

1 DONALD C. SMALTZ, SBN: 37312
2 Independent Counsel
3 Theodore S. Greenberg, D.C. Bar No. 227348
4 Deputy Independent Counsel
5 Wil Frentzen, La. Bar No. 24421
6 Associate Independent Counsel
7 103 Oronoco Street, Suite 200
8 Alexandria, VA 22314
9 (703) 706-0010

10 Attorneys for the
11 UNITED STATES OF AMERICA

12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,
15
16 v.
17 RICHARD DOUGLAS,
18
19 Defendant.

No.: CR-96-0348 (TEH)

20 UNITED STATES'
21 SENTENCING MEMORANDUM
22 (Under Seal)

23 Sentencing Date: July 27, 1998
24 Time: 1:30 p.m.
25 Hon. Thelton E. Henderson
26
27
28

RECEIVED

JUL 20 1998

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 DONALD C. SMALTZ, SBN: 37312
2 Independent Counsel
Theodore S. Greenberg, D.C. Bar No. 227348
3 Deputy Independent Counsel
Wil Frentzen, La. Bar No. 24421
4 Associate Independent Counsel
103 Oronoco Street, Suite 200
5 Alexandria, VA 22314
(703) 706-0010

6 Attorneys for the
7 UNITED STATES OF AMERICA

8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,
12 v.
13 RICHARD DOUGLAS,
14 Defendant.

No.: CR-96-0348 (TEH)

15 UNITED STATES'
16 SENTENCING MEMORANDUM
(Under Seal)

Sentencing Date: July 27, 1998
Time: 1:30 p.m.
Hon. Thelton E. Henderson

17 INTRODUCTION

18 Pursuant to Crim. L.R. 32-5(b), the United States submits the following recommendations
19 regarding sentencing of defendant Douglas. The parties in this case entered into a Plea
20 Agreement (attached as Exhibit A) on March 16, 1998, the same day that Douglas entered a
21 guilty plea to a one count criminal information charging him with making false statements to the
22 Federal Bureau of Investigation (in violation of 18 U.S.C. § 1001). A condition of the plea was
23 that Mr. Douglas "fully, completely, and truthfully testify" in meetings with government. Plea
24 Agreement, ¶5. The United States agreed to consider Mr. Douglas's cooperation and, if Mr.
25 Douglas fully and truthfully cooperated, recommend a sentence at the low end of the guideline
26 range or a probationary sentence.¹ Plea Agreement, ¶8. Douglas's entitlement to such a

27 ¹ In her Presentence Report (PSR), the United States Probation Officer determined that
28 the appropriate guideline range is 0-6 months, based on a total offense level of 6. The parties
agreed to the same offense level in the Plea Agreement, ¶6.

1 recommendation required the Independent Counsel's determination "in his sole and unfettered
2 discretion, that Richard Douglas has provided substantial assistance to the investigation and
3 prosecution undertaken by this office, and [that] Richard Douglas has fully complied with the
4 understandings specified in [the Plea] Agreement . . ." *Id.* The government cannot make such a
5 recommendation. Rather, the view of the government is that the Court should sentence Mr.
6 Douglas to six months incarceration. For the Court's consideration, this memorandum provides
7 the reasons for the government's decision.

8 As a threshold matter, Mr. Douglas met with interviewers on the occasions requested by
9 the government, at which times he was given letters of immunity (and, in the Grand Jury,
10 statutory immunity) and responded to questions.²

11 Where Mr. Douglas has failed to fully cooperate is in the crucial area of completely and
12 truthfully responding to all questions. For whatever reason, Mr. Douglas's testimony has been
13 lacking in certain meaningful particulars.³

14 There are two primary problems with Mr. Douglas's testimony. First, he purported to tell
15 the government about the involvement of certain government officials with a Napa Valley winery.
16 He disclaimed any knowledge of his own involvement with that winery in receiving wine in
17 October, 1993, that he requested for and on behalf of Secretary Espy and was delivered to him.
18 In that regard, Mr. Douglas's testimony was not truthful and there is independent evidence that
19

20 ² Mr. Douglas met with representatives of the Office of Independent Counsel on March
21 16, 1998, on March 30 and 31, 1998, on May 6, 1998, and on July 15, 1998. Pursuant to
22 subpoena and an immunity order compelling his testimony, Mr. Douglas appeared in the Grand
23 Jury on July 16, 1998. To the extent that the government requested his appearance, Mr. Douglas
24 has fully complied with the terms of the Plea Agreement. Similarly, pursuant to grants of
25 immunity, Mr. Douglas has responded to all questions put to him by the government, with the
26 single exception of questions put to him regarding leaks by his former counsel, John Dowd, to the
27 press of grand jury matters under seal. With respect to those questions, Mr. Douglas asserted
28 attorney-client privilege. With regard to the issue of the source of the NBA basketball tickets that
are the subject of the second false statement alleged in the criminal information, however, Mr.
Douglas did waive his attorney-client privilege so that the government could question Mr.
Douglas's original counsel, Fred Fielding.

³ In part, the government has been able to corroborate information that Mr. Douglas has
provided and, in part, Mr. Douglas has admitted culpability for events that he could have denied.
For example, Mr. Douglas admitted his involvement in the James Lake contribution scheme, of
which the jury found him not guilty at trial.

1 flatly contradicts Douglas. Second, although Douglas remembers the details of an agreement with
2 Secretary Espy to give false testimony to the FBI concerning the source of tickets to a June 18,
3 1993, Bulls/Suns NBA championship playoff game, Douglas denies any recollection of discussing
4 with Espy other false testimony he gave to the FBI to "cover" for Espy. In that regard, it is the
5 government's position that Mr. Douglas's testimony was not full and complete. Finally, in
6 addition to the problems with his testimony, Mr. Douglas refuses to take responsibility for his
7 own illegal actions and continues to view himself as a victim.

8 ARGUMENT

9 1. Mr. Douglas Was Not Honest Regarding His Own Involvement in Soliciting a Thing of 10 Value for Secretary Espy

11 Mr. Douglas first met with representatives of the United States shortly after he entered his
12 change of plea in this Court on March 16, 1998. During that brief meeting, Mr. Douglas
13 indicated that there were two principal areas in which he believed that he could assist the
14 investigations of the Independent Counsel.⁴ Mr. Douglas informed the Independent Counsel, in
15 generalities, about those two areas. Mr. Douglas presented one of the areas to the Independent
16 Counsel as a challenge. Mr. Douglas asserted that, in essence, he did not believe that the
17 Independent Counsel would prosecute white people if Mr. Douglas informed him about wrong-
18 doing by white people. To that end, Mr. Douglas informed the government about a dinner hosted
19 by the owners of a winery at which then-Secretary of Agriculture Espy, another sitting Cabinet
20 member, and a member of the Executive Office of the President, dined with lobbyists from a trade
21 organization representing various wineries and the officers of the winery. According to Mr.
22 Douglas, the attendees of the dinner discussed federal regulations of great interest to the wine
23 industry during the dinner. Mr. Douglas stated, in substance, that he wanted to see what steps the
24 Independent Counsel would take to investigate this alleged gratuity provided by white executives
25 and lobbyists to white public officials

27 ⁴ These two areas had been revealed in the most general terms to the United States in a
28 verbal proffer by Douglas's counsel prior to the March 16, 1998 meeting.

1 Prior to subsequent meetings with Mr. Douglas, the government investigated the
2 allegations to determine (1) whether Secretary Espy was involved and, (2) to the extent that other
3 public officials were involved, whether to pursue that information further or to refer it to other
4 investigative agencies. At that point, the investigation revealed that on an occasion separate from
5 the dinner mentioned by Mr. Douglas, Secretary Espy traveled to the California winery where the
6 winery made (or attempted to make) a gift of wine to Secretary Espy. Additionally, executives
7 and employees of the winery had discussed with the Secretary numerous issues pending at the
8 Department of Agriculture for which Secretary Espy could perform official acts to the benefit of
9 the winery and the wine industry as a whole. The government also determined that, on the trip to
10 the winery, Mr. Douglas accompanied the Secretary. Mr. Douglas had not mentioned this trip to
11 the government during the initial March 16, 1998 interview nor during the March 30 and 31, 1998
12 interview.⁵

13 The government asked Mr. Douglas about this trip to California in an interview conducted
14 at the Office of Independent Counsel on May 6, 1998. Mr. Douglas acknowledged the trip by
15 Secretary Espy, told the government that he (Douglas) accompanied Espy on the trip, and
16 informed the government about various details related to that trip. On the issue of the gift of wine
17 by the winery, however, Douglas stated that he could not recall whether or not Espy was given a
18 gift of wine at any time during the visit. He stated that he did believe that important guests were
19 typically given a bottle of wine or gift packs of wine and he stated that when he had escorted
20 other government officials to the winery in the past, those officials were given gifts of wine at the
21 same winery. Douglas stated that he could not recall whether the winery sent any wine to Espy at
22 Espy's home or office.

23 The government subsequently investigated whether the Secretary of Agriculture physically
24 received the wine (although it was clear from records and testimony of winery employees that the
25

26 ⁵ As to the investigation of attendance at a dinner by other high-ranking government
27 officials, the Independent Counsel, because of his jurisdictional mandate, summarized all relevant
28 information then known and referred it to the Department of Justice for whatever action deemed
appropriate.

1 company intended to make a gift to the Secretary) and other circumstances surrounding the gift.
2 The evidence is the Secretary, his staff, and Mr. Douglas traveled to the winery in two cars -- a
3 USDA car and Mr. Douglas's car. Following a reception and a dinner at the home of the
4 winery's President and CEO, the Secretary was transported from the winery to a USDA airplane
5 for a trip to view fires in the Southern California area. The wine was not transported on the
6 airplane with Espy, nor was it transported in the USDA car. Therefore, the government was left
7 with the inference that the wine ended up in Mr. Douglas's car.

8 Subsequent investigation thereafter revealed the following evidence:

9 Around October 4, 1993, Mr. Douglas telephoned an executive at the winery and asked if
10 it would be possible for Secretary Espy to visit the winery in the Napa Valley in California on or
11 about October 29, 1993. Douglas told the executive, in substance, that Secretary Espy would be
12 traveling to San Francisco, California to deliver a speech, and that Douglas wanted Secretary
13 Espy to come to Napa for broader wine industry exposure.

14 On a date uncertain after October 5, 1993 and before October 29, 1993, the executive
15 telephoned Douglas and told Douglas that senior officials of the winery and other interested Napa
16 Valley vintners would be available to meet with Secretary Espy on October 29, 1993.

17 On a date uncertain after October 5, 1993 and before October 29, 1993, during another
18 telephone call, Douglas told the executive that Secretary Espy and his girlfriend, Patricia
19 Dempsey, as well as Douglas's girlfriend, Patricia Kearney, would be in the San Francisco Bay
20 Area for the weekend to celebrate a private event. During the telephone call, Douglas asked the
21 executive, in substance, whether he could pick up "some wine" from the winery for Espy's group.
22 The executive agreed, knowing that Secretary Espy would be one of the recipients of the wine
23 and that it was unlawful for the winery to give things of value to Executive Branch officials.

24 On or about October 29, 1993, Secretary Espy visited the winery in California.
25 Representatives of the winery met with Secretary Espy and discussed matters of concern to the
26 winery and the wine industry which were pending before Secretary Espy and regarding which the
27 company hoped Secretary Espy would act favorably.

1 Following the meeting at the winery, an official of the company gave a tour to Secretary
2 Espy and Douglas. Between the meeting and the tour of the vineyards, Douglas asked the winery
3 executive, in substance, "do you have the wine for the Secretary?" The executive told Douglas, in
4 substance, that the wine would not be a problem.

5 Following the tour of the vineyards, Secretary Espy attended a reception at another Napa
6 Valley winery owned by the wine company. During a conversation between Douglas, the
7 executive of the winery and another employee ("employee"), Douglas again brought up the wine.
8 As a result of this conversation, the employee went to obtain wine from the winery store. The
9 executive told the employee, in substance, that the wine was for Secretary Espy.

10 On or about October 29, 1993 at approximately 5:43 p.m., the employee drew six bottles
11 of premium wine from the company's retail gift shop. The employee wrote on the receipt that the
12 purpose of the wine was a "GIFT FOR FED. AG. SEC." The total retail value of the six bottles
13 of wine was \$187.

14 On or about October 29, 1993 at approximately 5:50 to 5:55 p.m., the employee returned
15 to the winery with the six bottles of wine that he had drawn for Secretary Espy. Upon seeing the
16 employee arrive at the winery with the wine, the executive and Douglas escorted the employee to
17 the parking lot. Douglas advised both employees of the winery that Espy could not receive the
18 wine directly but it would be "OK if it was put in Douglas' car" for Espy. The wine was then
19 placed, either by Douglas or at the direction of Douglas, into one of the two cars that were part of
20 Secretary Espy's traveling party for and for the benefit of Secretary Espy.

21 Thus, Douglas not only knew that the winery had offered Espy wine, but he was
22 instrumental in soliciting the wine and directing the manner by which the wine could be given to
23 the Secretary without revealing the illegal gift made by the corporation. It is unknown whether
24 Secretary Espy ever actually received the wine that the winery intended to give to him. What the
25 government has ascertained is that Mr. Douglas challenged this office to investigate a dinner
26 involving wine interests hosted for Secretary Espy and others, but did not reveal his own
27
28

1 involvement in soliciting wine either for the Secretary or for himself (in the name of the
2 Secretary).⁶ In order to investigate these events, the government spent in excess of \$20,000.

3 After determining these facts, on April 15, 1998, the government asked Douglas about his
4 knowledge of Espy receiving wine on this particular trip and whether Douglas himself was
5 involved in any way with the winery providing wine to Secretary Espy or to Douglas. Mr.
6 Douglas again denied any recollection of these events.

7
8 2. Mr. Douglas Denies His Guilt with Regard to Certain Aspects of His Plea and Provides
9 less than Credible Testimony with Regard to His Conversations with Secretary Espy

10 Although the government cannot prove that Douglas has provided false testimony with
11 respect to his involvement in obstructing the investigation of Secretary Espy, it believes his
12 testimony is not credible with respect to certain key areas. Despite his plea of guilty before this
13 Court on March 16, 1998, Mr. Douglas denies that he made a false statement to an FBI agent on
14 June 6, 1994 with respect to his providing Secretary Espy basketball tickets to attend the
15 Bulls/Suns playoff game in Chicago on June 18, 1993. Mr. Douglas asserts that he "misled" the
16 investigator by telling him a literal truth with regard to the source of the basketball tickets for the
17 1993 NBA playoff game he attended with Secretary Espy (although Mr. Douglas does admit that
18 he intended to deceive the interviewing agent.)⁷ While this technical denial of guilt is not
19 sufficient in the government's view to obviate the Plea Agreement and the entry of Mr. Douglas's
20 guilty plea, *see North Carolina v. Alford*, 400 U.S. 25 (1970), the Court should be aware of it.

21 Mr. Douglas claims that if the agent had asked the right question, that Mr. Douglas would
22 not have lied and would have answered truthfully. In the same interview, however, Mr. Douglas

23
24 ⁶ The dinner, to the extent that the winery paid for Secretary Espy's food and
25 entertainment, is the subject of current investigation and the government expects this event and
Espy's trip to the winery to come to public light in the very near future.

26 ⁷ Mr. Douglas's counsel in July of 1994 took notes of his own discussions with Mr.
27 Douglas. Those notes indicate that in July of 1994, Mr. Douglas told his counsel that he managed
28 to "evade" the FBI questioner by misleading him. While these notes demonstrate that Mr.
Douglas did not recently fabricate this defense, they are notes of what Mr. Douglas told his
counsel and so their reliability depends upon his truthfulness at that time.

1 apparently had no qualms about lying with regard to gifts he and Sun-Diamond furnished
2 Secretary Espy. It is unclear why Mr. Douglas is adamant that he would have told the truth if
3 asked the right question in one regard when he clearly lied during that same interview when
4 questioned about other areas. Mr. Douglas has admitted that he lied when he told the FBI that
5 the only time Sun-Diamond ever paid any expenses for Espy was for a trip to California to speak
6 at a convention, but Espy was a Congressman at the time, not Secretary of Agriculture.

7 Both Mr. Douglas and Secretary Espy lied to investigators in the month of June, 1994,
8 regarding the same two issues: the source of the Bulls/Suns tickets and whether Sun-Diamond or
9 Douglas provided any things of value to Secretary Espy.

10 During a June 1, 1994 interview, with respect to the Bull/Suns tickets for the June 18,
11 1993 game, Espy told the FBI that Douglas provided the tickets. On June 6, 1994, Douglas told
12 the FBI that he (Douglas) obtained those tickets through his good friend Greg Anthony.

13 With regard to gifts made by Douglas and Sun-Diamond to Secretary Espy, Espy told the
14 FBI on June 1, 1994 that he did not recall accepting any favors, benefits, or gifts at any time from
15 any organizations or companies other than Tyson Foods. On June 6, 1994, Douglas lied by
16 stating that the only time Sun-Diamond ever paid any expenses for Espy was on the trip to
17 California, when Espy was still a Congressman. In addition, Douglas told the interviewer that
18 Douglas had not given any gifts to Espy with the exception of \$500 for a birthday party. On June
19 16, 1994, in Washington, D.C., Douglas again concealed the things of value given to Espy by
20 telling the FBI that he did not recall of any gifts, contributions or favors to Espy given by Douglas
21 or Sun-Diamond. On June 22, 1994, Secretary Espy told the FBI that he never knowingly took
22 any gifts or benefits from any prohibited source, which would include Mr. Douglas and Sun-
23 Diamond

24 Mr. Douglas admits covering up for Secretary Espy with regard to the FBI inquiries
25 regarding the source of the Bulls/Suns tickets, and Mr. Douglas admits having told Mr. Espy that
26 he did so. With regard to the issue of giving Secretary Espy things of value, however, Douglas
27 currently asserts that he can not recall any discussions with Espy regarding the FBI's inquiry until
28

1 after Secretary Espy had left office — more than six months after the initial FBI interviews of the
2 two men.⁸ It is incredible that these two men, who spoke often at that time (once or twice a week
3 by Douglas's estimation) and were under investigation together for these events, did not discuss
4 the areas of the FBI's inquiry and the responses that they gave outside of the single issue of the
5 Bulls tickets. Particularly when they both lied about the fact that Douglas gave and Espy
6 accepted gifts, and Douglas lied by denying that he ever gave gifts to Espy.

7 3. Mr. Douglas Has Not Demonstrated Remorse or Contrition for His Actions

8 Mr. Douglas has made it clear to the government that he views himself as a victim. He
9 has shown no remorse for participating in numerous illegal acts. While this is not a consideration
10 with regard to the truthfulness of Mr. Douglas's testimony or the extent of his cooperation, it
11 does effect his claim that he should receive an adjustment for acceptance of responsibility under
12 U.S.S.G. §3E1.1. In addition to the reasons stated by the Probation Officer in the PSR, and in
13 addition to the fact that Mr. Douglas agreed to an offense level of 6 in the Plea Agreement (¶6),
14 the fact of Douglas's lack of contrition and remorse is sufficient cause to deny him a two-level
15 adjustment for acceptance. See *United States v. Rosales*, 917 F.2d 1220, 1222-23 (9th Cir. 1990)
16 (defendant properly denied acceptance of responsibility adjustment because he pled guilty to a
17 reduced charge and expressed no remorse for his illegal conduct).

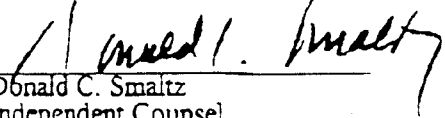
18 **CONCLUSION**

19 Mr. Douglas has cooperated to the extent that he has appeared and provided testimony
20 when immunized. He has provided certain information helpful to the resolution of these matters.
21 In other areas, however, he has either denied knowledge of his own involvement or provided
22 information that is less than credible. The government acknowledges that the agreement entered
23 into by the parties should not be set aside, however, in the view of the Independent Counsel, Mr.
24 Douglas has not been fully candid and truthful. In addition, Mr. Douglas appears to show few
25 signs of remorse for his actions and continues to consider himself to be a victim, rather than

26 _____
27 ⁸ Douglas informed the government that sometime after Espy left office, Douglas told
28 Espy that he had expensed the gifts to Sun-Diamond and that he would lie by stating that Espy
reimbursed the gifts if asked.

1 accepting responsibility for his own illegal, deceitful, and obstructionist activities. For these
2 reasons, the Independent Counsel hereby recommends that the Court sentence Mr. Douglas to a
3 term of imprisonment at the high end of the appropriate guideline range -- six months.

4
5 Respectfully submitted,

6 
7 Donald C. Smaltz
8 Independent Counsel

9 Dated: July 20, 1998
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28