THE WHITE HOUSE

WASHINGTON

September 17, 1984

new file

MEMORANDUM FOR FRED F. FIELDING

FROM: RICHARD A. HAUSER RAH

SUBJECT: "Neutrality Act"

Attached, as requested, is a copy of 18 USC §960, the so-called "Neutrality Act", along with a copy of a recent New York Times article on issues relating to this statute, and relevant sections of the Department of Justice's brief in Dellums v. Smith.

Attachments

Note 14

country, and from the action of third persons with whom he perfects the enlistment which he may have contracted in the United States. U. S. v. Hertz, C.C. Pa.1855, 3 Pittsb.Leg.J.(Pa.) 194, 26 Fed. Cas.No.15,357.

15. Weight and sufficiency of evidence

In a proceeding to remove a person to another state in which he was indicted for conspiring to retain a citizen to enlist in the Mexican revolutionary forces, evidence tended to show a violation of former section 22 of this title [now this section] and to show probable cause for believing defendant guilty of conspiring to compass such violation. Gayon v. McCarthy, N.Y.1920, 40 S.Ct. 244, 252 U.S. 171, 64 L.Ed. 513.

16. Examination of witnesses

The persons alleged to have been hired may testify as to their intent without criminating themselves. U. S. v. Kazinski, D.C.Mass.1855, 2 Sprague 7, 26 Fed. Cas.No.15,508.

17. Verdict

On a trial for violation of former section 22 of this title [now this section] the court had no power to direct the jury to return a verdict of guilty, pursuant to an agreed statement of facts between the government and the defendant, regardless of the jury's own view respecting the proper conclusion to be drawn from the facts agreed upon. Blair v. U. S., Cal.1917, 241 F. 217, 154 C.C.A. 137.

§ 960. Expedition against friendly nation

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

June 25, 1948, c. 645, 62 Stat. 745.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., § 25 (Mar. 4, 1909, c. 321, § 13, 35 Stat. 1099); June 15, 1917, c. 30, Title V, § 8, 40 Stat. 223).

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Reference to territory or possessions of the United States was omitted as covered by definitive section 5 of this title.

Canal Zone. Applicability of section to Canal Zone, see section 14 of this title.

Cross References

Foreign transients, application of section to, see section 959 of this title
Jurisdiction of offenses, see section 3241 of this title.
Letters, writings, etc., in violation of this section as nonmailable, see section 1717 of this title.

Library References

International Law ⇐10.15. C.J.S. International Law § 16.

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The New York Times

DATE: 9-12-84

PAGE: B10

Neutrality and Private Adventures

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Sept. 11 — The neutrality laws, enacted almost two centuries ago to bar the organizing in the United States of private military attacks against other nations, have become something of a headache for American policymakers in the era of covert intelligence operations.

If read broadly today, as they were by some courts in the 19th and early 20th centuries, these laws could make it a crime for people in the United States, perhaps including the President, to provide financial and other support for Nicaraguan rebels.

Some Congressional Democrats, and Nicaragua's Sandinista Government, have taken precisely this position in the controversy that has flared anew since two Americans were killed in Nicaragua Sept. 1. Their helicopter was downed in a rebel raid from Honduras into Nicaragua.

But administrations in the modern era have not read the neutrality laws broadly. "Clearly they were not designed for the kind of situation which exists in the world today," an Attorney General once said.

'Nothing Criminal' Noted

"Nor is an individual prohibited from departing from the United States, with others of like belief, to join still others in a second country for an expedition against a third country. There is nothing criminal in an individual leaving the United States with the intent of joining an insurgent group. There is nothing criminal in his urging others to do so."

That Attorney General was Robert F. Kennedy. He was explaining after the failure of the Bay of Pigs invasion in 1961 why there was no problem under the neutrality laws with organizing of Cuban exiles in the United States to make a military attack on Cuba, with Central Intelligence Agency support. After all, Mr. Kennedy reasoned, the immediate base for the operation was Central America, not the United States.

Judy Pond, a Justice Department spokesman, refused to comment today when asked whether it violated the neutrality laws for private American groups to help finance and join in military attacks on Nicaragua, as did two Americans.

But while the Federal Bureau of Investigation has reportedly investigated such activities, the narrow Kennedy interpretation of the neutrality laws seems to have some appeal to the Reagan Administration.

John Hughes, the State Department's chief spokesman, explained Monday that the Administration decided earlier this year not to discourage "legal" private American support of the rebels in Nicaragua supported by the Central Intelligence Agency.

Asked today what kind of support was legal, two other State Department officials, who refused to speak for attribution, said that in the Administration's view the neutrality laws prohibited only the direct launching of private military expeditions from the United States, not the provision of financial or other support to insurgencies or military expeditions launched from third countries.

Core of issue is use of third country as launching point.

This logic would immunize from prosecution those who raised money in the Unitd States to send to Nicaraguan rebels in third countries such as Honduras and those who traveled to such countries to enlist in forces attacking Nicaragua.

Attorney General William French Smith has also argued in a pending lawsuit that the neutrality laws do not apply to the President or other officials supporting private military operations abroad that are part of the President's "official foreign policy."

Judge Orders and Inquiry

Judge Stanley A. Weigel of Federal District Court in San Francisco disagreed last year, saying that the neutrality laws were intended in part to keep the President from entangling the nation in hostilities without a Congressional declaration of war.

Judge Weigel ordered a special investigation to determine whether President Reagan and others had violated criminal neutrality laws by supporting rebel attacks against Nicaragua, even though Congress appropriated $24 million for covert operations for the 1984 fiscal year. A Justice Department appeal is pending.

Meanwhile, Congress seems unlikely to appropriate funds for covert operations in Nicaragua for the 1985 fiscal year, which begins Oct. 1. While the Administration says it has decided not to discourage private groups from stepping in to support the Nicaraguan rebels, it has sought to avoid the appearance of circumventing Congressional restrictions.

But the more the Administration argues that private groups supporting military attacks are acting on their own, the more its critics demand that it prosecute the private groups under the neutrality laws.

Washington Supported It

The Neutrality Act of 1794, the provision most often cited by critics of the legality of the Administration's support for attacks on Nicaragua, was enacted with President Washington's support to prevent the weak new country from being dragged into foreign conflicts by adventurers.

The law states: "Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both."

The law was applied quite broadly by several lower Federal courts in the 19th and early 20th centuries. For example, in a 1921 decision, several people were convicted of conspiring in the United States, in World War I, to launch an invasion of India from Thailand and the Phillipines.

But the law has been used in only a handful of prosecutions in recent decades. And the archaic flavor of the language suggests the difficulty of applying this law in a world very different from the one for which it was written. It contains ambiguities enough to provide grist for both sides.

And Representative Don Edwards, Democrat of California, accused the Administration this week of "selective enforcement of the laws" by condoning private support for the Nicaragua rebels.

But one of the two State Department officials said today that the Administration's consistency in taking a narrow approach to the neutrality laws was illustrated by its not prosecuting groups raising money for leftist rebels in El Salvador, the Irish Republican Army or other hostile foreign rebels either.

"These guys are fairly clever and they get lawyers to stay clear of any violations of the laws," this official said. "Occasionally we catch somebody who was dumb enough to launch his expedition from the United States rather than from some other country, but not very often."

No. 84-1525

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD V. DELLUMS, et al.,

Plaintiffs-Appellees,

v.

WILLIAM FRENCH SMITH,
U.S. Attorney General, et al.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

QUESTIONS PRESENTED

1. Whether the Ethics in Government Act, which establishes a special procedure for investigating and prosecuting criminal allegations against high-level government officials, confers standing to sue on private persons, or permits private judicial enforcement actions.

2. Whether the Attorney General reasonably concluded that the Neutrality Act of 1794 does not criminalize acts of government officials taken in pursuit of official foreign policy objectives.

3. Whether the legality of the President's policy toward Nicaragua poses a justiciable question.

STATEMENT OF THE CASE

1. Jurisdiction

A. The district court exercised jurisdiction under the general federal question jurisdictional grant, 28 U.S.C. § 1331.

B. This Court possesses jurisdiction under 28 U.S.C. § 1291, the provision allowing appeals from district court final decisions.

C. The district court order is properly appealable, as it completely disposes of the case.

D. The appeal is timely. The district court entered judgment on November 3, 1983. The government filed a timely motion to alter the judgment under FED.R.CIV.P. 59(e). The district court entered an order denying that motion on January 10, 1984. The government filed a notice of appeal on that same day. The appeal, therefore, was timely under FED.R.APP.P. 4(a)(4).

2. Nature of the Case

The Ethics in Government Act requires the Attorney General to conduct a preliminary criminal investigation of high-level government officials upon receiving incriminating information that the Attorney General determines is sufficiently specific and credible. 28 U.S.C. §§ 591-592. The Attorney General then must notify a special division of the District of Columbia Circuit either that no further investigation is warranted or that independent counsel should be appointed to pursue the matter further. 28 U.S.C. § 592(b)(1), (c)(1).

In this case, the district court ordered the Attorney General to conduct a "preliminary investigation" under the Ethics Act (ER

206-07).[1] The court based its decision on plaintiffs' claim that the President and various Cabinet officers had violated the Neutrality Act of 1794 (18 U.S.C. § 960) in "supporting paramilitary operations against Nicaragua" (ER 171). The district court issued two opinions rejecting the government's arguments that (1) private persons lack standing to enforce the Ethics Act, (2) the Attorney General's Ethics Act decisions are unreviewable, (3) the Neutrality Act issue involves sensitive foreign policy concerns and therefore is non-justiciable, and (4) in any event, the Attorney General reasonably has construed the Neutrality Act not to apply to official government activities.

The government took an immediate appeal (ER 327), and obtained a stay pending appeal from this Court (ER 328).

3. The Ethics In Government Act

The Ethics in Government Act was enacted in 1978, and amended in 1983. The portions of the Act applicable to this case establish an investigatory and prosecutorial procedure for handling criminal allegations against high-ranking government officials. 28 U.S.C. §§ 49, 591-598. The Ethics Act applies to criminal allegations against the President and Vice President, cabinet-level officers, and certain other high-ranking government officials or participants in presidential campaigns. 28 U.S.C. § 591(a), (b).

The Act states that, "[u]pon receiving information that the Attorney General determines is sufficient grounds to investigate * * * the Attorney General shall conduct, for a period not to exceed

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[1] "ER" stands for the Excerpts of Record we have filed pursuant to Local Rule 13(a).

ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate." 28 U.S.C. § 592(a)(1). "In determining whether grounds to investigate exist, the Attorney General shall consider -- (A) the degree of specificity of the information received, and (B) the credibility of the source of the information." 28 U.S.C. § 592(a)(1). After completing the preliminary investigation, the Attorney General must notify a special division of the District of Columbia Circuit, established for the purpose of appointing independent counsel. 28 U.S.C. §§ 49, 592(b), (c).

The Attorney General's notification is to indicate either that "no further investigation or prosecution is warranted," in which case "the court shall have no power to appoint an independent counsel" (28 U.S.C. § 592(b)(1)), or that "further investigation or prosecution is warranted," in which case "the Attorney General shall apply to the division of the court for the appointment of an independent counsel" (28 U.S.C. § 592(c)(1)). Such applications "shall not be reviewable in any court." 28 U.S.C. § 592(f). In addition, whether the Attorney General applies for appointment of independent counsel or not, the Attorney General's report to the special court may not be revealed "without leave of the * * * court." 28 U.S.C. §§ 592(b)(3), (d)(2).

When the special court receives an application for appointment of independent counsel, it must "appoint an appropriate independent counsel and * * * define that independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 593(b). The independent counsel "shall have * * * full power and independent authority to exercise all investigative and prosecutorial functions and powers of the

Department of Justice * * * ." 28 U.S.C. § 594(a). The independent counsel must, "except where not possible, comply with the * * * established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f).

The Ethics Act also establishes an alternate triggering mechanism. "A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of an independent counsel." 28 U.S.C. § 595(e). The Attorney General must make a written response to the Congressional committee inquiry within 30 days of its receipt, or within 15 days of the completion of a preliminary investigation, whichever deadline is later. Ibid. The Attorney General's written response is to remain confidential unless the Congressional committee chooses to make it public upon a finding of no prejudice to the rights of any individual. Ibid.

4. This Litigation

On January 27, 1983, the three individuals who now are plaintiffs in this lawsuit -- a Congressman from California (Ronald V. Dellums), a resident of Florida (Eleanor Ginsberg), and a resident of Nicaragua (Dr. Myrna Cunningham) -- submitted a letter to the Attorney General demanding appointment of a "special prosecutor" under the Ethics in Government Act (ER 18-23). The letter claimed that seven public officials covered by the Ethics Act had violated federal criminal law: President Ronald Reagan, ex-Secretary of State Alexander M. Haig, Jr., current Secretary of State George P. Shultz, Assistant Secretary of State Thomas O. Enders, Secretary of Defense Caspar Weinberger, Deputy Assistant

Secretary of Defense Nestor Sanchez, and Director of Central Intelligence William Casey (ER 18).

These officials' purported "crimes" arise out of the United States' Central American policy, particularly its allegedly improper backing of an insurgency in Nicaragua (ER 18-23). Plaintiffs' January 27, 1983, letter[2] detailed numerous military-type activities allegedly taken by the United States government in furtherance of its Nicaragua policy, and concluded that public officials who participate in supporting non-wartime military operations against a foreign government are guilty of criminal misconduct (ER 19-22). Plaintiffs cited Criminal Code provisions that bar (1) military action against a foreign nation with whom the United States is at peace (the Neutrality Act, 18 U.S.C. § 960), (2) conspiracy to destroy foreign government property (18 U.S.C. § 956), and (3) transportation of firearms in foreign commerce (18 U.S.C. § 922) (ER 22-23).

On March 18, 1983, the then-Assistant Attorney General for the Criminal Division, D. Lowell Jensen, sent a letter to plaintiffs denying their request for appointment of a "special prosecutor" (ER 67). Mr. Jensen explained that the "material you provide does not constitute specific information of a federal offense 'sufficient to constitute grounds to investigate' as required by the Ethics in

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[2] Plaintiffs attached to their letter a copy of the complaint they and others had filed in Sanchez-Espinoza v. Reagan, No. 82-3395 (D.D.C.) (ER 24-66). The Sanchez-Espinoza complaint sought damages and injunctive relief for the government's allegedly illegal Nicaragua policy. The district court, however, dismissed the complaint under the political question doctrine. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983) appeal pending, No. 83-1997 (D.C. Cir.).

Government Act as amended on January 3, 1983" (ER 67).

Several months later, in July, 1983, plaintiffs filed this lawsuit against the Attorney General, William French Smith, and against Assistant Attorney General Jensen (ER 1-17). [3] The complaint alleges that plaintiffs' January 27 submission to the Attorney General presented sufficient information of criminal violations by the President and senior Administration officials to warrant a "preliminary investigation" under the Ethics Act (ER 4-5). The complaint points to a variety of injuries resulting from the alleged violations (ER 3). Plaintiff Dellums claims, as a member of Congress, a deprivation "of his constitutional right to participate in the decision to declare war, grant letters of marque and reprisal, and raise and support armies" (Id.). Plaintiff Ginsberg, who lives in Florida where plaintiffs say there are paramilitary training camps, claims a "nuisance," and the loss "of her right to the peaceful enjoyment of her property" (Id.). Plaintiff Cunningham claims "kidnapping and rape at the hands of insurgent forces" in Nicaragua that were "trained, armed, and funded at the direction of the President and other U.S. officials * * * " (Id.). Based on these allegations, plaintiffs' complaint demanded a preliminary investigation under the Ethics Act, or alternatively, appointment of independent counsel (ER 16).

5. District Court Decisions

On November 3, 1983, the district court entered summary

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[3] Stephen S. Trott now has succeeded Mr. Jensen as Assistant Attorney General for the Criminal Division, and pursuant to FED.R.APP.P. 43(c) he should be substituted for Mr. Jensen as a defendant in this lawsuit.

judgment for plaintiffs (ER 206-07). The judgment required the Attorney General, by February 1, 1984, to conduct and complete a "preliminary investigation * * * relating to violations of the Neutrality Act, 18 U.S.C. § 960" (Id.). The court reasoned that plaintiffs' claim of Neutrality Act violations was "sufficiently specific" and "credible" to warrant an Ethics Act investigation (ER 174). The court stressed that it was not declaring "illegal any action by the President or his subordinates," only "that the Executive actions alleged by plaintiffs, if true, may violate federal law" (ER 174, 204).

The district court rejected the government's argument that the Ethics Act does not contemplate private enforcement suits (ER 177-90). The court acknowledged that plaintiffs' claims of harm from "the underlying criminal acts" were too "speculative" to confer standing to sue (ER 200). The court found "the requisite interest for standing," however, in the Ethics Act itself -- which, according to the district court, grants "all members of the public" a "procedural right" that incriminating information they submit "will be forwarded and considered by appropriate decisionmakers" (ER 178-80). The court concluded from this, despite the Ethics Act's failure expressly to authorize private suits, that "Congress conferred upon [plaintiffs] a right to a judicial determination" (ER 180). The court also held that the Attorney General's refusal to conduct an Ethics Act investigation is reviewable because of the Administrative Procedure Act's "strong presumption of the right to judicial review" (ER 184 et seq.). Absent private enforcement suits, the district court believed, the Ethics Act would be rendered "a nullity" (ER 183).

Finally, the court rejected the government's "political question" argument that the judiciary ought not adjudicate sensitive foreign policy matters (ER 190-94). The court reasoned that plaintiffs' suit does "not directly challenge the legality of any action taken by the President," but "seek[s] only to compel good faith performance of a statutory duty" (ER 192).

The government immediately filed a motion under FED.R.CIV.P. 59(e) to alter the district court's judgment (ER 208-44). The government argued that the Attorney General reasonably had concluded that the Neutrality Act does not apply to official government activities, thus obviating any need for an Ethics Act investigation (Ibid.). The district court rejected the government's position (ER 305-21). Relying on the "history of the Neutrality Act and judicial precedent," the court found that plaintiffs' "contention that the Neutrality Act reaches executive officials is at least as persuasive as defendants' claim that it does not" (ER 309, 314). The court also concluded that various indications that Congress had sanctioned the government's Nicaragua policy through legislation "do not justify the Attorney General's refusal to conduct a preliminary investigation" (ER 313-14).

The government promptly took an appeal (ER 327). After the district court refused to stay its judgment pending the appeal (ER 322-26), the government on January 25, 1984, obtained a stay from this Court (Pregerson and Kennedy, JJ.) (ER 328).

STATUTORY PROVISIONS INVOLVED

The text of the Ethics in Government Act (28 U.S.C. §§ 591-98) and of the Neutrality Act (18 U.S.C. § 960) is reproduced in an addendum to this brief.

II. THE NEUTRALITY ACT DOES NOT REACH THE CONDUCT OF GOVERNMENT OFFICIALS ACTING PURSUANT TO OFFICIAL GOVERNMENT POLICY

Introduction

The district court held that plaintiffs' allegations "could * * * reasonably be construed as involving a federal crime" under the Neutrality Act, and therefore, that the Attorney General had no choice but to conduct a preliminary investigation (ER 309). But the Attorney General, the nation's chief law enforcement officer, must determine as a threshold matter under the Ethics Act whether the facts alleged amount to a criminal violation. The statute makes clear that a preliminary investigation is only necessary upon receipt of "information that the Attorney General determines is sufficient to constitute grounds to investigate." 28 U.S.C. 592(a)(1) (emphasis added). Based upon reasoned legal judgment and the overwhelming evidence of Congressional intent, the Attorney General has concluded that plaintiffs' allegations, even if true, simply do not constitute a federal crime -- namely, that Section 5 of the Neutrality Act, 18 U.S.C. 960, does not proscribe acts taken in pursuit of official governmental policy.[7]

Assuming standing and reviewability, the Attorney General's view of federal criminal statutes is at least entitled to considerable deference. Under the APA, the Attorney General's

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[7] The district court inexplicably asserted that the Attorney General has enunciated a policy not to prosecute federal officials under the Act (ER 314). To the contrary, the determination made by the Attorney General in this case represents the official legal position of the Department of Justice and was set forth in a 1979 opinion of the Office of Legal Counsel (ER 304A). It warrants judicial deference.

considered construction of the Neutrality Act can only be overturned if it is deemed unreasonable. Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 472-473 (9th Cir.), cert. denied, 104 S.Ct. 236 (1983). The responsibility to construe and enforce criminal statutes lies at the core of the executive's function, United States v. Dotterweich, 320 U.S. 277, 285 (1943), see p. 20-22, supra, and the principle of deference is particularly apt when the statutory construction affects the nation's foreign policy. See generally Dames & Moore v. Regan, 453 U.S. 654, 674-684 (1981); Haig v. Agee, 453 U.S. 280, 301-303 (1981). The Attorney General's resolution of the fundamental question in this case -- whether Congress intended to criminalize acts of Administration officials pursuing official foreign policy objectives -- ought not be questioned, therefore, absent complete unreasonableness or bad faith. As we show below, the Attorney General's position on the Neutrality Act is not only eminently reasonable, but compelled by considerations of the plain language of the statute, the circumstances surrounding its enactment, and the post-enactment history of executive and legislative measures consistent with that position.

By its very terms, the statute proscribes individual conduct, not government activities. The statute today addresses "[w]hoever, within the United States, knowingly begins or sets on foot * * * any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state * * *." 18 U.S.C. 960. The use of the term "whoever," like its statutory predecessor "any person," 1 Stat. 381, 384 (1794), is no mere catch-all expression. At

common law, a statutory reference to "any person" or "whoever" did not include the sovereign if such an interpretation would impinge upon the sovereign's prerogatives, an understanding of which the colonists presumably were aware. See Street, Effect of Statutes Upon the Rights and Liabilities of the Crown, 7 U. Toronto L.J. 357 (1947). Congress presumptively does not intend to include official governmental action when including the open-ended phrase "any person."

That canon of statutory construction has continuing vitality today. In United States v. Cooper Corp., 312 U.S. 600 (1941), the Supreme Court addressed the issue whether "any person" in Section 7 of the Sherman Act included the United States. The Court declared that "in common usage, the term 'person' does not include the sovereign, [and that] statutes employing the phrase are ordinarily construed to exclude it." Id. at 604. See also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979). Moreover, as the Court stated in FPC v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960), a "general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." (quoting United States v. Wittek, 337 U.S. 346, 358-359 (1949)). The intent to preserve the gist of the common law rule seems clear. Cf. United States v. United Mine Workers, 330 U.S. 258, 272 (1947) (reaffirming the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."). The statutory rule takes on that much more force when combined with the familiar canon that criminal statutes are

strictly construed. In a criminal statute, then, it is logical to conclude that "person" does not apply to Administration officials carrying out governmental policy.

Thus, by reference to traditional guides of statutory interpretation, the word "whoever" in the context of this criminal provision cannot bear the construction proffered by plaintiffs. "Whoever" reaches private conduct, not that authorized or initiated by official governmental policy. The Attorney General's interpretation on its face is thus unquestionably reasonable.[8]

A. The Legislative History Clearly Demonstrates That The Neutrality Act Sought To Proscribe Private As Opposed To Official Governmental Involvement In The Affairs Of Foreign "Neutral" Nations.

Examining the events leading up to enactment of the 1794

[8] The district court stated that British antecedents to the Neutrality Act illuminate Congress' intent to circumscribe the executive's authority (ER 309-310). The court contended that since the earlier statutes provide exceptions for those acts "with leave or license of the crown," Congress' failure to adopt a similar qualifier in the Neutrality Act proves that the Act applies to official government policy (Id.). The court's reasoning is ill-conceived. To begin with, the section of the Neutrality Act in dispute had no direct British precursor. See C. Fenwick, The Neutrality Laws of the United States 27 (1913); Lobel, The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy, 24 Harv. Int'l L. J. 1, 32 n.164 (1983). Rather, the British statutes -- 12 Anne c.11 (1713); 9 George 2, c.30 (1736); 29 George 2, c.17 (1756) -- all concerned prohibiting British subjects from enlisting in foreign wars. Even without the clause "with leave or license of the crown," the statutes would not have restrained official acts of the executive, and the statutes' only impact on government officials was the de minimus restriction on their participation as individuals in a foreign war. Since the statutes in question have no relevance to the problem Congress attempted to remedy in Section 5 of the Neutrality Act, Congress could not have copied the statutes verbatim even if it had so desired.

Neutrality Act removes any possible doubt as to the statute's purpose. Congress sought not to restrict executive prerogatives under Article II, but to support the executive by criminalizing acts of individuals that threatened to interfere with the government's conduct of foreign policy. President Washington feared that precipitous acts by individual citizens, primarily instances of privateering or of aid to privateering, would embroil the country in the war between France and England. Believing that open hostilities would jeopardize our newly won independence, President Washington opted for as strict a policy of neutrality as possible. C. Fenwick, supra, at 16-26. To that end, President Washington issued a proclamation of neutrality in April of 1793 warning citizens to avoid all acts which threatened to subvert the government's chosen neutral course. See 1 American State Papers, Foreign Relations 140 (1883).

Despite the proclamation, French vessels continued to be armed and commissioned in American ports, and the celebrated French Minister, Edmond Charles Genet, asserted French jurisdiction over prizes brought into those ports. C. Fenwick, supra, at 18-20. President Washington consequently called upon Congress, as soon as it had reconvened, to enact legislation to ensure American neutrality: "Where individuals shall, within the United States, array themselves in hostility against any of the Powers at war * * * these offenses cannot receive too early and close an attention, and require prompt and decisive remedies." 4 Annals of Congress 11 (1793).

Congress responded by passing the Neutrality Act. Its purpose, as discussed on the House floor, was to strengthen the

hand of the President: "We have been told from the first authority--that of the PRESIDENT--an authority which in no Government but ours would be called in question--that such additional powers were necessary. But if, after this notice, we reject the bill, this must dampen the exertions of the Executive; and what if we shall be driven into a war by the licentious behaviour of some individuals?" 4 Annals of Congress 743 (remarks of Rep. Ames). Far from circumscribing executive authority, the Neutrality Act was proposed by the executive to strengthen the executive.[9] The legislative history, therefore, contrary to the conclusory remarks of the district court (ER 311),[10] makes it

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[9] Circumstances surrounding the almost contemporaneous reenactment and revision of the Neutrality Act buttress the above conclusion. The Act was first amended substantively at President Adams' request in 1797, Act of March 2, 1797, ch. 5, 1 Stat. 497. The amendments tightened the proscription against privateering, and thereby girded the government's course of neutrality. C. Fenwick, supra, at 30-31. Twenty years later, in the wake of continued protests from Spain and Portugal, President Madison lobbied Congress for further amendments which resulted in the Act of March 3, 1817, ch. 58, strengthening the executive's hand against shipowners who lent their vessels in aid of Latin American revolutionaries. See C. Fenwick, supra, at 35-39. Supplementary legislation was again passed in 1838, Act of March 10, 1838, 15 Stat. 212, this time to increase the executive's power against citizens aiding Canadians to overthrow British rule. See C. Fenwick, supra, at 42-43. The pattern has been consistent: neutrality laws have been proposed by the executive to bolster the central government's foreign policy.

[10] The district court's glaring failure to address the legislative purpose behind enactment of the Neutrality Act is noteworthy. Instead of analyzing the circumstances giving rise to the Neutrality Act, it baldly asserted that "[o]ne of [the Act's] major purposes was to protect the constitutional power of Congress to declare war or authorize private reprisals against foreign states" (ER 311), and cited only to the law review article of plaintiffs' counsel, Professor Lobel, supra note 8, for support. But ironically, even Professor Lobel elsewhere in the article concluded that: "The fundamental purpose of the

(CONTINUED)

clear that Congress sought to fortify governmental control over foreign policy through enactment of the Neutrality Act.

Nor does the one case relied upon by the district court, United States v. Smith, 27 F. Cas. 1192 (C.C.S.D.N.Y. 1806), undermine the above understanding of the Act. In Smith, the court held that the President's alleged prior knowledge and approbation of a private military expedition did not shield the defendant mercenaries from prosecution under the Act. Even presuming the correctness of the trial court's decision in Smith, that case not only involved a prosecution of private individuals as opposed to government officials, it also concerned an expedition launched for private motives as opposed to the instant one which is alleged to be part of official government policy.

The district court's opinion attempted to elide the differences by claiming that the essence of Smith is the proposition that the Neutrality Act reaches acts authorized by the President (ER 313). But the court's characterization of Smith is itself faulty. Smith involved only allegations that the President knew of or "winked" at the private expedition, not that he authorized it in any way. After all, it should be remembered that it was the executive which initiated the prosecution in the first place. Indeed, Judge Patterson specifically questioned defendants' counsel about the nature of the critical allegation

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10 (FOOTNOTE CONTINUED)

Neutrality Act, however, lay not in asserting state sovereignty with respect to other states but in strengthening the authority of the central government vis-a-vis its citizens * * *." Id. at 24.

in the case: "You state in the affidavit that it was done with the knowledge and approbation of the president, but is it stated in the affidavit that he authorized the fitting out of the expedition?" The attorney responded, "I conceive that it was not necessary," and then he disavowed his intention to advance such a claim. The Trials of William S. Smith, and Samuel Ogden 66 (Thomas Lloyd, stenographer 1807) (excerpt attached to this brief). This case, however, unlike Smith, involves allegations of direct governmental involvement in the expedition; in fact, plaintiffs allege that the government was funding the insurgents, and that the CIA was to play a key role in training the insurgents, all as a part of official United States foreign policy (ER 6-12). Smith simply does not address whether the Neutrality Act reaches the conduct of public officials acting pursuant to governmental objectives.[11]

B. This Country's History Of Repeated Military Actions Against "Neutral" Nations Supports The Attorney General's Construction of the Neutrality Act.

As the district court recognized (ER 311), presidents throughout this nation's history have exercised the broad discretion invested to them under the Constitution to introduce

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[11] To our knowledge, no subsequent judicial decision has addressed the issue implicated in this case. However, it should be noted that the Supreme Court, in distilling the significance of the Neutrality Act, has stated that "no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty." United States v. The Three Friends, 166 U.S. 1, 52 (1897) (emphasis added). The Court recognized that the neutrality laws were enacted "in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers." Id. at 53 (emphasis added).

troops into foreign nations without first obtaining a declaration of war. Needless to say, this background of over one hundred instances of engaging in or supporting hostilities in "neutral" nations, see Emerson, War Powers Legislation, 74 West Va. L. Rev. 53 (1971); Monaghan, Presidential War-Making, 50 B.U.L. Rev. 22, 26-27 (1970), is difficult to square with plaintiffs' construction of the Act. Presidents have acted both with and without subsequent Congressional authorization. Vietnam and Grenada are two recent examples of a phenomenon which has marked the nation's history. Still, Congress as a whole has never invoked the Neutrality Act to oppose executive action. To the contrary, on many occasions it has adopted the executive's chosen path and provided funding for further military actions. See Emerson, supra, at 73.

The district court attempted to evade this inconsistency in its position by stating that Congress must not have intended the Neutrality Act to apply to military operations conducted by regular U.S. troops (ER 313). Yet the district court as well as plaintiffs are at a loss to explain why the Congress which purportedly sought to protect its war powers under Article I, § 8, by enacting the Neutrality Act would ever have exempted the most expansive infringement of its powers conceivable -- the President's right to introduce troops into foreign nations without a Congressional declaration of war. Moreover, as a historical matter, presidents not only have dispatched regular United States troops without seeking prior Congressional approval, but from the 1811-1813 secret war against Spanish Florida, see A. Sofaer, War, Foreign Affairs and Constitutional

Power 291-317 (1976), to the Bay of Pigs invasion, they have lent the government's support to paramilitary operations.[12] Practice thus corresponds with the intent of the enacting Congress -- the Neutrality Act was meant to proscribe only the acts of individuals interfering with the course of official governmental foreign policy.[13]

In dismissing the import of the continuing history of military and paramilitary expeditions, the district court chose to rely instead on post-enactment remarks of various presidents to demonstrate that the Act encompasses official governmental policy (ER 311). To be sure, former presidents have publicly remarked that the warmaking powers, as a constitutional matter, are vested solely in Congress. See, e.g., Statement of Pres. Van Buren (Dec. 3, 1838), reprinted in 3 Messages and Papers of the

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[12] We note that according to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess. Book I, 120 (1975), the government has supported paramilitary efforts on other occasions as well, most notably to the Committee, in Laos in the early 1960's, and in Guatemala in the 1950's.

[13] Attorney General Jackson's 1940 opinion, 39 Op. Atty. Gen. 484, 494-96, is not to the contrary. Jackson construed not the Neutrality Act of 1794, but an amendment inserted in the midst of World War I which had no antecedent in the original Act. Act of June 15, 1917, § 503, 40 Stat. 217, 222. In pertinent part the section reads: "During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war * * *." Moreover, the legislative history suggests that Congress enacted the provision to conform the conduct of the government in this respect to accepted international principles of neutrality. See H.R. Rep. No. 30, 65th Cong., 1st Sess. 9 (1917). Unlike in 1794, the fear was not just that the acts of individuals could propel the nation into war, but that foreign powers would interpret official government conduct in such a way as to lead to war.

Presidents 487 (J. Richardson ed. 1896); statement of Pres. Buchanan, Cong. Globe, 35th Cong., 1st Sess. 217 (Jan. 7, 1858). By citing these speeches, the district court apparently wished to graft a constitutional perspective on Congress' hegemony over the warmaking powers, a jurisprudential view which is by no means universally shared, onto a criminal statute drafted by the Executive Branch which incontrovertibly sought to augment the central government's control over foreign policy. The speeches shed no light on the proper construction of the Neutrality Act. They do not refer to the Neutrality Act at all, and any possible significance is belied by the accompanying history of repeated military incursions into nations without a declaration of war.

Similarly, the district court's reliance on Senator Slidell's attempt to amend the Neutrality Act in the 1850's is misplaced (ER 311-312). Slidell sought to amend the Neutrality Act to allow the President to suspend its operation whenever required "in the public interest." Cong. Globe, 33d Cong., 1st Sess. 1021-1024 (May 1, 1854). The purpose of his amendment was to enable southerners to invade Cuba in order to prevent the impending abolition of slavery by the Spanish Government. Id. at 1021. We do not understand plaintiffs to suggest that Slidell's scheme could conceivably have enjoyed the official sanction of the government. Slidell's amendment was addressed not to official government initiatives, but to private ventures. By rebuffing Slidell's attempt, Congress merely reaffirmed that the President should not "wink" at private expeditions launched for private purposes. The efforts of Senator Slidell, like the remarks of

the former presidents, simply do not support plaintiffs' position that the Neutrality Act was ever thought to circumscribe the acts of federal officials implementing official government policy.

C. Recent Congressional Enactments Are Inconsistent With Plaintiffs' Thesis That The Executive's Conduct Of Official Foreign Policy Could Conceivably Violate the Neutrality Act.

In recent years, Congress and the executive have engaged in a continual dialogue over the executive's right to conduct so-termed covert activities as part of its foreign policy. Although the two branches have not always agreed, the debates themselves demonstrate that Congress has long been aware of the executive's conduct of such activities, and the disagreements which have arisen concern not whether the conduct is criminal, but whether the activities should be carried out with greater Congressional participation. In light of repeated Congressional measures recognizing and authorizing appropriations for such actions, the district court's conclusion that the official conduct of foreign policy may reasonably constitute a criminal violation is simply specious.

In the aftermath of the Vietnam War, Congress as a whole asserted a greater role in foreign policy matters. In 1973, Congress enacted the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, which requires the President to consult with Congress and provide reports concerning the introduction of government troops abroad, 50 U.S.C. § 1543. The only sanction provided, however, is that "[w]ithin sixty calendar days after a report is submitted * * * the President shall terminate any use of United States Armed Forces * * * unless [several specified

conditions are met]." 50 U.S.C. § 1544(b). Enactment of the Hughes-Ryan amendment one year later, Pub. L. No. 93-559, 88 Stat. 1804 (codified at 22 U.S.C. § 2422), manifests a similar response to executive conduct of foreign affairs, this time directly relating to covert operations. In placing procedural limitations on CIA covert activities, Congress unquestionably recognized the underlying exercise of executive power: "Notwithstanding this limitation, the President may authorize and direct that any operation in a foreign country be resumed, or that any other operation in a foreign country be initiated, and funds may be expended therefor, if but not before, he (1) finds that such operation is important to the national security * * *." S. Rep. No. 1299, 93d Cong., 2d Sess. 43 (1974) (emphasis added). Any questions concerning the legitimacy of the executive's exercise of that power were not resolved by criminalizing the executive's conduct. Rather, Congress treated the subject of the covert actions as falling within the domain of both the executive and Congress -- each had its assigned role. The Hughes-Ryan legislation would for the most part be superfluous if the Neutrality Act reached covert actions pursued as a part of official government policy.

Congress has continued to help shape the executive's conduct of covert activities.[14] Indeed, Congress recently has authorized appropriations for the very activities which

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[14] Congress amended the Hughes-Ryan legislation in 1980, Pub. L. No. 96-450, 94 Stat. 1981 (codified at 50 U.S.C. § 413), providing for more extensive Congressional oversight of intelligence activities.

plaintiffs claim violate the neutrality laws. In passing the 1984 Intelligence Authorization Act on November 18, 1983, Congress affirmatively authorized funding should the executive choose to aid the insurgents in Nicaragua. The Act set a twenty-four million dollar cap on expenditures "for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual." Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473. Contrary to the district court's statement that the funding is irrelevant (ER 320), the Congressional authorization is clearly inconsistent with plaintiffs' thesis that the activities charged constitute criminal violations.

Thus, while Congress has chosen to place some limitations upon the executive's conduct of covert activities, including providing aid for paramilitary groups, it has also recognized the legitimacy of the underlying exercise of executive authority. Congressional participation in that exercise undermines plaintiffs' argument that the Neutrality Act was designed to circumscribe the executive's foreign affairs prerogatives. The Attorney General has reasonably concluded that the President and senior Administration officials cannot conceivably have violated a federal criminal law by allegedly pursuing policies explicitly funded by Congress.

III. THE NEUTRALITY ACT'S APPLICABILITY TO OFFICIAL ACTIONS OF THE EXECUTIVE BRANCH THAT HAVE BEEN SUPPORTED BY CONGRESS PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

Given Congress' legislation funding the government's Nicaragua policy, this case presents a political question

inappropriate for judicial resolution. It is important to reemphasize the extraordinary relief that plaintiffs seek--a declaration that the government's official conduct of foreign policy may violate a criminal provision housed in the Neutrality Act. What they are seeking, then, is for this Court to intrude upon an area constitutionally entrusted to the other two branches. But, as the Supreme Court has stated: "the very nature of executive decisions as to foreign policy is political not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative." Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

Measured against the standards articulated in Baker v. Carr, 369 U.S. 186, 217 (1962), the issue implicated in this case is nonjusticiable:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department * * * or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherance to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question."

First, there can be no question but that there is clearly a "textually demonstrable constitutional commitment of the issue to a coordinate political department." The conduct of foreign affairs in general, and the decision to provide covert aid in particular, lie within the prerogatives of Congress and the President. Recent legislation, see pages 42-44, supra, amply demonstrates that the two branches have joined in

continuing discourse to delineate their respective roles in so-termed covert aid decisions. As the Court of Appeals for the First Circuit held in dismissing a challenge to the conduct of the Vietnam War, "[a]s to the power to conduct undeclared hostilities beyond emergency defense, then, we are inclined to believe that the Constitution in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation." Massachusetts v. Laird, 451 F.2d 26, 33 (1st Cir. 1971); see Sarnoff v. Connally, 457 F.2d 809 (9th Cir.) (dismissing challenge to Vietnam War on political question ground because "[t]he conduct of foreign affairs is within the exclusive province of Congress and the Executive."), cert. denied, 409 U.S. 929 (1972). The district court's order disrupts the ongoing interplay between Congress and the Executive on the extent of covert activities, distorting the balance envisioned in the Constitution. In face of the commitment to the other branches, plaintiffs should not be permitted to bypass those branches -- any redress should be obtained through the political process.

Second, judicial intrusion into the President's realm of foreign policymaking can only end in denigrating the "respect due coordinate branches of government." The district court's order casts a pall upon the government's conduct of foreign policy, and it brings into question the legitimacy of past presidencies as well, since the majority of presidents have aided hostilities in "neutral" nations.

Finally, not only does the district court's order threaten to erode the respect due coordinate branches of government, but it exposes the government to the "real danger of embarassment from multifarious pronouncements by various departments on one question." The Executive Branch has allegedly articulated its view as to the legitimacy of aid to the Nicaraguan insurgents, and Congress through appropriations has acquiesced in that determination. The judiciary simply has no role to play. Recognizing the propriety of that consideration, the Court of Appeals for the Fifth Circuit in Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975), cert. denied, 424 U.S. 954 (1976), dismissed a challenge to the President's decision backed by Congress to provide foreign aid to Israel. The Court applied the political question doctrine because a determination that foreign aid was necessary was "a 'question uniquely demand[ing] single-voiced statement of the Government's views.'" Id. at 236. Since the Executive and Legislative Branches have already manifested their view that the Neutrality Act does not apply to the alleged governmental aid for Nicaraguan insurgents, the need for a "single voice" is just as pressing. The district court's pronouncement therefore may "rattle the delicate diplomatic balance that is required in the foreign affairs arena." Sanchez-Espinoza v. Reagan, supra (dismissing challenge to alleged U.S. support of covert activity in Nicaragua on political question grounds). When the executive branch has pursued a foreign policy objective and received Congress' imprimatur, judicial intrusion is wholly inappropriate.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

Respectfully submitted,

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MARCH 1984

STATEMENT OF RELATED CASES

There are no related cases within the meaning of Local Rule 13(b)(4).

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 1984, I served the foregoing Brief for the Appellants by causing copies to be Express Mailed, postage prepaid, to:

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ADDENDUM

A -- Transcript Excerpt from Smith case

B -- Ethics in Government Act, 28 U.S.C. §§ 591-598

C -- Neutrality Act, 18 U.S.C. § 960

ADDENDUM A

THE

TRIALS

OF

WILLIAM S. SMITH,

AND

SAMUEL G. OGDEN,

FOR

MISDEMEANOURS,

HAD IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NEW-YORK DISTRICT, IN JULY, 1806.

WITH A PRELIMINARY ACCOUNT OF THE PROCEEDINGS OF THE SAME COURT AGAINST MESSRS. SMITH & OGDEN, IN THE PRECEDING APRIL TERM.

BY

THOMAS LLOYD, STENOGRAPHER.

NEW-YORK:

PRINTED BY AND FOR I. RILEY AND CO.

1807.

tries. But if the foreign power, shall itself have broken that amity, and shall have given just grounds of war, no government ought to omit "providing and preparing the means" for military enterprises; nor could any law have intended to prevent the preparatory efforts of individuals for subduing the public enemy.—The memorable congress that commenced your revolution did not hesitate to provide and prepare the means of meeting the English before actual war was declared; nor did it censure or discountenance those patriots, who, unauthorised by any orders, and before the formal declaration of war, possessed themselves of Ticonderoga and Crown Point.

The circumstances of the times, we have shown, justified the president in giving his approbation, and my client, under that approbation, in providing and preparing the means of a military enterprise against Spain. And surely no enterprise could be more useful or effectual for drawing the enemy from our southern and western frontiers; none more worthy of the exalted and philosophic mind of our chief magistrate; none more consonant to the enlightened and philosophic views of society and politics, which he has exhibited to the world, than an expedition to liberate South America; to destroy at once Spanish tyranny and power on our own continent; to enfranchise, by one effort, millions of our fellow creatures from the most frightful bondage; and to lay the foundations, in so large a portion of the globe, for the freedom and the happiness of man!

PATERSON, J. You state in the affidavit that it was done with the knowledge and approbation of the president, but is it stated in the affidavit that he *authorised* the fitting out of the expedition?

Emmet. I conceive it was not necessary; for though I have argued upon the effects of an authorisation, it was only to show that the argument of the adverse counsel went much too far, when they contended that the president could not authorise any such measure. For our defence, it will be only necessary to show that the president was, under the circumstances of the times, warranted to provide and prepare the means for a military expedition; and that in what he might do, we acted with his knowledge and approbation. *Qui prohibere potest et non prohibet, jubet.* The knowledge and approbation of the chief magistrate and heads of departments, if we shall prove them to have been sufficiently express and positive, will amount to a justification; but even if we should fail in establishing them to that extent, they will still afford very powerful inducements for mitigating the punishment.

This is denied on the other side; but I would ask, if it could be proved that this enterprise was carried on *against* the president's express orders, would not that be matter of aggravation? If it would, surely the reverse must be matter of mitigation—The mistake into which a defendant may have been led by the

§ 587. Salaries

The Attorney General shall fix the annual salaries of United States trustees and assistant United States trustees at rates of compensation not to exceed the lowest annual rate of basic pay in effect for grade GS-16 of the General Schedule prescribed under section 5332 of title 5.

(Added Pub.L. 95-598, Title II, § 224(a), Nov. 6, 1978, 92 Stat. 2664.)

§ 588. Expenses

Necessary office expenses of the United States trustee shall be allowed when authorized by the Attorney General.

(Added Pub.L. 95-598, Title II, § 224(a), Nov. 6, 1978, 92 Stat. 2664.)

§ 589. Staff and other employees

The United States trustee may employ staff and other employees on approval of the Attorney General.

(Added Pub.L. 95-598, Title II, § 224(a), Nov. 6, 1978, 92 Stat. 2664.)

CHAPTER 39 [1]—INDEPENDENT COUNSEL

Sec.
591. Applicability of provisions of this chapter.
592. Application for appointment of a [2] independent counsel.
593. Duties of the division of the court.
594. Authority and duties of a [2] independent counsel.
595. Reporting and congressional oversight.
596. Removal of a [2] independent counsel; termination of office.
597. Relationship with Department of Justice.
598. Termination of effect of chapter.

[1] Another chapter 39, set out preceding this chapter, comprises sections 581 to 589 of this title.

[2] So in original.

Effective Date of Chapter. Section 604 of Pub.L. 95-621 provided in part that this chapter shall take effect on Oct. 26, 1978.

§ 591. Applicability of provisions of this chapter

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense.

(b) The persons referred to in subsection (a) of this section are—

(1) the President and Vice President;

(2) any individual serving in a position listed in section 5312 of title 5;

(3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;

(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office;

(8) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President.

(c) Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General may conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1867, and amended Pub.L. 97-409, §§ 3, 4(a), Jan. 3, 1983, 96 Stat. 2039, 2040.)

Applicability to Specific Information Relating to Pending Proceedings

Section 604 of Pub.L. 95-521 provided in part that the provisions of this chapter shall not apply to specific information received by the Attorney General pursuant to section 591, if the Attorney General determines that—

(1) such specific information is directly related to a prosecution pending at the time such specific information is received by the Attorney General;

(2) such specific information is related to a matter which has been presented to a grand jury and is received by the Attorney General within 180 days of October 26, 1978; or

(3) such specific information is related to an investigation that is pending at the time such specific information is received by the Attorney General, and such specific information is received by the Attorney General within 90 days of October 26, 1978.

§ 592. Application for appointment of a [1] independent counsel

(a)(1) Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. In determining whether grounds to investigate exist, the Attorney General shall consider—

(A) the degree of specificity of the information received, and

(B) the credibility of the source of the information.

(2) In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpenas.

(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a [1] independent counsel.

(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

(3) Such memorandum shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

(c)(1) If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of a [1] independent counsel. In determining whether reasonable grounds exist warrant further investigation or prosecution, t Attorney General shall comply with the written other established policies of the Department Justice with respect to the enforcement of crimin laws.

(2) If—

(A) after the filing of a memorandum und subsection (b) of this section, the Attorney Ge eral receives additional information sufficient constitute grounds to investigate about the ma ter to which such memorandum related, and

(B) the Attorney General determines, aft such additional investigation as the Attorne General deems appropriate, that reasonabl grounds exist to warrant further investigation o prosecution,

then the Attorney General shall, no later tha ninety days after receiving such additional informa tion, apply to the division of the court for th appointment of [1] independent counsel.

(d)(1) Any application under this chapter shal contain sufficient information to assist the divisior of the court to select a [1] independent counsel and to define that independent counsel's prosecutorial jurisdiction.

(2) No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

(e) The Attorney General may ask a [1] independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of a [1] independent counsel shall not be reviewable in any court.

(Added Pub.L. 95–521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1868, and amended Pub.L. 97–409, §§ 2(a)(1), 4(b)–(e), Jan. 3, 1983, 96 Stat. 2039–2041.)

[1] So in original.

References in Text. The Act, referred to in subsec. (a)(1), probably means the Ethics in Government Act of 1978 which enacted this chapter. For complete classification of that Act to the Code, see Short Title note under section 701 of Title 2, The Congress and Tables volume.

§ 593. Duties of the division of the court

(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction. A [1] independent counsel's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such prosecutor [2] shall be made public when any indictment is returned or any criminal information is filed.

(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing independent counsel, and such expansion may be in lieu of the appointment of an additional independent counsel.

(d) The division of the court may not appoint as a [1] independent counsel any person who holds or recently held any office of profit or trust under the United States.

(e) If a vacancy in office arises by reason of the resignation or death of a [1] independent counsel, the division of the court may appoint a [1] independent counsel to complete the work of the independent counsel whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of a [1] independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

(f) Upon a showing of good cause by the Attorney General, the division of the court may grant a single extension of the preliminary investigation conducted pursuant to section 592(a) of this title for a period not to exceed sixty days.

(g) Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, in its discretion, award reimbursement for all or part of the attorney's fees incurred by such subject during such investigation if—

(1) no indictment is brought against such subject; and

(2) the attorney's fees would not have been incurred but for the requirements of this chapter.

(Added Pub.L. 95–521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1869, and amended Pub.L. 97–409, §§ 2(a)(1), 5, Jan. 2, 1983, 96 Stat. 2039, 2041.)

[1] So in original.

[2] So in original. Substitution of "counsel" for "prosecutor" was not made by Pub.L. 97–409.

§ 594. Authority and duties of a [1] independent counsel

(a) Notwithstanding any other provision of law, a [1] independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel deems necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing

and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) A [1] independent counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

(c) For the purposes of carrying out the duties of the office of independent counsel, a [1] independent counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as such independent counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS–18 of the General Schedule under section 5332 of title 5.

(d) A [1] independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(e) A [1] independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. A [1] independent counsel's may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

(f) A [1] independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(Added Pub.L. 95–521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1869, and amended Pub.L. 97–409, §§ 2(a)(1), 6(a)–(c), Jan. 3, 1983, 96 Stat. 2039, 2041.)

[1] So in original.

References in Text. Section 6103 of the Internal Revenue Code of 1954, referred to in subsec. (a)(8), is classified to Title 26, U.S.C.A., § 6103.

§ 595. Reporting and congressional oversigl

(a) A [1] independent counsel appointed under th chapter may make public from time to time, ar shall send to the Congress statements or reports c the activities of such independent counsel. Thes statements and reports shall contain such inform tion as such independent counsel deems appropr ate.

(b)(1) In addition to any reports made under sul section (a) of this section, and before the termin tion of a [1] independent counsel's office under se tion 596(b) of this title, such independent couns shall submit to the division of the court a repor under this subsection.

(2) A report under this subsection shall set fort fully and completely a description of the work c the independent counsel, including the dispositio of all cases brought, and the reasons for not pros cuting any matter within the prosecutorial jurisdi tion of such independent counsel which was nc prosecuted.

(3) The division of the court may release to th Congress, the public, or to any appropriate perso such portions of a report made under this subse tion as the division deems appropriate. The div sion of the court shall make such orders as ar appropriate to protect the rights of any individua named in such report and to prevent undue inte ference with any pending prosecution. The div sion of the court may make any portion of a repor under this section available to any individual name in such report for the purposes of receiving withi a time limit set by the division of the court an comments or factual information that such indivi ual may submit. Such comments and factual infor mation, in whole or in part, may in the discretion c such division be included as an appendix to suc report.

(c) A [1] independent counsel shall advise th House of Representatives of any substantial an credible information which such independent cou sel receives that may constitute grounds for a impeachment. Nothing in this chapter or sectio 49 of this title shall prevent the Congress or eithe House thereof from obtaining information in th course of an impeachment proceeding.

(d) The appropriate committees of the Congres shall have oversight jurisdiction with respect to th official conduct of any independent counsel appoin ed under this chapter, and such independent cou sel shall have the duty to cooperate with the exe cise of such oversight jurisdiction.

(e) A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of a [1] independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

(Added Pub.L. 95–521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1871, and amended Pub.L. 97–409, § 2(a)(1), Jan. 3, 1983, 97 Stat. 2039.)

[1] So in original.

§ 596. Removal of a [1] independent counsel; termination of office

(a)(1) A [1] independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

(2) If a [1] independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b)(3) of this title and under the same limitations as apply to the release of a report under that section.

(3) A [1] independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.

(b)(1) An office of independent counsel shall terminate when (A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the independent counsel files a report in full compliance with section 595(b) of this title.

(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the independent counsel shall file the report required by section 595(b) of this title.

(Added Pub.L. 95–521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1872, and amended Pub.L. 97–409, §§ 2(a)(1), 6(d), Jan. 3, 1983, 96 Stat. 2039, 2042.)

[1] So in original.

§ 597. Relationship with Department of Justice

(a) Whenever a matter is in the prosecutorial jurisdiction of a [1] independent counsel or has been accepted by a [1] independent counsel under section 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which a [1] independent counsel participates in an

official capacity or any appeal of such a case or proceeding.

(Added Pub.L. 95–521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1872, and amended Pub.L. 97–409, § 2(a)(1)(A), Jan. 3, 1983, 96 Stat. 2039.)

[1] So in original.

§ 598. Termination of effect of chapter

This chapter shall cease to have effect five years after the date of the enactment of the Ethics in Government Act Amendments of 1982, except that this chapter shall continue in effect with respect to then pending matters before a [1] independent counsel that in the judgment of such special counsel require such continuation until that independent counsel determines such matters have been completed.

(Added Pub.L. 95–521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1873, and amended Pub.L. 97–409, §§ 2(a)(1)(A), 7, Jan. 3, 1983, 96 Stat. 2039, 2042.)

[1] So in original.

References in Text. The date of enactment of the Ethics in Government Act Amendments of 1982, referred to in text, is the date of enactment of Pub.L. 97–409, which was approved on Jan. 3, 1983.

§ 960. Expedition against friendly nation

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

June 25, 1948, c. 645, 62 Stat. 745.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., § 25 (Mar. 4, 1909, c. 321, § 13, 35 Stat. 1089; June 15, 1917, c. 30, Title V, § 8, 40 Stat. 223).

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Reference to territory or possessions of the United States was omitted as covered by definitive section 5 of this title.

Canal Zone. Applicability of section to Canal Zone, see section 14 of this title.