



June 15, 2001

United States Court of Appeals
For the District of Columbia Circuit

FILED JUN 15 2001

Mr. Mark J. Langer
Clerk
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Fifth Floor
Washington, D.C. 20001

Re: Final Report of the Office of Independent Counsel Donald Smaltz;
In Re: Alphonso (Mike) Espy, Division No. 94-2

Dear Mr. Langer:

Pursuant to the Order that was filed with your office on March 16, 2001, in the above-captioned matter by the Division for the Purpose of Appointing Independent Counsels (hereinafter the "Special Division"). I have reviewed those portions of the Independent Counsel's Final Report made available to me concerning my client, Henry E. Espy. On the basis of my review and consistent with the purpose of 28 U.S.C. § 594(h)(2), I request that the following comments about and corrections to the Final Report be incorporated before the Special Division releases the Final Report. Alternatively, I ask that the following comments and corrections be included in the Appendix to the Final Report, as has been done in various other Independent Counsel investigations.

Mr. Henry Espy has recently been elected Mayor of Clarksdale, Mississippi, the office he held before running for Congress to fill the seat vacated when his brother Michael Espy became Secretary of Agriculture. His position as a public official makes it especially important that the record of his experience with the Office of the Independent Counsel ("OIC") be reported accurately.

Generally, my comments can be grouped into four categories:

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1. Henry Espy's Acquittal Based On The Trial Judge Granting His Rule 29 Motion Indicated That The Case Should Not Have Been Brought In The First Place

While the Final Report mentions the numerous charges the OIC brought generally and the specific case brought against Henry Espy (p. 305-307), it does not present fully the fact that the charges brought against Henry Espy in this investigation were not supported by the evidence and should not have occurred. This is substantiated by the fact that the trial judge who presided in Henry Espy's case granted a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure made by the defense at the end of the government's presentation of evidence. Under the strict standards of Rule 29, a trial judge may not grant such a motion for judgment of acquittal unless there is no evidence from which a reasonable trier of fact could find the defendant guilty. It is generally recognized in the legal community that a grant of a Rule 29 motion at the end of the government's case (meaning that the defense never had to call a single witness or submit any evidence) indicates strongly that the case should not have been brought in the first place.

During the investigation phase, attorneys in the Office of Independent Counsel made it clear to Henry Espy's attorneys at the time that their intent was to obtain Henry Espy's cooperation and testimony against his brother. While the technique of using a threat of bringing charges to induce cooperation is common in the law enforcement community, it was most inappropriate here where there was scanty evidence to support the charges that were being threatened and then were brought.

In addition, Henry Espy notes, as he did in motions filed with the court, that the location for the filing of the original indictment against him was suspect. Despite the fact that Henry Espy ran for office from Mississippi, that the bank he was alleged to have defrauded was in Mississippi, and that all of his activities and most all potential witnesses were in Mississippi, the OIC chose to file its case in New Orleans, Louisiana. That decision raised issues of forum and jury shopping. The Final Report fails to adequately note that Henry Espy raised the misfiling of the case in Louisiana, and it was his motion raising these issues that caused the case to be transferred to the Northern District of Mississippi, where he was acquitted.

2. The OIC's Overtly Broad Statements Of Wrongdoing Which Could Be Read To Include Henry Espy Are Unfounded And Unsupported In The Evidence.

On a number of occasions, the Final Report contains overly broad language that concludes with a finding of some type of wrongdoing that could be read to include Henry Espy. Examples of the Final Report's overly broad language are set out below, and the accurate facts, as developed in various trials, are then presented.

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p. 4 - "There was, in the end, never any doubt that Espy and his family . . . had taken gifts of substantial value from those whom Espy regulated."

p. 4 - ". . . his brother [Henry Espy] received approximately \$50,000 in illegal campaign contributions because he could facilitate access to the Secretary . . ."

No evidence produced at any proceeding indicated that Henry Espy "had taken" any gifts of any kind. He and his campaign did receive campaign contributions that on their face appeared to be lawful. The fact that some of the contributions received ended up being reimbursed to contributors without the knowledge of Henry Espy does not make them "gifts" to Henry Espy. The record of various trials actually indicates that Henry Espy was unaware that any improper campaign contributions had been made.

The Final Report disparages Henry Espy and his campaign through innuendo. For example the OIC writes (pp. 183-84) that a variety of people and entities made campaign contributions to the Henry Espy for Congress campaign who had agricultural interests or few contacts with the district in Mississippi. The OIC is well aware that people from all over the country routinely make contributions to congressional candidates not from their own district, and the OIC is well aware that various interest groups support national candidates who understand their interests. Neither of these is explained in the OIC's report.

3. The Final Report's Discussion Of Campaign Violations Fails To Make Clear That Henry Espy Was Unaware Of Any Improper Conduct Of Any Contributors

Various times in the Final Report, the OIC will speak of "illegal contribution:"

p. 6 - 7 - "illegal contributions to Henry Espy by donors . . ."

p. 190 - "The [campaign's] reports did not identify any of the [companies reimbursing contributions] as the true contributors to the campaign."

p. 197 - a reimbursement scheme described

p. 198 - "As a result of this conduit scheme, Henry Espy's campaign received \$4,000 in illegal campaign contributions."

p. 208 - description of AFLAC's "Illegal Contributions"

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The Final Report even has a section entitled (p. 182) "E. Henry Espy Campaign Offenses."

As the OIC does point out, the illegality in these contributions was most often the fact that individuals' contributions were eventually reimbursed by their employers or others. What the OIC does not make clear is the fact that such reimbursements are rarely known by the campaign receiving what otherwise look to be legitimate contributions from individuals. And, in this case, trial after trial failed to provide *any* evidence that Henry Espy or his campaign was aware that any contribution had been reimbursed or was improper in any way. In fact, one of the charges brought against Henry Espy was a conspiracy charge with one object of the conspiracy alleged to be an attempt to defraud the Federal Election Commission. This charge, as well as all the others, was dismissed by the trial court for a lack of any evidence from which a jury could ever find guilt. Neither the campaign nor Henry Espy was ever found to have committed any of the violations to which the Final Report refers.

4. The Final Report Raises The Issue Of A Fraudulent Bank Loan And Fails To Point Out That Henry Espy Was Unaware Of And Was Acquitted Of That Conduct

One of the principal allegations made against Henry Espy was that he was part of a scheme to defraud his own day-to-day bank in Clarksdale, Mississippi by submitting or being involved in the submission of false loan information.

p. 193 – "On April 28 and again on May 3, 1993, Ferrouilet and Henry Espy, in order to qualify for the loan, submitted an application that falsely reported to the bank . . .

The trial testimony (and the evidence that should have be discovered by the OIC before trial) indicated that Henry Espy did not submit any false information of any kind, and that he had little motive to harm the bank that he and his family had used and needed for their livelihood. The true facts supported the trial court's decision to enter judgment in favor of Henry Espy as a matter of law after the government rested its case.

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Out of fairness to Henry Espy, and especially because of his position as a public servant, I request that the Final Report be corrected in a fashion which provides adequate explanation for the issues raised above. If not, then, at a minimum, this letter should be included in the Appendix of the Final Report.

Sincerely,

A handwritten signature in black ink, appearing to read "Abbe David Lowell". The signature is fluid and cursive, with the first name "Abbe" being particularly prominent.

Abbe David Lowell

ADL:pc

cc: Office of the Independent Counsel Donald C. Smaltz