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Attorneys' Fees Reimbursement Under the Independent Counsel Law

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(name redacted)
Legislative Attorney
American Law Division

ABSTRACT

Although the Independent Counsel law expired on June 30, 1999, the provisions of the law remain in effect for those investigations which were still ongoing at the time of the law's expiration. Under the provisions of law which had governed the selection, duties, and responsibilities of an "independent counsel," an individual who was a "subject" of an independent counsel investigation, and who was not indicted, could seek from the Government the reimbursement of "reasonable" attorneys' fees incurred by the individual "during" that investigation which he or she would not have incurred "but for" the provisions of the independent counsel law.

Attorney Fees Reimbursement Under the Independent Counsel Law

Summary

Although the Independent Counsel law expired on June 30, 1999, the provisions of the law remain in effect for those investigations which were still ongoing at the time of the law's expiration. Under the provisions of the law which had governed the selection, duties, and responsibilities of an "independent counsel," an individual who was a "subject" of an independent counsel investigation, and who was not indicted, could seek from the Government the reimbursement of "reasonable" attorneys' fees incurred by the individual "during" that investigation which he or she would not have incurred "but for" the provisions of the independent counsel law. Under such provision it may be possible, for example, for President Clinton, if he remains unindicted, to seek reimbursement from the court for reasonable attorneys' fees, incurred because of and during the independent counsel's investigation, that he would not have incurred "but for" the provisions of the independent counsel law. It may be noted that both President Reagan and President Bush, who were found to be "subjects" of the independent counsel investigation in the so-called "Iran-Contra" matter, sought and received reimbursement from the Government for some of their private attorneys' fees in that matter.

Contents

Legislative History	2
Judicial Interpretations	6

Attorneys' Fees Reimbursement Under the Independent Counsel Law

While the provisions of the independent counsel law expired on June 30, 1999 (such that no independent counsels could be appointed for new matters by the special three-judge panel upon the request of the Attorney General), the provisions of the entire law continued to remain in effect for those “pending matters before an independent counsel.”¹ One of those provisions of the independent counsel law allows for the reimbursement from the Government of “reasonable” attorneys’ fees sought by an individual who was a “subject” of an independent counsel investigation if that individual is not indicted, and if such expenses “would not have been incurred but for the requirements of this chapter.”² While the independent counsel statute does not expressly state a precise time when the statute should be deemed to be no longer in force with respect to any particular investigation that was on-going when the statute had lapsed, it is assumed, particularly since the independent counsel has express statutory duties with respect to the evaluation of attorneys’ fees requests, that this portion of the law would be continued (that is, is one of those “pending matters before an independent counsel”) until all such matters (including the final report, and appeals of convictions and other judicial decisions arising from the investigation) have been finally resolved.

The text of the attorneys’ fees provision states as follows:

28 U.S.C. § 593.

(f) Attorneys' Fees. -

(1) Award of fees. - Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the independent counsel who conducted the investigation and Attorney General of any request for attorneys' fees under this subsection.

¹ 28 U.S.C. § 599 provides:

This chapter shall cease to be effective five years after the date of enactment of the Independent Counsel Reauthorization Act of 1994, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

² 28 U.S.C. § 593(f)(1).

(2) Evaluation of fees. - The division of the court shall direct such independent counsel and the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, addressing -

- (A) the sufficiency of the documentation;
- (B) the need or justification for the underlying item;
- (C) whether the underlying item would have been incurred but for the requirements of this chapter; and
- (D) the reasonableness of the amount of money requested.

Legislative History

The statutory provisions setting out the mechanisms for the appointment of an independent counsel (originally called a "special prosecutor") were enacted by Congress as part of the Ethics in Government Act of 1978.³ There were, in the original 1978 legislation, no provisions for the reimbursement of attorneys' fees incurred by subjects of independent counsel/special prosecutor investigations. In 1982, however, the permission to seek attorneys' fees was added in the reauthorization of the independent counsel provisions, to reduce what were considered additional and unfair financial burdens upon a public official subject to the independent counsel law.⁴ The amended provisions of the Ethics in Government Act, concerning reimbursement for attorneys' fees, applied when the official was *not* indicted and when such official had incurred attorneys' fees that would not normally have been incurred by private citizens (or by other public officials not subject to the independent counsel provisions) in investigations of allegations of a similar nature. An explanation of the new provision was provided in the Senate Report on the Ethics in Government Act Reauthorization of 1982:

An officer who is subjected to a special prosecutor investigation incurs expensive burdens both financially and professionally. When a special prosecutor is appointed, the subject of the investigation often bears staggering legal expenses and potentially devastating publicity, even if the special prosecutor ultimately decides to forego prosecution. For example, Hamilton Jordan incurred legal fees "exceeding six figures" despite the fact that the special prosecutor concluded that no indictment was warranted.

In order to reduce this burden, section 5 of the bill gives the court discretion to award attorneys' fees to the subject of a special prosecutor investigation if no indictment is brought and if the court determines that the fees would not have been incurred by a private citizen in an investigation of the same allegations. The court should award only that portion of the fees, if any, which it determines would not have been incurred in the absence of the special prosecutor law. The bill does not authorize reimbursement for expenses incurred during the preliminary investigation, as these expenses would most probably be incurred by ordinary citizens.⁵

During hearings held the previous year, in May of 1981, by the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental

³ P.L. 95-521, title VI, October 26, 1978.

⁴ Ethics in Government Act Amendments of 1982, P.L. 97-409, January 3, 1983.

⁵ S.Rept. 97-496, 97th Cong., 2d Sess., 18 (1982).

Affairs, the recommendation concerning the permission to seek reimbursement of attorneys' fees was made. The report of the Subcommittee explained, in a similar manner as the full Committee report, that the intent of the provision was to reimburse an official of the Government who had incurred attorneys' fees that, because of the application to the official of the independent counsel/special prosecutor law, a private citizen would not have incurred given the similar circumstances:

The Subcommittee recommends reimbursement of attorneys' fees to the subjects of a special prosecutor investigation. This recommendation received near-unanimous support at the hearing.

As the purpose of this amendment is to compensate for the extraordinary costs caused exclusively by this statute, the Subcommittee finds that reimbursement should not cover costs which would have been incurred in a similar investigation of a private citizen.

To accomplish this goal, the Subcommittee recommends that the subject of a special prosecutor investigation be authorized to apply to the court for attorneys fees. In making its determination, the court should consider to what extent the fees incurred were caused by the special provisions, i.e., whether such fees would have been incurred by a private citizen in a private investigation of the same allegations. The court should award only those fees, if any, which it determined would not have been incurred in the absence of the special prosecutor laws.⁶

In addition to adding the attorneys' fees provision in 1982, Congress amended the special prosecutor/independent counsel statute to address the concern that the law created "unfairness by applying a higher standard of criminal law" for those under the independent counsel provisions than for the general public, and that the "legitimate discretion and prosecutive authority" of the Attorney General and the Department of Justice were being undermined.⁷ The 1982 amendments thus adjusted the so-called "triggering" mechanism of the special prosecutor/independent counsel provisions to allow for more discretion on the part of the Attorney General to *not* ask for an independent counsel. In the first instance, the standard for further investigation, and thus the standard for seeking the appointment of an independent counsel, was changed from requiring the Attorney General to seek the appointment of an independent counsel in the face of allegations unless the allegations were "so unsubstantiated" that no further investigation was warranted,⁸ to requiring the Attorney General to find "reasonable grounds to believe" that further investigation is warranted.⁹ Secondly, in deciding whether to seek an independent counsel, the Attorney General was expressly instructed to follow written or other established policies of the Department of Justice as to the enforcement and potential prosecution

⁶ Subcommittee on Oversight of Government Management, Senate Governmental Affairs Committee, 97th Cong., 1st Sess., *Special Prosecutor Provisions of the Ethics in Government Act of 1978*, 27-28 (Committee Print 1981).

⁷ S.Rept. 97-496, *supra* at 3.

⁸ 28 U.S.C. § 592(b)(1), 197? Code edition.

⁹ 28 U.S.C. § 592(c)(1) (1982), *see* current standard at 28 U.S.C. §§ 592(c)(1)(A), 593(c)(2)(B) and (C) (1994). *Note* discussion in *In re Meese*, 907 F.2d 1192, 1196-1197 (D.C.Cir.1990).

of a particular offense.¹⁰ That is, one of the factors for the Attorney General to consider in determining whether the matter warrants further investigation is the consideration of Justice Department policy concerning enforcement of the particular statute and prosecution of the conduct in question. This consideration was added to the law in 1982 to deal expressly with the triggering of the "special prosecutor" provisions during the Carter administration for allegations about certain presidential aides and social cocaine use which, even if true, would not normally have been prosecuted by the United States Attorney's office exercising its prosecutorial discretion within the district in which the allegations arose.¹¹ The Senate report on the matter explained:

In determining whether "reasonable grounds" exist, the bill directs the Attorney General to comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws. The Attorney General must justify his decision that a special prosecutor should not be appointed upon a showing to the court that the Department of Justice does not, as a matter of established practice, prosecute the alleged violation of federal criminal law. Alternatively, he may state to the court that it is the practice of U.S. Attorneys for the district in which the violation was alleged to have occurred not to prosecute this violation.¹²

Since, in theory, an independent counsel under the amended statute would *not* be appointed to investigate or prosecute a matter regarding a *public official*, that would not also be treated in a similar manner with respect to a *private citizen*, the drafters of the provision regarding attorneys' fees believed that on only "rare occasions" should the subject of an independent counsel investigation be able to show, under the "but for" standard, that attorneys' fees should be reimbursed by the Government. The provision was placed in the law, however, as a "safeguard" in those rare instances when an independent counsel investigation did occur even when a similar investigation of a private citizen, in similar circumstances, would not have gone forward. As explained in the Senate report in 1982:

The changes S. 2059 makes in the standards which trigger a preliminary investigation and an appointment of a special prosecutor are designed to ensure that covered officials will not be subjected to a more rigorous application of the criminal law than is applied to other citizens. Thus, the Committee believes that reimbursement of attorneys' fees would be warranted, if at all, in only rare instances. This amendment is included, however, as a safeguard to compensate officials in the event that they do incur extraordinary expenses during a special prosecutor investigation which eventually absolves them of any wrongdoing. Reimbursement may be warranted, for example, in instances where the special prosecutor duplicates actions which have been taken by the Attorney General during the preliminary investigation. The Committee stresses, however, that the

¹⁰ 28 U.S.C. § 592(c).

¹¹ S.Rept. 97-496, *supra* at 3, 14-15.

¹² S.Rept. 97-496, *supra* at 15.

court should award attorneys' fees sparingly, and that reimbursement should not become a routine event.¹³

When the independent counsel provisions of law were again reauthorized in 1987, there were concerns expressed that the allowance for attorneys' fees was becoming too routine, and overly costly. The Senate had proposed capping the fees payable to private attorneys to an hourly rate comparable to what Government attorneys received.¹⁴ This provision, however, was not accepted in conference, and the attorneys' fees allowance continued in the independent counsel provisions with a clarification that such fees are limited to "reasonable" fees, and that the Justice Department is to be notified and provided an opportunity to evaluate for the court any attorneys' fees request.¹⁵ The conference report again emphasized that Congress had intended to allow the reimbursement of attorneys' fees only when officials were "subjected to harsher standards than ordinary citizens" and thus incurred legal expenses they would not have incurred "but for" the provisions of the independent counsel law.¹⁶

The independent counsel provisions, and the provision for reimbursement of attorneys' fees, were reauthorized for the last time in 1994.¹⁷ The attorneys' fees provisions were again modified slightly at this time by providing for required notification by the court to the independent counsel (as well as to the Attorney General) concerning a subject's request for reimbursement of attorneys' fees, and by adding a requirement for the independent counsel and the Attorney General to provide a written evaluation to the court of such a request.¹⁸ Furthermore, the specific criteria and factors for the independent counsel and the Attorney General to consider and address in the evaluation of the attorneys' fees request were set out in the law.¹⁹ Congress again, in the legislative history of the revised attorneys' fees provision, emphasized that the court had been too generous and routine in awarding attorneys' fees requests, and reiterated that the attorneys' fees provision should be construed "narrowly" since such an award "is warranted, if at all, in only rare instances" and "should not become a routine event."²⁰ Although not willing to put such a standard in the statutory language itself (since, it was stated in the Conference Report, it is not necessary), the Conference Report noted that attorneys' fees should not be awarded in instances of independent counsel investigations of matters where, "were it not for the existence of the independent counsel statute, the Department of Justice may well

¹³ *Id.* at 19.

¹⁴ S.Rept. 100-123, 100th Cong., 1st Sess., 21 (1987).

¹⁵ P.L. 100-191,

¹⁶ H.Rept. 100-452, 100th Cong., 1st Sess. 31 (1987).

¹⁷ The statute had "lapsed" due to its five-year sunset provision and the absence of congressional reauthorization by the end of 1992, and was not reauthorized again until June of 1994. P.L. 103-270, June 30, 1994.

¹⁸ P.L. 103-270, Section 3(n), 108 Stat. 736, amending 28 U.S.C. § 593(f)(1) and (2).

¹⁹ See now 28 U.S.C. §593(f)(2)(A) through (D).

²⁰ H.Rept. 103-511, 103^d Cong., 2^d Sess. 14 (1994).

have investigated these same matters.”²¹ In conference, Congress was also unwilling to place a specific “cap” on what would be considered “reasonable” attorneys’ fees in an independent counsel investigation to be reimbursed, but expressly criticized the court award of attorneys’ fees in the amount of \$370 an hour. The Conference Report explained that reasonableness should be construed not only in reference to what high-priced private attorneys could charge wealthy clients in private practice, but also with respect to what attorneys are paid or reimbursed from tax dollars in other statutory contexts:

... Congress did not intend that properly recoverable attorney fees under this statute be construed to be what the market will bear in the private sector. Rather, Congress intends that the reasonableness of attorney fee requests under the independent counsel law be judged, not solely with reference to the rates commanded by expensive legal counsel, but also with reference to what cost is reasonable for the taxpayers to bear.

Three statutes provide the special court with the guidance it seeks in evaluating the reasonableness of attorney fees requested by defense counsel under the independent counsel statute. First, by law, the independent counsel is compensated at the per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule which is currently ... approximately \$55 per hour. Second, the Equal Access to Justice Act, Public Law 96-481, which allows Federal courts to award attorney fees to private parties in suits against the United States, limits the amount of attorney fee recovery to “\$75 per hour unless ... a special factor ... justifies a higher fee.” 28 U.S.C. 2412(d)(2)(A). Third, fees to private defense counsel who are paid by the United States pursuant to the criminal Justice Act of 1984, Public Law 88-455, to represent indigent defendants in Federal criminal cases, are currently limited to “\$60 per hour for time expended in court or before a United States magistrate and \$40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of \$75 per hour is justified” 18 U.S.C. 3006A(d)(1).

These three statutes identify hourly rates, ranging from \$40 to \$75 per hour, which Congress has determined are reasonable and may be fully reimbursed with taxpayer dollars. Although by design the independent counsel law does not impose a specific ceiling on the hourly rates payable to defense counsel, hourly rates of \$300 and \$400 generally so far exceed other statutorily approved rates that they should not be fully recoverable under the independent counsel law. While individuals remain free, of course, to employ any defense counsel they choose, they should be on notice that the independent counsel law may not authorize payment of taxpayer dollars to reimburse fully all of the fees they incur.²²

Judicial Interpretations

There has been a substantial amount of litigation and judicial interpretation of the provision for reimbursement of attorneys’ fees under the independent counsel law. The general requirements and elements of the provision were explained by the court to require that an unindicted individual in an independent counsel investigation show that:

²¹ H.Rept. 103-511, *supra* at 14.

²² H.Rept. 103-511, *supra* at 14-15.

(1) he is a subject of such investigation; (2) the fees were incurred “during” the investigation; (3) the fees would not have been incurred “but for” the requirements of the Act; and (4) the fees are reasonable.²³

Subjects of Investigation. Witnesses in an independent counsel investigation are generally distinguished from “subjects” of that investigation,²⁴ but witnesses may at some point also become “subjects.” The courts have found, based on the factual premises of a particular investigation, that when an individual’s conduct comes within the scope of an investigation such that the individual could “reasonably believe,”²⁵ “reasonably expect[],”²⁶ or where there is a “realistic possibility,”²⁷ that he or she would become a criminal defendant or that an independent counsel might “reasonably be expected to point the finger of accusation at him,”²⁸ then such person may be considered a “subject” of the independent counsel investigation at the time of incurring the relevant attorneys’ fees. While the court may rely, and has relied in many cases on the formal notification from the prosecutor that one is a “target” or subject of the investigation, an absence of such notification is not necessarily dispositive of the issue.²⁹

Fees Incurred During Investigation. Reimbursable fees must have been incurred “during” an independent counsel’s investigation, and thus could not be received for legal services rendered prior to the time the independent counsel was appointed,³⁰ nor for those services subsequent to the time that the independent counsel had filed his final report and the response to that final report had been submitted on behalf of the subject of the investigation.³¹ While a subject of an investigation could recover attorneys’ fees up to the time the independent counsel notified her that charges would not be sought against her (thus indicating that she was no longer a “subject” of the investigation), and then for the time during the period in which comments could be filed by individuals in response to the independent counsel’s final report, it was found that the subject could not recover attorneys’ fees for

²³ *In re Mullins (Tamposi Fee Application)*, 84 F.3d 1439, 1441 (D.C.Cir.1996); *In re Pierce (Olivas Fee Application)*, 102 F.3d 1264, 1265 (D.C.Cir.1996); *In re North (Cave Fee Application)*, 57 F.3d 1117, 1119 (D.C.Cir.1995).

²⁴ *In re Olson*, 884 F.2d 1415, 1427 (D.C. Cir.1989); *In re North (Bush Fee Application)*, 59 F.3d 184, 187 (D.C. Cir.1995)

²⁵ *In re North (Regan Fee Application)*, 72 F.3d 891, 894 (D.C.Cir.1995).

²⁶ *In re North (Teicher Fee Application)*, 48 F.3d 1267, 1268-1269 (D.C.Cir.1995).

²⁷ *In re North (Dutton Fee Application)*, 11 F.3d 1075, 1079 (D.C.Cir.1993); *Bush, supra*, 59 F.3d at 187-188.

²⁸ *Dutton, supra*, 11 F.3d at 1078; *In re North (Shultz Fee Application)*, 8 F.3d 847, 850 (D.C.Cir.1993); *Bush, supra*, 59 F.3d at 188; *In re North (Haskell Fee Application)*, 74 F.3d 277, 280 (D.C.Cir.1996).

²⁹ *Regan, supra*, 72 F.3d at 894.

³⁰ *Dutton, supra*, 11 F.3d at 1079; *In re Nofziger*, 938 F.2d 1397, 1403 (D.C.Cir.1991).

³¹ *In re North (Reagan Fee Application)*, 94 F.3d 685, 689 (D.C.Cir.1996).

activities during the period between the notice that charges would not be sought and the beginning of the comment period.³²

“But For” Requirement. The most difficult showing in an attorneys’ fees request may be the requirement that the subject of the investigation requesting reimbursement demonstrate that he or she would not have incurred those attorneys’ fees “but for” the provisions of the independent counsel law. The court has noted that the adoption of the reimbursement provision by Congress -

was motivated by a congressional “intent `to correct an unequal *application* of the “criminal law,” when high public officials were investigated under the Act in circumstances where private citizens would not be investigated.”³³

The “but for” requirement may thus necessitate a showing, for example, that the standards employed by the Attorney General in requesting an independent counsel, and/or the decisions and the actions of an independent counsel, resulted in the application of different criteria and standards of procedure, proof or prosecutorial discretion than those normally applied by federal prosecutors in the Department of Justice concerning persons not covered by the independent counsel law, such as private citizens or lower level Government officials investigated for the same offense.

The court has found, concerning the Attorney General’s request for or referral to an independent counsel, for example, that the “but for” provision was satisfied in Independent Counsel McKay’s investigation of former Attorney General Edwin Meese, since the standard in referring the matter to the already existing independent counsel by the Attorney General did not meet the “reasonable grounds” standard of the statute, or the “probable cause” standard for furthering a criminal investigation normally followed in the Department of Justice with respect to criminal investigations of private citizens, which policy was intended by Congress to be observed and followed by the Attorney General in deciding whether or not to apply for an independent counsel to further a criminal investigation.³⁴ The court found that even good public policy reasons, such as “public confidence in the administration of justice,” or an appearance standard, because of Mr. Meese’s past associations, did not

³² *In re Mullins (Tutwiler Fee Application)*, 87 F.3d 1372, 1376 (D.C.Cir.1996).

³³ *Bush, supra*, 59 F.3d at 188, quoting *Dutton, supra*, 11 F.3d at 1080, and *In re Nofziger*, 925 F.2d 428, 442 (D.C.Cir.1991).

³⁴ *See* 28 U.S.C. § 592(c)(1), requiring Attorney General to follow Department of Justice guidelines and policy. The court noted: “Joining the `reasonable grounds’ standard of the 1982 Act, with the Departmental policy of `probable cause’ as the standard that must be satisfied before considering whether to `request or conduct [a] further [criminal] investigation,’ according to the latest interpretation of probable cause by the Supreme Court, requires a determination that `reasonable grounds’ exist to believe that there is a `fair probability ... or substantial chance of *criminal activity*....’ [citations omitted] The `reasonable grounds’ ... cannot be based on mere association, casual rumor, speculation or mere suspicion.” *In re Meese, supra*, 907 F.2d at 1197.

rise to the level of ‘reasonable grounds’ to investigate, as there lacked any specificity of any information of criminal conduct on the part of Mr. Meese.³⁵

In *In re Nofziger*,³⁶ where the court denied the request for reimbursement of attorneys’ fees, the court described the types of cases in which the reimbursement had been granted up until that time:

First, the court has awarded fees in cases in which the subject is prejudiced by the Department of Justice’s failure to comply with the substantial protective features of the Act. *See, e.g., In re Meese*, 907 F.2d 1192 (D.C.Cir. 1990)....

Second, fees have been awarded because independent counsel’s investigation constituted a substantial duplication of prior investigations. *See, e.g., In re Olson* 884 F.2d 1415 (D.C.Cir. 1989)(independent counsel’s investigation massively duplicated House Judiciary Committee and Department of Justice investigations)....

Third, the court has awarded fees in two cases in which if the requirements of Act, restricting the Attorney General’s preliminary investigation, did not exist, 28 U.S.C. § 592(a)(2), the case could have been disposed of at an early stage of the investigation, without seeking appointment of independent counsel. *See, e.g., In re Donovan*, 877 F.2d 982 (D.C.Cir.) (Attorney General’s inability to subpoena the key witness to determine his credibility, upon which the entire allegation rested, resulted in appointment of independent counsel and subsequent fruitless investigation)....³⁷

Cases subsequent to *Nofziger*, particularly the fee requests arising from various subjects of the Iran-Contra investigation, demonstrated that subjects of independent counsel investigations may also satisfy the “but for” requirement by showing that the independent counsel was pursuing a theory of criminal law violation in their cases that would not normally be pursued by the Department of Justice or the United States Attorneys. In several of the *In re North* fee application cases the court noted that the “but for” requirement was met because the independent counsel was pursuing a prosecutorial theory of “conspiracy to circumvent the Boland Amendments, which

³⁵ *In re Meese*, *supra*, 907 F.2d at 1199-1200.

³⁶ 925 F.2d 428 (D.C. Cir.1991).

³⁷ *In re Nofziger*, *supra*, 925 F.2d at 438-439. The third type of “but for” case was found in *In re Segal*, 151 F.3d 1085, 1089 (D.C.Cir.1998), where the Attorney General expressly noted that although “the Department of Justice would in all likelihood exercise its discretion to decline to prosecute this case as a criminal matter ... I am nonetheless compelled by the terms of the Independent Counsel Act to apply for the appointment of an Independent Counsel.” All three reasons for reimbursement under the “but for” standard outlined in *Nofziger* were found in the case of the Clinton passport search regarding Janet Mullins, in *In re Mullins (Mullins Fee Application)*, 84 F.3d 459, 465 (D.C.Cir.1996), where the imminent expiration of the independent counsel law led to a truncated preliminary investigation by the Attorney General, and a duplication of an investigation by the State Department.

executive branch officials would not have considered a violation of criminal law.”³⁸ In applying the “but for” test in this way in some of the fee application cases concerning the Iran-Contra investigation, however, the court, it has been argued, seemed to diverge from past formulations of determining whether a federal prosecutor would have pursued a similar matter with respect to private citizens³⁹ (or to others not covered by the independent counsel law), and instead specifically looked to determine if “a politically appointed Attorney General as the representative of the Executive would ... [have] subjected such attempts to criminal prosecution.”⁴⁰ This seems to be a different formulation of the “but for” requirement, it may be argued, because it appears to take into consideration certain “political realities” of Justice Department prosecutions of high level executive branch officials directed by the Attorney General, such as the political factors of loyalty to the President and the Administration by a “politically appointed Attorney General,” rather than merely considering the concept of the even-handed application of the criminal laws.

Reasonableness of Fees. The court will direct reimbursement only of “reasonable” attorneys’ fees, which has meant reasonable both in the *rates* charged by attorneys and others, such as paralegals, and in the *time* that one’s attorneys had expended on the various legal matters within the case.⁴¹ All requests from a subject seeking reimbursement must be adequately documented and detailed, and the burden of proof to establish all of the elements of reasonableness is on the subject seeking reimbursement.⁴² The rates that have been deemed reasonable in the past have taken into consideration whether they “comport with the prevailing community standards” for attorneys of similar experience and skill dealing with a legal matter of comparable complexity and importance, and the amount that the lawyers charge other clients in comparable matters.⁴³ As noted above in the legislative history of the attorneys’ fees provision, however, Congress in the last reauthorization of the independent counsel law expressly criticized the award by the court of attorneys’ fees of \$300 - \$400 an hour, and stated in the Conference Report that the court should compare the “reasonableness” of the rates not only to the highest price private counsels in the community, but also compare the rates to what the Government has agreed to

³⁸ *Teicher, supra*, 48 F.3d at 1270; *Dutton, supra*, 11 F.3d at 1080; *In re North (Gadd Fee Application)*, 12 F.3d 252,256 (D.C.Cir.1994); *Regan, supra*, 72 F.3d at 895-896; *Shultz, supra*, 8 F.3d at 851; *Bush, supra*, 59 F.3rd at 188.

³⁹ “The purpose of limiting fee awards to fees that would not have been incurred “but for” the Act is to ensure that “officials ... who are investigated by independent counsels will be subject only to paying those attorneys’ fees that would normally be paid by private citizens being investigated for the same offense by” federal executive officials such as the United States Attorney.” *In re Segal, supra*, 151 F.3d at 1088, quoting *In re Sealed Case*, 890 F.2d 451, 452 (D.C.Cir.1989).

⁴⁰ *Dutton, supra*, 11 F. 3d at 1080; *Regan, supra*, 94 F.3rd at 689-690; *Regan, supra*, 72 F.3d at 895-896.

⁴¹ *In re North (Gardner Fee Application)*, 30 F.3d 143, 146 (D.C.Cir.1994); *Tutwiler, supra*, 87 F.3d at 1377.

⁴² *Schultz, supra*, 8 F.3d at 850; *Tutwiler, supra*, 87 F.3d at 1377.

⁴³ *Tutwiler, supra*, 87 F.3d at 1377; *Bush, supra*, 59 F.3d at 189; *Shultz, supra*, 8 F.3d at 851-852 (approving fees of up to \$370 an hour).

reimburse out of taxpayer dollars for other private parties in other statutes allowing for reimbursement of attorneys' fees.⁴⁴ Despite this language in the legislative history, the court in assessing the "reasonableness" of rates charged by attorneys in independent counsel investigations, found that the *language* of the law had not been changed by Congress in the 1994 reauthorization, thus ignoring the suggestions in the legislative history, and applying the same formulas and guidelines based on the skill, experience, and reputation of the private counsels employed by the subject, and the comparable fees charged in the community and by those counsels to other clients.⁴⁵

In addition to weighing the reasonableness of the rates charged and the time spent on matters, the court will look to the reasonableness of a particular activity and its connection or necessity to the subject's legal defense against criminal charges. The court has noted that reimbursement will only be made for attorneys' fees "rendered in asserting the merits of the subject's defense against the criminal charges being investigated."⁴⁶ Certain expenses have thus been found not to be reimbursable as not reasonably related to one's legal defense, such as media expenses of the attorneys representing the President.⁴⁷ The issue of necessity also arose in the questions concerning reimbursement for travel by attorneys, where the court has found that the travel expenses of out-of-town attorneys would not be approved unless the subject could show that comparable competent counsel could not have been retained locally;⁴⁸ while other expenses have been disapproved because they were for a "duplication of effort,"⁴⁹ for legal maneuvers which the court did not deem reasonable,⁵⁰ or where billing times or other expenses claimed were not adequately detailed and documented.⁵¹

⁴⁴ H.Rept. 103-511, *supra* at 14-15.

⁴⁵ *In re North (Armitage Fee Application)*, 50 F.3d 42, 44-45 (D.C.Cir.1995).

⁴⁶ *Bush, supra*, 59 F.3d at 194; *In re Meese, supra*, 907 F.2d at 1203.

⁴⁷ *Reagan, supra*, 94 F.3d at 690-691; *In re Donovan* 877 F.2d 982, 994 (D.C.Cir.1989).

⁴⁸ *In re Segal (Segal Fee Application)*, 145 F.3d 1348, 1353 (D.C.Cir.1998); *Bush, supra*, 59 F.3d at 194.

⁴⁹ *Reagan, supra*, 94 F.3d at 691; *Bush, supra*, 59 F.3d at 190.

⁵⁰ *Tutwiler, supra*, 87 F.3d at 1377. (Challenge to subpoena for telephone records).

⁵¹ *Gardner, supra*, 30 F.3d at 147-148; *Bush, supra*, 59 F.3d at 189-190.

Attorneys' Fees Reimbursed for Presidents Reagan and Bush. The attorneys' fees and expenses approved by the court for the defense of former President Reagan totaled \$562,111.08, of which \$546,267 (out of \$754,449.50 sought) was for attorneys' fees, and the rest was for expenses.⁵² The court awarded in the case of former President Bush, a total award of \$272,352.51, of which \$260,518.61 (out of \$439,201.50 billed) was for professional services.⁵³

⁵² *Reagan, supra*, 94 F.3d at 692.

⁵³ *Bush, supra*, 59 F.3d at 195-196.

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