

should he? A federal prosecutor may be legally able to subpoena a Secret Service agent, but should he? A federal prosecutor may be legally able to offer immunity to a target without telling her attorney, but should he? A federal prosecutor may be legally able to subpoena the media's nonpublic information, but should he? Justice Department policy says, in most cases, he should not. Such policies raise serious questions as to whether independent counsel Starr is meeting his legal obligation to comply with Justice Department policies.

Starr is not, by the way, the only independent counsel to raise these concerns. Independent counsel Smaltz, appointed to determine whether then-Agriculture Secretary Mike Espy violated criminal laws, is another example. One key issue in this area involves the role that courts play in enforcing independent counsel compliance with Justice Department policies, as mandated by statute. To date, several courts have held that criminal defendants lack standing to enforce such compliance and have declined to examine the substance of their claims. One judge handling a prosecution by independent counsel Smaltz went further, all but reading the requirement to comply with Justice Department policies out of the law.

The case involved Ronald Blackley, one time chief of staff to Secretary Espy. Independent counsel Smaltz charged Blackley, among other crimes, with making false statements on a financial disclosure form. Blackley moved for dismissal, in part by citing section 9-85A.304 of the U.S. Attorneys' Manual which he said prohibited:

prosecuting alleged violations of financial disclosure requirements under 18 U.S.C. 1001 "unless a nondisclosure conceals significant wrongdoing." . . . [T]here is no allegation of any underlying wrongdoing. . . . We have found no case where an individual filer has been criminally prosecuted in a situation similar to this one.

In a published decision, *United States v. Blackley*, 986 F. Supp. 607 (1997), the judge held the following:

It undeniable that Congress's addition of section 594(f) to the Independent Counsel statute in 1982 created somewhat of a paradox between that provision's purpose and the rationale underlying the overall Independent Counsel framework. On the one hand, through section 594(f)(1), Congress is ensuring that there are not two different standards of justice depending on the prosecutor; that "treatment of officials is equal to that given to ordinary citizens under similar circumstances." . . . To prevent against public officials being subject to potentially capricious prosecutorial conduct, an Independent Counsel needs to be tethered to some quantifiable standard, and the Department of Justice policy guidelines provide arguably the most complete, detailed and time-tested standards available. Furthermore . . . adherence to the executive branch's established prosecutorial guidelines helps to guard against constitutional separation-of-powers challenges to the Independent Counsel statute. . . . On the other hand, if an Independent Counsel is supposed to operate as nothing more than the identical twin of

the Department of Justice, with no permissible variance in prosecutorial discretion, then the need for the Independent Counsel structure becomes highly questionable. . . . For the Independent Counsel to play a meaningful role, he or she is necessarily expected to act in a manner different from, and sometimes at odds with, the Department of Justice. . . . Therefore, the Independent Counsel may prosecute this case, even if said prosecution is contrary to the general prosecutorial policies of DOJ. . . . Potential criminal ethical violations that may be too small to concern the Department of Justice are nonetheless properly within the purview of the Independent Counsel because the Independent Counsel is, in a sense, charged with the responsibility of ensuring that public officials have maintained the highest standards of ethical conduct.

The court then upheld the indictment of Blackley, ruling that it was irrelevant whether or not the charge in question complied with Justice Department policy.

Contrary to the court's ruling, however, Congress has never charged independent counsels with ethics enforcement. Independent counsels are federal prosecutors required to act in accordance with established Justice Department policies. The Blackley decision misreads both the law and the legislative history, not only by expanding the mission of independent counsels beyond criminal law into ethics enforcement, but also in essentially reading out of the statute the requirement that independent counsels comply with Justice Department policies.

The Blackley decision is now on appeal. It brings legal focus to the issue of independent counsel compliance with established Justice Department policies—its importance to the law and the question of how to enforce it.

The Supreme Court stated the following in a 1935 case about prosecutorial misconduct, *Berger v. United States*, 295 U.S. 78:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

This language applies with equal force to an independent counsel, and mandatory compliance with established Justice Department policies is a means to that end.

As the chief law enforcement officer of the United States, the Attorney General is responsible for ensuring that "no one is above the law." The law requires independent counsel compliance with established Justice Department policies. Where there is evidence that independent counsels are not complying with Justice Department policies, the Attorney General has a legal obligation to determine if that is so

and, if so, to take whatever action is appropriate to obtain independent counsel compliance. In light of court rulings that persons who are the victims of independent counsel non-compliance lack standing to contest the independent counsel's actions in this area, no one other than the Attorney General has the responsibility and the capability to enforce independent counsel compliance with the law.

If the Attorney General does not act, we need to understand why. If the reason is that the Attorney General feels she has insufficient statutory authority to obtain independent counsel compliance with Justice Department policies, we need to clarify the statute. If the reason is not the wording of the law, but politics that makes it impossible for the Attorney General to insist on compliance, we need to design new enforcement mechanisms which are more politically feasible. Stronger enforcement mechanisms could include, for example, amending the law to require an independent counsel to obtain from the Attorney General a certification of compliance with Justice Department policies before seeking court enforcement of a subpoena or filing an appeal of a question of law, or adding a provision giving affected persons legal standing in court to force independent counsel compliance with Justice Department policies.

The requirement for compliance with Justice Department policies is central to the law's constitutionality and fairness. The Attorney General and the Attorney General alone can enforce it. Since an independent counsel is not above the law, the Attorney General must enforce Section 594(f), which is the law of the land and essential to the independent counsel law's constitutionality and purpose.

ISRAELI MEMBERSHIP IN A UNITED NATIONS REGIONAL GROUP

Mr. MOYNIHAN. Mr. President, today a unanimous Senate will state in clear and simple terms that we will no longer abide by the discrimination faced by Israel at the United Nations. I speak of the fact that Israel is excluded from a United Nations regional group. Israel is the only one of the 185 member states of the United Nations barred from membership in a regional group. The United Nations member states have organized themselves by regional groups since before Israel joined the United Nations in 1949. Membership in a United Nations regional group confers eligibility to sit on the Security Council, the Economic and Social Council, as well as other United Nations councils, commissions, and committees.

For the first time, the Senate provides notice of its intention to work to end this Cold War anachronism. One sorry throwback to an era when the institutionalized isolation of Israel was a given in international affairs—the ugly

“gentlemen’s agreement” that excludes Israel and only Israel from membership in any United Nations Regional Group. Israel, and only Israel, can never sit on the United Nations Security Council. Israel, and only Israel, can never serve on the United Nations Economic and Social Council, where her expertise is so sorely missed. Israel, and only Israel, is less than a full member of the very international organization which bravely voted on November 29, 1947 to create it.

Today we call for Israel’s admission to a United Nations Regional Group. This must be a goal of our government’s foreign policy and a priority of reform efforts at the United Nations. That such legislation is necessary is a reminder that, despite the unparalleled success of the Zionist movement in its first hundred years, the state created half a century ago, as the fruit of this ideal, still requires support from its friends to overcome this institutional prejudice.

It is a fitting tribute to this vision that our country will take its rightful place in the forefront of the effort to allow Israel to participate fully in international affairs and to be counted as a legitimate member among the nations of the world. I am joined in this effort by 54 cosponsors. I thank my colleagues for their support and in particular the distinguished senior Senator from Indiana, Senator LUGAR, for his leadership.

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Williams, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting two treaties and sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

REPORT TO CONGRESS ON THE WHEREABOUTS OF THE U.S. CITIZENS WHO HAVE BEEN MISSING FROM CYPRUS SINCE 1974—MESSAGE FROM THE PRESIDENT—PM 133

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Foreign Relations.

To the Congress of the United States:

In accordance with Public Law 103-372, I hereby submit the enclosed “Report to Congress on the Investigation of the Whereabouts of the U.S. Citizens Who Have Been Missing from Cyprus Since 1974.” The report was prepared by retired Ambassador Robert S. Dil-

lon, with significant contribution by former State Department Associate Director of Security Edward L. Lee, II. Their intensive investigation centered on Cyprus, but it followed up leads in the United States, Turkey, Greece, Switzerland, and the United Kingdom.

The investigation led to the recovery of partial remains that were identified through DNA testing (done at the Armed Forces Institute of Pathology DNA Identification Laboratory) and other evidence as being those of one of the missing Americans, Andreas Kassapis. The report concludes that Mr. Kassapis was killed shortly after his capture in August 1974. The report also concludes that, although their remains could not be recovered, the other four missing U.S. citizens in all likelihood did not survive the events in Cyprus in July and August 1974.

WILLIAM J. CLINTON.

THE WHITE HOUSE, May 22, 1998.

MESSAGES FROM THE HOUSE

At 1:12 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 3616. An act to authorize appropriations for fiscal year 1999 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

The message also announced that the Houses has agreed to the following concurrent resolution, without amendment:

S. Con. Res. 98. Concurrent resolution providing for a conditional adjournment or recess of the Senate and the House of Representatives.

MEASURES PLACED ON THE CALENDAR

The following bill was read the first and second times, and placed on the calendar:

H.R. 3616. An act to authorize appropriations for fiscal year 1999 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-5025. A communication from the Secretary of Health and Human Services, transmitting, a draft of proposed legislation entitled, “The Health Insurance Purchasing Cooperative Act”; to the Committee on Labor and Human Resources.

EC-5026. A communication from the Acting Assistant Secretary for Employment and

Training, Department of Labor, transmitting, pursuant to law, the report of an administrative directive regarding prevailing wage policy for researchers received on May 20, 1998; to the Committee on Labor and Human Resources.

EC-5027. A communication from the Director of the Regulations Policy and Management Staff, Food and Drug Administration, Department of Health and Human Services, transmitting, pursuant to law, the report of a rule entitled “Food Labeling; Petitions for Nutrient Content and Health Claims, General Provisions” (Docket 98N-0274) received on May 20, 1998; to the Committee on Labor and Human Resources.

EC-5028. A communication from the Director of the Regulations Policy and Management Staff, Food and Drug Administration, Department of Health and Human Services, transmitting, pursuant to law, the report of a rule entitled “Revocation of Lather Brushes Regulation” (Docket 97P-0418) received on May 20, 1998; to the Committee on Labor and Human Resources.

EC-5029. A communication from the Acting Administrator of the General Services Administration, transmitting, pursuant to law, the report under the Freedom of Information Act for the period January 1, 1997 through September 30, 1997; to the Committee on the Judiciary.

EC-5030. A communication from the Acting General Counsel of the Department of Defense, transmitting, the draft of two items of proposed legislation that provide specific exemptions under the Freedom of Information Act in order to address management concerns of the Department of Defense; to the Committee on the Judiciary.

EC-5031. A communication from the Director of the National Legislative Commission of the American Legion, transmitting, pursuant to law, a report of statements describing the financial condition of the American Legion as of December 31, 1997; to the Committee on the Judiciary.

EC-5032. A communication from the Executive Director of the Committee for Purchase from People Who Are Blind or Severely Disabled, transmitting, pursuant to law, the report of additions to the Procurement List received on May 18, 1998; to the Committee on Governmental Affairs.

EC-5033. A communication from the Chairman of the Postal Rate Commission, transmitting, a report regarding the Postal Rate Commission’s recommended decision on the Omnibus Rate Case R97-1; to the Committee on Governmental Affairs.

EC-5034. A communication from the Assistant Secretary for Legislative Affairs, Department of State, transmitting, pursuant to law, the report of the certification of a proposed license for the export of major defense equipment to Chile (DTC-40-98); to the Committee on Foreign Relations.

EC-5035. A communication from the Assistant Secretary for Legislative Affairs, Department of State, transmitting, pursuant to law, notification that the danger pay allowance for Cambodia has been eliminated; to the Committee on Foreign Relations.

EC-5036. A communication from the Assistant Secretary for Legislative Affairs, Department of State, transmitting, pursuant to law, the report of the certification of a proposed license for the export of defense services to Saudi Arabia (DTC-31-98); to the Committee on Foreign Relations.

EC-5037. A communication from the Assistant Secretary for Legislative Affairs, Department of State, transmitting, pursuant to law, the report of the certification of a proposed license for the export of defense services to Kuwait (DTC-56-98); to the Committee on Foreign Relations.

EC-5038. A communication from the Assistant Secretary for Legislative Affairs, Department of State, transmitting, pursuant to