The original documents are located in Box 42, folder "Personnel - White House Higby, Larry" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

October 2, 1974

MEMORANDUM FOR THE FILE:

Subject: Halperin v. Kissinger, et al.

Heard from Skip that he had received call from plaintiff's attorney to raise deposition of Larry Higby (now OMB) within two weeks. The same procedure was followed for Tod Hullin (Domestic Council) and Muriel Hartley (Haig's secretary). Suggested Skip talk to Higby about accepting service of subpoena on his behalf, then to notify Ed Christenberry (DOJ) handling case for defendants and recommended place for deposition (DOJ).

P.W.B.

Philip W. Buchen
Counsel to the President

October 2, 1974

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Philip W. Buchen
Counsel to the President

October 11, 1974

MEMORANDUM FOR THE FILE:

FROM: Phil Buchen

Talked to Larry Silberman who said that he did not believe a memorandum would be ready for our consideration covering general policy on representation of government employees or former employees in suits brought by them. That it would not be ready in time to talk to Larry Higby.

He suggested I advise Larry Higby that because of a possible conflict of interest, the Justice Department is declining to represent him in the case of Halperin v. Kissinger. I so advised Higby and suggested that if he wanted any further information, he should have his attorney call Larry Silberman. Higby said he had been advised when talking to Justice originally that this was a possibility but now he questions what the status is of the information he provided to Justice. Then I suggested he express his concern to his own attorney.

Re: Halperin v. Kissinger et

THE WHITE HOUSE

WASHINGTON

10/3/74

Talked to Carla Hills &
to Larry Higbee (twice each)

CH is going to provide
me with policy memo
& I will review it
with Higbee in light
of his situation

§ 518. Conduct and argument of cases

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

Added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.

Historical and Revision Notes

Reviser's Notes

Derivation: United States Code 5 U.S.C. 309 — Revised Statutes and Statutes at Large R.S. § 359.

Explanatory Notes.

The words "and writs of error" are omitted on authority of the Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54. The word "considers" is substituted for "deems".

Library References

Attorney General ⇐7. C.J.S. Attorney General §§ 8, 9.

Notes of Decisions

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1. Generally

For cases cited without specific application. Confiscation Cases, La.1868, 74 U.S. 454, 7 Wall. 454, 457, 19 L.Ed. 196. See also, U. S. v. Smith, Ct.Cl.1895, 15 S. Ct. 846, 849, 158 U.S. 346, 39 L.Ed. 1011; Barrett Co. v. Ewing, C.C.A.N.Y.1917, 242 F. 506, certiorari denied 37 S.Ct. 746, 244 U.S. 661, 61 L.Ed. 1376; U. S. v. Virginia-Carolina Chemical Co., C.C.Tenn.1908, 163 F. 66; 1920, 32 Op.Atty.Gen. 276; Smith v. U. S., 1891, 26 Ct.Cl. 568.

A special assistant to the Attorney General is not an officer of the Department of Justice within former sections 309 and 316 of Title 5 [now this section and section 517 of this title], providing for the organization of the department and the duties of the Attorney General. U. S. v. Rosenthal, C.C.N.Y.1903, 121 F. 862.

2. Power of Attorney General—Generally

The fact that Congress twice failed to grant Attorney General specific authority to file suit against the State of California would not justify restricting Attorney General's statutory authority to institute action against the State for a declaration of the rights of the United States as against California in three-mile marginal belt off the California coast. U. S. v. State of Cal., Cal.1947, 67 S.Ct. 1658, 332 U.S. 19, 91 L.Ed. 1889, opinion supplemented 68 S.Ct. 20, 332 U.S. 804, 92 L.Ed. 382, rehearing denied 68 S.Ct. 37, 332 U.S. 787, 92 L.Ed. 370, petition denied 68 S.Ct. 1517, 334 U.S. 855, 92 L.Ed. 1776.

provision is made for assistance from the officers of the Department of Justice, under the direction of the Attorney General. 1893, 20 Op.Atty.Gen. 609.

3. Reservation of authority

Where an agent or agency of the federal government is not given authority to prosecute suits independently, they must be brought by the Attorney General or by his authority. Walling v. Crane, D.C.Ga.1945, 64 F.Supp. 88, reversed 158 F.2d 80, reversed 174 F.2d 646.

On issue of his immunity from disclosure of intra-governmental opinions and deliberations, the Attorney General carries the burden of litigation to which the United States or any of its agencies is a party, which responsibility is discharged through the Department of Justice whose legal business embraces the requirements and activities of various governmental agencies, and to function adequately, the Department must depend heavily upon candid exchanges of ideas, not only among its own staff, but also, particularly because of the institutional nature of its decisions, with other agencies whose interests are involved. Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, D.C.D.C.1966, 40 F.R.D. 318.

§ 517. Interests of United States in pending suits

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

Added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.

Historical and Revision Notes

Reviser's Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 316	R.S. § 367.

Cross References

Area redevelopment program activities, section as applicable, see section 2511(11) of Title 42, The Public Health and Welfare.

Library References

Attorney General ⇐7. C.J.S. Attorney General §§ 8, 9.

Notes of Decisions

1. Law governing

The authority granted the Attorney General under this section to protect the interests of the United States in pending suits must be exercised in conformity with the law and rules of procedure applicable to and governing the particular courts in which such suits are pending. Stephens v. First Nat. Bank of Nev., 1947, 182 P.2d 146, 64 Nev. 292.

2. Generally

For cases cited without specific application. Smith v. U. S., 1891, 26 Ct.Cl. 568, affirmed 15 S.Ct. 846, 158 U.S. 346, 39 L.Ed. 1011; Barrett Co. v. Ewing, C.C.A.N.Y.1917, 242 F. 506, certiorari denied 37 S.Ct. 746, 244 U.S. 661, 61 L.Ed. 1376; 1920, 32 Op.Atty.Gen. 276.

3. Right to appear in state proceedings

United States may appear through the Department of Justice in state court to

re: Larry Hughes request

extension of time to move, answer, or otherwise plead. The U.S. Attorney should under no circumstances allow the time for filing of the answer to expire without an answer having been filed or an extension of time obtained from the court.

Representation of Government Officers and Employees

It is the general policy of the Department to afford counsel and representation to Government officers and employees when suits for injunction, mandamus, etc., are brought against them in connection with their performance of their official duties. In situations where time does not permit communication through Department heads in Washington, U.S. Attorneys may, upon the request of a local officer of a Federal agency, afford counsel and representation to Government officers and employees in such cases. In the case of all such requests, the Civil Division should be promptly notified and advised by the U.S. Attorney of the circumstances of the case. It is the policy of the Civil Division to remove to the Federal district courts, pursuant to 28 U.S.C. 1442(a), cases of this type which are instituted in State or municipal courts. See *Sarner V. Mason,* 228 F. 2d 176 (C.A. 3), cert. denied, 351 U.S. 924. Note that a removal must be effected within 30 days (28 U.S.C. 1446 (b)). When time permits, the U.S. Attorney should obtain the approval of the Civil Division before effecting a removal; but if time does not permit, the U.S. Attorney may effect the removal and promptly send the Civil Division two copies of the removal papers filed.

It is also the Department's policy to afford counsel and representation to Government employees and servicemen who are sued civilly or charged with violation of local or State criminal laws as a result of the performance of their official duties. See *Johnson* v. *Maryland,* 254 U.S. 51; *Colorado* v. *Symes,* 286 U.S. 510; *City of Norfolk* v. *McFarland,* 143 F. Supp. 587, 145 F. Supp. 258 (E.D. Va.). This shall apply wherever property damage, personal injury or death has resulted, or where a substantial Federal interest is involved. (Policy with respect to representing Government drivers who are sued civilly and are entitled to representation pursuant to 28 U.S.C. 2679, as amended by P.L. 87–258, 75 Stat. 539, will be discussed under the Tort Section *infra*). Otherwise, except where unusual circumstances exist, the U.S. Attorneys shall decline (such as in minor traffic violations) to make court appearances on behalf of employees or servicemen, unless specific-

ally requested to do so by the Civil Division. Representation should also be declined when the employee or serviceman is adequately protected by his own liability insurance, in which case the U.S. Attorney should assist in getting the insurer to afford proper representation. Whenever pursuant to this policy representation is afforded, U.S. Attorneys are authorized, on the same basis as in other cases, to incur litigation expenses which are necessary to protect the Government's interests.

The potential liability of the United States makes it important to ascertain as early as possible the basic facts, extent of injury or damage, and the names of witnesses in every case, civil or criminal, based upon the alleged dereliction of Government employees or servicemen. For the same reason, pleas of guilty should be entered in criminal cases only after careful consideration of all factors involved. It is generally advisable to remove such cases from State courts to U.S. District Courts (see 28 U.S.C. 1442–1449).

General Jurisdictional Principles

As to immunity of Government officers from personal liability for acts done under color of office, see *Barr* v. *Matteo*, 360 U.S. 564; *Howard* v. *Lyons*, 360 U.S. 593; *Spalding* v. *Vilas*, 161 U.S. 483; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), cert. denied, 339 U.S. 949. Suits to enjoin enforcement of an allegedly unconstitutional act of Congress may be heard only by a 3-judge District Court. 28 U.S.C. 2282; *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171; *International Ladies' Garment Worker's Union* v. *Donnelly Garment Co.*, 304 U.S. 243; *California Water Service Co.* v. *City of Redding*, 304 U.S. 252.

The former rule that courts outside the District of Columbia had no jurisdiction over officers of the Government stationed in Washington (*Blackmar* v. *Guerre*, 342 U.S. 512) was changed by the addition of subsection (e) to 28 U.S.C. 1391 (P.L. 87–748) to provide that suits exclusively against Federal defendants may be brought in districts where a defendant resides, the cause of action arose, real property involved is situated or where plaintiff resides if no real property is involved. In such cases it is essential to advise the Department promptly and to keep the Department fully informed of developments, particularly motions for an injunction or mandamus.

In a suit brought against a subordinate officer, the head of the department or other superior officer is an indispensable party

Higby

~~Friday 10/4/74~~
Thursday 10/3/74

1:15 Skip told Mr. Buchen that Higby had been approached to see if he would be amenable to having his deposition taken in a case which is already in a pending case.

Higby is also being sued in another unrelated case involving the enemies list. He has asked the Justice Dept. to defend him and this request was denied by Carla Hills, Assistant Attorney General for the Civil Service Divison. Therefore, Mr. Higby wants to see Mr. Buchen to obtain a reversal of Mrs. Hills' decision.

Higby

Thursday 10/3/74

10:10 Larry Higby would like an appointment to see you today.

THE WHITE HOUSE

WASHINGTON

October 24, 1974

MEMORANDUM TO: PHILIP BUCHEN

FROM: LAWRENCE HIGBY

Attached you will see a copy of the type of waiver that the Justice Department is forcing all people it chooses to represent to sign in order for representation to be placed. As you can see, it is, in essence, a complete waiver of any of the rights pertaining to lawyer/client privilege.

Of course, the extremely interesting point here is the fact that people such as Al Haig or Henry Kissinger have not been requested, nor will they be requested, to sign such a waiver. The double standard that operates in this entire field is a little discouraging and, of course, is just one more example of the political basis on which the Justice Department is making its decisions as to who it will and will not represent.

Anyway, your help in the other matter was appreciated, although I think that a satisfactory answer has never really been obtained from Justice.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Robert L. Keuch, Chief
Special Litigation Section
Criminal Division
Department of Justice
Washington, D. C. 20530

Re: Morton H. Halperin, et al. v. Henry Kissinger, et al., Civil Action No. 1187-73 (D.D.C.)

Dear Mr. Keuch:

This is in reply to your letter to me of October 9, 1974, advising me that the Department of Justice would represent me at my deposition in the above-captioned case if a clear understanding could be reached as to your responsibility both to me and to the United States. Such an understanding is acceptable to me, and I therefore request that the Department of Justice represent me at my deposition in this case subject to the following conditions:

1. I undertake to provide any information regarding this litigation requested by your office and will do so freely and without condition.

2. I understand that in the event that the Department of Justice attorneys assigned to represent me determine that any information supplied by me in the course of such representation should be made available for use in or consideration of any Federal criminal or civil proceedings in which I might become a party, they may do so; and I freely and without reservation consent to such disclosure and use and hereby waive any rights that I may have to object to such disclosure or use or to otherwise challenge any such action by the Department of Justice.

3. I understand that the foregoing waiver may result in the use of such material against me in Federal civil or criminal proceedings to my detriment.

4. I understand that if the Department of Justice concludes that any representation provided me would, if continued, constitute a conflict of interest, then the Department will withdraw such representation.

5. I further understand that if, in the opinion of Department of Justice attorneys, a conflict should arise between the respective interests of the defendants that the Department of Justice is representing, then the Department may withdraw its representation of such defendants.

The foregoing conditions have been fully explained to me, and I consent thereto freely and without reservation.

Dated: October , 1974

THE WHITE HOUSE

WASHINGTON

October 24, 1974

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Attached you will see a copy of the type of waiver that the Justice Department is forcing all people it chooses to represent to sign in order for representation to take placed. As you can see, it is, in essence, a complete waiver of any of the rights pertaining to lawyer/client privilege.

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The foregoing conditions have been fully explained to me, and I consent thereto freely and without reservation.

Dated: October , 1974

THE WHITE HOUSE

WASHINGTON

October 31, 1974

Dear Mr. Keuch:

Attached please find a signed copy of the waiver you forwarded to me requesting the Justice Department to represent me in Morton H. Halperin, et al. v. Henry Kissinger, et al., Civil Action No. 1187-73 (D. D. C.). I apppreciate the Department's willingness to represent me in this matter. Due to obvious financial burdens imposed upon any individual where criminal litigation is involved, frankly I have no other option but to seek the Department's representation.

As I indicated to Mr. Christenbury of your office, I am still very perplexed about the standards employed by the Department in representing federal employees. With particular regard to this matter, I fail to understand, nor have I received a satisfactory explanation, of why, in order for me to receive representation by the Department, I am forced to sign a waiver that essentially voids all lawyer/client privileges, yet individuals like Dr. Kissinger and General Haig have never signed such a waiver. The double standard employed by the Department is perplexing.

Sincerely,

Lawrence M. Higby

Lawrence M. Higby

Mr. Robert L. Keuch, Chief
Special Litigation Section
Criminal Division
Department of Justice
Washington, D.C. 20530

cc: Mr. Philip Buchen

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Robert L. Keuch, Chief
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Criminal Division
Department of Justice
Washington, D. C. 20530

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The foregoing conditions have been fully explained to me, and I consent thereto freely and without reservation.

Dated: October 31, 1974

Lawrence Mead Hyl

Higby, Larry
Barry has a copy.
?

September 15, 1975

Dear Mr. Kane:

Thank you for your courtesy in sending me a copy of your September 5 letter and attachments addressed to the Honorable Harold R. Tyler.

Sincerely,

Donald Rumsfeld
Assistant to the President

Mr. Al. Philip Kane
Kane and Koons
1100 Seventeenth Street, NW.
Washington, D.C. 20036

bcc w/cc of incmg. to Mr. Buchen for attn.
~~bcc w/cc of incmg. to Hon. Harold R. Tyler for info.~~

DR:MD:pft

LAW OFFICES
KANE AND KOONS
1100 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036

AL. PHILIP KANE
CHARLES VINTON KOONS
MATTHEW A. KANE
MICHAEL A. MURPHY

TELEPHONE
659-2044
AREA CODE 202

September 5, 1975

Honorable Harold R. Tyler
Deputy Attorney General
Department of Justice
Washington, D. C. 20530

Dear Sir:

During the various investigations surrounding what has become known as the "Watergate" episode, this office represented Lawrence M. Higby, who, as an assistant to H. R. Haldeman was, during the Nixon Administration, a Deputy Assistant to the President of the United States.

In the case entitled Lowenstein v. Rooney, et al. in the United States District Court for the Eastern District of New York (74-C-593), Mr. Higby was named as an defendant. Upon service of the complaint, Mr. Higby consulted with the Counsel to the President, Honorable Fredrick Buzzard, in April of 1974. Mr. Higby was informed verbally by Mr. Buzzard that he would be represented in this matter by the Justice Department. Subsequent to that Mr. Higby was informed verbally upon two occasions by Justice Department personnel in the office of the Honorable Carla Hills, then Assistant Attorney General, Civil Division, that he would be represented.

In late September of 1974, Mr. Higby was forwarded a letter for his signature drafted by the Justice Department formally requesting representation. After returning the signed letter to the Justice Department he was interviewed for several hours by Justice Department personnel. Later in the month of September he received another letter from Mrs. Hills stating that "we are aware of no evidence that indicates that there is any merit to the allegations in the complaint. However, information available to us, including information which you have supplied, also indicates that it would not be appropriate to provide representation to you under the circumstances".

Following the refusal we prepared for Mr. Higby's signature and filing in proper person, a motion to quash service of process which was made upon him in compliance with 28 U.S.C.A. 1391. Points and authorities were also submitted to Judge Costantino, the presiding judge in the case.

Under date of July 31, 1975, the judge issued an order in which he denied the motion to quash. A copy of the portion of Judge Costantino

opinion dealing with Mr. Higby's motion is enclosed. In reaching his conclusion the judge determined that Higby, when performing the acts complained of, was acting "under color of legal authority". That legal authority could only come from his employer, the United States.

As a result of this refusal I wrote a letter, on August 14, 1975, to the Honorable Rex Lee renewing the request that the Department of Justice provide representation for Mr. Higby in the Lowenstein case. Last week I received a brief reply from Mr. Lee indicating that for reasons previously given it would still not be appropriate for the Justice Department to represent Mr. Higby.

It is impossible for me to understand why the Justice Department feels that it is inappropriate for it to represent Mr. Higby in this matter. He has never received any reasonable explanation why representation can not be offered.

Frankly, I felt earlier that, as long as the Special Prosecutor's office was in existence, with grand juries sitting on matters relating to its business, there might be some possible conflict. Since the grand juries are no longer sitting and the office is about to close down and there has been absolutely no suggestion that Mr. Higby in any way will be named in any suits or indictments from that Office, it would appear that a major impediment in terms of conflict has been eliminated. If, however, there are some other reasons why the Justice Department feels it would not be appropriate for Mr. Higby to be represented, I would appreciate knowing directly from you what those reasons are.

In similar cases, specifically the case in Charlottesville where representation could not be offered, the Justice Department saw fit to reimburse the individuals involved for legal representation. Certainly that precedent would seem to apply here.

Furthermore, as previously indicated in my letter to Honorable Rex Lee, the judge in this case clearly feels that Higby was acting at least under the color of legal authority in any of the alleged actions raised in the complaint. Certainly no one has ever offered even the slightest suggestion to the contrary.

Finally, it is my understanding that in a recent speech you gave before members of the Federal Bureau of Investigation, you indicated that it clearly was the Justice Department's policy to represent individuals employed by the Government in suits brought against them by outside persons, when the employee was operating under what was at the time deemed legal authority. This recent statement by you has led me to write directly to you for reconsideration of Mr. Higby's case. Other reasons are clearly stated in my letter to Honorable Rex Lee on August 14 (attached) and do not need to be repeated here.

I would appreciate your reconsideration of this matter and hearing directly from you in this regard.

Very truly yours,

Al Philip Kane

Al. Philip Kane

APK:es
Enclosures

cc: Honorable Donald Rumsfeld
Assistant to the President of the United States

LAW OFFICES
KANE AND KOONS
1100 SEVENTEENTH STREET, N.W.,
WASHINGTON, D.C. 20036

AL. PHILIP KANE
CHARLES VINTON KOONS
MATTHEW A. KANE
MICHAEL A. MURPHY

TELEPHONE
659-2044
AREA CODE 202

August 14, 1975

Honorable Rex Lee
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Re: Lawrence M. Higby
Lowenstein v. Rooney, et al.
Eastern District of New York,
74-C-593

Sir:

During the various investigations concerning the Watergate episode, this office represented Lawrence M. Higby who, as an assistant to H. R. Haldeman, was, during the second Nixon administration, a Deputy Assistant to the President of the United States.

In the case entitled Lowenstein v. Rooney, et al. in the United States District Court for the Eastern District of New York (74-C-593), Mr. Higby was named as a defendant. Mr. Higby requested representation by the Department of Justice. This request was considered and denied, apparently for the reason that the Department felt that Mr. Higby had been sued for something which he had done on his individual responsibility rather than as an employee of the United States.

Following that refusal we prepared for Mr. Higby's signature and filing, in proper person, a motion to quash service of process which had been made upon him in alleged compliance with 28 U.S.C.A. 1391(e). Points and authorities were also submitted to Judge Costantino.

Under date of July 31, 1975 the Judge issued a Memorandum and Order in which he denied the motion to quash. A copy of the portion of Judge Costantino's opinion dealing with Mr. Higby's motion is enclosed herewith and made part of this presentation on Mr. Higby's behalf. In reaching his conclusion the Judge determined that Higby, when performing the acts complained of, was acting "under color of legal authority". That legal authority could come only from his employer, the United States.

Your attention is also directed to the second sentence preceding the Judge's "Conclusion" which states:

> "If the defendants desire to invoke official immunity they may do so directly."

In view of the fact that the Court has held that Higby was acting "under color of legal authority" and that there is at least a possible claim of official immunity, I submit that it would be appropriate if not necessary, that he be represented by the Department of Justice.

Since I understand that the Department's earlier refusal to represent Mr. Higby was predicated on an administrative determination that, in performing the acts alleged, Higby was acting for the Committee to Re-Elect the President rather than for the United States Government, I deem it material to advise you of the following situation: The 1972 Campaign Liquidation Trust, established with funds left over in the hands of the Finance Committee to Re-Elect the President, which trust was authorized to pay all lawful debts of the Committee "including but not limited to: expenses incurred . . . .", has declined to pay Mr. Higby's legal expenses. A copy of the letter of declination from Richard W. Galiher, counsel for the trust, is enclosed as part of this presentation.

Thus we have Judge Costantino ruling that Higby was acting "under color of legal authority" and suggesting a possible claim of official immunity on the one hand, and the Committee to Re-Elect the President disavowing responsibility for his actions on the other.

Higby was at all times an employee of the United States, a subordinate in the Office of the President. He was one step removed from direct contact with the President. His job was of an administrative rather than a discretionary nature. He did not make the decisions, but merely acted as a conduit for information from one official of the Government to another. I cannot agree that a young person such as Higby must, at the risk of having it subsequently decided that his superior was directing him to do something that was outside the scope of the superior's lawful authority, make an instantaneous decision as to whether the superior was or was not overstepping the bounds of his lawful authority.

I can, of course, appreciate that if a superior orders a person to kill, to steal or to commit perjury, the subordinate has the duty in law and morality to refuse to do it. But that is not this case. It could not have been palpably clear to Higby that, when he performed the ministerial and not discretionary acts which he was directed to perform, he was leaving the employ of the Government and entering the employ of the Committee.

Furthermore it is possible today that a person, in performing a given act, may be serving two masters at the same time. Standard Oil Co. v. Anderson, 212 U.S. 215, 53 L. ed. 480, Kleps v. Prawl, 181 Kan. 590, 63 A.L.R. (2) 175 (1957).

In view of the foregoing, I renew the request that the Department of Justice provide representation for Mr. Higby in the Lowenstein case.

I shall appreciate hearing from you soon in this regard.

Very truly yours,

Al. Philip Kane

Al. Philip Kane

APK:es
Enclosures

Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

30 SEP 1974

Mr. Lawrence M. Higby
Deputy Assistant to the President
White House
Washington, D. C. 20001

Dear Mr. Higby:

This responds to your letter requesting that we provide representation on your behalf in litigation entitled Allard K. Lowenstein v. Rooney, et al., USDC ED NY, Civil Action No. 74C593.

Your request has received the most careful consideration. We are aware of no evidence that indicates that there is any merit to the allegations in the complaint. However, information available to us, including information which you have supplied, also indicates that it would not be appropriate to provide representation to you under the circumstances. Accordingly, we are unable to comply with your request.

Sincerely,

CARLA A. HILLS
Assistant Attorney General

If you decide to execute the enclosed waiver, we must commence, as soon as possible, the necessary interview to determine whether to provide the requested representation. In such case, please provide us with the executed waiver by 5 p.m. on Monday, September 16, 1974.

Sincerely,

CARLA A. HILLS
Assistant Attorney General

Enclosure

SEP 13 1974

Mr. Lawrence M. Higby
Deputy Assistant
to the President
The White House
Washington, D. C. 20501

Re: Allard K. Lowenstein v. John J. Rooney, et al., U.S.D.C., E.D. N.Y., Civil Action No. 74 C 593

Dear Mr. Higby:

This will refer to your letter to us requesting that we provide representation on your behalf in the above litigation. In order that we may determine whether to provide representation on your behalf, we will necessarily require information from you regarding the subject matter raised by the complaint.

Under the circumstances we request that you promptly execute the enclosed waiver if you wish us to consider further the question of such representation (a responsive pleading on your behalf must be filed with the Court by October 1, 1974). Following receipt of the waiver, we will want to interview you to ascertain whether any conduct of yours related to the complaint in this matter was within the scope of your official duties, whether such representation might present a conflict with the Department's representation of other defendants in this action, and whether representation on your behalf would otherwise be in accordance with the Department of Justice's usual standards in such matters.

Of course, you may decide not to execute the enclosed waiver and choose instead to retain private counsel to represent you in this matter.

Mrs. Carla A. Hills
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Dear Mrs. Hills:

As you know, I have previously requested the Justice Department to provide representation on my behalf in proceedings entitled Lowenstein v. Rooney, et al., E.D. N.Y., Civil Action No. 74 C 593. In making this request, I understand and agree that your consideration thereof, and any representation that you may ultimately decide to afford me, is subject to the following conditions:

1. I undertake to provide any information regarding this litigation requested by your office and will do so freely and without condition.

2. I understand that in the event that the Department of Justice attorneys assigned to represent me determine that any information supplied by me in the course of such representation should be made available for use in or consideration of any Federal criminal or civil proceedings in which I might be or become a party, it may do so; and I freely and without reservation consent to such disclosure and use and hereby waive any rights that I may have to object to such disclosure or use or to otherwise challenge any such action by the Department of Justice.

3. I understand that the foregoing waiver may result in the use of such material against me in Federal civil or criminal proceedings to my detriment.

4. I understand that if the Department of Justice concludes that any representation provided me would, if continued, constitute a conflict of interest, then the Department will withdraw such representation.

5. I further understand that if, in the opinion of Department of Justice attorneys, a conflict should arise between the respective interests of the several defendants that the Department of Justice is representing, then the Department may withdraw its representation of such defendants.

The foregoing conditions have been fully explained to me, and I consent thereto freely and without reservation.

Dated: September 13, 1974

Lawrence Head Higby

6. I reserve the right to terminate at anytime the services of the Department of Justice in this or any related matters.

Lawrence Head Higby.

May 9, 1974

Dear Mr. Jaffe:

I have recently been named as a defendant in a suit brought by Allard K. Lowenstein. Since it is alleged that I conspired with other individuals to deprive Mr. Lowenstein of certain Constitutional rights while acting in my official capacity as Deputy Assistant to the President, I am requesting the Department of Justice to represent me in this action.

I am enclosing a copy of the summons and complaint and would appreciate an early response as to whether or not Justice will be able to represent me in this matter.

Very truly yours,

Lawrence M. Higby
Deputy Assistant
to the President

Mr. Irving Jaffe
Deputy Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C.

Enclosure

(3) Whether the new investigation ordered by the defendant Kelley about FBI information on members of Congress has revealed any new material relating to plaintiff;

(4) Whether the material formerly found in J. Edgar Hoover's files contained information about plaintiff and has been retained anywhere in present FBI files.

Mr. Mintz's affidavit does not contend that the allegations of the complaint are not true with regard to the FBI and Congressman Rooney. Since it appears that a "genuine issue of fact" does exist the motion for summary judgment on behalf of the FBI defendants (motion 3) must be denied.

VENUE

The fourth and fifth motions involve questions arising under 28 U.S.C. § 1391(e). This section states:

> A civil action in which each defendant is an officer of the United States or any agency thereof acting in his official capacity or under color of legal authority or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: . . . (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action was brought.

Defendant Higby argues that section 1391(e) was not designed for actions based upon alleged torts but rather was enacted to facilitate review of administrative determinations which could only have been made in the District of Columbia prior to its enactment. Higby further asserts that if section 1391(e) is inapplicable this court does not have jurisdiction over him because he has performed no acts in New York which would expose him to New York long-arm jurisdiction under C.P.L.R. § 302. Higby also argues that by its terms section 1391(e) requires that "each" defendant must be an officer or employee of the United States, and that since it has been held that Congressmen are not subject to the section, Liberation News Service v. Eastland, 426 F.2d 1379 (2d Cir. 1970), and since Congressman Rooney is a defendant, section 1391(e) is inapplicable. Lastly, Higby contends that since he is a former government employee service under section 1391(e) is void. Defendant Haldeman asserts that he has committed no acts which would subject him to New York long-arm jurisdiction.

Plaintiff Lowenstein answers these contentions as follows. As to defendant Higby's argument concerning the type of action section 1391(e) was intended to facilitate, plaintiff points to the language of the section itself. It

does not limit its application to review of administrative actions; the section specifically allows a civil action to be brought against an official or employee of the United States (or any agency thereof) acting in his official capacity or under color of legal authority. As to defendant Higby's argument that "each" defendant must be a government official, plaintiff points to a footnote in Liberation News Service v. Eastland, 426 F.2d 1379, 1383, n. 5 (2d Cir. 1970), which states:

> We are in accord with decisions such as Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, 284 F.Supp. 809 (E.D. Pa. 1968) . . . which have held that the statutory requirement that "each defendant" be a Government official refers only to those defendants as to whom plaintiffs seek to justify venue and personal jurisdiction under § 1391(e).

Plaintiff asserts that venue is proper as to defendant Rooney under 28 U.S.C. § 1391(b) - Rooney is a resident of the Eastern District of New York. With regard to the contention that "former" officials may not be sued, plaintiff argues that to follow defendants' reasoning would defeat the purposes of the statute. He argues that an official should not be able to defeat an action against him for illegal acts merely by resigning his position. Furthermore, venue for the second cause of action would be proper in the District of Columbia, pursuant

to 28 U.S.C. § 1391(b), and since section 1391(e) was intended to permit actions which could only be brought in the District of Columbia to be brought in other districts, Schlanger v. Seamans, 401 U.S. 489, 490, n. 4 (1971), venue in the Eastern District of New York is proper.

Defendant Higby's arguments regarding the type of action section 1391(e) was intended to authorize and the requirement that each defendant must be an officer of the United States are rejected. The disposition of the motions by defendant Higby and Haldeman to quash service depend upon the answer to the contention that section 1391(e) may not be used against former government officers when injunctive and declaratory relief as well as damages are sought.

The insertion of the phrase "acting under color of legal authority" was described by the House Committee which considered the section:

> By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or an employee in his official capacity. It intends to include also those where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States but are brought against

> the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned.

H.R. 1960, 87th Cong., 1st Sess. (1961); see H.R. Rep. No. 536, at 3-4.

The actions complained of by the plaintiff clearly were committed "under color of legal authority." To assert that because the defendants are no longer in government service the plaintiff may not utilize section 1391(e) - a section clearly intended to permit such actions - would, as plaintiff contends, defeat the purposes of the statute. If the defendants desire to invoke official immunity, they may do so directly. Since service was proper under section 1391(e), the motions of defendants Haldeman and Higby (motions 4 and 5) are denied.

CONCLUSION

The motions to dismiss (motions 1 and 2) are denied, the motion for summary judgment (motion 3) is denied, and the motions to quash service (motions 4 and 5) are denied.

SO ORDERED.

U. S. D. J.