

**The Responsibility of Independent Counsel Arlin M. Adams
for the Appointment of Independent Counsel David M. Barrett**

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Reader of materials made available on this page are likely to conclude that the 1990-1999 investigation of Independent Counsel Arlin M. Adams and Larry D. Thompson into abuses of programs of the Department of Housing and Urban Development (HUD) was among the most abusive all Independent Counsel investigations (allowing of course that one really needs to know what occurred in all investigations to make such judgment). Most observers already regard the 1995-2005 investigation of Independent Counsel David M. Barrett into matters involving HUD Secretary Henry M. Cisneros to be among the most wasteful. Some formed that view as early as January 1997, when a *Legal Times* article bore the title “What’s Taking David Barrett So Long?” and when the investigation had expended only \$902,000 of what would be eventually be \$22,750,000 of public funds. But it is uncertain whether anything in Barrett’s protracted tenure as Independent Counsel will ultimately be deemed as remarkable as the fact of the Barrett appointment itself.

I explain below why it is reasonable to blame Arlin M. Adams, not only for the abuses in his own investigation, but for the Barrett appointment as well – at least as a result of Adams’ failure to alert the appointing panel of Barrett’s extensive involvement in the HUD abuses Adams was charged with investigating. And, I suggest, such point is hardly debatable. The more difficult issue, however, involves Adams’ motives in failing to bring Barrett’s involvements in the abuses of HUD programs to the attention of the appointing panel.

The reasons that the appointment of Barrett as an Independent Counsel to investigate anything, much less a HUD Secretary, should ultimately be deemed remarkable may be gleaned from two documents posted on a page of this site termed Lantos Hearings. The first document is a 50-page, single-spaced item styled “The Inquiry of Congressman Tom Lantos into Abuses of HUD’s Moderate Rehabilitation Program” ([Inquiry](#)). The document, which was created in approximately 1991, discusses Barrett at pages 1,18-19, 23-25, 28, 30-32, 36-37, 41-42, 47. The second document is an 8-page narrative in the form of a chronology styled “David M. Barrett (5/14/90)” ([Barrett Chronology](#)). The latter item chronologically records, along with certain other relevant information, Barrett’s contacts with Thomas T. Demery, the HUD Assistant Secretary for Housing named in the April 17, 1989 HUD Inspector General’s Report on abuses of HUD’s moderate rehabilitation program that led initially to congressional hearings and ultimately to the appointment of Independent Counsel Arlin M. Adams. The Barrett Chronology was in the possession of the staff of Congressman Tom Lantos on May 23, 1990, and evidently underlay the questioning of Demery about his contacts with Barrett in the hearing of that date (*see* Inquiry at 36-37). Such questioning and the chronology would also form the basis for much the discussion of Barrett in the subcommittee’s final report (*see* Inquiry at 47), which drew language directly from the chronology. It presumably was information in the Barrett Chronology itself, or the portions of such information that

were brought out in the May 23, 1990 hearing and the subcommittee's final report, that caused Lantos to describe Barrett's May 1995 appointment as independent counsel to investigate HUD Secretary Henry Cisneros initially as "mind-boggling"¹ and later as "appointing the well fed fox to investigate missing hens at the chicken coop."²

The Barrett Chronology, which is based almost entirely on materials that HUD made available, pursuant to the Freedom of Information Act, to numerous people or entities in the fall of 1989, could alone form an indictment for a conspiracy involving Barrett and Demery far stronger than many of the conspiracy charges Independent Counsel Adams in fact brought. It would presumably be an even more compelling indictment once one secured Barrett's records to show whether he in fact had provided Demery the benefits that the chronology suggested he had and once one investigated the issues left unresolved at the close of the chronology.³ And given that Demery was a prime target of Adams investigation, and that his connections with Barrett had been a specific focus on the Lantos subcommittee and of the HUD Inspector General (*see* note 3), Demery's connections to Barrett constituted one of the more obvious avenues of inquiry in the investigation of Demery. So Barrett's connections to Demery could not have escaped the notice of Independent Counsel attorneys.

On May 15, 1995, nine days before the Barrett appointment, Independent Counsel Arlin M. Adams met with the three United States Circuit Court Judges comprising the Division for the Purpose of Appointing Independent Counsels (usually referred to as the "Special Division") – David B. Sentelle of D.C. Circuit, John D. Butzner of the Fourth Circuit, and Peter T. Fay of the Eleventh Circuit. Presumably the meeting involved discussion of Adams' resignation, which he submitted in writing later that day, and possibly it involved discussion of the accomplishments of Adams' tenure as Independent Counsel. If such discussion touched on Judge Thomas F. Hogan's sharp criticisms of attorneys under Adams in the Dean case (discussed in the second paragraph of the Introduction to the material under the Prosecutorial Misconduct tab on this site), Adams apparently adequately explained such criticism away. For on May 17, 1995, the judges of the Special Division wrote Adams to convey their "unmeasured appreciation for a job well done," stating also: "No one has better carried out the role of independent counsel than you."

¹ See Johnson D, "Lawyer Linked to 80's HUD Scandal is Named to Investigate Housing Chief," *New York Times*, May 25, 1995: <http://query.nytimes.com/gst/fullpage.html?res=990CE6D71E3DF936A15756C0A963958260>.

² See Morgan D, "Counsel Has Previous HUD Connections," *Washington Post*, Aug. 30, 1999: <http://www.washingtonpost.com/wp-srv/politics/special/cisneros/stories/fbarrett083099.htm>.

³ At page 8, the chronology leaves open whether Barrett was connected to the Midland, Texas project on which the June 27, 1988 entries suggest Demery increase an allocation in circumstances that appeared intended to favor a project owned by partners of Barrett. But Barrett's co-ownership of the project had been specifically noted in a November 4, 1988 memorandum seeking to have Demery removed from the moderate rehabilitation process, among other reasons, for his apparently increasing the allocation to cause it to match the number of units in a Barrett project.

Very likely, during the May 15, 1995 meeting with the Special Division, Adams recommended as his successor Larry D. Thompson, an Atlanta lawyer and former United States Attorney who had been part of the Adams team since 1990. As discussed on the Prosecutorial Misconduct page of this site, the Special Division's acceptance of that recommendation virtually assured that prosecutorial abuses addressed on that page would never come to light, or at least would never come to light through actions of the Office of Independent Counsel itself.

Apparently, however, during the meeting there occurred no discussion of the appropriateness of the impending appointment of David M. Barrett as Independent Counsel to investigate HUD Secretary Henry Cisneros (which appointment would then take place on May 24, 1995). At any rate, in 1999, according to the *Washington Post* story identified in note 2, in explaining why he had raised no objection to the Barrett appointment because of Barrett's involvements with the HUD abuses Adams had been investigating for five years, Adams stated that he could not recall ever being asked about such matter by the Special Division.

The failure of the Special Division to ask Adams about the suitability of Barrett, either at the May 15, 1995 meeting or otherwise, would seem extremely negligent. But, given that the appointment process generally was one that few would regard as commendable, the failure to contact Adams about the appropriateness of the Barrett appointment was not so remarkable as to call seriously into question Adams' statement that he was not asked about the matter. But, assuming that Adams was not asked, his failure to bring the unsuitability of Barrett to the attention of the Special Division as soon as he learned of the appointment still seems hard to excuse.

The Barrett appointment was announced in the press on May 25, 1995. That day, in the provocatively styled article "Lawyer Linked to 80's HUD Scandal is Named to Investigate Housing Chief" (*see* note 1 *supra*) the *New York Times* would describe some of Barrett's HUD activities and quote Lantos's description of the appointment as "mind-boggling," as well as his statement that "Mr. Barrett is someone who clearly benefited from influence peddling at HUD during the Reagan Administration and, incredibly, he is named special counsel to examine the Secretary of HUD."

Leave aside that the *Times* account of Barrett's HUD activities and Lantos's comments should have prompted the Special Division to contact Adams (and Lantos). Even absent such account, Adams should have contacted the Special Division as soon as he learned of the appointment. But the account gave him additional reason to do so. In any case, the failure of Adams to contact the Special Division on the matter alone makes it fair to say that Adams should be held responsible for the Barrett appointment.

But what if Adams also had an improper motive for failing to bring Barrett's unsuitability to the attention of the Special Division?

The May 31, 2008 document available on this site styled "The Independent Counsel's Use of Dean's Off-the-Stand Remark about David Barrett and the Judge" ([Barrett](#))

discusses the way that on October 18, 1993, Independent Counsel attorneys prosecuting *United States of America v. Deborah Gore Dean* brought to the attention of trial judge Thomas F. Hogan an innocuous off-the-stand remark the defendant Deborah Gore Dean made about David Barrett and Judge Hogan. Stating that they were bringing the remark to Judge Hogan's attention at the express instruction of Independent Counsel Adams, the attorneys discussed the remark as if it were something rather odd and suggested they had no idea what Dean might have meant. The referenced document maintains that Independent Counsel attorneys raised this matter in the way they did in an effort to prejudice the court against Dean, both generally and in order to facilitate the use later that day of facially implausible testimony to lead the court and jury to believe that Dean had lied about a matter, when Independent Counsel attorneys knew with absolute certainty that she had not.⁴ The referenced document also suggests that the Independent Counsel's use of Dean's remark may well have had its desired effect.

On May 26, 1995, the day after the announcement of the Barrett appointment, the court of appeals remanded the Dean case to Judge Hogan to reconsider Dean's sentence. Even before the May 26, 1995 court of appeals ruling, Adams had to recognize that the case might well be again before Judge Hogan. In these circumstances, it seems understandable that Adams would not want it to come to Judge Hogan's attention that Adams had interfered with the Barrett appointment on the basis of his (Barrett's) involvements with matters being investigated by Adams. Indeed, after feigning ignorance of what Dean could possibly have meant, it seems that Adams would not want Hogan even to understand that in fact Barrett had substantial involvements in the matters investigated by Adams.

I do not mean to suggest that the case the such considerations caused Adams to fail to alert the Special Division as to Barrett's unsuitability is a compelling one. Possibly Judge Adams never gave any thought to such obligations as he might have in the circumstances.

Further, one cannot overlook that Adams and Barrett were in a sense members of the same club – that is, the well-connected Republican lawyers. That is what caused Adams to be appointed to the Third Circuit in 1969. It is presumably what caused Barrett – much involved in Lawyers for Reagan in 1980 – to be considered for a federal judgeship sometime in the 1980s. The way it was put to the *Washington Post* in 1999 by Reagan White House Counsel Fred Fielding, also a Lawyers for Reagan alumnus, Barrett would in fact have been offered a judgeship but for his unwillingness to accept the loss of income. It was membership in the same club that caused both Thomas F. Hogan and David B. Sentelle to receive their appointments to federal judgeships. It is hardly surprising that an Independent Counsel who was also a member of such club, particularly if not a very principled Independent Counsel, would be disinclined either to involve another member of the club in a criminal conspiracy charge or to otherwise interfere with the members' prospects unless doing so was unavoidable. And, after all, the Special Division had not asked. Thus, there is an obvious reason for Adams to fail to bring

⁴ The latter matter is also the subject of Section B.1 of the material under the Prosecutorial Misconduct tab on this site (also available by means of a separate tab on the Prosecutorial Misconduct page).

Barrett's unsuitability to serve as Independent Counsel to the attention of the Special Division that, while hardly an excuse for such failure, has nothing whatever to do with the Dean prosecution.

Addendum:

I add several more points regarding matters of varying importance partly to keep track of them and partly to ensure a complete record.

1. This document concerns Arlin M. Adams' responsibility for the appointment of David M. Barrett as Independent Counsel, not Barrett's actions in causing the appointment. Nevertheless, it warrants note that the August 1999 *Washington Post* article identified in note 2 provides the following account of the *Post's* efforts to learn about process that led to Barrett's appointment:

Barrett declined to be interviewed, and Judge David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit, who has presided over the judicial selection panel for more than six years, did not respond to written questions about the Barrett appointment.

In a short letter to The Washington Post, Barrett said that "the screening process [by the judges] included thorough inquiry into my past work, including all matters involving HUD."

At Senate hearings in April, Sentelle defended his screening system, saying he and his fellow judges "cross-examine [candidates] pretty thoroughly" and have eliminated those with "something that would have caused a bad appearance."

One has to wonder both how thorough was the cross-examination of Barrett and how forthcoming were his responses. As with Arlin M. Adams' failure to address Barrett's unsuitability with the Special Division, there are circumstances in which not being asked, or not being asked the right questions, is not entirely a satisfactory explanation.

2. The 1999 *Washington Post* article gives the reader considerable reason to question Barrett's appointment in light of his involvement with Demery, including the suggestion that a Tulsa, Oklahoma moderate rehabilitation allocation had been made to favor Barrett. But the article overlooks entirely the Moore, Oklahoma and Midland, Texas moderate rehabilitation allocations that were apparently intended for Barrett projects. The former allocation, which involved an instance where Demery had matched a pending request with Barrett's name, had been specifically discussed at the May 23, 1990 hearing. While Demery denied that the Moore request was funded (as he put it, "Barrett's was not"), in fact the request was funded. See Item C.5 to [Appendix D](#) to my August 13, 1997 letter to Larry D. Thompson. As discussed in note 3 *supra*, the Midland, Texas allocation had been specifically cited by the HUD Inspector General in seeking to have Demery removed from the moderate rehabilitation selection process.

The article also states the following:

Demery told the independent counsel for Pierce that Barrett helped him get the job. Once Demery was situated at HUD, phone logs and other records show, Barrett was in frequent contact with him, organizing meetings, meals, parties and out-of-town travel. In a 1987 memo to GOP presidential candidate Pat Robertson, Demery said Barrett could provide fund-raising help "with the Republican machine."

Two months later, Barrett's partner in two Tulsa housing developments wrote to Demery's office seeking an easing of HUD rules for an apartment building that was seeking federal subsidies.

During questioning by a House committee, Demery initially denied that he had ever discussed the Tulsa projects with Barrett. But the committee introduced a May 1987 entry from Demery's phone log, noting that Barrett had called "re: Tulsa Hsg Auth . . . needs your help . . . A letter from him is in your box."

Demery told the committee he did "not remember this particular situation."

A week after the Barrett message, however, Demery's office sent a letter to Barrett's Oklahoma partner, George Carnes, approving the loosened rules. Carnes told HUD auditors in 1988 that he "needed Barrett's financial backing" and that Barrett was "well-connected in Washington," though he insisted that Barrett never provided special help to him at HUD.

The testimony of Demery to which the article refers involved his being confronted by Congressman Tom Lantos, in a May 23, 1990 hearing, with a *New York Times* article that, after discussion of the funding of a Barrett mod rehab project in Tulsa, quoted Demery as stating: "I had never had any discussions with Mr. Barrett about mod rehab – period." In the hearing, Demery's not very persuasive effort to explain the matter led to his explicitly stating that, while he and Barrett may have discussed the mod rehab program generally, he had never discussed a particular mod rehab project with Barrett. Lantos Hearings 5 at 348. The *Washington Post* article intends to contradict Demery's statement and seems to do so effectively. But the article overlooks the fact that Demery's list matching the Moore, Oklahoma request with Barrett's name seems inferentially also to contradict Demery's statement, as well as the fact that later in the hearing Demery explicitly stated with regard to the list that Barrett had personally contacted him about the Moore request. Lantos Hearings 5 at 399.

3. The May 25, 1989 *New York Times* account of the Barrett appointment states:

Mr. Barrett was a friend of Thomas Demery, Assistant Secretary for Housing under Mr. Pierce and one of the officials who directed the Moderate Rehabilitation program, in which influential Republicans had an inside track to winning grants for themselves or their clients.

A report by the House Government Operations Committee in 1990 found that Mr. Barrett had telephoned Mr. Demery 65 times from November 1986 to June 1988 and attended dozens of meetings, lunches and parties with him. Mr. Demery denied that Mr. Barrett ever tried to influence him on a specific project, although records indicate that Mr. Barrett had contacted Mr. Demery on HUD grants.

Mr. Barrett was also co-owner of Oklahoma housing projects that received substantial subsidies under the favoritism-plagued Moderate Rehabilitation rent subsidy program. One of Mr. Barrett's projects in Tulsa received a \$1.7 million contract in 1987.

Two points warrant mention. First, the figure 65 is actually based on instances when Barrett or someone from his office called Demery but could not get through to him and left a message. Actual connections would be many times that number. Second, like the 1999 *Washington Post* account, the article overlooks the Moore, Oklahoma and Midland, Texas fundings, as well as the fact that Demery eventually acknowledged that Barrett had contacted him on the Moore, Oklahoma request (though denying that it was funded).