

## **The Government's Investigation of Fife Symington - The Real Story**

### **I. Overview**

Throughout much of the 1990s, both before and during his terms as Governor of Arizona, Fife Symington was subjected to a lengthy government investigation that utilized the enormous resources of the federal government, with investigators and prosecutors scrutinizing every aspect of his business, professional and personal life to pursue a constantly shifting set of allegations. When Mr. Symington responded to one series of allegations, the government simply switched the investigation to another topic. Finally, the government obtained an indictment, which required it to prove its case in a court of law and to a jury of Arizona citizens. After a lengthy four-month trial, the jury began deliberations. When it became clear that the jury would not reach a unanimous verdict of guilty, the prosecutors asked the court to dismiss a juror who clearly was favorable to the defense. Over a defense objection that the dismissal of the juror would violate Mr. Symington's rights, the court dismissed the juror. A new juror was substituted in place of the dismissed juror and jury deliberations resumed.

Even with that maneuver, the government obtained convictions on only six of 23 counts. But Fife Symington was denied a fair trial. The removal of a pro-defense juror was a gross violation of his rights. He immediately took an appeal. In 1999, the U.S. Court of Appeals in San Francisco agreed and threw out the convictions, finding that the dismissal of the juror violated Mr. Symington's right to due process. Accordingly, Fife Symington does not stand convicted of any criminal offense. In 2000, after the court of appeals' decision, the case and its entire history was brought to the attention of President Bill Clinton. At the President's request, a pardon petition was submitted on Mr. Symington's behalf. President Clinton granted the pardon in January 2001, even though there was no outstanding conviction. The pardon barred the

government from re-trying Fife Symington. The 10-year odyssey was over, but along the way Fife Symington suffered a great deal. He lost his position as Governor of Arizona, to which he was initially elected in 1991 and then re-elected by a large margin in 1994, as he resigned the office in 1997 when the jury verdict was returned, before he had an opportunity to have the verdict thrown out on appeal. He and his family suffered the pain and humiliation of a lengthy investigation and trial, all in the public spotlight of intense media scrutiny. He spent a great deal of money to defend himself. At the end of the day, he was fully vindicated, but the entire ordeal caused harm to him. The media feeding frenzy was relentless, as the press jumped on the prosecutors' bandwagon. As a result, the other side of the story never got out. It is time now to disclose the details of exactly what happened.

## **II. The Investigation**

Prior to being elected Governor of Arizona in 1991, Fife Symington was a commercial real estate developer in Phoenix for 25 years. He developed some of the finest commercial real estate projects in the city, including the Camelback Esplanade, consisting of a Ritz-Carlton Hotel and two office towers at 24<sup>th</sup> and Camelback Road. That project is very successful today, as three additional office towers, a multiplex movie theater, and many restaurants have been added over the years. The Camelback Esplanade is generally regarded as the premier mixed use project in the Southwest.

Fife Symington was also a member of the board of directors of Southwest Savings and Loan in Phoenix. He resigned from that position in 1986. In the late 1980s, Arizona suffered a severe real estate depression and many savings and loans failed. Southwest Savings was no exception; it failed in 1989. As a result, the government-run Resolution Trust Corporation (RTC) began an investigation of Mr. Symington and the other directors. After a three-year investigation, no charges were brought against him relating to his service as a director of

Southwest. When Fife Symington ran for governor in 1990, his opponent sought to take political advantage of the RTC/Southwest Savings investigation. In the midst of the campaign, Senator Howard Metzenbaum held a Senate Committee hearing on Southwest Savings, requiring testimony from Mr. Symington, in an obvious attempt to embarrass him and influence the Arizona governor's race.

The RTC investigation should have ended by 1990 when the RTC found no basis for a lawsuit. However, by 1991, Fife Symington had won the election and was the new Governor and thus a big target for federal prosecutors. The RTC referred its investigation of Mr. Symington relating to his role as a director of Southwest to the Justice Department. Because he was the sitting Governor, the U.S. Attorney in Phoenix recused the entire office from handling the matter. The Justice Department in Washington, D.C. then appointed the U.S. Attorney's Office in Los Angeles as special prosecutors to handle the RTC referral.

Thereafter, prosecutors from Los Angeles began commuting to Phoenix on a regular basis to interview witnesses and investigate the RTC matter. As noted previously, the government ultimately concluded that no charges related to the RTC referral on Southwest Savings were appropriate.

Instead of dropping the investigation at that time, prosecutors simply shifted the focus of the investigation to an examination of Fife Symington's real estate development activities dating all the way back to the 1970s. In particular, prosecutors examined Mr. Symington's personal financial statements that he prepared and submitted to lenders who loaned money to the real estate partnerships that were formed to develop each new real estate project. The prosecutors compared the financial statements to Mr. Symington's personal tax returns in an attempt to find discrepancies between the two.

This phase of the investigation went on for several more years. Fife Symington cooperated fully throughout, producing millions of pages of documents from the 20 or so real estate projects he developed. He also testified under oath, answering all the prosecutors' questions. He testified truthfully, and the government never alleged any false statement in his testimony.

After several years, it was clear that the special prosecutors from Los Angeles and the investigators had so much time invested in the investigation that they would bring some charge to justify the resources they had expended. However, they faced a major hurdle in the form of Mr. Symington's accounting firm, Coopers & Lybrand.

### **III. The Role of Coopers & Lybrand**

The national accounting firm of Coopers & Lybrand was Fife Symington's regular accounting firm. They prepared his personal tax returns and the returns of the real estate partnerships. They had access to all his personal and business financial records. For three years, Coopers & Lybrand also examined Fife Symington's personal financial statements in order to satisfy requirements of the lenders who were receiving these financial statements.

Thus it became clear to the federal prosecutors that any charges they might bring against Mr. Symington relating to the personal financial statements would be difficult to sustain in light of his reliance on his accountants. The prosecutors' response to this situation was to investigate the accountants. They subpoenaed all of Coopers & Lybrand's records and called them as witnesses before the grand jury. They eventually threatened to indict the accounting firm and a senior company official, which would have dealt a very serious blow to the firm, preventing it from doing any work for the federal government. To avoid indictment, they required Coopers & Lybrand to pay a large settlement relating to a state contract they had won, and issue a press release that was very critical of their client, Fife Symington. The press release was timed for

release shortly before Mr. Symington's trial and was designed to poison the potential jury pool against him. In fact, the press release caused a great deal of harm to Mr. Symington, as it appeared that his own accounting firm was turning against him.

The government eventually did indict John Yeoman, who was the Coopers' partner responsible for the Symington account. The indictment did not concern the accounting work done for Symington. Rather, the prosecutors brought a fraud charge relating to a contract that Coopers & Lybrand won from the State of Arizona. Also indicted was George Lecke, who worked on the State Commission that awarded the contract. Lecke was in poor health at the time, as he had been undergoing treatment for cancer. Nevertheless, Lecke went to trial and was acquitted of all charges. He died a year after his trial. Before John Yeoman went to trial, he died in a tragic automobile accident that was caused, at least in part, by alcohol consumption that increased in amount after his indictment.

Fife Symington was indicted shortly after John Yeoman died. The government knew that his accountant was no longer available as a favorable defense witness. When Mr. Symington's trial took place in 1997, the witnesses from Coopers & Lybrand who testified for the government knew that their professional careers were at stake. They testified favorably to the government, creating an inaccurate impression that Fife Symington had misled his own accountants, when in fact they knew his financial condition better than he did.

After the Symington trial and while the case was on appeal, the Arizona State Board of Accountancy began an investigation of the services that Coopers & Lybrand provided to Mr. Symington and its role and activities in his case. At that time, the truth finally came out, i.e., Coopers witnesses recanted much of their trial testimony and revealed the enormous pressure they were under from the federal prosecutors. Coopers acknowledged that the scathing press

release they issued about Fife Symington was virtually written by the prosecutor. If the Symington case were ever re-tried after the Court of Appeals threw out the initial conviction, all the new favorable evidence regarding Coopers & Lybrand would have been presented.

#### **IV. The Charges Against Fife Symington**

The government's indictment against Fife Symington contained no allegation that any of the over \$200 million provided by lenders to develop his real estate projects was misappropriated. There would have been no basis for such an allegation, as all projects were completed on budget and no funds were misused. Instead, the government brought a very technical accounting case, presenting their view of the proper valuation of the real estate projects during a real estate depression, i.e., whether the values of the real estate projects as represented on the financial statements were accurate and whether Mr. Symington's share of each project was also accurate. Thus the trial was essentially an audit in the courtroom, focusing on the details of how commercial real estate should be valued. Of course, Fife Symington no longer had the assistance of his long-time accountant, John Yeoman. Mr. Symington testified in his own defense, and was questioned by prosecutors for five days about numerous things, including items on his resume that were 25 or more years old. He defended his real estate values on his financial statements as his best estimate of the value of each project, explained the basis of his initial valuation (which was usually when the project was being built – an inherently subjective process since a building under construction generates no cash flow) and explained how he generally carried the same valuation from year to year on his financial statements. His personal financial statements were not the basis of the real estate lenders' willingness to loan money for a project. Rather, the lenders secured their loans with the project itself, usually holding the first deed of trust. Fife Symington's role was the "sweat equity" partner, who put the deal together. He was not the financial partner and his personal financial statements, which usually reflected a

relatively small ownership interest, were not material to a lender in deciding whether to invest in a commercial real estate project. Therefore, after presenting this defense, it was not surprising that when the case was submitted to the jury, there was a lack of unanimity on a verdict, and even after a pro-defense juror was removed (at the government's request) the jury only returned guilty verdicts on six of 23 counts.

## **V. The Extortion Charge**

The government attempted to make the case into something more than the accounting dispute that it was, by including an extortion count that was completely baseless. Extortion involves a public official using, or threatening to use, his official office to cause harm to someone else for his own private gain. The government charged that Fife Symington attempted to extort some concessions from the lender on one of his projects by threatening, as Governor, to not renew the office lease that Arizona State University had for the building in question. The lender was a group of union pension funds that had its own political agenda in pressing this charge with the prosecutors. The prosecutors saw this as a chance to sensationalize the case, by attempting to implicate Fife Symington in criminal conduct in his role as Governor. Without this charge, the case was otherwise a very technical accounting case.

The hurdle that the prosecutors faced here was that one of Mr. Symington's lawyers attended the meeting in question with the pension fund lender, when the alleged threatening comment was made. The prosecutors knew that the lawyer was prepared to testify that nothing even remotely approaching a threat was made by Mr. Symington. In order to eliminate him as a potential defense witness, the prosecutors began to investigate the lawyer and his law firm. Although there was no basis for any charges, the prosecutors threatened to charge the law firm, making the lawyer a very reluctant defense witness. The government succeeded and the lawyer did not testify at trial.

However, the jury saw through this poor excuse for an extortion charge, and unanimously voted not guilty on it in the first five minutes of their deliberations.

## **VI. The Jury Deliberations**

After four months of presenting evidence, the case was submitted to the jury. On the sixth day of jury deliberations, some jurors sent a note to the judge complaining about a fellow juror. The judge then questioned each juror individually and it became clear that the juror in question saw serious flaws in the government's case. As she stated, the problem the other jurors had with her was that she "can't agree" with the other jurors all the time. She said she was "looking for more in the case." The other jurors complained to the court that with her on the jury they would not be able to reach a unanimous verdict. As soon as they heard this, the prosecutors moved to have the juror dismissed, arguing that she was not able to deliberate. Mr. Symington's lawyers strongly objected, arguing that the situation presented a "classic disagreement" where some jurors did not agree with another juror, which is not a ground for dismissal. However, the court granted the government's motion and dismissed the juror. An alternative juror, who had been released from the jury after the closing arguments days earlier, was recalled and placed on the jury. The jury was then told to begin deliberations anew. Three weeks later, they returned their verdict, rejecting most of the government's case, but convicting on six of the 23 counts.

On appeal, the court of appeals reversed the conviction, finding that the dismissal of the juror was a serious error because there was a reasonable possibility that the jurors' complaints about the dismissed juror were simply disagreements over the evidence. Mr. Symington was entitled to that juror's vote, but he was denied it because the prosecutors viewed that juror as an obstacle to their long-sought conviction. Thus Governor Symington lost his public office by a jury trial that was fundamentally flawed. He suffered many of the adverse consequences of a

criminal conviction, including the loss of the Governor's Office, without being granted a fair trial. Fortunately, President Clinton recognized these facts and granted the presidential pardon.

## **VII. Aftermath**

Despite this 10-year ordeal, Fife Symington has moved on. After he left office he went back to school for 18 months to learn the restaurant business. He obtained a degree in culinary arts and restaurant management. He founded the Arizona Culinary Institute, which now graduates 200 students per year. He is involved in eight different restaurants in various capacities.

Fife Symington is also Chairman of the Board of Hummingbird Defense Systems, which is engaged in homeland defense work. He is also the co-founder of Strategic Visions, a political consulting and crisis management company.

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