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**MEMORANDUM**

TO: The Attorney General
The Deputy Attorney General

FROM: Robert S. Litt
Principal Associate Deputy Attorney General

RE: Gore and Ickes

DATE: November 22, 1998

After reviewing the various recommendations on Gore and Ickes, I firmly believe that the Attorney General should not seek the appointment of an independent counsel with respect to Harold Ickes, and conclude with somewhat less certainty that she should do so with respect to Vice President Gore. My reasons are set forth below.

## I. The Applicable Standard

In each of these cases there is some evidence tending to show that the target of the investigation lied. In each of these cases there is considerably more evidence tending to show that the target of the investigation did not lie. A critical analytical question, and one on which the various recommendations are entirely contradictory, is the extent to which the Attorney General, in determining whether or not to seek an independent counsel, is permitted to weigh conflicting evidence and draw conclusions of fact.

The statute contains two relevant provisions. At the end of a preliminary investigation, the Attorney General must seek an independent counsel if she determines that there are "reasonable grounds to believe that further investigation is warranted." 28 U.S.C. § 592(c)(1)(A). By itself, this language does not give much guidance as to whether the Attorney General can weigh factual evidence. However, 28 U.S.C. § 592(a)(2)(B)(ii) expressly permits the Attorney General to find that there are no reasonable grounds to believe that further investigation is warranted if "there is clear and convincing evidence" that the target lacked "the state of mind required for the violation of the criminal law involved."

Thus, the Attorney General can draw factual conclusions about a target's state of mind, albeit subject to a fairly high standard. This accords with prior practice. For example, in the Freeh matter there was evidence from which one could have inferred that Director Freeh knew his statement was false (a briefing book presented to him contained the true information), yet the Attorney General found this outweighed -- to the point of "clear and



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convincing evidence" by other evidence showing that he did not know.[1]

But does the Attorney General have the power to weigh conflicting evidence on issues other than intent, and if she does, what standard does she use? The FBI Memorandum, and the Public Integrity Section's memorandum with respect to Ickes, both suggest that she has no such power, but that an independent counsel must be sought so long as there is "evidence sufficient to support a finding" that the target committed the offense. For two reasons, I disagree.

First, as Mr. Radek's memorandum and the FBI Memorandum both note, the "clear and convincing evidence" standard was added to the law because Congress that the Department was dismissing cases based on too low a threshold. However, Congress only made the "clear and convincing evidence" standard applicable to factual determinations about the target's state of mind. The necessary implication is that some lower threshold remains applicable to other factual issues, such as identity or (in these cases) falsity. It would actually reverse Congressional intent if the Attorney General could weigh conflicting evidence in making a state of mind determination, but not with respect to other elements of the offense.

This conclusion also accords with common sense. Assume, for example, a case in which a totally credible witness to a bank robbery identifies the Secretary of Treasury as the robber, and so swears under oath. The Secretary claims that he was present at a social function with 25 other people at the time of the robbery. During the course of the preliminary investigation we locate and interview 15 of these people, each of whom credibly confirms the Secretary's alibi.[2] No one would have any hesitancy in closing this matter based upon a factual conclusion that the witness, however certain he was, was in error. Yet the witness' testimony would, I believe, be "sufficient to support a finding" of the Secretary's guilt.

[1] Both the FBI memo and Assistant Attorney General Robinson's memo discuss whether the Attorney General is to make this determination based on an "objective" or a "subjective" standard. I do not find these formulations particularly illuminating. The Attorney General is to act as a fact-finder, subject only to the qualification that she must make any determinations as to state of mind by clear and convincing evidence. That is the practice that the Department has followed in prior preliminary investigations and should not be changed at this time.

[2] The FBI Memorandum suggests that the Department may not conduct a factual inquiry during the preliminary investigation. But the consistent practice of the Department has been to investigate whether the matter can be closed without appointment of an independent counsel. This was done, for example, in the Freeh matter.

I conclude, therefore, that even when there is evidence sufficient to support a finding that the target of an investigation has committed a crime, the Attorney General retains the power to weigh conflicting evidence and draw factual conclusions. I am unsure how to articulate the appropriate standard for such determinations when the issue is not the target's state of mind. The legislative history referred to above shows that it is less than "clear and convincing evidence"; it seems equally clear that it should be greater than a preponderance of the evidence. Ultimately, I am unable to be more precise than to reiterate the words of the statute. If the Attorney General is sufficiently convinced by the facts to conclude that it would not be reasonable to proceed further, then she should not seek an independent counsel.

Of course, the entire discussion above assumes that all reasonable factual investigation has been done. If that is not the case, however, the Attorney General must determine whether it is "reasonable" to conclude that further investigation might lead to a decision to prosecute. In these cases, I do not find that issue to be relevant, because there does not appear to be any more factual investigation to be done with respect to Ickes, and I conclude on other grounds that an independent counsel should be sought with respect to Gore.

## II. Ickes

The Ickes matter is straightforward. I am convinced by clear and convincing evidence that Ickes did not knowingly lie. I reach that conclusion based primarily on the following:

1. The questions were imprecise and ambiguous. Whether the Administration "did anything" about the Diamond Walnut strike is not subject to only one interpretation; Ickes' own answers at the deposition make clear that he was not certain of the meaning himself. On the one hand, "doing anything" could include Ickes' conversations with Hamilton, or even just discussions within the Administration. On the other hand, it could refer, as Ickes now claims, to formal public actions.

2. In answer to other questions, Ickes acknowledged several things that the Administration "did" in connection with the strike -- conversations that he had with Hamilton, and conversations with Jennifer O'Connor. These answers both reveal the imprecision of the question, and suggest that Ickes did not intend to deceive.

3. The whole tenor of Ickes' deposition is one of contention but not deception. He is cagey and combative but not untruthful. It is noteworthy that although Ickes' many depositions have presumably been gone over by Congressional staffers with a fine-toothed comb, no other statement is claimed to have been false.

4. The Diamond Walnut matter was not brought to Ickes' attention before the deposition, but was sprung on him without warning.

5. Ickes was deposed some 26 times, as I recall. He had ample opportunity to conceal information that was far more damaging but did not do so. For example, many of the documents that are most heavily relied upon in connection with the Common Cause allegations to show the involvement of the President (and, not incidentally, Ickes) in the media fund campaign came from Ickes, and he acknowledged -- indeed, bragged about -- his own role in his depositions. By comparison, his alleged motive to lie about Kantor's call to Diamond Walnut seems fairly trivial.

In sum, after reviewing all of the evidence, I am left with the firm conviction that, even if Ickes' statement was technically false, it was not knowingly so.[3] Indeed, I am convinced of this beyond a reasonable doubt. Accordingly, I do not believe it is appropriate to seek an independent counsel with respect to Ickes.

## III. Vice President Gore

I find the Gore matter much more troubling and very close. There is from which one could infer that Gore knew what he claimed he did not know: that the media campaign was paid for in part with hard money.[4] Gore was unquestionably present at a meeting at which it appears that the hard money component to the media campaign was discussed. In addition, he was sent a large number of memos which made reference to the same topic. (However, what Gore's chief of staff may have known, or Gore's press statement that he was raising money for "the campaign," say nothing about Gore's knowledge of whether there was a hard money component to the media campaign.)

On the other hand, there is clearly substantial contrary evidence. The statements of Gore's staff give rise to an inference that Gore never read the memos that were sent to him. And the lack of recollection displayed by many others who attended the same meeting that Gore did could support an inference that he either never understood or subsequently forget what he was told at the meeting.

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[3] I agree with the Public Integrity Section that falsity and state of mind are separate elements, and that the "clear and convincing evidence" standard applies only to the latter, even when the statement at issue concerns the target's knowledge, belief or recollection.

[4] I do not believe there is anything worth investigating further in the Allard or Uribe matters; indeed, at this point I do not think either rises to the level of a specific allegation from a credible source of possible criminal activity.

While reasonable minds could draw, and have drawn, a different conclusion, I cannot conclude that this evidence meets the "clear and convincing" standard necessary to conclude that Gore did not knowingly lie, nor am I sufficiently convinced that Gore's statement was true that further investigation is unreasonable. I do not think we can disregard evidence that a target was told something based upon an inference that he might not have understood or recollected it. If a defendant claims lack of knowledge or recollection, I think that we would go forward with evidence showing that he was put on notice of the facts, and leave it to him as a defense to show that he did not hear the statements, or read the memos. This is not the sort of factfinding that I believe it is "reasonable" for the Attorney General to engage in: it requires her simply to prefer one set of inferences over another.[3]

I am not persuaded by the suggestion that Gore had no motive to lie. With the light of hindsight, we can conclude that he did not need to lie, because the hard money component of the media campaign was being borrowed. We also have uncontradicted evidence that gore told his lawyers as well as the Government that he believed there was no hard money component and adhered to this story even when the lawyers pointed out to him that he was wrong. <u>However,</u> this evidence does not negate the possibility that Gore could have concluded that evidence of his state of mind about hard and soft money would be relevant to the Department's investigation (as in fact it was) and thus determined to lie about that. Gore's lawyers do not claim that they discussed with him that the hard money component was being borrowed, and so Gore might stall have thought that it would help him to claim that he <u>thought</u> only soft money was being raised (even if that belief would have been erroneous). I do not believe that this is likely; but I cannot rule it out based on the facts before us.

As a finder of fact, I would be unable to conclude that the evidence sustains the government's proof beyond a reasonable doubt. As an exercise of prosecutorial discretion, I would not bring this case. But that is not the test to be applied here. On the factual record developed in this matter, I am unable to conclude that there are "no reasonable grounds for further investigation." Accordingly, I believe that this matter should be referred to an independent counsel.

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[3] This conclusion might be claimed to be inconsistent with the approach taken in the Freeh matter, where we likewise had evidence that Director Freeh was presented with the true facts; but in the Freeh matter, we had affirmative evidence that he was also told things which supported his (incorrect) view of the facts, and other corroborating evidence affirmatively demonstrating his state of mind. We have no such evidence here.



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I do not, however, believe that there is any basis to refer any matter other than the false statement. In particular, I do not see any basis for revisiting the underlying § 607 determination. Whether or not Gore lied about the state of his knowledge concerning the hard money component to the media campaign, the evidence firmly establishes that the calls were made only for the purpose of raising soft money for that campaign, regardless of what the DNC did with the funds once received. There is still no evidence that Gore in fact asked for hard money in any of the calls, nor that Gore knew about the subsequent splitting of the contributions by the DNC. Equally, I do not think that this possible false statement rises to the level of the sort of aggravating circumstance that would overcome the Department policy that served as alternate basis for decision. Accordingly, I do not believe that there is any reasonable grounds to investigate the § 607 matter further, and would refer only the false statement matter.

cc: AAG Robinson
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