



U.S. Department of Justice

Washington, D.C. 20530

TO: John E. Harris
FROM: Angel Kelley *Angel Kelley 8/22/91*
DATE: August 22, 1991
SUBJECT: El Salvador's request for depositions

In granting El Salvador's request for depositions of several United States witnesses including Army officers and civilians, the procedure you chose in order to take the depositions from these witnesses has raised several legal issues. Based upon the facts your method included: a certified notary public/court reporter administering the oath and taking the depositions of each witness followed by a signed affidavit by which each witness swore to the truthfulness of their testimony before a Federal Court Magistrate. The three legal issues that you requested that I research are laid out below.

I. WHAT AUTHORITY GRANTS NOTARY PUBLICS THE POWER TO ADMINISTER OATHS AND TO TAKE DEPOSITIONS?

District of Columbia Code § 1-810 (1976) clearly states "Each Notary Public shall have power...to take depositions and to administer oaths..." I was unable to find any cases supporting this particular point of law. Even though the statute did not specify what type of deposition notary publics can take and what occasions oaths may be administered, I am of the impression that you can confidently assert that the court reporter/Notary Public has the power to administer the oaths before the taking of depositions, based upon § 1-810.

The "Uniform Law on Notarial Acts of 1990" also states in § 2(4) "A notarial act means... administering an oath or affirmation...." D.C. Act 8-280 (1990). Although, it is stated in the act that Notary Publics have the authority to administer oaths as listed in § 2 "Definitions" section, I found myself uncomfortable with the fact that this is the only place in the Act that mentions this function of the Notary Publics. I thought this power of the Notary Publics should have been listed in § 3 "Notarial Acts", where other functions of the Notary Publics are again listed, but with more specificity. I contacted the

Notary's Office to inquire into this peculiarity. I spoke with Rosalyn Brown from the D.C. Notary's office and she informed me that her office derives its power to administer oaths from this act, despite the act's brief prescription. The legislative history did not offer an explanation for the omission of this function from § 3 "Notarial Acts". I speculate that the power to administer oaths has become such a customary function of the Notary's Office that the drafters did not feel it was necessary to over-state this principle.

5 United States Code § 2903 (c)(2) states "An oath authorized or required under the laws of the United States may be administered by an individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered." Therefore, even though the El Salvador case is a federal one, El Salvador's right to have witness depositions taken, can be executed based upon local D.C. law. Consequently, based upon 5 U.S.C. § 2903 (c)(2), D.C. Code § 1-810 and D.C. Act 8-280 it is permissible for Notary Publics to take depositions and administer oaths.

II. WHAT AUTHORITY EMPOWERS A UNITED STATES DISTRICT COURT MAGISTRATE TO ADMINISTER OATHS TO INDIVIDUALS ATTESTING TO THE TRUTHFULNESS OF THEIR DEPOSITIONS?

28 United States Code § 636 (a)(2) empowers United States Magistrates to administer oaths. No cases were found to support this particular function. Because the oath administered by the Federal Magistrate only acted as a second tier safety measure, § 636 should offer enough re-enforcement to overrule any El Salvadoran objection, despite the lack of case law on point.

III. IN THE EVENT THAT THE EL SALVADORAN OFFICIALS QUESTION THE TRUTHFULNESS OF THE WITNESS TESTIMONIES, CAN THE JUSTICE DEPARTMENT ASSURE EL SALVADOR THAT THE WITNESSES MAY BE CHARGED WITH PERJURY FOR ANY FALSE STATEMENTS MADE DURING TESTIMONY?

Under 18 United States Code § 1621, there are four prima facie elements of perjury which include: 1) witness must be under oath; 2) makes a false statement; 3) false statement was material to the proceedings; 4) intent to falsify. In this instance, we are concerned with the adequacy of the oaths administered.

18 United States Code § 1621 states that whoever, having taken an oath before a competent tribunal or officer of the court that his deposition is true, subsequently states a material matter which he does not believe to be true, is guilty of perjury. Moreover, he shall be fined \$2,000, imprisoned for not

more than five year, or both.

District of Columbia Code § 22-2511 (a)(1) states "A person commits the offense of perjury if: having taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered...." D.C. Code § 22-2511 (a)(3) lists punishment to include a fine of not more than \$5,000 or imprisonment for not more than 10 years, or both.

District of Columbia Code § 14-101 (c) states " Whoever swears, affirms, declares, or gives testimony in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury in a case where he would be guilty of that crime if sworn according to the forms of the common law.

There are a couple of cases, at the turn of the century, that speak on a the Notary Public's power to administer oaths, none of which are particularly helpful as far as providing case law, but it serves for informational purposes. In looking at these cases it is important to remember that these are old cases, decided at a time when states were attempting to develop their own law on the issue. In Anderson v. Commonwealth 117 S.W. 364 (Ky. Ct. App.)(1909), it was held that Notary Publics did not at common law have the right to administer oaths, and cannot exercise this power unless authorized by statute. However, the court did find a Kentucky statute authorizing Notary Publics to administer oaths.

In United States v. Law 50 F. 915 (D.C. Va.) (1892), the court recognized by statute that Notary Publics have the authority to administer oaths in all situations that justices of the peace may administer oaths. But in this case the court was unable to find this administration of oaths within the scope of duties of a justice of the peace.

In United States v. Cook, 17 F.D.R. 412 (1955), states that an affidavit, required by law, can be made basis for perjury charge regardless whether it is sworn to before United States Commissioner or a Notary Public.

IV. LEGAL ANALYSIS

The oath is a necessary basis for a prosecution for perjury. The oath under which false testimony has been given must have been administered by a person having lawful authority to do so, and express authority to administer oaths may be required.

There are several statutes that baldly assert that Notary Publics and Federal Magistrates have the power to administer oaths. However, I have not been able to uncover cases that

support this assertion. My impression is that the lack of case law should not cause insecurity about the method chosen to depose the witnesses, when there is a strong statutory foundation. My research of the perjury laws lead me to a similar conclusion.

There is one point that I would like to mention. When the Notary's Office and Federal District Court Magistrate were called to take depositions and administer oaths, they did not express any concern about the acceptability of such conduct. Their reliance upon the above stated laws comforts me enough to believe the procedure you chose to take the witness depositions is acceptable and within the limits of the law.