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# DISGRACED SENATOR BACK IN U.S. LEGAL JEOPARDY

The Justice Department is highly likely to reopen its criminal investigation of John Ensign based on new evidence in more than 1,000 confidential emails.

BY MURRAY WAAS

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**I**T WAS ONE OF THE most high-profile investigations of a senator in years: John Ensign of Nevada had conducted an affair with his campaign treasurer, Cynthia Hampton, the wife of his closest friend and chief of staff. His family later paid \$96,000

to the couple, and suspicions arose that the payment amounted to hush money in the form of an illegal campaign contribution.

Ensign's once promising political career was over because of the disclosures, but he was no longer in any legal jeopardy.

The Justice Department had informed him in December 2010 that he would not face criminal charges. An aggressive Senate

Ethics Committee investigation was still pursuing Ensign, but that probe would be shelved once he resigned.

As Ensign was preparing to leave the Senate, investigators for the Senate Ethics Committee were attempting at the 11th hour to obtain a trove of email correspondence concerning the payments to the Hamptons. The trouble for the committee was that



**INNER CIRCLE:** In 2006, John Ensign was a rising star in the Republican Party. Here he stands at the back (second from right) as the then new Senate Republican leader Mitch McConnell (R-KY) speaks alongside other new members of his leadership team on Capitol Hill in Washington November 15, 2006. **REUTERS/JASON REED**

Ensign's attorneys insisted the emails were privileged.

The committee had unsuccessfully battled for 18 months to obtain them.

A Reuters examination of the Ensign probe shows the case then took a sudden turn: Ensign reversed course and handed over more than 1,000 sensitive emails between himself and his attorneys and other top advisers. The decision "puzzled" congressional investigators who thought they would never see the emails and baffled even most of his own closest advisers, say people close to the case.

That decision would also reverse Ensign's legal fate: even after he resigned on May 3, the Senate Ethics Committee continued its probe and concluded he violated federal criminal laws and should have been expelled from the Senate.

The Justice Department, which had cleared Ensign, is now almost certain to reopen its criminal investigation, attorneys close to the case told Reuters.

The unexpected last minute developments in the Ensign case raise serious questions as to why the Justice Department closed its file on the Senator without first obtaining the crucial emails later seen by the Senate.

**"THIS IS NOT THE SAME AS AGREEING THAT HE DID OR INTENDED TO VIOLATE ANY LAWS OR RULES."**

A senior Justice Department official told Reuters that the decision to publicly say that they were no longer pursuing Ensign displayed bad judgment, harmed the investigation, and will likely leave lingering effects on the Department's reputation in prosecuting public officials.

The Department is already smarting after the dismissal of charges against the late Senator Ted Stevens, a Republican from Alaska, after disclosures of prosecutorial misconduct.

As it happens, the Justice Department is also preparing to charge another former senator, Democrat John Edwards, over allegations he illegally spent campaign contributions to hide his affair with Rielle Hunter, according to legal sources. His attorney said on Wednesday Edwards did not break the law.

This account of the Ensign case is based on interviews with attorneys familiar with the probe and on a Reuters review of several of the more than 1,000 previously undisclosed emails connected to the case, as well as descriptions of the contents of many others. People familiar with the probe say these documents could potentially be presented as evidence of campaign finance law violations and obstruction of justice.

No charges have been filed, and it isn't clear whether prosecutors will do so.

Ensign, in a statement issued through his lawyers, said he had apologized for his conduct "but this is not the same as agreeing that he did or intended to violate any laws or rules."

#### SEQUENCE OF EVENTS

IN 2008, ENSIGN WAS a rising star in the Republican Party. He had been elected chairman of the National Republican Senatorial Committee in 2006 and there was even talk of a presidential run.

That came to end with the discovery of an extramarital affair he had with his campaign treasurer Cynthia Hampton between late 2007 and summer 2008. Her husband, Doug Hampton, was Ensign's closest friend and

chief of staff. The Justice Department and Senate ethics probes focused on \$96,000 paid by Ensign's parents to the Hamptons.

In mid-June, 2009, Ensign was preparing to hold a press conference to address reports of the affair.

In two drafts of statements that Ensign himself prepared for the press, he referred to payments to the Hamptons as "severance pay." One of Ensign's own attorneys, Chris Gober, wrote in an email on June 16 to the senator's communications director, Rebecca Fisher, that the references to severance "raise a host of potential criminal issues for the Senator."

In the same email, which was quoted in part by the May 12 Senate committee report and reviewed in its entirety by Reuters, Gober wrote, "if this statement doesn't get the attention of the U.S. Attorney's Office, then nothing will."

Federal campaign finance laws prohibit campaign contributions of more than \$2,300 by individuals to political campaigns, and require the prompt reporting of any contributions to the Federal Election Commission.

If the \$96,000 from Ensign's parents was used to pay "severance" to the Cynthia Hampton for her work as a campaign aide, it would be considered campaign contributions, which would be illegal because the payments both exceeded the legal limit and were not disclosed to the Federal Election Commission.

In a sworn deposition to investigators for the Ethics Committee, Fisher said she relayed the legal advice in Gober's email to Ensign.

The day after Ensign's public statement which omitted the word severance, his chief of staff, John Lopez, was still concerned that the Senator would continue to refer to the payments to the Hamptons as severance. Lopez emailed Ensign that he should speak with his attorneys before "we start answering questions about 'severance.'"

Lopez has since told investigators that the payments were indeed severance, and Ensign only changed his story about the nature of the payments to evade potential criminal prosecution, according to people close to the case. Lopez, through his attorney, declined to comment.

After the key email from Gober, Ensign only referred to the \$96,000 as a gift from his elderly parents to help the Hamptons get back on their feet. Prior to receiving that email, Ensign had referred to them to several of his staff, in his draft payments to the press, and in his own diary as "severance."

A portion of the Gober email was quoted in

the Senate Ethics Committee report, the only one of the more than a thousand made public. Among the others are emails that describe specific attempts by Ensign's legal team and his staff to discredit Doug Hampton's claims that the payments to him and his wife were "severance."

Based in part on that email and others never reviewed by the Justice Department, the Senate report alleged that Ensign violated several federal criminal laws and engaged in conduct bringing "public discredit to the Senate."

### BURDEN OF PROOF

THE JUSTICE DEPARTMENT had also investigated the \$96,000 payment, but concluded at the time it did not have evidence to charge Ensign. But prosecutors and FBI agents working on the case never saw the crucial June 16, 2009 email.

The Justice Department and Senate also uncovered evidence that Ensign personally deleted from his computer a draft of his statement to the press in which he described the payments to the Hamptons as severance. The deleted document was recovered and obtained by federal investigators, who believed that the attempt to delete it was a potential obstruction of justice. However they felt at the time they fell just short of evidence of criminal intent by Ensign, according to the sources close to the case.



Prosecutors also investigated whether Ensign committed perjury when he claimed in a sworn affidavit to the Federal Election Commission, two months after Gober's warning, that the payments made were not severance but instead gifts from Ensign's parents.

Perjury and obstruction cases are often difficult to bring because a prosecutor must demonstrate motivation to destroy evidence or lie. Dan Richman, a former federal prosecutor who now teaches law at Columbia University, says: "In many cases, you almost have to literally take the jury inside a defendant's head to demonstrate their intent." The crucial email from Gober, according to attorneys involved in the case, may do exactly that in that it demonstrates

that Ensign was warned by his own attorney that such severance payments to the Hamptons would be illegal campaign contributions, and that Ensign took steps to conceal them from that point on.

The Senate Ethics Committee also alleged in its report that Ensign improperly pressured Nevada businessmen who had official matters before his office to hire Doug Hampton. Doug Hampton was charged earlier this year with violating a one-year ban on former government employees lobbying government agencies for which they worked. He has pleaded not guilty.

### WHY HAND OVER THE EMAILS?

EXTRAORDINARILY, THE REASON that Ensign faces the renewed legal jeopardy is because of his own decision to turn over the emails to the Senate before he resigned.

Until as late as February, his legal team had argued they were protected from disclosure by the attorney-client privilege. According to records reviewed by Reuters, Ensign's attorneys also argued the emails were protected by the "work product doctrine" - a legal protection which says one side in a legal case doesn't have to turn over materials prepared by attorneys and people working with them in anticipation of litigation.

Attorney-client privilege is usually inviolate with few exceptions, and prosecutors appear to have accepted the assertion of the defense team (including a former U.S. attorney) that the emails in question were privileged.

However, several of Ensign's attorneys sent emails about the case not only to Ensign, but also to two of his top aides - chief of staff John Lopez and director of communications Rebecca Fisher - as well as a small number of other key aides.

Because the emails were sent to Ensign's aides, the Senate Ethics Committee asserted that the attorney-client privilege did not apply and eventually threatened to sue to see them.

Legal precedent and case law on the issue is ambiguous and unresolved. Legal wrangling over the issue would almost certainly have been protracted and it's unclear which side might have prevailed.

Why Ensign turned the material over remains a mystery to many involved in the case, including his closest advisers.

His Senate career was over because of the extramarital affair and his efforts to cover it up. His resignation was inevitable, he himself acknowledged to aides.

The Justice Department had informed him in December he was in the clear, and

the Federal Election Commission had also turned down a request by an advocacy group to investigate the \$96,000.

By February, Ensign had only one more bullet to dodge. The Senate Ethics Committee was still aggressively investigating Ensign's conduct and had stepped up its efforts by hiring a special counsel, Carol Elder Bruce, to lead the probe.

If Ensign had resigned late last year or earlier this year without handing over the emails, the committee would likely have shelved its investigation.

But despite all that, he handed over the emails.

Ensign said he did so because he had done nothing wrong, thus had nothing to fear, and that his cooperation demonstrated his good will in bringing the investigation to a conclusion, according to a person close to the former senator.

Committee investigators, however, said the emails demonstrated new and distressing evidence of wrongdoing.

### CAN PROSECUTORS MAKE A CASE?

AFTER THE SENATE REPORT, Laura Sweeney, a spokeswoman for the Department of Justice, told Reuters: "We take all referrals of potential crimes seriously. We intend to examine thoroughly the information provided and take any necessary and appropriate steps based on our review."

One possible complication for U.S. prosecutors in using the emails as evidence is whether Ensign's actions were protected by the "speech or debate" clause of the U.S. Constitution that insulates lawmakers from prosecution for official acts.

The provision has been viewed fairly broadly in the courts but it is unclear whether emails between Ensign, his attorneys and members of his staff about the Hampton scandal could be considered "within the legislative sphere."

"Members of Congress tend to interpret that provision broadly, some have said that they can't be prosecuted for basically anything that they say while they're in office," said Steve Nickelsburg, a partner with Clifford

**END OF THE ROAD:** U.S. Senator John Ensign (R-NV) was accompanied by his wife Darlene as he announced he would not seek another term in 2012 during a news conference in Las Vegas, Nevada March 7, 2011. **REUTERS/LAS VEGAS SUN/STEVE MARCUS**



Chance who has focused on government investigations and white collar matters.

However, if Ensign withheld those emails about lobbying and Hampton for that reason, "I think that's stretching it awfully far," he said.

### RESIGNATION

ENSIGN OFFICIALLY LEFT the Senate on May 3, the day before he was due to give sworn deposition to the Senate committee.

If he had continued to assert under oath during the deposition that the payments to the Hamptons were gifts, he would have placed himself in further legal jeopardy by sticking with that story. If, on the other hand, Ensign were to admit the payments were severance, that would amount to an admission they in fact were illegal campaign contributions and that he had earlier lied about it.

By resigning in May, Ensign not only avoided giving a deposition, but also hoped that the Senate Ethics Committee would end its investigation, leaving him in the clear.

But by then it was too late.

A source who spoke to Senator Barbara Boxer, the Ethics committee chairman, said that she was "upset that Ensign was resigning at the last minute, to evade giving a deposition, and also to foreclose any formal findings by the committee."

The committee worked overtime to complete its report, and Boxer took to the Senate floor to say the committee had decided unanimously to recommend Ensign's expulsion from the Senate.

In a farewell speech and apology, given on May 2 to a practically empty chamber - except for the presiding senator, Chris Coons, who was required to be there - Ensign said that having been awarded such a powerful position, he had grown "blind to how arrogant and self-centered that I had become."

He also said: "Often times, the more power and prestige a person achieves, the more arrogant a person can become." (This story is published without a dateline to protect the identity of sources)

(Additional reporting by Brian Grow and Jeremy Pelofsky; Editing by Claudia Parsons and Michael Williams)

**COVER PHOTO:** U.S. Senator John Ensign (R-NV) announces he will not seek another term in 2012 during a news conference at the Lloyd George Federal Building in Las Vegas, Nevada March 7, 2011. **REUTERS/LAS VEGAS SUN/STEVE MARCUS**

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