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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Report	Michael M. Baylson [6 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/15/2025 JLS]	6	12/14/2001	

COLLECTION TITLE:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
Judges - [Baylson, Michael M.]
FRC ID:
9631

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Report	Michael M. Baylson	6	12/14/2001	P5;

COLLECTION TITLE:
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Privileged/Deliberative Process

REPORT ON MICHAEL M. BAYLSON CANDIDATE FOR NOMINATION TO THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA PREPARED FOR THE WHITE HOUSE PURSUANT TO THE WHITE HOUSE'S REQUEST FOR VIEWS

I. CAREER HIGHLIGHTS

Following graduation from law school, Michael M. Baylson had a judicial clerkship with Judge Joseph Sloane of the Philadelphia County Court of Common Pleas. Baylson then spent four years as an Assistant District Attorney in Philadelphia. He left that position in 1970 to become an associate at Duane Morris & Heckscher in Philadelphia. Baylson became a partner in that firm in 1974. Baylson was the United States Attorney in Philadelphia from October 1988 through January 1993. He should be noted that Baylson was never confirmed by the United States Senate and was never even put up for vote. (SEE CONFIRMATION ISSUES) Following Baylson's position as United States Attorney, he went back to Duane Morris & Heckscher in 1993 and has remained there as managing partner of the litigation group.

II. ACADEMIC AND PERSONAL BACKGROUND

Mr. Baylson received a Bachelor of Science degree in Economics in 1961 from the Wharton School of Economics and Commerce. He received his LL.B. from the Pennsylvania Law School in 1964.

Michael Baylson is married to Dr. Frances Ruth Batzer Baylson, a physician with the Philadelphia Fertility Institute. They have three children aged 25, 23 and 19 years old.

III. MEMBERSHIPS

Mr. Baylson is currently a member of the Federalist Society, the American Bar Association, the American Jewish Committee, Gaudenzia, Inc. (a non-profit drug rehabilitation center that he co-founded), the Center for the Community Interest (Director and Treasurer), Germantown Jewish Center, and the Germantown Cricket Club. He also a member of several local and state bar organizations.

Regarding political memberships, Mr. Baylson was the Treasurer for the Big Tent Political Action Committee from 1994 to 1999 and was elected as a delegate to the Republican National Convention in 1996.

IV. JUDICIAL PHILOSOPHY

During his interview, Mr. Baylson stated that good judges are not only fair, they must appear to be fair. Parties, or their counsel, must be shown patience and be allowed to advocate their position. Good judges must be intellectually strong and know the law and follow precedent. Mr. Baylson stressed that judges should not create the law. When asked about his United States Supreme Court Justices that he admires, Mr. Baylson stated that he was a strict constructionist and likes the "philosophies" of Chief Justice Rehnquist and Justice Scalia.

V. SIGNIFICANT LEGAL OPINIONS

As a head of the litigation section at the firm, Mr. Baylson has been involved in significant and complex civil cases. In lieu of reciting the cases listed by Mr. Baylson on his Senate questionnaire, it can be simply noted that he has handled sophisticated federal cases and is merit qualified for the position. However, it should be noted that some of Mr. Baylson's cases have garnered significant and political attention. A review of these cases follows.

In *Baylson v. Disciplinary Board of Supreme Court of Pennsylvania*, 975 F.2d 102 (3d. Cir. 1992), cert. den. 113 S.Ct. 1578 (1993), the designee, in his capacity as United States Attorney, joined the other two United States Attorneys from Pennsylvania in filing suit against the state disciplinary board challenging the requirement that federal prosecutors must get court approval prior to issuing a subpoena to an attorney. The District Court granted summary judgment in favor of the plaintiffs and the Third Circuit affirmed the decision.

Mr. Baylson was United States Attorney during the investigation of Rep. Joseph McDade. According to Mr. Baylson, the investigation into McDade began prior to his becoming United States Attorney but he did sign the indictment after getting permission from the Criminal Division of the Department of Justice. After McDade was indicted, McDade's counsel filed a motion requesting the indictment be dismissed because of Mr. Baylson's relationship with Sen. Arlen Spector. Counsel for McDade alleged Sen. Specter should have been the real target of the investigation. Essentially, the motion stated that Baylson had a conflict of interest in that Baylson was the former campaign treasurer for Sen. Spector and had a reason to steer the investigation away from Sen. Spector and thus Rep. McDade was investigated. The court examined the evidence and affidavits from Mr. Baylson and other federal prosecutors and denied the motion to dismiss (decision attached). The trial of Rep. McDade began after Mr. Baylson left his position as United States Attorney. Rep. McDade was acquitted. Since then, the *McDade Amendment* requiring federal prosecutors to comply with state ethics rules was passed. Rep. McDade and Rep. John Murtha (D-Johnston) also introduced the Citizens Protection Act allowing for targets of wrongful investigations to recover their legal expenses.

Mr. Baylson was also United States Attorney during the FBI's investigation into financial improprieties of Rep. Bill Gray. Rep. Gray was never indicted but did resign. There was a subsequent investigation (conducted by Ken Starr) into who leaked the information that Rep. Gray was under investigation. Mr. Baylson, along with others, was given two polygraph examinations. Mr. Baylson would not discuss the results of the polygraph examinations but is willing to speak to Deputy Counsel to the President Tim Flanigan about this. There were rumors about this suggesting that Mr. Baylson failed at least one of the polygraphs.

VI. PUBLICITY

In addition to the publicity Mr. Baylson received in conjunction with the above cases, he has been mentioned in dozens of newspaper articles. Most of the articles are concerning prosecutions of various offenders while United States Attorney and are not noteworthy for these purposes.

Currently, Mr. Baylson is representing the Adams Mark Hotel in various litigation. Recently, he represented the hotel chain in August of this year when they filed for a preliminary injunction to block the NAACP's national boycott of the chain. Baylson filed for injunctive relief in federal court in Baltimore primarily seeking relief for the NAACP allegedly distributing false information about the chain. The court denied the relief holding that boycotts were constitutionally protected under the First Amendment. Attached to this report is an article from the Baltimore Sun newspaper discussing this matter. Mr. Baylson also represented the Adams Mark in the NAACP discrimination suit in Florida. That case settled (for the second time after the first settlement was not accepted by the court)in early December of this year. Mr. Baylson is currently representing the hotel chain in an ongoing discrimination suit in Philadelphia.

In 1999, Mr. Baylson was asked by Sen. Specter if he would be on the Senate Oversight Subcommittee to investigate issues such as Waco and Wen Ho Lee. Mr. Baylson came to Washington and sat in on some meetings and he was publicly mentioned in several articles as probably becoming counsel to that subcommittee. The subcommittee was never budgeted.

Mr. Baylson's firm represented the State of Pennsylvania in the tobacco litigation. The firm was one of many that was criticized for the amount of the fee that was generated for the firm. The firm received approximately $25 million. Mr. Baylson states that while he did sign the pleadings, he was not actively involved in the suit or the settlement discussions.

Similarly, Mr. Baylson's firm represented the NRA in a libel suit in Philadelphia. The jury found against the NRA and awarded a $4.45 million dollar verdict. The judge set the verdict aside as being excessive. Although he was one of the attorneys in the firm that signed pleadings and he was quoted in the newspapers, Mr. Baylson states that he did not play a major role in the case.

On June 10, 2001, the Sunday Patriot News in Harrisburg, Pennsylvania, had an editorial (attached) that was critical of the some of the potential federal judges. The editorial, *Merit Choice of Jurists has Little Merit*, discussed how Mr. Baylson's involvement in the McDade prosecution had angered local Republicans. The article discussed that Sen. Specter might be willing to hold up all of the nominees unless he was able to put Mr. Baylson on the 3rd Circuit. Finally, the article noted that some local Republicans were also upset because Mr. Baylson had "nurtured" one of his law partners in her unsuccessful Democratic challenge for the state senate.

Most recently, Mr. Baylson was quoted in an article discussing the war on terrorism. In *Bin Laden's Guilt Debated* by Joseph Slobodzian for Knight Ridder, October 6, 2001, (attached)(which was picked up by several newspapers across the country), Mr. Baylson states that the circumstantial evidence against bin Laden appears to be sufficient try the terrorist in the United States.

VII. PUBLICATIONS AND SPEECHES

As listed on his Senate questionnaire, Mr. Baylson has written or co-written over two dozen articles. Most of them are for various legal publications and confirm that Mr. Baylson clearly has the legal acumen necessary for the United States District Court bench. However, some of the articles are noteworthy because of their potential for political use. Mr. Baylson has written two articles on artificial insemination and one article on abortion. While the titles of the articles are clearly of interest, they are presented by Mr. Baylson in a rather historical fashion.

In "A Medical Advancement in Search of a Legal Theory–Artificial Insemination by Donor and the Law" written for *Seminars in Reproductive Endocrinology* (Quagliarello 1987), Mr. Baylson recites the various court decisions across the country. He does conclude that some reasonable state regulation may be proper. Id. at 71. Mr. Baylson explains his belief that the United States Supreme Court would find this type of procreation constitutionally permissible. He also states that he believes that a state's attempt to have a wholesale ban on artificial insemination for unwed women would not survive constitutional scrutiny. Id. at 72. However, he did conclude that some "modest" state regulations on an unwed women may be permissible. Id.

Mr. Baylson's article "Donor Insemination" (Legal Aspects)(with S.L. Corson, M.D. and F.R. Batzer. M.D.) Vol 12 *Obstetrics and Gynecology Annual* (1983), Mr. Baylson discusses the legal protections for the participants. He states that "(i)f there is to be increased legal regulation... legislative action, rather than judicial decision-making, is the preferable means, provided that the legislation adequately takes into account the individual rights of procreation that have been cloaked with constitutional protection." Id. at 300. Mr. Baylson goes on to state that artificial insemination is the "...reverse side of the same reasoning under which the Supreme Court has protected the right of a woman to have an abortion." Id. at 301. As in the prior publication, Mr. Baylson discusses the issue of an unwed women using this method to procreate. He states that "...the God-given ability of woman to have a child is a more constitutionally protected right than a state's desire to limit the right to bear children to married women." Id. at 302.

In "The Legal Aspects of Abortion" for the publication *Voluntary Termination of Pregnancy* (Hafez, ed., 1984), Mr. Baylson traces abortion from the ancient times through 1984. He begins the article by recognizing that abortion "...more than any other medical procedure...raises significant questions concerning the origin of human life, and the degree of freedom a woman should have over the consequences of intercourse and conception." Id. at 147. Mr. Baylson briefly discusses the pro-life and the pro-abortion positions and then gives a historical perspective for both the United States and other countries. He concludes by stating that:

> "...the Supreme Court serves as the final arbitrator as to whether legislation is unduly restrictive on the rights of individuals. The balancing test may be a precarious one, and is usually better done by a legislature than a Court. However, this principle does not require a Court which has the ultimate authority of upholding the laws and Constitution of a sovereign country, to abdicate its authority. Id. at 153.

In *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint* 40 Federal Bar News & Journal 167 (1993), Mr. Baylson reiterates the theme that is appropriate for the legislature to set criminal guidelines as within their legitimate purview.

In "Wager on Gaming or Watch Rival States Lure Lucrative Play Away" for the Philadelphia Inquirer, July 23, 1995 (attached to questionnaire), Mr. Baylson writes a commentary stating that Pennsylvania should allow riverboat gambling as the state loses one billion dollars a year as Pennsylvanians travel to other states to gamble.

Mr. Baylson has given approximately nine speeches during his career. None of them appear to be controversial or noteworthy.

VIII. THIRD PARTY INTERVIEWS

There were numerous people who were interviewed for this report. The people interviewed included U.S. District Court judges, state judges and attorneys. Everyone believed that Mr. Baylson was very qualified for the position on the district court bench.

IX. CONFIRMATION ISSUES

The only concern that people had was that because of Mr. Baylson's involvement in the McDade case and other high-profile matters (such as the Rep. Bill Gray matter), there would be some political infighting about his confirmation. Several people commented that they did not believe that Mr. Baylson's enemies would be able to make much headway since Sen. Specter is so strongly backing him. As previously mentioned, Mr. Baylson was never put up for Senate voting while U.S. Attorney. The prevailing opinion was that there would be extensive opposition to him as U.S. Attorney because of these matters.

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2001 WL 2701218
(Publication page references are not available for this document.)

The Sunday Patriot-News Harrisburg

Sunday, June 10, 2001

Perspective

Inside Politics

Merit choice of jurists has little merit
Peter L. DeCoursey
Of the Patriot-News

Every time I get an up-close peek at merit selection, I realize that in choosing judges, our only pick is between absurdities.

There's no doubt that even the few who vote for statewide judges know little about the candidates who, if successful, get the final word on our laws and lives. Since judicial rules prevent them from telling us their opinions or plans, judicial races turn into a lottery where those with the best geography -- in the state and on the ballot -- win.

But compared with the federal court merit selection process, it doesn't look so bad. For the last few years, costly courtrooms in Allentown and Reading have sat vacant, waiting for a nominee to be approved. That was because President Clinton and U.S. Sen. Rick Santorum had differed over the qualifications of federal judge nominees and refused to compromise.

At least when we elect judges, new ones take office within months of the departures of the old ones.

Then, it got worse this year.

With a fellow Republican in the White House, Santorum wanted to live up to his pledge last year to fill those empty courtrooms, as did U.S. Sen. Arlen Specter, another Republican. But Specter, having already secured federal judgeships for pals Jan Dubois and Marvin Katz, wants to hang the robes on one more protege: former Eastern District U.S. Attorney Michael **Baylson**.

If everyone else agreed to give **Baylson** the 3rd Circuit Court of Appeals post, Specter said, he'd sign off on the rest of the proposed three-nominee eastern federal judge slate: Lehigh County President Judge James Gardner, Bucks County Judge Cynthia Rufe and either Berks County Judge Jeffrey Schmehl or Berks attorney Ronald Stanko.

No one has said that this slate lacks judicial merit. But two of those candidates got this far based on where they're from (Berks and Lehigh counties). The third, Rufe, is in line for robes because, as one longtime federal court power said, "It's Bucks County's turn this year to get a federal judge."

That was as close to "merit" as this process got. Then politics broke out. Delaware County's nit-picking GOP chiefs said **Baylson** had prosecuted their pals back when he was U.S. attorney. Even worse, they accuse him of nurturing a Democrat, Melissa Maxman. She's the **Baylson** protege who frightened the Delaware County's GOP in this spring's special Senate election before losing to the GOP's Ted Erickson.

The Delaware County Republicans said they will never accept a **Baylson** nod. They added that if Specter insists on **Baylson**, our senior senator will never be listed on a their ballot cards again. The political warlords of the state's fifth-largest county let Santorum know it is up to him to stop Specter and **Baylson**.

Specter isn't flinching. So far, the Delaware County GOP threats have just made it unlikely that **Baylson** will get onto the U.S. appeals court. Instead, Specter is pushing him hard for one of the three lower federal judgeships which had been slated for Berks, Lehigh and Bucks.

Our GOP senators have switched roles. Specter is playing Santorum, insisting on his guy, perfectly willing to stall the process. Santorum is trying to broker a deal, but unless a fourth seat opens up, Specter's stubbornness may result in either no new judges, or the music stopping with **Baylson's** rear end on the Musical Bench that used to be marked "Lehigh" or "Berks."

So we may be paying $50,000 a month for unused courtrooms in Reading and Allentown for a while yet.

I can't wait till the state adopts a similar method of choosing judges. Can you?

Peter L. DeCoursey may be reached at 255-8115 or pdecoursey@patriot-news.com.

---- INDEX REFERENCES ----

Citation Search Result Rank 2 of 313 Database
10/6/01 THESTATE A6 ALLNEWS
10/6/01 The State (Colum., SC) A6
2001 WL 27362249
(Publication page references are not available for this document.)

The State (Columbia, SC)

Saturday, October 6, 2001

FRONT

BIN LADEN'S GUILT DEBATED

By JOSEPH A. SLOBODZIAN Knight Ridder Newspapers
THE STATE

PHILADELPHIA -- In the court of U.S. public opinion, Osama bin Laden already has been convicted in absentia of first-degree murder in the Sept. 11 attacks.

But in a court of law, would the evidence meet legal standards? Is there enough proof to indict, let alone attack, bin Laden?

It's not just a philosophical debate among academicians. Some experts worry that in a rush to avenge the dead, the U.S. government will flout and undermine legal treaties that have taken decades to forge.

Without clear proof justifying to the world a strike at bin Laden, some legal scholars say, the United States could sow the seeds for a new generation of terrorists and, possibly, a war beyond expectation.

Others maintain it is a mistake to try to impose standards of law and evidence - U.S. or international - on the events of Sept. 11.

Francis Boyle, a University of Chicago professor of international law,

and John B. Quigley, a professor of international law at Ohio State University, said they were worried some foreign officials viewed the U.S. evidence as circumstantial ties to al Qaeda but not necessarily to bin Laden.

"It looks as if they have links to people who have links to him but nothing else," Quigley said. "That would make it difficult to show . . . he has any criminal responsibility in the Sept. 11 attacks."

Others disagree.

"It's hypothetical," said Temple University law professor James A.

Strazzella, a former federal prosecutor and expert on criminal law and procedure. "I don't think you can use criminal law terms and the responses that would be measured by any court to what is perceived by our government as an act of war.."

Philadelphia lawyer Michael M. **Baylson**, the U.S. attorney for the Eastern District of Pennsylvania during the first Bush administration, said he believes the circumstantial evidence linking bin Laden to terrorism and the Sept. 11 attacks would support his arrest in the United States.

Boyle said the International Court of Justice has held since 1949 that countries are not justified in invading others without persuasive evidence of a purposeful attack from the other country.

Ten years ago, President Bush's father sought and obtained United Nations' approval for the Gulf War and obeyed international restrictions on how far he could take the war into Iraq, Boyle said.

Beyond questions of evidence and international law, argues Chaim Kaufman, a professor of international relations at Lehigh University in Bethlehem, Pa., it is in the United States' interest to prove to the world why it takes the actions it does.

"Our public is more than satisfied (with the evidence)," Kaufman said. "The public we have to reach for is the public of the Muslim world. We have to convince them that what we do is not another example of American arrogance or American genocide."

---- INDEX REFERENCES ----

NEWS SUBJECT: English language content; Crime/Courts; Political/General News; Crime; Terrorism (ENGL GCRIM GCAT CRM GTERR)

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BAYLSON

UNITED STATES OF AMERICA v. JOSEPH M. MCDADE
CRIMINAL ACTION No. 92-249

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OFPENNSYLVANIA

1992 U.S. Dist. LEXIS 9703

June 19, 1992, Filed; June 22, 1992, Entered

CORE TERMS: prosecutor, indictment, conflict of interest, evidentiary hearing, subpoena, motion to dismiss, congressman, prosecutorial misconduct, grand jury, campaign contributions, politician, campaign, treasurer, entitle, prosecutorial, prosecuting, reimbursed, pursued, entities, speculation, indicted, appointment, evidentiary, involvement, conclusory, illegally, discovery, corrupt, sworn, investigated

COUNSEL: [*1] Nicholas C. Harbist, James J. Eisenhower, AUSA.

Sal Cognetti, Jr, Esq., FOLEY, COGNETTI & COWLEY, 507 Linden Street, 7th Flr., Scranton, PA 18503. Abbe David Lowell, Esq., BRAND & LOWELL, 923 15th, N.W., Washington, D.C. 20005.

JUDGES: Gawthrop

OPINIONBY: ROBERT S. GAWTHROP, III

OPINION: MEMORANDUM AND ORDER

Gawthrop, J.

Defendant, Joseph M. McDade, has filed a motion to dismiss the indictment returned against him. He claims that because of an alleged conflict of interest in the United States Attorney's Office for the Eastern District of Pennsylvania, and specifically of United States Attorney, Michael Baylson, the lengthy investigation and grand jury process conducted by those prosecutors was irreparably tainted.

The rather narrow, but important, question before me now is whether Mr. McDade is entitled to an evidentiary hearing on his motion to dismiss the indictment. He has subpoenaed the United States Attorney's Office for the Eastern District of Pennsylvania for documents and records and for Mr. Baylson, personally, to testify. He has also subpoenaed current and former U.S. Attorneys who conducted the investigation of his case, records of the Small Business Administration, and records of the[*2] Department of the Navy. n1 The Government has moved to quash the subpoenas. After oral argument and consideration of the briefs submitted by counsel, I shall grant the Government's motions, upon the following reasoning.

n1 It appears that Mr. McDade has subpoenaed documents from United States Senator Arlen Specter's office, as well. That issue is not, however, before me today.

BACKGROUND

The defendant, Joseph McDade, is a Member of the United States House of Representatives, representing the Tenth Congressional District in Pennsylvania. He has served as a United States congressman since 1962. On May 5, 1992, a grand jury in the Eastern District returned a five-count indictment against him, charging him with conspiracy, n2 accepting an illegal gratuity by a public official, n3 and RICO n4 violations. A significant portion of the indictment charges a corrupt relationship between Congressman McDade and officials and employees of United Chem Con ("UCC"); Mr. McDade allegedly agreed to accept, among other[*3] things, UCC's contributions to his campaign, free aircraft transportation, and free vacations in exchange for his efforts to get government contracts awarded to UCC.

n2 18 U.S.C. § 371.

n3 18 U.S.C. § 201(c)(1)(B).

n4 18 U.S.C. § 1962(c).

On May 27, 1992, Mr. McDade filed a motion to dismiss the indictment, alleging that United States Attorney Michael Baylson, and by extension, his entire office, have an actual and apparent conflict of interest. Such conflict, he claims, amounted to prosecutorial misconduct, violating his constitutional rights to a fair grand jury process. The thrust of the motion to dismiss is the allegation that Mr. Baylson, as the former campaign treasurer for Senator Arlen Specter, accepted contributions from the same corporation that his office has now charged as one of Mr. McDade's alleged co-conspirators – UCC. Mr. McDade claims that Mr. Baylson's personal and political relationship with Senator Specter caused Mr. Baylson to be interested in directing any United States Attorney's[*4] investigation into UCC's relationship with politicians away from Senator Specter. This interest, he claims, conflicts with Mr. Baylson's interest as a U.S. Attorney in disinterestedly pursuing justice and prevents him from making an independent and impartial determination about whom to investigate and prosecute. Mr. McDade contends that such an alleged conflict of interest calls for the dismissal of the indictment.

In the first week of June, 1992, after Mr. McDade filed his motion to dismiss, he served a subpoena on Mr. Baylson, asking for documents and testimony relating to his involvement with and decisions made in investigating Mr. McDade and any investigation of or correspondence with Senator Specter. n5 When the government filed its opposition to defendant's motion to dismiss, attached were affidavits from Mr. Baylson and current and former federal prosecutors who had worked on the McDade investigation, addressing the issues perceived to be raised by defendant in his motion and subpoena.

n5 Specifically, McDade's counsel, Abbe David Lowell, Esquire, told Nicholas Harbist, Esquire, the Assistant United States Attorney ("AUSA") prosecuting the case, in a letter of June 1, 1992, that he wanted to ask Mr. Baylson questions concerning "(1) Mr. Baylson's personal and political relationship with Senator Specter; (2) the United States Attorney's knowledge of the Senator's, his office's, and his campaign's relationships with Reading Anthracite Company and the entities and individuals listed in Congressman McDade's indictment, including, without limitation, the United Chem Con Corporation and its employees and agents; (3) the nature and scope, if any, of the investigation of the Senator and Mr. Baylson conducted by the United States Attorney's Office for the Eastern District of Pennsylvania with respect to the entities and individuals listed in # 2, above, and the reasons why the nature and scope of any such investigation (if any) was as it was; (4) Mr. Baylson's role in the investigation of, grand jury proceedings, relating to, and indictment of Congressman McDade; and (5) the motivations behind the expansion of the investigation centering on Congressman McDade; and (6) Mr. Baylson's role in the changing of the focus of the investigation. (Exhibit A to Government's Motion to Quash Defendant's Subpoena).

[*5]

After the government filed its opposition with accompanying affidavits, Mr. McDade served subpoenas for testimony on at least three of the affiants in the government's response: AUSA Nicholas Harbist, one of the case prosecutors, Thomas H. Lee, II, Esquire, former Acting U.S. Attorney, and Richard Scheff, Esquire, a former AUSA and Chief of the Criminal Division Corruption/Labor Section. Mr. McDade also served a subpoena duces tecum on the Small Business Administration and the Department of the Navy, Naval Seal Systems Command, seeking documents from 1983 to 1987, revealing communications, relating to UCC, between those offices and Senator Specter.

The government now seeks to quash all subpoenas served on its prosecutors, former prosecutors, and government agencies. It claims that because Mr. McDade has not met the legal standard required to delve into a prosecutor's files and state of mind, he is not entitled to an evidentiary hearing.

DISCUSSION

1. Legal Standard for an Evidentiary Hearing

To begin my inquiry, I look to the Federal Rules of Criminal Procedure. With exceptions not here relevant, Fed.R.Crim.P. 16(b) specifically exempts from discovery, "reports, [*6] memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case . . ." And Fed.R.Crim.P. 6 prohibits the disclosure of grand jury proceedings. An exception does exist to this general rule of non-disclosure, however; Rule 6(C)(ii) provides that disclosure may be made "when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed.R.Crim.P. 17(c) provides, however, that the court "may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." It is within the discretion of the court to either quash a subpoena directed to the internal government process or to allow an evidentiary hearing to proceed. The standard Mr. McDade must meet in order to avoid a motion to quash and whether he has met that standard is the issue here.

The government and the defendant dispute what standard the court should use in deciding whether to grant an evidentiary hearing. Mr. McDade claims that when a defendant moves for dismissal of an indictment[*7] because of prosecutorial misconduct or a conflict of interest, evidentiary hearings are not extraordinary requests. Although the defendant cites cases in which evidentiary hearings were held or factual inquiries were made, n6 he does not articulate a legal standard used by those cases different from the one that the government urges the court to apply in this case.

n6 See e.g. United States v. Troutman, 814 F.2d 1428, 1437 (10th Cir. 1987); United States v. Criden, 633 F.2d 346 (3d Cir. 1980), cert.denied, 449 U.S. 113 (1981); United States v. Eisenberg, 773 F.Supp. 662, 703-06 (D.N.J. 1991); United States v. Gold, 470 F.Supp. 1336 (N.D.Ill. 1979).

In United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the Third Circuit held that the defendants had to meet a burden "of proving a colorable entitlement to the defense", in that case, of discriminatory prosecution, "so as to entitle them to the [*8] desired testimonial and documentary evidence." See also United States v. Torquato, 602 F.2d 564 (3d Cir. 1979) (when claiming selective prosecution, a defendant must make a threshold showing before an evidentiary hearing will be granted). In United States v. Boffa, 89 F.R.D. 523 (D.Del 1981), the court expatiated upon the general standard enunciated in Berrigan, setting out more fully what a defendant had to show to get an evidentiary hearing. Chief Judge Latchum there stated:

In general, an evidentiary hearing need not be granted as a matter of course and must be held only if the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that relief must be granted if the facts alleged are proved.

General and conclusory factual allegations which are based upon mere suspicion or conjecture, however, will not suffice to necessitate a hearing.

Moreover, if facts urged in support of a hearing would not entitle the moving party to relief as a matter of law, no evidentiary hearing is required.

Boffa, supra, 89 F.R.D. at 528 (Emphasis Added. Citations omitted). [*9]

Mr. McDade complains that Berrigan, Torquato, and Boffa were selective prosecution or discriminatory prosecution cases, with the court applying a standard higher than what this court should apply in the case at bar, which the defendant characterizes as a case of conflict of interest. However, virtually the same standard was used by the Ninth Circuit in United States v. Rewald, 889 F.2d 836, 860 n.23 (9th Cir. 1989), a conflict of interest case. There, defendant Rewald alleged a conflict of interest, in seeking to disqualify the United States Attorney prosecuting his case. Rewald intended to rely on a defense that the Central Intelligence Agency had told him to commit the crimes for which he was indicted, and the U.S. Attorney was a former CIA attorney. The court held that Rewald "failed to present factual allegations by affidavit that, if true, would warrant relief." Id.; see also United States v. Benjamin, 852 F.2d 413, 423 (9th Cir. 1988) (applying this standard in a case alleging prosecutorial misconduct in front of the grand jury); United States v. Carrion, 463 F.2d 704, 706 (9th Cir. 1972) (applying[*10] same standard to defendant's request for an evidentiary hearing to prove he was the object of a search, in support of his Fourth Amendment claim to suppress evidence).

I find that the standard enunciated in Berrigan and refined in Boffa is the appropriate one to be applied in this situation. When a defendant seeks to discover the inner workings of the prosecutor's office that investigated the case against him, whether it is pursuant to a claim asserting selective prosecution, conflict of interest, or prosecutorial misconduct, that defendant must meet a threshold burden of showing that his allegations of wrongdoing are more than mere speculation or conjecture. Courts require defendants to overcome a heavy burden, because of the "long-accepted intolerance toward judicial inquisition into the process whereby prosecutorial decisions are formulated." United States v. Cox, 342 F.2d 167 (5th Cir. 1965). This policy of non-interference with the prosecutorial function, arising out of the doctrine of separation of powers, is especially important in the incipient stages of a prosecution, when the government "must be relatively unconstrained in its deployment of[*11] resources. The choice of whom to prosecute and the strategy of prosecution are generally matters left wholly to the government's control." United States v. Torquato, supra, 602 F.2d at 569. Thus, I turn to Congressman McDade's allegations of United States Attorney Baylson's conflict of interest, to assess whether they are alleged with sufficient definiteness, clarity, and specificity to enable this court to conclude, if the facts alleged were to be proved, that they would warrant the relief defendant seeks.

2. Analysis of Defendant McDade's Factual Averments

A. Mr. McDade's Conflict of Interest Allegations

Mr. McDade contends that the allegations in the motion to dismiss and information in the public record are sufficiently definite, clear, and specific to show Mr. Baylson's conflict of interest, and that they entitle him to relief because of that interest. There are a number of facts in the record that are undisputed.

In 1988, Baylson was Senator Specter's campaign treasurer, and in that position, he accepted and signed for contributions made by UCC and Reading Anthracite. According to newspaper articles, Senator Specter worked to get some [*12] government contracts awarded to UCC. The campaign contributions from UCC and Reading Anthracite, accepted by Senator Specter, along with other politicians, later turned out to be illegally reimbursed.

On September 15, 1988, UCC's president, James Christian, and other UCC officials were indicted for various federal crimes, some dealing with their efforts to procure government contracts. Seven months earlier, in February 1988, however, Mr. Christian agreed to plead guilty and began to cooperate with the government in the investigation into Mr. McDade, which began as an investigation into campaign contributions. Ultimately, the government did not charge Mr. McDade in his indictment with knowingly accepting illegally reimbursed campaign contributions from UCC or Reading Anthracite. Indeed, Reading Anthracite is named nowhere in the indictment. The government charged no politician who had accepted campaign contributions from UCC or Reading Anthracite with knowingly accepting illegally reimbursed campaign contributions from those two entities. The contributions Mr. McDade received from UCC where charged in the indictment as "sham contributions," allegedly used as bribes to induce[*13] Mr. McDade to help UCC with procuring government contracts.

On September 27, 1988, a subpoena duces tecum was issued to the Office of the Honorable Joseph McDade. On October 12, 1988, Mr. McDade retained the services of the law firm of Brand and Lowell with regard to the grand jury investigation. On October 17, 1988, Mr. Baylson was appointed United States Attorney for the Eastern District of Pennsylvania: he resigned his position as Senator Specter's campaign treasurer, effective that very day. n7

n7 After resigning, Mr. Baylson did have one meeting with the succeeding representatives of Sen. Specter's campaign committee to explain reports, files, and other organizational matters on October 27, 1988. He swears that the meeting was only to provide a smooth transition in the committee and that after October 17, 1988, he performed no official function as Treasurer. (Baylson Affidavit P1).

Eighteen months later, in May of 1990, Raymond S. Wittig, a former Aide to Congressman McDade and then lobbyist for UCC, [*14] was indicted for his involvement with UCC, and in August 1990, agreed to plead guilty and cooperate with the government in its investigation of Mr. McDade. In November 1990, Wittig formally entered his plea of guilty before the Honorable Ronald L. Buckwalter. In that same month, the government expanded the McDade investigation to look at his relationship with other defense contractors and lobbyists, issuing several subpoenas to various entities across the United States. Also in November 1990, counsel for Mr. McDade wrote a lengthy letter to the AUSAs investigating Mr. McDade, outlining Mr. McDade's assertion that because Mr. Baylson had been Senator Specter's campaign treasurer during relevant times, Mr. Baylson had a conflict of interest with the McDade investigation.

After Mr. Baylson came to the U.S. Attorney's office in October 1988, he did approve the issuance of subpoenas to Congresman McDade's staff and others in the investigation and signed pleadings concerning litigation over those subpoenas. He also signed letters in correspondence on the case and participated in some meetings with the defendant's attorneys and other Department of Justice officials, beginning in November[*15] 1990.

From these undisputed facts, the defendant makes several allegations as to how Mr. Baylson's alleged conflict of interest manifested itself, allegations that he claims amount to prosecutorial misconduct and entitle him to further discovery and an evidentiary hearing. Mr. McDade contends that the shift in focus in the investigation of him from illegal reimbursement of campaign contributions to "sham" contributions, as bribes, was made because Mr. Baylson was interested in moving the investigation away from anything that might inculpate or prompt investigation into the conduct of Senator Specter or Mr. Baylson. As evidence of this alleged interest, Mr. McDade points to the fact that Reading Anthracite, a company that gave contributions to Senator Specter, is left out of the indictment. In addition, Mr. McDade claims that Mr. Baylson's interest in not being investigated prompted the issuance, in

November 1990, of several subpoenas to entities all over the United States, this being to deflect attention from the UCC portion of the investigation. Defendant contends that it all boils down to the fact that Mr. Baylson's connection with Senator Specter made him interested in the[*16] McDade investigation. Or, more particularly, he argues that this alleged interest precluded Mr. Baylson from making a full and independent inquiry into his own and Senator Specter's involvement, if any, with UCC, and that it prohibited his making an impartial determination of where the investigation was and was not to go, and of who was and was not to be indicted.

B. Government's Responding Affidavits

The government, in its opposition to defendant's motion to dismiss, submitted Mr. Baylson's affidavit, as well as those of five other prosecutors n8 who had worked on the McDade investigation at varying levels. The affidavits explain why and when the government decided to take and not to take certain actions as well as who made those decisions. The facts sworn to in these affidavits rebut many of the inferences Mr. McDade has drawn from the facts in the public record. It is to those facts that I will now turn.

n8 The affidavits referred to in this discussion were submitted by Thomas H. Lee, II, First Assistant U.S. Attorney from July 1987 to February 1990 and Acting U.S. Attorney for the District from May 1988 to October 17, 1988; Richard Scheff, former Assistant U.S. Attorney and Chief of the Corruption/Labor Section of the U.S. Attorney's office from 1987 to February 1990; Geoffrey Moulton, Jr., former Assistant U.S. Attorney from 1986 to August 1990; Nicholas C. Harbist, case prosecutor and Assistant U.S. Attorney since 1984; and Robert E. Goldman, Assistant U.S. Attorney since 1987.

[*17]

The government began to focus its investigation on UCC's relationship with Mr. McDade and his aide, one Raymond Wittig, in early 1988, before Mr. Baylson was appointed U.S. Attorney. (Affidavits of Lee P3, Scheff P3, Harbist P6, Goldman P3). In September 1988, the case prosecutor, Mr. Harbist, in consultation with his section chief, Mr. Scheff, decided that sufficient evidence of a corrupt relationship between Mr. McDade and UCC existed to expand the investigation in that area and to warrant the issuance of a subpoena to Congressman McDade's office. The Acting U.S. Attorney, Mr. Lee ultimately approved that decision. (Affidavits of Lee P4, Scheff PP3 and 4, Harbist P6 and 10). In the summer of 1988, the U.S. Attorney's office divided somewhat the duties of the UCC grand jury investigation between AUSA Harbist, who was in charge of the investigation of UCC's allegedly corrupt relationship with Messrs. McDade and Wittig, and AUSA Goldman, who was primarily in charge of other aspects of the UCC investigation. Both AUSAs attest that in the summer of 1988, they concluded that there was insufficient evidence to warrant an investigation into violations of the criminal law in connection[*18] with UCC's relationship with any other public officials, other than Congressman McDade. (Affidavit of Goldman P3). Specifically, they found insufficient evidence to pursue "any allegation that a public official, other than Mr. McDade and Wittig, knowingly accepted illegal campaign contributions from UCC." (Affidavit of Harbist P7). All this occurred before Mr. Baylson was appointed as U.S. Attorney on October 17, 1988.

Mr. Baylson swears in his affidavit that before his appointment as the U.S. Attorney, he had no knowledge of any Investigation into UCC or Mr. McDade, (Baylson Affidavit P2), and that since his appointment, he has never discussed the investigation of UCC, Mr. McDade, or Mr. Wittig with Senator Arlen Specter or any one on his staff. (Baylson Affidavit P7). Mr. Baylson was first briefed on the investigation by AUSAs Goldman and Harbist on November 4, 1988. He was informed periodically as to the progress of the investigation into UCC and Mr. McDade and he did sign official pleadings and correspondence, but the direction and focus of the investigation was coordinated primarily by AUSA Harbist, later joined by AUSA Eisenhower, who made the day-to-day decisions in [*19] the investigation, consulting when needed with AUSA Goldman, section chiefs Scheff and Ronald Levine, and First AUSA Lee. (Affidavits of Lee P2, Scheff P2, Moulton P1, Baylson P4, Harbist PP15 and 17, Goldman P4).

Mr. Baylson did not personally work on the UCC or Mr. McDade investigations; he did not appear before the Grand Jury to present evidence or interview witnesses; nor did he debrief witnesses. (Affidavits of Baylson P4, Harbist P15). Mr. Baylson swears that he never directed any AUSA working on the UCC or McDade investigations not to pursue any line of inquiry or other evidence, and in particular, inquiries directed to activities of Senator Specter or his relationship with UCC. (Baylson Affidavit P6). Each AUSA submitting an affidavit to the court confirmed that Mr. Baylson never directed which leads should and should not be pursued, that he never directed, suggested or implied that any information implicating any other politician, including Arlen Specter, should not be pursued, or in the converse, that any lead implicating Mr. McDade should be pursued in order to divert attention away from other politicians, including Senator Specter. (Affidavits of Harbist P17, Goldman[*20] P6, Moulton P2, Scheff P5, Lee P5). As one AUSA testified, "In short, at all times, Mr. Baylson urged that all leads be followed and that the investigation, wherever it lead, be pursued." (Scheff Affidavit P5). AUSA Harbist explained that the reasons the investigation expanded in scope in November of 1990, to include defense contractors other than UCC, was the development of leads received before Mr. Baylson's appointment and after, and, in addition to other cooperating individuals, Wittig's increased cooperation after entering his guilty plea. (Harbist Affidavit P16).

3. Assessment of the Evidence Now of Record as to Whether it Warrants an Evidentiary Hearing

When faced with the undisputed factual record and the factual averments, sworn to be true under penalty of perjury, in the affidavits of Mr. Baylson and current and former AUSAs, I find that Mr. McDade's conflict of interest allegations are supported by no credible evidence. They are conclusory allegations based on conjecture and speculation of how Mr. Baylson may have acted or not acted to influence the prosecutorial decisions made in the McDade investigation.

Mr. McDade insinuates that an allegedly improper interest[*21] of Mr. Baylson prevented him from performing his duties as an independent prosecutor in conducting the McDade investigation and following evidentiary leads. Yet Mr. McDade can point to no concrete, specific facts that show that this alleged improper interest in any way tainted or caused to be pursued improperly the indictment of Mr. McDade. In contrast, the government submits sworn statements that sufficiently rebut the McDade allegations. The affidavits make clear that before Mr. Baylson's appointment, the determining factor that prompted the investigation of Mr. McDade and not an investigation of other politicians, was purely and simply that that was were the evidence led. The prosecutors made the decision, a decision well within their discretionary power, to pursue that evidence against Mr. McDade and not to go against other officials. The government has also stated in its affidavits that Mr. Baylson in no way, either by direct order, or by implication, inference, or innuendo, directed the investigation towards Mr. McDade or away from other politicians, including Senator Specter. The defendant has come forward with no fact, other than Mr. Baylson's having served as Senator[*22] Specter's campaign treasurer, and in that capacity, apparently, temporarily having accepted campaign contributions reimbursed by UCC, n9 to warrant a wholesale search through the government's files and interrogation of its prosecutors. It is not enough to meet his considerable legal burden.

n9 There is no proof that either of these campaigning politicians -- Congressman McDade or Senator Specter -- knew, at the time of initial receipt, that the campaign contributions had been illegally reimbursed by UCC.

A brief review of other cases that mention or discuss evidentiary hearings involving prosecutors illustrates that factual averments of wrongdoing, much more specific and extensive that the ones here alleged, are required to make a showing of conflict of interest or prosecutorial misconduct strong enough to receive an evidentiary hearing. In United States v. Eisenberg, 773 F.Supp. 662 (D.N.J. 1991), the defendant sought to dismiss his indictment, alleging a conflict of interest of one of the AUSAs[*23] prosecuting his case. The conflict alleged was that the AUSA had worked at the Securities and Exchange Commission before being sworn in as a Special AUSA, and while there, he had been extensively involved in the SEC's civil action against the defendant. The defendant also averred that that AUSA was the only one presenting evidence to the grand jury at times. Id. at 703. The court denied any further discovery directed at the AUSA and denied defendant's motion to dismiss, finding no conflict of interest or appearance of impropriety. The court relied on the AUSA's affidavit in which he explained that he did work on the SEC action for seven months, but had ceased doing so and would not do so if he returned to the SEC. Id. at 706.

In United States v. Rewald, 889 F.2d 836 (9th Cir. 1989), as discussed briefly above, the defendant sought an evidentiary hearing on his motion to dismiss the indictment or to disqualify the AUSA prosecuting the case. He alleged that it appeared that the AUSA, a former CIA attorney who arrived in Hawaii to prosecute the defendant, came to help cover up CIA involvement in the case. The government[*24] submitted affidavits, however, explaining why and when the prosecutor was assigned to the case. The court concluded that although the newspapers expressed skepticism about the government's explanation, there was no evidence, just as in the case at bar, that undercut the government's account. Id. at 860. Gossip and speculation, fueled in part by the defendant, was not enough entitle the defendant to an evidentiary hearing or dismissal of the indictment. Id.

In his motion to dismiss the indictment because of conflict of interest and prosecutorial misconduct, the defendant in United States v. Gold, 470 F.Supp. 1336 (N.D.Ill. 1979), averred that a Special AUSA prosecuting the case, was at the same time in the employ of the EPA, the complaining party in the criminal charges being investigated. During the period of investigation, he represented the EPA in administrative hearings against the defendant. He appeared in front of the grand jury, as an important witness, but also as a prosecutor, without approval or notice to his superiors in the U.S. Attorney's office or the Department of Justice. Finding that the government's affidavits in[*25] response to defendants motion inadequately explained the prosecutor's actions, the court held an evidentiary hearing. The court found that, in addition to several other incidents of prosecutorial misconduct, the AUSA's varied roles in front of the grand jury presented a conflict of interest that demanded dismissal of the indictment.

Mr. McDade's conclusory allegations of Mr. Baylson's alleged prosecutorial misconduct differ significantly in degree from the kinds of specific and clear allegations made in the cases discussed above. Even in the face of such potent and specific allegations, as in Rewald and Eisenberg, the courts found that government affidavits sufficiently explained and rebutted the defendant's assertions of conflict of interest. In addition, in the cases cited throughout this memorandum, it is evident that the conflicts of interest alleged by those defendants were conflicts that biased the prosecution against the defendant. They bespake situations in which either the prosecutor had some reason, whether it be personally or professionally based, but a reason arising outside of the prosecutorial context, to get the defendant, or situations in which prosecutors [*26]had inside information gleaned from a previous professional connection to the defendant, information which conflicted with their duty to be independent. Here, the defendant has found no motive or interest of Mr. Baylson that would lead him to unfairly focus an investigation on McDade. During oral argument, the court repeatedly asked Mr. Lowell, counsel for Mr. McDade, what illicit interest Mr. Baylson had in pursuing Mr. McDade. (N.T. June 10, 1992 at 29, 83, 84, 86). Mr. Lowell stated, "he has no motive that I know of to get Congressman McDade." (N.T. June 10, 1992 at 84).

The defendant contends, however, that the totality of the circumstances raises the spectre that Mr. Baylson did have an interest in diverting the investigation away from the Senator, and himself, and toward the Congressman. Yet, the record shows that all that Mr. Baylson did was follow the evidence. That the evidence led to Mr. McDade's allegedly corrupt relationship with other defense contractors, having no connection to Senator Specter, does not a conflict make.

Defendant cites two cases in which the court held an evidentiary hearing, and in which the case prosecutors were called to testify. But there, [*27] the inquiry of the defendants, unlike the information sought at bar, did not go into the prosecutor's decisions on how and why he conducted the investigation as he did. The first, United States v. Criden, 633 F.2d 346 (3d Cir. 1980), addressed the question of improper pretrial publicity. There, the court held a hearing on defendant's motion to dismiss the indictment, charging prosecutorial misconduct as a result of sensational and prejudicial information released by the U.S. Attorney's Office of the Eastern District. It was an undisputed fact that the source of the news leaks was a government employee. At the hearing, a chief prosecutor from Brooklyn's Organized Crime Strike Force and a U.S. Attorney from the Eastern District testified about how much the press knew about their operation (the ABSCAM investigation) and when they knew it. They testified about their knowledge of any leaks. They did not, however, testify about their conduct of the investigation itself, as it was not germane to the issue at hand.

Likewise, in United States v. Troutman, 814 F.2d 1428, 1437 (10th Cir. 1987), the issue was different from that here presented. There, [*28] the defendant sought to dismiss the indictment, alleging that the state Attorney General, assisting the U.S. Attorney in the prosecution, had a professional conflict of interest. More particularly, the defendant was the New Mexico State Investment Officer, a state employee, and as such, was, in effect, a client of the Attorney General. The court held a lengthy hearing on the disqualification issue, but the inquiries made at the hearing were into the scope of the attorney-client duty owed to the defendant by the State Attorney General, and into past communications between them in that context. There is no evidence that the court allowed inquiry into prosecutorial decisionmaking.

Mr. McDade argues that he needs this discovery into the minds and files of the prosecutors investigating his case, in order to ferret out evidence to support his claim of conflict of interest. Before he be permitted to start ferreting, however, he must show more than averments based on speculation and suspicion, conjectural surmise and conclusory allegations, all of which are adequately explained away in the government's uncontradicted affidavits.

The burden Mr. McDade must meet in order to subpoena prosecutors[*29] to testify and to search through internal government documents is admittedly high, but it is necessary to protect the ability of law enforcement to conduct an investigation as they see fit and to prevent defendants from diverting government resources into defense of these subpoenas. Defendant has shown no credible evidence that there is anything in the prosecutor's files that will show a conflict of interest amounting to prosecutorial misconduct. He has not met his burden, and therefore, will not receive his evidentiary hearing. His motion to dismiss will be decided on the record as it now stands.

An order follows.

ORDER

AND NOW, this 19th day of June, 1992, after reviewing the briefs and hearing oral argument thereon, and after due deliberation, the defendant having failed to meet his burden of demonstrating his entitlement to an evidentiary hearing on his Motion to Dismiss the Indictment, it is hereby ORDERED that the Government's Motions to Quash Subpoenas, * issued on behalf of defendant in connection with his motion to dismiss, are GRANTED.

* The government has filed three motions to quash directed at different subpoenas. This order is addressed to, specifically, the following motions: (1) the government's motion of June 4, 1992, to quash the subpoena issued to the United States Attorney's Office and U.S. Attorney Michael Baylson; (2) the government's motion of June 9, 1992, to quash subpoenas issued to Assistant U.S. Attorney Nicholas C. Harbist; former Acting U.S. Attorney Thomas H. Lee, II; former Assistant U.S. Attorney Richard Scheff, prior Chief of the Criminal Division Corruption/Labor Section; and the Small Business Administration; and (3) the government's motion of June 11, 1992, to quash a subpoena issued to the Department of the Navy, Naval Seal Systems Command.

[*30]

BY THE COURT:

Robert S. Gawthrop, III J.

RJ

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. JOSEPH M. MCDADE, Defendant	CRIMINAL ACTION NO. 92-249

FILED
JUL 30 1992
MICHAEL E. KUNZ, Clerk
By ______ Dep. Clerk

OPINION

GAWTHROP. J.

Defendant, Congressman Joseph M. McDade, was indicted for, among other things, accepting illegal gratuities from United Chem Con ("UCC"), some in the form of campaign contributions. He now has filed a motion to dismiss the indictment returned against him. He claims that the United States Attorney's Office for the Eastern District of Pennsylvania, and specifically United States Attorney ("USA") Michael Baylson, have an actual and apparent conflict of interest that amounts to prosecutorial misconduct, tainting the indictment. Having denied the defendant's request for an evidentiary hearing on June 19, 1992, in a memorandum, which I incorporate, discussing the defendant's and the government's factual averments and caselaw at some length, I turn now to the existing record in deciding the motion to dismiss the indictment on its merits. Having done so, I shall deny the defendant's motion, upon the following reasoning.

BACKGROUND

The facts pertinent to the defendant's motion to dismiss, although extensively discussed in the court's earlier memorandum, I briefly summarize and reiterate. Mr. McDade claims that United States Attorney Michael Baylson's alleged conflict of interest arose from the fact that before he was appointed U.S. Attorney on October 17, 1992, he served as Senator Arlen Specter's campaign treasurer, and in that capacity, accepted campaign contributions from UCC, the same corporation his office has now charged McDade with conspiring with to accept illegal gratuities. Mr. McDade contends that a personal and professional relationship exists between Mr. Baylson and Senator Specter that prevents Mr. Baylson from making an impartial and independent decision about whom to investigate and prosecute. Mr. McDade avers that this alleged conflict of interest caused Mr. Baylson to direct any investigation into UCC's relationship with politicians towards Mr. McDade and away from Senator Specter.

To rebut Mr. McDade's allegations, the government has submitted several affidavits of former and current U.S. Attorneys.[1] Essentially, the affiants swear that the decision

1. The affidavits referred to here are discussed more fully in the court's opinion of June 19, 1992. They were submitted by Michael Baylson, U.S. Attorney; Thomas H. Lee, II, First Assistant U.S. Attorney from July 1987 to February 1990 and Acting U.S. Attorney for the District from May 1988 to October 17, 1988; Richard Scheff, former Assistant U.S. Attorney and Chief of the Corruption/Labor Section of the U.S. Attorney's Office from 1987 to February 1990; Geoffrey Moulton, Jr., former Assistant U.S. Attorney from 1986 to August 1990; Nicholas C. Harbist, case prosecutor and Assistant U.S. Attorney since 1984; and Robert E. Goldman, Assistant U.S. Attorney since 1987.

to investigate UCC's dealings with McDade and not to investigate its dealings with any other politician was made in the summer of 1988, before Mr. Baylson was appointed U.S. Attorney. They swear that that decision was based on the evidence -- where it did and did not lead. Acting U.S. Attorney Thomas Lee, II, authorized the issuance of subpoenas directed to Congressman McDade's office in mid-September, almost one month before Mr. Baylson was appointed.

The same day Mr. Baylson came on board at the U.S. Attorney's Office -- October 17, 1988, he resigned his position as Senator Specter's campaign treasurer. In early November, he was briefed on the McDade investigation by the Assistant United States Attorneys ("AUSA") handling the case. While Mr. Baylson, in his official capacity as U.S. Attorney of the Eastern District of Pennsylvania, signed subpoenas and various pleadings related to the McDade case, AUSA Nicholas Harbist, with approval of his immediate superiors when necessary, was the primary prosecutor making the day-to-day decisions in the McDade investigation. Mr. Baylson did not personally work on the investigation, nor did he appear before the grand jury to present evidence or interview witnesses.

All of the AUSAs who worked on the McDade investigation and submitted affidavits to the court, swore that Mr. Baylson never suggested, implied, or directed that any evidentiary leads be or not be pursued or that the investigation be directed toward Mr. McDade or away from any other politician, including Senator

Specter. The investigation into Congressman McDade's dealings with government contractors was expanded in November 1990, not at Mr. Baylson's direction, attest the AUSAs, but at the insistence of the evidence, evidence such as the receipt of the guilty plea and cooperation of Mr. McDade's former aide, Raymond Wittig.

DISCUSSION

1. Standard for Dismissal of an Indictment

Mr. McDade claims that an actual conflict of interest existed between Mr. Baylson and his duties as U.S. Attorney during the investigation that lead to the grand jury indictment on May 5, 1992. More particularly, Mr. McDade claims that Mr. Baylson's alleged interest in avoiding any investigation into his own or Senator Specter's dealings with UCC or other government contractors was a violation of various ethical rules regarding conflict of interest. The defendant claims that such a conflict amounted to prosecutorial misconduct, which tainted the indictment and violated his rights to a fundamentally fair grand jury process.

The standard of review in cases seeking dismissal of an indictment was articulated in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), and recently affirmed in United States v. Williams, ___ U.S. ___, 112 S.Ct. 1735, 1741 (May 4, 1992).[2] The Court in Bank of Nova Scotia held that in the case of nonconstitutional error, dismissal of an indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." Id. at 256. A district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants. Id. at 254.[3] Therefore, only a showing of actual prejudice will warrant a dismissal of the indictment against Mr. McDade.

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2. See also Justice O'Conner's concurring opinion in United States v. Mechanik, 475 U.S. 66 (1986).

3. Constitutional error does not require a showing of actual prejudice. Such error occurs only when "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." Id. at Bank of Nova Scotia, supra at 257. See e.g. Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jurors warranted dismissal of the indictment); Ballard v. United States, 329 U.S. 187 (1946) (women had been excluded from the grand jury).

Although Mr. McDade alleges a violation of his Fifth Amendment right to due process and to an impartial grand jury, a prosecutor's alleged violation of ethical rules does not go to the very foundation of the structure of the grand jury; thus, it does not amount to an error of constitutional proportion. See e.g. United States v. Birdman, 602 F.2d 547, 557 (3d Cir.), cert. denied, 444 U.S. 1032 (1979) (special AUSA's violation of ethical rules in appearing before the grand jury as both a prosecutor and witness did not rise to the level of constitutional violation or require per se dismissal under the Court's supervisory power); United States v. Soberon, 929 F.2d 935, 940 (3d Cir. 1991) (prosecutor's misconduct in presenting allegedly perjured testimony to grand jury did not amount to constitutional error).

2. Conflict of Interest Allegations

Defendant McDade alleges that in conducting this investigation of him, Mr. Baylson's representation of the United States was materially limited by his relationship with Senator Specter and his interest in keeping any investigation away from his and the Senator's activities. Mr. McDade claims that this alleged interest of Baylson's prevented him from rendering independent decisions, free from conflict, on where the investigation would go. Mr. McDade cites three ethical rules which provide that a lawyer's loyalty to his client is not to be divided by his own interests or the interests of other clients or third parties.[4]

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4. The first is Rule 1.7(b) of the Pennsylvania Rules of Professional Conduct (1989), which provides:

> Conflict of Interest:
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>> (2) the client consents after full disclosure and consultation.
>
> (emphasis added).

The second is EC 5-1 and EC 5-15 of the American Bar Association's Code of Professional Responsibility, made applicable to the Justice Department through Federal Regulations. See 28 C.F.R. §45.735-1(b), which provides:

> *EC 5-1 The professional judgment of a lawyer should be exercised ... solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

(continued...)

4. (...continued)

> *EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided... He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests...

The third is Section 45.735-4(a) of Title 28 of the Code of Federal Regulations, which provides:

> (a) Unless authorized under paragraph (b) of this section, no [prosecutor] shall participate in a criminal proceeding or prosecution if he has a personal or political relationship with:
>
> (1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or
>
> (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

28 C.F.R. §45.735-4(a) (1990) (emphasis added).

For the purposes of this section political and personal relationship is defined as the following:

> (1) 'Political relationship' means a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof; and
>
> (2) 'Personal relationship' means close and substantial connection of the type normally viewed as likely to induce partiality . . . Whether relationships (including friendships) of an employee to other persons or organizations are "personal" must be judged on an individual basis with due regard given to the subjective opinion of the [prosecutor].

28 C.F.R. §45.735-4(c) (1990). <u>See also</u>, <u>United States Attorney's Manual</u> ("USAM") 1-4.700 (1988 ed.) (adopting the standards of conduct promulgated at 28 C.F.R. Part 45).

The Manual, however, by its own terms is only the internal operating procedure of the Department of Justice and creates no substantive or procedural rights. At 1-1.100 of the Manual it states:

(continued...)

The defendant has presented no real evidence that Mr. Baylson's representation of the United States in the McDade investigation was in conflict with his alleged interest in protecting himself and Senator Specter from investigation. Several current and former U.S. Attorneys attest that the U.S. Attorneys involved in the case had decided, before Mr. Baylson's arrival, and that no evidence warranted further investigation into Senator Specter or any other politician, except Mr. McDade. They swear that, after Mr. Baylson came to the U.S. Attorney's Office, he never used his position to direct the investigation away from himself and the Senator or toward any other individual.

That Mr. Baylson served as Senator Specter's campaign treasurer and signed Federal Election Commission reports with regard to campaign contributions does not establish that Mr. Baylson had a "personal or political relationship" with the people at UCC or other companies who were the "subject of the investigation." Although Mr. Baylson may have developed a personal or political relationship with the Senator while serving as his campaign treasurer, the outcome of Mr. McDade's investigation and prosecution, whatever it might be, would not,

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4. (...continued)
The manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

in the language of the U.S. Attorney's Manual, directly affect any specific and substantial interest of Senator Specter.

It is well to observe that the provisions upon which the defendant seeks to rely were put into place in order to remedy a mischief different from that which is of concern to the defendant. Ethical Canons 5-1 and 5-15 of the ABA Code of Professional Responsibility, as well as Rule 1.7(b) of the Pennsylvania Rules of Professional Conduct, by their literal terms and their spirit, are there to protect the client. Mr. Baylson, throughout the continuum leading up to the joinder of issue in this controversy, has had but one client: the United States of America -- not Senator Specter, not Congressman McDade. The Department of Justice was well aware that Mr. Baylson once served as Senator Specter's campaign treasurer, the defendant having told it that he believed there was a conflict of interest. The United States has apparently thoroughly looked into this matter; having done so, it has, through the Justice Department hierarchical higher-ups, consented.[5] That is the concern of the client, not of the client's opponent.

5. The Justice Department has approved Mr. Baylson's and his office's continued participation in the McDade investigation, at least twice officially. In March 1991, the Assistant Attorney General for the Criminal Division rejected Mr. McDade's conflict of interest arguments. (Exhibit 3 to Government's Opposition). In 1992, the Department of Justice again rejected Mr. McDade's arguments, after various meetings with representatives from the Criminal Division, the Organized Crime and Racketeering Section, and the Public Integrity Section. (Exhibit 4 to Government's Opposition).

In the face of the government's affidavits and the rest of the record, the defendant has failed to demonstrate that Mr. Baylson violated any of the relevant ethical standards.

3. Appearance of Impropriety

Even in the absence of an actual conflict, a dismissal may be justified if Mr. McDade can show that he suffered actual prejudice from an alleged appearance of impropriety stemming from Mr. Baylson's involvement in the investigation. While the need to avoid even the appearance of impropriety by a prosecutor conducting a federal grand jury proceeding is important, motions to disqualify prosecutors on grounds of conflict of interest are not lightly granted. See In re Grand Jury Subpoena of Rochon, 873 F.2d 170, 176 (7th Cir. 1989).

Mr. McDade claims that because under Mr. Baylson, the U.S. Attorney's Office did not investigate Senator Specter as it did Mr. McDade, the government created an appearance of impropriety. In its affidavits, the government makes clear, however, that the U.S. Attorney's Office did look at UCC's relationship with other politicians, including Senator Specter, and found that the evidence did not warrant an investigation. The defendant argues further that, after Mr. Baylson became U.S. Attorney, the prosecution may have decided not to ask witnesses questions about their knowledge of UCC dealings with Senator Specter because they were influenced by knowledge of Mr. Baylson's previous political ties to the Senator. That argument challenging the reasonableness of the prosecutors' decisions on how to selectively conduct or not conduct an investigation is in reality a claim for selective prosecution. Defendant McDade has not met the high burden, set out in the Third Circuit's decision in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), of proving that others similarly situated were not prosecuted. That precedent binds the case at bar, and thus, I find no appearance of impropriety in the U.S. Attorneys' conduct of the McDade investigation.

4. Prejudice Requirement of Bank of Nova Scotia

Even assuming that I could find a conflict of interest or an appearance of impropriety in Mr. Baylson's or his office's conduct, Mr. McDade still must show that he was prejudiced in the grand jury process by this conduct. This he has not done. The defendant has failed to demonstrate how Mr. Baylson's alleged conflict of interest "substantially influenced the grand jury's decision to indict or presented a grave doubt that the decision to indict was free from the substantial influence of such violations." Bank of Nova Scotia, supra, 487 U.S. at 256.

The dismissal of an indictment on the basis of governmental misconduct "is an extreme sanction which should be infrequently utilized." United States v. Birdman, 602 F.2d 547, 557 (3d Cir. 1979) (citing United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978)). When "an abundance of competent evidence" supports the indictment and there has been no material effect on the grand jury's decision to indict, the defendant has not met his high burden of proving prejudice. Even when courts find that a prosecutor has violated ethical rules, they may not dismiss the indictment unless the defendant can show that the misconduct amounted to more than harmless error, that it substantially influenced the jury's decision to indict. See e.g. United States v. Riccobene, 451 F.2d 586 (3d Cir. 1971) (prosecutor told grand jurors that they would not hear from a key government witness because the proposed defendants were "connected with organized crime and could harm him"); United States v. Bruzgo, 373 F.2d 383, 384 (3d Cir. 1967) (prosecutor had allegedly threatened a reluctant witness before the grand jury with loss of citizenship, and had called her a "thief" and "racketeer").

Here, the grand jury found sufficient evidence to return an indictment against Mr. McDade. In contrast, Mr. McDade has failed to meet his high burden of showing that he was actually prejudiced by Mr. Baylson's former ties with Senator Specter and his later, limited participation in the U.S. Attorney's investigation. Mr. McDade has not shown that any alleged conflict of interest tainted the grand jury process so as to invalidate the indictment returned against him. Therefore, Mr. McDade's motion to dismiss the indictment is denied.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	CRIMINAL ACTION
v.	NO. 92-249
JOSEPH M. MCDADE,	
Defendant	

FILED

JUL 30 1992

MICHAEL E. KUNZ, Clerk
By ________ Dep. Clerk

ORDER

AND NOW, this 30th day of July 1992, upon consideration of and oral argument upon the defendant's Motion to Dismiss the Indictment and the government's response thereto, it is hereby ORDERED that the said Motion is DENIED.

BY THE COURT:

Robert S. Gawthrop, III J.

7/31/92.
xc: J. Eisenhauer
N. Harlwist
opinion clerk
S. Cognetti
A. Lowell
S. Shirey