to resist the investigation at every turn. The District Court had taken no action on DOJ’s Motion to Quash, which was likely to be the subject of a lengthy appeal no matter what the outcome. The Special Division had clearly indicated that it wanted the matter resolved expeditiously. And, while all of these factors were slowing the progress of the investigation, the statute of limitations was becoming an increasingly serious concern for the prosecution of possible offenses that had, for the most part, taken place several years earlier.

¹¹⁹⁸ *Id.* at 33, quoting *Morrison v. Olsen*, 487 U.S. 654, 653 n. 21 (1998) (citations omitted).

¹¹⁹⁹ Special Division Order 9/3/02.

¹²⁰⁰ Special Division Memorandum 9/3/02 at 6.

Accordingly, on February 28, 2003, the OIC filed with the Special Division its Response to the September 3, 2002 Order.¹²⁰¹ In its Response, the OIC informed the Special Division that it had decided to cease all pending investigative and prosecutorial activities, had withdrawn the subpoena to DOJ, and had notified the District Court of the withdrawal. The OIC also informed the Special Division that its remaining activities would be directed to its non-investigative and non-prosecutorial duties, in particular the preparation and filing of its Final Report.

On March 17, 2003, the Special Division entered an Order directing the Independent Counsel to continue his duties with respect to the filing of this Final Report.¹²⁰²

G. The Results of the OIC's Obstruction Investigation

1. Summary of Findings

For the reasons discussed above, the OIC did not complete its investigation of possible obstruction of justice in connection with its earlier investigation of Cisneros. However, the incomplete investigation of obstruction issues yielded substantial credible evidence to draw certain inferences about the underlying facts. This evidence and these inferences are discussed below.

Specifically, the OIC determined that this evidence supports the conclusion that certain DOJ officials had:

- attempted to prevent an independent counsel from being appointed to investigate any of the allegations against Cisneros; and
- in conjunction with certain IRS officials, attempted to prevent an independent counsel from being appointed to investigate allegations that Cisneros committed tax offenses.

The OIC further found that this evidence supports the conclusion that certain officials of the IRS's ACC had:

¹²⁰¹ Office Of Independent Counsel's Response To Order To Show Cause 2/28/03.

¹²⁰² Special Division Order 3/17/03.

- independently and in conjunction with certain DOJ officials, attempted to preclude an independent counsel investigation of Cisneros's possible tax offenses;
- discussed the Cisneros case with DOJ before DOJ had reached its determination on the OIC's expansion request, indicating at that time that ACC was not going to forward the case for prosecution;
- failed to follow normal IRS practices in reviewing the Cisneros case;
- ignored, throughout their review, critical evidence that, in the view of the IRS officials who normally would make such determinations, clearly indicated that the Cisneros case warranted prosecution;
- ignored crucial and seemingly undeniable facts in determining whether the evidence merited prosecution of Cisneros; and
- given conflicting testimony on numerous issues before the grand jury in the OIC investigation.

H. Findings Regarding the Initial Request for Appointment of an Independent Counsel

Public Integrity's preliminary investigation of the Cisneros matter, conducted in 1994 and 1995 pursuant to 28 U.S.C. § 592(a) to determine whether the Attorney General should request appointment of an independent counsel to investigate Cisneros, appears to have been tailored to preclude the appointment of an independent counsel. High-ranking Public Integrity officials seem to have shied away from obtaining relevant evidence concerning Cisneros, to have ignored other critical evidence, to have falsely claimed that they conducted investigations of issues concerning Cisneros's financial dealings and potential tax violations, and to have engaged in a result-driven legal and factual analysis. All of this occurred when the Clinton Administration was beset by other accusations of impropriety and other independent counsel investigations, leading the head of Public Integrity to state that he did not want to recommend the appointment of another independent counsel because it would pose problems for the Attorney General in her role with the President.

1. Preliminary Inquiries into the Cisneros Allegations

In early September 1994, the press began reporting that Medlar had taped Cisneros and was preparing to appear on the television program *Inside Edition*, where she would tell her side of the story and air some of the recorded conversations.¹²⁰³ It was also reported that Medlar and Cisneros had discussed his FBI background investigation on some of the tapes.¹²⁰⁴

Almost immediately, White House Chief of Staff Leon Panetta directed the White House Counsel's Office ("WHCO") to look into the matter. According to Panetta, the WHCO was instructed "to review the allegations that were out there regarding [Cisneros's] conduct, as expeditious and thorough a review as they could, for purposes of making a recommendation . . . to the President as to whether or not action should be taken."¹²⁰⁵ The inquiry was not, and apparently was not designed to be, a fact-finding investigation, but rather a review to determine whether, as a political matter, Cisneros should remain and could function effectively as a Cabinet Secretary.¹²⁰⁶ By the time Medlar's *Inside Edition* episode aired on September 12, 1994, the WHCO had spoken with Cisneros and reviewed the FBI reports of his background investigation interviews.¹²⁰⁷ The day after the broadcast, Cisneros's attorney, Seagal Wheatley briefed WHCO attorneys on the status of Medlar's civil suit against Cisneros.¹²⁰⁸ Transition Team Counsel James Hamilton was also contacted by the WHCO on September 13, 1994.¹²⁰⁹

¹²⁰³ See, e.g., *San Antonio Express-News*, "Medlar sells story to 'Inside Edition'" 9/3/94.

¹²⁰⁴ *Id.*

¹²⁰⁵ OIC Depo. Tr. Panetta 10/17/97 at 45-46.

¹²⁰⁶ OIC Interview Report Joel Klein 7/16/97 at 2.

¹²⁰⁷ OIC Depo. Tr. Cutler 10/21/97 at 30; White House Privilege Log Document #9 (notes from Nolan to Klein summarizing Cisneros's FBI-302s).

¹²⁰⁸ *San Antonio Express-News*, "Cisneros' attorney briefs White House" 9/14/94.

¹²⁰⁹ Fax cover sheet from Klein to Hamilton 9/13/94.

On September 14, 1994, Public Integrity began an initial 30-day inquiry of Cisneros prompted by the allegations aired on *Inside Edition*. The purpose of the inquiry was to provide the Attorney General information to determine whether to initiate a 90-day preliminary investigation of Cisneros leading to the possible appointment of an independent counsel.¹²¹⁰ In making that determination, the Attorney General was obligated by statute to consider only two factors: (1) the specificity of the information received and (2) the credibility of the source of the information.¹²¹¹ However, Public Integrity soon appeared to be taking steps that would preclude the acquisition of evidence relevant to these factors.

On the same day that Public Integrity began its inquiry, September 14, 1994, the FBI office in San Antonio, Texas (“FBI San Antonio”) received from a confidential source 14 transcripts of tape recordings that Medlar had made of her telephone conversations with Cisneros. After reviewing the transcripts, FBI San Antonio determined that they did, in conjunction with revelations in the *Inside Edition* broadcast, contain evidence of potential criminality concerning Cisneros.¹²¹²

Because Cisneros, as a Cabinet member, was a “covered person” under the provisions of the Independent Counsel Act,¹²¹³ FBI San Antonio was obligated by FBI internal procedures to notify FBI Headquarters in Washington, D.C. (“FBIHQ”) of its receipt of the transcripts. Consequently, on September 16, 1994, FBI San Antonio sent FBIHQ a teletype noting its receipt of the transcripts and describing their content. The teletype provided, in pertinent part:

A review of these transcripts revealed that the fourteen conversations occurred between about November of 1992 through December of 1993. Many of the transcripts seem to be in a rough draft format and others appear closer to a final form. In brief summary, the conversations center on Medlar’s requests for money from Cisneros, discussions of the political career of Cisneros, and personal exchanges. Notations on the transcripts indicate that certain portions have been “skipped”; and from the context of the conversations, it appears that

¹²¹⁰ See 28 U.S.C. §§ 591-92.

¹²¹¹ 28 U.S.C. §§ 591(d)(1)(A)-(B).

¹²¹² GJ 00-001 Ex. 341.

¹²¹³ 28 U.S.C. § 591(b).

untranscribed conversations may contain information of value to captioned matter.

Throughout the tapes, Medlar and Cisneros discuss the efforts of Cisneros to provide money for Medlar's current financial needs as well as to provide for her future financial security.¹²¹⁴

Around the same time, FBI San Antonio was contacted by an IRS CID agent based in San Antonio, who asked if the FBI had any interest in pursuing a joint investigation of Cisneros with the IRS.¹²¹⁵ The agent informed FBI San Antonio that the IRS had financial information concerning Cisneros that was relevant to the allegations made during the *Inside Edition* broadcast. FBI San Antonio informed the CID agent that, since Cisneros was a person covered by the Independent Counsel Act, DOJ in Washington, D.C. would control any investigation and that FBI San Antonio did not have the authority to go forward with the IRS in a joint investigation of Cisneros.¹²¹⁶

Meanwhile, the WHCO continued with a review of FBI reports generated during the Cisneros background investigation, as well as transcripts of selected tapes, relevant newspaper articles, and other public documents. The WHCO interviewed Elizabeth Arky, a vetting team member who later became a Cisneros subordinate at HUD.¹²¹⁷ Arky provided the WHCO with her notes from the vetting process.¹²¹⁸ The WHCO also spoke with Vetting Team Captain Raymond Calamaro and President Clinton's personal emissary Webster Hubbell.¹²¹⁹

The WHCO had also arranged to interview Cisneros. The meeting took place on or about September 16, 1994; Cisneros was accompanied by his lawyers Mortimer Caplin and Cono Namorato from the law firm of Caplin & Drysdale in Washington,

¹²¹⁴ GJ 00-001 Ex. 341 at 3.

¹²¹⁵ GJ 00-001 Ex. 16.

¹²¹⁶ OIC Interview Notes George Parks 6/14-15/01 at 2-3.

¹²¹⁷ OIC Interview Report Joel Klein 7/16/97 at 1.

¹²¹⁸ GJ 97-1 Tr. Arky 11/20/97 at 25.

¹²¹⁹ OIC Interview Report Joel Klein 7/16/97 at 1, 3.

D.C.¹²²⁰ This firm was well known for its tax practice; Caplin had served as IRS Commissioner and Namorato had served as an IRS Special Agent and the Assistant Attorney General of the Tax Division.

The September 16 meeting was dominated by tax issues. According to White House Counsel Lloyd Cutler, who was present at the meeting:

The bulk of the meeting was taken up with the tax issues relating to the payments [Cisneros] had made. It is my recollection that they were largely gift tax issues because they were in excess of the gift tax inclusion for an individual. Caplin and Namorato explained to us just what the tax issues were and why they thought there was no criminal violation of the tax laws.¹²²¹

Cutler later indicated that the WHCO had speculated that the gift tax laws would have been implicated if the payments were as large as alleged in Medlar's lawsuit and on the tapes, but that it was probably Cisneros and his attorneys who had raised the issue.¹²²² Cutler also recalled Cisneros stating that he had understated the amount of the payments to the FBI because he did not want his wife to know how much he had actually given to Medlar.¹²²³ Cisneros reiterated the claim in his July 1994 press release that he had not provided any assistance to Medlar since assuming office.¹²²⁴ According to Cutler, Cisneros offered to resign because of the charges, but Cutler told him that "the presumption of innocence was in his favor and he should carry on until the matter progressed further."¹²²⁵

On September 19, 1994, members of the WHCO reinterviewed Cisneros telephonically. According to notes taken by one of the WHCO attorneys, Cisneros

¹²²⁰ See OIC Interview Report Joel Klein 7/16/97 at 3; OIC Depo. Tr. Cutler 10/21/97 at 20, 23-24.

¹²²¹ OIC Depo. Tr. Cutler 10/21/97 at 23.

¹²²² OIC Depo. Tr. Cutler 10/21/97 at 26-27.

¹²²³ *Id.* at 24-25.

¹²²⁴ *Id.* at 51.

¹²²⁵ *Id.* at 22.

informed them that he had paid Medlar \$16,000 to assist her with the purchase of a home.¹²²⁶ The notes also suggested that Cisneros discussed efforts to get Medlar a job and apparently alluded to a failed attempt to direct HUD business to Medlar's relatives.¹²²⁷ The same day, members of the WHCO met with incoming White House Counsel Abner Mikva to discuss the Cisneros matter.¹²²⁸

Also on September 19, 1994, the United States Attorney for the Northern District of Texas sent the Attorney General a letter, transferring to Public Integrity 12 transcripts of the Medlar tapes he had received from Medlar's attorneys. In the letter, the U.S. Attorney stated that Medlar's attorneys had claimed that "the tapes indicate that Secretary Cisneros was not completely truthful to the FBI during his background check (for example, by not divulging the amount of the payments) and that he may not have reported the payments accurately on his returns."¹²²⁹ The letter was copied to Public Integrity Chief, Lee Radek.

On September 21, 1994, Public Integrity lawyers, including Public Integrity Deputy Chief Jo Ann Farrington, who had substantial responsibility within Public Integrity for Independent Counsel Act matters, met with FBI agents to discuss Cisneros. FBI Supervisory Special Agent Steve Yount, who was present at the meeting, described it as "confrontational."¹²³⁰ The FBI believed that there was a need to explore further what was on the Medlar tapes; Public Integrity indicated that the tapes did not warrant further inquiry, and that the investigation should be stopped at that point.¹²³¹

¹²²⁶ Nolan notes 9/19/94 at 1.

¹²²⁷ *Id.*; GJ 97-1 Tr. Nolan 11/18/97 at 51-52.

¹²²⁸ GJ 97-1 Tr. Nolan 11/18/97 at 40.

¹²²⁹ GJ 00-001 Ex. 342 at 1.

¹²³⁰ GJ 00-001 Tr. Yount 12/6/01 at 13.

¹²³¹ GJ 00-001 Tr. Yount 12/6/01 at 13-14, 18.

At the time of the meeting, the Public Integrity attorneys claimed to have reviewed approximately 6 of the 12 transcripts in their possession.¹²³² Medlar had made more than 80 tapes.¹²³³

At the September 21, 1994 meeting, the FBI agents expressed their disagreement with Public Integrity's view that the investigation should not go further. Specifically, the FBI agents told the Public Integrity attorneys that Cisneros had possibly made false statements during his background investigation and that his dealings with San Antonio businessman Morris Jaffe, who had made payments to Medlar on Cisneros's behalf, might involve bribery, extortion, conflict of interest violations, and financial disclosure violations.¹²³⁴ The FBI agents further stated that no determination should be made in the Cisneros matter until all available information, not just part of it, was reviewed, and they advocated an interview of Medlar.¹²³⁵

At about the same time as the September 21, 1994 meeting, Farrington stated in substance to another Public Integrity attorney, regarding the investigation of Cisneros, that "we need to hurry up and shut the investigation down."¹²³⁶

In the aftermath of the September 21, 1994 meeting between Public Integrity attorneys and FBI agents, Yount sent a memorandum to Jo Ann Harris, the Assistant Attorney General (Criminal Division).¹²³⁷ Harris supervised Public Integrity and acted as an intermediary between Public Integrity and the Attorney General. The memorandum summarized information the FBI had received concerning Cisneros and relayed what had occurred at the September 21, 1994 meeting. It also reiterated the FBI's position that the tapes should be secured and reviewed and that Medlar should be interviewed.

¹²³² OIC Interview Notes Yount 7/6/01 at 3.

¹²³³ OIC Interview Notes Parks 6/14-15/01 at 3; *see also* FBI memo 10/3/94.

¹²³⁴ GJ 00-001 Ex. 344 at 3.

¹²³⁵ *Id.*

¹²³⁶ OIC Interview Notes (Witness Identity Withheld) 8/2001 at 2.

¹²³⁷ GJ 00-001 Ex. 344.

Yount testified that he sent the memorandum because the FBI believed that Public Integrity had no interest in fulfilling its statutory obligation to determine whether the allegations concerning Cisneros were “specific and credible.”¹²³⁸ The FBI further believed that Public Integrity had already decided, on the basis of very limited investigation, that the Cisneros matter should go nowhere.¹²³⁹

On September 22, 1994, as Public Integrity was beginning its inquiry, the *New York Times* reported that:

Webster L. Hubbell, who was a senior Clinton transition official and later Associate Attorney General, said in an interview that Mr. Cisneros had been “totally forthcoming” about the matter. He said that the transition team had accepted the explanation that Mr. Cisneros had been providing money to help Ms. Medlar, not to silence her, and that the team had found it “quite admirable.”¹²⁴⁰

The same day, September 22, 1994, the Attorney General was asked at a press conference if the Department of Justice was investigating Cisneros. She declined to comment.¹²⁴¹ Following the press conference, the Department of Justice issued a press release, which stated in pertinent part:

The Ethics in Government Law directs the Attorney General to determine whether information received about a covered person alleging a violation of federal criminal law is specific enough and from a sufficiently credible source to warrant a preliminary investigation.

The Justice Department has received information relating to material that was broadcast on the television show “*Inside Edition*” about Secretary Cisneros and is proceeding as the law provides.¹²⁴²

¹²³⁸ GJ 00-001 Tr. Yount 12/6/01 at 15.

¹²³⁹ OIC Interview Notes Yount 7/6/01 at 3.

¹²⁴⁰ *New York Times*, “Housing Secretary faces new questions” 9/22/94.

¹²⁴¹ *Los Angeles Times*, “Tapes of Cisneros, ex-girlfriend probed” 9/23/94.

¹²⁴² GJ 00-001 Ex. 343 (September 22, 1994 DOJ Press Release).

On September 23, 1994, the *Los Angeles Times* reported that, according to Cisneros's attorney Wheatley, he and Cisneros:

[W]ere questioned in detail last week about Medlar's allegations by White House Counsel Lloyd N. Cutler. He said Cutler was primarily interested in Medlar's lawsuit alleging that Cisneros owed her money.¹²⁴³

By September 24, 1994, the WHCO was downplaying the allegations against Cisneros. The WHCO informed Panetta that there was "no evidence that . . . Cisneros had in any way . . . violated the law."¹²⁴⁴ Contemporaneously, the White House publicly emphasized that the allegations "involved pre-administration events" and that there were "no charges . . . about misuse of office."¹²⁴⁵ Administration officials also expressed President Clinton's "confidence" in Cisneros.¹²⁴⁶

The FBI continued to investigate the matter. Although Public Integrity had informed the FBI that there was no need to interview Medlar or to obtain the tapes of her conversations with Cisneros, FBI San Antonio made arrangements through one of Medlar's civil attorneys to meet with her and make copies of the tapes in Lubbock, Texas on September 28 and 29, 1994.¹²⁴⁷

While the FBI San Antonio agents were driving from San Antonio to Lubbock to meet with Medlar, Susan Park, an attorney from Public Integrity, called Yount in Washington, D.C. to express concern about the FBI obtaining the tapes. According to Yount, Park was "frantic" and wanted to instruct him on how the agents were to

¹²⁴³ *Los Angeles Times*, "Tapes of Cisneros, ex-girlfriend probed" 9/23/94.

¹²⁴⁴ OIC Depo. Tr. Panetta 10/17/97 at 63-64.

¹²⁴⁵ *Dallas Morning News*, "Cisneros faces risk from tapes" 9/24/94.

¹²⁴⁶ *San Antonio Express-News*, "Cisneros gets D.C. support – White House vote of confidence follows news of Justice review" 9/24/94.

¹²⁴⁷ OIC Interview Notes Parks 6/14-15/01 at 3; GJ 95-2 Tr. Magness 12/5/96 at 159-60.

conduct the Medlar interview.¹²⁴⁸ When Yount informed her that the agents could not be contacted, Park called FBI San Antonio and asked the supervising agent, who also described Park as “frantic,” to put her in contact with the interviewing agents.¹²⁴⁹ This time, Park stated that the FBI had no authority to get the tapes and said that they should not do so.¹²⁵⁰ After she was informed that the FBI San Antonio agents could not be reached and that the Medlar interview was going forward, Park called FBI San Antonio at least two to three more times to find out what Medlar was telling the agents.¹²⁵¹

Notwithstanding Park’s attempts to prevent the interview and preclude the FBI team from getting the tapes, Medlar met the two FBI agents as arranged. The agents interviewed Medlar and copied 86 tapes, which she represented to be originals.¹²⁵² While the FBI agents copied her tapes, Medlar gave them information about the payments she had received from Cisneros and others acting on his behalf. She told them that, from 1990 to 1992, Cisneros had made continuing, regular monthly payments to her of about \$4,000 as the result of an agreement they had made in January 1990.¹²⁵³ She said that, in 1993, after Cisneros began serving as HUD Secretary, she had received fewer payments from Cisneros, but that the payments were in larger amounts.¹²⁵⁴ She gave the agents records of some of these payments.¹²⁵⁵ She further stated that she had received money and job offers from other individuals, including Morris Jaffe, acting on Cisneros’s behalf.¹²⁵⁶ She also

¹²⁴⁸ OIC Interview Notes Yount 7/6/01 at 4.

¹²⁴⁹ *Id.*; OIC Interview Notes McClure 8/2/01 at 3.

¹²⁵⁰ *Id.*

¹²⁵¹ *Id.*

¹²⁵² FBI-302 Medlar 9/28-29/94 at 1.

¹²⁵³ *See* FBI-302 Medlar 9/28-29/94 at 1.

¹²⁵⁴ *Id.*

¹²⁵⁵ *Id.* at 5.

¹²⁵⁶ *Id.* at 1-3.

advised that the tapes contained references to the possibility that Cisneros or his contacts might find jobs for a lighting business owned by her relatives.¹²⁵⁷

Medlar told the FBI that on two separate occasions, once in 1987 during his re-election campaign for Mayor and then again in 1989 during the Alamodome project, Cisneros had received \$10,000 in cash from Morris Jaffe.¹²⁵⁸ Medlar said she did not know what Cisneros had done with the money or what accounting, if any, was ever made of it.

By September 29, 1994, Public Integrity had its first known contact with Cisneros's attorney, Cono Namorato. On that day, purportedly at Radek's request, Namorato provided Radek with copies of Cisneros's personal tax returns for 1988 to 1993.¹²⁵⁹

That same day, September 29, 1994, the *San Antonio Express-News* reported that Cisneros claimed that he had not enlisted support from the White House but nevertheless thought that their "view" was that "this is a matter now in the appropriate stage and that they will await the review that everyone else is anticipating."¹²⁶⁰

On October 3, 1994, the FBI sent another memorandum to DOJ. The memorandum summarized the information the FBI had gathered by that date and noted, among other things, the following:

San Antonio obtained copies of eighty-six cassette tapes recorded by MEDLAR which contain conversations between MEDLAR and CISNEROS.

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¹²⁵⁷ *Id.* at 2.

¹²⁵⁸ *Id.* at 4.

¹²⁵⁹ Letter from Namorato to Radek 9/29/94.

¹²⁶⁰ *San Antonio Express-News*, "Accuracy of Medlar transcript attacked" 9/29/94.

A review of the FD-302 of interview of CISNEROS on January 7, 1993, at Washington, D.C. by the FBI indicates CISNEROS advised . . . that he paid taxes on all the receipts he was paid as salary for speeches made.

• • •

A review of financial records obtained from MEDLAR during the interview indicate MEDLAR received regular monthly payments which averaged approximately \$4,000.00 a month from February of 1990 through January 19, 1993.

• • •

MEDLAR's bank records show deposits of \$42,000.00 in 1990, \$56,524.21 in 1991, \$60,700.00 in 1992, and \$60,873.45 in 1993, which MEDLAR advised were monies received from CISNEROS.¹²⁶¹

On October 4, 1994, the FBI, on its own initiative, interviewed Medlar's nephew Michael Wooten.¹²⁶² Following Medlar's FBI interview on September 28 and 29, 1994, one of Medlar's attorneys had told the FBI in San Antonio that in January 1994, Cisneros's friend Morris Jaffe had paid Medlar a large sum of money through Wooten, who was involved in the family lighting business – WTL – that Medlar had

¹²⁶¹ GJ 00-001 Ex. 347 at 1-2. The following items among others were also transmitted to the Department with this memorandum:

- two FD-302s of Cisneros (December 30, 1992 and January 7, 1993);
- FBI Summary of Bank Statements for Linda Medlar from January 1990 through July 1993;
- Medlar's financial records;
- FBI summary listing of 86 conversations; and
- FBI draft transcripts of 21 conversations.

¹²⁶² FBI-302 Michael Wooten 10/4/94 at 1.

mentioned in her FBI interview.¹²⁶³ The attorney also told the FBI that he had received an additional tape from Medlar, which he was going to provide to the FBI. The attorney advised that the tape, made in December 1993, contained discussion about “sending business WTL’s way – Jaffe providing more business for WTL, so that WTL could hire Medlar.”¹²⁶⁴

During his FBI interview, Wooten told the FBI agents about his dealings with Jaffe in San Antonio and gave them copies of a \$12,000 check Jaffe had made out to WTL and a WTL check made out to Medlar, which passed Jaffe’s funds (less Wooten’s expenses) on to Medlar.¹²⁶⁵

On October 5, 1994, an article in the Washington, D.C. press reported:

Justice Department officials close to an ongoing probe of Mr. Cisneros said his resignation could come this week.

Clinton officials said Mr. Cisneros has told White House Counsel Abner Mikva that he is prepared to quit if the president wants him to.

• • •

“He’s told friends he’d resign if his case was hurting us,” said a senior administration official of Mr. Cisneros.

The official added that Mr. Clinton doesn’t want the former San Antonio mayor to quit. “We don’t want him to leave yet. We’re not ready yet,” said the official.

• • •

¹²⁶³ FBI Investigative Insert McClure 10/1994; FBI-302 Medlar 9/28-29/94 at 2.

¹²⁶⁴ FBI Investigative Insert McClure 10/1994.

¹²⁶⁵ FBI-302 Michael Wooten 10/4/94 at 1-4.

The Justice Department is investigating the payments, and a top White House official said the administration doesn't want to push Mr. Cisneros aside before a report is filed.¹²⁶⁶

On October 6, 1994, Namorato and his partner Scott D. Michel met with a Public Integrity attorney and reviewed Public Integrity files concerning Cisneros.¹²⁶⁷ At some point, they were permitted to hand-copy Cisneros's FBI interview reports.¹²⁶⁸

On October 7, 1994, during a press conference, President Clinton publicly signaled his support for Cisneros. He was asked the following question and gave the following answer about Cisneros:

- Q. Did you know when you nominated Secretary Cisneros that he was making payments to a former mistress? If you did, did you ask any questions about them? And, finally, do you think the recent controversy about them undermines his effectiveness in your Cabinet?
- A. [President Clinton] We knew what the facts were at the time and the legal counsel or the people – excuse me – who were handling it for me reviewed it, decided that there was nothing illegal or inappropriate about what was done by Secretary Cisneros – something that was fully know [sic] by his family. And, no, I don't think it undermines his effectiveness. I mean, what he did in his past he's dealt with, and he's been pretty forthright. He's been, in fact, I think painfully forthright. And I think he has been an extraordinary gifted HUD Secretary. . . . He is doing the job that I hired him to do for the American people. And as long as he is doing that job at a high level, I think he ought to be permitted to continue to do it.¹²⁶⁹

¹²⁶⁶ *Washington Times*, "Payments to his ex-mistress may force Cisneros to resign" 10/5/94.

¹²⁶⁷ Letter from Namorato to Park 10/7/94.

¹²⁶⁸ OIC Memorandum of 11/26/96 meeting with Namorato and Michel.

¹²⁶⁹ Remarks by President Clinton in Press Conference 10/7/94, 1994 WL 3824293.

Thus, by October 7, 1994, as Public Integrity was investigating Cisneros, it was publicly known that the White House had reviewed the Cisneros matter, that Cisneros had not been asked to resign, and that he had the support of President Clinton – who announced that, at the time of Cisneros’s nomination, his payments to Medlar had been reviewed and this review had determined that Cisneros had done nothing illegal or unethical.

Around this same time, Farrington spoke with a Public Integrity attorney who agreed with the FBI that the Cisneros matter should be fully investigated. Farrington told this attorney that it would be unfortunate if Cisneros were to resign.¹²⁷⁰

On October 11, 1994, Senator Lauch Faircloth (R-NC), a member of the Senate Banking Committee that had held Cisneros’s confirmation hearing, wrote to FBI Director Louis Freeh.¹²⁷¹ In his letter, Faircloth stated that he was “extremely troubled” by press reports about Cisneros; that Senate approval of Cisneros’s nomination had been “predicated upon background information” Cisneros had provided to Congress; that “[i]t now appears this information may be inaccurate and misleading”; and that “[t]oo many high level Administration officials have displayed to the American people and to Congress a blatant disregard for the truth.” The Senator also requested an opportunity to examine the original FBI Background Investigation Report on Cisneros. The FBI referred the letter to DOJ for a determination of whether the FBI Report should be released.

2. The Ninety-Day Preliminary Investigation

Against this backdrop, on October 14, 1994, DOJ initiated a preliminary investigation of the Cisneros allegations.¹²⁷² By statute, the investigation was to last a maximum of 90 days, if not extended.¹²⁷³ By this time, Public Integrity had copies of Cisneros’s tax returns and knew that Cisneros had been paying Medlar on average over \$4,000 a month.

¹²⁷⁰ OIC Interview Notes (Witness Identity Withheld) 8/2001 at 2.

¹²⁷¹ GJ 00-001 Ex. 351.

¹²⁷² The OIC was never able to determine which DOJ officials recommended in favor of or against the initiation of a preliminary investigation.

¹²⁷³ 28 U.S.C. § 592(a).

On October 19, 1994, Public Integrity attorneys, led by Public Integrity Chief Lee Radek and including Farrington and Park, met with FBI agents to discuss the preliminary investigation. The meeting quickly became a heated discussion about the Cisneros investigation. The Public Integrity attorneys indicated that they were not inclined to conduct an investigation that would lead to the appointment of an independent counsel.¹²⁷⁴ Radek said that Public Integrity's function was to find ways to decline Independent Counsel Act cases.¹²⁷⁵

During this meeting, there was "extensive discussion" about the scope of the investigation and the manner in which it was going to be conducted.¹²⁷⁶ Public Integrity told the FBI agents that the investigation only concerned whether Cisneros's false statements about the amount of his payments were "material" to "decision makers" involved in Cisneros's vetting and his subsequent Senate confirmation.¹²⁷⁷

Public Integrity proposed that the preliminary investigation identify "all decision makers" and all persons in the vetting process.¹²⁷⁸ Public Integrity was interested in ascertaining what information the FBI had made available to these individuals.¹²⁷⁹ However, Public Integrity excluded several key decisionmakers from its consideration.

For example, Radek stated that he saw no reason to interview Senators.¹²⁸⁰ Faircloth, whose October 11, 1994 letter of concern was forwarded to DOJ by the

¹²⁷⁴ OIC Interview Notes Martin 6/14-15/01 at 3; OIC Interview Notes Parks 6/14-15/01 at 5.

¹²⁷⁵ OIC Interview Notes Parks 6/14-15/01 at 5.

¹²⁷⁶ GJ 00-001 Ex. 350 at 1.

¹²⁷⁷ *Id.*

¹²⁷⁸ *Id.*

¹²⁷⁹ *Id.*

¹²⁸⁰ OIC Interview Notes Parks 6/14-15/01 at 5; *see also* OIC Interview Notes Enderson 6/20/01 at 5.

FBI, was specifically discussed. Radek said that the Senator would not be interviewed because it was already known what he would say.¹²⁸¹

Furthermore, Public Integrity did not consider the FBI to be a decisionmaker, and thus maintained that the fact that Cisneros had lied to the FBI agents was irrelevant and could not be inquired into.¹²⁸² Radek told the FBI agents that questions concerning Cisneros lying to the FBI would be offensive and unfair.¹²⁸³

Farrington informed the FBI agents that Public Integrity was assuming that financial dealing among Cisneros, Medlar and Jaffe had occurred.¹²⁸⁴ Farrington told the FBI that there was no need to investigate any financial transactions involving Jaffe.¹²⁸⁵ The agents responded that this made no sense. Radek's response was that "this is the way it's going to be."¹²⁸⁶ Radek also informed the agents that there would be no investigation of any income tax violations by Cisneros.¹²⁸⁷ There was no discussion at all about whether the DOJ Personnel Security Office was a decisionmaker, or in particular whether knowledge of the true amounts of the payments, or the fact that Cisneros had lied to the FBI, would have had any effect on its decision to grant Cisneros the top secret security clearance required for his Cabinet position.

Public Integrity also imposed limits on the FBI's interviewing of other parties with relevant information. For example, it informed the FBI that it did not want

¹²⁸¹ GJ 00-001 Tr. Enderson 8/9/01 at 53-54.

¹²⁸² OIC Interview Notes McClure 8/2/01 at 5; OIC Interview Notes Gallagher 6/21/01 at 3; OIC Interview Notes Enderson 6/20/01 at 3; OIC Interview Notes Martin 6/14-15/01 at 3; OIC Interview Notes Parks 6/14-15/01 at 5.

¹²⁸³ OIC Interview Notes Parks 6/14-15/01 at 5.

¹²⁸⁴ GJ 00-001 Ex. 350 at 1.

¹²⁸⁵ GJ 00-001 Tr. Enderson 8/9/01 at 17; OIC Interview Notes McClure 8/2/01 at 5.

¹²⁸⁶ OIC Interview Notes McClure 8/2/01 at 5.

¹²⁸⁷ OIC Interview Notes Enderson 6/20/01 at 3; GJ 00-001 Tr. Enderson 8/9/01 at 17.

interviews conducted of Medlar¹²⁸⁸ or of the FBI agents who had interviewed Cisneros during the background investigation.¹²⁸⁹

The FBI agents expressed strong disagreement with, among other things, Public Integrity's views that the FBI was not a decisionmaker, that lying to the FBI was irrelevant, and that the inquiry should focus solely on the question of whether knowledge of the truth would have been material.¹²⁹⁰ This resolution of the discussion caused the FBI agents to leave the meeting with the conclusion that Public Integrity did not want to conduct an investigation that would lead to the appointment of an independent counsel.¹²⁹¹

Similarly, a Public Integrity attorney whose views of the proper scope of the Cisneros investigation were similar to the FBI's concluded at that time that Radek and other Public Integrity supervisory attorneys intended to conduct a very limited inquiry into the materiality of Cisneros's false statements as a means of killing the investigation, regardless of the facts.¹²⁹² The attorney expressed his/her disagreement with the approach taken by Public Integrity on several occasions and was subsequently excluded from Public Integrity's meetings regarding the Cisneros investigation.¹²⁹³

Park, on behalf of Public Integrity, and the FBI again discussed the issue of materiality in a late October 1994 meeting. Park reiterated Public Integrity's position that the FBI was not a decisionmaker and that the fact that Cisneros had lied to the

¹²⁸⁸ OIC Interview Notes McClure 8/2/01 at 5.

¹²⁸⁹ OIC Interview Notes Yount 7/6/01 at 4-5.

¹²⁹⁰ OIC Interview Notes McClure 8/2/01 at 5; OIC Interview Notes Enderson 6/20/01 at 3; OIC Interview Notes Martin 6/14-15/01 at 3; OIC Interview Notes Parks 6/14-15/01 at 5.

¹²⁹¹ OIC Interview Notes Martin 6/14-15/01 at 3; OIC Interview Notes Parks 6/14-15/01 at 5.

¹²⁹² OIC Interview Notes (Witness Identity Withheld) 8/2001 at 2-4.

¹²⁹³ *Id.*

FBI was irrelevant.¹²⁹⁴ Park further stated that the purpose of Public Integrity's Independent Counsel Act investigations was, unlike that of other investigations, not to determine whether the allegations were true, but rather to prove that the allegations were false.¹²⁹⁵ An FBI agent present at the meeting informed Park that the FBI's job was to gather the facts, regardless of who was being investigated.¹²⁹⁶

On November 2, 1994, FBIHQ issued a written statement directing field agents in both San Antonio and Washington, D.C. to communicate "immediately" any "[c]oncerns or conflicts with the Public Integrity Section" to FBIHQ.¹²⁹⁷ This unusual directive resulted from the substantial disagreements between Public Integrity and the FBI concerning the scope of the Cisneros investigation and from the FBI's conclusion that Public Integrity did not want to conduct a proper inquiry.¹²⁹⁸

The 90-day deadline for completing the Attorney General's preliminary investigation fell on January 11, 1995. On or about November 9, 1994, Public Integrity informed the FBI that it wanted the results of the FBI's preliminary investigation by December 14, 1994, so that Public Integrity could have "sufficient time to prepare [a] report for the AG."¹²⁹⁹

Public Integrity continued to limit the scope of the investigation. FBI Supervisory Special Agent Yount testified:

In general, any time they knew of an interview that we were going to do, first they would discuss whether they felt it should be done and if it was going to be done, again what specific questions we were allowed to ask and which ones they did not want asked.¹³⁰⁰

¹²⁹⁴ OIC Interview Notes Gallagher 6/21/01 at 3.

¹²⁹⁵ *Id.*

¹²⁹⁶ *Id.*

¹²⁹⁷ GJ 00-001 Ex. 352.

¹²⁹⁸ OIC Interview Notes Yount 7/6/01 at 5.

¹²⁹⁹ GJ 00-001 Ex. 353.

¹³⁰⁰ GJ 00-001 Tr. Yount 12/6/01 at 26.

As of November 28, 1994, the FBI had interviewed seven individuals. Five of these individuals had been involved in vetting Cisneros or in preparing him for his confirmation hearing: Michael Veve (Transition Team member), James Hamilton (Transition Counsel), Howard Pastor (Transition Team Congressional Liaison), Raymond Calamaro (Cisneros Transition Team Vetting Leader), and Gary Ginsberg (Transition Assistant Counsel). Public Integrity had ordered each of these interviews.¹³⁰¹ The FBI interviewed two other individuals – Medlar and Medlar’s nephew, Michael Wooten – on its own initiative.¹³⁰² On December 15 and 20, 1994, the FBI also interviewed Clinton’s personal emissary Hubbell and vetting team member Arky, respectively.¹³⁰³ These interviews were coordinated with Public Integrity.

On November 30, 1994, Public Integrity allowed the FBI to interview Senator Donald W. Riegle, Jr. (D-MI), the Chairman of the Senate Banking Committee that held Cisneros’s confirmation hearings. Riegle had received a copy of the FBI’s Background Investigation Report on Cisneros before his private January 1993 pre-confirmation meeting with Cisneros. However, the copy that Riegle had received contained only the FBI’s summary of the results of the preliminary investigation, and not the individual interview reports, because the Transition Team had removed them.¹³⁰⁴ The summary report that Riegle saw indicated that one witness had reported that Cisneros had given Medlar as much as \$60,000 per year, but did not report that Cisneros had told the FBI that his payments did not exceed \$10,000 per year.¹³⁰⁵ Nor did the Transition Team inform Riegle that the information Cisneros had supplied to the Transition Team differed materially from the information he had given the FBI.

¹³⁰¹ OIC Interview Notes McClure 8/2/01 at 3; OIC Interview Notes Parks 6/14-15/01 at 5; OIC Interview Notes Enderson 6/20/01 at 5-6.

¹³⁰² OIC Interview Notes Parks 6/14-15/01 at 3; *see also* OIC Interview Notes McClure 8/2/01 at 4.

¹³⁰³ FBI-302 Hubbell 12/15/94; FBI-302 Arky 12/20/94.

¹³⁰⁴ GJ 97-1 Tr. Ginsberg 10/7/97 at 82-84.

¹³⁰⁵ FBI-302 Riegle 11/30/94 at 2-3.

In his 1994 FBI interview, Riegle could not recall the contents of the FBI summary report he had seen in early 1993.¹³⁰⁶ According to the Senator, he and Cisneros had discussed the affair and the payments to Medlar, and Cisneros had answered his questions satisfactorily.¹³⁰⁷ He recalled discussing the payments, but did not recall the amounts, except that he had been satisfied that they were consistent with the purposes Cisneros had represented.¹³⁰⁸ He also could not recall if the Banking Committee's Ranking Minority Member, Senator Alfonse D'Amato (R-NY), had been given access to the Report, and he recommended that the FBI contact D'Amato to find out.¹³⁰⁹

On December 1, 1994, the day after the FBI interviewed Riegle, Cisneros's counsel Cono Namorato faxed D'Amato a letter asking for his position "as to whether the amount of [the] payments would have been relevant to your consideration of the Secretary's confirmation."¹³¹⁰ This letter was preceded by a phone call from Namorato to the Senator during which Namorato asked the same question.¹³¹¹ One week later, on December 8, 1994, D'Amato responded that "the specific amount of the payments made by Secretary Cisneros to the person in question would not have changed my judgment concerning Secretary Cisneros' qualifications for confirmation."¹³¹² The FBI interviewed the Senator on December 13, 1994.¹³¹³ Public Integrity received a copy of D'Amato's response from Namorato but declined to share it with the FBI.¹³¹⁴

¹³⁰⁶ FBI-302 Riegle 11/30/94 at 2.

¹³⁰⁷ *Id.* at 3.

¹³⁰⁸ *Id.*

¹³⁰⁹ *Id.* at 2.

¹³¹⁰ Letter from Namorato to D'Amato 12/1/94.

¹³¹¹ FBI-302 D'Amato 12/13/94 at 3.

¹³¹² Letter from D'Amato to Namorato 12/8/94.

¹³¹³ Letter from Namorato to Radek 12/21/94 at 2.

¹³¹⁴ Gallagher notes of Public Integrity activity during preliminary investigation.

In his FBI interview, D'Amato said that he did not receive or review the FBI's Background Investigation Report on Cisneros.¹³¹⁵ The Senator also stated that he did not discuss Cisneros's relationship with Medlar or the payments to Medlar during his pre-confirmation meeting with Cisneros.¹³¹⁶ Regarding the payments, D'Amato informed the FBI that he had been contacted by Namorato and that he had responded in writing that the specific amount of the payments would not have altered his judgment of Cisneros's qualifications.¹³¹⁷ The Senator expanded on this statement, telling the FBI that the specific amount of the payments made by Cisneros was not relevant to the confirmation process, but the fact that a person was not truthful during the FBI Background Investigation would be relevant.¹³¹⁸

On December 14, 1994, Riegle received a letter from Namorato similar to the one D'Amato had received.¹³¹⁹ Riegle responded the same day, stating that he did not recall discussing the specific amount of the payments with Cisneros, and that "[a]ny specific amounts – per se – were not relevant to my judgment as to his fitness to serve – or to my support of his nomination."¹³²⁰ Public Integrity declined to share this correspondence with the FBI.¹³²¹

On December 19, 1994, shortly after the D'Amato interview, Namorato met with Radek and Public Integrity attorneys working on the Cisneros matter to discuss whether there would be a recommendation to the Attorney General for the appointment of an independent counsel. On December 21, 1994, Namorato wrote Radek a letter addressing some of the issues discussed at December 19, 1994 meeting.

¹³¹⁵ FBI-302 D'Amato 12/13/94 at 2.

¹³¹⁶ *Id.* at 1.

¹³¹⁷ *Id.* at 3.

¹³¹⁸ *Id.* at 3-4.

¹³¹⁹ GJ 97-1 Ex. 518.

¹³²⁰ Letter from Riegle to Namorato 12/14/94 at 1.

¹³²¹ Gallagher notes of Public Integrity activity during preliminary investigation.

Relying in part on the Riegle and D'Amato letters, Namorato argued that Cisneros's false statements were not material.¹³²²

Notwithstanding his letter to Namorato, D'Amato later told the OIC that he would never have indicated that the specific amount of the payments would not have changed his confirmation vote if he had known that Cisneros had intentionally withheld information.¹³²³ The Senator further stated that he would have absolutely wanted to know the size of the payments, the source of the payments, and the manner in which the payments were structured if he had been aware of the fact that Cisneros was lying.¹³²⁴ D'Amato further asserted that the gift tax and hush money issues would have also been important to his confirmation decision,¹³²⁵ and that Cisneros's two successive payments of \$8,000 to Medlar within a very short time would also have been a "red flag" to other Senators because they raised the issue of structuring transactions to avoid legal reporting requirements.¹³²⁶

Namorato's letter to Radek further stated that "[t]here are no reasonable grounds to investigate whether Mr. Cisneros engaged in any wrongdoing arising out of Mr. Jaffe's assistance to Ms. Medlar."¹³²⁷ Addressing the gratuities issue, it continued as follows:

[I]t is unreasonable to believe that further investigation will reveal evidence to the contrary. As we noted at our meeting, Mr. Jaffe went to school with Mr. Cisneros' mother; Mr. Jaffe and members of his family have been friends of Mr. Cisneros and his family for many years; and Mr. Jaffe apparently has a longstanding personal relationship with Mr. Frank Wing, who urged him to assist Ms. Medlar. Thus, aside from the

¹³²² Letter from Namorato to Radek 12/21/94 at 1-2.

¹³²³ OIC Interview Report D'Amato 12/1/97 at 2.

¹³²⁴ *Id.*

¹³²⁵ *Id.*

¹³²⁶ *Id.* at 1.

¹³²⁷ Letter from Namorato to Radek 12/21/94 at 4.

utter lack of any connection between HUD and Mr. Jaffe, it is clear that Mr. Jaffe considered this matter to be purely personal.¹³²⁸

The next day, after receiving this exculpatory presentation from defense counsel, Public Integrity directed the FBI to interview Medlar and Cisneros's friend Frank Wing.¹³²⁹ This was the first time that Public Integrity showed any desire to interview Medlar or Wing and marked a change from the position Public Integrity had taken during the October 19, 1994 meeting.

The FBI was opposed to interviewing Wing during the preliminary investigation, because Wing was involved in the Jaffe matter. It was the FBI's position, on the basis of FBI San Antonio's prior experience in investigating Jaffe for other, unrelated violations, that any investigation of the Jaffe issue would require the authority to issue grand jury subpoenas to compel the production of documents and witness testimony.¹³³⁰ The FBI also felt that, even without an interview of Wing or further examination of the Jaffe issue, the preliminary investigation had uncovered sufficient evidence to require further investigation, thereby requiring the Attorney General to request the appointment of an independent counsel.¹³³¹ Grand jury subpoenas could not, by statute, be issued during the preliminary investigation.¹³³² Unlike the FBI during the preliminary investigation, an independent counsel could fully investigate the matter with the benefit of subpoena power. The FBI explained its position to Public Integrity; Public Integrity rejected the argument and directed the FBI to interview Wing.¹³³³

The FBI also thought that reinterviewing Medlar without first obtaining certain background information was "premature."¹³³⁴ Specifically, it wanted first to obtain

¹³²⁸ *Id.* at 5.

¹³²⁹ FBI Memo 12/21/94 at 1.

¹³³⁰ OIC Interview Notes Parks 6/14-15/01 at 5-6.

¹³³¹ GJ 00-001 Exs. 361, 362.

¹³³² 28 U.S.C. § 592(a)(2)(A).

¹³³³ FBI Memo 12/21/94 at 1.

¹³³⁴ GJ 00-001 Ex. 359 at 2.

a transcript of Medlar’s civil deposition. It had also shortly before learned that the IRS had interviewed Medlar. Thus, given the fact that Medlar had gone on the record several times already, the FBI expressed the concern that “an interview of Medlar before a review of those documents could prove detrimental to Medlar’s witness value in any prosecutive effort.”¹³³⁵ Nevertheless, Public Integrity ordered the FBI to interview Medlar, without the benefit of the additional information it sought.

Radek had apparently decided to recommend against the appointment of an independent counsel before these interviews took place. On December 22, 1994, Radek allowed FBI Supervisory Special Agent Woody Enderson to review a draft memorandum he had prepared recommending that the allegations against Cisneros not be referred to an independent counsel.¹³³⁶ Radek would not allow Enderson to make a copy of the draft or to take notes, and he required Enderson to review the draft in his presence.¹³³⁷

Enderson disagreed with many of the statements in the recommendation and pointed out to Radek the sections that he believed were in error.¹³³⁸ Radek responded that he would look at those areas when revising the draft.¹³³⁹

The contents of Radek’s draft so disturbed Enderson that, immediately after reviewing it, he wrote a memorandum setting out his concerns; Enderson addressed the memorandum to Assistant FBI Director Larry Potts and prepared it for FBI Deputy Assistant Director William Esposito’s signature.¹³⁴⁰ In this memorandum, Enderson stated that “numerous facts were either misrepresented or distorted by [Public Integrity] to arrive at the . . . recommendation.”¹³⁴¹ The memorandum noted, among other things, that the draft recommendation:

¹³³⁵ *Id.*

¹³³⁶ OIC Interview Notes Enderson 6/20/01 at 4-5.

¹³³⁷ OIC Interview Notes Enderson 6/20/01 at 5.

¹³³⁸ *Id.*

¹³³⁹ *Id.*

¹³⁴⁰ GJ 00-001 Ex. 360.

¹³⁴¹ *Id.* at 1.

- devoted more than a page to falsely claiming that the FBI did not consider Cisneros’s false statements to be an issue during his background investigation;
- falsely indicated that the Jaffe issue had been resolved during the preliminary investigation, when, in fact, virtually no investigation had been conducted due to lack of subpoena power;
- indicated that the Jaffe payments to Medlar were nothing more than a friend helping a friend;
- engaged in “selective reporting” to minimize the Jaffe issue, by omitting the fact that Jaffe instructed Medlar’s nephew to prepare fraudulent company invoices to cover a payment made by Jaffe that ultimately went to Medlar; and
- falsely indicated that the issue of Cisneros’s non-reporting of business income had been resolved by Public Integrity’s review of his tax returns.¹³⁴²

Enderson’s memorandum further stated that:

The primary focus of the 90-day preliminary investigation on Cisneros has been the alleged false statements Cisneros made to the FBI during his [background investigation] interviews. It has been and continues to be the FBI’s position that the false statements were material in that Cisneros openly discussed with Medlar prior to the FBI interview that he did not want the full knowledge of the payments to become known for fear that this information could jeopardize his nomination to a cabinet position.

[Public Integrity’s] position has been that “materiality” centered around the transition team. [Public Integrity] opined that members of the transition team involved in “vetting” Cisneros needed to be interviewed to determine whether the members felt that the “true” statements relative to payments to Medlar would have materially made a difference in the decision to push forward Cisneros’ nomination as Secretary of HUD. In other words, if the members would not have changed their decision given the true information, then the statements made to the FBI were “immaterial.”

¹³⁴² *Id.* at 1-2.

Investigation relative to Jaffe, possible tax violations, and other possible gratuity violations has not been conducted for several reasons. First, it was the position of FBIHQ, San Antonio and WMFO [the FBI's Washington Metropolitan Field Office] that these areas of investigation could not adequately be addressed during the preliminary investigation, largely due to the lack of subpoena power. Second, that the false statement aspect was "sufficient" for referral to an IC, who then would have the subpoena power necessary to address these violations.¹³⁴³

On December 24, 1994, following his receipt of the Enderson memorandum, Esposito discussed the Cisneros investigation with the Attorney General. According to Esposito, the Attorney General instructed him "to do everything that can be done to get at the truth" and wanted to know why the preliminary investigation had not been more thorough.¹³⁴⁴

In fact, the FBI had already prepared a document, entitled "Leads the FBI would like to cover (Independent Counsel - Subpoena Authority)," listing 23 investigative steps that the FBI believed should be taken by an independent counsel with subpoena authority.¹³⁴⁵ These steps included further investigation of Medlar, Wing, and Jaffe.

Around the same time, FBI representatives, including Special Agent Dan Gallagher, met with DOJ officials, including Radek and Assistant Attorney General Jo Ann Harris. During this meeting, Radek falsely represented that an FBI San Antonio agent, who was not present, had determined that there was no evidence of wrongdoing concerning Jaffe's relationship with Cisneros. Gallagher, who had been working on the Cisneros investigation in close conjunction with FBI San Antonio, knew that the agent had never made such a determination. Gallagher pointed this out and stated that the San Antonio agent actually believed that the Jaffe issue was not resolvable without the use of grand jury subpoenas. Nevertheless, Radek repeated

¹³⁴³ *Id.* at 2.

¹³⁴⁴ OIC Interview Notes Esposito 7/26/01 at 5; GJ 00-001 Ex. 361B.

¹³⁴⁵ GJ 00-001 Ex. 361B.

this misrepresentation during the same meeting, forcing Gallagher to correct him again.¹³⁴⁶

On January 5, 1995, prompted by the serious problems with Public Integrity's investigation and Radek's draft recommendation, FBI Director Louis B. Freeh sent DOJ a memorandum that "strongly" urged the Attorney General to appoint an independent counsel to investigate Cisneros.¹³⁴⁷ This conclusion was based upon a review of the caselaw concerning materiality, the underlying facts, and, most particularly, the numerous taped conversations between Cisneros and Medlar, in which they discussed the need to control the information conveyed to the FBI. The Director concluded in the memorandum, among other things, that Cisneros "and Medlar agreed prior to any decision by the President to nominate him, not to mention the payments to anyone."¹³⁴⁸ He also cited portions of ten different taped conversations between Cisneros and Medlar as "a representative sample of the manner and degree in which Cisneros and Medlar conspired to furnish false information" to the FBI and, consequently, to DOJ and the United States Senate.¹³⁴⁹

Regarding tax issues, the FBI Director's memorandum noted that "it is inconceivable to believe that a review of Cisneros's tax returns would be sufficient to draw the conclusion that Cisneros had not been skimming money from his company to make payments to Medlar."¹³⁵⁰ Likewise, with respect to the Jaffe issue, the memorandum noted that "investigation relative to Jaffe providing money to Cisneros and Medlar was not pursued," and that, absent such investigation, the Jaffe matter could not have been resolved.¹³⁵¹ The memorandum also reiterated that "[i]t

¹³⁴⁶ GJ 00-001 Tr. Enderson 8/9/01 at 43; OIC Interview Notes Gallagher 6/21/01 at 3-4.

¹³⁴⁷ GJ 00-001 Ex. 362 at 1.

¹³⁴⁸ *Id.* at 4-5.

¹³⁴⁹ *Id.* at 6-9.

¹³⁵⁰ *Id.* at 10.

¹³⁵¹ *Id.* at 10.

was the opinion of the FBI . . . that the allegations relative to Jaffe . . . could not be sufficiently investigated without effective use of subpoenas.”¹³⁵²

3. The Sixty-Day Extension of the Preliminary Investigation

On January 13, 1995, pursuant to 28 U.S.C. § 592(a)(3), the Attorney General extended the Cisneros preliminary investigation for a period of 60 days.¹³⁵³ The OIC was not able to determine the circumstances behind the Attorney General’s decision to extend the preliminary investigation for 60 days, or who, if anyone, recommended for or against the extension.

On January 18, 1995, Radek met with FBI Supervisory Agents Enderson and Yount. The purpose of the meeting was to discuss specific investigative steps to be taken during the 60-day extension of the preliminary investigation. According to a letter dated January 23, 1995 from the FBI to Radek documenting the meeting, the discussion centered on three main areas: (1) the Cisneros vetting process, (2) tax violations, and (3) an interview with Cisneros.¹³⁵⁴ The letter indicated that Webster Hubbell would be reinterviewed concerning his discussions with the President-elect regarding his meeting with Cisneros; Christopher and Wing were also considered for additional interviews.¹³⁵⁵ The FBI was to prepare a list of all vetters, a chronology of their interviews, and the information Cisneros had given them.¹³⁵⁶ The letter stated that the FBI was to obtain certified copies of the depositions of Medlar and Cisneros taken in Medlar’s civil suit in Texas.¹³⁵⁷ The letter further indicated that Public Integrity asked the FBI to make copies of the available Medlar tapes; Public Integrity had not previously asked that it be provided any of the tapes.¹³⁵⁸

¹³⁵² *Id.* at 4.

¹³⁵³ GJ 00-001 Ex. 2 (DOJ Notice of 60-day extension of time 1/13/95).

¹³⁵⁴ GJ 00-001 Ex. 364.

¹³⁵⁵ *Id.* at 1.

¹³⁵⁶ *Id.* at 1.

¹³⁵⁷ *Id.* at 2.

¹³⁵⁸ *Id.*

The FBI's letter indicated that the FBI was to interview Cisneros's accountant, Luis Hernandez, "concerning the tax violations," following a request to Cisneros's attorney that Cisneros waive any accountant-client privilege that Cisneros might have concerning Hernandez.¹³⁵⁹ Hernandez was to be asked if he knew of any funds Cisneros had not deposited into his bank accounts¹³⁶⁰ and whether Cisneros had paid taxes on any of those funds.¹³⁶¹ The letter related that Radek had asked the FBI to obtain copies of Cisneros's speechmaking calendar for comparison to his reported speaking fees, as well as clearer photocopies of checks payable to Cisneros and endorsed by Medlar.¹³⁶²

Although Public Integrity and the FBI agreed on the need to interview Hernandez, they disagreed about the interview's purpose. Public Integrity wanted the interview to address tax violations.¹³⁶³ The FBI did not believe that the interview could resolve the tax issues.¹³⁶⁴

The FBI's letter also stated that, at the recommendation of the Attorney General, the Deputy Attorney General, and the Assistant Attorney General for the Criminal Division, Public Integrity would ask Cisneros's attorney to make Cisneros available for an interview.

Despite the agreed-upon investigative steps indicated in the letter, Radek continued to express his view that the case should not go forward.¹³⁶⁵ Yount testified that, at the January 18, 1995 meeting, Radek was very clear that his role was to prevent cases from being referred to an independent counsel.¹³⁶⁶

¹³⁵⁹ GJ 00-001 Ex. 364 at 2.

¹³⁶⁰ GJ 00-001 Ex. 364 at 2.

¹³⁶¹ GJ 00-001 Ex. 364 at 2.

¹³⁶² GJ 00-001 Ex. 364 at 2.

¹³⁶³ GJ 00-001 Tr. Yount 12/6/01 at 49.

¹³⁶⁴ GJ 00-001 Tr. Yount 12/6/01 at 45-46.

¹³⁶⁵ GJ 00-001 Tr. Yount 12/6/01 at 46.

¹³⁶⁶ *Id.*

At that meeting, according to Yount:

[Radek] expressed concerns with the fact that the Attorney General worked for the President and that there were several ongoing Independent Counsels at the time. To recommendation [*sic*] to her that she should refer another case for an Independent Counsel would pose potential problems for the Attorney General, as far as her role or job with the President and he did not want to put her in that situation.¹³⁶⁷

On January 19, 1995, Radek met with Namorato.¹³⁶⁸ Radek requested from Namorato copies of Cisneros's appointment books, calendars, and other documents that would list speeches Cisneros gave from 1990 to 1993.¹³⁶⁹ Radek also requested that Namorato make Cisneros available for an interview.¹³⁷⁰

In a January 25, 1995 letter to Radek, Namorato denied Radek's request to interview Cisneros.¹³⁷¹ However, Namorato did provide Cisneros's appointment books and some logs maintained by Arce-Garcia, which, he claimed, listed Cisneros's speeches and the amount of income he had received for each speech.¹³⁷²

Namorato's letter also offered Public Integrity the opportunity to interview Hernandez and Arce-Garcia.¹³⁷³ The letter predicted that the documents provided and the interviews would show that further investigation would not produce evidence of violations.¹³⁷⁴

¹³⁶⁷ *Id.* at 46-47.

¹³⁶⁸ Letter from Namorato to Radek 1/25/95.

¹³⁶⁹ *Id.* at 1.

¹³⁷⁰ *Id.* at 2.

¹³⁷¹ *Id.* at 2.

¹³⁷² *Id.* at 1.

¹³⁷³ *Id.* at 1, 3.

¹³⁷⁴ *Id.* at 3.

On January 26, 1995, FBI San Antonio agents interviewed Hernandez. In direct contradiction to the 1992 and 1993 FBI background investigation interviews, in which he had stated that Cisneros was not depositing certain portions of his speechmaking income, Hernandez advised that “he was not aware of any funds received by Cisneros that were not deposited into Cisneros’s bank accounts.”¹³⁷⁵

On the face of the FBI’s interview report, it is not apparent how Hernandez calculated Cisneros’s income for tax purposes. At one point, he advised that he had calculated 1991 and 1992 income for CISCOM “based on the amount listed on Forms 1099”¹³⁷⁶ issued by payers to Cisneros.¹³⁷⁷ He also advised that “all deposits were counted as income,” resulting in a probable overreporting of income because some transfers between accounts appeared as deposits.¹³⁷⁸ Finally, he advised that, in computing Cisneros’s income for 1991 to 1993, he compiled different amounts from the Forms 1009, the books, and the accounts receivable log and reported the highest figure as income.¹³⁷⁹

The FBI agents interviewing Hernandez did not feel prepared to conduct a tax investigation – they did not have experience investigating tax matters, they did not receive guidance about tax violations, and they did not have the necessary financial records to compare to Hernandez’s answers or to confront him with.¹³⁸⁰ Therefore, the interviewing agents did not question Hernandez further on his methodology for

¹³⁷⁵ GJ 00-001 Ex. 366 at 2.

¹³⁷⁶ IRS Form 1099 is commonly used as the means to report payments for services. The payer issues the 1099 form to both the recipient of their payments and the IRS. The form enables taxpayers to report their income on their tax forms accurately, and the IRS to make sure the recipient reports such income.

¹³⁷⁷ *Id.* at 1.

¹³⁷⁸ *Id.* at 2.

¹³⁷⁹ *Id.* at 3.

¹³⁸⁰ OIC Interview Notes Martin 6/14-15/01 at 4; OIC Interview Notes Parks 6/14-15/01 at 6-7.

preparing Cisneros's tax returns. Instead, they focused on Cisneros's payments to Medlar.¹³⁸¹

During the interview, Hernandez told the FBI that the IRS had served him a summons requesting that he provide, by February 10, 1995, documents concerning Cisneros.¹³⁸² In a subsequent FBI interview, on January 30, 1995, Hernandez said that the IRS had also served summonses on Rene Gonzalez, his predecessor as Cisneros's accountant, and on Arce-Garcia, Cisneros's trusted employee who later joined him at HUD.¹³⁸³

FBI San Antonio already knew that the IRS had interviewed Medlar and obtained copies of the tapes and other documents in December 1994, and FBIHQ had brought this fact to Public Integrity's attention. Public Integrity had advised FBI San Antonio that the matter was discussed with the IRS and that Public Integrity would follow up on that discussion with a letter asking the IRS to discontinue further investigation.¹³⁸⁴ Despite that representation, Public Integrity never sent the letter to the IRS.¹³⁸⁵

Upon hearing from Hernandez at his January 26, 1995 interview that the IRS investigation was still active, FBI San Antonio sent a teletype to FBIHQ advising that Hernandez, Arce-Garcia, and Gonzalez had all been served with IRS summonses.¹³⁸⁶ The teletype also informed FBIHQ that:

San Antonio was recently advised by [Public Integrity] and FBIHQ that [Public Integrity] did not send a letter to IRS.

• • •

¹³⁸¹ OIC Interview Notes Martin 6/14-15/01 at 4; OIC Interview Notes Parks 6/14-15/01 at 6-7.

¹³⁸² GJ 00-001 Ex. 367 at 3.

¹³⁸³ *Id.*

¹³⁸⁴ *Id.* at 1-2.

¹³⁸⁵ OIC Interview Notes Martin 6/14-15/01 at 5; GJ 00-001 Ex. 367 at 3.

¹³⁸⁶ GJ 00-001 Ex. 367 at 2-3.

San Antonio believes this issue has to be resolved without delay in order to prevent potential problems in this investigation, both current and future.

San Antonio respectfully requests that FBIHQ contact [Public Integrity], resolve this issue, and notify San Antonio of status.¹³⁸⁷

Enderson then requested that Radek contact the IRS and ask it to suspend its investigation until the preliminary investigation was concluded. Radek informed Enderson that he would send a letter to the IRS requesting that they “stand down.”¹³⁸⁸ Shortly afterward, Radek told Enderson that the matter had been resolved.¹³⁸⁹ When Enderson asked Radek how the matter had been taken care of, Radek informed him that he did not need to know the details.¹³⁹⁰ Around the same time, Public Integrity attorney Susan Park told an FBI San Antonio agent that Radek had found “the right person” at the IRS to handle the problem.¹³⁹¹

On February 6, 1995, Hernandez provided records concerning Cisneros to the FBI for copying. These records were also subjects of the IRS summons. The FBI reinterviewed Hernandez when it returned the records on February 8, 1995. Hernandez again advised the FBI that he was unaware of any checks that Cisneros had received but not deposited into his bank accounts. The agents confronted Hernandez with copies of checks payable to Cisneros that Cisneros had endorsed and deposited directly into Medlar’s account. Hernandez responded that, regardless of whether the checks had been deposited into Cisneros’s accounts or negotiated and deposited elsewhere, he believed taxes had been paid on the income they represented.¹³⁹²

¹³⁸⁷ *Id.* at 2-4.

¹³⁸⁸ GJ 00-001 Tr. Enderson 8/9/01 at 66.

¹³⁸⁹ *Id.* at 66.

¹³⁹⁰ *Id.* at 67.

¹³⁹¹ OIC Interview Notes Martin 6/14-15/01 at 5.

¹³⁹² FBI-302 Hernandez 2/8/95 at 1-2.

On February 10, 1995, the return date on the IRS summons, Public Integrity attorney Park advised the FBI that there was no need to obtain any additional financial records for investigative purposes.¹³⁹³ Then, on February 15, 1995, Park met again with an FBI agent working on the Cisneros preliminary investigation and stated that the FBI's concerns about the IRS investigation had been "resolved"; that the IRS would be "in touch if they found anything warranting crim[inal] referral"; and that it looked as if the IRS were conducting a "full audit," which differentiated the focus of the IRS investigation from that of Public Integrity's preliminary investigation.¹³⁹⁴

On February 16, 1995, the FBI interviewed Arce-Garcia. Contrary to her statements in her December 31, 1992 FBI interview for the background investigation preceding Cisneros's nomination, Arce-Garcia now admitted she had an intimate knowledge of and involvement in Cisneros's payments to Medlar. She stated that she had learned about Cisneros's payments to Medlar in early 1992 and had withdrawn cash from the CISCOM personal account and deposited it into Medlar's account on behalf of Cisneros.¹³⁹⁵ She stated that she usually made deposits to Medlar's account monthly, but sometimes she made them more frequently.¹³⁹⁶ The amount of the deposits ranged from \$4,000 to \$8,000.¹³⁹⁷ Arce-Garcia said she made the deposits to Medlar's account on instructions from Cisneros, who insisted that she make cash deposits instead of writing Medlar a check from the CISCOM account.¹³⁹⁸ When asked whether any of Cisneros's income checks had not been deposited into Cisneros's accounts, Arce-Garcia advised that Cisneros would sometimes take undeposited checks from her, and that she did not know what he did with them.¹³⁹⁹

Arce-Garcia also stated that she had been responsible for preparing Cisneros's daily calendar and had kept a log reflecting fees that were received and those that

¹³⁹³ GJ 00-001 Ex. 370 at 5.

¹³⁹⁴ GJ 00-001 Exs. 369, 371 at 1-2.

¹³⁹⁵ FBI-302 Arce-Garcia 2/16/95 at 4.

¹³⁹⁶ *Id.* at 4.

¹³⁹⁷ *Id.* at 4-5.

¹³⁹⁸ *Id.* at 5.

¹³⁹⁹ *Id.* at 4.

were outstanding. She claimed that she saw and made copies of every check that Cisneros received. She stated that she provided this log to Hernandez and that he was responsible for comparing the 1099 forms to the log. She said that she was not responsible for reviewing Cisneros's bank statements but that they were provided to Hernandez. She claimed that Hernandez rarely had trouble matching her log entries with 1099s and bank statements, but that, if he did, he would contact her.¹⁴⁰⁰

Arce-Garcia also advised the FBI that, while Cisneros was HUD Secretary, Medlar threatened to go public with the information she had about him. According to Arce-Garcia, Medlar sent a facsimile to Cisneros, received by Cisneros's confidante Frank Wing, that read: "What about the agreement we had, this is it, I've had enough of it, you won't return my calls, you didn't keep your promise like you said you would, you promised that once you took office, you wouldn't forget about me and my finances."¹⁴⁰¹

On February 17, 1995, FBI San Antonio summarized the results of the investigation to date in a teletype to the FBI Director. On the tax issue, FBI San Antonio stated that "[i]t was not possible, based on the available records, to definitely state that taxes were paid on each of the check amounts that were received as speech fees regarding checks that were deposited into Medlar's account."¹⁴⁰²

Thus, the interviews conducted by the FBI during the 60-day extension of the preliminary investigation revealed that:

- **[REDACTED PURSUANT TO 11/4/05 SPECIAL DIVISION ORDER ("COURT ORDER")]**
- some checks were not being deposited into Cisneros's business accounts, and some of the money from the checks instead went to Medlar;

¹⁴⁰⁰ *Id.* at 1-3.

¹⁴⁰¹ *Id.* at 7.

¹⁴⁰² GJ 00-001 Ex. 370 at 4-5. Public Integrity was formally notified of this fact by early March. FBI Letterhead Memo 3/2/95 at 4.

- Arce-Garcia, who had earlier claimed that she had no knowledge of any payments to Medlar, now admitted her knowledge of and participation in the payments;
- Arce-Garcia knew that Cisneros sometimes took undeposited checks from her; and
- Medlar had threatened Cisneros while Cisneros was HUD Secretary.

On February 24, 1995, the FBI General Counsel met with Assistant Attorney General Harris to discuss the Cisneros investigation. According to a memorandum documenting the meeting, much of the discussion centered on Public Integrity's position that the FBI would not have done anything differently during the background investigation if Cisneros had disclosed the true amount of the payments, and that the Senate had available to it the approximate amount of the payments made and that Senators Riegle and D'Amato were unconcerned about the payments.¹⁴⁰³ Cisneros's attorney Namorato had made these same points in a December 1994 letter to Radek.¹⁴⁰⁴

4. Recommendations to the Attorney General

In a February 27, 1995 memorandum to the Assistant Attorney General for the Criminal Division, Radek formally recommended that no aspect of the Cisneros matter be investigated by an independent counsel.¹⁴⁰⁵ According to Enderson, the memorandum was very similar to Radek's December 1994 draft recommendation that he had reviewed and with which the FBI had earlier taken issue.¹⁴⁰⁶

Like the late December 1994 draft, Radek's final memorandum seemed to strain to reach the conclusion that no independent counsel should be appointed, to the point of misapplying the law and misstating certain facts. The result was a vigorous argument against the appointment of an independent counsel that raises questions about the author's intent in focusing the analysis so narrowly.

¹⁴⁰³ GJ 00-001 Ex. 373 at 1.

¹⁴⁰⁴ Letter from Namorato to Radek 12/21/94 at 1-3.

¹⁴⁰⁵ GJ 00-001 Ex. 372.

¹⁴⁰⁶ OIC Interview Notes Enderson 6/20/01 at 5.

The statutory standard for requesting the appointment of an independent counsel was whether “there are reasonable grounds to believe that further investigation is warranted.”¹⁴⁰⁷ However, the memorandum did not directly address this standard. Instead, it repeatedly argued against the appointment of an independent counsel on the ground that the preliminary investigation had uncovered absolutely no inculpatory evidence at all – an obvious exaggeration, in light of the evidence developed in the FBI investigation. The memorandum stated that “[t]here is no evidence of a prosecutable offense by Cisneros that would warrant further investigation”;¹⁴⁰⁸ that “[g]iven the lack of any evidentiary support . . . any criminal prosecution based on [Cisneros’s] false statement would inevitably fail and as a result, no further investigation of this false statement is warranted”;¹⁴⁰⁹ that “the conversations are too ambiguous to provide support for a conclusion that there was a criminal conspiracy”;¹⁴¹⁰ that “there is no evidence that Cisneros was motivated by anything other than real concern for Medlar’s and her daughter’s well-being in making the payments”;¹⁴¹¹ that “[w]e developed no evidence that any decisionmaker involved in the confirmation process was ever aware of the false information communicated to the FBI”;¹⁴¹² that “[g]iven the lack of any evidentiary support for a conclusion that Cisneros’s false statement had the potential to affect his confirmation, . . . any criminal prosecution based on this false statement would inevitably fail”;¹⁴¹³ and that “we have no evidence of an unlawful objective” behind Cisneros’s statement to Medlar that he had intended to answer questions from the Senate “the way we agreed,” because what the two had agreed to say was not known.¹⁴¹⁴

¹⁴⁰⁷ 28 U.S.C. § 592(c)(1)(A).

¹⁴⁰⁸ GJ 00-001 Ex. 372 at 1.

¹⁴⁰⁹ *Id.* at 3 (emphasis in original); *see also id.* at 27, 48.

¹⁴¹⁰ *Id.* at 5.

¹⁴¹¹ *Id.* at 2 (emphasis in original).

¹⁴¹² *Id.* at 2.

¹⁴¹³ *Id.* at 3.

¹⁴¹⁴ *Id.* at 32.

Perhaps the best example of the extent to which the memorandum strains to avoid acknowledging inculpatory evidence as such can be found in its analysis of Cisneros’s statement to Medlar about the upcoming confirmation hearing:

If [the subject comes up] I’ll tell [the Senate] what we agreed and the only person in the world who can sink me at that point, and I mean serious, I’m talking con, con, contempt of congress, jail, is you.¹⁴¹⁵

The memorandum concludes that “[t]here is no evidence in this conversation of an agreement to accomplish an illegal end,” again because precisely what Cisneros and Medlar had agreed to tell the Senate was not known.¹⁴¹⁶

In urging that absolutely no evidence of a criminal offense could be found, the memorandum also failed to note the strict limits Public Integrity placed on the FBI’s investigatory efforts. It did not consider whether a broader investigation – either before or after the appointment of an independent counsel – might in fact yield additional evidence, as the FBI repeatedly asserted. Thus, the memorandum did not justify the negative answer it gave to the only question before the Attorney General: whether “there are reasonable grounds to believe that further investigation is warranted.”¹⁴¹⁷

In examining the central accusation that Cisneros had lied to the FBI in violation of 18 U.S.C. § 1001, the memorandum recognized, although with apparent reluctance, that Cisneros might be charged with knowingly or willfully making false statements in a matter within the jurisdiction of a federal department or agency.¹⁴¹⁸ It therefore focused on the remaining question under § 1001 – whether Cisneros’s false statements were material.¹⁴¹⁹ On its face, a series of significantly false statements given to the FBI while it is investigating a candidate’s fitness for high office would appear to be potentially material to every official involved in the selection process, but the memorandum argued that the materiality question tipped

¹⁴¹⁵ *Id.* at 29.

¹⁴¹⁶ *Id.* at 30.

¹⁴¹⁷ 28 U.S.C. § 592(c)(1)(A).

¹⁴¹⁸ GJ 00-001 Ex. 372 at 20-23.

¹⁴¹⁹ GJ 00-001 Ex. 372 at 23-27.

so decisively in Cisneros's favor that it precluded even the possibility of prosecuting him.¹⁴²⁰

Radek's memorandum notes correctly that, under § 1001, it is the substance of the false statement, and not the falsity of the statement, that must be material.¹⁴²¹ Thus, in assessing the materiality of Cisneros's statements concerning his payments to Medlar, the relevant question was whether the governmental decisionmaker at whom the statement was aimed could have been influenced by the fact of the payments, not whether he or she could have been influenced by the fact that Cisneros lied. Therefore, the memorandum focused exclusively on whether the actual amounts of Cisneros's payments could have had any effect on the FBI, the Transition Team, or the Senate.

This approach, however, ignored the fact that Cisneros's false statements were not confined to the amount of the payments to Medlar. By its very nature, the appointment inquiry was designed to determine not the amount of money that Cisneros gave to Medlar, but whether Cisneros was honest, trustworthy, and reliable enough to be a Cabinet officer.¹⁴²² Cisneros falsely represented that he was being candid when, in fact, he was not.

Indeed, Cisneros made specific false statements about whether he had been truthful to the government about his relationship with Medlar, thus bringing his veracity directly into question under § 1001. Cisneros had stated on the Supplement to the SF-86 he had completed for the appointment process that there was nothing in his personal life that anyone could use to coerce or blackmail him¹⁴²³ – an obvious misrepresentation in light of the conversations he was then having with Medlar. Then, in his December 30, 1992 interview with the FBI, Cisneros had advised the

¹⁴²⁰ Ultimately, when Cisneros was prosecuted, the court did find that his alleged false statements were material. *United States v. Cisneros*, 26 F. Supp. 2d 24, 40, 56.

¹⁴²¹ GJ 00-001 Ex. 372 at 24.

¹⁴²² OIC Depo. Tr. Christopher 9/17/97 at 38-39; GJ 97-1 Tr. Calamaro 9/9/97 at 26-30, 36-38; GJ 97-1 Tr. Hamilton 11/12/97 at 204-05.

¹⁴²³ Cisneros Supp. to SF-86 12/14/92 at Question 10-S.

agents that his answers on the form were accurate and complete to the best of his knowledge and recollection.¹⁴²⁴

When the FBI became concerned about Cisneros's apparent lack of candor in his initial background investigation interview, the supervisory agent had ordered a second interview of Cisneros and directed the interviewing agents to:

Advise Mr. Cisneros that he should be completely candid during this interview, that he should provide any information not previously provided, and that if there is any other information such as other affairs, payments made to any other individuals, etc., that it would be in his best interest to come forth with that information now.¹⁴²⁵

Cisneros did not take this opportunity to identify or correct his previous omissions and false statements.

Nevertheless, the memorandum did not consider whether Cisneros's false representations of honesty and candor could have been material to the governmental decisionmakers at whom they were aimed. Instead, it incorrectly asserted that Cisneros "was never asked and never made a false statement concerning his truthfulness."¹⁴²⁶

Focusing exclusively on Cisneros's false statements about the Medlar payments, Radek's memorandum insisted that these statements "were not material to any of [the] decisionmakers."¹⁴²⁷ Identifying the relevant decisionmakers as the FBI, the Transition Team, and the Senate Banking Committee, the memorandum asserted that none of them actually cared about the amount of Cisneros's payments. The memorandum did not identify DOJ-PSO as a relevant decisionmaker, and it did not address the possible effect of Cisneros's false statements on security determinations by DOJ-PSO.

¹⁴²⁴ FBI-302 Cisneros 12/30/92 at 1.

¹⁴²⁵ OIC Interview Report Gray 11/5/96 and 11/7/96 at 7-9, 12; FBI Routing Slip 1/7/93 at 1.

¹⁴²⁶ GJ 00-001 Ex. 372 at 2.

¹⁴²⁷ GJ 00-001 Ex. 372 at 26.

The memorandum stated that “[t]he false statements about the amounts paid to Medlar simply were not material to any of these decisionmakers. The Transition Team and the Senate were both concerned only with the purpose of the payments.”¹⁴²⁸ But the memorandum did not consider whether the decisionmakers might have further examined the purpose behind Cisneros’s payments if they had known their true amount.

Regarding the FBI, the memorandum simply viewed that agency’s task as recording information and passing it on to others – “[t]he FBI’s job was to report to the Transition Team the information it gathered.”¹⁴²⁹ The memorandum paraphrased an FBI official who supposedly had said that “it did not matter whether the payments were \$1,000 or \$100,000 per month; the [FBI]’s summary memorandum would have reflected only what Cisneros had stated.”¹⁴³⁰ However, the memorandum did not specifically address what the FBI might have done differently in its investigation if Cisneros had honestly disclosed to it that he had paid Medlar hundreds of thousands of dollars. One agent later confirmed to the OIC that “the amount of the payments was a problem, but was not a ‘big problem,’ and the overall truthfulness of Cisneros was an important issue.”¹⁴³¹ Another agent indicated that further investigation would have been conducted if the FBI had received contradictory facts and figures.¹⁴³²

Ultimately, Radek’s memorandum emphasized that Cisneros’s accountant had told the FBI that Cisneros had paid Medlar as much as \$60,000 per year, and that the FBI had simply passed on the information without remarking on the fact that Cisneros had claimed in his FBI interview to have given her no more than \$10,000 per year.¹⁴³³ The memorandum concluded that “[t]he plain reason for this course of action is that Cisneros’s false statements did not matter – they had no effect on the FBI’s approach

¹⁴²⁸ GJ 00-001 Ex. 372 at 26.

¹⁴²⁹ GJ 00-001 Ex. 372 at 27.

¹⁴³⁰ *Id.* at 16.

¹⁴³¹ OIC Interview Report Rodrigue 2/6/97 at 3.

¹⁴³² FBI-302 Bourke 12/21/94 at 4.

¹⁴³³ GJ 00-001 Ex. 372 at 27.

to its [background investigation] duties.”¹⁴³⁴ The memorandum’s clear implication was that the FBI was unconcerned about Cisneros’s lies.

However, the FBI in fact believed that Cisneros’s lies had greatly impeded its work. The reason the FBI did not comment on the discrepancy between Cisneros’s low estimate of the payments and the much higher figure his accountant had given was not that the FBI found it unimportant, but that none of the interviewing agents involved in the Cisneros background investigation had been in a position to notice the discrepancy, and the official who compiled the report failed to flag it – a possibility the memorandum did not even consider.¹⁴³⁵ Moreover, the FBI felt that “the purpose of the background investigation was to report the facts as they were related . . . [as opposed to] completely resolv[ing] all discrepancies to arrive at the truth.”¹⁴³⁶ Consequently, when Cisneros informed the FBI that the payments had already been discussed with “the highest levels of the Transition Team,” the FBI did not consider it necessary to follow up on the issue.¹⁴³⁷

Similarly, the memorandum asserted that the amount of the payments was not material to the Senate, citing statements by Senators Riegle and D’Amato that the true amount of Cisneros’s payments to Medlar would not have affected how they would have voted on his appointment.¹⁴³⁸ However, D’Amato later informed the OIC that he would not have supported Cisneros’s nomination if he had known that Cisneros had lied during the confirmation process.¹⁴³⁹ Other Senators expressed similar concerns to the OIC¹⁴⁴⁰ and the FBI.¹⁴⁴¹

¹⁴³⁴ GJ 00-001 Ex. 372 at 27.

¹⁴³⁵ FBI-302 Bourke 3/8/95; OIC Interview Report Bourke 3/6/97 at 6.

¹⁴³⁶ FBI-302 Bourke 12/21/94 at 2-3, 4.

¹⁴³⁷ GJ 00-001 Ex. 372 at 2; OIC Interview Report Gray 11/5/96 and 11/7/96 at 12.

¹⁴³⁸ GJ 00-001 Ex. 372 at 26.

¹⁴³⁹ OIC Interview Report D’Amato 12/1/97 at 1.

¹⁴⁴⁰ *See* OIC Interview Report Shelby 11/6/97.

¹⁴⁴¹ GJ 00-001 Ex. 351.

Radek’s memorandum did not analyze the reaction of any Senator other than Riegle and D’Amato. It noted that “Riegle would not suggest that other members of the committee review the summary [FBI] memorandum unless something in the memorandum was of such extraordinary importance that he believed it should be reviewed individually by other committee members,”¹⁴⁴² but it did not consider whether Riegle would have shared the correct information about the payments with other members of the Committee if it had been stated in the FBI Report. Instead, the memorandum proceeded on the assumption that the Senators did not care about the true facts regarding Cisneros’s payments because the Senate, acting in ignorance of those facts, took no action on them.

The memorandum dismissed the possibility of a conspiracy offense on the ground that sufficient evidence to convict had not yet been gathered. In discussing passages of the Medlar tapes that clearly identified agreements between Medlar and Cisneros about what to tell the Senate, the memorandum asserts:

- “it is impossible to tell exactly what it was that they agreed”;¹⁴⁴³
- “there is no indication of either what the subject was or what was agreed”;¹⁴⁴⁴ and
- “[t]he ominous tone to Cisneros’s remarks here does not obviate the lack of information as to what was agreed.”¹⁴⁴⁵

The memorandum does not consider the possibility that a full-scale investigation could fill the gaps in the concededly “ominous” information already available.

Most of the other key conclusions in the memorandum were built solely on the foundation of the materiality analysis. After discussing a potential conspiracy offense, because it was not known what had been agreed to, the memorandum claimed that “even if Cisneros and Medlar agreed to provide specific false information to the FBI, that was not a crime, because the false information they

¹⁴⁴² GJ 00-001 Ex. 372 at 17.

¹⁴⁴³ GJ 00-001 Ex. 372 at 29.

¹⁴⁴⁴ GJ 00-001 Ex. 372 at 29.

¹⁴⁴⁵ GJ 00-001 Ex. 372 at 29.

agreed to provide was not material,”¹⁴⁴⁶ and that “it is difficult to articulate a way in which providing immaterial false information to the FBI during a background investigation could impair, obstruct or defeat a government function”¹⁴⁴⁷ The memorandum did not explain how the unknown agreement could unquestionably be immaterial.

The memorandum acknowledged that Cisneros’s direct and indirect payments continued well past his confirmation.¹⁴⁴⁸ It did not consider the possibility that the continuing payments were intended to buy Medlar’s silence – a silence that ended when the payments stopped in 1994.

Radek’s memorandum also looked at the question of whether Cisneros might be prosecuted for obstruction of agency proceedings.¹⁴⁴⁹ It rejected this possibility, and the analysis in support of this rejection “again turns on the materiality issue.”¹⁴⁵⁰

With respect to possible tax violations, Radek’s memorandum stated that, based on Public Integrity’s investigation of possible skimming, and tax evasion, “the evidence clearly established that taxes were paid on the income” from the checks endorsed over to Medlar.¹⁴⁵¹ However, the memorandum admitted that during the 90-day preliminary investigation Public Integrity had only “briefly considered” the possibility that Cisneros had been skimming income and viewed this as an “unlikely

¹⁴⁴⁶ GJ 00-001 Ex. 372 at 33.

¹⁴⁴⁷ *Id.* at 34.

¹⁴⁴⁸ GJ 00-001 Ex. 372 at 18-19.

¹⁴⁴⁹ *Id.* at 35-36.

¹⁴⁵⁰ *Id.* at 36.

¹⁴⁵¹ *Id.* at 5. The memorandum’s conclusion that the evidence “clearly established” that Cisneros paid taxes on all income he had received from speaking engagements was in stark contrast to the information provided to Public Integrity by the FBI that it “was not possible, based on the available records to definitively state that taxes were paid.” GJ 00-001 Ex. 370 at 4-5; 3/2/95 FBI Letterhead Memo at 4.

scenario.”¹⁴⁵² Likewise, during the 60-day extension, Public Integrity “focused” on eight checks that Cisneros had received for speaking engagements and had deposited into Medlar’s bank account.¹⁴⁵³ These eight checks spanned a seven-month period in 1991 to 1992, totaled less than \$15,000, and represented only a fraction of the evidence then available. Nevertheless, the memorandum asserted that Public Integrity had investigated the tax matter “in much greater detail” during the extension, only to determine again that Cisneros had not committed the tax violation of underreporting his income.¹⁴⁵⁴

In contrast to FBI Director Freeh’s January 5, 1995 memorandum to DOJ concerning Radek’s draft declination memorandum, in which Freeh had told DOJ that it was “inconceivable” that a review of Cisneros’s tax returns was sufficient to conclude that Cisneros had not skimmed money to pay Medlar,¹⁴⁵⁵ Radek’s memorandum claimed that, “the payments [to Medlar] were well within [Cisneros’s] means, given his income as disclosed on his tax returns.”¹⁴⁵⁶ Radek’s memorandum did not describe how this conclusion was reached. In fact, this conclusion was demonstrably wrong and contrary to evidence then available to Public Integrity.

In 1991, Cisneros’s Net Disposable Income (Taxable Income less Total Tax) was \$75,358.¹⁴⁵⁷ Public Integrity determined that Cisneros paid Medlar \$56,000 that year.¹⁴⁵⁸ This left Cisneros \$19,358 with which to care for his family of five. Public Integrity had information available to it – obtained by the FBI from Hernandez – which indicated that Cisneros had almost \$71,000 in household expenses that year.¹⁴⁵⁹

¹⁴⁵² GJ 00-001 Ex. 372 at 43.

¹⁴⁵³ *Id.* at 44.

¹⁴⁵⁴ *Id.* at 44.

¹⁴⁵⁵ GJ 00-001 Ex. 362 at 10.

¹⁴⁵⁶ GJ 00-001 Ex. 372 at 2.

¹⁴⁵⁷ Cisneros’s 1991 Form 1040 reflected \$105,509 of taxable income (Line 37) and a total tax of \$30,151 (Line 53).

¹⁴⁵⁸ GJ 00-001 Ex. 372 at 8.

¹⁴⁵⁹ 1991 Cisneros 1 p. profit and loss statement. (Obtained by FBI from
(continued...))

This means that Cisneros spent \$50,462 more on Medlar and his family than his 1991 return indicated he had available to him.

In 1992, Cisneros's Net Disposable Income was \$45,138.¹⁴⁶⁰ Public Integrity determined that Cisneros paid Medlar \$60,700 that year.¹⁴⁶¹ Without even taking into account any household expenses, Cisneros spent \$14,562 more on Medlar than his 1992 return reflected he had available to him.

Cisneros clearly was spending more on Medlar and his family in 1991 and 1992 than, according to his returns, he had available to spend. At the least, this discrepancy merited further inquiry. Radek's memorandum instead simply concludes that no further investigation was warranted because Cisneros was supposedly living within his means.

Overall, Radek's February 27, 1995 memorandum recommending against the appointment of an independent counsel gave a very one-sided assessment of whether further investigation was warranted. It did not attempt to address the substantial nature of Cisneros's false statements, the breadth of the available evidence (particularly the Medlar tapes), the strong contrary position taken by the FBI throughout the preliminary investigation, or the evidence that suggested tax violations.

In a brief February 28, 1995 memorandum to Assistant Attorney General Jo Ann Harris, Deputy Assistant Attorney General John Keeney also recommended that no independent counsel be appointed to investigate Cisneros.¹⁴⁶² Keeney's memorandum concluded that "the false statements are not material. Therefore, we do not have proof of a crime."¹⁴⁶³ However, the memorandum did note that "if this were not an independent counsel matter, many of us would put some witnesses before a

¹⁴⁵⁹(...continued)

Hernandez on February 6, 1995. FBI-302 Hernandez 2/8/95.)

¹⁴⁶⁰ Cisneros's 1992 Form 1040 reflected \$68,599 of taxable income (Line 37) and a total tax of \$23,461 (Line 53).

¹⁴⁶¹ GJ 00-001 Ex. 372 at 8.

¹⁴⁶² Memorandum from Keeney to Harris 2/28/95.

¹⁴⁶³ *Id.* at 2.

grand jury realizing that the grand jury testimony would most likely not change the result.”¹⁴⁶⁴ Keeney’s memorandum made no mention of the tax issue.

On March 1, 1995 FBI General Counsel Howard Shapiro directed a memorandum to Assistant Attorney General Jo Ann Harris, supporting the FBI’s position that an independent counsel should be appointed to investigate Cisneros.¹⁴⁶⁵ The memorandum vigorously argued against the recommendation in Radek’s February 27, 1995 memorandum that no independent counsel be requested, and focused on how evidence of Cisneros’s false statements during the confirmation and appointment process required further investigation by an independent counsel.¹⁴⁶⁶ The memorandum did not raise specific objections to other issues discussed in the February 27, 1995 Public Integrity memorandum, such as tax questions, although the FBI had previously asserted that an independent counsel was required to resolve such matters.¹⁴⁶⁷

Shapiro’s memorandum specifically took issue with Radek’s analysis of the Independent Counsel Act and the law of materiality, as well as some of his assertions concerning the FBI and the Senate decisionmaking process. As to the threshold for the appointment of an independent counsel, Shapiro stated that “[t]he issue here . . . is not whether Cisneros would prevail at trial, or even whether an indictment should be returned, but rather, whether it is appropriate for the Department of Justice to determine, as a matter of law, that the false statements were immaterial.”¹⁴⁶⁸ Shapiro’s memorandum went on to argue that proper test for materiality “**is not whether the false statement actually influenced a government decision or even whether is [sic] probably influenced the decision; the standard is whether the misrepresentation was capable of influencing the decision.**”¹⁴⁶⁹ Applying that test to the Cisneros case, the memorandum concluded that “[i]t cannot be said with

¹⁴⁶⁴ *Id.*

¹⁴⁶⁵ GJ 00-001 Ex. 373.

¹⁴⁶⁶ GJ 00-001 Ex. 373.

¹⁴⁶⁷ GJ 00-001 Ex. 373.

¹⁴⁶⁸ GJ 00-001 Ex. 373 at 6.

¹⁴⁶⁹ *Id.* at 5 (emphasis in original); quoting *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

certainty that these statements did not have the capacity to influence the FBI in conducting the background investigation or the membership of the Senate in determining the fitness of Cisneros to serve as Secretary of HUD.”¹⁴⁷⁰

As for Public Integrity’s assertion that the FBI did not find Cisneros’s statements to be material, Shapiro’s memorandum stated that:

The fact that the FBI had short deadlines to complete background investigations, and that under these circumstances [a single agent] would not have caused greater investigation to be conducted, does not mean that under more ideal circumstances additional investigation would not have been conducted More importantly, the fact that one particular FBI agent would not have conducted further investigation does not bind the FBI to this position. Many crucial investigative decisions are made by the agents assigned to the case, without any consultation with the [supervisory agent in charge].¹⁴⁷¹

Likewise, as to the Senate, Shapiro’s memorandum asserted that:

[I]f the Senate had been advised of this criminal conduct, at least some of the Senators may have wanted to conduct further inquiry into the circumstances surrounding it prior to the confirmation vote. . . . It is not at all clear that if a diligent Senator had discovered that Cisneros had failed to file a required gift tax return, this would not have affected the decision-making process. Neither Senator Riegle nor Senate [sic] D’Amato was specifically questioned on the gift tax return issue, and none of the other Senators, including those on the Committee, were interviewed in connection with this investigation. Since the statements at issue are not clearly immaterial, we believe that appointment of an Independent Counsel to evaluate the matter is mandated.¹⁴⁷²

¹⁴⁷⁰ GJ 00-001 Ex. 373 at 6 (emphasis in original).

¹⁴⁷¹ GJ 00-001 Ex. 373 at 6.

¹⁴⁷² GJ 00-001 Ex. 373 at 6-7.

Assistant Attorney General Harris wrote her own memorandum to the Attorney General on March 3, 1995.¹⁴⁷³ Like the Shapiro memorandum, Harris's submission disagreed with Public Integrity's recommendation that no independent counsel was required and recommended that the Attorney General seek the appointment of an independent counsel to investigate Cisneros's false statements to the FBI.¹⁴⁷⁴ However, Harris's memorandum indicated that further investigation was required only to resolve the materiality issue:

Because of [Public Integrity's] hard work, I think it is fair to say that we have all narrowed the matter to be decided down to the question of whether further investigation is necessary to inform the materiality analysis, or whether we can and should conclude on the basis of the record we have developed to date, that Cisneros' lies to the FBI were not material.¹⁴⁷⁵

The memorandum further urged that the evidence of a potential conspiracy was strong enough to warrant further investigation.¹⁴⁷⁶ Harris accepted Public Integrity's conclusion that no independent counsel need be sought on the tax and Jaffe allegations.¹⁴⁷⁷

The Attorney General and FBI General Counsel Shapiro met on March 8, 1995 to discuss the Cisneros investigation, and Shapiro prepared a memorandum addressing the Attorney General's concerns the next day. In that memorandum, he reiterated, among other things, that a truthful answer by Cisneros to questions regarding his payments to Medlar would have influenced the actions of the Senate during the confirmation process.¹⁴⁷⁸ Shapiro's memorandum also argued that it would be prudent to appoint an independent counsel who could subpoena bank records,

¹⁴⁷³ Memorandum from Harris to Attorney General Reno 3/3/95.

¹⁴⁷⁴ *Id.* at 5.

¹⁴⁷⁵ *Id.* at 4.

¹⁴⁷⁶ *Id.* at 8.

¹⁴⁷⁷ *Id.* at 5 n. 2.

¹⁴⁷⁸ GJ 00-001 Ex. 375 at 5.

interview more Senators, and call Medlar, Cisneros's accountant, and members of the Transition Team for questioning before a grand jury.¹⁴⁷⁹

Radek responded to Shapiro's March 9, 1995 memorandum with a memorandum to the Attorney General on the same day. He reiterated Public Integrity's recommendation that no independent counsel was needed. He stated, among other things, that Cisneros's false statements were not material to the Senate,¹⁴⁸⁰ that it was "impossible to fathom that Medlar would have any information which could shed light on the nomination and confirmation process,"¹⁴⁸¹ that Cisneros paid taxes on the funds he paid to Medlar,¹⁴⁸² and that "[t]here is no reason to go any further."¹⁴⁸³

5. The Attorney General's Application and the Appointment of the Independent Counsel

On March 13, 1995, notwithstanding Public Integrity's recommendation, the Attorney General filed an Application for the Appointment of an Independent Counsel ("Application") with the Special Division. Regarding the false statement allegations, the Attorney General agreed with the recommendations of Harris and the FBI and concluded that "there are reasonable grounds to believe that further investigation is warranted' into whether Secretary Cisneros may have violated a federal criminal law . . . when he made false statements to the FBI during his background investigation."¹⁴⁸⁴ Regarding tax allegations, the Attorney General accepted Public Integrity's position, stating that "[o]ur investigation developed no evidence that Secretary Cisneros failed to pay any income or gift taxes due in connection with his payments to Medlar."¹⁴⁸⁵ Therefore, the Attorney General did not

¹⁴⁷⁹ *Id.* at 6.

¹⁴⁸⁰ GJ 00-001 Ex. 376 at 3.

¹⁴⁸¹ *Id.* at 4 (emphasis in original).

¹⁴⁸² *Id.* at 5.

¹⁴⁸³ *Id.* at 6.

¹⁴⁸⁴ GJ 00-001 Ex. 3 at 2.

¹⁴⁸⁵ GJ 00-001 Ex. 3 at 4.

request that an independent counsel be given jurisdiction over tax matters.¹⁴⁸⁶ Similarly, the Attorney General concluded that no further investigation of the Jaffe issue was warranted.¹⁴⁸⁷

On May 19, 1995, Cisneros agreed to pay Medlar \$49,000 to settle her civil lawsuit against him. In exchange, Medlar agreed not to make any more financial claims against Cisneros.¹⁴⁸⁸ She also agreed to allow Cisneros's criminal attorneys to debrief her.¹⁴⁸⁹

On May 24, 1995, the Special Division appointed David M. Barrett as Independent Counsel to investigate the false statement allegations against Cisneros.¹⁴⁹⁰ In accordance with the Attorney General's Application, the tax and Jaffe issues were not included in the Independent Counsel's jurisdiction.¹⁴⁹¹

The IRS interviewed Medlar on May 31, 1995, at which time Medlar, pursuant to an IRS summons, gave the IRS 88 tapes of her conversations with Cisneros.¹⁴⁹² Shortly thereafter, Cisneros's criminal attorneys debriefed Medlar.¹⁴⁹³

6. The OIC's Initial Encounter with Public Integrity

In mid-Summer 1995, the Independent Counsel and members of his staff went to Public Integrity's office to pick up DOJ files concerning its investigation of

¹⁴⁸⁶ *Id.*

¹⁴⁸⁷ *Id.* at 4-5.

¹⁴⁸⁸ *Washington Post*, "Cisneros to pay \$49,000 to settle suit by former mistress" 5/20/95.

¹⁴⁸⁹ GJ 97-1 Tr. Holder 8/20/97 at 133, 149.

¹⁴⁹⁰ GJ 00-001 Ex. 4.

¹⁴⁹¹ *Id.*

¹⁴⁹² IRS Interview Report Medlar 5/31/95 at 5.

¹⁴⁹³ GJ 97-1 Tr. Holder 8/20/97 at 133, 149.

Cisneros.¹⁴⁹⁴ They were invited into a conference room to meet with Public Integrity Chief Lee Radek, who was accompanied by Public Integrity Deputy Chief Jo Ann Farrington and Trial Attorney Susan Park.

Park asserted that Public Integrity had conducted a complete, intensive, and thorough preliminary investigation of the Cisneros matter, and that it viewed the appointment of an independent counsel as completely unnecessary. She stated that the Independent Counsel would find Cisneros innocent of any wrongdoing. Park further indicated that Public Integrity had reviewed all aspects of tax allegations involving Cisneros and had concluded that no further investigation of any tax issues was needed. From her statements and the tone of her voice, the Independent Counsel inferred that Park intended her assertions to be taken as directives.

The Independent Counsel regarded Park's statements as an improper attempt by DOJ to direct the conduct and the outcome of his investigation and viewed them as an infringement on his independence. For these reasons, as Park was speaking, he asked to have a private conversation with Radek.

The Independent Counsel and Radek spoke outside the conference room. The Independent Counsel asked Radek the purpose of Park's statements; the Independent Counsel had anticipated that the only purpose of visiting Public Integrity was to receive DOJ files. Radek replied that Public Integrity was merely giving the OIC its view, which was that "you will find nothing here." The Independent Counsel replied that he would find what he would find, and not what he was told to find.

The tone and content of Radek's and Park's comments led the Independent Counsel to conclude that further contact with Public Integrity likely would not be productive.

I. Findings with Respect to the OIC's Requests for Jurisdiction over Tax Matters

Almost immediately after Medlar's September 1994 public disclosure that Cisneros had been making payments to her, the IRS's Criminal Investigative Division ("CID") in San Antonio, Texas began to investigate possible tax offenses by Cisneros, in light of his concealment of the relatively large sums of money he had

¹⁴⁹⁴ OIC memorandum of meeting with Public Integrity. This document is the source for the entirety of the following discussion of the meeting.

redirected to Medlar. The investigation yielded what CID viewed as significant evidence of criminal tax offenses, and the case was forwarded with a prosecution recommendation to the IRS's Austin District Counsel's Office ("District Counsel"). However, before District Counsel could complete its review of the case, the IRS's Assistant Chief Counsel's Office for Criminal Tax ("ACC") in Washington, D.C. took control of it.

Like DOJ, which struggled to determine whether an independent counsel should be appointed to investigate Cisneros in the first place for tax and non-tax matters, the IRS engaged in a heated internal debate over whether the tax allegations should be pursued as a criminal matter. This controversy was played out at the same time that the Independent Counsel was asking the Attorney General and the Special Division for an expansion of its authority to allow it to investigate Cisneros for tax offenses in four tax years. After consulting with the IRS, DOJ rejected the Independent Counsel's request for all but one tax year and opposed his application to the court for referral of the tax matters.

After consulting with DOJ, ACC ultimately elected not to refer the Cisneros case to DOJ for prosecution or grand jury investigation, despite substantial evidence that led CID and District Counsel to conclude that there was a strong criminal case to be made. Such a referral to DOJ almost certainly would have required that an independent counsel be appointed to investigate the Cisneros tax matter in multiple years, notwithstanding DOJ's earlier rejection of most of the OIC's expansion request.

1. IRS Criminal Investigation and Review

The IRS's criminal tax investigation of Cisneros deviated significantly from the agency's normal procedure. The following discussion describes the IRS's usual procedures, and its underlying organization, at the time of the Cisneros investigation.¹⁴⁹⁵

IRS Criminal Investigation was responsible for investigating potential criminal violations of the Internal Revenue Code relative to tax administration and related

¹⁴⁹⁵ In July 1998, the structure of the IRS was reorganized pursuant to the IRS Restructuring and Reform Act. Pub. Law 105-206 (1998). Therefore, many of these descriptions are no longer current.

financial crimes.¹⁴⁹⁶ Criminal Investigation's national office in Washington, D.C. supervised four regional offices,¹⁴⁹⁷ which in turn oversaw local field offices.¹⁴⁹⁸ Each field office conducted criminal investigations within that office's local area of responsibility.¹⁴⁹⁹

The field office that investigated the Cisneros case was the San Antonio CID, headed by Chief John Filan. Group Manager Sheila Colbenson, who reported indirectly to Filan, oversaw the Cisneros investigation. Colbenson assigned CID agents Kesha Lange and Dorman Barrows to conduct the Cisneros investigation.¹⁵⁰⁰

The IRS's Office of Chief Counsel was responsible for providing legal guidance and interpretive advice to the IRS.¹⁵⁰¹ At the time of the Cisneros case, the structure of the Chief Counsel's Office was similar to that of IRS Criminal Investigation, with offices on the national, regional, and local levels. The IRS divided the country into four regions, each under the supervision of a Regional Counsel.¹⁵⁰² The Regional Counsel directed and supervised a staff of attorneys furnishing legal advice and performing legal services for IRS Criminal Investigation.¹⁵⁰³ The duties of the Regional Counsel relating to criminal investigations were generally redelegated to Assistant Regional Counsel (Criminal

¹⁴⁹⁶ GJ 00-001 Ex. 308 (Ch. 1 at 4).

¹⁴⁹⁷ *Id.* (Ch. 1 at 5).

¹⁴⁹⁸ *Id.* (Ch. 1 at 5).

¹⁴⁹⁹ *Id.* (Ch. 1 at 5).

¹⁵⁰⁰ GJ 00-001 Ex. 18.

¹⁵⁰¹ GJ 00-001 Ex. 76.

¹⁵⁰² GJ 00-001 Ex. 187.

¹⁵⁰³ *Id.*

Tax) and the appropriate District Counsel office.¹⁵⁰⁴ District Counsel served as the in-house counsel for local CID personnel.¹⁵⁰⁵

The Chief Counsel's Office in Washington, D.C. had several components, including ACC.¹⁵⁰⁶ ACC was supervised by the Associate Chief Counsel (Enforcement Litigation).¹⁵⁰⁷ ACC was headed by the Assistant Chief Counsel (Criminal Tax), who served as a principal legal advisor to the Assistant Commissioner Criminal Investigation.¹⁵⁰⁸

At the time of the Cisneros investigation, Eliot Fielding was the Associate Chief Counsel (Enforcement Litigation) and Dominic Paris was his deputy.¹⁵⁰⁹ Barry Finkelstein was the Assistant Chief Counsel (Criminal Tax) and therefore head of ACC.¹⁵¹⁰ Finkelstein reported directly to Fielding and Paris.¹⁵¹¹ At the time of the Cisneros review, ACC was a small office,¹⁵¹² staffed by no more than nine attorneys, including Finkelstein.¹⁵¹³

The Assistant Regional Counsel (Criminal Tax) with jurisdiction over the Cisneros case was Carleton Knechtel. The Cisneros case fell within the jurisdiction of District Counsel in Austin, headed by District Counsel Lewis "Willie" Hubbard

¹⁵⁰⁴ *Id.*

¹⁵⁰⁵ GJ 00-001 Ex. 76.

¹⁵⁰⁶ GJ 00-001 Ex. 76.

¹⁵⁰⁷ *Id.*

¹⁵⁰⁸ *Id.*

¹⁵⁰⁹ GJ 00-001 Tr. Finkelstein 5/23/00 at 42.

¹⁵¹⁰ GJ 00-001 Tr. Finkelstein 5/23/00 at 14-16.

¹⁵¹¹ GJ 00-001 Tr. Finkelstein 5/23/00 at 42.

¹⁵¹² GJ 00-001 Tr. Finkelstein 5/23/00 at 50.

¹⁵¹³ GJ 00-001 Tr. Finkelstein 7/18/00 at 86-87.

and Assistant District Counsel James Macdonald, who had the primary responsibility over criminal matters.¹⁵¹⁴

A Criminal Investigation Division field office typically initiated a criminal tax investigation. On the basis of a preliminary investigation, the field office could recommend that the case be investigated either administratively or through a federal grand jury.¹⁵¹⁵

If a case was pursued administratively, Criminal Investigation conducted the investigation and could issue IRS summonses to obtain evidence. At the conclusion of an administrative investigation, Criminal Investigation generated a Special Agent's Report ("SAR") analyzing, among other things, the evidence, proposed charges, and any defenses offered by the taxpayer. The SAR included, as exhibits, testimonial and documentary evidence.¹⁵¹⁶ Any evidence obtained in an administrative criminal tax investigation could also be used in a civil tax proceeding.¹⁵¹⁷

District Counsel was responsible for reviewing prosecution recommendations in criminal cases and, where appropriate, referring such cases to DOJ for prosecution at DOJ's election.¹⁵¹⁸ Normally, upon receipt from CID of an SAR in a complex administrative tax case, the IRS's District Counsel office for the locale in which the case was investigated conducted a complete, independent review of the SAR.¹⁵¹⁹ From the day it received the SAR for a complex matter like the Cisneros case, District Counsel had 90 days to complete its review.¹⁵²⁰ District Counsel could refer the case to DOJ for prosecution, refer the case to DOJ for further investigation before a grand jury, put the case in "supplemental" status so that CID could gather more evidence,

¹⁵¹⁴ GJ 00-001 Tr. Finkelstein 5/23/00 at 36-38.

¹⁵¹⁵ See GJ 00-001 Ex. 308 (Chap. 12 at 10) (citing IRM 9267.21).

¹⁵¹⁶ GJ 00-001 Tr. Finkelstein 6/6/00 at 27-28; GJ 00-001 Ex. 20.

¹⁵¹⁷ GJ 00-001 Tr. Finkelstein 5/23/00 at 43-44.

¹⁵¹⁸ GJ 00-001 Ex. 187.

¹⁵¹⁹ GJ 00-001 Tr. Klotz 3/27/01 at 115; GJ 00-001 Tr. Finkelstein 6/6/00 at 27-28.

¹⁵²⁰ GJ 00-001 Ex. 308 at 17.

or decline to refer the case.¹⁵²¹ The applicable standard for referring a case to DOJ for prosecution was that there had to be evidence sufficient to establish guilt beyond a reasonable doubt and a reasonable probability of conviction.¹⁵²² If this standard was met, District Counsel prepared and signed a Criminal Reference Letter (“CRL”) recommending prosecution.¹⁵²³ It sent the CRL to the DOJ Tax Division with the SAR and the exhibits for further review and a determination of whether to prosecute the case.¹⁵²⁴

CID could refer certain types of cases directly to the appropriate federal prosecutor for grand jury investigation.¹⁵²⁵ Other types of cases, which included the Cisneros case, had to be forwarded to the Assistant Regional Counsel or the Assistant Chief Counsel, who would in turn refer them to the appropriate prosecutor for grand jury investigation.¹⁵²⁶

If Criminal Investigation recommended that a case be investigated by a grand jury instead of administratively, the Assistant Regional Counsel would decide whether to refer the case to DOJ to conduct the inquiry.¹⁵²⁷ At the conclusion of the inquiry, Criminal Investigation would prepare a criminal evaluation letter to analyze the results of the grand jury investigation.¹⁵²⁸ Evidence obtained by a grand jury is protected by the secrecy provisions of Federal Rule of Criminal Procedure 6(e) and

¹⁵²¹ GJ 00-001 Exs. 76 (CCDM (31)110); 171 (CCDM (31)440); 173 (CCDM (31)550); CCDM (31)430; CCDM (31)580.

¹⁵²² GJ 00-001 Ex. 166 (CCDM (31)310).

¹⁵²³ GJ 00-001 Ex. 187.

¹⁵²⁴ GJ 00-001 Ex. 187; GJ 00-001 Ex. 308 at 18.

¹⁵²⁵ GJ 00-001 Ex. 308 at 24-25; *see also* GJ 00-001 Ex. 173 (CCDM (31)550(2)).

¹⁵²⁶ GJ 00-001 Ex. 173.

¹⁵²⁷ GJ 00-001 Tr. Finkelstein 6/6/00 at 36-37.

¹⁵²⁸ GJ 00-001 Tr. Finkelstein 6/6/00 at 36.

can be disclosed only under certain exceptions to the Rule.¹⁵²⁹ Thus, such evidence cannot be readily used in a civil tax proceeding.¹⁵³⁰

CID chose to pursue the Cisneros case administratively rather than before a grand jury.¹⁵³¹

2. The Amendment of CCDM(31)440

The Chief Counsel's Directives Manual ("CCDM") contained the policies, procedures, instructions, guidelines, and delegations of authority that directed the operation and administration of Chief Counsel's Office and its subsidiaries.¹⁵³² At the time the IRS was reviewing the Cisneros case, Finkelstein was responsible for initiating, authoring, and supervising changes relating to criminal tax matters in the CCDM.¹⁵³³ Paris from time to time performed this function as well.¹⁵³⁴

In May 1996, as CID was conducting its investigation of Cisneros, ACC revised the CCDM to obtain for itself a regular role in administrative cases involving "politically sensitive individuals," such as Cabinet officers. Finkelstein directed that a CCDM provision be amended to require District Counsel offices to "coordinate" certain "high profile" cases with ACC. In a May 23, 1996, e-mail directing the change, Finkelstein stated:

As you know, there are certain high profile cases that require coordination with the National Office. This revision extends the same level of review that exists in the grand jury and search warrant environment to administrative cases.^[1535] The change is being

¹⁵²⁹ Fed. R. Crim. P. 6(e)(3).

¹⁵³⁰ *Id.*; Fed. R. Crim. P. 6(e)(6).

¹⁵³¹ GJ 00-001 Ex. 18.

¹⁵³² GJ 00-001 Tr. Finkelstein 5/25/00 at 144-45, 154.

¹⁵³³ GJ 00-001 Tr. Finkelstein 5/25/00 at 145-47, 155-61.

¹⁵³⁴ *Id.* at 144-45, 147-48, 153-61.

¹⁵³⁵ GJ 00-001 Ex. 173 at 3 (CCDM (31)550). All CCDM citations are to the
(continued...)

recommended since many of the same policy concerns that pervade the grand jury and search warrant arena with respect to these individuals also exist in the administrative arena.¹⁵³⁶

Finkelstein assigned ACC attorney Martin Needle, who later worked on the Cisneros case, to draft the amendment.¹⁵³⁷

On July 25, 1996, the revised version of CCDM (31)440, “Cases Presenting Special Problems or Processing,” went into effect.¹⁵³⁸ It established procedures for the administrative investigation of “politically sensitive individuals,” which expressly included Cabinet officers.¹⁵³⁹ It provided in pertinent part:

(a) Immediately upon receipt of a Special Agent’s Report concerning [a politically sensitive individual], District Counsel should telephonically notify the Assistant Regional Counsel (Criminal Tax) of the existence of said administrative case. The Assistant Regional Counsel (Criminal Tax) should then coordinate the matter with the Assistant Chief Counsel (Criminal Tax).

• • •

(b) The administrative case will be reviewed by the Assistant Regional Counsel (Criminal Tax), or designee. The criminal reference letter referring the case to the Tax Division or the Department of Justice shall be prepared for signature of the Assistant Chief Counsel (Criminal Tax).

¹⁵³⁵(...continued)

version in effect at the time of the Cisneros case review from December 1996 to March 1997.

¹⁵³⁶ GJ 00-001 Ex. 176 at P 242 00098.

¹⁵³⁷ GJ 00-001 Ex. 248.

¹⁵³⁸ GJ 00-001 Ex. 248.

¹⁵³⁹ GJ 00-001 Ex. 248 at 24000009.

(c) The Assistant Chief Counsel (Criminal Tax) may, at his/her discretion, authorize the Assistant Regional Counsel (Criminal Tax), or designee, to sign the criminal reference letter.

Thus, by virtue of the amended provision, the review path for cases involving “politically sensitive individuals” like Cisneros changed. Before the amendment, the District Counsel performed the review and signed the CRL; after the amendment, the Assistant Regional Counsel had the responsibility for conducting the review, although he or she could still delegate the authority to the District Counsel. But the case now had to be “coordinate[d]” with Assistant Chief Counsel in Washington, D.C., who had the responsibility for signing any CRL, and therefore made the ultimate determination of whether to refer the matter to DOJ for criminal prosecution of these individuals.

The reason this amendment to CCDM (31)440 was promulgated in the Summer of 1996 is unclear. Finkelstein, who ordered the change, testified that the reason for the change was to eliminate confusion in the IRS as to whether certain administrative cases should be reviewed by ACC; however, he said that he did not remember if the confusion related to a specific case.¹⁵⁴⁰ He also testified that suggestions for changes to the CCDM could come from any source, including private practitioners and DOJ,¹⁵⁴¹ but that he had no idea who suggested the (31)440 revision, when the suggestion was first made, when the suggestion first came to his attention, or who had input in making the decision to amend the provision.¹⁵⁴² Needle, who was assigned to make the revision,¹⁵⁴³ likewise testified that he did not know whose idea it was to amend the CCDM provision or why it was amended.¹⁵⁴⁴

¹⁵⁴⁰ *Id.* at 68-69.

¹⁵⁴¹ GJ 00-001 Tr. Finkelstein 5/25/00 at 156-57.

¹⁵⁴² GJ 00-001 Tr. Finkelstein 6/20/00 at 65-66.

¹⁵⁴³ GJ 00-001 Tr. Needle 7/10/01 at 32-43.

¹⁵⁴⁴ *Id.* at 42-43.

3. The IRS Investigation of the Cisneros Criminal Tax Case

After its unsuccessful attempt to set up a joint investigation of Cisneros with the FBI in September 1994, CID initiated an investigation of its own into Cisneros's potential tax violations.

In January 1995, CID notified Cisneros by telephone that he was under criminal investigation for tax years 1989 through 1993. Cisneros told the agents that he was "always very careful to review his tax records."¹⁵⁴⁵ Later the same month, CID interviewed Cisneros, with his counsel present. He was represented by Cono Namorato, Scott Michel, and Chad Muller, all well-respected tax attorneys.¹⁵⁴⁶ During the interview, Cisneros stated that he was "meticulous, scrupulous and uncompromising in making sure everything was reported for taxes," and that to the best of his knowledge all of his income had been reported on his income tax returns for 1989 to 1993.¹⁵⁴⁷

However, CID's investigation developed compelling evidence that Cisneros had failed to declare substantial amounts of income on his 1991, 1992, and 1993 federal income tax returns. By early November 1996, CID was preparing an SAR recommending that Cisneros be prosecuted.¹⁵⁴⁸

At the same time, the OIC investigation of Cisneros's false statements was progressing. In a December 18, 1996 letter to CID Chief John Filan, the OIC requested that he assign the two CID Special Agents who had worked on the Cisneros investigation to the OIC.¹⁵⁴⁹ The letter made clear that the agents would assist in the grand jury investigation of possible false statements and conspiracy, and that their tasks would not include the investigation of tax crimes.¹⁵⁵⁰

¹⁵⁴⁵ GJ 00-001 Ex. 20 at 14; *see also* GJ 00-001 Ex. 28.

¹⁵⁴⁶ GJ 00-001 Ex. 20; GJ 00-001 Tr. Hubbard 9/7/00 at 31-32.

¹⁵⁴⁷ GJ 00-001 Ex. 20 at 14; GJ 00-001 Ex. 29 at 6.

¹⁵⁴⁸ IRS District Director Briefing 11/5/96.

¹⁵⁴⁹ Letter from OIC to Filan 12/18/96.

¹⁵⁵⁰ Letter from OIC to Filan 12/18/96 at 1.

By December 19, 1996, CID had completed the SAR, recommending that Cisneros be prosecuted for making and subscribing false tax returns for the years 1991, 1992, and 1993 in violation of 26 U.S.C. § 7206(1).¹⁵⁵¹ Under that section of the Tax Code, it is a felony to “[w]illfully make[] and subscribe[] any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which [the maker] does not believe to be true and correct as to every material matter.” The tax returns signed by Cisneros in 1991, 1992, and 1993 contained the following standard declaration: “Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.”¹⁵⁵²

The SAR summarized the evidence CID developed during its investigation of Cisneros. That evidence included, among other things, the following: Cisneros’s filing history; his personal, educational, political, and business background; his demonstrated knowledge of tax matters; his bookkeeping and record keeping practices; and the accounting system he used in having his tax returns prepared and filed.¹⁵⁵³

The SAR compared Cisneros’s books and records to his filed returns, demonstrating Cisneros’s failure to declare significant income. For the 1991 and 1992 returns, CID used a hybrid of the specific items and the bank deposits methods of proof. The bank deposits method computes a taxpayer’s taxable income by

¹⁵⁵¹ GJ 00-001 Ex. 20 at 57.

¹⁵⁵² IRS Form 1040, U.S. Individual Income Tax Return.

¹⁵⁵³ See GJ 00-001 Ex. 20 at 2-27.

analyzing total bank deposits and expenditures.¹⁵⁵⁴ The specific items method, in contrast, uses direct evidence, such as 1099 forms and canceled checks, to calculate an income total to compare with the reported income.¹⁵⁵⁵ CID used the specific items method of proof alone to calculate Cisneros's 1993 income. According to CID's investigation and computations, Cisneros underreported his income by \$107,052.66 in 1991, \$141,290.78 in 1992, and \$37,136.93 in 1993.¹⁵⁵⁶

The SAR also detailed evidence indicating that Cisneros had acted willfully in underreporting his income. It noted that Cisneros knew that absolutely all income had to be deposited into his business accounts for his accountants to file accurate

¹⁵⁵⁴ The bank deposits method is commonly used when the taxpayer's books and records are not complete and do not adequately reflect income. The formula is as follows:

	Total bank deposits
PLUS:	<u>Currency expenditures</u>
=	Total bank deposits plus currency expenditures (total receipts)
MINUS:	<u>Non-income deposits and items (transfers, checks to cash, gifts, loans, inheritances, etc.)</u>
=	Gross income
MINUS:	<u>Total business expenses and statutory deductions</u>
=	Adjusted gross income
MINUS:	<u>Deductions and exemptions</u>
=	Taxable income
MINUS:	<u>Reported taxable income</u>
=	Understated taxable income.

See GJ 00-001 Ex. 308 (Ch. 7 at 48).

¹⁵⁵⁵ CID was able to use the specific items method for 1993 because Cisneros, as HUD Secretary, was a salaried employee receiving income from a smaller number of sources, making it easier to trace his taxable income. Since specific items is the only method of proof that uses direct evidence of the taxpayer's income, it is the preferred method of proof, when feasible. See *id.* at (Ch. 7 at 7).

¹⁵⁵⁶ See GJ 00-001 Ex. 20 at 29-49.

returns.¹⁵⁵⁷ However, CID determined that “Cisneros knowingly and willfully bypassed every accounting system which had been specifically set up to insure all income was deposited, recorded, and reported.”¹⁵⁵⁸ The SAR specified how Cisneros had deposited income into a number of personal accounts and had intentionally concealed those deposits and incoming money from his accountants.¹⁵⁵⁹ For example, according to the SAR, Cisneros had told his accountant, Luis Hernandez, that any income that he received from October 1992 to December 1992 had been *de minimis*.¹⁵⁶⁰ In reality, Cisneros had received but not reported over \$75,000 of income during this period, of which more than \$28,000 went to Medlar.¹⁵⁶¹ Hernandez had asked Cisneros for, but never received, bank statements from this period.¹⁵⁶²

The SAR also explained that Hernandez had prepared Cisneros’s 1991 tax return on the basis of a one-page profit and loss statement that Cisneros had provided,¹⁵⁶³ but that, according to Hernandez, Cisneros had never provided any records to substantiate the figures on the statement.¹⁵⁶⁴ The SAR further showed that Cisneros had improperly claimed a \$30,000 deduction on his 1992 tax return for contributions he had made to an annuity he owned through Lincoln Benefit Life.¹⁵⁶⁵

Moreover, according to the SAR, after he became HUD Secretary in 1993, Cisneros had also cashed in two IRA accounts he maintained through Massachusetts Mutual IRA (“Mass Mutual”). The SAR stated:

¹⁵⁵⁷ GJ 00-001 Ex. 20 at 9, 13, 21-27, 29.

¹⁵⁵⁸ *Id.* at 50.

¹⁵⁵⁹ *See id.* at 22, 26.

¹⁵⁶⁰ *Id.* at 16, 29, 54.

¹⁵⁶¹ *Id.* at 50, 54.

¹⁵⁶² *Id.* at 54.

¹⁵⁶³ *Id.* at 24.

¹⁵⁶⁴ *Id.* at 24-26.

¹⁵⁶⁵ *Id.* at 27, 29-30, 36, 55.

[Cisneros's insurance representative Anna Marie] Ornelas advised Cisneros not to divest himself of his Mass Mutual annuities because they were IRA accounts, and the distributions would be taxable to Cisneros with a 10 percent penalty for early withdrawal.¹⁵⁶⁶

However, according to the SAR, Cisneros had never informed Hernandez about this additional income and, therefore, it was not reported on his 1993 tax return.¹⁵⁶⁷ Cisneros and other employees loyal to him had also, the SAR said, failed to give Cisneros's accountants certain deposit slips that would have revealed that Cisneros was not depositing all of his income into the proper accounts.¹⁵⁶⁸

The SAR noted that the totals of Cisneros's 1991 and 1992 payments to Medlar were close to or in excess of his declared income,¹⁵⁶⁹ and that he did not provide an explanation or a statement of his defense to CID.¹⁵⁷⁰

4. The "Partnership" for Counsel Review of the Cisneros Tax Case

District Counsel received the SAR on Friday, December 20, 1996. It then began its review of the case pursuant to what came to be called a "partnership" with ACC.

Finkelstein testified that the first information he had about the Cisneros case came in a conversation with Cisneros's attorney, Scott Michel, who said that he represented a client whose case was going to "end up" in ACC. Finkelstein said that Michel had made this remark to him in passing at a tax law conference in Washington, D.C. in either May, October, or November of 1996, where he and

¹⁵⁶⁶ *Id.* at 35.

¹⁵⁶⁷ *See id.* at 35, 55, 73. The IRS sent Cisneros two Forms 1099 for the distributions. According to his accountant Luis Hernandez, Cisneros, never turned over the 1099s and kept the distributions a secret, despite Ornelas's instructions. GJ 00-001 Ex. 20 at 36.

¹⁵⁶⁸ *See id.* at 47-48, 53-54.

¹⁵⁶⁹ GJ 00-001 Ex. 20 at 15, 50-51.

¹⁵⁷⁰ *Id.* at 55.

Michel gave a presentation.¹⁵⁷¹ According to Finkelstein, Michel did not identify the client, but he did claim that the client was innocent.¹⁵⁷²

Finkelstein further testified that during the Fall of 1996, approximately one to two months before December 20, 1996, he received a “heads up” about the Cisneros case from Carleton Knechtel, Assistant Regional Counsel for criminal tax matters in the region including Texas.¹⁵⁷³ Finkelstein said that Knechtel informed him that because the case concerned a Cabinet-level official it would “probably have to come into Washington,”¹⁵⁷⁴ and that Cono Namorato and Scott Michel represented Cisneros.¹⁵⁷⁵

However, Knechtel denied that this conversation ever took place.¹⁵⁷⁶ Rather, Knechtel testified that he first learned about the Cisneros case on January 13, 1997.¹⁵⁷⁷ According to Knechtel, he most likely had learned about the case from Macdonald and had decided that, since it was a case on Cisneros, he needed to inform

¹⁵⁷¹ Records Finkelstein produced to the grand jury reflected that he was not listed as a presenter at an ABA tax conference in Washington, D.C. on May 10 to 11, 1996. GJ 00-001 Exs. 159 and 162A, 162B, and 162C. According to other records Finkelstein produced, both he and Michel were scheduled to make a presentation at a Georgetown University Law Center tax conference during the afternoon of October 18, 1996. GJ 00-001 Exs. 157 and 160. Finkelstein also produced records to the grand jury reflecting that he made a presentation to an ABA tax conference the morning of November 14, 1996. GJ 00-001 Exs. 158 and 161. These records list Finkelstein, Namorato, and Muller as faculty, but not Michel.

¹⁵⁷² GJ 00-001 Tr. Finkelstein 6/6/00 at 75-77.

¹⁵⁷³ GJ 00-001 Tr. Finkelstein 6/6/00 at 60-61.

¹⁵⁷⁴ *Id.* at 61.

¹⁵⁷⁵ *Id.* at 75-76.

¹⁵⁷⁶ GJ 00-001 Tr. Knechtel 8/8/00 at 69-70.

¹⁵⁷⁷ *Id.* at 69-73, 151-52; GJ 00-001 Ex. 153 (Knechtel timesheet for week ending 1/16/97, reflecting 1/13/97 as first day that Knechtel logged time on the Cisneros case).

Finkelstein about it.¹⁵⁷⁸ After a telephone conversation with Finkelstein, Knechtel called Macdonald and told him that Finkelstein had decided that ACC would handle the Cisneros case.¹⁵⁷⁹

Finkelstein testified that he put the purported conversation with Knechtel together with the earlier conversation he had had with Michel and concluded that the case to which Michel had referred at the tax conference involved Cisneros.¹⁵⁸⁰ Finkelstein further said that he had no preexisting knowledge of the Cisneros case at the time of his conversations with Michel and Knechtel.¹⁵⁸¹

Finkelstein said that he and Knechtel discussed how the case would be reviewed. Finkelstein testified that he and Knechtel agreed that, because District Counsel had been involved during the investigation of the case, it would be “untoward” to have ACC alone review the case; rather, District Counsel was to perform the review of the case and draft a CRL for Finkelstein’s signature.¹⁵⁸²

Although he did not recall this conversation, Knechtel was emphatic in his testimony that, far from agreeing to the idea of a partnership as Finkelstein claimed, he could not conceive of such an arrangement:

In fact, that would shock me because you see, to me, if that was taking place, I would have thought that Barry would have made it clear up front that when this case came in, he would be the one handling it, so it would really be a total shock to me if that was the case.¹⁵⁸³

However, by mid-November 1996, Finkelstein had expressed a desire to conduct the entire review of the Cisneros case at ACC, thereby removing District

¹⁵⁷⁸ GJ 00-001 Tr. Knechtel 8/8/00 at 82-83.

¹⁵⁷⁹ *Id.* at 49, 129.

¹⁵⁸⁰ GJ 00-001 Tr. Finkelstein 6/6/00 at 75-76.

¹⁵⁸¹ *Id.* at 77.

¹⁵⁸² *Id.* at 61-62, 64.

¹⁵⁸³ GJ 00-001 Tr. Knechtel 8/8/00 at 177.

Counsel in Texas from the process. According to an internal CID e-mail sent in the afternoon of November 14, 1996:

The Cisneros (sp) case is complete and ready for District Counsel review, the district informed me today that the local Counsel attorney . . . was informed that Barry Finkelstein wants to pull the review of the case into his office due to sensitivity. I have contacted the Deputy Regional Counsel-C/Tax [Carl Knechtel] who did not know this, and asked him to talk to Barry before I got involved. The issue is that the local District Counsel has been very involved in this case from the beginning and is aware of all the issues – this is not the time to cut District Counsel out of the process. If Barry wants to review it after District Counsel has looked at it, fine. Will keep you informed.¹⁵⁸⁴

Nevertheless, despite Finkelstein’s apparent desire to pull the entire review of the Cisneros case into ACC immediately, he and District Counsel agreed to work in what Finkelstein later characterized as a “partnership.”¹⁵⁸⁵ According to District Counsel Hubbard, shortly after District Counsel received the SAR on December 20, 1996, he and Macdonald called either Knechtel or Finkelstein to confirm the partnership.¹⁵⁸⁶ However, District Counsel and ACC seem to have had different perceptions of what the partnership entailed from the outset.

District Counsel apparently understood the partnership to be nothing more than the procedure outlined by CCDM (31)440, as modified at Finkelstein’s direction in the Summer of 1996 to give ACC more control over administrative investigations of politically sensitive persons. That regulation contemplated that the Assistant Regional Counsel or his designee District Counsel would conduct the review of the Cisneros case and then prepare a CRL for Finkelstein’s signature. This is apparently the framework that District Counsel initially contemplated for their interaction in the Cisneros case.

Thus, Hubbard testified that District Counsel was going to do what it normally did – that is, review the SAR and determine if CID’s investigation had resulted in a

¹⁵⁸⁴ GJ 00-001 Ex. 148.

¹⁵⁸⁵ GJ 00-001 Finkelstein 6/6/00 at 62.

¹⁵⁸⁶ GJ 00-001 Tr. Hubbard 9/7/00 at 44.

case for “which we believe that there’s a reasonable likelihood of prosecution.”¹⁵⁸⁷ Hubbard and Macdonald believed that District Counsel was responsible for holding the taxpayer conference,¹⁵⁸⁸ also commonly known as the defense conference, and that it would be in Texas.¹⁵⁸⁹ Similarly, Finkelstein testified that, after his Fall 1996 conversation with Knechtel, he had a conversation with District Counsel Hubbard and Assistant District Counsel Macdonald, confirming with them the agreement he had reached with Knechtel – that District Counsel would review the case and prepare any CRL for Finkelstein’s signature.¹⁵⁹⁰

However, Finkelstein’s view of the partnership apparently went beyond ACC’s determining whether to sign a CRL prepared by District Counsel; it included ACC’s simultaneous review of the case from the outset. According to Finkelstein, District Counsel was to provide ACC with a copy of the SAR and key exhibits so that ACC could start “looking” at the case and make sure “we’re all heading in the same direction.”¹⁵⁹¹ Finkelstein said that the partnership entailed District Counsel doing “some of the review” and then sending a CRL to ACC where it would be reviewed along with the exhibits and other relevant documents.¹⁵⁹² Finkelstein told the grand jury that there was a question as to whether the defense conference would be held in

¹⁵⁸⁷ *Id.* at 42.

¹⁵⁸⁸ “The purpose of the conference is to provide the taxpayer and/or representative an opportunity to supply information which may be relevant to Counsel’s ultimate determination of whether to refer the case to the Tax Division, Department of Justice.” CCDM (31)420(1)(b).

¹⁵⁸⁹ GJ 00-001 Ex. 149; GJ 00-001 Tr. Hubbard 9/7/00 at 43; GJ 00-001 Tr. Macdonald 8/10/00 at 138-39, 142.

¹⁵⁹⁰ GJ 00-001 Tr. Finkelstein 6/6/00 at 61-62, 95, 99; GJ 00-001 Ex. 339B at 3.

¹⁵⁹¹ GJ 00-001 Tr. Finkelstein 6/6/00 at 99; *see also* GJ 00-001 Tr. Hubbard 9/7/00 at 44 (stating he had a conversation confirming the partnership with either ACC or Knechtel); GJ 00-001 Ex. 339B at 3 (with Hubbard referencing “when we talked” in a discussion about the partnership with Finkelstein).

¹⁵⁹² GJ 00-001 Tr. Finkelstein 6/6/00 at 61-62, 95.

Texas or Washington, D.C., as well as how much involvement ACC would have in the conference.¹⁵⁹³

Klotz testified that, even though the authority for ACC to review administrative tax cases was not found in the CCDM, it was something that occurred as a matter of “custom and practice.”¹⁵⁹⁴ Finkelstein similarly testified that, while the CCDM does not specify who will review cases like the Cisneros case, it was ACC’s “practice” to review the cases for which Finkelstein was responsible for signing the CRL.¹⁵⁹⁵ However, Finkelstein also told the grand jury that, during his tenure, the Cisneros case was the only administrative tax case for which the entire review was conducted by ACC.¹⁵⁹⁶

Finkelstein indicated that he confirmed with Hubbard, “head of office to head of office,” that they were on the “same page” and that the offices would work the case together but that the “logistics” would be left to their respective subordinates, Klotz and Macdonald.¹⁵⁹⁷ District Counsel mailed ACC a copy of the SAR, without the supporting exhibits, shortly after receiving it on December 20, 1996.¹⁵⁹⁸

District Counsel included a memorandum from CID Chief Filan that had accompanied the transmittal of the SAR from CID to District Counsel.¹⁵⁹⁹ Among other things, the memorandum stated:

The Office of Independent Counsel, David M. Barrett, is conducting a related investigation on whether Cisneros lied to the FBI regarding payments Cisneros made to Linda D. Jones Medlar. Independent Counsel obtained an Ex Parte Order to gain access to the information collected by the IRS in this investigation. After a lengthy process, the

¹⁵⁹³ *Id.* at 95-96, 103-04.

¹⁵⁹⁴ GJ 00-001 Tr. Klotz at 137-43.

¹⁵⁹⁵ GJ 00-001 Tr. Finkelstein 6/6/00 at 65-66.

¹⁵⁹⁶ GJ 00-001 Tr. Finkelstein 7/18/00 at 56-57.

¹⁵⁹⁷ GJ 00-001 Tr. Finkelstein 6/6/00 at 102-09.

¹⁵⁹⁸ GJ 00-001 Tr. Macdonald 8/10/00 at 125-26.

¹⁵⁹⁹ *Id.*; GJ 00-001 Ex. 23.

Ex Parte has nearly been met. As part of the Ex Parte, Independent Counsel has questioned Special Agents Barrows and Lange on numerous occasions. Independent Counsel has not directed this investigation and has not disclosed the specific nature, breadth, or scope of their investigation to IRS.¹⁶⁰⁰

District Counsel and ACC then began their simultaneous reviews. At District Counsel, Macdonald assigned the case to attorney Thomas Eagan.¹⁶⁰¹ Eagan, who had an advanced legal degree in tax, had been with the IRS since 1974 and had extensive experience providing pre-referral advice and reviewing SARs and exhibits in administrative tax cases.¹⁶⁰² On Monday, December 23, 1996, ACC opened its own Cisneros case file.¹⁶⁰³ Finkelstein assigned the case to ACC attorney Martin Klotz.¹⁶⁰⁴

That same day, although he had already implemented the July 25, 1996 revision of CCDM (31)440, Finkelstein instructed Klotz and another ACC attorney to amend the CCDM to provide for the coordination of “highly sensitive” administrative cases with ACC. The e-mail directing the change stated:

In CCDM (31)550(3) and 760(5) the field is required to coordinate highly sensitive grand jury cases here. Although I remember discussing the need for a CCDM revision, I cannot find any requiring coordination of highly sensitive administrative cases. There should be one. Please work it out and have one prepared.¹⁶⁰⁵

The CCDM was not actually revised again, presumably because it had just been amended to the same effect five months earlier at Finkelstein’s direction.

¹⁶⁰⁰ GJ 00-001 Ex. 23 at 2-3.

¹⁶⁰¹ GJ 00-001 Tr. Macdonald 8/10/00 at 103-04.

¹⁶⁰² GJ 00-001 Tr. Eagan 6/28/01 at 7, 9-10.

¹⁶⁰³ GJ 00-001 Ex. 24.

¹⁶⁰⁴ *Id.* (Cover Sheet).

¹⁶⁰⁵ GJ 00-001 Ex. 251.

On January 2, 1997, CID sent a certified letter to Cisneros at his Washington, D.C. residence.¹⁶⁰⁶ The letter informed Cisneros that CID had forwarded to Austin District Counsel's office a report recommending that criminal proceedings be initiated against him. A copy of the letter went to his Washington lawyers, Namorato and Michel, and to his San Antonio lawyer Muller.

In the meantime, pursuant to its understanding of the partnership agreement with ACC, District Counsel continued to review the case. On January 6, 1997 District Counsel sent a letter to Cisneros's San Antonio attorney, Muller, notifying him that a report of the Cisneros investigation had been referred to District Counsel with a recommendation that Cisneros be prosecuted for willfully filing false tax returns for tax years 1991 to 1993, in violation of 26 U.S.C. § 7206(1). The letter tentatively scheduled a conference between defense counsel and District Counsel for January 22, 1997 in Austin.¹⁶⁰⁷

At ACC, from Monday, January 6 to Friday, January 10, 1997, Klotz logged 16 hours of time on the Cisneros case.¹⁶⁰⁸ During that same time period, Finkelstein logged 15 hours on the case.¹⁶⁰⁹ By Wednesday, January 8, 1997, Finkelstein had assigned another ACC attorney, Martin Needle, to work on the Cisneros matter.¹⁶¹⁰ Needle logged his first time – three hours – on that day and another 12 hours by Friday, January 10, 1997.¹⁶¹¹

On January 8, 1997, Muller called CID Group Manager Colbenson. According to Colbenson's notes of the conversation, Muller complained that CID had forwarded the case to District Counsel without giving Cisneros an opportunity for a

¹⁶⁰⁶ GJ 00-001 Ex. 31A.

¹⁶⁰⁷ GJ 00-001 Ex. 149.

¹⁶⁰⁸ GJ 00-001 Ex. 153 (Klotz time sheet for week ending 1/10/97).

¹⁶⁰⁹ *Id.* (Finkelstein timesheet for week ending 1/10/97).

¹⁶¹⁰ GJ 00-001 Tr. Finkelstein 6/6/00 at 110-12; GJ 00-001 Ex. 153 (Needle timesheet for week ending 1/11/97).

¹⁶¹¹ GJ 00-001 Ex. 153 (Needle timesheet for week ending 1/11/97).

conference with CID.¹⁶¹² She also noted that Muller said the defense counsel had wanted the CID conference so that they could point out problems with the case and persuade CID not to forward the case to District Counsel.¹⁶¹³

As its review commenced, ACC immediately began expressing reservations about the case to District Counsel. At this point, the two offices were no longer, as Finkelstein earlier had said, “heading in the same direction,”¹⁶¹⁴ and their differences soon led to a dissolution of the partnership and ACC’s assumption of sole control over the review.

By January 9, 1997, Macdonald and Klotz had a telephone conversation, during which Klotz stated that ACC had some problems with the Cisneros case.¹⁶¹⁵ Macdonald relayed ACC’s concerns to Colbenson. According to Colbenson, Macdonald informed her that ACC had concerns about double-counting of income,¹⁶¹⁶ the method of proof, willfulness, and witness problems.¹⁶¹⁷ Colbenson questioned how ACC could have come to any conclusions about the case without the case

¹⁶¹² GJ 97-1 Ex. 15.

¹⁶¹³ GJ 97-1 Ex. 15.

¹⁶¹⁴ GJ 00-001 Tr. Finkelstein 6/6/00 at 99.

¹⁶¹⁵ GJ 97-1 Tr. Colbenson 3/24/98 at 112-14; GJ 00-001 Tr. Macdonald 8/10/00 at 132-39; OIC Phone Chart 1/8/97 call from Macdonald to Klotz.

¹⁶¹⁶ Double-counting is the “error of counting something twice: a statistical accounting error in which an item is taken into account more than once, for example, as part of two separate categories to which it belongs.” <http://encarta.msn.com/dictionary_561546920/double-counting.html> For example, in this context, ACC’s stated concerns included the possibility that CID, in using a hybrid of the bank deposits and specific items methods, might have counted a specific item as income when it was earned, and then counted the same funds as income again when they were deposited in the bank. GJ 00-001 Tr. Finkelstein 7/20/00 at 146-47. *See* GJ 00-001 Ex. 168 (ACC’s Cisneros Legal File, which included a copy of Handbook for Special Agents at §§ 426.4-426.5).

¹⁶¹⁷ GJ 97-1 Tr. Colbenson 3/24/98 at 112-14.

exhibits, but Macdonald told her that he was not very concerned and that District Counsel's review was proceeding.¹⁶¹⁸

The next day, January 10, 1997, Macdonald informed Colbenson that he had learned from Finkelstein that it was unlikely that the case was going to be forwarded for prosecution.¹⁶¹⁹ Indeed, Klotz and Needle testified that, from their first contact with the Cisneros case, they understood that ACC would be conducting the entire review. Klotz said that as of December 23, 1996 – which was the day that ACC opened its Cisneros case file, the day that Finkelstein began billing time on the case, and the day Finkelstein ordered a (redundant) change to the CCDM to increase ACC involvement in cases like Cisneros's – “the case was going to be centralized and was coming in It was no longer their case, it was now a national office case.”¹⁶²⁰ Needle testified that “early on” Finkelstein or Klotz told him that ACC was going to “evaluate the case from start to finish, looking at every aspect of it, to determine whether we should refer the case or decline the case.”¹⁶²¹

In a January 10, 1997 letter to the OIC, CID Chief John Filan in Austin authorized the detail of the two Special Agents who had worked on CID's Cisneros investigation to assist the OIC in its non-tax grand jury investigation.¹⁶²²

5. Dissolution of the Partnership

According to Paris, at the time Finkelstein was deciding whether to take the case away from District Counsel, he was having regular conversations with Deputy Attorney General Mark Matthews, his peer at DOJ.¹⁶²³ Finkelstein recalled that, in the “early” stages of the case, which he assumed was when it was in “partnership mode,” he called Matthews and told him that he had a case involving Cisneros, whom

¹⁶¹⁸ *Id.* at 115-17.

¹⁶¹⁹ *Id.* at 128-30.

¹⁶²⁰ GJ 00-001 Ex. 165 at 148.

¹⁶²¹ GJ 00-001 Ex. 174 at 46-47.

¹⁶²² Letter from Filan to OIC 1/10/97.

¹⁶²³ OIC Interview Notes Paris 7/18/01 at 2, 10.

he understood an independent counsel was investigating.¹⁶²⁴ Finkelstein testified that he did not in this conversation discuss with Matthews the fact that the case was being reviewed in “partnership” with District Counsel.¹⁶²⁵ Nor was there any discussion with Matthews concerning whether the case should be reviewed by District Counsel or ACC.¹⁶²⁶ Finkelstein said he made the call to determine, in the event he decided to refer the case for prosecution, whether he should make the referral to the Tax Division or to the Independent Counsel.¹⁶²⁷

On January 13, 1997, ACC received a faxed copy of the OIC’s mandate from DOJ’s Public Integrity Section.¹⁶²⁸ Finkelstein, Klotz, and Needle all testified that they did not ask Public Integrity to send the mandate, that they did not know who if anyone had asked for it, and that they were not in contact with anyone at Public Integrity at the time.¹⁶²⁹ The OIC was unable to determine who faxed the Independent Counsel’s mandate to ACC, or why this was done.

At about the same time, District Counsel learned that ACC had decided to dissolve the partnership by terminating District Counsel’s involvement in the review and assuming sole control. On Monday, January 13, 1997, Knechtel and Finkelstein spoke by phone about the Cisneros case.¹⁶³⁰ In the course of the conversation, Finkelstein determined to conduct the complete review of the Cisneros case in Washington, D.C.¹⁶³¹ Knechtel called Macdonald and told him that Finkelstein had

¹⁶²⁴ GJ 00-001 Tr. Finkelstein 10/26/00 at 47-48, 60.

¹⁶²⁵ GJ 00-001 Tr. Finkelstein 10/26/00 at 61-62.

¹⁶²⁶ GJ 00-001 Tr. Finkelstein 10/26/00 at 61-62.

¹⁶²⁷ GJ 00-001 Tr. Finkelstein 10/26/00 at 47-48, 60-61.

¹⁶²⁸ GJ 00-001 Ex. 35.

¹⁶²⁹ GJ 00-001 Tr. Finkelstein 8/1/00 at 42-48; GJ 00-001 Tr. Klotz 12/12/00 at 57-59, 70-73; GJ 00-001 Tr. Needle 5/3/01 at 98-99.

¹⁶³⁰ GJ 00-001 Tr. Knechtel 8/8/00 at 127-28, 152; *see also* GJ 00-001 Ex. 153.

¹⁶³¹ GJ 00-001 Tr. Finkelstein 6/6/00 at 21-22; GJ 00-001 Tr. Knechtel 8/8/00 at 177.

decided that ACC would handle the Cisneros case.¹⁶³² On January 13, 1997, after unsuccessfully attempting to reach Macdonald on the telephone, Klotz sent him an e-mail requesting that he call ACC to “discuss the latest development in and the status of the case.”¹⁶³³ On January 14, 1997, Klotz informed Macdonald that Finkelstein had decided that ACC was going to conduct the review of the Cisneros matter and that District Counsel would no longer have a role in the case.¹⁶³⁴

Macdonald probed Klotz about the meaning of this decision. Macdonald asked Klotz to put in writing ACC’s specific concerns with the case so that ACC would not be able to suggest later that District Counsel had not addressed ACC’s concerns.¹⁶³⁵ According to Macdonald, Klotz was “vague” in describing ACC’s concerns with the case and declined to document them. Macdonald also discussed with Klotz whether the Cisneros case could be put in “supplemental” status so that ACC’s concerns could be addressed.¹⁶³⁶

Macdonald informed Hubbard of his conversation with Klotz.¹⁶³⁷ Hubbard in turn decided to contact Finkelstein.¹⁶³⁸ Hubbard wanted to ascertain from Finkelstein the mechanics of transferring the case to ACC; he also wanted to learn the nature of ACC’s specific concerns so that District Counsel could discuss them with CID and enable CID to address them with ACC.¹⁶³⁹ Hubbard further wanted to ascertain whether the decision diminished District Counsel’s reputation in Washington, D.C.¹⁶⁴⁰

¹⁶³² GJ 00-001 Tr. Knechtel 8/8/00 at 48-49, 129.

¹⁶³³ GJ 00-001 Ex. 34.

¹⁶³⁴ GJ 00-001 Tr. Macdonald 8/10/00 at 128-29, 143-44; GJ 00-001 Ex. 339B at 2.

¹⁶³⁵ GJ 00-001 Tr. Macdonald 8/10/00 at 156.

¹⁶³⁶ GJ 00-001 Tr. Macdonald 8/10/00 at 155-56; GJ 00-001 Ex. 339B at 3.

¹⁶³⁷ GJ 00-001 Tr. Macdonald 8/10/00 at 143.

¹⁶³⁸ *Id.* at 148.

¹⁶³⁹ *Id.* at 148-49.

¹⁶⁴⁰ *Id.* at 144-45.

Either that day or the next – January 15, 1997 – District Counsel attorneys, including Hubbard and Macdonald, telephoned Finkelstein.¹⁶⁴¹ Klotz was also on the phone at ACC’s end. Hubbard recorded the call. Hubbard told the grand jury that he did so because he did not trust Finkelstein after an earlier, unrelated incident in which Finkelstein had accused District Counsel of mishandling a case, only to deny later that he had made the accusations.¹⁶⁴² Hubbard also said that he wanted to have a record of ACC’s problems with the case.¹⁶⁴³ Neither Finkelstein nor Klotz knew that the call was being recorded.¹⁶⁴⁴

Hubbard began the conversation by restating his view of the partnership: “[I]t was agreed that this office would make the initial review, prepare the referral, and put your signature . . . block on it and forward it to your office for . . . final review and disposition.” Finkelstein concurred.¹⁶⁴⁵

Finkelstein continued, though, that “we have some difficulties with the method of proof and all that, and our concern was that we need to focus in where we think the

¹⁶⁴¹ GJ 00-001 Ex. 339B.

¹⁶⁴² GJ 00-001 Tr. Hubbard 9/7/00 at 54-55. In this earlier incident, Knechtel forwarded Hubbard a voice-mail from Finkelstein in which Finkelstein had made certain accusations against District Counsel. Hubbard transcribed the voice-mail and, when Finkelstein later denied that he had made the accusations, read it to Finkelstein. Thereafter, Finkelstein’s calls to District Counsel were very infrequent, if not non-existent. *Id.* at 54-56. Hubbard also told the OIC grand jury that he concluded that Finkelstein was a liar and that Knechtel knew that he distrusted Finkelstein. *Id.* at 56.

¹⁶⁴³ GJ 00-001 Tr. Hubbard 9/7/00 at 54-55. After learning of the existence of this tape, the OIC tried to secure it. The OIC was informed by several District Counsel employees that the tape had been discarded. However, in June 2001, the tape was located by former District Counsel attorney Thomas Eagan and delivered to the OIC. GJ 00-001 Ex. 330A; GJ 00-001 Tr. Eagan 6/28/01 at 46-47.

¹⁶⁴⁴ GJ 00-001 Tr. Macdonald 8/10/00 at 178. Under Texas law, it is not illegal to tape a telephone conversation so long as one party consents to the taping. *Id.*; GJ 00-001 Ex. 39.

¹⁶⁴⁵ GJ 00-001 Ex. 339B at 3.

case is deficient to either repair it or, ah, address it.”¹⁶⁴⁶ Finkelstein further indicated that, after ACC had the opportunity to review the exhibits to the SAR, which it had not yet received, he wanted the CID agents to fly to Washington for a meeting with ACC.¹⁶⁴⁷ The purpose of the meeting would be to “find out . . . is our reading of the SAR correct and if so, we have some deficiencies, and if so let’s not be writing a CRL”¹⁶⁴⁸

Finkelstein then attributed to Knechtel his decision to move control of the case to ACC in Washington:

And I broached that with Carlton and Carlton before I even finished the sentence said “Barry, why don’t you just centralize it completely?” And that just seems to be a way to kind of get everything together.¹⁶⁴⁹

Hubbard asked Finkelstein what his specific problems with the case were; he answered that “the specific problem we have is some of the numbers from one table to the next just don’t ring true, they change.”¹⁶⁵⁰ Finkelstein elaborated that the problem was that the numbers might be inconsistent and that “maybe the concept and how this thing was set up . . . I’m not sure they’re not double counting things”¹⁶⁵¹

Macdonald responded that he did not think there was double-counting in the SAR.¹⁶⁵² Finkelstein replied, “God forbid we are correct . . . and that there is some

¹⁶⁴⁶ *Id.*

¹⁶⁴⁷ *Id.*

¹⁶⁴⁸ *Id.*

¹⁶⁴⁹ *Id.*

¹⁶⁵⁰ *Id.* at 4.

¹⁶⁵¹ *Id.* at 4. Double-counting is defined above at footnote 1616.

¹⁶⁵² *Id.* at 4.

double counting of some order in here, then I think your, the agent has to re-work this case and we may be at the supplemental point.”¹⁶⁵³

Additionally, Finkelstein suggested that there was a problem in identifying the items that were not reported as income on Cisneros’s returns because Cisneros did not make the information available to his accountants:

Secondly, I can’t help but wonder out loud that in final analysis if something was deposited, then I think that Cisneros set up a mechanism that it should have been reported because he told his accountants that all income is deposited. Now we all know that not everything was deposited. However, some of the non-deposited items, there are 1099’s issued on it, and thus since, the accountants resorted to the 1099 methodology, it would be inaccurate to say that non-deposited items were not reported. So I’m curious as to if we took each specific item of money, and said was it (a) deposited?, was it (b) 1099’d?, and (c) none of the above? What is the number that would be in the none or above category? And that may be your cleanest case if there’s any volume to that.¹⁶⁵⁴

Consequently, Finkelstein advocated that the agents attempt a specific items analysis instead of a bank deposits analysis:

So I’d like the agent to go back through . . . the underlying documents, and see where is this case if we simplify it. If we have something of meat remaining, it’s a much cleaner case than going through a bank deposits analysis where you have to have a lot of agent determinations as to adjustments such as the transfers and the cash and all these other good things. So I’m thinking of, maybe this is a, a neater specific item case if you’re left with a lot of meat.¹⁶⁵⁵

Finkelstein then specifically asked for Eagan’s input:

¹⁶⁵³ *Id.* at 5.

¹⁶⁵⁴ *Id.*

¹⁶⁵⁵ *Id.* at 5.

Tom Eagan has things that he's come across, hey to be sure, share 'em with us, . . . we're far from perfect on these things, and if he's come up with either pluses or minuses in his review, for example, if he's come up with things that seem a little screwy to him, please share it.¹⁶⁵⁶

Hubbard confirmed that Eagan's recommendations would be included with the transfer of the case to ACC.¹⁶⁵⁷

Finkelstein went on to state that "even if the case is totally clean," he thought that a recommendation to a prosecutor:

has to be that the four or five key witnesses such as Medlar and Gonzalez and Hernandez [Cisneros's accountants] and Garcia, and . . . Ramirez, . . . they need to be locked in in the grand jury because, boy they could really take the dive for this guy and I'm not sure that Q & A's or statements lock them in near as nice as a grand jury questioning.¹⁶⁵⁸

Finkelstein concluded by justifying his termination of the partnership as follows:

[O]nce we got into the meat of it the logistics seemed to scream out to us that since we're going to be signing this letter we need to focus in on this thing This has a lot of numbers, a lot of number crunching, a lot of maneuvering of numbers, that's it, it's a whole different ball game, and I think we'd be poorly served by bifurcating the review.¹⁶⁵⁹

Macdonald told the grand jury that this taped conversation led him to conclude that Finkelstein was predisposed to kill the Cisneros case and not to forward it for prosecution.¹⁶⁶⁰ Finkelstein, testifying about whether he could have led District Counsel to believe that the Cisneros case could not be prosecuted, stated: "The

¹⁶⁵⁶ *Id.* at 6.

¹⁶⁵⁷ *Id.* at 6.

¹⁶⁵⁸ *Id.* at 7.

¹⁶⁵⁹ *Id.*

¹⁶⁶⁰ GJ 00-001 Tr. Macdonald 8/10/00 at 165, 169.

hearer – I think it would be a wrong assumption, but the hearer could have walked away with that sense, is my sense.”¹⁶⁶¹

Macdonald testified that the concerns expressed by Finkelstein (which were the same Klotz had previously relayed) were “just not true,”¹⁶⁶² and therefore he felt that CID would be able to resolve them once CID met with ACC.¹⁶⁶³ Macdonald also considered Finkelstein’s desire to recommend that the key witnesses testify in the grand jury to be a positive sign.¹⁶⁶⁴

In the taped conversation, Finkelstein indicated that the idea of dissolving the partnership and giving ACC total control of the review of the case originated with Knechtel, and that his principal reasons for doing so were the logistical problems of dealing with a complicated case in two offices. However, neither assertion appears to withstand scrutiny. Rather, the principal reason for the decision appears to be ACC’s concern that District Counsel was on track to prepare a CRL in a case that ACC did not want to refer for prosecution.

Regarding Knechtel’s role, Finkelstein reiterated before the grand jury that the suggestion to pull the review of the case to ACC came from Knechtel.¹⁶⁶⁵ Specifically, Finkelstein testified:

Carl [Knechtel] then asked how the case was going to proceed and I said it was my goal that we could work it in unison. Carl said he doesn’t think that’s going to work well; why don’t we just centralize it in

¹⁶⁶¹ GJ 00-001 Tr. Finkelstein 7/25/00 at 107.

¹⁶⁶² GJ 00-001 T. Macdonald 8/10/00 at 164-65, 172-73.

¹⁶⁶³ *Id.*

¹⁶⁶⁴ *Id.*

¹⁶⁶⁵ GJ 00-001 Ex. 339B at 3; GJ 00-001 Tr. Finkelstein 6/6/00 at 21, 117; GJ 00-001 Tr. Finkelstein 6/22/00 at 74; GJ 00-001 Tr. Finkelstein 6/29/00 at 71, 80, 101, 102.

Washington. I said that's my sense but it's a tough pill to swallow for the folks in the district, and he said that's his recommendation.¹⁶⁶⁶

Finkelstein further told the grand jury:

I am 100 percent certain that it's a conversation between me and Knechtel, with Klotz in my office, and at the end of the conversation, Knechtel says this is silly, you ought to centralize it¹⁶⁶⁷

However, Knechtel testified with "absolute certainty" that it was both Finkelstein's idea and decision that ACC take the Cisneros case from District Counsel and conduct the review.¹⁶⁶⁸ Klotz likewise testified that the decision to review the case at ACC was Finkelstein's idea and that Knechtel either agreed or did not object to it.¹⁶⁶⁹

Regarding logistics, Klotz testified that ACC pulled the case in part because Finkelstein "had not timely received the materials that [District Counsel] said they were sending him."¹⁶⁷⁰ Paris told the OIC that Finkelstein said he was looking for the SAR and that it was taking too long to get it from District Counsel.¹⁶⁷¹

It was clear, however, that there was never any insurmountable difficulty in getting a copy of the document from one office to the other. District Counsel received the SAR on December 20, 1996, and sent a copy to ACC immediately.¹⁶⁷² Klotz phoned Macdonald around January 6, 1997, and told him that ACC had never

¹⁶⁶⁶ GJ 00-001 Tr. Finkelstein 6/6/00 at 21.

¹⁶⁶⁷ GJ 00-001 Tr. Finkelstein 6/29/00 at 80.

¹⁶⁶⁸ GJ 00-001 Tr. Knechtel 8/8/00 at 145.

¹⁶⁶⁹ GJ 00-001 Tr. Klotz 12/12/00 at 139-40.

¹⁶⁷⁰ GJ 00-001 Tr. Klotz 12/19/00 at 91.

¹⁶⁷¹ OIC Interview Notes Paris 7/18/01 at 5.

¹⁶⁷² GJ 00-001 Tr. Macdonald 8/10/00 at 125-26.

received the SAR.¹⁶⁷³ Macdonald had another copy sent to ACC by overnight delivery.¹⁶⁷⁴ Some time before Needle began working on the case on January 8, 1997, ACC located the original copy of the SAR from District Counsel; it had been mistakenly delivered to another ACC attorney not assigned to the Cisneros case.¹⁶⁷⁵

Klotz also testified that Finkelstein decided to review the case at ACC so that the defense conference could be conducted in Washington, D.C.¹⁶⁷⁶ Klotz further testified that Cisneros's counsel had asked Finkelstein to hold the conference in Washington, D.C. and that this request was a factor in pulling the case from District Counsel.¹⁶⁷⁷ Colbenson testified that Klotz told her Finkelstein had agreed with Namorato before the case was transferred that the conference would occur in Washington, D.C.¹⁶⁷⁸ Paris similarly told the OIC that Cisneros's counsel's expectation that the case would be reviewed in Washington, D.C. prompted Finkelstein's decision.¹⁶⁷⁹

Finkelstein testified that the scheduling of the conference had nothing to do with the transfer of the case,¹⁶⁸⁰ although he did state that bringing the case to Washington, D.C. resolved some logistical considerations, including where to have the conference and who would attend the conference.¹⁶⁸¹ Finkelstein also testified that he was unable to recall whether he spoke with Cisneros's defense counsel before

¹⁶⁷³ GJ 00-001 Tr. Macdonald 8/10/00 at 129; OIC Phone Chart 1/6/97 call from Macdonald to Klotz.

¹⁶⁷⁴ GJ 00-001 Tr. Macdonald 8/10/00 at 129-30.

¹⁶⁷⁵ GJ 00-001 Tr. Finkelstein 6/29/00 at 68-69; GJ 00-001 Tr. Macdonald 8/10/00 at 130-32.

¹⁶⁷⁶ GJ 00-001 Tr. Klotz 12/12/00 at 123-29.

¹⁶⁷⁷ *Id.* at 128-29.

¹⁶⁷⁸ GJ 97-1 Tr. Colbenson 3/24/98 at 159-60, 177-78; GJ 97-1 Ex. 22.

¹⁶⁷⁹ OIC Interview Notes Paris 7/18/01 at 10.

¹⁶⁸⁰ GJ 00-001 Tr. Finkelstein 6/29/00 at 102-03.

¹⁶⁸¹ GJ 00-001 Tr. Finkelstein 6/29/00 at 103-04.

the case was transferred and agreed to hold the defense conference in Washington, D.C.¹⁶⁸²

The real reason behind ACC's dissolution of the partnership and its taking control over the case from District Counsel appears to be their respective views of its merits. District Counsel believed the Cisneros case was prosecutable.¹⁶⁸³ But Klotz testified that, shortly after the case was transferred to ACC, Finkelstein claimed that District Counsel didn't "understand" the case.¹⁶⁸⁴ Finkelstein told Fielding that ACC was bringing the case into his office in Washington, D.C. because it "sucks."¹⁶⁸⁵

Finkelstein testified that he believed that District Counsel would be "more liberal" in its review than ACC, which was "more conservative,"¹⁶⁸⁶ and that he believed it was likely District Counsel would have referred the Cisneros case.¹⁶⁸⁷ Knechtel likewise testified that ACC had a record of "killing matters."¹⁶⁸⁸ In contrast, the Austin District Counsel office had a reputation of being aggressive in referring cases for prosecution.¹⁶⁸⁹ Finkelstein, however, claimed that his belief that District Counsel would be more liberal than ACC in reviewing the case was not a factor that

¹⁶⁸² GJ 00-001 Tr. Finkelstein 7/25/00 at 133-34.

¹⁶⁸³ GJ 00-001 Tr. Macdonald 8/10/00 at 182.

¹⁶⁸⁴ GJ 00-001 Tr. Klotz 3/27/01 at 71.

¹⁶⁸⁵ OIC Interview Notes Fielding at 4.

¹⁶⁸⁶ GJ 00-001 Tr. Finkelstein 7/20/00 at 89-90.

¹⁶⁸⁷ GJ 00-001 Tr. Finkelstein 7/20/00 at 86-89.

¹⁶⁸⁸ GJ 00-001 Tr. Knechtel 8/8/00 at 161-64.

¹⁶⁸⁹ GJ 00-001 Tr. Hubbard 9/7/00 at 15, 16, 40. Furthermore, District Counsel had a history with Cisneros's lead attorney, Cono Namorato. According to Macdonald, during the Fall of 1996, CID recommended that another of Namorato's clients be prosecuted for a misdemeanor. However, after a meeting with Namorato in which this recommendation was discussed, District Counsel reassessed the case and recommended that the charges be enlarged to a felony. Macdonald told the OIC grand jury that, at a second conference with Namorato to discuss the felony recommendation, Namorato was so upset with District Counsel that he walked out of the meeting after five minutes. GJ 00-001 Tr. Macdonald 8/10/00 at 115-20.

he considered in deciding that ACC should conduct the entire Cisneros review.¹⁶⁹⁰ Finkelstein testified that he focused instead solely on logistics.¹⁶⁹¹

Paris, in contrast, told the OIC that Finkelstein knew that District Counsel was favorable to referring the case for prosecution and that Finkelstein disagreed.¹⁶⁹² Paris informed the OIC that Finkelstein, in telling him that ACC was going to conduct the entire review, mentioned that he disagreed with District Counsel's inclination to refer.¹⁶⁹³

The fact that the Cisneros tax matter was already under scrutiny by the OIC and DOJ also appear to have influenced Finkelstein's determination to centralize review. Finkelstein told Paris that the fact that the OIC was also investigating Cisneros affected his decision to take over the case.¹⁶⁹⁴ Paris also stated that Finkelstein decided to conduct the review as a result of discussions Finkelstein had with DOJ.¹⁶⁹⁵

Thus, if the partnership had continued as it began, District Counsel acting as Assistant Regional Counsel's designee would have completed the review of the SAR. It would likely have recommended referral for criminal prosecution and drafted a CRL that Finkelstein did not want to sign and that, possibly, DOJ did not want him to sign. By taking the case into Washington before District Counsel completed its review, Finkelstein short-circuited the process before a CRL could be drafted.

6. ACC Reviews the SAR

On January 16, 1997, District Counsel transferred to ACC the entire Cisneros case file, including the SAR and the exhibits, as instructed.¹⁶⁹⁶ In accordance with Finkelstein's request, Eagan's memorandum analyzing the case accompanied the case

¹⁶⁹⁰ GJ 00-001 Tr. Finkelstein 7/20/00 at 84-85.

¹⁶⁹¹ *Id.* at 85.

¹⁶⁹² OIC Interview Notes Paris 7/18/01 at 10.

¹⁶⁹³ OIC Interview Notes Paris 7/18/01 at 10-11.

¹⁶⁹⁴ OIC Interview Notes Paris 7/18/01 at 9-10.

¹⁶⁹⁵ OIC Interview Notes Paris 7/18/01 at 10.

¹⁶⁹⁶ GJ 00-001 Ex. 38.

file.¹⁶⁹⁷ The memorandum stated, on the basis of his review of the case, that there was a “probability of conviction with respect to . . . the unreported gross receipts attributable to checks which were cashed or endorsed to Medlar without deposit to the business account.”¹⁶⁹⁸ The memorandum also noted:

Cisneros paid Medlar \$73,024 during 1991 . . . while reporting net Schedule C income of only \$61,014 . . . and \$67,580 during 1992 . . . while reporting a net Schedule income of \$109,195 He gave his wife about \$6,000 per month for household expenses, which would amount to about \$72,000 per year. Between Medlar and his wife, he paid out more than he claimed to have earned. He could not have believed that those returns correctly reported his gross receipts.¹⁶⁹⁹

By January 17, 1997, ACC had received the exhibits to the SAR and Eagan’s memorandum. ACC, now with total control over the IRS’s investigation of Cisneros, continued the review it had begun before receiving these materials.

Finkelstein charged his subordinates Klotz and Needle with conducting the review of the Cisneros case. Klotz, as the “lead attorney” on the case, was responsible for reading the exhibits and witness statements, and with drafting any documents relating to ACC’s review.¹⁷⁰⁰ Klotz said that he was also the “communicator” on the case, meaning that he was responsible for making telephone calls and establishing contacts throughout ACC’s review.¹⁷⁰¹ Needle was assigned to perform the computational analyses on the figures in the SAR and the exhibits.¹⁷⁰²

¹⁶⁹⁷ GJ 00-001 Ex. 38.

¹⁶⁹⁸ GJ 00-001 Ex. 38 at 1.

¹⁶⁹⁹ GJ 00-001 Ex. 38 at 2.

¹⁷⁰⁰ GJ 00-001 Tr. Klotz 12/14/00 at 8; GJ 97-1 Tr. Klotz 4/23/98 at 97.

¹⁷⁰¹ GJ 00-001 Tr. Klotz 12/14/00 at 8.

¹⁷⁰² GJ 00-001 Tr. Needle 5/1/01 at 115-16; GJ 97-1 Tr. Klotz 4/23/98 at 97.

Finkelstein testified that he assigned Klotz and Needle to the case because of Klotz's lengthy experience and Needle's accounting background.¹⁷⁰³ However, in his grand jury testimony, Klotz admitted that he had never before while at ACC reviewed a request for prosecution based on an SAR.¹⁷⁰⁴ He had been employed by the IRS as an attorney since 1972. From 1972 until 1987, he had worked in IRS field offices reviewing SARs, among other things.¹⁷⁰⁵ From 1987 to 1991, he had been Finkelstein's Deputy at ACC¹⁷⁰⁶ and then had become a "Technical Assistant" in ACC.¹⁷⁰⁷ However, before the Cisneros case, Klotz had not reviewed a request for prosecution predicated on an SAR since arriving in Washington, D.C. in 1987.¹⁷⁰⁸ He also testified that he considered himself to be "math challenged"¹⁷⁰⁹ and did not have the ability to do the type of computational analysis that the review required.¹⁷¹⁰

When he conducted the Cisneros review in 1997, Needle had less than five years of experience at ACC.¹⁷¹¹ He was not a Certified Public Accountant and his formal training in accounting was limited to two courses in undergraduate school and one at law school.¹⁷¹² Needle admitted to being "inexperienced" in terms of the hands-on review of a case.¹⁷¹³ Needle also testified that he had never reviewed any

¹⁷⁰³ GJ 00-001 Tr. Finkelstein 5/23/00 at 83; GJ 00-001 Tr. Finkelstein 6/6/00 at 111-12.

¹⁷⁰⁴ GJ 00-001 Tr. Klotz 12/14/00 at 80.

¹⁷⁰⁵ GJ 97-1 Tr. Klotz 4/21/98 at 9-10; GJ 00-001 Tr. Klotz 12/19/00 at 19.

¹⁷⁰⁶ GJ 97-1 Tr. Klotz 4/21/98 at 12.

¹⁷⁰⁷ GJ 00-001 Tr. Klotz 12/12/00 at 15.

¹⁷⁰⁸ GJ 00-001 Tr. Klotz 12/14/00 at 80.

¹⁷⁰⁹ GJ 00-001 Tr. Klotz 3/27/01 at 119.

¹⁷¹⁰ GJ 00-001 Tr. Klotz 4/24/01 at 22.

¹⁷¹¹ GJ 00-001 Tr. Needle 3/8/01 at 38.

¹⁷¹² GJ 00-001 Tr. Needle 3/8/01 at 59.

¹⁷¹³ GJ 97-1 Tr. Needle 5/14/98 at 81-82.

case from scratch,¹⁷¹⁴ that his knowledge of the use of tape recordings as evidence in a criminal case was “minimal at best,”¹⁷¹⁵ and that it was “very, very infrequent” that anyone at ACC would review source documents and bank records as he was asked to do in evaluating the Cisneros case.¹⁷¹⁶

Finkelstein did not tell his direct supervisor Paris that Cisneros was a bank deposits case but instead led him to believe that it was a specific items case.¹⁷¹⁷ Paris informed the OIC that Needle had no experience with bank deposits cases.¹⁷¹⁸ According to Paris, if he had known that Cisneros was a bank deposits case, he would have obtained personnel from CID to assist Needle in the review.¹⁷¹⁹

Finkelstein testified that, in light of Klotz’s experience, he was not going to tell Klotz how to review the Cisneros case.¹⁷²⁰ According to Finkelstein, Klotz was not a “guy that you bring in and tell him okay, make sure you do this and make sure you do this and then do this and then do that. You assign him the case and you kind of just get out of the way.”¹⁷²¹

Finkelstein claimed that he did not steer the review. He testified that he did not review the case exhibits,¹⁷²² did not listen to the Medlar tapes,¹⁷²³ and did not have any substantive conversations with Cisneros’s defense counsel regarding the Cisneros

¹⁷¹⁴ GJ 00-001 Tr. Needle 3/8/01 at 40.

¹⁷¹⁵ GJ 97-1 Tr. Needle 5/14/98 at 77-78.

¹⁷¹⁶ GJ 00-001 Tr. Needle 5/10/01 at 104-05.

¹⁷¹⁷ OIC Interview Notes Paris 7/27/01 at 10.

¹⁷¹⁸ *Id.* at 10.

¹⁷¹⁹ OIC Interview Notes Paris 7/18/01 at 7.

¹⁷²⁰ GJ 00-001 Tr. Finkelstein 6/6/00 at 114.

¹⁷²¹ *Id.* at 113.

¹⁷²² GJ 00-001 Tr. Finkelstein 9/21/00 at 51.

¹⁷²³ *Id.* at 62.

case.¹⁷²⁴ He said that Klotz championed the specific items analysis as ACC's preferred method of proof, and said that he had not had a strong view one way or another about the method of proof to be used.¹⁷²⁵ Finkelstein also said that Klotz probably first raised the issue of Cisneros's willfulness.¹⁷²⁶

In contrast, Klotz said Finkelstein controlled the review of the case. Klotz testified that "[t]here was nothing, or very little, if anything that was done on this case that Mr. Finkelstein didn't know about."¹⁷²⁷ Klotz said that Finkelstein had problems with the case from the very beginning¹⁷²⁸ and that Finkelstein was the first to raise concerns regarding CID's computations¹⁷²⁹ and the bank deposits method of proof predominantly used in the SAR.¹⁷³⁰ Klotz also denied raising the issue of double-counting, attributing the initiation of that issue to Finkelstein or Needle.¹⁷³¹

Klotz testified that Finkelstein determined the types of analysis to be conducted and then tasked Needle to perform it:

He assigned Mr. Needle to do it and then he was present when the results of that were forthcoming and given over to him. . . . I don't know whether [Needle] had discretion in what he did or not.¹⁷³²

Needle testified that Finkelstein's pervasive involvement influenced the outcome of the Cisneros case review:

¹⁷²⁴ GJ 00-001 Tr. Finkelstein 7/20/00 at 23-25.

¹⁷²⁵ GJ 00-001 Tr. Finkelstein 8/29/00 at 26.

¹⁷²⁶ GJ 00-001 Tr. Finkelstein 7/20/00 at 142-44.

¹⁷²⁷ GJ 00-001 Tr. Klotz 12/14/00 at 33.

¹⁷²⁸ GJ 00-001 Tr. Klotz 2/27/01 at 99-100.

¹⁷²⁹ GJ 97-1 Tr. Klotz 4/23/98 at 103-04.

¹⁷³⁰ *Id.* at 171.

¹⁷³¹ *Id.* at 105.

¹⁷³² GJ 00-001 Tr. Klotz 4/24/01 at 6-7.

Mr. Finkelstein to my knowledge, I mean he played an active role in this case. He was always one to make his opinions known and positions known and take a leadership role. And I mean clearly by his issue statements and other active involvement in the case and to my knowledge, comprehensive review of SAR and being updated and I mean playing a role in formulating our office's position, I mean that he did play a vital role and more or less oversaw or directed the case.¹⁷³³

According to Needle, from early on in ACC's review, Finkelstein "was on a specific course," and did not waver in his belief that the case had problems.¹⁷³⁴ Needle testified that he did not raise any issues early in the case and that it was Finkelstein or Klotz who first raised the issue of willfulness.¹⁷³⁵ Needle further testified that Finkelstein or Klotz told him "what [he] was supposed to look for"¹⁷³⁶ and that he did not act on his own initiative.¹⁷³⁷ According to Needle, to a large extent Finkelstein directed his activities reviewing the SAR, in terms of what he did and did not do.¹⁷³⁸

Klotz and sometimes Needle were in regular telephone contact with CID Group Manager Colbenson in the period leading up to a late January meeting between ACC and CID.

On January 17, 1997, Colbenson spoke by phone with Klotz. Klotz told Colbenson that Finkelstein had agreed with defense counsel that the defense conference would occur in Washington, D.C.¹⁷³⁹ Colbenson told Klotz that she and

¹⁷³³ GJ 00-001 Tr. Needle 6/19/01 at 104.

¹⁷³⁴ *Id.* at 7-8.

¹⁷³⁵ GJ 97-1 Tr. Needle 5/14/98 at 77.

¹⁷³⁶ GJ 00-001 Tr. Needle 5/1/01 at 137-38.

¹⁷³⁷ *Id.* at 115-16.

¹⁷³⁸ *Id.* at 115-16.

¹⁷³⁹ GJ 97-1 Tr. Colbenson 3/24/98 at 159-60.

the CID agents wanted to meet with ACC before the defense conference.¹⁷⁴⁰ Klotz agreed to a meeting and represented that ACC would not make a final decision on the matter before the meeting occurred.¹⁷⁴¹

On January 21, 1997, Colbenson and Klotz had two telephone conversations. In the first, Klotz told Colbenson that the Cisneros review had been transferred from District Counsel to ACC as a result of a decision made the prior week by Finkelstein and Knechtel.¹⁷⁴² Klotz informed Colbenson that Namorato was the defense attorney with whom Finkelstein had spoken about the defense conference and that Namorato wanted the conference to be in Washington, D.C. on February 12, 1997.¹⁷⁴³

Klotz informed Colbenson that he was going to recommend that key witnesses should be called to testify before the grand jury because they were close to Cisneros and would “take the fall for [him].”¹⁷⁴⁴ Klotz stated that he wanted to reduce the case to a simpler form and questioned why CID had used the bank deposits method of proof instead of the specific items method.¹⁷⁴⁵ Klotz told Colbenson that he believed CID had double-counted in calculating Cisneros’s income.¹⁷⁴⁶

In their second telephone conversation on January 21, 1997, Colbenson told Klotz that CID would be available to meet with him on January 29, 1997. Klotz told Colbenson that he had sent a letter to Namorato concerning the February 12, 1997 Washington, D.C. defense conference, disclosing that CID had recommended that Cisneros be charged with filing false tax returns for tax years 1991, 1992, and 1993, and setting out the civil computations of Cisneros’s taxable income for these years.¹⁷⁴⁷ Klotz said that the letter made the following points: that Cisneros’s returns were false

¹⁷⁴⁰ GJ 97-1 Tr. Colbenson 3/24/98 at 159-60.

¹⁷⁴¹ Letter from Colbenson to OIC 6/3/97; OIC Interview Notes Colbenson.

¹⁷⁴² GJ 97-1 Ex. 22; GJ 97-1 Tr. Colbenson 3/24/98 at 168, 175-76.

¹⁷⁴³ GJ 97-1 Ex. 22; GJ 97-1 Tr. Colbenson 3/24/98 at 177-78.

¹⁷⁴⁴ GJ 97-1 Ex. 22; GJ 97-1 Tr. Colbenson 3/24/98 at 178-79.

¹⁷⁴⁵ GJ 97-1 Tr. Colbenson 3/24/98 at 178-80.

¹⁷⁴⁶ GJ 97-1 Ex. 22; GJ 97-1 Tr. Colbenson 3/24/98 at 168-69, 177.

¹⁷⁴⁷ GJ 97-1 Ex. 23; GJ 97-1 Tr. Colbenson 3/24/98 at 169-70.

because income had not been deposited into his business bank accounts and was undisclosed to his accountants; that the case was based on the bank deposits and specific items methods of proof; that Cisneros had claimed a false deduction for a 1992 annuity contribution to Lincoln Benefit; and that in 1993 Cisneros had failed to report liquidation of Mass Mutual IRA accounts.¹⁷⁴⁸

Colbenson told Klotz that the letter disclosed critical information about CID's case, and that CID believed defense counsel were previously unaware of the information. Colbenson was specifically concerned about the letter's references to the 1992 Lincoln Benefit deduction and 1993 Mass Mutual liquidation.¹⁷⁴⁹ These items were important to demonstrating that Cisneros had acted willfully, because he knew he was not entitled to the 1992 Lincoln Life deduction and knew that the 1993 IRA liquidation he had failed to report was reportable income.¹⁷⁵⁰ These actions thus could be used to show a pattern of conduct resulting in false returns.¹⁷⁵¹ Klotz responded that he thought it appropriate to make the disclosures to Cisneros and his lawyers.¹⁷⁵²

According to records the OIC obtained, Klotz had not, at the time of this conversation, actually sent the letter to Namorato. The letter bears a date of January 23, 1997 and indicates that Klotz had finished drafting it and Finkelstein had reviewed it that same day.¹⁷⁵³ It was faxed from Klotz to Namorato on January 27, 1997, and included the content to which Colbenson had objected. The letter, signed

¹⁷⁴⁸ GJ 97-1 Ex. 23; GJ 97-1 Tr. Colbenson 3/24/98 at 170-72.

¹⁷⁴⁹ GJ 97-1 Ex. 23; GJ 97-1 Tr. Colbenson 3/24/98 at 170-73.

¹⁷⁵⁰ GJ 97-1 Tr. Colbenson 3/24/98 at 171-72. When interviewed during the IRS's tax investigation of Cisneros, Cisneros's insurance representative Annamaria Ornelas stated that Cisneros knew that money paid into the annuity did not qualify as a tax deduction and that any distributions from his policies would have a tax impact. IRS Interview Report Ornelas 10/3/96 at 3.

¹⁷⁵¹ GJ 97-1 Tr. Colbenson 3/24/98 at 171-72.

¹⁷⁵² *Id.* at 174-75; OIC Interview Report Colbenson 8/7/97 at 3.

¹⁷⁵³ GJ 00-001 Ex. 44A.

by Klotz, confirmed a conversation between Klotz and Namorato setting the conference for February 12, 1997.¹⁷⁵⁴

In their second January 21 conversation, Klotz also told Colbenson that Cisneros could defend the case by claiming CID's investigation had failed to establish that Cisneros knew that all of his income was not being reported. According to Colbenson, Klotz said that Cisneros could say that he was a busy man, that he had set up internal systems for the recording of all income, and that it was his accountants' or employees' fault that all income had not been reported.¹⁷⁵⁵ Colbenson disagreed, maintaining that the SAR established that the accountant had not been provided with information concerning all of Cisneros's income, despite repeated requests made to Cisneros and his employees.¹⁷⁵⁶

According to Colbenson, Klotz then raised with her the OIC's investigation of Cisneros. Klotz informed her that the OIC's investigation did not encompass any tax violations and involved only whether Cisneros made false statements to the FBI.¹⁷⁵⁷ Klotz said that the Cisneros case would therefore be referred to the Tax Division, not to the OIC, if prosecution were recommended.¹⁷⁵⁸ Klotz told Colbenson that in any event, the OIC had "just a 2 witness case."¹⁷⁵⁹

On January 23, 1997, Colbenson spoke by phone with Klotz and Needle. According to Colbenson's notes of the conversation, Klotz stated that Namorato had expressed the opinion that Medlar's tapes were altered and would "never see the light of day."¹⁷⁶⁰ (However, Klotz, Needle, and Finkelstein all later claimed not to have

¹⁷⁵⁴ GJ 00-001 Exs. 44A at 2, 44B at 2.

¹⁷⁵⁵ GJ 97-1 Ex. 23; GJ 97-1 Tr. Colbenson 3/24/98 at 178-80.

¹⁷⁵⁶ GJ 97-1 Tr. Colbenson 3/24/98 at 179-181.

¹⁷⁵⁷ GJ 97-1 Ex. 23; GJ 97-1 Tr. Colbenson 3/24/98 at 183-86.

¹⁷⁵⁸ GJ 97-1 Ex. 23; GJ 97-1 Tr. Colbenson 3/24/98 at 183-86.

¹⁷⁵⁹ GJ 97-1 Ex. 23; GJ 97-1 Tr. Colbenson 3/24/98 at 183-86.

¹⁷⁶⁰ GJ 97-1 Ex. 26.

had substantive conversations with Cisneros’s defense attorneys by this time.¹⁷⁶¹) Klotz further told Colbenson that the meeting between CID and ACC in Washington, D.C. would focus on “computations.”¹⁷⁶²

On January 27, 1997, Colbenson spoke by phone with Klotz and Needle. Klotz told her that he was still concerned about the computations in the SAR and maintained that the bank deposits method of proof was inappropriate.¹⁷⁶³ Klotz again raised the issue of whether Cisneros had acted willfully and suggested that it was the fault of Cisneros’s accountant or employees – not Cisneros – that his returns were inaccurate.¹⁷⁶⁴

Colbenson testified that, during her conversations with Klotz (sometimes including Needle) from January 17, 1997 to January 27, 1997, she consistently rebutted Klotz’s contentions concerning double-counting, method of proof, and willfulness, by referring him to the portions of the SAR that addressed each contention; Klotz, she said, did not accept her explanations.¹⁷⁶⁵ According to Colbenson, she made clear to Klotz and Needle throughout these conversations that both CID and District Counsel believed that the Cisneros case was prosecutable.¹⁷⁶⁶

7. The OIC’s Requests for Expanded Tax Jurisdiction

On January 28, 1997, the Independent Counsel asked the Attorney General, pursuant to 28 U.S.C. § 593(c)(2), to expand his jurisdiction to include Cisneros’s possible tax violations in 1989, 1991, 1992, and 1993.¹⁷⁶⁷ On the same day, the Independent Counsel filed with the Special Division a “Sealed Application for the Referral of Related Matters,” pursuant to 28 U.S.C. § 594(e), requesting a referral of

¹⁷⁶¹ GJ 97-1 Tr. Klotz 4/23/98 at 132; GJ 97-1 Tr. Needle 5/14/98 at 87; GJ 00-001 Tr. Finkelstein 7/20/00 at 23-25.

¹⁷⁶² GJ 97-1 Ex. 26; GJ 97-1 Tr. Colbenson 3/24/98 at 192-96.

¹⁷⁶³ GJ 97-1 Tr. Colbenson 4/9/98 at 13.

¹⁷⁶⁴ *Id.* at 13-16.

¹⁷⁶⁵ GJ 97-1 Tr. Colbenson 3/24/98 at 180-82.

¹⁷⁶⁶ *Id.* at 158-59.

¹⁷⁶⁷ GJ 00-001 Ex. 51A.

jurisdiction to include Cisneros's possible tax offenses as matters related to his existing jurisdiction.¹⁷⁶⁸ Neither request was made public and no notice was given to Cisneros or his counsel.

The evidence submitted with these documents was detailed in an affidavit executed by FBI Agent T.J. Roberts ("Roberts Affidavit"), who was assigned to the OIC for the Cisneros investigation. It showed that Cisneros had underreported his income by approximately \$16,000 for 1989, \$126,000 for 1991, \$158,000 for 1992, and \$34,000 for 1993 – a total of more than \$325,000. The evidence also showed that Cisneros had taken an improper \$30,000 deduction in 1992. These showings were backed by Medlar's taped conversations with Cisneros, statements made by Cisneros's personal accountant, tax records, and bank documents. In light of this documentation of Cisneros's failure to report substantial income, the only remaining issue of his criminal liability appeared to be whether Cisneros's failure to report the income was "willful" under 26 U.S.C. § 7206(1).

The requests also demonstrated how the tax investigation related to the independent counsel investigation already underway. The most substantial underreporting of income and the improper deductions were in returns filed when Cisneros was most in need of funds – in 1992 and 1993, when he was making substantial payments to Medlar. The requests demonstrated the overlap of witnesses and documentary evidence between the OIC's ongoing false statement/conspiracy investigation and its proposed tax investigation of Cisneros.

8. The IRS Debate over the Merits of the Cisneros Tax Case

On January 29, 1997, the day the OIC submitted its requests for tax jurisdiction, Colbenson and CID agents Lange and Barrows met with ACC to review Finkelstein's professed problems with the SAR. They first met briefly with Finkelstein, Klotz, and Needle, and then at length with only Klotz and Needle.

Finkelstein reiterated his concerns about the case that Klotz and Needle had previously conveyed to Colbenson. Finkelstein contended that CID had double-counted income and used the wrong method of proof – using the bank deposits

¹⁷⁶⁸ GJ 00-001 Ex. 50.

method where they should have used the specific items method.¹⁷⁶⁹ (The SAR reported that CID actually used “a hybrid of bank deposits and specific items” method of proof to analyze 1991 and 1992. CID analyzed 1993 using the specific items method.¹⁷⁷⁰) Finkelstein further maintained that Cisneros’s willfulness could not be proved.¹⁷⁷¹

Finkelstein then told the agents that Klotz and Needle would review the case with them and go over these concerns. The agents told Finkelstein that CID could answer their questions and completely resolve ACC’s problems.¹⁷⁷² The agents met with Klotz and Needle for most of the day.

The agents gave Klotz and Needle an overview of CID’s investigation of Cisneros. They mentioned that they had provided the OIC with records generated as a result of the CID investigation pursuant to the court orders the OIC had obtained.¹⁷⁷³ They further related that CID had agreed to assist the OIC in its investigation of Cisneros concerning non-tax matters and would cooperate with the OIC if it received jurisdiction over tax matters.¹⁷⁷⁴

At this point in the meeting, according to Colbenson, Klotz referred to a photocopy of an article that had appeared in the January 27, 1997 issue of the *Legal Times*, entitled “What’s Taking David Barrett So Long?”¹⁷⁷⁵ The article questioned

¹⁷⁶⁹ Letter from Colbenson to OIC 6/3/97 at 4; GJ 97-1 Tr. Colbenson 4/9/98 at 17-18.

¹⁷⁷⁰ GJ 00-001 Ex. 20 at 2.

¹⁷⁷¹ Letter from Colbenson to OIC 6/3/97 at 4; GJ 97-1 Tr. Colbenson 4/9/98 at 17-18.

¹⁷⁷² OIC Interview Notes Colbenson at 6, 8.

¹⁷⁷³ GJ 97-1 Tr. Colbenson 4/9/98 at 25-26.

¹⁷⁷⁴ OIC Interview Notes Colbenson at 10.

¹⁷⁷⁵ GJ 97-1 Tr. Colbenson 4/9/98 at 25-26. Two different copies of the article were located in ACC’s files. GJ 00-001 Ex. 212 bore an “[illegible] Chief Counsel” stamped-in date of January 27, 1997. GJ 00-01 Ex. 213 bore a mailing label from Namorato’s law firm, Caplin & Drysdale. Finkelstein testified that, although ACC
(continued...)

the progress of the OIC's investigation. Klotz told the agents that they should not be eager to team up with the OIC, which he characterized as lacking the ability and expertise to handle tax matters.¹⁷⁷⁶ He asserted that the OIC had just a "two-witness case" and had come up with nothing in its investigation.¹⁷⁷⁷

Klotz further represented that both ACC and the Tax Division had had problems with other independent counsels that had tax jurisdiction.¹⁷⁷⁸ He noted that independent counsels did not have the experience of the DOJ Tax Division and asserted that independent counsels had usurped the Tax Division's role.¹⁷⁷⁹

Discussion then turned to the SAR. The field agents responded to ACC's criticism of their use of the bank deposits method, and they explained why the specific items method of proof was inappropriate for tax years 1991 and 1992. Specifically, although there were several systems of recordkeeping at Cisneros's business, the sole method by which all income was to be recorded was by depositing it into Cisneros's business bank accounts.¹⁷⁸⁰ The agents pointed out that Cisneros, his employees, and Hernandez knew that this was how income was to be recorded.¹⁷⁸¹ Thus, a principal reason why CID chose to use the bank deposits method of proof was that this was the system used by Cisneros's accountants.¹⁷⁸²

¹⁷⁷⁵(...continued)

did not subscribe to *Legal Times*, someone within the Chief Counsel's office, whom he could not identify, had sent a copy of the article to ACC. GJ 00-001 Tr. Finkelstein 8/29/00 at 88-94.

¹⁷⁷⁶ OIC Interview Notes Colbenson at 10.

¹⁷⁷⁷ OIC Interview Notes Colbenson at 10; GJ 97-1 Tr. Colbenson 4/9/98 at 25-26.

¹⁷⁷⁸ OIC Interview Notes Colbenson at 11.

¹⁷⁷⁹ OIC Interview Notes Colbenson at 11.

¹⁷⁸⁰ GJ 97-1 Tr. Colbenson 4/9/98 at 27-34.

¹⁷⁸¹ GJ 97-1 Tr. Colbenson 4/9/98 at 27-28, 32.

¹⁷⁸² *Id.* at 32.

The agents also explained to Klotz and Needle that, although there were several systems of recordkeeping in place, most of these records were not maintained for the purpose of tracking income.¹⁷⁸³ For example, Arce-Garcia maintained records known as the “green ledgers” to keep track of Cisneros’s smaller speech engagements, but these were not designed to be used for recording income.¹⁷⁸⁴ The green ledgers did not show who paid Cisneros or the amounts he was paid; this could be determined only by directly contacting numerous individuals outside the Cisneros organization and comparing the information obtained from them with a reconstruction of items deposited into Cisneros’s bank accounts.¹⁷⁸⁵ The agents explained that an effort to track income using systems other than the bank deposits would not capture all of the unreported income.¹⁷⁸⁶ Thus, according to the CID agents, it was a very complicated process to track all the income using the specific items method.¹⁷⁸⁷

The field agents also demonstrated that they had not double-counted Cisneros’s income.¹⁷⁸⁸ Klotz and Needle did not voice any disagreement with the agents’ explanations.¹⁷⁸⁹

The agents reviewed evidence of Cisneros’s willfulness, including his education, employment history, and financial acumen, as well as his involvement in the day-to-day operation of his business and his detailed knowledge of its financial condition with respect to the receipt of income and the payment of expenses.¹⁷⁹⁰ They pointed out that Cisneros had failed to disclose to either Hernandez or Gonzalez that he was paying Medlar or that he had earned income from speaking engagements in

¹⁷⁸³ *Id.* at 29.

¹⁷⁸⁴ *Id.* at 27-31.

¹⁷⁸⁵ *Id.* at 30-31.

¹⁷⁸⁶ *Id.* at 29-30.

¹⁷⁸⁷ *Id.* at 29-31.

¹⁷⁸⁸ *Id.* at 32-33.

¹⁷⁸⁹ *Id.* at 33-34.

¹⁷⁹⁰ *Id.* at 34-37.

the last quarter of 1992, and that he had failed to disclose the existence of bank accounts into which he was depositing income checks.¹⁷⁹¹

According to Colbenson, the January 29, 1997 meeting ended at approximately 4:00 p.m. Colbenson and the agents left the meeting with the understanding that the issues reviewed with Klotz and Needle had been resolved to their satisfaction.¹⁷⁹² Klotz and Needle indicated that all of their questions had been answered and that they had no more questions.¹⁷⁹³ According to Colbenson, Klotz and Needle appeared to understand and to be satisfied with CID's presentation concerning the bank deposit method of proof, the lack of double-counting of income, Cisneros's awareness of and involvement in the day-to-day operations of his business, and the fact that Cisneros had withheld information from and failed to be responsive to his accountant.¹⁷⁹⁴

According to Colbenson, at the conclusion of the meeting both attorneys appeared to be favorable to the case.¹⁷⁹⁵ Klotz indicated that he was not the decisionmaker, Finkelstein was, and that he would have to convince Finkelstein that the case was prosecutable.¹⁷⁹⁶ Klotz indicated that he would speak with Finkelstein the next morning.¹⁷⁹⁷ Colbenson perceived that Klotz was reluctant to talk to Finkelstein and asked him why. She described the conversation as follows:

¹⁷⁹¹ *Id.* at 37-38.

¹⁷⁹² OIC Interview Notes Colbenson at 3; Letter from Colbenson to OIC 6/3/97 at 4; Letter from Lange to OIC 5/30/97 at 3; GJ 97-1 Tr. Colbenson 4/9/98 at 33-34, 38-40.

¹⁷⁹³ GJ 97-1 Tr. Colbenson 3/24/98 at 182-83; GJ 97-1 Tr. Colbenson 4/9/98 at 32-34, 38-40.

¹⁷⁹⁴ *Id.*

¹⁷⁹⁵ Letter Colbenson to OIC 6/3/97 at 4.

¹⁷⁹⁶ GJ 97-1 Tr. Colbenson 4/9/98 at 39-40.

¹⁷⁹⁷ Letter from Lange to OIC 5/30/97 at 3.

. . . I actually said to him “If you would be honest with me as to what you’re up against, I won’t burn you.” . . . “He just said well, I’ll talk with him.”¹⁷⁹⁸

They agreed that the agents should return the next morning at 8:30 a.m. to answer any questions that Finkelstein might have.¹⁷⁹⁹ Colbenson told Klotz that, if he was unable to convince Finkelstein that the case should go forward, then she and the agents would attempt to do so.¹⁸⁰⁰

While Klotz and Needle were meeting with the CID agents on January 29, 1997, Finkelstein returned a telephone call made the day before by Michael Killfoil, the IRS’s Austin District Director.¹⁸⁰¹ According to a memorandum Finkelstein prepared of the return call, Killfoil expressed his concern that the Independent Counsel might be getting the Cisneros case to review.¹⁸⁰² Finkelstein’s memorandum stated that he had told Killfoil that he had reviewed the Independent Counsel’s appointment order and had determined that it was very limited in that it only covered matters relating to Cisneros’s false statements.¹⁸⁰³ Therefore, according to Finkelstein, any IRS referral of the case for criminal prosecution would be made to the Tax Division, unless, as he expected would happen, the Independent Counsel’s jurisdiction were expanded to include tax matters.¹⁸⁰⁴ The memorandum also stated Finkelstein’s view that the Independent Counsel had been in existence for two years

¹⁷⁹⁸ GJ 97-1 Colbenson Tr. 4/9/98 at 40-41.

¹⁷⁹⁹ *Id.* at 40, 42.

¹⁸⁰⁰ *See* OIC Interview Notes Colbenson at 23.

¹⁸⁰¹ Killfoil supervised the CID office that investigated the Cisneros case. According to Killfoil, CID Chief Filan kept him informed and briefed him on sensitive matters in San Antonio CID, such as the Cisneros matter. OIC Interview Notes Killfoil 9/14/00 at 3.

¹⁸⁰² GJ 00-001 Ex. 52.

¹⁸⁰³ *Id.*

¹⁸⁰⁴ *Id.*

“which suggested that he had either come up empty or had somehow expanded without authority into other areas.”¹⁸⁰⁵

According to the memorandum, Finkelstein also told Killfoil that the CID agents were in Washington, D.C. to discuss the case and that some “technical difficulties” with the case had to be overcome or addressed by putting the case in supplemental status.¹⁸⁰⁶ The memorandum recorded Finkelstein’s observation that, if the case were put in supplemental status, it might not be worthy of prosecution.¹⁸⁰⁷ The memorandum also cited Finkelstein’s concern that Cisneros’s popularity would make it very difficult to convict him in San Antonio, and Killfoil’s opinion that conviction would be “almost impossible.”¹⁸⁰⁸

Finkelstein testified before the OIC grand jury regarding this conversation and added details that did not appear in his memorandum. Finkelstein testified that Killfoil had called him because Killfoil was “getting a lot of pressure from CI[D] and a lot of pressure from [the] Independent Counsel through CI[D] to approve the case.”¹⁸⁰⁹ According to Finkelstein, Killfoil told him that Cisneros was a “hero” in San Antonio and that no jury would convict him.¹⁸¹⁰ Finkelstein testified that he chastised Killfoil for sending ACC the Cisneros case when Killfoil did not believe there was a reasonable probability of conviction,¹⁸¹¹ and Killfoil answered by repeating that he was under a lot of pressure to refer the case.¹⁸¹²

The OIC interviewed Killfoil, showed him Finkelstein’s memorandum of the conversation, and questioned him about the substance of Finkelstein’s testimony on the subject. Killfoil took great exception to Finkelstein’s accounts of the

¹⁸⁰⁵ *Id.*

¹⁸⁰⁶ *Id.*

¹⁸⁰⁷ *Id.*

¹⁸⁰⁸ *Id.*

¹⁸⁰⁹ GJ 00-001 Tr. Finkelstein 6/1/00 at 6, 16, 21.

¹⁸¹⁰ *Id.* at 6, 19-20.

¹⁸¹¹ *Id.* at 7, 17-19, 21.

¹⁸¹² *Id.* at 7.

conversation and told the OIC that, contrary to Finkelstein's claim, he had supported the case and had made efforts to allay Finkelstein's concerns.¹⁸¹³

Killfoil recalled two calls with Finkelstein – the first call concerning the merits of the case and the second call concerning ACC's request for the Medlar tapes.¹⁸¹⁴ Killfoil told the OIC that the purpose of the first call was to push the case with Finkelstein to ensure that it was prosecuted.¹⁸¹⁵ Killfoil said that the Cisneros case "was a very good criminal case" and that he knew of cases weaker than the Cisneros case that had been prosecuted.¹⁸¹⁶ Killfoil told the OIC that he supported the case and thought it should go to trial to send a message to the public that, regardless of the status of the person involved, anyone caught cheating on his or her taxes would be prosecuted by the IRS.¹⁸¹⁷

Killfoil denied that CID had been under pressure from the OIC to refer the Cisneros case for prosecution.¹⁸¹⁸ He also denied that he was under pressure from District Counsel to refer the case for prosecution.¹⁸¹⁹ To the contrary, Killfoil told the OIC that he thought the Cisneros case was a good case that he wanted to move toward prosecution quickly.¹⁸²⁰ Thus, according to Killfoil, his real concern was that the OIC would take the case and then not prosecute it.¹⁸²¹

The OIC asked Killfoil about Finkelstein's claim that Killfoil had indicated to him that he did not think the Cisneros case had a reasonable probability of conviction,

¹⁸¹³ OIC Interview Report Killfoil 9/22/97 at 2.

¹⁸¹⁴ *Id.* at 1; OIC Interview Notes Killfoil 9/14/00 at 10.

¹⁸¹⁵ OIC Interview Notes Killfoil 9/14/00 at 10.

¹⁸¹⁶ OIC Interview Report Killfoil 9/22/97 at 2.

¹⁸¹⁷ OIC Interview Notes Killfoil 9/14/00 at 6.

¹⁸¹⁸ *Id.* at 7.

¹⁸¹⁹ *Id.* at 7-8.

¹⁸²⁰ *Id.* at 9.

¹⁸²¹ *Id.* at 7, 9.

but that he was under pressure from CID and the OIC to refer it for prosecution.¹⁸²² Killfoil emphatically disagreed.¹⁸²³ He told the OIC that, while he felt that it would be a “challenge” to convict Cisneros in San Antonio, he did not believe and would not have said that it was impossible.¹⁸²⁴ He also told the OIC that he still believed that Cisneros could have been convicted.¹⁸²⁵

On January 30, 1997, the CID agents returned to ACC’s offices to meet with Finkelstein. Klotz informed them that Finkelstein was not going to meet with them. Klotz advised that a referral for prosecution would be unlikely. He said that Finkelstein still had problems with the method of proof, believed that evidence of willfulness was weak, and did not understand why the specific items method of proof could not be used.¹⁸²⁶

The CID agents asked Klotz whether this was his position or Finkelstein’s; Klotz replied that this was Finkelstein’s position, and that he was highly unlikely to change his mind.¹⁸²⁷ He further stated that, although ACC would take into account the information the CID agents had provided the day before, no additional investigative work would be performed.¹⁸²⁸ He affirmed that all of his and Needle’s questions had been satisfactorily answered but noted that Finkelstein was his boss and had the final word on the case.¹⁸²⁹

The agents decided that they needed to tell CID Chief Filan and CID officials in the Washington, D.C. National Office what had occurred. As they left the room,

¹⁸²² *Id.* at 7-9.

¹⁸²³ *Id.* at 7-9.

¹⁸²⁴ *Id.* at 6-7.

¹⁸²⁵ *Id.* at 9.

¹⁸²⁶ GJ 97-1 Tr. Colbenson 4/9/98 at 42-43.

¹⁸²⁷ *Id.* at 43-45.

¹⁸²⁸ Letter from Colbenson to OIC 6/3/97 at 4.

¹⁸²⁹ GJ 97-1 Tr. Colbenson 4/9/98 at 43-44.

according to the agents, Klotz said that he had two children in college and was unwilling to jeopardize his job by challenging Finkelstein, his boss.¹⁸³⁰

In his grand jury testimony, Klotz denied making some of the statements attributed to him at the January 29 and 30 meetings. He acknowledged that he had two sons in college and needed his job but did not recall telling the agents that he would not go against Finkelstein's decision for this reason.¹⁸³¹ He denied telling the agents that he was not going to say anything about the case that would put his job in jeopardy or that his job would be in jeopardy if he contradicted Finkelstein.¹⁸³²

Klotz also testified that he did not recall making several comments attributed to him regarding the OIC during the meeting. He said he did not recall telling the agents that the OIC had little or no evidence;¹⁸³³ that the OIC did not have the proper tax expertise to deal with tax issues, did not know what it was doing, and would screw up the Cisneros case;¹⁸³⁴ or that the OIC was usurping DOJ's role.¹⁸³⁵ He also did not recall telling the CID agents that they should not be eager to work with the OIC or that it would be inappropriate for them to do so,¹⁸³⁶ or that they should read the *Legal Times* article criticizing the progress of the OIC's investigation.¹⁸³⁷ He did not recall telling the agents that ACC had had problems with independent counsels in the past¹⁸³⁸ or that DOJ did not care for independent counsels.¹⁸³⁹

¹⁸³⁰ Letter from Barrows to OIC 5/5/97; GJ 97-1 Tr. Colbenson 4/9/98 at 43-44.

¹⁸³¹ GJ 00-001 Tr. Klotz 2/27/01 at 101.

¹⁸³² *Id.* at 102-03.

¹⁸³³ GJ 00-001 Tr. Klotz 1/11/01 at 97.

¹⁸³⁴ *Id.* at 98-99.

¹⁸³⁵ *Id.* at 119-20.

¹⁸³⁶ *Id.* at 97-98, 104-05.

¹⁸³⁷ *Id.* at 97.

¹⁸³⁸ *Id.* at 116.

¹⁸³⁹ *Id.* at 117.

Later on January 30, 1997, Colbenson and CID National Office officials met with Finkelstein, Klotz, and Needle to discuss the Cisneros case. Finkelstein reiterated the position that there were problems with the method of proof used to show underpayment and weak evidence of willfulness.¹⁸⁴⁰ Finkelstein said that the defense position was that Hernandez was at fault if the returns were inaccurate because he had the 1099s.¹⁸⁴¹ Finkelstein represented that he wanted to “simplify” the case by using the specific items method of proof, thereby including as omitted income only speech payments for which 1099s had not been supplied.¹⁸⁴² He also said that he did not believe that a prosecution of the case was sustainable.¹⁸⁴³

Colbenson responded that the CID agents had met with Klotz and Needle, had discussed the bank deposit method of proof at length, and had answered all of Klotz and Needle’s questions to their satisfaction.¹⁸⁴⁴ Neither Klotz nor Needle disagreed with Colbenson’s assessment of the preceding day’s meeting.¹⁸⁴⁵ Colbenson told Finkelstein that, had he been present, all of the facts would have been reviewed with him.¹⁸⁴⁶ Finkelstein later conceded that double-counting and other technical issues “went away quickly” at the meeting.¹⁸⁴⁷

According to Colbenson, Finkelstein became angry at this point and claimed that he did not need to be instructed on the bank deposits method of proof.¹⁸⁴⁸ Finkelstein then said that what really concerned him was whether the agents had violated 26 U.S.C. § 6103 in making disclosures to the OIC about CID’s

¹⁸⁴⁰ GJ 97-1 Tr. Colbenson 4/9/98 at 45-47.

¹⁸⁴¹ OIC Interview Notes Lange.

¹⁸⁴² OIC Interview Notes Colbenson at 7; OIC Interview Notes Lange.

¹⁸⁴³ GJ 97-1 Tr. Colbenson 4/9/98 at 46-47.

¹⁸⁴⁴ GJ 97-1 Tr. Colbenson 4/9/98 at 46-47.

¹⁸⁴⁵ *Id.* at 49-50.

¹⁸⁴⁶ *Id.* at 46-47.

¹⁸⁴⁷ GJ 00-001 Tr. Finkelstein 8/29/00 at 115-17.

¹⁸⁴⁸ GJ 97-1 Tr. Colbenson 4/9/98 at 47.

investigation.¹⁸⁴⁹ Finkelstein said that he viewed certain disclosures to the OIC as inappropriate because CID had made some of them to the OIC directly rather than through an IRS disclosure officer. Colbenson saw Finkelstein's accusation as an attempt to intimidate the CID agents, because she knew that the IRS and the courts took disclosure violations seriously.¹⁸⁵⁰ (When he was later questioned about the meeting, Finkelstein did not dispute that he told the agents that he hoped none of them went to jail over improper disclosures to the OIC.)¹⁸⁵¹ Colbenson told Finkelstein that disclosures of information by CID to the OIC had been approved by the Austin District's Disclosure Officer and were proper.¹⁸⁵²

The discussion turned to CID joining the OIC's investigation of Cisneros. Finkelstein stated that there had been problems with the OICs handling tax matters as far back as the Iran-Contra investigation. Finkelstein said that his experience was that OICs did not have the expertise of the Tax Division and did not have the requisite judgment or experience to recognize issues or problems in tax matters.¹⁸⁵³

According to Colbenson, as the meeting concluded, Finkelstein stated that ACC would take into consideration the information that CID had provided to Klotz and Needle.¹⁸⁵⁴ He also said that ACC would review Gonzalez's CID interview, which documented that Gonzalez had devised the system of income recordation that required that all income be deposited into Cisneros's business bank accounts.¹⁸⁵⁵ Finkelstein represented that ACC would contact CID if they had any additional questions and that CID would receive ACC's decision in writing.¹⁸⁵⁶ However, according to Paris, CID had not changed Finkelstein's mind about the case, and it was

¹⁸⁴⁹ *Id.* at 47-49.

¹⁸⁵⁰ *Id.* at 48-49.

¹⁸⁵¹ GJ 00-001 Tr. Finkelstein 11/2/00 at 46-48.

¹⁸⁵² GJ 97-1 Tr. Colbenson 4/9/98 at 47-48.

¹⁸⁵³ OIC Interview Notes Colbenson at 9.

¹⁸⁵⁴ GJ 97-1 Tr. Colbenson 4/9/98 at 49-50.

¹⁸⁵⁵ *Id.*

¹⁸⁵⁶ *Id.* at 50.

still going to be declined.¹⁸⁵⁷ Finkelstein testified that he could not “exclude” the possibility that, at the end of January 1997, he had informed CID that the Cisneros case was “terrible, there is no way in hell this case is going to go forward.”¹⁸⁵⁸ He added: “But, I was not there at that point.”¹⁸⁵⁹

Also on January 30, 1997, the Special Division entered an order directing DOJ to file its response to the OIC’s referral application by no later than February 6, 1997.¹⁸⁶⁰

On February 5, 1997, Klotz and Colbenson spoke by phone. Klotz again agreed with Colbenson that the Cisneros matter should be investigated through a grand jury.¹⁸⁶¹

9. The OIC and DOJ’s Initial Discussions Concerning the OIC’s Jurisdictional Requests

While the IRS engaged in its internal debate over the merits of the Cisneros tax case, the OIC and DOJ entered into detailed discussions over whether the OIC should be allowed to investigate possible Cisneros tax offenses. On February 3, 1997, the Independent Counsel and members of his staff met with DOJ officials to discuss the OIC’s pending expansion and referral requests. The DOJ officials present included Radek, Farrington, Robert Litt (Deputy Assistant Attorney General, Criminal Division), Mark Matthews (Deputy Attorney General, Tax Division), and Stanley F. Krysa (Senior Division Counsel, Tax Division).

One topic of discussion was whether the OIC could obtain from the Special Division the requested referral of jurisdiction to investigate possible tax offenses involving income Cisneros had not paid to Medlar and had not declared for tax purposes. The OIC told DOJ that it believed it would have authority under 26 U.S.C. § 6103(h) to obtain tax information from the IRS if it first received from the Special

¹⁸⁵⁷ OIC Interview Notes Paris 7/18/01 at 11-12.

¹⁸⁵⁸ GJ 00-001 Tr. Finkelstein 8/31/00 at 79.

¹⁸⁵⁹ GJ 00-001 Tr. Finkelstein 8/31/00 at 79.

¹⁸⁶⁰ Special Division Order 1/30/97.

¹⁸⁶¹ GJ 97-1 Ex. 33.

Division a referral of jurisdiction over Cisneros tax offenses relating to income not diverted to Medlar.¹⁸⁶² Section 6103(h) permits the IRS to disclose otherwise confidential tax information to certain federal officers under certain circumstances, solely for the purposes of tax administration.

Radek responded that it was DOJ's position that the Attorney General's March 13, 1995 request for appointment of an independent counsel had intentionally omitted tax jurisdiction. Therefore, according to Radek, the only way the OIC could obtain jurisdiction to investigate tax offenses involving income not paid to Medlar was through an expansion of jurisdiction requested by the Attorney General, and not through referral by the Special Division. Radek further stated that the OIC could not ask the IRS pursuant to 26 U.S.C. § 6103(h) for authority to use Cisneros's income tax information in a tax investigation or prosecution unless it first obtained tax jurisdiction, pursuant to an expansion authorized by the Attorney General.

The DOJ officials stated that they preferred to follow the process used in non-OIC tax matters – to wait for the IRS to make a referral to DOJ for prosecution before DOJ authorized prosecution. The OIC informed DOJ that it did not want to follow this procedure because there was already sufficient information in its expansion and referral requests for DOJ to make a decision without further input from the IRS. The meeting concluded with the OIC and DOJ agreeing that DOJ's review of the OIC jurisdictional request could proceed without any resolution of the 26 U.S.C. § 6103 issue.¹⁸⁶³

Later the same day, February 3, 1997, Litt spoke by phone with OIC staff. Litt advised the OIC that it would be in a better position to investigate Cisneros for tax crimes if the IRS first referred the matter to DOJ and the Attorney General, then requested that the Independent Counsel's jurisdiction be expanded to encompass such a referral. An IRS referral to DOJ would put the OIC in a better posture, Litt suggested, than the alternative of the Attorney General enlarging the Independent Counsel's jurisdiction without an IRS referral, followed by the IRS's authorization for the OIC to use IRS material.

Litt further stated that the OIC's expansion request would be granted if there were no problems with the underlying factual basis for the investigation and if the

¹⁸⁶² OIC staff notes of 2/3/97 meeting with DOJ.

¹⁸⁶³ OIC staff notes of 2/3/97 meeting with DOJ.

Tax Division had no legal objections. Litt said that he knew of no problems with the OIC's factual basis and that the OIC had done excellent work. Litt indicated that the OIC had information available to it that Public Integrity Section had not had during its 1994-95 preliminary investigation.¹⁸⁶⁴

After Litt's call, Krysa spoke by phone with OIC staff. Krysa informed the OIC that DOJ preferred for the OIC to obtain authorization to use IRS materials concerning Cisneros for a tax investigation as a result of the IRS referring the Cisneros matter to DOJ – as opposed to the OIC obtaining the materials following an Attorney General request for an expansion of the OIC's jurisdiction without an IRS referral. Krysa then said that, if the Special Agent's affidavit submitted with the expansion request was believed, there was substantial potential for a tax prosecution. Krysa noted that the affidavit had far more detail than 85% of the tax cases the Tax Division processed.¹⁸⁶⁵

On February 4, 1997, Krysa spoke again with OIC staff. Krysa informed the OIC that IRS's District Counsel had reviewed CID's prosecution recommendation but that Finkelstein had taken over the review because of the case's sensitivity. Krysa said that Finkelstein would either "kill" the case or refer it to the Tax Division. Krysa further stated that Cisneros should be investigated if the affidavit submitted with the expansion request was accurate. Krysa observed that the tax matter was a potentially "bigger" case than a false statement prosecution. Krysa predicted that Finkelstein would "unload" the case to avoid having to wrestle with it.¹⁸⁶⁶

Also on February 4, 1997, Radek spoke by phone with OIC staff. Radek asked for additional time for DOJ to respond to the OIC's referral request; the OIC declined. The OIC agreed, however, to make FBI Special Agent Roberts available to assist DOJ in its review of his affidavit. The OIC informed Radek that, if the OIC's request for tax jurisdiction was granted, the OIC and not IRS would be controlling any resulting investigation, and that therefore the OIC did not want to be bound by any determination ACC might make with respect to CID's prosecution referral request.¹⁸⁶⁷

¹⁸⁶⁴ OIC staff notes of 2/3/97 Litt phone call.

¹⁸⁶⁵ OIC staff notes of 2/3/97 Krysa phone call.

¹⁸⁶⁶ OIC staff notes of 2/4/97 Krysa phone call.

¹⁸⁶⁷ OIC staff notes of 2/4/97 Radek phone call.

On February 5, 1997, Litt spoke by phone with OIC staff. Litt informed the OIC that DOJ had decided to oppose the OIC referral request then pending before the Special Division. Litt claimed that the OIC was making rather than avoiding problems by opposing any ACC involvement in DOJ's review.¹⁸⁶⁸

On February 5, 1997, the Independent Counsel sent a letter to the Attorney General, asking to meet to discuss the OIC's expansion and referral requests. The letter stated, in pertinent part:

While the Department previously examined the subject matter of my request for expansion, it did so under time constraints, without the benefit of subpoena power and without the opportunity to acquire all of the facts. My Office has acquired additional information of which the Department of Justice was unaware when it, through your Application, sought the appointment of an Independent Counsel. This information is specific, credible and overwhelmingly supports the conclusion that an expansion is required. Moreover, the referral is also appropriate.

The goal of appointing and fully empowering an independent counsel is not only to reach a fair outcome, but also to reassure the public that a full, complete and thorough investigation will be carried out, without regard to fear or favor. I will be unable to attain this goal without both the expansion and referral of a related matter.¹⁸⁶⁹

On February 6, 1997, the Independent Counsel and members of his staff met with the Attorney General and other DOJ officials, including Litt, Radek, and Farrington. The Attorney General was briefed on the substance of the OIC's jurisdictional request.¹⁸⁷⁰

Following the meeting with the Attorney General, the Independent Counsel and his staff met with DOJ officials, including Litt, Matthews, and Radek. Litt stated that it would be "an act of lawlessness not to expand" the Independent Counsel's jurisdiction, and that "absent [a] bombshell" his jurisdiction would be expanded.

¹⁸⁶⁸ OIC staff notes of 2/5/97 Litt phone call.

¹⁸⁶⁹ Letter from Independent Counsel to Attorney General Janet Reno 2/5/97.

¹⁸⁷⁰ OIC staff notes of 2/6/97 meeting with Attorney General Janet Reno.

Matthews stated that DOJ wanted to consult with the IRS about the OIC's request. He claimed that DOJ could and did come to opposite conclusions from the IRS. Matthews predicted that the IRS's likely reaction, given the politics involved in the Cisneros matter, would be to refer it to DOJ.¹⁸⁷¹

Following this meeting, the Independent Counsel met with Litt. Litt asked the Independent Counsel to consent to a 15-day extension for DOJ to file its response to the pending referral request, due on that day. Litt stated that he was the Attorney General's direct representative concerning this matter, and that he had personally briefed the Attorney General. The Independent Counsel expressed concern about the role of Public Integrity (due to its actions in the 1994-95 preliminary investigation) and about the role of the IRS. Litt responded that he had discussed the matter up and down within DOJ and that the Independent Counsel had "no cause for concern." In light of Litt's assurances, including his earlier representation that it would be an "act of lawlessness" not to grant the expansion, the Independent Counsel consented to DOJ's extension request.¹⁸⁷²

After the Independent Counsel met with Litt, Matthews telephoned OIC staff. Matthews stated that DOJ intended to seek input from the IRS. Matthews said that DOJ wanted the IRS either to refer the case to DOJ or to tell DOJ why it did not want to do so. Matthews represented that, if IRS lawyers had thoughts about any "wrinkles" in the case, DOJ wanted to know what the "wrinkles" were. According to Matthews, DOJ normally consulted with the IRS, and 26 U.S.C. § 6103 permitted such a dialogue.¹⁸⁷³

On February 7, 1997, Matthews spoke by phone with OIC staff. The OIC informed Matthews that, in its view, DOJ was fully capable of deciding the OIC's request without any input from the IRS. The OIC further informed Matthews that the Independent Counsel Act did not provide for any IRS role, and that DOJ's decision to involve the IRS potentially gave it an implicit veto power over the OIC's request not contemplated in the law.¹⁸⁷⁴ The OIC told Matthews that the OIC was particularly

¹⁸⁷¹ *Id.*

¹⁸⁷² OIC staff notes of 2/6/97 meeting with DOJ.

¹⁸⁷³ OIC staff notes of 2/6/97 Matthews phone call.

¹⁸⁷⁴ 28 U.S.C. § 593.

concerned about any IRS input because the IRS could be compromised and politicized.¹⁸⁷⁵

On February 10, 1997, OIC staff, including Special Agent Roberts, met with DOJ officials, including Matthews, Krysa, and Park. They reviewed the contents of Special Agent Roberts's affidavit.¹⁸⁷⁶ On the following day, February 11, 1997, Matthews informed the OIC that, notwithstanding the facts set forth in Roberts's affidavit, Public Integrity wanted to conduct its own investigation of the facts underlying the OIC's request. Matthews told the OIC that this investigation might include meeting with Cisneros's counsel and interviewing his accountants.¹⁸⁷⁷

10. Allegations of Improper Disclosures to the OIC

In the first weeks of February 1997, Colbenson received several telephone calls from ACC regarding the disclosures pursuant to 26 U.S.C. § 6103 that CID had made to the OIC; these had been a point of contention in her January 30 meeting with Finkelstein. On February 6, according to Colbenson's notes, Klotz and Needle called Colbenson requesting the dates of the court orders that allowed the OIC access to tax information.¹⁸⁷⁸ Colbenson returned the call on February 7, 1997 and gave them the dates (October 3, 1995 and February 6, 1996). Klotz then requested copies of the orders and an inventory of the items the IRS had turned over to the OIC.¹⁸⁷⁹ Colbenson expressly told Klotz that the SAR had not been provided to the OIC.¹⁸⁸⁰ (The OIC had not, in fact, been provided a copy of the SAR.)¹⁸⁸¹

¹⁸⁷⁵ OIC staff notes of 2/7/97 Matthews phone call.

¹⁸⁷⁶ OIC staff notes of 2/10/97 meeting with DOJ.

¹⁸⁷⁷ OIC staff notes of 2/11/97 Matthews phone call.

¹⁸⁷⁸ GJ 00-001 Ex. 63.

¹⁸⁷⁹ GJ 00-001 Ex. 65.

¹⁸⁸⁰ *Id.*

¹⁸⁸¹ GJ 00-001 Ex. 65.

On February 10, 1997, Klotz called Colbenson and again requested an inventory of all items sent to the OIC.¹⁸⁸² According to Colbenson’s notes of the conversation, Klotz said he needed to make sure that CID had not violated the law by making disclosures to the OIC not authorized by the court orders.¹⁸⁸³ Klotz also stated that ACC was required to transmit this information to DOJ as part of ACC’s write-up of the case.¹⁸⁸⁴

The CID agents brought the disclosure issue to the attention of Mitzi Eastman, the IRS Disclosure Officer for the South Texas District. On February 11, 1997, Eastman discovered that, due to a “technical error,” the IRS had mistakenly provided certain information to the OIC that was not covered by the court orders.¹⁸⁸⁵ The error involved a misunderstanding on Eastman’s part of Internal Revenue Manual (“IRM”) 1272(28)34.5(11), governing the time frame of the documents to be disclosed under court orders. Eastman had believed that the IRM called for the IRS to produce documents in existence at the time the IRS had completed its response to the order, plus an additional 30 days.¹⁸⁸⁶ However, Eastman discovered that the IRM actually called for production of documents in existence on the date of the order itself, plus an additional 30 days.¹⁸⁸⁷ As a result of the mistake, the OIC had received documents beyond the appropriate date range.¹⁸⁸⁸

Upon discovering the error on February 11, 1997, Eastman reported it to an IRS Inspector, who made a note of the event and advised Eastman that no further action was warranted.¹⁸⁸⁹ The next day, February 12, 1997, Eastman informed the

¹⁸⁸² GJ 00-001 Ex. 66.

¹⁸⁸³ *Id.*

¹⁸⁸⁴ *Id.*

¹⁸⁸⁵ GJ 00-001 Ex. 73A (Memorandum from Eastman to Filan 2/19/97) at 1.

¹⁸⁸⁶ *Id.*

¹⁸⁸⁷ *Id.*

¹⁸⁸⁸ *Id.*

¹⁸⁸⁹ *Id.*

OIC of the error.¹⁸⁹⁰ Eastman also assured the OIC that the matter could be corrected with an amended disclosure order.¹⁸⁹¹

On February 13, 1997, the OIC secured an amended order from the United States District Court for the District of Columbia, permitting the IRS to disclose to the OIC all of the information it had earlier produced.¹⁸⁹² The time frame stated in the order for disclosure was “taxable period 1985 to the present” with the condition that the IRS was to “[d]isclose such return information described as comes into the possession of the Internal Revenue Service subsequent to the date of this Order; but for not longer than ninety (90) days thereafter”¹⁸⁹³

11. The Cisneros Defense Conference

On February 12, 1997, Klotz and Needle held the defense conference in Washington, D.C. Representing Cisneros were Namorato, Michel, Muller, Caplin, and Charles Matthys, an investigator for Muller.¹⁸⁹⁴ The IRS prepared a Conference Memorandum summarizing what had transpired, signed by Klotz and Needle and “noted” by Finkelstein.¹⁸⁹⁵

According to the memorandum, Klotz first gave a general description of the case against Cisneros.¹⁸⁹⁶ Namorato began the defense presentation with a detailed overview of the OIC investigation, although he characterized it as not relevant to the

¹⁸⁹⁰ *Id.*

¹⁸⁹¹ *Id.*

¹⁸⁹² GJ 00-001 Ex. 72 at 5.

¹⁸⁹³ *Id.*

¹⁸⁹⁴ GJ 00-001 Ex. 60A at 2.

¹⁸⁹⁵ GJ 00-001 Ex. 75 at 9.

¹⁸⁹⁶ GJ 00-001 Ex. 75 at 1-2.

tax case.¹⁸⁹⁷ He emphasized that DOJ had decided, at the time the Attorney General requested appointment of an independent counsel to investigate Cisneros, that there was no basis for the investigation to include tax matters.¹⁸⁹⁸ He also represented that the Attorney General had sent the case to an independent counsel “in the face of contrary advice from career personnel.”¹⁸⁹⁹ He argued that Medlar’s tapes were sanitized copies, implying that they presented serious evidentiary problems, and that Medlar, a target of the OIC investigation who had been institutionalized, was worthless as a witness.¹⁹⁰⁰

Namorato stated that his concern, in light of these facts, was that the Independent Counsel would try to use the tax case to save face, without regard for the IRS’s criteria for deciding whether to refer a case for prosecution.¹⁹⁰¹ He suggested that the IRS would not want to stake its case on the determination of an independent counsel with no experience in selecting tax cases for prosecution.¹⁹⁰²

For the remainder of the conference, according to the memorandum, defense counsel addressed the merits of the case against Cisneros. The thrust of the presentation was that any failure to declare income on Cisneros’s tax returns was due to Hernandez’s incompetence and not to a willful effort by Cisneros to evade taxes. Defense counsel’s basic argument was that information reflecting almost all of Cisneros’s income was available to Hernandez, and Cisneros as a busy public official had no way of knowing that Hernandez was not identifying it. Defense counsel

¹⁸⁹⁷ GJ 00-001 Ex. 75 at 2.

¹⁸⁹⁸ GJ 00-001 Ex. 75 at 2.

¹⁸⁹⁹ GJ 00-001 Ex. 75 at 2.

¹⁹⁰⁰ GJ 00-001 Ex. 75 at 2-3.

¹⁹⁰¹ GJ 00-001 Ex. 75 at 3.

¹⁹⁰² GJ 00-001 Ex. 75 at 3.

emphasized that Cisneros's efforts to conceal his payments to Medlar were not tax motivated.¹⁹⁰³

Defense counsel characterized the "systems" in place for recording income as Arce-Garcia's logs (the "green ledgers"), the 1099 forms that payers issued to Cisneros, and the bank deposits of his income.¹⁹⁰⁴ They represented that Cisneros knew about these systems and that all of this information was available to Hernandez.¹⁹⁰⁵ They argued that Hernandez had been hired to straighten out the accounting system at Cisneros's company but did not avail himself of most of the information available when he prepared Cisneros's tax returns.¹⁹⁰⁶

Defense counsel suggested that a proper examination of the sources available to Hernandez would have yielded correct income figures. They represented that they had found very few items that were not in one of the three sources they identified – the green ledgers, 1099 forms, or bank deposits.¹⁹⁰⁷ They emphasized that Hernandez knew about the green ledgers but did not reconcile them with the other information available to him.¹⁹⁰⁸ They also suggested that all the payments to Medlar – either checks or cash – were documented in the green ledgers or the 1099s.¹⁹⁰⁹ They referred to an affidavit executed by Hernandez on February 4, 1997, in which he took the blame for incorrectly deducting the Lincoln Benefit Life contributions in 1992; they characterized the failure to declare the Mass Mutual distribution as income as another example of Hernandez's incompetence.¹⁹¹⁰

¹⁹⁰³ GJ 00-001 Ex. 75 at 3-4.

¹⁹⁰⁴ GJ 00-001 Ex. 75 at 3.

¹⁹⁰⁵ GJ 00-001 Ex. 75 at 3-4.

¹⁹⁰⁶ GJ 00-001 Ex. 75 at 4-5, 7.

¹⁹⁰⁷ GJ 00-001 Ex. 75 at 5.

¹⁹⁰⁸ GJ 00-001 Ex. 75 at 5, 7.

¹⁹⁰⁹ GJ 00-001 Ex. 75 at 5-6.

¹⁹¹⁰ GJ 00-001 Ex. 75 at 6.

From all of this, defense counsel argued that the Government would not be able to prove Cisneros intended to cheat on his taxes. He had hired Hernandez, had given Hernandez free access to records, had relied on Hernandez, and had been the victim of Hernandez's negligence.¹⁹¹¹ They concluded by noting that the Medlar evidence would not be useful to the prosecution, that Cisneros would be a popular and sympathetic defendant, and that the prosecution case would be complicated by accusations of misconduct by the agents.¹⁹¹²

Needle testified that, during the conference, defense counsel raised many of the same concerns with the case that ACC had.¹⁹¹³ He noted that the "legal theories" presented were similar to the problem areas ACC had identified – including the asserted need to prove that an income item could not be found in the green ledgers, 1099 forms, or the bank deposits.¹⁹¹⁴

Following the conference, Klotz and Needle briefed Finkelstein; Finkelstein said Klotz had been very impressed by the presentation.¹⁹¹⁵ Finkelstein testified that he would have expected Klotz to "push back" at the conference by demanding documentary support for some of defense counsel's assertions.¹⁹¹⁶ Klotz said he had not given Finkelstein any reason to believe that he would "push back."¹⁹¹⁷ According to Needle, Finkelstein had instructed him and Klotz before the conference that it was an opportunity for the defense to present its case, and that they were not to get in a debate or exchange with defense counsel over any issues brought up.¹⁹¹⁸

¹⁹¹¹ GJ 00-001 Ex. 75 at 8.

¹⁹¹² GJ 00-001 Ex. 75 at 8-9.

¹⁹¹³ GJ 00-001 Tr. Needle 5/31/01 at 68-69.

¹⁹¹⁴ GJ 00-001 Tr. Needle 5/15/01 at 26-30.

¹⁹¹⁵ GJ 00-001 Tr. Finkelstein 11/2/00 at 90-91.

¹⁹¹⁶ GJ 00-001 Tr. Finkelstein 9/21/00 at 118-20.

¹⁹¹⁷ GJ 00-001 Tr. Klotz 1/9/01 76-79.

¹⁹¹⁸ GJ 00-001 Tr. Needle 5/15/01 at 62-64.

The following day, February 13, 1997, Klotz spoke by phone with Colbenson and gave her an overview of the prior day's meeting with Cisneros's attorneys, which he described as impressive.¹⁹¹⁹ Klotz told Colbenson that ACC had been "wrestling" with the same issues that the defense had raised in the conference.¹⁹²⁰ Klotz indicated that Cisneros's attorneys had claimed that there were various systems of recordkeeping in place that the accountant could have used to track income, and that ACC was concerned about the same problem as it related to showing Cisneros's willfulness.¹⁹²¹ He had numerous questions about Arce-Garcia's green ledgers.¹⁹²² Klotz also informed Colbenson that Cisneros's lawyers had provided ACC an affidavit executed by Hernandez, in which he took the blame for the improper deduction of the payments to Lincoln Benefit Life.¹⁹²³

Klotz promised Colbenson that he would send her a copy of the conference memorandum, giving her the impression that she would receive the copy that day.¹⁹²⁴ In fact, she received it on March 3, 1997, the same day Klotz told her ACC had declined to refer the matter to DOJ to prosecute.¹⁹²⁵

On February 12, 1997, the day of the IRS defense conference, Cisneros's attorneys Namorato and Muller reportedly met with Public Integrity at the Department of Justice.¹⁹²⁶ The meeting purportedly concerned the OIC's then-

¹⁹¹⁹ GJ 97-1 Tr. Colbenson 4/9/98 at 83-84.

¹⁹²⁰ *Id.* at 88.

¹⁹²¹ *Id.*

¹⁹²² GJ 97-1 Tr. Colbenson 4/9/98 at 84.

¹⁹²³ *Id.* at 86.

¹⁹²⁴ *Id.* at 89-90.

¹⁹²⁵ GJ 97-1 Tr. Colbenson 4/9/98 at 90-91; *see also* GJ 00-001 Ex. 75.

¹⁹²⁶ GJ 00-001 Ex. 95.

pending request for an expansion of its jurisdiction to include tax matters.¹⁹²⁷ The OIC was unable to verify that this meeting actually took place.

12. DOJ Consultation with the IRS Concerning the OIC's Jurisdictional Requests

On February 12, 1997, Matthews told the OIC that he believed the IRS counsel would not want to consult with DOJ about the Cisneros case before formally referring the matter to DOJ. Matthews stated that the triggering mechanism for consultation between DOJ and the IRS before a formal referral consultation was a decision by the IRS that it wanted DOJ's input and not (as DOJ had previously represented to the OIC) a decision by DOJ that it wanted the IRS's input. Nevertheless, Matthews suggested that the OIC agree to DOJ's submitting Special Agent Roberts's affidavit to IRS counsel for evaluation.¹⁹²⁸ Later that day, the OIC informed Matthews that it would agree to submitting Roberts's affidavit to the IRS.¹⁹²⁹

On February 12 and 13, 1997, DOJ officials, including Park and a DOJ criminal tax attorney, continued the review of Special Agent Roberts's affidavit with Roberts that had begun on February 10. The OIC provided the officials underlying factual documents.¹⁹³⁰

On February 13, 1997, Matthews spoke by phone with OIC staff. Matthews informed the OIC that Finkelstein was not going to provide any input to DOJ unless DOJ made a request pursuant to 26 U.S.C. § 6103(h)(3)(B) for access to IRS records concerning Cisneros. Matthews stated that, if such a request were made, Finkelstein would stop his review of CID's administrative tax case because no purpose would be served by any further review. Notwithstanding his statement that Finkelstein was not going to provide any input to DOJ absent a 26 U.S.C. § 6103(h) referral request, Matthews further stated that he believed the IRS would refer the case or provide pre-referral consultation, and that Krysa believed the IRS would refer the case.

¹⁹²⁷ *Id.*

¹⁹²⁸ OIC staff notes of 2/12/97 Matthews phone call.

¹⁹²⁹ OIC staff notes of 2/12/97 Matthews phone call.

¹⁹³⁰ OIC staff notes of 2/12/97 and 2/13/97 meetings with DOJ.

Matthews also explained that Radek wanted the IRS's input because, if the expansion request were granted absent the input and DOJ later found out that the IRS thought it was not a good case, it would make DOJ look "stupid." Alternatively, if the expansion request were denied without IRS input, DOJ could be asked why it did not ask the IRS for its views.

Matthews represented that DOJ intended to submit Special Agent Roberts's affidavit to Finkelstein for his review, to learn whether he was going to refer CID's administrative case or provide pre-referral advice to DOJ. Matthews said that, if Finkelstein responded that he was not going to provide advice before a formal referral because he was conducting his own administrative review, then DOJ would have to decide whether to make a disclosure request to the IRS pursuant to 26 U.S.C. § 6103(h). Matthews stated that the letter to Finkelstein had to be sent to the IRS that day.

The OIC pointed out to Matthews that the substantial factual basis underlying the OIC's request was functionally equivalent to the results of a long-term administrative CID investigation. Consequently, the OIC asserted, DOJ did not need any IRS input to make its determination. Matthews responded that, since CID had conducted its own investigation, Radek wanted ACC's input.¹⁹³¹

That same day, following this conversation, DOJ hand-delivered to Finkelstein a letter requesting ACC's input on the OIC's expansion request. The letter, signed by Krysa and Radek, sought Finkelstein's assistance in evaluating the OIC's request for an expansion of its jurisdiction to include tax matters. As part of this request, DOJ provided Finkelstein with the Roberts affidavit, which had accompanied the OIC's expansion and referral requests and which contained grand jury material.

Finkelstein claimed to have called Matthews immediately after receiving and opening the materials from DOJ on February 13, 1997.¹⁹³² According to a Finkelstein memorandum discussing the incident and the conversation, Finkelstein told Matthews that he had not read the Roberts Affidavit and could not do so without tainting ACC's

¹⁹³¹ OIC staff notes of 2/13/97 Matthews phone call.

¹⁹³² GJ 00-001 Ex. 79.

review of the Cisneros administrative tax case.¹⁹³³ Finkelstein testified that, since the Cisneros case was brought as an administrative tax case, ACC was precluded from considering grand jury material during its review.¹⁹³⁴ Furthermore, he testified that he was permitted to review grand jury material pursuant to an exception to Rule 6(e)'s general rule of secrecy only to assist an attorney for the government in enforcing the federal criminal law.¹⁹³⁵ According to Finkelstein, this exception to Rule 6(e) would not have come into play unless ACC completed its independent review of the Cisneros case and referred it to DOJ for prosecution.¹⁹³⁶ Finkelstein testified that if he had seen grand jury material relating to Cisneros, absent a prior referral to DOJ, he would have been required to recuse himself from ACC's review of the Cisneros case,¹⁹³⁷ and "it just didn't seem like a price I wanted to pay."¹⁹³⁸

Finkelstein testified that DOJ could have gone to his supervisors and sought assistance from ACC.¹⁹³⁹ According to Finkelstein, if his supervisors agreed to such a request, he would have been required to render the assistance and recuse himself from ACC's review.¹⁹⁴⁰ However, DOJ never made such a request,¹⁹⁴¹ and Finkelstein never informed his boss Paris about the meeting with DOJ.¹⁹⁴²

¹⁹³³ *Id.* at 1-2.

¹⁹³⁴ GJ 00-001 Tr. Finkelstein 9/28/00 at 28.

¹⁹³⁵ *Id.* at 29; *see also* Fed. R. Crim. P. 6(e)(2), 6(e)(3)(A)(ii).

¹⁹³⁶ GJ 00-001 Tr. Finkelstein 9/28/00 at 29-30.

¹⁹³⁷ *Id.* at 43.

¹⁹³⁸ *Id.*

¹⁹³⁹ GJ 00-001 Tr. Finkelstein 10/19/00 at 45.

¹⁹⁴⁰ GJ 00-001 Tr. Finkelstein 9/28/00 at 73.

¹⁹⁴¹ GJ 00-001 Tr. Finkelstein 10/29/00 at 46.

¹⁹⁴² OIC Interview Notes Paris 7/18/01 at 12.

Finkelstein also testified that ACC was precluded from sharing certain information with DOJ.¹⁹⁴³ According to Finkelstein, 26 U.S.C. § 6103 barred ACC from turning over its Cisneros case file to DOJ, because ACC was not asking for DOJ's assistance¹⁹⁴⁴ by referring the case to DOJ.¹⁹⁴⁵

Finkelstein asserted that these constraints on sharing information made it inappropriate for ACC and DOJ to discuss the details of the Cisneros case and the OIC's expansion application.¹⁹⁴⁶ Finkelstein testified that ACC would not have relayed "the ins and outs of the case" to DOJ, including anything that ACC thought "kills the case."¹⁹⁴⁷

Despite these constraints, Finkelstein, Klotz, and Needle¹⁹⁴⁸ met with Matthews, Krysa, and Radek, on February 14, 1997,¹⁹⁴⁹ although Finkelstein asserted that he had already made it clear to Matthews that ACC could not assist DOJ.¹⁹⁵⁰ Klotz testified that the ACC officials "went as sponges, because we were not authorized to disclose any information to [DOJ], but they wanted us to attend a

¹⁹⁴³ GJ 00-001 Tr. Finkelstein 5/23/00 at 66-67.

¹⁹⁴⁴ GJ 00-001 Tr. Finkelstein 10/19/00 at 38-39.

¹⁹⁴⁵ GJ 00-001 Tr. Finkelstein 9/28/00 at 67; GJ 00-001 Tr. Finkelstein 5/23/00 at 66-67.

¹⁹⁴⁶ GJ 00-001 Tr. Finkelstein 9/28/00 at 67.

¹⁹⁴⁷ GJ 00-001 Tr. Finkelstein 5/23/00 at 67.

¹⁹⁴⁸ Needle took notes of the meeting. GJ 00-001 Ex. 81; GJ 00-001 Tr. Needle 7/10/01 at 65-66. However, during his grand jury testimony, Needle claimed to have no independent recollection of attending the meeting or of what transpired during the meeting. GJ 00-001 Tr. Needle 7/10/01 at 68. He testified that if he was there it would have been in a notetaking or "passive listening" capacity. *Id.* at 68-69.

¹⁹⁴⁹ GJ 00-001 Ex. 81; *see* GJ 00-001 Tr. Finkelstein 10/26/00 at 10.

¹⁹⁵⁰ GJ 00-001 Tr. Finkelstein 9/28/00 at 71-73.

meeting.”¹⁹⁵¹ Finkelstein testified that one of the purposes of the meeting was to “educate” Radek on the tax process.¹⁹⁵²

However, Finkelstein also testified that DOJ invited him to consult only when it had problems with a case.¹⁹⁵³ According to Finkelstein, because DOJ had requested the meeting, he sensed that it had problems with the OIC’s expansion request.¹⁹⁵⁴

Finkelstein testified that he felt that DOJ was trying to use him as “cover” or as a “scapegoat” for their impending decision to recommend that the OIC’s jurisdiction not be expanded to include tax matters.¹⁹⁵⁵ He said that since the Cisneros case was not technical and was not the type of case for which DOJ would need IRS expertise.¹⁹⁵⁶ According to Finkelstein:

You’ve got a whole room full of Krysa with 40 some odd years of experience . . . Mark Matthews with varying experience, not as long, but certainly pretty high-level experience and now suddenly they need you to tell them what the right answer is? Sometimes you get a sense it’s a set up.¹⁹⁵⁷

Finkelstein also testified that DOJ’s request for ACC’s advice on an independent counsel expansion request for tax jurisdiction was unique:

¹⁹⁵¹ GJ 00-001 Tr. Klotz 12/12/00 at 29.

¹⁹⁵² GJ 00-001 Tr. Finkelstein 9/28/00 at 67-68; *see also* GJ 00-001 Tr. Finkelstein 10/19/00 25-26.

¹⁹⁵³ GJ 00-001 Tr. Finkelstein 10/19/00 at 21-23; GJ 00-001 Tr. Finkelstein 9/28/00 at 77-79.

¹⁹⁵⁴ GJ 00-001 Tr. Finkelstein 10/19/00 at 22-24.

¹⁹⁵⁵ GJ 00-001 Tr. Finkelstein 9/28/00 at 75-77.

¹⁹⁵⁶ GJ 00-001 Tr. Finkelstein 9/28/00 114-15.

¹⁹⁵⁷ GJ 00-001 Tr. Finkelstein 9/28/00 at 79.

They have had requests for expansions of Independent Counsel on God knows how many occasions, they never seem to have needed my advice before, I don't know why they needed my advice on this one. It was never articulated to me why suddenly I was a necessary ingredient to this thing.¹⁹⁵⁸

Needle's notes of the meeting indicated that the participants discussed 26 U.S.C. § 7401, which allows DOJ to prosecute a criminal tax case without first getting a concurrence or a referral from the IRS.¹⁹⁵⁹ Finkelstein testified that, while he did not recall why this statutory provision was raised, the reference to it in the notes of the meeting indicated that ACC had conveyed to DOJ that ACC had problems with the case and might not refer it.¹⁹⁶⁰ According to Finkelstein, he informed DOJ that § 7401 permitted DOJ to prosecute a tax case without a referral from the IRS.¹⁹⁶¹ He testified that:

[W]e have this thing under review, but it makes no difference what we do, because the Attorney General or the Independent Counsel, if given the tax jurisdiction can go on their own, they don't need us. . . . So that our referral, non-referral is not particularly binding as such.¹⁹⁶²

Nevertheless, Finkelstein testified that at the meeting the ACC attendees told DOJ that they were struggling with the Cisneros case,¹⁹⁶³ and that he might have told

¹⁹⁵⁸ *Id.* at 115.

¹⁹⁵⁹ GJ 00-001 Ex. 81 at 2; *see also* GJ 00-001 Tr. Finkelstein 10/19/00 at 26-27.

¹⁹⁶⁰ GJ 00-001 Tr. Finkelstein 10/26/00 at 44-45.

¹⁹⁶¹ *Id.* at 43-45.

¹⁹⁶² GJ 00-001 Tr. Finkelstein 10/19/00 at 30-31.

¹⁹⁶³ *Id.* at 33-35.

DOJ that the problems related to proof.¹⁹⁶⁴ Furthermore, according to Finkelstein, if the DOJ officials stated that they had a problem with the case, the ACC officials probably expressed similar concerns.¹⁹⁶⁵ Finkelstein testified that the DOJ officials might have raised the difficulty of pinning the failure to declare income on the taxpayer instead of the return preparer as a problem and that, if they had, the ACC officials might have said they had similar problems.¹⁹⁶⁶ According to Finkelstein, “[a]t one point the fact that we both were hung up on the same issue was known to each other.”¹⁹⁶⁷

At the meeting, DOJ and ACC also discussed potential § 6103 violations by CID and the OIC.¹⁹⁶⁸ According to Finkelstein, Krysa had told Klotz before the meeting that the OIC must have received a copy of the SAR from CID because the Roberts Affidavit resembled the SAR too closely.¹⁹⁶⁹ Finkelstein testified that, since the OIC’s § 6103(i) orders were entered before the date of the SAR, ACC and DOJ had a “tremendous concern” that giving the SAR to the OIC constituted a criminal violation.¹⁹⁷⁰ He also testified that ACC and DOJ discussed the fact that some of the IRS witness interviews cited in the Roberts Affidavit were outside of the scope of the § 6103(i) orders.¹⁹⁷¹

¹⁹⁶⁴ *Id.* at 35-36.

¹⁹⁶⁵ *Id.*; GJ 00-001 Tr. Finkelstein 10/26/00 at 11-12.

¹⁹⁶⁶ GJ 00-001 Tr. Finkelstein 11/19/00 at 35-36; GJ 00-001 Tr. Finkelstein 10/26/00 at 11-12.

¹⁹⁶⁷ GJ 00-001 Tr. Finkelstein 11/2/00 at 91-92.

¹⁹⁶⁸ GJ 00-001 Ex. 81 at 1-2; GJ 00-001 Tr. Finkelstein 10/5/00 at 121-22, 127-30.

¹⁹⁶⁹ GJ 00-001 Tr. Finkelstein 11/2/00 at 34-37, 80-81.

¹⁹⁷⁰ GJ 00-001 Tr. Finkelstein 10/5/00 at 128-30; GJ 00-001 Ex. 81 at 2.

¹⁹⁷¹ GJ 00-001 Tr. Finkelstein 11/2/00 at 82.

Finkelstein also testified that Klotz had told him he thought CID had turned the SAR over to the OIC.¹⁹⁷² However, in a telephone call on February 7, 1997, one week before the meeting between ACC and DOJ, Colbenson had expressly told Klotz that CID never provided the SAR to the OIC.¹⁹⁷³ At Klotz's request, CID also provided ACC with an inventory of the materials that were turned over to the OIC; the inventory did not list the SAR.¹⁹⁷⁴ In fact, CID had not given the OIC the SAR as of this time.¹⁹⁷⁵

Klotz testified that Finkelstein had first brought the § 6103 issue to his attention,¹⁹⁷⁶ but Klotz did not recall the issue being discussed at the February 14, 1997 meeting.¹⁹⁷⁷ In fact, Klotz was unable to explain how such a conversation between ACC and DOJ could have taken place, if DOJ did not have the SAR or the § 6103(i) orders, and given that Finkelstein claimed he did not read the Roberts Affidavit.¹⁹⁷⁸

Despite DOJ's reluctance to obtain the materials the IRS had developed regarding Cisneros, Matthews and Finkelstein appear to have given each other clear signals of their respective agencies' intended actions. Finkelstein testified that, in the February 14, 1997 meeting with DOJ, he had given the impression that there was a "possibility, maybe even a likelihood" that ACC was not going to refer the Cisneros case for prosecution.¹⁹⁷⁹ Finkelstein also testified that ACC was conveying the

¹⁹⁷² GJ 00-001 Tr. Finkelstein 10/5/00 at 134-35.

¹⁹⁷³ GJ 00-001 Ex. 65.

¹⁹⁷⁴ GJ 00-001 Ex. 65; *see* Letter from Eastman to Barrett 4/3/97; GJ 97-1 Tr. Colbenson 4/9/98 at 73-75.

¹⁹⁷⁵ GJ 00-001 Ex. 65.

¹⁹⁷⁶ GJ 00-001 Tr. Klotz 2/1/01 at 99-100.

¹⁹⁷⁷ *Id.* at 98-99.

¹⁹⁷⁸ GJ 00-001 Tr. Klotz 2/6/01 at 34-36.

¹⁹⁷⁹ GJ 00-001 Tr. Finkelstein 10/26/00 at 45-46.

message that it had “problems” with the case but that DOJ had the power to prosecute it without his referral, if it wanted to.¹⁹⁸⁰

Furthermore, Finkelstein testified that, in the days leading up to a presentation by Cisneros’s defense team to DOJ,¹⁹⁸¹ Matthews had informed him that DOJ was going to recommend that the OIC receive jurisdiction for only a single tax year.¹⁹⁸² Finkelstein said that Matthews had told him this so that Finkelstein would know where to send the case if ACC decided to refer it for prosecution.¹⁹⁸³ According to Finkelstein, he then told Matthews “I don’t think we’re there yet. I think this case is not going to reach that threshold.”¹⁹⁸⁴

Also on February 14, 1997, Matthews discussed with OIC staff DOJ’s meeting with Finkelstein. According to Matthews, Finkelstein had declined DOJ’s request for consultation before a formal referral and had refused to read Roberts’s affidavit because it contained grand jury information subject to Rule 6(e).¹⁹⁸⁵ Matthews also said Finkelstein had informed DOJ that, if DOJ asked the IRS to refer its case to DOJ, Finkelstein would stop the administrative review of the case, put the IRS documents relative to Cisneros “in a truck,” and give them to DOJ.¹⁹⁸⁶ Finkelstein also allegedly had told DOJ that during the defense conference Namorato had made a submission to ACC the “size of the Manhattan phone book,”¹⁹⁸⁷ and that Namorato had given the IRS a road map to the tax case. Matthews said that DOJ wanted to contact Namorato

¹⁹⁸⁰ GJ 00-001 Tr. Finkelstein 10/26/00 at 45-47.

¹⁹⁸¹ This meeting occurred on February 20, 1997, a week before the Attorney General was to file her response to the OIC’s referral application. OIC staff notes of 2/21/97 phone call with Litt.

¹⁹⁸² GJ 00-001 Tr. Finkelstein 8/1/00 at 82-92.

¹⁹⁸³ GJ 00-001 Tr. Finkelstein 5/23/00 at 163.

¹⁹⁸⁴ *Id.*

¹⁹⁸⁵ OIC staff notes of 2/14/97 Matthews phone call.

¹⁹⁸⁶ OIC staff notes of 2/14/97 Matthews phone call.

¹⁹⁸⁷ *See* GJ 00-001 Ex. 75 at 3.

to get from him what he had presented to ACC, so that DOJ would not have to request it from the IRS.¹⁹⁸⁸

Matthews further stated that he “presumed” Namorato had provided a new affidavit from Cisneros’s accountant, although Finkelstein had not said so. Matthews related that DOJ was worried about Cisneros’s accountants, who could “completely protect” Cisneros. OIC staff pointed out to Matthews that, if Namorato had provided an affidavit from Cisneros’s accountant contradicting what the accountant had previously said, such conflicting statements should be sorted out through the OIC’s investigation. The OIC informed Matthews that DOJ appeared to be proceeding as if it were deciding whether the case should be prosecuted, not whether reasonable grounds existed to warrant further investigation.¹⁹⁸⁹

On February 14, 1997, the Independent Counsel sent a letter to the Attorney General opposing the proposal that DOJ obtain materials from Namorato:

Th[e] focus on potential inconsistencies in the statements of [Cisneros’s employees’ and accountants’] is, at the least, troubling. It appears that the Department misapprehends its role in this process. The **only** finding the Department is supposed to undertake is to determine whether reasonable grounds exist to believe further **investigation** is warranted. 28 U.S.C. § 593(c)(2)(A). The Roberts Affidavit, let alone materials this Office supplied to the Department representatives on February 12 and 13, 1997, more than satisfy that standard. The Department is not being asked to determine whether Cisneros is guilty beyond a reasonable doubt, whether there is a reasonable probability of conviction, or whether probable cause exists to believe he committed tax crimes. Those determinations are beyond the Department’s purview: they belong to an Independent Counsel and if circumstances warrant, to a jury. I view the Department’s focus in its review as a wrongful attempt to usurp the prerogatives of an Independent Counsel and the judiciary. If defenses exist, it is the Independent Counsel’s obligation to deal with them with respect to charging decisions and the judge and

¹⁹⁸⁸ OIC staff notes of 2/14/97 Matthews phone call.

¹⁹⁸⁹ OIC staff notes of 2/14/97 Matthews phone call.

jury's function to do so at trial. This Office has determined that further investigation **is** warranted and as provided in the statute the Department is obligated to give that determination great weight. 28 U.S.C. § 593(c)(2)(A). It is the Independent Counsel's function to resolve, if necessary, inconsistencies, if any, in the statements of witnesses.

In any event, the Department is free to obtain these materials [from the IRS] pursuant to 26 U.S.C. § 6103(h)(3)(B). Nevertheless, if the Department believes that it needs Namorato's submission, the Department should obtain leave of the Special Division to involve Namorato in this process. This Office will oppose that application. If the Department decides not to obtain leave from the Special Division before contacting Namorato, please inform us before such contact is made so that we may seek such further relief as is appropriate.

In conclusion, it is clear that the Department's sole function in this process is to determine **only** whether there are grounds for further investigation by an independent counsel, and not to make a determination of prosecutorial merit. I urge you to take no action deviating from the applicable standard.¹⁹⁹⁰

Thus, as of mid-February 1997, the OIC had highlighted for DOJ the availability of the Cisneros tax material – which included the SAR – from the IRS. Had DOJ obtained those materials, it almost certainly would have been compelled to conclude that reasonable grounds existed to believe that further investigation was warranted, and therefore would have been compelled to request that an independent counsel investigate the entire Cisneros tax matter. DOJ did not request these materials.

¹⁹⁹⁰ GJ 00-001 Ex. 80 (Letter from Independent Counsel to Attorney General Janet Reno 2/14/97) (emphasis in original).

13. DOJ Consultation with Cisneros's Attorneys Concerning the OIC's Jurisdictional Requests

On February 18, 1997, Litt spoke by phone with OIC staff concerning the Independent Counsel's February 14, 1997 letter to the Attorney General and DOJ's desire to contact Namorato. Litt related that it was "normal" or "routine" practice for DOJ to contact a potential target of an investigation and get his version of events before DOJ decided whether to conduct an investigation. The OIC pointed out to Litt that it was neither normal nor routine for DOJ to contact targets before making a decision to investigate them. Litt responded that Cisneros was being treated differently because it was a tax case. Litt stated that DOJ had no doubts that its responsibility was to determine if there was "no case" or if further investigation was warranted. The OIC informed Litt that, in light of Public Integrity's handling of the 1994-95 preliminary investigation and the manner in which it had been interacting with Special Agent Roberts, it was apparent that Public Integrity was examining the OIC's request under the incorrect standard of whether the case could be proved at trial, and not under the correct standard of whether further investigation was warranted. Litt stated that, although the correct standard would be applied, Public Integrity looked at cases "differently than the rest of us."

The OIC informed Litt that, in its view, Public Integrity had inappropriately relied on information Namorato supplied as it conducted its 1994-95 preliminary investigation, and that the OIC was concerned that the same thing might happen again. Nevertheless, Litt said Namorato's information would be critical to questions that he had. Litt further stated that the Independent Counsel's request would be granted unless Namorato's presentation conclusively demonstrated that Cisneros had not violated any law; if the presentation left any doubts, the doubts would be resolved in favor of the Independent Counsel.¹⁹⁹¹

On February 19, 1997, Litt spoke by phone with OIC staff. The OIC agreed that DOJ could contact Namorato and ask him to provide DOJ the information he had provided to ACC. DOJ agreed that, in making the request, it would not disclose to

¹⁹⁹¹ OIC staff notes of 2/18/97 Litt phone calls.

Namorato any information concerning the OIC's expansion or referral requests, including Special Agent Roberts's affidavit.¹⁹⁹²

Later that day, Radek and Litt telephoned OIC staff and informed them that Radek had contacted Namorato and asked for the submission that he had provided to ACC. Namorato informed Radek that he had not made a written submission but that he had made an oral presentation and had provided documents and a statement from Cisneros's tax preparer. Namorato asked why DOJ wanted this information and alleged that DOJ's request indicated that "disclosure violations" (i.e., violations of 26 U.S.C. § 6103) had occurred. Litt and Radek wanted the OIC's approval to tell Namorato that DOJ wanted the information because it had received information, not from the IRS, but from the OIC pursuant to the Independent Counsel Act.¹⁹⁹³

Radek and Litt spoke with OIC staff a third time that day. Litt agreed to provide to the OIC any written information he received from Namorato. Despite Radek's resistance, Litt also agreed to provide to the OIC the substance of Namorato's oral presentation.¹⁹⁹⁴

Later in the day, Litt and Radek had another telephone conversation with OIC staff. They informed the OIC that they had spoken with Namorato and had scheduled a meeting for the following day, February 20, 1997. Litt reported that Namorato was focusing on disclosure issues and looking for disclosure violations, which could later pose legal issues in any prosecution.

Also, according to Litt and Radek, Namorato had told DOJ that he had figured out what was going on – that he had made a presentation to ACC that killed the case, and CID then went to the Independent Counsel and got him "ginned up." Litt said he had informed Namorato that CID had not "ginned up" the Independent Counsel.¹⁹⁹⁵

¹⁹⁹² OIC staff notes of 2/19/97 Litt phone call.

¹⁹⁹³ OIC staff notes of 2/19/97 Radek and Litt phone call.

¹⁹⁹⁴ OIC staff notes of 2/19/97 Radek and Litt phone call.

¹⁹⁹⁵ *Id.*

Finkelstein, however, claimed that Namorato had no way of knowing, at that time, that ACC had decided to kill the case. Finkelstein also testified that, in the conversations he had with Namorato and Michel shortly after the defense conference, he did not disclose that ACC intended to decline to refer the case for prosecution.¹⁹⁹⁶

On February 20, 1997, Cisneros's attorneys met with DOJ officials concerning the Cisneros matter. At the meeting, Namorato conceded that Cisneros's tax returns were inaccurate, but asserted (as he had at the IRS defense conference) that Cisneros should not be prosecuted for understating his taxable income because he had relied on his accountant to prepare his returns accurately.¹⁹⁹⁷

In a February 21, 1997 phone conversation with OIC staff, Litt discussed Namorato's February 20, 1997 meeting with DOJ. Litt said that he, Matthews, Radek, Farrington, Krysa, Park, and a DOJ Criminal Tax attorney had attended the meeting. Litt related that Cisneros's defense was that he had relied totally on his tax-return preparer, Hernandez. Litt said that he had asked Namorato whether the returns that Hernandez had prepared were accurate or not. Namorato had admitted that the returns were inaccurate but claimed it was Hernandez's fault. Namorato had represented that all information had been made available to Hernandez but that he did not use it. Namorato had also stated that Hernandez had prepared the returns in a "slipshod" fashion.

Litt also said that Namorato had provided various materials to DOJ, including statements made by Hernandez, excerpts of IRS interviews of Cisneros's employees and the tax preparer who had preceded Hernandez, and analytical and legal materials. Litt stated that DOJ wanted time to digest the materials Namorato had provided and would recontact the OIC after doing so.¹⁹⁹⁸

On February 21, 1997, Radek spoke by phone with OIC staff. Radek informed the OIC that DOJ would be providing the OIC with a copy of the documents Namorato had given DOJ. The OIC confirmed with Radek that, according to

¹⁹⁹⁶ GJ 00-001 Tr. Finkelstein 7/27/00 at 62, 65-66.

¹⁹⁹⁷ OIC staff notes of 2/21/97 Litt phone call.

¹⁹⁹⁸ OIC staff notes of 2/21/97 Litt phone call.

Namorato, Cisneros had totally relied on Hernandez to prepare his returns and that Cisneros's defense was that he lacked criminal intent.¹⁹⁹⁹

On February 24, 1997, the OIC hand-delivered a letter to the Attorney General. The letter set forth evidence demonstrating Cisneros's willfulness, analyzed Cisneros's "reliance-on-accountant" defense, and reviewed the Attorney General's limited authority to decline to expand an independent counsel's jurisdiction where there was an issue concerning "state of mind." By this time the OIC believed, despite Litt's representation that it would be an "act of lawlessness" to deny the OIC's request, that Public Integrity was not going to recommend to the Attorney General that the OIC be given jurisdiction to investigate Cisneros for tax offenses. The OIC pointed out to the Attorney General that, because Namorato had admitted Cisneros's returns were inaccurate²⁰⁰⁰ and was asserting a reliance-on-accountant defense, the sole issue before her on the OIC's expansion request was whether Cisneros had acted willfully²⁰⁰¹ – i.e., his state of mind.

The OIC's letter also noted that, pursuant to the Independent Counsel Act, at 28 U.S.C. § 592(a)(2)(B)(ii), the Attorney General could not deny the expansion request on the ground that Cisneros lacked the requisite state of mind unless there was clear and convincing evidence of this fact. The letter stated that:

Since there is conflicting evidence of Cisneros' willfulness, there cannot be "clear and convincing evidence" that he lacked the requisite "state of mind" with respect to the potential tax violations.²⁰⁰²

Thus, the letter urged, DOJ could not find that there were "no reasonable grounds to believe that further investigation is warranted."²⁰⁰³ The OIC's letter further argued

¹⁹⁹⁹ OIC staff notes of 2/21/97 Radek phone call.

²⁰⁰⁰ GJ 00-001 Ex. 85 at 2.

²⁰⁰¹ *Id.* at 2-4.

²⁰⁰² *Id.* at 4.

²⁰⁰³ *Id.*

that, given the abundant evidence of Cisneros's willfulness, the reliance-on-accountant defense could be resolved only through further investigation.²⁰⁰⁴

An exhibit to the letter detailed evidence of the following factors demonstrating Cisneros's willfulness:

- his advanced education and financial sophistication;
- his pattern of underreporting substantial income in several successive years;
- his motivation to underreport his income due to cash flow problems;
- the fact that Cisneros signed his returns with the knowledge that the income figures were inaccurate;
- his failure to supply his accountant with accurate and complete information regarding his income;
- his use of structured transactions and nominees to conceal transfers of funds to Medlar;
- his use of cash transactions to conceal the source of the payments to Medlar; and
- his false statements to government agents about his finances.²⁰⁰⁵

The same day, February 24, 1997, at DOJ's request, OIC staff met with DOJ officials, including Radek and Krysa. DOJ informed the OIC that it wanted to interview Cisneros's accountants and employees. This proposal came four days

²⁰⁰⁴ *Id.* at 4.

²⁰⁰⁵ *Id.* at Exhibit B.

before the end of the statutory 30-day deadline for the Attorney General to act on the Independent Counsel's expansion request.²⁰⁰⁶

The OIC objected to this course of action. Following the meeting, the OIC immediately sent a letter to Litt detailing its objections. The letter pointed out, among other things, that Cisneros's accountant had now contradicted, under oath, earlier statements he had made to the IRS.²⁰⁰⁷ “[B]y means of illustration and not limitation, when Hernandez swore in his affidavit that he ‘did not speak with Mr. Cisneros,’ he contradicted an earlier statement to IRS agent Lange on April 6, 1996 wherein he claimed to have spoken about the payments to Lincoln Benefit with Cisneros, Arce-Garcia and Alfred Ramirez.”²⁰⁰⁸ Consequently, the letter urged, his statements could not possibly exculpate Cisneros at this stage of the investigation.²⁰⁰⁹

The OIC's letter emphasized that the proposed interviews would not be productive at such a late date: “It is impossible to resolve the open factual issues within the next four days.”

14. ACC Reaction to Revelations about [REDACTED PURSUANT TO COURT ORDER]

On February 24, 1997, CID informed ACC in writing that [REDACTED PURSUANT TO COURT ORDER]²⁰¹⁰ [REDACTED PURSUANT TO COURT ORDER]. CID had not opened a case as a result of [REDACTED PURSUANT TO COURT ORDER], but it did refer the matter to the FBI, who questioned [REDACTED PURSUANT TO COURT ORDER].²⁰¹¹ CID advised ACC that [REDACTED PURSUANT TO COURT ORDER] had come to its attention in mid-

²⁰⁰⁶ 28 U.S.C. § 593(c)(2).

²⁰⁰⁷ Letter from OIC to Litt 2/24/97.

²⁰⁰⁸ *Id.* at 1.

²⁰⁰⁹ *Id.*

²⁰¹⁰ [REDACTED PURSUANT TO COURT ORDER].

²⁰¹¹ [REDACTED PURSUANT TO COURT ORDER].

February 1997 and acknowledged that this information should have been included in the December 20, 1996 memorandum transmitting the Cisneros case to District Counsel.²⁰¹²

The ACC officials later attributed the decision not to prosecute Cisneros in 1997 largely to the discovery of **[REDACTED PURSUANT TO COURT ORDER]**. Finkelstein called the fact that **[REDACTED PURSUANT TO COURT ORDER]** a “bombshell” that changed the status of the Cisneros case from a “fence-sitter” to “dead.”²⁰¹³ Klotz testified that the information about **[REDACTED PURSUANT TO COURT ORDER]** was “fatal” to the 1997 Cisneros case and could not be overcome.²⁰¹⁴ He also stated that “[i]f **[REDACTED PURSUANT TO COURT ORDER]** had not been in that capacity that he was, this case probably would have gone forward.”²⁰¹⁵

Despite Finkelstein’s testimony that the discovery that **[REDACTED PURSUANT TO COURT ORDER]** was the death-knell of the case²⁰¹⁶ and Klotz’s testimony that it was “fatal” to the case,²⁰¹⁷ they gave different accounts to the grand jury about when and how this information first came to their attention.

In his initial grand jury testimony, Klotz said that ACC learned about the **[REDACTED PURSUANT TO COURT ORDER]** issue from Cisneros’s counsel during the February 12, 1997 defense conference and that the information was confirmed by CID.²⁰¹⁸ Finkelstein testified that he first learned from Klotz that

²⁰¹² GJ 00-001 Ex. 147 at 1.

²⁰¹³ GJ 00-001 Tr. Finkelstein 8/3/00 at 87-91.

²⁰¹⁴ GJ 00-001 Tr. Klotz 2/27/01 at 96-97.

²⁰¹⁵ GJ 00-001 Tr. Klotz 3/27/01 at 111.

²⁰¹⁶ GJ 00-001 Tr. Finkelstein 8/3/00 at 87-91.

²⁰¹⁷ GJ 00-001 Tr. Klotz 2/27/01 at 96-97.

²⁰¹⁸ GJ 97-1 Tr. Klotz 4/23/98 at 172.

[REDACTED PURSUANT TO COURT ORDER]²⁰¹⁹ and that he had discussed this with Klotz before the defense conference.²⁰²⁰ According to Finkelstein, he and Klotz believed that there was no way Cisneros’s counsel would know this “pivotal” information.²⁰²¹ Finkelstein said he did not know how Klotz knew this but assumed that it was as a result of conversations with CID.²⁰²² Finkelstein said he did not communicate this “pivotal” information to DOJ because once he learned it he had decided not to refer the case to DOJ and therefore there would be no purpose to conveying the information to DOJ.²⁰²³

After Finkelstein testified on this subject, Finkelstein and Klotz discussed Finkelstein’s grand jury testimony. Finkelstein told Klotz that he thought Klotz had told him that **[REDACTED PURSUANT TO COURT ORDER]** before the defense conference. Klotz told Finkelstein that he did not know if he told Finkelstein this “before the conference,

after the conference, whether [Klotz] learned that before or after.”²⁰²⁴ According to Finkelstein, Klotz went on to say that he (Klotz) may not have known about it until after the conference.²⁰²⁵

In subsequent grand jury testimony, Klotz again said that he learned for the first time that **[REDACTED PURSUANT TO COURT ORDER]** from Cisneros’s counsel at the defense conference.²⁰²⁶ Klotz testified that he also learned at the conference that **[REDACTED PURSUANT TO COURT ORDER]** had a

²⁰¹⁹ GJ 00-001 Tr. Finkelstein 5/23/00 at 55.

²⁰²⁰ *Id.* at 77.

²⁰²¹ *Id.*

²⁰²² *Id.* at 56.

²⁰²³ *Id.* at 66-67.

²⁰²⁴ GJ 00-001 Tr. Finkelstein 5/25/00 at 9, 20-21.

²⁰²⁵ *Id.* at 23.

²⁰²⁶ GJ 00-001 Tr. Klotz 1/9/01 at 10-16.

relationship with the FBI as well.²⁰²⁷ Klotz said that he was “surprised” to first learn this during the conference because it was the type of information that CID should have revealed in the SAR.²⁰²⁸ Klotz did not recall asking Cisneros’s counsel how they knew this but did not find it “unusual” that they did.²⁰²⁹ Klotz testified **[REDACTED PURSUANT TO COURT ORDER]** was the “primary thing” on his mind after the conference and that he informed Finkelstein about defense counsel’s disclosure.²⁰³⁰ Then, after being shown his and Needle’s notes of the defense conference²⁰³¹ and the conference memorandum,²⁰³² none of which contains any reference to the **[REDACTED PURSUANT TO COURT ORDER]**, Klotz testified that he was wrong about getting the information

from the defense during the defense conference.²⁰³³ Klotz was thereafter unable to explain when and how he first learned this.²⁰³⁴

Needle testified that he was confident that the **[REDACTED PURSUANT TO COURT ORDER]** was not raised by Cisneros’s attorneys at the defense

²⁰²⁷ *Id.* at 11-12.

²⁰²⁸ *Id.* at 17.

²⁰²⁹ *Id.* at 20.

²⁰³⁰ *Id.* at 81.

²⁰³¹ GJ 00-001 Exs. 254, 255.

²⁰³² GJ 00-001 Ex. 75.

²⁰³³ GJ 00-001 Tr. Klotz 1/9/01 at 98-102.

²⁰³⁴ *Id.* at 102-10.

conference.²⁰³⁵ He testified that he did not know the source of the information²⁰³⁶ and that it was possible that ACC knew the information before the defense conference.²⁰³⁷

In any event, according to Needle, the **[REDACTED PURSUANT TO COURT ORDER]** was never “a determinative or linchpin or most important factor in the case.”²⁰³⁸ Furthermore, Klotz admitted that ACC never took any steps to understand or ascertain whether **[REDACTED PURSUANT TO COURT ORDER]**.²⁰³⁹ **[REDACTED PURSUANT TO COURT ORDER]****[REDACTED PURSUANT TO COURT ORDER]**.²⁰⁴⁰ **[REDACTED PURSUANT TO COURT ORDER]**.

Fielding told the OIC that Finkelstein had led him to believe that **[REDACTED PURSUANT TO COURT ORDER]**.²⁰⁴¹ **[REDACTED PURSUANT TO COURT ORDER]**

[REDACTED PURSUANT TO COURT ORDER].²⁰⁴² **[REDACTED PURSUANT TO COURT ORDER]**.²⁰⁴³

²⁰³⁵ GJ 00-001 Tr. Needle 5/15/01 at 91-92.

²⁰³⁶ *Id.* at 90.

²⁰³⁷ *Id.* at 92.

²⁰³⁸ GJ 00-001 Tr. Needle 5/15/01 at 88-89.

²⁰³⁹ GJ 00-001 Tr. Klotz 4/24/01 at 117.

²⁰⁴⁰ **[REDACTED PURSUANT TO COURT ORDER]**.

²⁰⁴¹ **[REDACTED PURSUANT TO COURT ORDER]**.

²⁰⁴² **[REDACTED PURSUANT TO COURT ORDER]**.

²⁰⁴³ **[REDACTED PURSUANT TO COURT ORDER]**.

15. The Limited Grant of Tax Jurisdiction to the OIC

On February 25, 1997, OIC staff met again with DOJ officials at DOJ. The discussion focused on what type of information Cisneros's employees had provided to Hernandez and how Hernandez had prepared Cisneros's returns. DOJ again informed the OIC that it intended to interview Cisneros's employees and tax preparers. In a phone conversation with Litt, Radek, and Matthews after the meeting, OIC staff again objected to DOJ conducting these interviews.²⁰⁴⁴

On that same day, February 25, 1997, DOJ interviewed Gonzalez, the tax preparer for Cisneros who had preceded Hernandez, and other persons affiliated with Cisneros.²⁰⁴⁵ DOJ arranged its interviews through Namorato.²⁰⁴⁶

On February 26, 1997, Litt spoke by phone with OIC staff. He informed the OIC that DOJ needed to interview other witnesses, including, at a minimum, Hernandez. Litt said that DOJ was making arrangements for these interviews but that he did not know who else they would interview.²⁰⁴⁷

Also on February 26, 1997, the OIC transmitted to Park interview reports and other materials for the persons Public Integrity said it wanted to interview – Hernandez, Gonzalez, Arce-Garcia, and Ramirez.²⁰⁴⁸ On February 26, 1997, DOJ interviewed Hernandez and Ramirez, and on February 27, 1997 they interviewed Arce-Garcia.²⁰⁴⁹

On February 27, 1997, the OIC hand-delivered a letter to Litt. The letter detailed evidence of Cisneros's willfulness in failing to declare a substantial portion

²⁰⁴⁴ OIC staff notes of 2/25/97 meeting with DOJ.

²⁰⁴⁵ Public Integrity Memoranda of 2/25/97 Gonzalez telephone interviews.

²⁰⁴⁶ OIC Memo 4/30/97 re 4/21/97 meeting with Namorato.

²⁰⁴⁷ OIC staff notes of 2/26/97 Litt phone call.

²⁰⁴⁸ Letter from OIC to Park 2/26/97.

²⁰⁴⁹ Fax from DOJ to OIC 3/27/97.

of his income on his tax returns and evidence that the failure to declare began before Hernandez became Cisneros's accountant.²⁰⁵⁰ Later the same day, Litt informed OIC staff that the OIC's expansion request was not going to be approved with respect to tax year 1993.²⁰⁵¹ Then on February 28, 1997, Litt told OIC staff that it had been a "difficult and close decision" but that it appeared that the OIC's expansion request would be granted only for tax year 1992.²⁰⁵²

On February 28, 1997, the Attorney General filed an application for the expansion of the OIC's jurisdiction with the Special Division, stating, in part:

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 reasonable grounds to believe that further investigation is warranted for tax years 1989, 1991, and 1993.²⁰⁵³

With respect to 1991, the Attorney General stated:

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 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. [Footnote: 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.] Even giving great weight to the views of the Independent Counsel, I cannot recommend expansion of his jurisdiction to include purported tax

²⁰⁵⁰ Letter from OIC to Litt 2/27/97.

²⁰⁵¹ OIC staff notes of 2/27/97 voice-mail from Litt.

²⁰⁵² OIC staff notes of 2/28/97 Litt phone call.

²⁰⁵³ GJ 00-001 Ex. 87 at 1-2.

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.²⁰⁵⁴

At the time of the Attorney General's application, however, as in 1994 and 1995 when it conducted its preliminary investigation, DOJ was in possession of evidence which not only indicated that Cisneros had underreported his 1991 income, but also should have raised questions as to whether he could have believed that his tax returns were accurate as filed. Cisneros's 1991 tax return shows that his net disposable income²⁰⁵⁵ was \$75,358,²⁰⁵⁶ but evidence available to DOJ indicated that Cisneros had paid Medlar at least \$56,000 in 1991.²⁰⁵⁷ Information that Namorato presented to DOJ at their meeting on February 20, 1997 indicated that Cisneros spent \$70,769.41 on non-Medlar, non-deductible personal expenses in 1991.²⁰⁵⁸ Thus, Cisneros's expenditures would have left him with a shortfall of over \$50,000 in 1991. These figures strongly indicate that further investigation of the tax issue was needed since, absent an alternate, major source of funds or the running of a substantial deficit in multiple years, Cisneros's returns were obviously inaccurate as filed.

DOJ could have pursued these discrepancies by seeking more information from the IRS, and it then would have gained immediate access to the SAR. DOJ knew that CID had presented a prosecution recommendation that was pending before Finkelstein.²⁰⁵⁹ But it chose not to exercise its power under 26 U.S.C. § 6103(h)(3)(B) to obtain the recommendation and the evidence that supported it. Had it done so, it would then have had in its possession more than sufficient evidence to indicate that further investigation of possible Cisneros tax offenses was

²⁰⁵⁴ *Id.* at 9-10.

²⁰⁵⁵ Net disposable income is reported taxable income minus total tax.

²⁰⁵⁶ GJ 00-001 Ex. 241.

²⁰⁵⁷ GJ 00-001 Ex. 372 at 8.

²⁰⁵⁸ GJ 97-1 Ex. 60B at Tab 2.

²⁰⁵⁹ OIC staff notes of 2/3/97 Krysa phone call.

warranted – compelling expansion of the Independent Counsel’s jurisdiction to include tax offenses in 1991 to 1993.

The Attorney General’s application acknowledged that the Cisneros tax matter was “now under administrative review by the Chief Counsel’s office of the IRS, pursuant to the standard procedures followed in any tax matter.”²⁰⁶⁰ It also stated that she had decided not to terminate the IRS’s administrative review by asking that the matter be referred to her, and noted that:

[I]t 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 Attorney General’s application also stated “I recognize that . . . 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.”²⁰⁶¹ Thus, even though DOJ was unwilling to ask the IRS for the information it had developed about the Cisneros case (including the SAR), the Attorney General represented that she was willing to wait and see whether the IRS decided to send such information on its own in a referral of the case. However, Finkelstein had by that time told certain DOJ officials that ACC was going to decline to refer the Cisneros tax case for prosecution or grand jury investigation.²⁰⁶²

The Attorney General thereby tied her decision of whether to allow expansion of the Independent Counsel’s jurisdiction directly to the IRS’s decision whether to refer the Cisneros case to DOJ for prosecution – a decision that Finkelstein had

²⁰⁶⁰ GJ 00-001 Ex. 87 at 4.

²⁰⁶¹ *Id.* at 6.

²⁰⁶² GJ 00-001 Tr. Finkelstein 5/23/00 at 163.

already telegraphed to DOJ.²⁰⁶³ However, the standard for an IRS referral to DOJ for prosecution – whether there was evidence sufficient to establish guilt beyond a reasonable doubt and a reasonable probability of conviction²⁰⁶⁴ – was much more stringent than the Attorney General’s standard for expanding the Independent Counsel’s jurisdiction – “that there are reasonable grounds to believe that further investigation is warranted.”²⁰⁶⁵ She decided, in other words, that she would examine the evidence in the IRS’s possession to determine whether it reasonably indicated the need for further investigation only if the IRS first determined that the same evidence in and of itself was sufficient to establish guilt beyond a reasonable doubt in a criminal trial.

In the same document, the Attorney General opposed the OIC’s application to the Special Division for a referral of the tax offenses involving unreported income not diverted to Medlar as a matter related to the OIC’s existing jurisdiction. The Attorney General noted that she had already, in her 1995 application for the appointment of an independent counsel, informed the court that no further investigation of the tax matter was warranted.²⁰⁶⁶ According to the Attorney General, that conclusion created an “absolute bar” that prevented the court from referring the tax matter to the OIC.²⁰⁶⁷

16. ACC’s Decision Not to Refer the Cisneros Case for Prosecution or Grand Jury Investigation

On Monday, March 3, 1997 – the next business day after the Attorney General filed her application with the Special Division asking for only a limited expansion of the Independent Counsel’s jurisdiction – Klotz and Colbenson spoke on the phone, and Klotz said that ACC had decided not to refer the Cisneros matter to DOJ for

²⁰⁶³ GJ 00-001 Tr. Finkelstein 8/1/00 at 82-98.

²⁰⁶⁴ GJ 00-001 Ex. 187.

²⁰⁶⁵ 28 U.S.C. § 593(c)(2)(C)(i).

²⁰⁶⁶ GJ 00-001 Ex. 87 at 15-22.

²⁰⁶⁷ *Id.* at 17.

prosecution.²⁰⁶⁸ Klotz provided a list of reasons for the decision that closely mirrored the assertions made by Cisneros's counsel at the February 12, 1997 defense conference with ACC. According to Colbenson's contemporaneous notes of the conversation and Colbenson's subsequent grand jury testimony, Klotz stated that:

- even though there was substantial unreported income and an understatement of income could be proven, there was insufficient evidence to prove that the unreported income was Cisneros's fault;²⁰⁶⁹
- Hernandez had taken full blame for the improper 1992 deduction;²⁰⁷⁰
- ACC thought that willfulness could not be proven beyond a reasonable doubt and that there was not a reasonable possibility of conviction;²⁰⁷¹
- the 1099s for Cisneros's Mass Mutual distributions were mailed to Cisneros's home and business in San Antonio, but he never received them because he had moved to Washington, D.C.;²⁰⁷²
- Hernandez was negligent in not reporting the Mass Mutual distributions on Cisneros's 1993 tax return;²⁰⁷³
- much of the specific unreported income was recorded in Arce-Garcia's logs and the 1099s;²⁰⁷⁴

²⁰⁶⁸ GJ 97-1 Ex. 44; GJ 97-1 Tr. Colbenson 4/9/98 at 105-06.

²⁰⁶⁹ GJ 97-1 Ex. 44 at 1; GJ 97-1 Tr. Colbenson 4/9/98 at 106-07.

²⁰⁷⁰ GJ 97-1 Ex. 44 at 1-2; GJ 97-1 Tr. Colbenson 4/9/98 at 107.

²⁰⁷¹ GJ 97-1 Ex. 44 at 1; GJ 97-1 Tr. Colbenson 4/9/98 at 116-17.

²⁰⁷² GJ 97-1 Ex. 44 at 1; GJ 97-1 Tr. Colbenson 4/9/98 at 117.

²⁰⁷³ GJ 97-1 Ex. 44 at 1-2; GJ 97-1 Tr. Colbenson 4/9/98 at 117.

²⁰⁷⁴ GJ 97-1 Ex. 44 at 2; GJ 97-1 Tr. Colbenson 4/9/98 at 119.

- the fact that Hernandez was a CPA who had an MBA, but had not thoroughly reviewed the 1991 tax return with Cisneros, suggested accountant negligence and a reliance-on-accountant defense;²⁰⁷⁵
- Hernandez had committed errors with respect to the reporting of estimated tax payments;²⁰⁷⁶
- the first accountant, Gonzalez, was not being paid to prepare Cisneros's tax returns, and Hernandez was hired with the expectation that he would provide more services to Cisneros;²⁰⁷⁷
- Hernandez never contacted Gonzalez to get all of the information regarding the accounting system;²⁰⁷⁸
- **[REDACTED PURSUANT TO COURT ORDER]**,²⁰⁷⁹
- the case could not be won;²⁰⁸⁰
- at least one of the Medlar tapes could not be entered into evidence;²⁰⁸¹
- Cisneros and Medlar were lying just to the FBI;²⁰⁸²

²⁰⁷⁵ GJ 97-1 Ex. 44 at 2; GJ 97-1 Tr. Colbenson 4/9/98 at 119.

²⁰⁷⁶ GJ 97-1 Ex. 44 at 2.

²⁰⁷⁷ GJ 97-1 Ex. 44 at 2; GJ 97-1 Tr. Colbenson 4/9/98 at 120.

²⁰⁷⁸ GJ 97-1 Ex. 44 at 3; GJ 97-1 Tr. Colbenson 4/9/98 at 120.

²⁰⁷⁹ **[REDACTED PURSUANT TO COURT ORDER]**.

²⁰⁸⁰ GJ 97-1 Ex. 44 at 3; GJ 97-1 Tr. Colbenson 4/9/98 at 121.

²⁰⁸¹ GJ 97-1 Ex. 44 at 3; GJ 97-1 Tr. Colbenson 4/9/98 at 121.

²⁰⁸² GJ 97-1 Ex. 44 at 4; GJ 97-1 Tr. Colbenson 4/9/98 at 121.

- on one of the tapes, Cisneros told Medlar that what he did with his money was a personal matter and that he had paid his taxes;²⁰⁸³
- there was no real evidence of willfulness and nothing to rebut an assertion that the unreported income was the fault of Cisneros's accountants and employees;²⁰⁸⁴
- there were too many accounting systems for Cisneros to keep track of;²⁰⁸⁵
- Cisneros was wearing himself thin trying to take care of Medlar;²⁰⁸⁶
- Cisneros would produce a lot of good character witnesses at trial;²⁰⁸⁷
- the evidence was not sufficient for conviction;²⁰⁸⁸
- the case should not have been investigated;²⁰⁸⁹ and
- CID had committed possible § 6103 disclosure violations, and one of the CID agents had misrepresented herself as a collection agent to Hernandez during an interview.²⁰⁹⁰

Colbenson testified that she had disagreed with Klotz's contentions and told him that CID had evidence that would rebut every issue raised by him in the

²⁰⁸³ GJ 97-1 Ex. 44 at 4; GJ 97-1 Tr. Colbenson 4/9/98 at 122.

²⁰⁸⁴ GJ 97-1 Ex. 44 at 4; GJ 97-1 Tr. Colbenson 4/9/98 at 122-23.

²⁰⁸⁵ GJ 97-1 Ex. 44 at 4; GJ 97-1 Tr. Colbenson 4/9/98 at 123.

²⁰⁸⁶ GJ 97-1 Ex. 44 at 5; GJ 97-1 Tr. Colbenson 4/9/98 at 123.

²⁰⁸⁷ GJ 97-1 Ex. 44 at 5; GJ 97-1 Tr. Colbenson 4/9/98 at 123.

²⁰⁸⁸ GJ 97-1 Ex. 44 at 5; GJ 97-1 Tr. Colbenson 4/9/98 at 123.

²⁰⁸⁹ GJ 97-1 Ex. 44 at 6; GJ 97-1 Tr. Colbenson 4/9/98 at 124.

²⁰⁹⁰ GJ 97-1 Ex. 44 at 6-7; GJ 97-1 Tr. Colbenson 4/9/98 at 124-27.

telephone conversation.²⁰⁹¹ However, according to Colbenson, Klotz told her that ACC would be sending CID a declination memorandum and that both he and Needle agreed with the decision to decline the case.²⁰⁹² She testified that she had considered this to be a significant change from Klotz's earlier statements that the Cisneros case needed to be investigated by a grand jury.²⁰⁹³

Colbenson testified that she requested a conference with ACC, so that CID could rebut ACC's problems with the case.²⁰⁹⁴ According to Colbenson, Klotz said that the telephone call was sufficient and that it was not necessary to have a conference, but she insisted on a meeting.²⁰⁹⁵ It was subsequently agreed that a meeting would be conducted on March 18, 1997 in ACC's offices in Washington, D.C.

Klotz testified that the Cisneros case was subsequently put in supplemental status to accommodate CID's request for a meeting.²⁰⁹⁶ According to Colbenson, Klotz told her that the case would be put in supplemental status only to hold a meeting and that, contrary to the standard reasons for granting a supplemental,²⁰⁹⁷ CID could not conduct further investigation or perform additional computations.²⁰⁹⁸

²⁰⁹¹ GJ 97-1 Tr. Colbenson 4/9/98 at 128-29.

²⁰⁹² *Id.* at 127.

²⁰⁹³ *Id.* at 128.

²⁰⁹⁴ *Id.* at 129-30.

²⁰⁹⁵ *Id.*

²⁰⁹⁶ GJ 00-001 Tr. Klotz 12/14/00 at 5-6.

²⁰⁹⁷ GJ 00-001 Ex 89A; *see* GJ 00-001 Ex. 165 at 20-21.

²⁰⁹⁸ Letter from Colbenson to OIC 6/3/97 at 6-7.

On March 11, 1997, Macdonald and Krysa spoke by phone regarding the Cisneros case, and Macdonald memorialized the conversation in writing.²⁰⁹⁹ According to the memorandum, Krysa maintained that the case against Cisneros could not be proved because Cisneros's accountant had access to all books, records, and income information for Cisneros's businesses.²¹⁰⁰

Macdonald disagreed. He pointed out to Krysa that payments to Medlar had been diverted from Cisneros's accounting system and were unaccounted for, resulting in the discrepancy between Cisneros's in-house records and bank deposits, and that Cisneros and his office employees knew but did not tell Hernandez that income being paid to Medlar had not been deposited.²¹⁰¹ Macdonald asserted that defense counsel had made "bald-faced allegations that flew in the face of considerable evidence compiled by CID" and argued that it was inappropriate for ACC not to refer the case for prosecution on the basis of defense counsel's unsubstantiated allegations.²¹⁰²

Macdonald also pointed out that Finkelstein had agreed with District Counsel that key witnesses should be called to testify before the grand jury prior to any prosecution decision.²¹⁰³ Macdonald suggested that Finkelstein's position on the case would preclude even investigation by a grand jury.²¹⁰⁴

Macdonald told Krysa that his office was responding to ACC's memorandum summarizing the defense conference but that it had not received this memorandum until several weeks after it was "done."²¹⁰⁵ Krysa responded that he had heard that CID was "dragging its feet" in responding to ACC's memorandum so that the OIC

²⁰⁹⁹ GJ 00-001 Ex. 95.

²¹⁰⁰ GJ 00-001 Ex. 95 at 2.

²¹⁰¹ *Id.* at 2.

²¹⁰² *Id.* at 2.

²¹⁰³ *Id.* at 2.

²¹⁰⁴ *Id.* at 2.

²¹⁰⁵ *Id.* at 2.

could get tax jurisdiction.²¹⁰⁶ Macdonald asked Krysa who had told him this; Krysa claimed he could not remember.²¹⁰⁷

According to Macdonald's memorandum, Krysa was concerned about possible disclosures of tax information in violation of 26 U.S.C. § 6103. Macdonald told Krysa that the District Disclosure Officer had misinterpreted a court order concerning such disclosures to the OIC and that a court order had been obtained to correct the matter.²¹⁰⁸ Krysa said he did not know this and was "surprised" to hear that a disclosure officer had been involved.²¹⁰⁹ Macdonald reminded Krysa that disclosure violations did not preclude an indictment of Cisneros.²¹¹⁰

Krysa further asserted that the assignment of IRS case agents to the OIC was not a good move, that the Independent Counsel Act was not a good law, and that tax administration was not well served by independent counsel prosecutions because independent counsels could not distinguish a good tax case from a poor one.²¹¹¹ These statements echoed concerns that Klotz and subsequently Finkelstein had previously raised with Colbenson.²¹¹²

17. The Supplemental Status Memorandum

On March 13, 1997, Klotz faxed a memorandum dated March 7, 1997 to CID Chief John Filan, reviewed by Finkelstein, placing the case in supplemental status ("Supplemental Status Memorandum") and reiterating the concerns that prompted

²¹⁰⁶ *Id.* at 2.

²¹⁰⁷ *Id.* at 2.

²¹⁰⁸ *Id.* at 3.

²¹⁰⁹ *Id.* at 3.

²¹¹⁰ *Id.* at 3.

²¹¹¹ *Id.* at 3.

²¹¹² OIC Interview Notes Colbenson at 11.

ACC's preliminary decision to decline to refer the case.²¹¹³ The memorandum noted that, although ACC had some "disagreement" with some of the SAR's computations, those disagreements did not "rise" to the level of ACC's concern with willfulness. Accordingly, the memorandum focused solely on willfulness.²¹¹⁴

The memorandum laid out the four elements of 26 U.S.C. § 7206(1) that the prosecution had to prove beyond a reasonable doubt to establish that Cisneros had violated the law:

- 1) that he had subscribed each return that was false as to a material matter;
- 2) that each return had contained a written declaration that it was made under the penalty of perjury;
- 3) that he had not believed each return to be true and correct as to every material matter; and
- 4) that he had falsely subscribed each return willfully with the specific intent to violate the law.²¹¹⁵

The memorandum conceded that it was clear the first two elements could be proven.²¹¹⁶ However, as to the third element, the memorandum stated that "Cisneros also had no way of knowing that the complicated returns Hernandez prepared for him

²¹¹³ GJ 00-001 Exs. 89; 89A; Filan notes at 4; Letter from Lange to OIC 5/30/97 at 6.

²¹¹⁴ GJ 00-001 Ex. 89 at 1 n. 1.

²¹¹⁵ *Id.* at 1.

²¹¹⁶ *Id.*

each year contained significant errors.”²¹¹⁷ Regarding the fourth element, the memorandum stated that “our major concern with this case turns on willfulness.”²¹¹⁸

The memorandum repeated many of the problems that Klotz had outlined over the phone with Colbenson on March 3, 1997. Specifically, it reiterated Cisneros’s reliance on his accountants,²¹¹⁹ Gonzalez’s status as “free help,”²¹²⁰ **[REDACTED PURSUANT TO COURT ORDER]**²¹²¹ Cisneros’s taped claim to Medlar that he was paying taxes,²¹²² Hernandez’s failure to utilize the information in the 1099s and green ledgers,²¹²³ Hernandez’s errors with respect to the reporting of estimated tax payments,²¹²⁴ and Cisneros’s ability to muster good character witnesses.²¹²⁵ The memorandum also noted ACC’s concerns over possible disclosure violations²¹²⁶ and an allegation by Cisneros’s defense counsel that a CID agent had misrepresented herself as a collection officer to Hernandez.²¹²⁷ The memorandum did not address whether further investigation would be conducted to address any of these issues.

On March 14, 1997, Filan, Colbenson, Lange, and Barrows met with Macdonald to prepare for CID’s scheduled March 18, 1997 meeting with ACC.

²¹¹⁷ *Id.* at 2.

²¹¹⁸ *Id.* at 1.

²¹¹⁹ *Id.* at 2.

²¹²⁰ *Id.*

²¹²¹ *Id.*

²¹²² *Id.* at 3.

²¹²³ *Id.*

²¹²⁴ *Id.* at 2-3.

²¹²⁵ *Id.* at 3.

²¹²⁶ *Id.* at 3-4.

²¹²⁷ *Id.* at 4 n. 3.

During the meeting, Macdonald told the agents about his March 11, 1997 telephone conversation with Krysa. The agents discussed with Macdonald CID obtaining from ACC documentation concerning all of ACC's contacts with DOJ and Cisneros's defense counsel.²¹²⁸

Also on March 14, 1997, as the OIC was beginning its investigation of the 1992 Cisneros tax case, it spoke with Klotz to inform the IRS it would soon make a § 6103(h)(3)(B) request for relevant records.²¹²⁹ Klotz claimed that ACC had not given DOJ any information about the Cisneros case when they met to discuss the matter and that he did not know what action the Attorney General had taken on the OIC's expansion request.²¹³⁰ He told the OIC that ACC had placed the Cisneros case in "sort of" supplemental status.²¹³¹ Klotz stated that Fielding or the Chief Counsel, not Finkelstein, would be making the ultimate decision to refer or decline the case.²¹³²

On March 18, 1997, the Special Division granted the Attorney General's application, issuing an order expanding the Independent Counsel's jurisdiction to include tax matters in the year 1992.²¹³³ An Amending Order further defining the OIC's jurisdiction followed on March 26, 1997.²¹³⁴

Also on March 18, 1997, Filan, Colbenson, Lange, and the CID Director for the region including Texas met with Klotz and Needle in Washington, D.C.²¹³⁵

²¹²⁸ OIC Interview Filan 4/18/00 at 4-5.

²¹²⁹ OIC Memorandum re IRS Chief Counsel Contacts 3/13-14/97 at 2-4.

²¹³⁰ *Id.* at 1.

²¹³¹ OIC staff notes re Chief Counsel Contacts 3/13-14/97 at 4.

²¹³² *Id.* at 5.

²¹³³ GJ 00-001 Ex. 91.

²¹³⁴ GJ 00-001 Ex. 92.

²¹³⁵ GJ 97-1 Tr. Colbenson 4/9/98 at 136, 138.

Finkelstein did not attend the meeting.²¹³⁶ In compliance with Klotz's earlier instruction regarding the limited purpose for placing the case in supplemental status, CID did not conduct any further investigation on the Cisneros case before meeting.

Filan led the discussion at the meeting and asserted that the Cisneros case was a very simple tax case.²¹³⁷ He said that there was a significant understatement of income and that Cisneros, by virtue of his close, day-to-day involvement in his businesses, was aware of the unreported income.²¹³⁸ Filan also pointed out that Cisneros had told the IRS that he was "meticulous, scrupulous, and uncompromising" in making sure everything was reported on his tax returns.²¹³⁹ Filan reiterated that Cisneros could not have believed his returns were true and correct because, even without accounting for the Medlar money, Cisneros was paying out more to his wife, college tuition, and annuities than he was reporting as income.²¹⁴⁰

To refute the reliance-on-accountant defense, Lange noted that Cisneros had lied to Hernandez by leading him to believe that all income was being deposited.²¹⁴¹ She also pointed out that the system of depositing all income was the only accounting system Cisneros used, and that the green ledgers were used only to forecast projected income.²¹⁴² CID further stated to Klotz and Needle that Cisneros had rebuffed

²¹³⁶ *Id.* at 138-39.

²¹³⁷ GJ 97-1 Tr. Colbenson 4/9/98 at 139; GJ 97-1 Ex. 47 at 1; GJ 00-001 Exs. 97; 230 (Needle notes at 1).

²¹³⁸ GJ 97-1 Tr. Colbenson 4/9/98 at 139; GJ 97-1 Ex. 47 at 2; GJ 00-001 Exs. 97; 230 (Needle notes at 1).

²¹³⁹ GJ 00-001 Exs. 97 at 3; 230 (Needle notes at 1).

²¹⁴⁰ GJ 97-1 Ex. 47 at 2; GJ 00-001 Ex. 97 at 3, 4; GJ 00-001 Tr. Needle 6/19/01 at 113.

²¹⁴¹ GJ 97-1 Ex. 47 at 4.

²¹⁴² GJ 97-1 Ex. 47 at 4.

Hernandez's efforts to straighten out Cisneros's bookkeeping system.²¹⁴³ Moreover, Filan cited portions of the Medlar tapes and other evidence that demonstrated Hernandez did not know about the money going to Medlar.²¹⁴⁴

Filan also told Klotz and Needle that Cisneros's employees were complicit in hiding his payments to Medlar and that, consequently, it was important to bring some of his employees before the grand jury.²¹⁴⁵ Furthermore, CID rebutted the allegation that one of the agents had misrepresented herself as a collection officer to Hernandez.²¹⁴⁶

CID also addressed ACC's assertion that Cisneros overpaid his taxes in 1992 as a result of Hernandez classifying estimated tax payments as a Schedule A itemized deduction.²¹⁴⁷ In the March 7, 1997, Supplemental Status Memorandum, ACC had opined that Hernandez, in preparing Cisneros's 1992 returns, had reported Cisneros's substantial 1992 estimated tax payments as a "Schedule A itemized deduction (thereby causing Cisneros to grossly overpay his tax on the return as filed)."²¹⁴⁸ At the March 18 meeting, CID pointed out to Klotz and Needle that this conclusion was wrong; the deduction actually represented payments Cisneros made in 1992 for his 1990 and 1991 federal income taxes – not estimated tax payments.²¹⁴⁹

The subject of ACC's contacts with DOJ was discussed at the March 18 meeting. Filan asked Klotz and Needle to disclose any contacts that ACC previously

²¹⁴³ GJ 97-1 Ex. 47 at 4; GJ 00-001 Ex. 97 at 5.

²¹⁴⁴ GJ 97-1 Ex. 47 at 1; GJ 00-001 Exs. 97 at 5; 230 (Needle notes at 2).

²¹⁴⁵ GJ 97-1 Tr. Colbenson 4/9/98 at 139-40; GJ 97-1 Ex. 47 at 1, 6; GJ 00-001 Exs. 97 at 3; 230 at 3 (Needle notes at 3).

²¹⁴⁶ GJ 97-1 Ex. 47 at 8; GJ 00-001 Ex. 230 (Needle notes at 4).

²¹⁴⁷ GJ 00-001 Ex. 230 (Needle notes at 3).

²¹⁴⁸ GJ 00-001 Ex. 89 at 2-3.

²¹⁴⁹ GJ 00-001 Ex. 230 (Needle notes at 3); Letter from Lange to OIC 5/30/97 at 7; Lange notes 3/20/97.

had had with DOJ concerning the Cisneros case. Filan referred to Macdonald's March 11, 1997 telephone conversation with Krysa, in which Krysa told Macdonald that CID was "dragging its feet" so that the OIC could get jurisdiction over the tax case."²¹⁵⁰ According to Colbenson, Klotz informed CID that he had initially talked with Krysa and that ACC had received a package from DOJ that Finkelstein, once he opened it, realized he should not look at;²¹⁵¹ in response, Klotz, Finkelstein, and Needle informed DOJ that ACC could not tell DOJ anything about the tax case.²¹⁵² Klotz noted that ACC had "absolutely not" given any information to DOJ about the tax case and that Krysa had "nothing."²¹⁵³

In addition to asking about ACC's communications with DOJ during the Cisneros review, Filan pointed out to Klotz that it was normal procedure for IRS counsel to document any contacts with defense counsel. Filan asked Klotz to inform CID of any discussions with Cisneros's counsel and to provide CID with the documentation of such discussions. Klotz told CID that, other than the February 12, 1997 defense conference and the conversation setting that date, which CID already knew about, there had been no contacts with defense counsel.²¹⁵⁴

Filan's notes of the meeting indicate that Klotz stated that he did not have a problem with CID's income computations and acknowledged that there was evidence in the case.²¹⁵⁵ According to Colbenson, Klotz admitted there was unreported income²¹⁵⁶ and agreed that the witnesses in the case knew more and needed to be put

²¹⁵⁰ OIC Interview Report Filan 4/18/00 at 6.

²¹⁵¹ GJ 97-1 Tr. Colbenson 4/9/98 at 142-43.

²¹⁵² GJ 97-1 Ex. 47 at 7-8; OIC Interview Report Filan 4/18/00 at 6.

²¹⁵³ GJ 97-1 Ex. 47 at 7-8; OIC Interview Report Filan 4/18/00 at 6.

²¹⁵⁴ OIC Interview Filan 4/18/00 at 6; GJ 00-001 Ex. 96.

²¹⁵⁵ GJ 00-001 Ex. 97 at 7.

²¹⁵⁶ GJ 97-1 Ex. 47 at 2.

before a grand jury.²¹⁵⁷ But Colbenson also testified that, although Klotz said that he would consider the information that CID provided him during the meeting, “he seemed very closed to any suggestions.”²¹⁵⁸

Colbenson further testified that Klotz was doubtful that Cisneros could be prosecuted and indicated that ACC was most likely going to decline the case.²¹⁵⁹ CID then requested that, in the event that the case was declined, ACC not inform Cisneros of its decision until CID had a chance to protest.²¹⁶⁰ According to Filan, Klotz agreed.²¹⁶¹

Two days later, on March 20, 1997, Lange and Needle had a telephone conversation, during which Needle again claimed that the SAR did not give Cisneros credit for estimated tax payments in 1992.²¹⁶² Lange responded that the payments were for delinquent tax payments from prior years, as had been explained to ACC just two days before.²¹⁶³ The same day, March 20, 1997, Lange faxed to Klotz and Needle copies of Cisneros’s checks for these payments.²¹⁶⁴

The information that CID conveyed to Klotz and Needle in the March 18 meeting and the follow-up call had no effect on ACC’s ultimate decision. Klotz testified that, after the meeting ended, he spoke with Finkelstein.²¹⁶⁵ Finkelstein

²¹⁵⁷ *Id.* at 6.

²¹⁵⁸ GJ 97-1 Tr. Colbenson 4/9/98 at 141.

²¹⁵⁹ *Id.* at 151.

²¹⁶⁰ GJ 97-1 Ex. 47 at 8; GJ 00-001 Ex. 230 (Needle notes at 4).

²¹⁶¹ GJ 00-001 Ex. 96.

²¹⁶² Letter from Lange to OIC 5/30/97 at 7.

²¹⁶³ *Id.*

²¹⁶⁴ GJ 00-001 Ex. 234.

²¹⁶⁵ GJ 00-001 Tr. Klotz 3/27/01 at 14.

asked Klotz if there was anything “new” had come up in the meeting.²¹⁶⁶ Klotz told Finkelstein “not really.”²¹⁶⁷ Finkelstein testified that Klotz told him that CID had presented no new information.²¹⁶⁸

Klotz did concede before the grand jury, though, that CID had presented information to ACC during the meeting that ACC “had not had previously,”²¹⁶⁹ concerning the erroneous 1992 Schedule A deduction and Lange’s alleged misrepresentation of herself as a revenue officer.²¹⁷⁰ Klotz further conceded he was not in a position to dispute that, during the meeting, CID had presented evidence demonstrating that Cisneros could not have believed his returns were correct when he signed them, based on amounts he spent on his wife, his children’s tuition, and his Lincoln Benefit annuity before including the monies he paid to Medlar – independent of whether the inaccurate returns could be attributed to Hernandez.²¹⁷¹

18. The Declination Memorandum

On March 27, 1997, ACC issued a formal Declination Memorandum, declining to refer the Cisneros tax case for either prosecution or grand jury investigation.²¹⁷² The memorandum bore Finkelstein’s signature stamp, but Finkelstein attributed the decision to Klotz. According to Finkelstein, after Klotz told him that no new information had come out of the March 18 meeting with CID, he responded, “if

²¹⁶⁶ *Id.* at 14.

²¹⁶⁷ *Id.* at 14.

²¹⁶⁸ GJ 00-001 Tr. Finkelstein 11/14/00 at 99, 108-10, 115.

²¹⁶⁹ GJ 00-001 Tr. Klotz 3/27/01 at 24-26.

²¹⁷⁰ *Id.* at 18-25.

²¹⁷¹ *Id.* at 48-65.

²¹⁷² GJ 00-001 Ex. 93.

there's nothing that's changed your mind, if you're still strong on decline, write it up."²¹⁷³

Klotz, on the other hand, testified that Finkelstein "made his decision and I was just going to put it on paper."²¹⁷⁴ Klotz said that Finkelstein had editorial authority and control over the memorandum and that he made additions and deletions to the document "until it was what [Finkelstein] wanted."²¹⁷⁵ Needle testified that Klotz was only a "scribe," putting Finkelstein's ultimate determinations to paper.²¹⁷⁶

The Declination Memorandum concluded that:

[T]he recommended offenses cannot be proven beyond a reasonable doubt and that there is no reasonable probability of conviction.

• • •

Accordingly, we decline to refer this case to the Tax Division, Department of Justice, for criminal prosecution and instead, recommend that the criminal aspects of this case be closed.²¹⁷⁷

ACC deemed willfulness the "major concern" in the case.²¹⁷⁸ **[REDACTED PURSUANT TO COURT ORDER]**²¹⁷⁹ Cisneros's ability

²¹⁷³ GJ 00-001 Tr. Finkelstein 11/14/00 at 115.

²¹⁷⁴ GJ 00-001 Tr. Klotz 4/24/01 at 97.

²¹⁷⁵ GJ 00-001 Tr. Klotz 2/6/01 at 88-90, 93.

²¹⁷⁶ GJ 00-001 Tr. Needle 6/19/01 at 117.

²¹⁷⁷ GJ 00-001 Ex. 93 at 10.

²¹⁷⁸ *Id.* at 3.

²¹⁷⁹ *Id.* at 4.

to muster character witnesses,²¹⁸⁰ and the IRS's disclosure of information to the OIC as additional problems that could further impede prosecution.²¹⁸¹

Finkelstein also identified, as a factor favoring declination, DOJ's decision to decline to expand the OIC's jurisdiction to embrace tax offenses in two out of three years for which expansion was requested²¹⁸² – a decision for which, Finkelstein testified, DOJ might have used him as a “scapegoat” or “cover.”²¹⁸³ The Declination Memorandum did not mention this factor.

The Declination Memorandum also did not mention several points that had been flagged in the March 7, 1997 Supplemental Status Memorandum. These points included the following, all of which had been discussed at the March 18 meeting:

- ACC's conclusion that Cisneros had no way of knowing that the returns contained significant errors;
- defense counsel's claim that one of the CID agents, while misrepresenting herself as a collection officer to Hernandez, had obtained information from him concerning Cisneros's 1993 return; and
- the claim that Cisneros had overpaid his 1992 taxes because Hernandez had incorrectly reported Cisneros's substantial 1992 estimated tax payments as a Schedule A itemized deduction on Cisneros's 1992 return. (The Declination Memorandum characterized this deduction as a mistake by Hernandez that was “amateurish and totally inexcusable,” but did not note that it actually lowered Cisneros's declared taxable income and tax bill.²¹⁸⁴)

²¹⁸⁰ *Id.* at 9.

²¹⁸¹ *Id.* at 9.

²¹⁸² GJ 00-001 Ex. 216A; GJ 00-001 Tr. Finkelstein 11/30/00 at 47-48.

²¹⁸³ GJ 00-001 Tr. Finkelstein 9/28/00 at 71-77.

²¹⁸⁴ GJ 00-001 Ex. 93 at 6.

Like the Supplemental Status Memorandum, the Declination Memorandum laid out the four elements of 26 U.S.C. § 7206(1) that the Government would have to prove at trial:

- 1) that he had subscribed each return that was false as to a material matter;
- 2) that each return had contained a written declaration that it was made under the penalties of perjury;
- 3) that he had not believed each return to be true and correct as to every material matter;
- 4) that he had falsely subscribed each return willfully with the specific intent to violate the law.²¹⁸⁵

The Declination Memorandum acknowledged that the Government could prove the first two elements and identified the fourth element, willfulness, as ACC's major concern with the case.²¹⁸⁶ The Declination Memorandum simply failed to address the third element – whether Cisneros knew his returns were false – and how this element influenced the element of willfulness. Klotz conceded to the grand jury that ACC did not analyze the third element of § 7206(1) and characterized this failure as “an oversight.”²¹⁸⁷

Thus, by the time it issued the Declination Memorandum, ACC (like Cisneros's defense counsel) no longer maintained that the IRS could not prove that Cisneros had failed to declare income. ACC also no longer took the position that CID's method of proving income – the bank deposits method instead of the specific items method, which had consumed so much of the debate between ACC and CID – was an impediment to prosecution.

²¹⁸⁵ GJ 00-001 Ex. 93 at 2.

²¹⁸⁶ *Id.*

²¹⁸⁷ GJ 00-001 Tr. Klotz 3/27/01 at 124-27.

Instead, ACC declined to refer the Cisneros case because it accepted the reliance-on-accountant defense advocated by Cisneros's attorneys as disproving willfulness. This defense proceeded on the assumption that, if a non-deposited item of income could be "found" in Cisneros's business records, either in a 1099 form or Arce-Garcia's green ledgers, then Hernandez should have known about it and should have included it as income in Cisneros's tax returns.²¹⁸⁸ Thus, according to ACC, it was Hernandez's fault – not Cisneros's – that the returns were false.²¹⁸⁹

In accepting this defense, ACC did not address certain key evidentiary facts. It ignored evidence of the information that actually was available to Hernandez when he prepared Cisneros's returns.²¹⁹⁰ It overlooked evidence that Cisneros and his employees took steps to mislead Hernandez and failed to comply with his requests for information, thereby hindering him from setting up an effective accounting system.²¹⁹¹

For example, the Declination Memorandum stated that all evidence of income had been available to Hernandez.²¹⁹² However, according to ACC's notes of the case, ACC knew from CID that Hernandez did not have access to critical records, including the green ledgers and numerous 1099s, and did not know that Cisneros was depositing income directly into his household account.²¹⁹³

²¹⁸⁸ GJ 00-001 Tr. Finkelstein 11/14/00 at 67; GJ 00-001 Tr. Finkelstein 11/30/00 at 106-08.

²¹⁸⁹ GJ 00-001 Ex. 93 at 7-10; GJ 00-001 Tr. Finkelstein 11/30/00 at 107-08.

²¹⁹⁰ GJ 00-001 Exs. 97; 20 at 24-25.

²¹⁹¹ GJ 00-001 Exs. 20 at 15-16; 320.

²¹⁹² GJ 00-001 Ex. 93 at 10.

²¹⁹³ GJ 00-001 Ex. 293 (Needle notes 9-14); GJ 00-001 Tr. Needle 6/5/01 at 71-94.

Additionally, the Declination Memorandum claimed that Hernandez prepared Cisneros's returns on the basis of 1099 forms.²¹⁹⁴ However, evidence in the SAR as well as statements from Cisneros's defense counsel to ACC indicated that Hernandez used a profit and loss statement – which he had derived from Cisneros's bank statements – to prepare the 1992 return.²¹⁹⁵ When asked about this in the grand jury, Needle could not explain how what he, Finkelstein, and Klotz should have recognized as an obvious error had made its way into the Declination Memorandum.²¹⁹⁶

The Declination Memorandum's principal conclusion regarding willfulness was that “[Cisneros] entrusted his office management to a number of employees without realizing they were not fulfilling his obligation to prepare and file complete and accurate returns.”²¹⁹⁷ This conclusion embraces the reliance-on-accountant defense; Macdonald explained the limits of this defense to the grand jury as follows:

[W]hat the government tends to say in those cases is you have to one, prove that the taxpayer indeed gave access to all the books and records to the accountant, he has to talk to the accountant. If the accountant asks him questions, you have to be forthwith, you can't mislead your accountant.

And even if indeed you go through all that exercise and you get a return that you know on its face can't be right and you sign it, it's no defense to you that it was prepared by someone who might be an idiot.²¹⁹⁸

Finkelstein in his grand jury testimony similarly acknowledged that a taxpayer who knows that his returns are inaccurate cannot escape liability by saying that his

²¹⁹⁴ GJ 00-001 Ex. 93 at 7.

²¹⁹⁵ GJ 00-001 Tr. Needle 6/7/01 at 50-51; GJ 00-001 Exs. 20, 75.

²¹⁹⁶ GJ 00-001 Tr. Needle 6/19/01 at 122-24.

²¹⁹⁷ GJ 00-001 Ex. 97 at 3.

²¹⁹⁸ GJ 00-001 Tr. Macdonald 8/10/00 at 192.

accountant prepared the returns.²¹⁹⁹ Before the grand jury, Klotz was asked if, knowing one's returns were false, a taxpayer could sign the returns, claim reasonable reliance on the tax preparer, and thereby immunize oneself from criminal liability. He responded that "[t]here has to be a reasonable reliance and we felt that there was. We felt that we could not disprove that."²²⁰⁰

The Declination Memorandum notably failed to deal with the evidence indicating that Cisneros knew that his returns were false. There was in fact a substantial body of compelling evidence within the SAR and its exhibits that demonstrated Cisneros must have known that his returns were not correct. The Declination Memorandum ignored this evidence.

District Counsel had informed ACC in Eagan's memorandum accompanying the Cisneros case file that Cisneros "could not have believed that those returns correctly reported his gross receipts."²²⁰¹ The memorandum supported this contention by comparing the amounts Cisneros gave to Medlar and his wife in both 1991 and 1992 to what he reported as Schedule C income (business income) on his tax returns.²²⁰² All of the figures used were accompanied by citations to exhibits to the SAR.²²⁰³ The tax returns themselves were exhibits to the SAR.²²⁰⁴

Likewise, the SAR explained that, when compared to his reported taxable income, Cisneros's 1991 and 1992 payments to Medlar left him with little money for

²¹⁹⁹ GJ 00-001 Tr. Finkelstein 12/5/00 at 111-12.

²²⁰⁰ GJ 00-001 Tr. Klotz 3/27/01 at 120-21.

²²⁰¹ GJ 00-001 Ex. 38 at 3.

²²⁰² GJ 00-001 Ex. 38 at 1.

²²⁰³ GJ 00-001 Ex. 38 at 1.

²²⁰⁴ GJ 00-01 Ex. 20 at 58.

other expenses.²²⁰⁵ Klotz took note of this passage in the SAR as he reviewed the Cisneros case.²²⁰⁶

During the March 18, 1997 meeting with Klotz and Needle, Filan specifically addressed the Supplemental Status Memorandum's contention that Cisneros had no way of knowing that his tax returns contained significant errors. Specifically, Filan told ACC, "You draw the conclusion that he had no way of knowing that the returns were wrong. That's a bunch of bunk."²²⁰⁷ Filan also informed ACC that – without even considering Cisneros's payments to Medlar – his payments to his wife, to schools for tuition, and to his Lincoln Benefit annuity together exceeded his taxable income.²²⁰⁸ Confronted with these statements during his grand jury testimony, Needle conceded that "based on that fact and that fact alone" someone could come to the conclusion that Cisneros could not have believed that his tax returns were accurate.²²⁰⁹

With respect to whether Cisneros had any reason to believe that his returns were false, Finkelstein testified that Klotz either came to a contrary conclusion or "chose not to take this issue on."²²¹⁰ Finkelstein continued: "Could we have made a mistake? Maybe we did. I don't think we did. . . . Did he mess up? I don't know. . . . we may have made a mistake on that element, I don't know."²²¹¹

Klotz admitted that, if one compared Cisneros's expenditures on his wife and Medlar to his taxable income as declared on his returns, the expenditures far exceeded

²²⁰⁵ GJ 00-001 Ex. 20 at 50-51.

²²⁰⁶ GJ 00-001 Ex. 293 (Klotz notes at 26).

²²⁰⁷ GJ 00-001 Ex. 97 at 3.

²²⁰⁸ *Id.* at 4.

²²⁰⁹ GJ 00-001 Tr. Needle 6/19/01 at 115-16.

²²¹⁰ GJ 00-001 Tr. Finkelstein 12/5/00 at 119.

²²¹¹ *Id.* at 122-23.

his taxable income.²²¹² Klotz testified, however, that ACC chose to rely on Needle's analysis, and that this analysis did not show that Cisneros's expenditures on Medlar and his wife far exceeded his reported income.²²¹³

Klotz acknowledged that District Counsel had told ACC in Eagan's memorandum that Cisneros could not have believed his returns to be true and accurate because his expenditures on Medlar and his family exceeded his taxable income for 1991 and 1992.²²¹⁴ He also acknowledged that the SAR substantiated Eagan's analysis.²²¹⁵ However, he said he did not accept this analysis. He argued that District Counsel at that time "had not completely reviewed the case."²²¹⁶ In particular, he noted that CID was unaware of Hernandez's role, which he characterized as "one of the most critical and in my opinion compelling and sort of determinative factor[s] as to why that would not have been correct"²²¹⁷

During their grand jury appearances, the OIC showed Finkelstein, Klotz, and Needle charts prepared by OIC that summarized declared income and expenditure figures taken from the SAR and its exhibits, showing that Cisneros's expenditures greatly exceeded his declared income.²²¹⁸ The charts made this showing on the basis of information provided or generated by Hernandez, and alternatively on the basis of information not attributable to Hernandez, such as third party records, witness statements, and testimony.²²¹⁹ Information contained in the SAR and its exhibits demonstrated that Cisneros's expenditures in 1991 and 1992 greatly exceeded the income he had reported in his tax returns. In 1991, Cisneros reported taxable income

²²¹² GJ 00-001 Tr. Klotz 3/27/01 at 78-81.

²²¹³ *Id.* at 121-23.

²²¹⁴ GJ 00-001 Ex. 38 at 2; GJ 00-001 Tr. Klotz 3/27/01 at 73-74.

²²¹⁵ GJ 00-001 Ex. 20 at 15, 40; GJ 00-001 Tr. Klotz 3/27/01 at 78-81.

²²¹⁶ *Id.* at 77-78.

²²¹⁷ *Id.* at 77-78.

²²¹⁸ GJ 00-001 Exs. 241; 294.

²²¹⁹ GJ 00-001 Exs. 241; 294.

of \$105,509, and his personal expenditures exceeded \$143,000, of which about \$73,000 he paid to Medlar.²²²⁰ In 1992, Cisneros reported taxable income of \$68,599, and his personal expenditures exceeded \$234,000, of which about \$68,000 he paid to Medlar.²²²¹

Finkelstein testified that the figures were never presented to ACC “in this way,”²²²² but that they gave him “a pause for concern” that would have caused him to raise the issue with Klotz:

I would have said hey, this guy is in over his head, he’s spending \$200,000 in one year and between \$60,000 and \$100,000, depending on how you analyze it, in another year, more than he’s reporting, get back to me. What do we say about that and I’d have to find out what he has to say about that. I don’t know. We’re saying what if on something that I didn’t have and maybe it was in [the] file and we were too foolish to find it, I don’t know.²²²³

Finkelstein admitted to the grand jury that “a fair argument could be made” that there was no way that Cisneros could have believed that his returns were accurate as filed, and finally concluded that “[w]e could have been wrong.”²²²⁴

When he was confronted with these figures, Klotz testified that he did not have the “technical acumen to do an accounting analysis” and claimed that he relied on Needle’s calculations.²²²⁵ Klotz also testified:

²²²⁰ GJ 00-001 Exs. 241 at 1; 294 at 2-3.

²²²¹ GJ 00-001 Exs. 241 at 2-3; 294 at 2-3.

²²²² GJ 00-001 Tr. Finkelstein 12/5/00 at 144. Finkelstein was shown GJ 00-001 Ex. 241.

²²²³ *Id.* at 144-45.

²²²⁴ *Id.* at 143, 146.

²²²⁵ GJ 00-001 Tr. Klotz 3/27/01 at 118-19. Klotz was shown GJ 00-001
(continued...)

This is a very nice chart. This chart was not made available to us. If it was, maybe – . . . Well, we didn't do it.²²²⁶

Nevertheless, Klotz acknowledged that all of the information needed to conduct this type of expenditures analysis had been available and, in some instances, reiterated to ACC during its review of the case.²²²⁷

Needle testified that he had never compared Cisneros's reported taxable income to his expenditures because no one at ACC had directed him to do so.²²²⁸ However, when presented with these figures, Needle conceded that all the information necessary for an analysis comparing income and expenditures was contained in the SAR and its exhibits.²²²⁹

The OIC showed the same information to Finkelstein's boss Paris, who acknowledged that all of the information was available to ACC during its review and that Eagan had pointed it out in his transmittal memorandum.²²³⁰ Paris told the OIC that the expenditures analysis would have had an impact on the third and fourth elements of 26 U.S.C. § 7206(1) – Cisneros's knowledge of the failure to declare income and his willfulness – and that ACC had performed poorly in not addressing whether Cisneros knew that his returns were false.²²³¹ However, according to Paris,

²²²⁵(...continued)
Ex. 294.

²²²⁶ *Id.* at 119.

²²²⁷ *Id.* at 102-05.

²²²⁸ GJ 00-001 Tr. Needle 6/19/01 at 79-81.

²²²⁹ *Id.* at 88. Needle was shown GJ 00-001 Ex. 294.

²²³⁰ OIC Interview Notes Paris 7/27/01 at 9.

²²³¹ *Id.* at 9.

Finkelstein never mentioned this analysis in his briefings and instead focused on the information that was contained in Cisneros's various accounting systems.²²³²

The Declination Memorandum thus ignored the evidence of Cisneros's willfulness that had been presented to ACC on multiple occasions orally and in writing, including Eagan's early analysis of the case that Finkelstein and Klotz had received back in mid-January 1997. Eagan's transmittal memorandum demonstrated that Cisneros could not have believed that his tax returns were accurate as filed because he spent more on Medlar and his personal and household expenses than he reported as income.²²³³ Finkelstein had expressly solicited the results of Eagan's review when he informed District Counsel that he was transferring the case to ACC.²²³⁴ However, when Finkelstein was asked how ACC had used Eagan's analysis, he replied: "I'm sure I've seen it before, but did I read it, did I focus on it, did I think about it, did I debate it? I don't think so."²²³⁵ Finkelstein testified that he had "no idea" whether Eagan's analysis was even considered by his office.²²³⁶

Finkelstein appears to have dismissed Eagan's analysis from the outset. Klotz testified that he and Finkelstein discussed Eagan's memorandum when it arrived.²²³⁷ According to Klotz, Finkelstein said it was not a complete analysis and that District Counsel didn't really understand the case.²²³⁸ After this discussion, Klotz testified "the document just sort of – I guess it just sort of faded away. I don't remember going back to the document."²²³⁹ Needle, the ACC attorney Finkelstein had assigned

²²³² *Id.* at 9.

²²³³ GJ 00-001 Ex. 38.

²²³⁴ GJ 00-001 Ex. 339B at 6.

²²³⁵ GJ 00-001 Tr. Finkelstein 12/5/00 at 118.

²²³⁶ *Id.* at 119.

²²³⁷ GJ 00-001 Tr. Klotz 3/27/01 at 81.

²²³⁸ *Id.* at 69-71.

²²³⁹ *Id.* at 70.

to perform the computation analysis, testified that Finkelstein and Klotz had never made Eagan's analysis available to him.²²⁴⁰

The Declination Memorandum also does not address the fact that the reliance-on-accountant defense contradicted Cisneros's prior statements to the IRS that he was "always very careful to review his tax records"²²⁴¹ and that he was "meticulous, scrupulous, and uncompromising in making sure that everything was reported for taxes."²²⁴²

Some of the other rationales the Declination Memorandum gave for its conclusions do not seem to hold up under close scrutiny. The memorandum flagged CID's disclosure of information to the OIC as a possible problem,²²⁴³ but Paris informed the OIC that accusations of improper disclosures do not warrant declining to refer a case for prosecution.²²⁴⁴ Although the memorandum also notes **[REDACTED PURSUANT TO COURT ORDER]** as a problem,²²⁴⁵ it does not assign to the **[REDACTED PURSUANT TO COURT ORDER]** the significance that Finkelstein and Klotz gave it in their grand jury testimony. In later grand jury testimony, none of the ACC officials could even pinpoint when they first learned about the **[REDACTED PURSUANT TO COURT ORDER]**.²²⁴⁶

As in other areas, the ACC officials could not agree as to who was responsible for the analysis found in the Declination Memorandum. In the taped conversation with District Counsel, Finkelstein had foreshadowed the analysis used in the Declination Memorandum when he expressed "curiosity" about whether a 1099 form

²²⁴⁰ GJ 00-001 Tr. Needle 6/19/01 at 74-75, 109-11.

²²⁴¹ GJ 00-001 Exs. 20 at 14; 28.

²²⁴² GJ 00-001 Exs. 20 at 14; 29 at 6.

²²⁴³ *Id.* at 9.

²²⁴⁴ OIC Interview Notes Paris 7/18/01 at 11-12.

²²⁴⁵ GJ 00-001 Ex. 93 at 4, 10.

²²⁴⁶ See text accompanying footnotes 2018 to 2037.

had been issued for Cisneros's income checks that had not been deposited.²²⁴⁷ However, Finkelstein attributed the formulation of the analysis to Klotz and Needle:

Needle and Klotz, who were analyzing this thing, started to focus in on the non-deposited items, they came to me and said those non-deposited items you could find in the 1099s or the green books and I said oh, really I did not test [Needle]. I did not ask him to. He found them. I don't know how he found them.²²⁴⁸

In contrast, Needle testified that Finkelstein devised the analysis and directed him to compare the figures deemed as unreported income in the SAR against the 1099s issued to Cisneros and Arce-Garcia's green ledgers – the same analysis suggested by Cisneros's counsel at the defense conference.²²⁴⁹

Finkelstein testified to the grand jury that ACC left unanswered a number of factual issues originally raised by defense counsel. Among those issues were the authenticity of the Medlar tapes,²²⁵⁰ Medlar's competency and value as a witness,²²⁵¹ whether Cisneros knew that some of his payments to the IRS in 1992 were intended for tax liabilities in prior years,²²⁵² the possibility that Hernandez's errors could have been benign mistakes,²²⁵³ whether Cisneros knew the tax implications of his Lincoln Benefit Life contributions and the liquidation of his Mass Mutual account,²²⁵⁴ whether Cisneros knew what his true income was in 1991 and 1992 versus what he reported

²²⁴⁷ GJ 00-001 Ex. 339B at 5.

²²⁴⁸ GJ 00-001 Tr. Finkelstein 11/30/00 at 106-07.

²²⁴⁹ GJ 00-001 Tr. Needle 5/1/01 at 107-15.

²²⁵⁰ GJ 00-001 Tr. Finkelstein 11/28/00 at 51-52.

²²⁵¹ *Id.* at 61-62.

²²⁵² *Id.* at 105.

²²⁵³ *Id.* at 106.

²²⁵⁴ *Id.* at 110, 128, 134, 157-60.

on his tax returns,²²⁵⁵ and whether Hernandez had had access to all of Cisneros's books and business records.²²⁵⁶ In fact, though, the conclusions of the Declination Memorandum were consistent with defense counsel's positions on many of these issues.²²⁵⁷

Needle also testified that a number of issues were left unresolved following ACC's March 18, 1997 meeting with CID. He defined an "unresolved" issue as one that CID and ACC were "not able to reconcile . . . and that our office's position goes forward, notwithstanding CI[D]'s position."²²⁵⁸ Among the unresolved issues were whether the undeposited income could be tracked using the 1099s and green ledgers,²²⁵⁹ the credibility of the Medlar tapes,²²⁶⁰ and willfulness.²²⁶¹ According to Needle, the only issue that ACC and CID agreed on after the March 18, 1997 meeting was that the computations in the SAR were accurate.²²⁶²

However, Needle acknowledged that there ways to resolve such matters. Needle testified that one way to resolve the outstanding issues would have been to

²²⁵⁵ GJ 00-001 Tr. Finkelstein 11/30/00 at 43-44.

²²⁵⁶ GJ 00-001 Tr. Finkelstein 12/5/00 at 26.

²²⁵⁷ See GJ 00-001 Ex. 75 at 2-3, 6; GJ 00-001 Ex. 93 at 8-9 (authenticity of tapes); GJ 00-001 Ex. 75 at 6; GJ 00-001 Ex. 93 at 6 (mistaken deduction of estimated tax payments); GJ 00-001 Ex. 75 at 7-8; GJ 00-001 Ex. 93 at 5-6 (Hernandez's errors as benign mistakes); GJ 00-001 Ex. 75 at 6; GJ 00-001 Ex. 93 at 6-7 (Cisneros's knowledge of tax implications of Lincoln Benefit and Mass Mutual transactions); GJ 00-001 Ex. 75 at 7; GJ 00-001 Ex. 93 at 10 (Hernandez's access to Cisneros's financial information).

²²⁵⁸ GJ 00-001 Tr. Needle 6/7/01 at 81.

²²⁵⁹ *Id.* at 82-84.

²²⁶⁰ *Id.* at 85.

²²⁶¹ *Id.* at 84, 86, 95-98.

²²⁶² *Id.* at 87.

authorize a supplemental investigation during which CID could have gathered more information.²²⁶³ Another was to conduct a grand jury investigation.²²⁶⁴

Finkelstein testified that he believed the Cisneros case should have been worked as a grand jury matter.²²⁶⁵ He cited the disconnect between the returns and Cisneros's real income, Cisneros's Cabinet status, the volume of bank records involved, and the fact that Cisneros's employees had been interviewed with Cisneros's defense counsel present as reasons the investigation would have been "neater" if pursued before a grand jury rather than administratively.²²⁶⁶ According to Finkelstein, the presence of a prosecutor, the more thorough nature of witness testimony, and the fact that a transcript is produced were just some of the "tremendous benefits" of using a grand jury.²²⁶⁷

Other IRS officials outlined the same options. Paris told the OIC that the discrepancy between Cisneros's income and his expenditures would have warranted further investigation, including talking to CID or referring the case for grand jury investigation.²²⁶⁸ Hubbard testified that "[y]ou don't kill a case because there's a problem, you try to resolve the problem."²²⁶⁹ The common response to problems with an investigation that has reached the review stage, according to Hubbard, is to put it on supplemental status to resolve those problems, and in some cases to refer it for grand jury investigation.²²⁷⁰

²²⁶³ *Id.* at 101-02.

²²⁶⁴ *Id.* at 98-101.

²²⁶⁵ GJ 00-001 Tr. Finkelstein 11/2/00 at 52.

²²⁶⁶ *Id.* at 52-54.

²²⁶⁷ *Id.* at 60-62.

²²⁶⁸ OIC Interview Notes Paris 7/18/01 at 7.

²²⁶⁹ GJ 00-001 Tr. Hubbard 9/7/00 at 97.

²²⁷⁰ GJ 00-001 Tr. Hubbard 9/7/00 at 94-97; GJ 00-001 Ex. 173 (CCDM (31)550); CCDM (31)580.

The Declination Memorandum, unlike the Supplemental Status Memorandum, did address whether the case should be referred to DOJ with a recommendation that it be investigated in front of a grand jury before a prosecution decision was made. ACC declined to make a grand jury referral, stating:

[W]e considered the possibility of forwarding this matter to the Tax Division with a prosecution recommendation predicated upon taking Hernandez, Arce-Garcia and Alfred Ramirez before the grand jury to ascertain whether their testimony would be different in that atmosphere as compared to the setting of their prior testimony before special agents and one of Cisneros' attorney [*sic*]. We concluded there is no reason to believe that the witnesses will change their testimony to the extent that it will establish that Cisneros directed them to not record income or to conceal income from Hernandez.²²⁷¹

When asked about the grand jury option for the Cisneros case, Finkelstein testified that:

[H]ad it come to us in its much earlier stages with a request to conduct a grand jury investigation, we would have said yes because there was clearly – you've got a false return. There is no doubt in my mind that that return was bad and it needed to be investigated. So a request for a grand jury would have gone through the system very quickly So we had many discussions about had this case come here a year earlier, we would have said yes to the investigation and then we would have been out of the way. The policy implications of that bothered us because in essence we're telling the agents by doing it right you suffer and that's a terrible result. . . . Because we tell our agents that it's better for the organization if the investigation is done solely within the IRS where the IRS controls the investigation, but the reality is by going that way the agents thus are bound by [ACC's] review.²²⁷²

²²⁷¹ GJ 00-001 Ex. 93 at 10.

²²⁷² GJ 00-001 Tr. Finkelstein 8/31/00 at 50-51.

Regarding the decision not to refer the matter to a grand jury, Finkelstein and Klotz again pointed to each other. Finkelstein testified that Klotz recommended that the case be declined and not forwarded to a grand jury,²²⁷³ and that he (Finkelstein) was just “along for the ride.”²²⁷⁴ Klotz, in contrast, testified that he had told Finkelstein that “one way we can do this is to sen[d] it forth for grand jury questioning of these individuals, with subsequent determination of whether prosecution would be warranted.”²²⁷⁵ He continued:

I remember saying to [Finkelstein] that look, you’ve got to make up your mind. How do you want this case to come out, are we going to just kill it, are we going to send it forward with grand jury? What do you think, what are you going to do? You have to make the decision. It’s close, you can do anything you want. That’s when he decided that he didn’t think that it would do any good to go with grand jury. Then the decision was made and the document was written.²²⁷⁶

Needle corroborated the fact that Klotz favored putting certain witnesses before a grand jury.²²⁷⁷

Needle further acknowledged that, on the basis of an analysis of the disparity between Cisneros’s expenditures and his reported income, the Cisneros case would have “fall[en] within [the] realm” of matters requiring referral for grand jury investigation.²²⁷⁸ However, Needle also testified that he did not personally recommend or promote using a grand jury because, at the time of ACC’s review of

²²⁷³ GJ 00-001 Tr. Finkelstein 11/14/00 at 115, 122; GJ 00-001 Tr. Finkelstein 9/12/00 at 66, 67.

²²⁷⁴ GJ 00-001 Tr. Finkelstein 9/12/00 at 66.

²²⁷⁵ GJ 00-001 Tr. Klotz 4/24/01 at 71.

²²⁷⁶ *Id.* at 93-94.

²²⁷⁷ GJ 00-001 Tr. Needle 6/19/01 at 64-66.

²²⁷⁸ GJ 00-001 Tr. Needle 7/10/01 at 128-29.

the Cisneros case, he did not have a “working knowledge” of the grand jury process,²²⁷⁹ and therefore “defer[red] to the expertise of others.”²²⁸⁰

19. Reactions to the Declination Memorandum

On March 31, 1997, Filan submitted a memorandum to the IRS Office of Chief Inspector alleging improprieties by Finkelstein in his handling of the Cisneros case (“Improprieties Memorandum”). The Improprieties Memorandum noted that, in an unprecedented deviation from the normal review process, the case was taken from District Counsel because of its “sensitive nature” and given to ACC attorneys who did not review criminal tax cases on a regular basis and to whom Finkelstein had apparently given directions to kill the case.²²⁸¹ It also alleged that the decision to decline the case apparently had been made without regard to the evidence or the facts,²²⁸² and that Finkelstein had apparently disclosed to a high-ranking DOJ Tax Division official “inside” information about the decision to decline the case.²²⁸³ The memorandum also observed that the Attorney General’s language in declining to expand the OIC’s jurisdiction mirrored the language Finkelstein had given CID for declining the case, and that Finkelstein’s possible disclosure of his intention to decline the case had potentially influenced the Attorney General’s decision to deny most of the OIC’s request.²²⁸⁴

The Improprieties Memorandum further represented that Finkelstein was reported to have had a “cozy” relationship with Cisneros’s defense counsel for a

²²⁷⁹ GJ 00-001 Tr. Needle 6/7/01 at 103.

²²⁸⁰ *Id.* at 103.

²²⁸¹ GJ 00-001 Ex. 94 at 2-3.

²²⁸² *Id.* at 3-5.

²²⁸³ *Id.* at 6-7.

²²⁸⁴ *Id.* at 7.

number of years.²²⁸⁵ The OIC developed no evidence of any improper relationship between Finkelstein and any of Cisneros’s defense counsel.

On or about April 7, 1997, CID submitted a “Notification of Intent to Protest Declination” to ACC. It was signed by several CID officials, including Filan and Killfoil.²²⁸⁶

On April 10, 1997, the Special Division issued a sealed order denying the OIC’s referral request. The court determined that “[b]ecause the proposed referrals are encompassed within matters which the Attorney General has already determined should not be pursued by the Independent Counsel, we do not have the authority under the statute to make [the referral].”²²⁸⁷ As a result, the Independent Counsel was left with jurisdiction over only one tax year.

On April 25, 1997, CID sent a “Protest of Declination Memorandum” to the Assistant Commissioner for CID in its National Office in Washington, D.C. The protest stated that “[t]he evidence in this case clearly proves Cisneros knowingly and willfully signed and filed false and fraudulent tax returns for each of the years 1991, 1992, and 1993, in violation of Title 26, United States Code 7206(1).”²²⁸⁸ The Assistant Commissioner submitted the protest to Paris.²²⁸⁹

However, on April 28, 1997, Paris and CID Deputy Assistant Commissioner Edward Federico agreed that the protest would be returned to CID and held in abeyance pending the outcome of the OIC’s investigation.²²⁹⁰ Federico and Paris also agreed that ACC would not inform Cisneros’s defense counsel of the decision to

²²⁸⁵ *Id.* at 5.

²²⁸⁶ Memorandum from Filan to ACC 4/17/97.

²²⁸⁷ GJ 00-001 Ex. 105 (Opinion) at 1.

²²⁸⁸ GJ 00-001 Ex. 110 at 26.

²²⁸⁹ GJ 00-001 Ex. 112.

²²⁹⁰ GJ 00-001 Ex. 112.

decline prosecution.²²⁹¹ On the same day, Finkelstein was informed that the protest was being sent back to CID.²²⁹²

Although Finkelstein knew that CID contemplated protesting his declination decision, he maintained in his grand jury testimony that CID had never asserted that the decision was wrong. He testified:

Everything that [Klotz and Needle] had was provided to CID – the affidavit, the thick book from the defense counsel, the memo of conference from the defense counsel, the memo of March 7th saying we’re having problems with the case, the decline memo of March 27th, and to this day we’ve received nothing in response to say that our decision was wrong and where they disagree with the facts. If we butchered the facts, that’s why it’s written down. CID could have said you’re wrong, here’s where you’re wrong.²²⁹³

Finkelstein further testified that “CID was absolutely welcome to protest it up four levels of review.”²²⁹⁴ Klotz similarly stated that “we didn’t stop short of just begging CI[D] to formally protest our declination before it was submitted and put in writing, on a line-by-line basis, their disagreement with our Declination Memorandum. CI[D] declined to ever do that.”²²⁹⁵

²²⁹¹ *Id.*

²²⁹² GJ 00-001 Ex. 111.

²²⁹³ GJ 00-001 Tr. Finkelstein 9/21/00 at 110; *see also* GJ 00-001 Tr. Finkelstein 8/3/00 at 91, 110-120, 124; GJ 00-001 Tr. Finkelstein 5/25/00 at 27-28; GJ 00-001 Tr. Finkelstein 5/23/00 at 145-47.

²²⁹⁴ GJ 00-001 Tr. Finkelstein 12/5/00 at 122.

²²⁹⁵ GJ 00-001 Tr. Klotz 3/27/01 at 49-50.

The OIC received a copy of the Improprieties Memorandum on May 5, 1997. On May 6, the OIC met with Klotz and Federico.²²⁹⁶ At the meeting, Klotz represented that “[i]f [CID] files a protest, [Chief Counsel’s Office] would most likely (99.9% likelihood), affirm its decision to disapprove the investigation and produce yet another declination with which the OIC would have to deal.”²²⁹⁷ CID postponed any filing of a protest pending completion of the OIC’s investigation.²²⁹⁸

Klotz told the OIC that any protest would be reviewed by Fielding or Paris.²²⁹⁹ Fielding subsequently told the OIC that it was his responsibility to review CID protests of ACC decisions and that he and Paris would have done so if a protest had been filed in the Cisneros case.²³⁰⁰ Fielding and Paris informed the OIC that they had not told Klotz that a CID protest would be declined, and that Klotz was not authorized to make such a statement.²³⁰¹

Klotz also testified that he and Finkelstein “many, many times” asked their superiors to look at the case.²³⁰² Similarly, Finkelstein testified that he and Klotz were “screaming” at their superiors to review the case to determine whether ACC had made the right decision²³⁰³ and that it was his intent for ACC to have nothing to do with a protest.²³⁰⁴ However, Finkelstein wrote a memorandum to Fielding dated May

²²⁹⁶ GJ 00-001 Ex. 119.

²²⁹⁷ *Id.* at 2.

²²⁹⁸ Memorandum from Brown to Fielding 5/23/97 re request by OIC.

²²⁹⁹ GJ 00-001 Ex. 119 at 2.

²³⁰⁰ OIC Interview Notes Fielding 8/2/01 at 4, 6.

²³⁰¹ *Id.* at 6-7; OIC Interview Notes Paris 7/27/01 at 8.

²³⁰² GJ 00-001 Tr. Klotz 3/27/01 at 50.

²³⁰³ GJ 00-001 Tr. Finkelstein 7/18/00 at 146-48.

²³⁰⁴ GJ 00-001 Tr. Finkelstein 5/23/00 at 72-73.

30, 1997 stating, in part: “You have the authority to have me decide the protest after consultation with you.”²³⁰⁵

During the May 6, 1997 meeting with the OIC, Klotz also expressed ACC’s desire to inform Cisneros’s defense counsel that ACC had declined the case.²³⁰⁶ Klotz stated that it was standard procedure for ACC to meet with defense counsel and advise them of the disposition of their case.²³⁰⁷ Klotz told the OIC that Namorato had called ACC on numerous occasions to inquire about the state of the Cisneros case, and Klotz presumed that defense counsel was already aware of the declination.²³⁰⁸ He was informed that the OIC had not so notified the defense counsel.²³⁰⁹

Klotz also expressed a desire to inform defense counsel that the OIC had obtained jurisdiction for the 1992 tax year.²³¹⁰ The OIC advised Klotz that ACC was barred from doing so by court order.²³¹¹ Klotz stated that he was “uncomfortable” withholding information from defense counsel.²³¹²

Paris told the OIC that it would have further complicated the OIC’s efforts to prosecute Cisneros for 1992 criminal tax violations if District Counsel was concurrently pursuing Cisneros for 1991 and 1993 civil tax violations.²³¹³ Specifically, Paris told the OIC that Cisneros’s defense counsel would attempt to

²³⁰⁵ GJ 00-001 Ex. 131.

²³⁰⁶ GJ 00-001 Ex. 119 at 3.

²³⁰⁷ *Id.* at 3.

²³⁰⁸ *Id.* at 3.

²³⁰⁹ *Id.* at 3.

²³¹⁰ *Id.* at 3.

²³¹¹ *Id.* at 3-4.

²³¹² *Id.* at 3.

²³¹³ OIC Interview Notes Paris 7/27/01 at 8.

draw attention to the fact that some of the conduct was being treated as a civil administrative matter.²³¹⁴

Federico later informed Klotz that neither statute nor regulation required ACC to notify taxpayers or their counsel of the disposition of an administrative tax case.²³¹⁵ Klotz responded that he agreed with Federico's assessment.²³¹⁶ Klotz's memorandum to the file regarding this conversation was later noted by Finkelstein on May 20 or 21, 1997.²³¹⁷

On May 23, 1997, the OIC sent a letter to the IRS asking it not to give Cisneros or his counsel notification of the status of its administrative tax case.²³¹⁸ The Acting Commissioner of the IRS directed Finkelstein not to give such notice.²³¹⁹

J. Conclusion

Because the OIC was unable to complete its obstruction investigation, let alone prosecute possible offenses in court, the investigation left numerous questions unanswered. However, the following points appear to be reasonably well established, and they are at least suggestive of the fact that some officials of DOJ and the IRS acted with a predisposition not to allow an independent counsel investigation of possible Cisneros tax offenses to go forward:

- DOJ's Public Integrity Section was very resistant to any independent counsel investigation of Cisneros, including in particular an investigation for tax offenses;

²³¹⁴ *Id.* at 8.

²³¹⁵ GJ 00-001 Ex. 122.

²³¹⁶ *Id.*

²³¹⁷ *Id.*

²³¹⁸ Letter from OIC to Dolan 5/23/97.

²³¹⁹ Memorandum from Dolan to Finkelstein 6/2/97.

- Public Integrity strongly urged against giving tax jurisdiction to an independent counsel without conducting a serious inquiry and despite strong evidence of possible tax offenses;
- acting on Public Integrity's recommendations, the Attorney General gave the Independent Counsel limited tax jurisdiction that made a tax prosecution impractical, and made the granting of further tax jurisdiction dependent on an IRS referral of the matter for prosecution, even though such a referral had a much more exacting threshold than that for granting jurisdiction to an independent counsel;
- the IRS's Assistant Chief Counsel for criminal tax matters and the DOJ Tax Division Senior Counsel were opposed to independent counsels' investigating and prosecuting tax matters;
- the IRS's Assistant Chief Counsel assumed control of the Cisneros matter in an unprecedented fashion, when it became apparent that the experienced line officials who normally would have reviewed the case were strongly disposed to refer it for prosecution;
- the IRS's Assistant Chief Counsel took an interest in the fact that the Independent Counsel's request for tax jurisdiction was pending while he conducted his review of the Cisneros matter, and he consulted with DOJ about the Cisneros case while the Independent Counsel's request for tax jurisdiction was pending before it; and
- the IRS's Assistant Chief Counsel declined to refer the Cisneros case for prosecution or grand jury investigation in the face of substantial evidence that objectively appears to indicate that the matter should have been prosecuted.

VI. CONCLUSION

This Final Report presents a multi-faceted story of persons who put their personal, political, or institutional interests before the public interest. The result was a time-consuming and expensive, but ultimately necessary, investigation and prosecution effort. In the end, many questions remain open, but there are definite conclusions to be drawn.

The false statements investigation showed that Cisneros (in league with Medlar) and some of Cisneros's employees deliberately lied to the Federal Bureau of Investigation and others to help Cisneros gain a Cabinet post. This phase of the investigation ended with a plea bargain, following Cisneros's resignation from the Cabinet, but this Office is confident it would have proved in court that Cisneros and the others told such lies and that the lies were material to government decision-making. In the view of this Office, and of the court, the negotiated disposition of these charges was appropriate given the nature of the offenses, the available evidence, and the other consequences suffered by the participants. The evidence also indicated that certain members of the Transition Team and the Senate were remiss in their oversight role in their enthusiasm to see Cisneros appointed to his post, but this Office did not uncover a sufficient basis to state criminal charges against any of these persons.

Unfortunately, a major part of this Office's efforts were expended in dealing with the non-cooperation of Medlar, whose public revelations and lawsuit had launched the inquiry in the first place. She lied repeatedly, at times under oath, and seriously impeded this Office's efforts. In the end, she suffered more severe consequences than anyone else, a regrettable result that she brought upon herself.

This Office also had jurisdiction to investigate Cisneros for tax offenses in one year, 1992. In the end, it elected not to press any charges against him in this matter. This decision rested principally on the difficulty of proving a willful tax violation for a single year. This Office maintained, and still is of the view, that Cisneros's tax filings for 1991, 1992, and 1993, merited a multi-year criminal investigation and, quite possibly, prosecution for willful tax evasion. There is no real question that he seriously underdeclared his income on his tax returns, and it is hard to escape the conclusion that these actions were willful, given that his expenses (including his payments to Medlar) far exceeded the income he declared. However, because of the

actions of the Department of Justice and the Internal Revenue Service, an independent counsel could never undertake a multi-year investigation.

This Office's inquiry into possible obstruction of justice within DOJ and the IRS was incomplete, but the limited record developed is sufficient to suggest that these agencies' treatment of possible charges against Cisneros was at best questionable and at worst represented serious wrongdoing. There seems to be no question that Cisneros was given extra consideration and more limited scrutiny because of who he was – an important political appointee. It also appears likely that, if the responsible officials had properly applied the statutory standards they are obligated to uphold, the IRS would have referred the Cisneros case to DOJ for criminal prosecution, and the Attorney General would have asked that an independent counsel handle the matter. But this Office received little in the way of cooperation from DOJ, whose purpose should be to protect the public interest and not to circle the wagons in protection of government personnel. This non-cooperation, in conjunction with the lapsing of the Independent Counsel Act, brought this phase of this Office's activities to an end without a definitive conclusion.

The foregoing is not meant to be a criticism of these agencies as a whole. Numerous officials in each worked hard to make certain that Cisneros received no special treatment. But, in the end, enough high-ranking officials with enough power were able to blunt any effort to bring about a full and independent examination of Cisneros's possible tax offenses, in the face of what seemed to many to be obvious grounds for such an inquiry.

This Office at all times attempted to fulfill its mandates, often in the face of stiff resistance. It sought, and sometimes received, clarification or expansion of its powers and duties when this seemed appropriate. When circumstances made it apparent that further efforts would no longer serve the public interest, it halted operations and began the process of closing down.

This Report, in the end, demonstrates the need for public officials to tell the truth and to perform honest services. The fact that this does not always happen is the impetus for institutions like the independent counsels. How this can be accomplished today, in the absence of an Independent Counsel Statute, is a question to which the public must demand an effective answer.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David M. Barrett". The signature is fluid and cursive, with a large initial "D" and "B".

David M. Barrett
Independent Counsel

Date: August 13, 2004

