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June 13, 2001

BY HAND

Mr. Mark J. Langer
Clerk
United States Court of Appeals for the
District of Columbia Circuit
Washington, D.C. 20001-2861

Dear Mr. Langer:

I am responding on behalf of Tom D. Kilgore, and two other individual clients with respect to the final report submitted by Independent Counsel Donald C. Smaltz. All three of my clients were, at the relevant time, employed by Oglethorpe Power Corporation.

It is an abuse of power for a prosecutor to use his investigative powers to obtain information and then to disclose that information, not in a public forum, such as a trial, but in a written report. It is even more inappropriate for a prosecutor, who has brought formal charges and lost his case on every count at trial, to nevertheless reassert those charges in a public report as though true and proven. Finally if a prosecutor is to write a report, in addition to limiting himself to discussion of facts previously disclosed in a public forum, he should be scrupulously fair to tell the whole story. Based on the few pages of Mr. Smaltz's report that his office has allowed me to read, it fails all three tests. It discloses matters before the grand jury that were not disclosed at trial; it asserts as true allegations rejected by the jury; it fails to disclose significant facts that cast doubt on the picture Mr. Smaltz seeks to paint.

1. The Limitations on a Prosecutor's Report

The proper limitations on a report written by a prosecutor were best set out in the Report of the Watergate Special Prosecution Force (WSPF) over 25 years ago. In contrast to Mr. Smaltz's performance, The Watergate Special Prosecutor Force successfully prosecuted many of President Nixon's aides who participated in the Watergate cover-up. Nevertheless, the Special Prosecution Force declined in its Report to disclose matters that occurred before the grand jury or which had otherwise not been disclosed in a public forum. It did so because it recognized that disclosure of such non-public matters would be unethical and would constitute an abuse of its power.

> This report contains no facts about alleged criminal activity not previously disclosed in a public forum. Many public officials saw the Special Prosecutor as one with special privileges to lay bare what witnesses had said and to offer his own, personal conclusions as to what really happened. Other persons also asserted that President Nixon's pardon, and Congress' passage in the middle of WSPF's work of a retroactive, 3-year statute of limitations for campaign law violations (replacing the normal 5-year period for initiating prosecutions) reinforced the propriety of releasing grand jury testimony, informants' allegations, and the confidential assertions of cooperative witnesses.
>
> However, for WSPF to make public the evidence it gathered concerning the former President and others who were not charged with criminal offenses would be to add another abuse of power to those that led to creation of a Special Prosecutor's office. The Federal Rules of Criminal Procedure prohibit the disclosure of information presented to a grand jury except as necessary in the course of criminal proceedings. The American Bar Association reinforces this stricture in its *Code of Professional Responsibility* and limits the circumstances under which attorneys involved in criminal investigations are free to make out-of-court statements about the details of their work.
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> Most important, in terms of the American constitutional system of government, is the notion of fundamental fairness for those who, after investigation, have not been charged with any criminal misconduct. This consideration is particularly important for a Special Prosecutor whose independence considerably reduces his accountability and who must be unusually sensitive to possible abuses of his power. It is a basic axiom of our system of justice that every man is innocent unless proven guilty after judicial proceedings designed to protect his rights and to ensure a fair adjudication of the charges against him. Where no such charges are brought, it would be irresponsible and unethical for a prosecutor to issue a report suggesting criminal conduct on the part of an individual who has no effective means of challenging the allegations against him or of requiring the prosecutor to establish such charges beyond a reasonable doubt.

Watergate Special Prosecution Force, Report at 1-2 (1975) (footnote omitted).

2. Oglethorpe's Involvement in the Espy Investigation

To understand how Mr. Smaltz has violated the strictures that should constrain a prosecutor, it is necessary to understand Oglethorpe's role in the Espy investigation. (Although I represented Oglethorpe and five of its employees, I have chosen to address this issue as it applies to the company in order to protect the privacy of the individual clients, some of whom were not explicitly mentioned in Mr. Smaltz's report.) Briefly, Oglethorpe sought to pay back certain debt obligations to the United States ahead of schedule and without incurring the full penalties for early repayment, a process that is explicitly authorized by Section 306(c) of the REA Act. Early repayment would benefit Oglethorpe's rural consumers, which made this issue of interest to the Secretary of Agriculture. Accordingly, Oglethorpe sought to enlist Secretary Espy's assistance in persuading the Treasury Department to allow it to pay off its obligations ahead of schedule. Oglethorpe had engaged Smith Barney, Inc., to assist it , and Smith Barney had brought in EOP Group, Inc., a lobbying organization, to help lobby the Department of Agriculture. Unbeknownst to Oglethorpe, EOP employed Secretary Espy's girlfriend. When Oglethorpe learned this fact, several months after the crucial events occurred, it ceased doing business with EOP.

In January, 1994 a meeting with Secretary Espy was arranged on the Saturday before the Super Bowl at Oglethorpe's headquarters outside of Atlanta. Secretary Espy was in town to attend the football game and thus was available to meet in the Atlanta area. The Friday evening before the Saturday meeting, a Smith Barney employee telephoned an Oglethorpe employee and said that Super Bowl tickets were being messengered to Oglethorpe to be given to the EOP lobbyist who would be in attendance the next day. Nothing was said about the tickets being paid for by Smith Barney or being given to anyone other than the EOP lobbyist. The tickets arrived. Oglethorpe locked them up for the night and gave them to the EOP lobbyist the next day, before Secretary Espy arrived. The EOP lobbyist claimed that he later passed a ticket to Secretary Espy, but even if this occurred, it did not occur in the presence of any Oglethorpe employee nor with the knowledge and consent of any such employee. Nor did the lobbyist tell the Oglethorpe employees that he was giving a ticket to Secretary Espy.

When Mr. Smaltz began to investigate the incident, his office assured Oglethorpe and its employees that their status was that of "witnesses" (as opposed to "subjects" or "targets"). Oglethorpe and the employees cooperated fully, submitting to interviews and testifying before the grand jury.

Months after the testimony occurred, the Independent Counsel's office informed me that the status of Oglethorpe and some of the employees who had testified had changed. They were no longer "witnesses", now they were "subjects" of the investigation. Two events had brought about this change. First, the EOP lobbyist was cooperating with the prosecutors. Precisely what this witness said about Oglethorpe, I was never told. Nor do I know what inducements he

received for his cooperation. The few pages of Mr. Smaltz's report that I was permitted to read state that he testified that he told Oglethorpe representatives in a meeting that occurred about two weeks before the Super Bowl that Secretary Espy needed a Super Bowl ticket. Ignoring the implausibility of this claim – one pictures the Secretary of Agriculture coming to Atlanta unable to find a Super Bowl ticket, hoping to purchase one from a scalper on the sidewalk outside the stadium – no one ultimately corroborated it.

Nevertheless, Mr. Smaltz's office chose to claim to believe this "evidence," motivated in large part by the second intervening event, Smith Barney's payment of $1 million in a "civil settlement." Although Oglethorpe did not know it at the time, Smith Barney did pay scalper's rates to purchase tickets for the EOP lobbyist. Moreover, Smith Barney did not accurately account for the purchase on its books, thereby opening itself up to a potential criminal charge. Smith Barney resolved this problem by entering into a "civil settlement," in which there were filed simultaneously in court a complaint and a settlement agreement. The case was settled for $1 million. Mr. Smaltz has trumpeted this payment on his web site in response to criticism about the cost of his unsuccessful investigation.

After this occurred, Mr. Smaltz's office contacted me, told me that my clients' status had changed from "witnesses" to "subjects," and then inquired if I were aware of the Smith Barney settlement. To ensure that I was aware, the Independent Counsel's office kindly messengered to me a copy of the pleadings, including the $1 million "settlement agreement." In a subsequent meeting, while stating that it would be wrong for a prosecutor to use the criminal process to obtain a civil settlement, the Independent Counsel's office let me know that it was open to consider any resolution that Oglethorpe might propose. Our internal memorandum of the February 12, 1998 meeting discloses that the Independent Counsel's office said that it had four options.

> One, drop the case, which they are not prepared to do. Two, indict OPC [Oglethorpe] now, which they are not prepared to do. Three, launch a criminal investigation. Or, four, discuss the possibility of a non-criminal disposition. He noted that he is not offering that [non-criminal disposition] now and added that it would have to be initiated by OPC. He believes that the investigation can either be done with OPC's cooperation or can be done through the adversarial process.

The import of this communication was not difficult to discern. It was clear that if Oglethorpe agreed to pay a substantial "civil settlement," the Independent Counsel would not pursue criminal charges against it or the employee "subjects" of the investigation. This put Oglethorpe under considerable pressure. Although confident that no one had done anything wrong, there was a distinct threat of an indictment and trial, and the possibility, however slight, of a conviction. This was particularly troubling to the individual employees deemed to be

"subjects," who saw the possibility of indictment, trial, and the necessity to prove their innocence to avoid imprisonment. Paying money to make these problems go away was the easy way out. To its credit, Oglethorpe did not succumb. Its chief executive officer, Tom Kilgore (I make an exception here about not naming names) said that the company had done nothing wrong and was not going to give in to extortion. We communicated that to Mr. Smaltz's office, and, of course, no one was ultimately charged. The Independent Counsel did interview or re-interview a number of Oglethorpe employees, however. When the Independent Counsel subsequently subpoenaed two of my individual clients to trial, I insisted on and received letters stating that they had metamorphosed back into the status of "witnesses," now that the Independent Counsel needed their testimony.

Several of the counts in the indictment of Secretary Espy alleged that he had improperly received Super Bowl tickets from Smith Barney, EOP, and Oglethorpe. A jury acquitted him of all counts after about one hour's deliberation.

3. **Irresponsible and Unethical Allegations.**

Of course, most of the story about the Super Bowl ticket was disclosed in a public forum, Secretary Espy's trial. But since that trial resulted in an overwhelming rejection of Mr. Smaltz's view of reality, his report thickens the soup by inserting unproven conclusions, innuendo, and non-public details. The report repeatedly says or implies that Oglethorpe knowingly "gave" a Super Bowl ticket to Secretary Espy. (Actually at several places, it says that Oglethorpe gave him Super Bowl "tickets" [plural]. *See* pp. 286, 288.) Thus, the report says that the EOP lobbyist gave Secretary Espy a ticket he had "obtained from" Oglethorpe and Smith Barney (p. 120), that Oglethorpe and EOP had "provided" Secretary Espy with a ticket to the Super Bowl (p. 122-23), that Oglethorpe "obtained" the ticket from Smith Barney (p. 123); that Secretary Espy "received as a gift" a Super Bowl ticket from EOP and Oglethorpe (p. 151); and that Secretary Espy failed to report "receipt" of a Super Bowl ticket worth $2,200 from Oglethorpe, Smith Barney, and EOP (p. 151). Its description of the complaint, filed as part of its "civil settlement" with Smith Barney, says that Smith Barney gave the ticket to Secretary Espy "on behalf of" its client Oglethorpe (p. 316).

What the report does not do is to cite a single shred of credible evidence that Oglethorpe knew that Smith Barney had paid for the Super Bowl ticket or that it was going to be passed on to Secretary Espy. There is no such evidence. To the contrary, the testimony was that anyone at Oglethorpe, who helped provide a ticket to a government official, knowing that Smith Barney was paying for it, would have been fired. Nor does the report mention that every Oglethorpe witness denied knowing that Smith Barney had paid for the Super Bowl ticket or that it was destined for Secretary Espy. It is a lot more plausible, as the Olgethorpe employees believed, that the lobbyist, rather than the Secretary of Agriculture, would have traveled to Atlanta from Washington in need of a last-minute Super Bowl ticket. All the witnesses present at the Saturday

meeting said that the ticket was given to the EOP lobbyist before Secretary Espy's arrival. The lobbyist apparently agrees that this was so but, according to the report, claimed that he gave the Secretary a ticket after the meeting, at a hotel, when conveniently there was no one else present.

The EOP lobbyist, after he decided to cooperate, did apparently say that at a meeting about two weeks before the Super Bowl, he had told some Oglethorpe employees that the Secretary needed a ticket. (Even his version of this meeting does not claim this was to be a free ticket.) The other participants in that meeting denied that this statement was made. The report says that the Oglethorpe employee with the "most complete" recollection of this portion of the meeting said that the Secretary or someone in his entourage needed a ticket. But in a footnote, the report reveals that the witness first said he was told that Secretary Espy would need "tickets" [plural]. Then he said either the Secretary or a member of his party would need "tickets" [plural]. Finally, he said someone in the party would need a ticket, and this was what he testified to under oath in the grand jury. The report implies that this changing testimony was caused by his conferring with me (p. 123-24 and n. 44).

Our interview notes and internal memorandum contradict the Report's version of events. This witness submitted to an interview on April 28, 1998. When the subject of the mid-January meeting came up, there was no discussion with the witness outside of the Independent Counsel's presence, as his report states. According to our memorandum, when asked what he knew about Superbowl tickets, the witness replied, without first conferring with counsel:

> I knew nothing about Superbowl tickets for the Secretary. In an earlier meeting, [the EOP lobbyist] said Espy was coming to the Superbowl. [The EOP lobbyist] made the statement that the Secretary already had tickets. I vaguely remember that he mentioned that someone else needed a ticket or could use a ticket and [a Smith Barney employee] made a note that he would take care of it and would look for a broker.

This witness was never called by Mr. Smaltz to testify at trial, despite having "the most complete" memory. Instead, Mr. Smaltz's report discloses the Independent Counsel's version of its interviews of this witness and his grand jury testimony, neither of which were ever disclosed at trial. It also strongly implies that I persuaded the witness to change his story, presumably to make it less, not more accurate, and hints strongly that I had a conflict of interest. Of course, no such claim of conflict was made at the time. Thus, in order to bolster a version of events most damaging to Oglethorpe and its employees, Mr. Smaltz selectively chooses portions of the evidence – omitting those portions that are inconsistent with his theory – violates Rule 6(e), Fed. R. Crim. P., and insinuates unethical conduct by a defense lawyer. None of this did he prove, or in most instances, even attempt to prove. If he could not prove it, he ought not allege it in a public report.

Finally, Mr. Smaltz's report never mentions the fact that Oglethorpe was unaware, when it became involved with EOP, that EOP employed Secretary Espy's girlfriend and that when Oglethorpe did become aware, it terminated its relationship with EOP. EOP was first employed by Smith Barney. Oglethorpe worked with EOP and engaged the firm itself in early January, 1994. Later in the year an EOP employee mentioned that Secretary Espy's girlfriend was employed there. Oglethorpe became uncomfortable with EOP representing the company in lobbying Secretary Espy under those circumstances. It directed EOP to wind down the matter, and the representation thereafter ceased. As far as I know, this testimony was uncontradicted. But Mr. Smaltz never mentions it in his report. Instead he leaves the impression that Oglethorpe knew about the girlfriend's job and probably chose EOP because of that fact (122-23, 125).

Had Mr. Smaltz elected to indict Oglethorpe or any of its employees, he would have had to convince a jury of their culpability. Before a jury, we would have had the right to confront his "evidence." He did not do that, and his result before the Espy jury confirms that this was a wise decision. He should not now, however, use information he gathered through his prosecutorial powers to insinuate Oglethorpe's culpability. It is particularly disgraceful that he does so using selective evidence, violating grand jury secrecy, and failing to disclose evidence that casts significant doubt on his theories.

In its present form, this report should not be published. At a minimum, I request that this letter be appended to the report.

Very truly yours,

Hamilton P. Fox, III

HPF/djdjs