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THE WHITE HOUSE

WASHINGTON

August 22, 1988

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: PAULA E. BOGGS *PAB*

SUBJECT: The Independent Counsel's Authority
Under Section Six of the Classified
Information Procedures Act (CIPA)¹

Question Presented: Whether the Attorney General retains authority under Section 6 of the Classified Information Procedures Act (CIPA) to determine whether "disclosure of classified information would cause identifiable damage to the national security of the United States" consistent with the enumerated authority and duties of an independent counsel contained in Section 594(a) of the Ethics in Government Act (EIGA).²

(a) Does Section 14 of CIPA preclude transfer of the Attorney General's authority under Section 6 of CIPA to an independent counsel?

(b) Is the Attorney General's authority to make national security certifications under Section 6 of CIPA an "investigative and prosecutorial" function as that term is understood under EIGA?

(c) If so, is EIGA unconstitutional to the extent it purports to transfer the Attorney General's authority to make national security certifications, under Section 6 of CIPA, to an Independent Counsel?

¹ 18 U.S.C. Appendix IV, Pub. L. 96-456, Oct. 15, 1980, 94 Stat. 2025.

² 28 U.S.C. § 591 et. seq., Pub. L. 95-521, Title VI § 601(a), Oct. 26, 1978, 92 Stat. 1867, and amended Pub. L. 97-407 §§ 3, 4(a), Jan. 3, 1983, 96 Stat. 2039, 2040; Pub. L. 98-473, Title II, § 228(b), Oct. 12, 1984, 98 Stat. 2030; Pub. L. 100-91, § 2, Dec. 15, 1987, 101 Stat. 1293.

Conclusion: Consistent with EIGA, and with the Supreme Court's recent decision Morrison v. Olson, et al.³ the Attorney General retains authority to make national security certifications under Section 6 of the CIPA.

I. Overview

The Court in United States v. North⁴ has not to date resolved the issue of whether ultimate authority to make national security certifications under Section 6 of CIPA rests with the Attorney General or with the Independent Counsel. Under Section 6, the United States Government may seek hearings to resolve questions involving the disposition of classified information at trial. These hearings may be held in camera if the Attorney General certifies to the court that a public proceeding might result in the disclosure of classified information.⁵ Further, the Attorney General may certify through an affidavit that public disclosure of classified information, found relevant and admissible by the court, "would cause identifiable damage to the national security of the United States."⁶ In short, under CIPA the Attorney General may decide to prevent public disclosure of classified information even though relevant and though that decision might fatally impair the Government's ability to move forward with prosecution of a given case.

Even so, The Independent Counsel argues that under EIGA, the Independent Counsel, not the Attorney General, "has the power and responsibility to make CIPA Section 6 certifications with respect to matters within Independent Counsel's jurisdiction."⁷ The Independent Counsel further states that in exercising this power "Independent Counsel must be deferential to the Executive's determination as to whether national security concerns⁸ prevent public disclosure of validly classified information."

In response, Defendant North has objected strongly to Independent Counsel's interpretation of his authority under Section 6 of the CIPA on grounds of both statutory construction and

³ No. 87-1279, decided June 29, 1988.

⁴ Crim. No. 88-0080-02-GAG.

⁵ 18 U.S.C.S. Appx. § 6(a)(c)(1).

⁶ Id. at § 6(c)(2).

⁷ Memorandum of Independent Counsel Concerning Section 6 of the Classified Information Procedures Act, May 13, 1988 at 3.

⁸ Id.

constitutionality.⁹ According to Defendant North, Section 14 of CIPA prohibits the Independent Counsel from exercising and the Attorney General from delegating the duties entrusted to the Attorney General under CIPA.¹⁰ Further, Defendant North argues that EIGA did not nor could not constitutionally authorize the Independent Counsel to assume the Attorney General's national security functions under CIPA.¹¹

Through its order of June 22, 1988, the Court declined to rule on the Independent Counsel's status under CIPA.¹² Moreover, the Court ruled by its order of July 8, 1988 that the Attorney General's designation of Assistant Attorney General-Designate Dennis as his CIPA Section 6 representative "avoid[s] any question as to Independent Counsel's authority."¹³ Indeed, the Court has at least inferred that Section 6 national security determinations are made jointly by the Independent Counsel and the Attorney General.¹⁴

This paper attempts to parse through the advocacy of the Independent Counsel and of Defendant North in analyzing the question of whether the Attorney General enjoys ultimate authority to make CIPA Section 6 determinations on national security issues even when a case is prosecuted by an Independent Counsel rather than by the Department of Justice. For the following reasons this paper concludes that a strong argument can be made, based on widely recognized rules of statutory construction, that the Attorney General retains his national security

⁹ Motion for a declaration that the Independent Counsel is prohibited from exercising the powers of the Attorney general under the Classified Information Procedures Act (Joint Pretrial Motion Number 9), May 23, 1988.

¹⁰ Id.

¹¹ The Department of Justice by way of a draft memorandum concurs with most of Defendant North's legal analysis.

¹² Memorandum and Preliminary Order Re CIPA, Crim. No. 88-0080, June 22, 1988.

¹³ Further Memorandum and Order Re CIPA and Trial Schedule, Crim. No. 88-0080-02, July 8, 1988.

¹⁴ See Transcript of Scheduling Conference Before the Honorable Gerhard A. Gesell, United States District Judge, June 23, 1988, 1:30 p.m., Docket No. CR 88-80, p. 57: "[P]erhaps the Attorney General ought to designate someone under the statute and some decision really ought to be made jointly with [Independent Counsel].

responsibilities under Section 6 of CIPA consistent with Section 594(a) of EIGA. Further, this paper concludes that EIGA is probably unconstitutional to the extent it purports to strip away the Executive's authority to make national security determinations.

II. Argument

- A. Section 14 of CIPA prohibits the Attorney General from delegating to an independent counsel his authority to make national security determinations under Section 6 of CIPA.

CIPA expressly limits the delegation of authority vested in the Attorney General under that statute. Section 14 provides that the authority vested in the Attorney General by the Act "may be exercised by the Deputy Attorney General or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official." (emphasis added). Indeed, the United States Supreme Court held in United States v. Giordano¹⁵ that the Attorney General may not delegate his statutory duties when Congress expressly prohibits him from doing so.

Giordano held invalid the Attorney General's purported delegation to his executive assistant of the power to authorize a wiretap application under 18 U.S.C. § 2516(1). Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, in effect at the time of Giordano, 18 U.S.C. § 2516(1) provided that "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize" an application for authority to wiretap.¹⁶ The Supreme Court held that notwithstanding 28 U.S.C. § 510¹⁷ which authorizes the Attorney General to delegate any of his functions to any other officer, employee or agency of the Justice Department, Section 2516(1), "fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate."

¹⁵ 416 U.S. 505, 512-23 (1974).

¹⁶ Id. at 513.

¹⁷ In full, 28 U.S.C. § 510 provides:

"The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

Even more so than the statute at issue in Giordano, CIPA restricts the Attorney General's authority to delegate his statutory responsibilities by its explicit directive that those responsibilities "may not be delegated" to any official other than those specified in Section 14 of CIPA. The language of Section 14 is unambiguous and leaves no room for the interpretation articulated by the Independent Counsel in his memorandum of May 13, 1988. Though Independent Counsel concedes that a "literal reading of CIPA" ¹⁸ would prohibit the Attorney General from delegating his CIPA authority to the Independent Counsel, he nevertheless argues that when CIPA is "read in light of the provisions of the Independent Counsel statute, which has been reenacted twice since CIPA's passage in 1980," ¹⁹ it should not bar the Independent Counsel's assumption of the Attorney General's CIPA responsibilities.

- B. By its explicit language EIGA limits the degree to which an Independent Counsel may assume the Attorney General's authority.

There are several problems with the Independent Counsel's analysis given the rules of statutory construction generally accepted in the U.S. federal court system. First, the Supreme Court has time and again embraced what has come to be known as the "plain meaning rule." Though this rule is given expression in a variety of ways, the Supreme Court has declared that, "the meaning of the statute must, in the first instance, be sought in this language in which the act is framed, and if that is plain, . . . the sole function₂₀ of the courts is to enforce it according to its terms."

Moreover, as the Supreme Court has also held, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. ²¹ Applying this principle to the instant case, Congress was certainly well aware in 1980, when it passed CIPA, that by enacting Section

¹⁸ Memorandum of Independent Counsel Concerning Section 6 of the Classified Information Procedures Act, May 13, 1988, at 7 n. 2.

¹⁹ Id.

²⁰ Caminetti v. United States, 242 U.S. 470 ().

²¹ See Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954).

14 it was expressly excluding the Independent Counsel,²² whose duties and responsibilities were established in 1978 by EIGA, from making CIPA decisions on behalf of the Attorney General. For were it otherwise, Congress might easily have included the Independent Counsel among those authorized to make CIPA decisions in lieu of the Attorney General.

By its explicit terms, § 594(a) of EIGA limits the Independent Counsel's authority to act on behalf of the Attorney General. Section 594(a) grants the Independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." (emphasis added). The Section then goes on to outline examples of what is meant by "investigative and prosecutorial functions." Though this listing is not exhaustive, it does illustrate what types of activities Congress had in mind as "investigative and prosecutorial functions."

None of the examples listed suggests in even the remotest way that Congress intended an Independent Counsel to assume executive branch authority to make decisions concerning release of or access to classified information. The only example listed under § 594(a) which speaks to the issue of classified information allows the Independent Counsel to receive "appropriate" national security clearances and contest in court "any claim of privilege or attempt to withhold evidence on grounds of national security."²³

Though Independent Counsel may be correct when he argues that the language concerning his ability to challenge Executive branch national security decisions only refers to his access to classified information, this observation misses the point. It is not relevant whether the court review procedure refers to the Independent Counsel's access to classified information or to his ability to make decisions with respect to disclosure of classified information. In whichever case, it is clear Congress did not envision an Independent Counsel making decisions on the releasability of classified information. Moreover, contrary to Independent Counsel's position, this restriction goes well beyond issues of "declassification." Indeed, were it otherwise subparagraph (6) would be superfluous in that Independent Counsel could invoke "authority granted under EIGA" in obtaining classified information without needing to resort to the courts.

²² "Independent Counsels" were then known as "Special Prosecutors."

²³ 28 U.S.C. § 594(a)(6).

Further, as Defendant North correctly observes, the language of EIGA easily permits a construction which excludes transfer to the Independent Counsel of the Attorney General's national security functions under CIPA.²⁴ Under accepted rules of statutory construction in the D.C. Circuit, statutes touching the same subject, though in apparent conflict under one construction, should be construed so that effect is given to every provision in each if this is possible through reasonable construction.²⁵ Here, a reasonable and consistent interpretation of EIGA and CIPA, viewed together, is that the Congress did not consider the Attorney General's authority under CIPA to be an "investigative and prosecutorial" function to be exercised by an Independent Counsel pursuant to EIGA.

Another rule of statutory construction widely accepted is that when one among alternative constructions involves constitutional difficulties, that interpretation should be rejected in favor of one more sound constitutionally.²⁶ Indeed, federal courts have held that "a strained construction is not only permissible, but desirable, if it is the only construction that will save constitutionality."²⁷ Applying this rule of construction here, EIGA should not be interpreted as granting an Independent Counsel authority to make CIPA determinations concerning access to or releasability of classified information.

- C. EIGA is probably unconstitutional to the extent it purports to transfer the Attorney General's authority to make national security certifications, under Section 6 of CIPA, to an Independent Counsel.

An attempt by Congress to divest the President of his power to control the disclosure of national security information should not pass constitutional muster. As correctly stated by Defendant North, "[t]he protection of this nation's diplomatic and military secrets lies at the core of the powers and responsibilities of the Executive branch."²⁸ Article II, § 1 of the Constitution

²⁴ Defendants Joint Pretrial Motion Number 9, May 23, 1988, at 17.

²⁵ See Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

²⁶ See United States v. Clark, 445 U.S. 23 (1980).

²⁷ In re Gifford, 688 F.2d 447 (7th Cir. 1982) (citing text); United States v. Rivera, 427 F. Supp. 89 (S.D.N.Y. 1977).

²⁸ Defendant's Memorandum, May 23, 1988 at 12, citing U.S. Const. Art. II.