

# WHAT'S IN A NAME?—THE TALE OF LOUIS WOLFSON'S AFFIRMED

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*Why would someone choose to name a thoroughbred racehorse “Affirmed” after his conviction for federal securities laws violations had been affirmed on appeal? This inquiry is the basis for exploring the enigmatic life and spectacular career of Louis E. Wolfson, owner and breeder of the last winner of horse racing’s Triple Crown.*

*Perhaps best known as the central figure in the scandal that resulted in the forced resignation of Supreme Court Justice Abe Fortas, Wolfson left a sizable footprint on corporate legal history. He has been described as the original corporate raider, the inventor of the market for corporate control through the hostile tender offer, and the founder of the first modern conglomerate. Principal cases involving Wolfson appear in virtually all Corporations and Securities Regulation casebooks. Long the subject of academic study, commentary, and controversy, these decisions continue to be cited as authority for the partial indemnification of officers and directors, and the proposition that controlling persons expose themselves to criminal liability for effecting a distribution of unregistered shares through a broker.*

## I. INTRODUCTION

On the first Saturday in May of each year, upwards of 150,000 people converge on Churchill Downs in Louisville for the Kentucky Derby,<sup>1</sup> known as “the fastest two minutes in sports.”<sup>2</sup> An audience of

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1. *Kentucky Derby Draws Largest TV Audience Since 1989*, BUS. FIRST (May 4, 2010, 4:49 PM EDT), <http://www.bizjournals.com/louisville/stories/2010/05/03/daily29.html>. Because Churchill Downs has a seating capacity of 52,000, the overwhelming majority of them will be lucky to catch a glimpse of the race from the packed infield. *History of Churchill Downs*, CHURCHILL

sixteen million watches the Run for the Roses on television.<sup>3</sup> They are hoping to witness the next three-year-old thoroughbred who, in five weeks' time, will achieve one of sport's greatest accomplishments. It could happen again some year.<sup>4</sup> But it has not happened since 1978, when Louis E. Wolfson's Affirmed became the eleventh and last winner of horse racing's Triple Crown.<sup>5</sup>

By the time Affirmed had won the Triple Crown, his owner had won and lost fights for corporate control of such household names as Montgomery Ward and American Motors,<sup>6</sup> established the first modern conglomerate,<sup>7</sup> been convicted of, and served time in prison for, securities law violations,<sup>8</sup> caused a justice of the Supreme Court of the United States to resign in disgrace for the only time in history<sup>9</sup> (not to mention the arrest of television personality Larry King),<sup>10</sup> and enriched a legion of corporate and white collar criminal defense lawyers. He is said to have invented the hostile tender offer and activated the modern market for corporate control.<sup>11</sup> In almost every Corporations and

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DOWNES, <http://www.churchilldowns.com/about/history> (last visited July 20, 2011).

2. Amalie Drury, *They're Off! Chicago Bars Prep for the Fastest Two Minutes in Sports*, CHICAGONOW (Apr. 30, 2010, 1:14 PM), <http://www.chicagonow.com/blogs/chicago-magazine-the-chaser/2010/04/and-theyre-off-chicago-bars-prep-for-the-fastest-two-minutes-in-sports.html>. Churchill Downs perpetuates this slogan in its marketing although it has not been true since the advent of motor sport. *Id.*

3. *Kentucky Derby Draws Largest TV Audience Since 1989*, *supra* note 1.

4. *Triple Crown Winners*, TRIPLE CROWN RACES, <http://www.triplecrownraces.com/triplecrownwinners.php> (last visited July 20, 2011). The current thirty-three-year gap is by far the longest in Triple Crown history. *Id.*

5. *Id.* The Kentucky Derby, run over 1-1/4 miles, is the first jewel in the Triple Crown, the other two being the Preakness Stakes ran two weeks later over a 1-3/16 mile course at Pimlico Race Track in Baltimore, and the Belmont Stakes ran three weeks thereafter over a 1-1/2 mile course at Belmont Park in New York. ESPN, *Triple Crown Tracks Information*, THE VISA TRIPLE CROWN <http://espn.go.com/horse/triplecrown04/s/tracks.html> (last visited July 20, 2011); *The Triple Crown*, KENTUCKY-DERBY.ORG, <http://www.kentucky-derby.org/triple-crown.html> (last visited July 20, 2011).

6. Henry G. Manne, *The Original Corporate Raider*, WALL ST. J., Jan. 18, 2008, at A12. *See Wolfson Steps Out*, TIME, Feb. 6, 1956, at 86, 86 (stating that Wolfson had resigned as a director of Montgomery Ward & Co. a week before the article's publishing).

7. ROBERT SOBEL, DANGEROUS DREAMERS 16 (1993).

8. Manne, *supra* note 6. Wolfson was also found "guilty of one of the government's all-purpose, 'perjury-and-obstruction-of-justice' charges." *Id.*

9. KIRKPATRICK SALE, POWER SHIFT 181 (1975). Yale law professor Alexander Bickel described Justice Abe Fortas's acceptance of money from Wolfson, then under investigation for securities fraud, as "very probably the gravest known lapse in the personal ethics of a Justice of the Supreme Court in the history of the institution." *Id.* Wolfson may also have been responsible for President Lyndon B. Johnson's firing of Attorney General Nicholas Katzenbach in 1966 for refusing to block Wolfson's indictment and subsequent conviction. James Freeman, Op-Ed., *The World's District Attorney*, WALL ST. J., Dec. 26-27, 2009, at A9.

10. *See State v. King*, 275 So. 2d 274, 275, 277 (Fla. Dist. Ct. App. 1973).

11. "Wolfson's contribution to human welfare far exceeded the total value of all private

Securities Regulation casebook, principal cases bear his name.<sup>12</sup> This Article explores the meaning behind the name of Louis Wolfson's most successful racehorse, Affirmed, and its connections to twentieth-century American corporate legal history.<sup>13</sup>

Wolfson's complex life and spectacular career are described in Part II of the Article. Part III examines Wolfson's sizable footprint in American corporate legal history. He is the subject of leading cases on the indemnification of officers and directors, and the requirement that controlling persons in a corporation cannot dispose of their shares without registration. Wolfson's central role in the resignation of Justice Abe Fortas is discussed in Part IV. Fascinating new details continue to emerge more than four decades after the scandal.<sup>14</sup> Part V describes the life and extraordinary career of Affirmed, arguably the best of the eleven winners of the Triple Crown.<sup>15</sup> Part VI explores various theories for the name, Affirmed. It includes explanations not previously offered based on conversations and correspondence with attorneys who litigated on behalf of and in opposition to Wolfson, and with equine historians who knew the principals.

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philanthropy in history. He invented the modern hostile tender offer. This invention, which activated and energized the market for corporate control, was the primary cause of the revolutionary restructuring of American industry in the 1970s and 1980s, and the ensuing economic boom." Manne, *supra* note 6. See Larry Ribstein, *Who Invented the Market for Corporate Control?*, IDEOBLOG (Jan. 18, 2008, 9:00 AM), <http://busmovie.typepad.com/ideoblog/2008/01/who-invented-th.html>.

12. In a bizarre coincidence, Louis E. Wolfson figures prominently in a leading case in the law of closely-held corporations, *Smith v. Atlantic Props., Inc.*, 422 N.E.2d 798 (Mass. App. Ct. 1981). Because the case arose out of the affairs of Louis E. Wolfson's charitable foundation, it was plausible to assume they were the same person. *Id.* Multiple editions of the teacher's manual accompanying one of the most widely adopted Corporations casebooks perpetuated this misinformation, which was likely passed along inadvertently to thousands of law students. See WILLIAM A. KLEIN ET AL., *TEACHER'S MANUAL FOR BUSINESS ASSOCIATIONS* 405-06 (7th ed. 2009). One of the authors acknowledges the error on his blog, noting that this Louis E. Wolfson was in fact a Massachusetts medical doctor. Stephen Bainbridge, *Brodie v. Jordan and Wilkes v. Springside Nursing Home*, PROFESSORBAINBRIDGE.COM (Nov. 25, 2009, 2:52 PM), <http://professorbainbridge.com/professorbainbridge.com/2009/11/brodie-v-jordan-and-wilkes-v-springside-nursing-home.html>.

13. In race-track parlance, a horse's "connections" consist of the principal humans involved in its ownership and training, and its jockey.

14. See *infra* notes 156 and 232.

15. "There is validity to the argument that Affirmed may be the best of the 11 Triple Crown winners because he thrice defeated a horse that was almost his equal while ten others were clearly the overwhelmingly dominant members of their generations." Paul Moran, *Rivalry Sprang from Kentucky Mud in '89*, ESPN.COM (Apr. 30, 2009, 4:34 PM), [http://sports.espn.go.com/sports/horse/triplecrown09/columns/story?columnist=moran\\_paul&id=4001289](http://sports.espn.go.com/sports/horse/triplecrown09/columns/story?columnist=moran_paul&id=4001289).

## II. THE ORIGINAL CORPORATE RAIDER

Perhaps the result of his capacity for litigiousness during the first half of his life,<sup>16</sup> and publicity shyness to the point of reclusiveness thereafter,<sup>17</sup> no biography of Wolfson was written during his lifetime, or since his death in 2007.<sup>18</sup> The story of Wolfson's rags-to-riches (and back again) life and career may be pieced together through a combination of published opinions, media accounts, and sources about his contemporaries.<sup>19</sup>

Louis Elwood Wolfson was born in St. Louis, Missouri on January 28, 1912.<sup>20</sup> The following year, the family moved to Jacksonville, Florida, where his father went into the salvage business.<sup>21</sup> “[A] four-sport star athlete in high school,”<sup>22</sup> Wolfson attended the University of Georgia on a football scholarship.<sup>23</sup> As a sophomore, Wolfson started at right end,<sup>24</sup> but suffered a career-ending shoulder injury in the Yale Bowl in Fall 1931 tackling Yale football legend Albie Booth while returning the second-half kick-off.<sup>25</sup> Wolfson would remain at Georgia

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16. Wolfson sued *The Washington Post* for \$30 million for defamation after the paper criticized his chairmanship of the Washington, D.C. public transportation system. *See infra* text accompanying notes 40-56. The *Post* contributed \$25,000 to a Wolfson charity to avoid protracted litigation. *Charity Begins . . .*, TIME, Nov. 10, 1958, at 68, 68. *See generally* Wolfson v. Hous. Post Co., 441 F.2d 735 (5th Cir. 1971) (per curiam) (dismissing a lawsuit brought by the litigious Wolfson).

17. *A Nice, Quiet Life*, TIME, May 29, 1978, at 60, 60. Wolfson was described by friends as “a quiet man, a private man, one who avoids the limelight of public appearances.” *Id.*

18. “LEW,” a documentary based on Wolfson's life, was released in March 2010 by Perilune Pictures. Margie Lindsay, *Film Highlights Life of First US Corporate Raider*, HEDGE FUNDS REV. (Mar. 7, 2010), <http://www.hedgefundsreview.com/hedge-funds-review/news/1595273/film-highlights-life-us-corporate-raider>.

19. New information has emerged within the past few years as a result of the principals becoming more reflective, candid, or both in their retirement. *See infra* notes 156, 233, and 288.

20. Karen Read Wolfson, *Pop . . . A Very Rare Man*, WOLFSON CHILDS. HOSP. (Dec. 1992), <http://www.wolfsonchildrens.org/about-us/Documents/Pop.pdf>.

21. *Id.* Wolfson very likely inherited his instinctive entrepreneurship, capacity for hard work, and determination to succeed from his father. *See id.* Morris David Wolfson was a Lithuanian Jewish immigrant who escaped to the United States in 1896 at the age of seventeen to avoid conscription in the Russian army. *See id.* Before moving his family to Jacksonville, he worked in Baltimore as a clothes presser, and in St. Louis as an iceman and fruit peddler. *Id.*

22. TIMOTHY T. CAPPS, AFFIRMED AND ALYDAR: RACING'S GREATEST RIVALRY 14 (2007). Wolfson was an All-Southern end in football, and lettered in basketball, baseball, and track. Herbert Brean, *It's Easier to Make a Million Than a Hundred Thousand*, LIFE, Nov. 22, 1954, at 179, 185. He also boxed professionally in his teens “under the ring name ‘Kid Wolf.’” ROBERT SHOGAN, A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT 186 (1972).

23. Brean, *supra* note 22, at 185.

24. According to a source, Wolfson was described as a “salaried football player” for the University of Georgia. *Derby Choice Journal 2007 – 28th Edition*, INNISFREE FARM, <http://www.innisfree.org/2007.html> (last visited July 20, 2011).

25. Joe Hirsch, *Louis Wolfson at the Stable Door*, SPORTS ILLUSTRATED, Feb. 27, 1961, at 32,

another year, playing basketball and wrestling, before dropping out of college to help his father rebuild the family scrap metal business, M. Wolfson & Co., in Jacksonville that had been crippled by the Great Depression.<sup>26</sup>

In 1932, with \$10,000 (half borrowed from a wealthy Georgia football booster, Harold Hirsch, and the rest a loan against his father's life insurance policy),<sup>27</sup> Louis and his older brother, Sam, invested in a construction supply firm, Florida Pipe and Supply Co.<sup>28</sup> Younger brothers Sol, Cecil, and Nathan later joined the business as partners. Working eighteen to twenty-hour days loading trucks and selling pipe,<sup>29</sup> their sales grew from \$100,000 in the first year to \$4.5 million per year.<sup>30</sup> When World War II broke out, brothers Sam, Saul, and Cecil enlisted, but Wolfson was turned down because of his shoulder injury, which had never healed properly, and a bad kidney.<sup>31</sup>

Having discovered how under-valued scrap metal and building supplies could be bought and sold for a substantial profit, Wolfson realized that the skills developed in the junkyard might be transferable to something more lucrative and less strenuous.<sup>32</sup> He taught himself to scan corporate balance sheets and recognize under-performing assets.<sup>33</sup> Wolfson became known as "the Junkman" for his aptitude for identifying, acquiring, and liquidating undervalued businesses.<sup>34</sup>

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33. available at [http://sportsillustrated.cnn.com/vault/edb/reader.html?magID=SI&issueDate=19610227&mode=reader\\_vault](http://sportsillustrated.cnn.com/vault/edb/reader.html?magID=SI&issueDate=19610227&mode=reader_vault). The injury, which left Wolfson with a steel plate in his shoulder, ended his ambition to pursue a career as a professional football player and coach, and made him ineligible for service in World War II. See 2 EDWARD L. BOWEN, LEGACIES OF THE TURF: A CENTURY OF GREAT THOROUGHBRED BREEDERS 205 (2004); Wolfson, *supra* note 20.

26. See BOWEN, *supra* note 25, at 205; CAPPS, *supra* note 22, at 15; Wolfson, *supra* note 20.

27. Wolfson, *supra* note 20.

28. *Id.*

29. BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 193 (1988). "In those days, there were no hours[.]" recalled brother Saul. "You worked morning to night, Saturday, Sunday, until you got the job done . . ." Wolfson, *supra* note 20.

30. William F. Reed, *A Front-Runner Launches a Comeback*, SPORTS ILLUSTRATED, June 5, 1978, at 71, 72, available at [http://sportsillustrated.cnn.com/vault/edb/reader.html?magID=SI&issueDate=19780605&mode=reader\\_vault](http://sportsillustrated.cnn.com/vault/edb/reader.html?magID=SI&issueDate=19780605&mode=reader_vault). According to family legend, Wolfson made his first "killing" when he bought plumbing supplies and fixtures for \$275 from the son of department store magnate J.C. Penney. Intended for Penney Farms, a retirement community for clergy whose construction was temporarily placed on hold by the Great Depression, the supplies were hauled by Wolfson to the family scrap metal yard, held until the price rose, and sold piecemeal for \$100,000. Jessie-Lynne Kerr, *Millionaire Excelled in Various Endeavors*, FLA. TIMES-UNION, Jan. 2, 2008, [http://jacksonville.com/tu-online/stories/010208/met\\_230808569.shtml](http://jacksonville.com/tu-online/stories/010208/met_230808569.shtml).

31. DIANA B. HENRIQUES, THE WHITE SHARKS OF WALL STREET 75 (2000).

32. See Brean, *supra* note 22 (describing the various business ventures the Wolfson brothers pursued under Wolfson's leadership).

33. See SOBEL, *supra* note 7, at 14.

34. ARTHUR L. LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY 86 (1998). "As a butcher might purchase a side of beef and carve it up into parts to be sold for a profit, he found

Wolfson played “the game of business . . . [as] aggressively as he had once played football,”<sup>35</sup> earning the reputation for being a “raider” decades before the term became commonplace in the corporate lexicon.<sup>36</sup> Wolfson was the successful bidder in 1946 for St. John’s Shipbuilding Co., a government-owned war-surplus shipyard in Jacksonville that he liquidated at a considerable profit.<sup>37</sup> In what became a recurring pattern, his St. John’s success was clouded by allegations of bribery, a congressional probe, and a grand jury investigation.<sup>38</sup> Wolfson parlayed the proceeds from the St. John’s liquidation into the 1947 purchase of a chain of movie theaters, and a second Florida surplus shipyard, Tampa Shipbuilding Co., which he also liquidated for a considerable profit.<sup>39</sup>

In 1949, Wolfson gained control of Capital Transit Co., the District of Columbia’s public transportation service, in what has been described as the first hostile tender offer.<sup>40</sup> Capital Transit at the time held \$6.7 million in cash and securities.<sup>41</sup> Wolfson acquired 46% of the shares for \$20 per share, for a total of about \$2.2 million.<sup>42</sup> Soon after taking control, Wolfson replaced almost all of senior management and the board, installing himself as chairman.<sup>43</sup>

Wolfson’s management of Capital Transit was seen as a classic case of “milking” by an absentee owner, a characterization that Wolfson did not dispute.<sup>44</sup> Instead of investing money in needed new equipment, he caused the company’s surplus cash and subsequent earnings to be paid in dividends.<sup>45</sup> Capital Transit made multiple requests for fare increases while bus and streetcar ridership declined, and costs for labor and fuel climbed.<sup>46</sup> According to one newspaper editorial, “[h]is tactics,

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properties that could be purchased at low prices, and then, disassembled, resold for a profit, or managed into prosperity.” SOBEL, *supra* note 7, at 14.

35. HENRIQUES, *supra* note 31, at 75.

36. *See Woe for Wolfson*, TIME, July 7, 1958, at 65, 65.

37. HENRIQUES, *supra* note 31, at 75.

38. *Id.* Wolfson took advantage of a mistake by the government, which inadvertently omitted a requirement that the winning bidder operate the shipyard and not merely dismantle it. *Id.*

39. *See Florida’s Big Dealer*, TIME, Feb. 9, 1953, at 86, 86, 88. Wolfson’s total profit on the two shipyards was \$10 million. *A Nice, Quiet Life*, *supra* note 17, at 62.

40. Henry G. Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231, 239 n.23; Manne, *supra* note 6.

41. SOBEL, *supra* note 7, at 15.

42. *Id.* at 16.

43. *Id.*

44. *Wolfson at Work*, TIME, Oct. 25, 1954, at 82, 82. At a 1954 press conference announcing his plans to seek control of Montgomery Ward & Co., Wolfson admitted to milking Capital Transit, justifying his conduct on the basis of it being in a regulated industry. *Id.*

45. *See Florida’s Big Dealer*, *supra* note 39, at 88.

46. HENRIQUES, *supra* note 31, at 171; SOBEL, *supra* note 7, at 21.

indeed the whole Wolfson operation of a once-sound company, have been a hark-back to the robber baron days of the last century.”<sup>47</sup>

A midsummer bus strike that started on July 1, 1955 immobilized Washington, D.C. for approximately seven weeks in the heat of summer.<sup>48</sup> As chairman of the Capital Transit board, Wolfson's presence was requested before a Senate subcommittee.<sup>49</sup> He could not be located.<sup>50</sup> In response to a subpoena, he sent a telegram.<sup>51</sup> Pandemonium erupted when Wolfson finally appeared on July 12.<sup>52</sup> During the course of his testimony, he engaged in a shouting match with committee members.<sup>53</sup> Wolfson expressed his philosophy that stockholders came first: “I believe in being liberal in dividends; I expect always to be.”<sup>54</sup> After the strike ended on July 30, Congress passed legislation making Capital Transit a public utility.<sup>55</sup> Although Wolfson got the last laugh, selling the company in 1956 for \$13.5 million,<sup>56</sup> his turbulent tenure as head of Capital Transit made Wolfson a high-visibility figure, and the subject of considerable animosity among officials in Washington.

The year 1949 also saw Wolfson engineer the successful acquisition of Merritt-Chapman & Scott (“MCS”), then a small marine salvage company, through one of the first proxy contests of the post-war period.<sup>57</sup> Ripe for take-over, MCS suffered from stodgy, internally divided management.<sup>58</sup> Together with his brothers, Wolfson accumulated more than 35% of MCS shares.<sup>59</sup> He formed an alliance with Hirsch and Co., a New York brokerage firm whose customers owned a large number of MCS shares.<sup>60</sup> By the end of the contest,

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47. *Charity Begins . . .*, *supra* note 16.

48. *See* HENRIQUES, *supra* note 31, at 172, 177.

49. *Id.* at 172-73.

50. *Id.* at 173.

51. *Id.* at 173-74. Capital Transit workers went out on strike after management refused to negotiate a new labor contract until Congress approved yet another fare increase. *See Strike Against Wolfson*, TIME, July 18, 1955, at 87, 87-88.

52. HENRIQUES, *supra* note 31, at 175.

53. SOBEL, *supra* note 7, at 21.

54. HENRIQUES, *supra* note 31, at 177.

55. *See id.*; SOBEL, *supra* note 7, at 21.

56. HENRIQUES, *supra* note 31, at 206-07.

57. SOBEL, *supra* note 7, at 14-15.

58. HENRIQUES, *supra* note 31, at 79. The common stock had a value below \$6 million at a time when the firm's net worth was at least \$8 million, including \$3.4 million in cash. SOBEL, *supra* note 7, at 14-15. “Management was old, weak, and unable to adjust to the postwar environment. Like many other men of their generation, they were unassertive, psychologically scarred by the Great Depression.” *Id.*

59. HENRIQUES, *supra* note 31, at 80.

60. *See id.* at 79-80.

Wolfson and his associates held thirteen of the twenty-one seats on the board of directors.<sup>61</sup>

As chairman of the board and chief executive officer from 1951 through 1969, Wolfson transformed MCS into the first modern conglomerate, acquiring businesses in such diverse industries as paint production, steel manufacturing, and money lending.<sup>62</sup> Although it may have seemed like a lack of coherent agenda to be randomly assembling businesses without regard to synergy, Wolfson was decades ahead of his time in conglomerating companies based solely on the rationale of their having unrealized values. An MCS subsidiary, New York Shipbuilding Corp., built the *Savannah*, the first nuclear-powered cargo ship, and the aircraft carrier *Kitty Hawk*.<sup>63</sup> Within six years under Wolfson's management, the value of MCS increased from \$8 million to \$132 million.<sup>64</sup> By the mid-1960s, MCS was 210 on the Fortune 500 list.<sup>65</sup>

In 1954, Wolfson announced his plan to seek control of Chicago-based Montgomery Ward & Co. ("Montgomery Ward"), the nation's oldest catalog retailer, by means of a proxy contest.<sup>66</sup> Like MCS, Montgomery Ward's management strategy appeared to Wolfson as overly conservative, to its stockholders' detriment.<sup>67</sup> Challenged by rival Sears, Roebuck and Co., Montgomery Ward was closing stores and cutting inventory.<sup>68</sup> Like Capital Transit, Montgomery Ward was hoarding \$300 million in cash and debt-free in anticipation of the next Great Depression, which octogenarian chairman Sewell Lee Avery feared was around the corner.<sup>69</sup>

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61. *Id.* at 80.

62. See MURPHY, *supra* note 29, at 193; SOBEL, *supra* note 7, at 16.

63. MURPHY, *supra* note 29, at 193.

64. *A Nice, Quiet Life*, *supra* note 17, at 62.

65. MURPHY, *supra* note 29, at 193. At its peak in 1956, MCS was ranked 92 on the list. *Fortune's 1956 Ranking of Merritt-Chapman & Scott*, CNN, [http://money.cnn.com/magazines/fortune/fortune500\\_archive/snapshots/1956/3327.html](http://money.cnn.com/magazines/fortune/fortune500_archive/snapshots/1956/3327.html) (last visited July 20, 2011).

66. HENRIQUES, *supra* note 31, at 149; SOBEL, *supra* note 7, at 17. "It was the business story of the year. Newspaper readers who earlier had no interest in such matters wondered just what it was Wolfson was attempting, why he was going about it in that way, and what it had to do with them. People who previously demonstrated little or no interest in the subject started reading the financial pages . . ." *Id.* at 19.

67. See HENRIQUES, *supra* note 31, at 149. "'Montgomery Ward, as it stands today, is a glaring and notorious example of private enterprise in reverse gear,'" Wolfson said in announcing his intentions at a press conference in August 1954. *Id.* at 151.

68. Dave, *A New Day for Wards*, PLEASANT FAMILY SHOPPING (Apr. 17, 2009, 12:54 PM), <http://pleasantfamilyshopping.blogspot.com/2009/04/new-day-for-wards.html>. "By 1955, as Fortune magazine later put it, 'Montgomery Ward was a very sick cat' . . ." *Id.*

69. HENRIQUES, *supra* note 31, at 149-50. "Avery awoke in the morning of postwar America on the wrong side of the bed." JAMES GRANT, *MONEY OF THE MIND: BORROWING AND LENDING IN AMERICA FROM THE CIVIL WAR TO MICHAEL MILKEN* 28 (1992). During the immediate postwar period, Avery was hardly alone in his belief in a strategy of accumulating cash reserves with a view

The struggle for control of Montgomery Ward was, according to *The New York Times*, “one of the fiercest battles in the history of corporate finance.”<sup>70</sup> Largely unregulated, “dangerous[,] and difficult” in the 1950s,<sup>71</sup> a proxy contest for control of a public corporation was clearly perceived by Wolfson as being in reality a campaign for the hearts and minds of its shareholders.<sup>72</sup> Montgomery Ward’s two thousand employees were enlisted to contact stockholders, asking them to vote with management.<sup>73</sup> Invoking his Capital Transit and Florida shipyards track record, Montgomery Ward management attacked Wolfson personally, describing him as an irresponsible raider seeking to loot the company.<sup>74</sup>

Wolfson sought to portray himself as a strong voice for stockholders.<sup>75</sup> He traveled to shareholders’ meetings in Florida, California, New York, Chicago, and Detroit.<sup>76</sup> Notwithstanding a public persona of “somewhat humorless intensity,”<sup>77</sup> Wolfson became a media celebrity.<sup>78</sup> Convinced that the low level of stock ownership in America

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to expansion if real estate and construction prices fell in a repeat of the Great Depression. SOBEL, *supra* note 7, at 17.

70. Martin Weiss, *United States Battles Won and Battles Lost*, MARKET ORACLE (May 28, 2007, 1:50 PM), <http://www.marketoracle.co.uk/Article1111.html>.

71. See SOBEL, *supra* note 7, at 18. “Wolfson was subjected to anonymous telephone calls threatening kidnapping, which were reported to federal authorities. For a while, FBI agents traveled with the Wolfson party.” *Id.* at 20. By the 1980s, as a result of the greater availability of credit, including junk bond financing, the hostile tender offer had almost completely replaced the proxy contest as the preferred means of acquiring corporate control. See *id.* at 17-18; Jonathan R. Macey, *The Politicization of American Corporate Governance*, 1 VA. L. & BUS. REV. 10, 28-29, 31 (2006).

72. See Leland Carling Whetten, *Recent Proxy Contests: A Study in Management-Stockholder Relations*, in *STUDIES IN BUS. & ECON.*, at 43-44 (Bureau of Bus. and Econ. Research, Sch. of Bus. Admin., Ga. State Coll. Bus. Admin., Bulletin No. 6, 1959). According to Wolfson, “Proxy contests are wholesome because similar to public elections they serve to focus attention on the stewardship of those holding and aspiring to office. They are a form of surgery sometimes necessary to affect the cure of corporate ills. Just as the cure for any physical condition must start with the patient himself, the cure for corporate ills must start with management.” *Id.*

73. *Near the Bell*, TIME, Apr. 4, 1955, at 86, 86.

74. See HENRIQUES, *supra* note 31, at 152-53.

75. In Wolfson’s own words following the Montgomery Ward proxy fight, “[S]hareholders will recognize that they are not voiceless and directors and executives will become aware of the power of the investor to hold management to account for their stewardship.” GRANT, *supra* note 69, at 35.

76. SOBEL, *supra* note 7, at 19. For dramatic images of proxy solicitation at stockholders’ meetings in various locales, see *Louis Wolfson Photos*, LIFE, <http://www.life.com/search/?type=images&q0=Louis+Wolfson> (last visited July 20, 2011).

77. HENRIQUES, *supra* note 31, at 74.

78. SOBEL, *supra* note 7, at 14. “Tall, strikingly handsome, with piercing eyes and a slow drawl,” Wolfson, together with his photogenic wife and children, attracted the attention of *Time*, *Look*, *Life*, the *Saturday Evening Post*, *Business Week*, and other mainstream publications. HENRIQUES, *supra* note 31, at 151; SOBEL, *supra* note 7, at 14. For images of the Wolfson family, see Gene Stevens, *There Will Never Be Another Like Lou Wolfson*, POST TIME USA, Feb. 2008, at

was the product of a lack of confidence in corporate management, he claimed to be on a mission to restore U.S. companies to their rightful owners, and thereby inspire more Americans to become stockholders.<sup>79</sup>

Because of staggered terms, only three of Montgomery Ward's nine directors were up for election each year.<sup>80</sup> Using cumulative voting, Wolfson might hope to achieve at most a minority voice on the board.<sup>81</sup> His solution to this problem was an audacious lawsuit challenging the constitutionality of the staggered board of directors.<sup>82</sup> A week before the annual meeting of stockholders, the Illinois Supreme Court held for Wolfson, ordering that all nine directors' seats be placed on the ballot for election.<sup>83</sup> Wolfson hailed the decision as "a tremendous victory for corporate democracy," and Montgomery Ward's stock rose on the news.<sup>84</sup>

The showdown took place on April 22 at the Medinah Temple, a Shrine auditorium on Chicago's North Side. The meeting was well attended and covered in detail by the press. The board tried to restrain the elderly Avery, but he would have none of it, insisting on personally answering questions. He appeared weary and confused, rambling at times, rarely responding directly. Wolfson was courteous, content to permit Avery to damage his credibility with this kind of performance. No one there could have failed to conclude that the chairman was ill-equipped to continue in office.<sup>85</sup>

Avery allowed the rumor to spread that, regardless of the outcome, he would resign as chairman following the election.<sup>86</sup> The retirement

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8, 38, available at <http://www.posttimeusa.com/Portals/16/v35%20number%202/PT%20Feb%2008%20%20WOLFSON4.pdf>. Wolfson's is believed to be the first photograph ever published in *The Wall Street Journal*. Interview by Kenneth Durr with Paul Windels, in N.Y.C., N.Y. (Sept. 18, 2007), at 17, available at [http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/oral-histories/windels\\_091807.pdf](http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/oral-histories/windels_091807.pdf).

79. HENRIQUES, *supra* note 31, at 149, 151.

80. *See id.* at 152.

81. *Id.*

82. *Wolfson v. Avery*, 126 N.E.2d 701, 703-04 (Ill. 1955).

83. *Id.* at 710-12 (holding the staggered election of directors unconstitutional as undermining the effectiveness of cumulative voting, which was mandatory at the time). Illinois's mandatory cumulative voting requirement was subsequently repealed. Jeffrey N. Gordon, *Institutions As Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, app. II at 190 (1994).

84. HENRIQUES, *supra* note 31, at 154.

85. SOBEL, *supra* note 7, at 20. Avery's daughter, a spectator to her father's alarming performance at the meeting, wept. *Defeat for Wolfson*, TIME, May 2, 1955, at 84, 84.

86. HENRIQUES, *supra* note 31, at 154. Avery resigned as chairman days after the meeting, although he remained on the board until his death in 1960. GRANT, *supra* note 69, at 18, 36. The day he announced his resignation, Montgomery Ward was the most active issue traded on the New York Stock Exchange. *Id.* at 36-37. As buy orders flooded in, trading in Montgomery Ward stock

rumor may have reassured enough stockholders that Wolfson received just 30% of the votes, entitling him to only three seats using cumulative voting.<sup>87</sup> The battle for control of Montgomery Ward cost Wolfson \$500,000 in proxy solicitation expenses.<sup>88</sup>

Wolfson followed his bid for Montgomery Ward by targeting American Motors Corp. (“AMC”).<sup>89</sup> This effort likewise was unsuccessful.<sup>90</sup> In the process, Wolfson shorted AMC stock by 137,000 shares, betting that the price would fall.<sup>91</sup> As AMC’s stock price rose under the leadership of George Romney, Wolfson faced the prospect of considerable losses covering his short position.<sup>92</sup>

In June 1958, Wolfson’s long-time confidante and investment adviser, Alexander Rittmaster, planted a false story with *The New York Times* that Wolfson was selling AMC shares, believing the stock to be fully valued.<sup>93</sup> (Wolfson had already sold his shares and was in fact short in the stock.) By this time, Wolfson had attracted the attention of government investigators by reason of the public fascination surrounding him during the Washington, D.C. transit strike and struggle for control of Montgomery Ward.<sup>94</sup> The Securities and Exchange Commission (“SEC”) accused Wolfson of using false information to drive down the price of AMC stock.<sup>95</sup> Claiming the short selling was done by an associate without his knowledge,<sup>96</sup> Wolfson settled the case without admitting wrongdoing, entering into a consent decree not to make any fraudulent statements about AMC stock or his holdings.<sup>97</sup>

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was suspended for an hour until the balance between buy and sell orders could be restored. *Id.* at 36. Avery’s successor, Vice President John Barr, instituted most of the changes urged by Wolfson in his proxy fight. *See Wolfson Steps Out*, *supra* note 6, at 86. Montgomery Ward’s stock price rose, and Wolfson’s profits more than covered his costs by the time he and his associates resigned from the board in January 1956. *See id.*

87. HENRIQUES, *supra* note 31, at 156.

88. *A Nice, Quiet Life*, *supra* note 17, at 62.

89. *Id.*

90. *See id.* Wolfson also failed in efforts to buy the Brooklyn Dodgers, the Washington Senators, and the Baltimore Colts. *Id.* In 1985, Wolfson offered to pay \$46.2 million for Churchill Downs, a bid that was later rejected. *Comings and Goings*, N.Y. TIMES, Sept. 5, 1985, at D28. *See* Steven Crist, *Swollen Ankle Sidelines Spend a Buck*, N.Y. TIMES, Sept. 13, 1985, at B12.

91. HENRIQUES, *supra* note 31, at 207.

92. *Id.*

93. *Id.*; SHOGAN, *supra* note 22, at 187.

94. *See* HENRIQUES, *supra* note 31, at 207.

95. SHOGAN, *supra* note 22, at 187.

96. *Id.* Wolfson claimed that, after deciding to abandon his bid for AMC, he put Elkin Gerbert in charge of selling the 400,000 shares of AMC that he owned. *Id.* Gerbert, without Wolfson’s knowledge, not only sold all of the shares but left Wolfson short. *Id.*

97. *Id.*

III. “WHEN YOU SOAR LIKE AN EAGLE, YOU ATTRACT THE HUNTERS”<sup>98</sup>

Wolfson’s downfall was being plotted even as the wealth was piling up and his long-term success seemed assured, “not unlike the tragic and untimely end that awaits a great thoroughbred . . . pushed to exceed his levels of endurance and talent, and whose destruction is sowed by his success.”<sup>99</sup>

High-profile battles in the 1950s for control of AMC, Montgomery Ward, and MCS had made Wolfson “something of a folk hero, a sort of Robin Hood.”<sup>100</sup> Along with great wealth and celebrity status, however, Wolfson’s spectacular career trajectory earned him a reputation for sharp dealing and widespread distrust in the business community.<sup>101</sup> Having challenged the leadership of large corporations, Wolfson made powerful enemies. Unproven charges of “skillful opportunism” dogged Wolfson in the 1950s.<sup>102</sup> More serious accusations of criminal misconduct in the 1960s would haunt Wolfson for the rest of his life.<sup>103</sup>

Two indictments were returned against Wolfson by the same federal grand jury on September 19 and October 18, 1966, respectively, for unrelated violations of the federal securities laws in connection with trading in the shares of MCS and Continental Enterprises, Inc., a Jacksonville theater-management company.<sup>104</sup> The indictments presented novel legal and complex factual problems.<sup>105</sup> Securities and corporate law issues raised by Wolfson’s vigorous and persistent defense against these charges have since been the subject of academic study, commentary, and controversy. Wolfson was not alone in his belief that he was the target of over-zealous prosecution in both cases.<sup>106</sup>

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98. *Downed Eagle*, TIME, Dec. 8, 1967, at 104, 104. This was the statement of Wolfson’s criminal defense attorney Milton S. Gould, quoting English poet Robert Browning, in September 1967 during closing arguments in the Continental Enterprises case. *Id.*; see *infra* text accompanying notes 124-26.

99. TODD KLIMAN, THE WILD VINE 142 (2010). Although written in an unrelated context, Kliman’s words apply to Wolfson with remarkable accuracy.

100. Interview by Kenneth Durr with Paul Windels, *supra* note 78, at 16. Windels was a federal prosecutor who was involved in the AMC case. See *supra* text accompanying notes 95-97. He was interviewed two years before his death in 2009.

101. SOBEL, *supra* note 7, at 11. Wolfson was reputed to have been “a known friend and business associate of various members of the Florida criminal underworld.” SALE, *supra* note 9, at 181.

102. SOBEL, *supra* note 7, at 11.

103. See, e.g., Wolfgang Saxon, *Louis Wolfson Dies at 95; Central to Fall of a Justice*, N.Y. TIMES, Jan. 2, 2008, at B7 (describing Wolfson’s misconduct in the 1960s).

104. *Wolfson v. Palmieri*, 396 F.2d 121, 122 (2d Cir. 1968).

105. See *infra* note 187.

106. See *infra* notes 116 and 169.

While investigating a suspicious pattern of trading in MCS stock,<sup>107</sup> the SEC staff probed into Wolfson's financial affairs more generally, and became interested in Continental Enterprises. Its stock price had increased dramatically after Wolfson had licensed the rights to Propel-Pak, an aerosol device for dispensing soft drinks, to Continental Enterprises.<sup>108</sup> From 1960 to 1962, Wolfson and Elkin ("Buddy") Gerbert, a close Wolfson associate and director of MCS and Continental Enterprises, sold 633,000 unregistered shares through six brokerage houses as the price rose from \$2.75 to \$8.50, for a profit of \$1.3 million.<sup>109</sup> The government charged Wolfson and Gerbert with hyping publicity about the stock to increase its price while they sold shares at a substantial profit without first registering with the SEC, as required under Section 5 of the Securities Act of 1933 (the "'33 Act").<sup>110</sup>

The SEC referred the Continental Enterprises case to the Department of Justice for criminal prosecution in March 1966.<sup>111</sup> The case was assigned to the office of Robert M. Morgenthau,<sup>112</sup> then U.S. Attorney for the Southern District of New York.<sup>113</sup> Under the government's theory, Wolfson's position as the largest individual stockholder in Continental Enterprises and as the corporation's guiding spirit made him a "control person."<sup>114</sup> In a somewhat novel interpretation of several complex provisions of the '33 Act, the government argued that the sale of stock on behalf of a control person

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107. This investigation would ultimately result in Wolfson's indictment and conviction. *See infra* text accompanying notes 152 and 163.

108. SHOGAN, *supra* note 22, at 201.

109. *Id.* *See* United States v. Wolfson, 405 F.2d 779, 781 (2d Cir. 1968).

110. 15 U.S.C. § 77e (2006).

111. William Lambert, *The Justice . . . and the Stock Manipulator*, LIFE, May 9, 1969, at 32, 35.

112. *Id.* The fiercely independent Morgenthau inspired the original district attorney character, Adam Schiff, on the television drama *Law & Order*. Terry Carter, *The Boss*, A.B.A. J., June 2010, at 34, 36; Freeman, *supra* note 9. Critics have accused Morgenthau, who once left his position as prosecutor to run (unsuccessfully so) against Nelson Rockefeller for governor of New York in 1962, of putting too much emphasis on white collar crime and targeting prominent persons to further his own political ambition. SHOGAN, *supra* note 22, at 205. Morgenthau retired in 2010 at the age of ninety after thirty-five years as Manhattan district attorney. Freeman, *supra* note 9.

113. SHOGAN, *supra* note 22, at 204. The experience of Morgenthau's office in dealing with complex white collar crime surely influenced the Justice Department's choice of where to assign the Wolfson cases. *Id.* at 205. By 1967, Wolfson had suffered a heart attack. *Id.* at 213. His first wife, Florence Monsky Wolfson, was dying from cancer. *Id.* Wolfson's lawyers argued that the cases should have been transferred to Florida, closer to Continental Enterprises' office and Wolfson's home, where he would have been on friendlier ground. United States v. Wolfson, 269 F. Supp. 621, 623-24 (S.D.N.Y. 1967); SHOGAN, *supra* note 22, at 205.

114. 405 F.2d at 781. Together with immediate family members and the Wolfson Family Foundation, Wolfson and Gerbert directly and indirectly owned more than 40% of the Continental Enterprises stock then outstanding. *Id.*

makes the broker an outlet for the distribution of securities to the public, and the transaction not exempt from registration.<sup>115</sup>

Wolfson believed he was being victimized for his celebrity, and by those who felt threatened by his challenge to the entrenched leadership of large corporations.<sup>116</sup> He testified at trial that he had no idea there was any law requiring registration of a security before its distribution by a controlling person to the public, that he operated at a level of corporate finance far above the details of the securities laws, and that he relied upon others in matters of regulatory compliance.<sup>117</sup> Wolfson pointed his finger at his stockbrokers for willfully neglecting to call his attention to the registration requirements for fear of aborting the transactions and losing substantial commissions.<sup>118</sup> Joe DiMaggio and Ed Sullivan were among the many celebrities who testified as character witnesses to Wolfson's reputation in the community for truth and veracity.<sup>119</sup>

Wolfson had reported the stock sales on his tax returns and paid income taxes on the profit.<sup>120</sup> He claimed he would not have done so had he known that what he was doing was unlawful.<sup>121</sup> The weak-link in Wolfson's inner circle, financial adviser Rittmaster, agreed to cooperate with the government to avoid indictment as a co-conspirator.<sup>122</sup>

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115. *Id.* at 782. The considerable uncertainty as to the rules governing sales of securities by controlling persons in brokers' transactions was largely resolved by *In Re Ira Haupt & Co.*, 23 S.E.C. 589, 590-91, 604 (1946), but the proceeding involved a broker. The Continental Enterprises case was the first time the government brought criminal proceedings against controlling persons. SHOGAN, *supra* note 22, at 201-02. At the time, it could still be argued that, if the broker sold for the controlling person without knowledge that it was participating in a distribution of securities, no specific provision of the '33 Act imposed liability on the control person either. RICHARD W. JENNINGS ET AL., *SECURITIES REGULATION* 545 (8th ed. 1998).

116. Henry Manne, former Dean of George Mason University School of Law, characterized the Continental Enterprises case as "a completely trumped up securities violation case heralded by the managerial establishment" to extract revenge against the inventor of the hostile takeover. Henry G. Manne, *Corporate Governance – Getting Back to Market Basics*, SEMINARIO CONSOB, Nov. 10, 2008, at 1, 12, available at [http://www.consob.it/documenti/Pubblicazioni/Convegni\\_seminari/seminario\\_20081110\\_manne.pdf](http://www.consob.it/documenti/Pubblicazioni/Convegni_seminari/seminario_20081110_manne.pdf). "From the vantage point of a quarter of a century later, it seems clear that Wolfson had no criminal intent, that the government had come after him with guns blazing, determined to rid the business scene of a dangerous raider. There are no subtle shadings here; Wolfson was the victim of a zealous prosecutor." SOBEL, *supra* note 7, at 12.

117. *United States v. Wolfson*, 297 F. Supp. 881, 882 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 804, 805 (2d Cir. 1969). This trial strategy would come back to haunt them on appeal. *See infra* text accompanying notes 147-49.

118. Wolfson later filed suit against the broker who handled the largest number of sell orders, claiming the broker had fraudulently misrepresented that Wolfson would be able to dispose of his Continental Enterprises stock without registering with the SEC. *See infra* text accompanying note 150.

119. *Wolfson v. Baker*, 444 F. Supp. 1124, 1129 n.3 (M.D. Fla. 1978).

120. SOBEL, *supra* note 7, at 10.

121. *See id.*

122. *Id.*

Rittmaster testified that he had placed sales orders for Continental Enterprises stock as a nominee,<sup>123</sup> from which jurors might imply that the defendants were aware of the illegality of their conduct.

Following a three-week trial, on September 29, 1967, the jury convicted Wolfson and Gerbert of nineteen counts of violating and conspiring to violate the securities laws in selling unregistered stock in Continental Enterprises.<sup>124</sup> Assured by his attorneys that, at worst, he might be subject to civil penalties but not criminal prosecution for what amounted to minor, technical offenses, Wolfson now faced a possible ninety-five years in prison.<sup>125</sup> On November 28, 1967, Judge Edmund L. Palmieri sentenced Wolfson to one year on each count, to run concurrently, assessed a fine of \$100,000, and ordered Wolfson to pay the costs of the prosecution.<sup>126</sup>

Wolfson moved for a new trial a year later on the basis of newly discovered evidence.<sup>127</sup> To refute Wolfson's claim that he was unaware of the registration requirements of the '33 Act, the government had called as a rebuttal witness James Duncan, a retired SEC attorney present during an interview SEC staff members conducted with Wolfson in 1950 on the specific subject of the registration requirements of Section 5.<sup>128</sup> The government introduced a damaging piece of rebuttal evidence consisting of an eight-page internal memorandum from the SEC files, dated in 1950, purporting to contemporaneously memorialize the interview.<sup>129</sup> After reviewing the memorandum to refresh his recollection, Duncan testified as to who was present and what had occurred.<sup>130</sup> Wolfson claimed the watermarks on the paper did not come

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123. *See id.*

124. *Wolfson v. Palmieri*, 396 F.2d 121, 123 (2d Cir. 1968); *United States v. Wolfson*, 297 F. Supp. 881, 882 (S.D.N.Y. 1968).

125. *The Woes of Wolfson*, TIME, Sept. 30, 1966, at 106, 108.

126. 297 F. Supp. at 882; JOHN COONEY, THE AMERICAN POPE: THE LIFE AND TIMES OF FRANCIS CARDINAL SPELLMAN 315 (1984). According to one account, Wolfson claimed that while he was awaiting sentencing, he was approached by Dr. Samuel Belkin, President of Yeshiva University, who purported to be acting as intermediary for Francis Cardinal Spellman of New York. *Id.* "If Wolfson contributed heftily to Catholic Charities, 'my legal problems would be over,'" Wolfson is said to have reported. *Id.* Wolfson did not recall that a price had been set, but an associate put the figure at \$1 million. *Id.* After considering the offer, Wolfson became furious. *Id.* "I refused to buy any political influence or any other type of influence," he is said to have decided. *Id.* "I spent in excess of two million [dollars] fighting this injustice." *Id.* (alteration in original). According to this account, Judge Palmieri was a friend of Spellman. *Id.* Spellman, at the time, was trying to finance a lobbying effort to secure an amendment to the New York State Constitution to permit state aid for parochial schools, and presumably needed funds for that purpose. *See id.* at 316.

127. *See* 297 F. Supp. at 881.

128. *Id.* at 882, 884.

129. *Id.* at 881, 882 n.5.

130. *Id.* at 882.

into existence until 1952 and the document had been fabricated by the government.<sup>131</sup> Following an eight-day evidentiary hearing, including reports of ink, signature, and neutron activation analysis (a method for determining the elemental composition of matter by placing samples in a nuclear reactor and measuring the emitted radioactivity), Judge Palmieri found that Wolfson had not proven the document was spurious, and denied his motion for a new trial.<sup>132</sup>

Wolfson's conviction was affirmed on appeal.<sup>133</sup> The opinion of the United States Court of Appeals for the Second Circuit is still studied in Securities Regulation courses and cited as the leading case establishing the criminal liability of a control person for making an unregistered distribution of stock.<sup>134</sup> Through a curious method of drafting, the '33 Act does not explicitly hold the conduct of controlling persons illegal when they effect a distribution of unregistered securities through brokers.<sup>135</sup> To reach this result, Senior Circuit Judge Peter Woodbury skillfully weaved his way through several provisions of the statute.

Section 5 makes it unlawful to use means of interstate commerce to sell a security unless a registration statement is in effect.<sup>136</sup> However, Section 4(1) exempts "transactions by any person other than an issuer, underwriter, or dealer."<sup>137</sup> Wolfson and Gerbert claimed they fell within this exemption because they were not issuers, underwriters, or dealers.<sup>138</sup> The difficulty with this argument, according to the court, is that it ignores Section 2(11), which broadly defines "underwriter" to include both traditional underwriters and any person who has purchased from an issuer with a view to the distribution of any security.<sup>139</sup> The definition goes on to define "issuer" for purposes of Section 2(11) to include any person directly or indirectly controlling the issuer.<sup>140</sup> When the dust

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131. *Id.* at 881, 888.

132. *Id.* at 881, 887-88, 891.

133. *United States v. Wolfson*, 405 F.2d 779, 786 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

134. *See, e.g.*, ROBERT CHARLES CLARK, *CORPORATE LAW* 739 & n.32 (1986).

135. JENNINGS, *supra* note 115, at 545; MARC I. STEINBERG, *SECURITIES REGULATION* 361 (3d ed. 1998).

136. 15 U.S.C. § 77e (2006).

137. 15 U.S.C. § 77d(1).

138. 405 F.2d at 782.

139. *Id.* "The 'deemed issuer' provision of section 2(11) is a curious piece of draftsmanship, by any standard." ALFRED F. CONARD ET AL., *ENTERPRISE ORGANIZATION* 641 (4th ed. 1987). "The one clear lesson of the cases . . . is that section 2(a)(11)'s definition of underwriter is a trap for both the careless and unwary." 1 THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 444 (4th ed. 2002).

140. 405 F.2d at 782. The court focused on the language of the statute, indicating that the term "underwriter" means "any person who has purchased from an issuer with a view to the distribution of any security" and further that the term "issuer" is "any person directly or indirectly *controlling* or

settles on this exercise in complex statutory construction, the brokers who provide outlets for the sale of large blocks of securities by control persons are thus underwriters. Securities sold in transactions by underwriters are not exempt under Section 4(1).<sup>141</sup>

But, appellants argued, there is yet another exemption available under Section 4(4) for brokers' transactions executed upon customers' orders.<sup>142</sup> Wolfson and Gerbert ingeniously tried to piggy-back along with the brokers in claiming entitlement to the Section 4(4) exemption. Because none of the brokers had solicited the sales and Wolfson had kept them in the dark as to the scope of his sales, they were innocent parties entitled to the exemption for brokers' transactions. Unfortunately, Section 4(4) was intended only to exempt the brokers.<sup>143</sup> As Judge Woodbury famously wrote, "Control persons must find their own exemptions."<sup>144</sup>

The court rejected appellants' assertion that Judge Palmieri committed reversible error by allowing the prosecutor to cross the line in closing argument to the jury,<sup>145</sup> although Judge Woodbury did acknowledge that allusions to violent crimes, specifically bank robbery, murder, and Jack Ruby's shooting of Lee Harvey Oswald, "were somewhat extreme."<sup>146</sup> In response to appellants' argument that Sections 4 and 5 of the '33 Act were unconstitutionally vague, the court noted that Wolfson and Gerbert were not claiming to have misunderstood or misinterpreted the statute, but rather to have been unaware of it because

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controlled by *the issuer*, or any person under the direct or indirect common control with the 'issuer.'" *Id.* When a control person sells securities, the broker who assists in the sale is deemed to be selling for an issuer, which makes the broker an underwriter. In other words, a control person is not himself an underwriter; control persons taint brokers by turning brokers into underwriters. If the broker is an underwriter, the transaction is not exempt under Section 4(1). *Id.* As Johnny Carson, former host of *The Tonight Show*, would say, "If you buy the premise, you buy the bit." The intellectual honesty of the interpretation may be challenged by noting that the next time someone is in Wolfson's position, he could avoid prison by selling the securities without involving brokers. By effecting the distribution himself, the control person would not be deemed an issuer, underwriter, or dealer and would fall within the Section 4(1) exemption. However, as a practical matter, control persons cannot dispose of large blocks of securities to the public without involving the securities industry. They need a broker.

141. 405 F.2d at 782.

142. *Id.* See 15 U.S.C. § 77d(4).

143. 405 F.2d at 782.

144. *Id.* This statutory interpretation, although tortuous, is entirely consistent with the legislative intent. If a control person who has access to material nonpublic information about the company is unloading shares, the public ought to be informed. Also, like any other change in the company's business, the influx of shares in large volumes is a significant event that ought to be known by other traders in the market.

145. *Id.* at 785.

146. *Id.* "But counsel for the appellants went to the other extreme of likening their clients' purported offense to parking too close to a hydrant." *Id.*

it was “beneath their notice.”<sup>147</sup> “There will be time enough to consider that question when raised by someone whom it concerns.”<sup>148</sup> Ouch!<sup>149</sup>

In 1970, after serving his prison sentence, Wolfson filed a civil suit to recover actual and punitive damages from the stockbroker who handled the largest number of sell orders, alleging the broker had fraudulently misrepresented that Wolfson could sell his Continental Enterprises stock without violating the securities laws.<sup>150</sup> In granting defendant’s motion to dismiss and motion for summary judgment, the court held that, as a result of his conviction, Wolfson was collaterally estopped from claiming he was unaware of the registration requirements at the time of the sales.<sup>151</sup>

In 1964, the SEC commenced an investigation of irregularities in trading in MCS stock.<sup>152</sup> On June 10, 1966, the Department of Justice received a referral of the MCS case from the SEC with a recommendation for criminal prosecution.<sup>153</sup> Morgenthau’s office secured an indictment charging Wolfson, Gerbert, Joseph Kosow, MCS President Marshal Staub, and Rittmaster with conspiracy to violate the securities laws, obstruction of justice, and perjury.<sup>154</sup>

In the summer of 1968, less than a year after being convicted in the Continental Enterprises case, Wolfson was back in Judge Palmieri’s courtroom facing trial in the MCS case.<sup>155</sup> After accepting a plea bargain, Rittmaster provided information that formed the basis for the government’s prosecution, and testified as its star witness.<sup>156</sup> The

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147. *Id.* at 783.

148. *Id.*

149. “The government’s successful contention that Wolfson should be deemed an issuer and his brokers deemed underwriters reminds one of an anecdote about a Canadian judge who held that an equestrian who shot his horse when it went lame should be convicted under a law against feather merchants who shoot songbirds. In either case, the conduct was outrageous, and had escaped a more specific prohibition.” CONARD, *supra* note 139, at 641.

150. *Wolfson v. Baker*, 444 F. Supp. 1124, 1126-27 (M.D. Fla. 1978).

151. *Id.* at 1126, 1130 (“Wolfson’s knowledge of the registration requirements in connection with his sale of Continental stock was an exhaustively litigated issue.”), *aff’d*, 623 F.2d 1074, 1076, 1083 (5th Cir. 1980).

152. *Citron v. Merritt-Chapman & Scott Corp.*, 409 A.2d 607, 608-09 (Del. Ch. 1977).

153. SHOGAN, *supra* note 22, at 203.

154. *United States v. Wolfson*, 437 F.2d 862, 863-64 (2d Cir. 1970).

155. *See id.* at 865; *supra* text accompanying note 124. Wolfson unsuccessfully sought recusal of Judge Palmieri, himself a former federal prosecutor, on the grounds of Palmieri’s bias and his having presided over the Continental Enterprises case. *Wolfson v. Palmieri*, 396 F.2d 121, 122-23 (2d Cir. 1968); LIMAN, *supra* note 34, at 89. Before and during the trial, Judge Palmieri denied motions by various defendants for severances, including Kosow’s motion for a severance based on the conviction of Wolfson and Gerbert the previous year in the Continental Enterprises case. 437 F.2d at 865.

156. *Id.* at 863. Rittmaster had pled guilty in 1964 of conspiring to bribe a New York City official to obtain a parking meter contract and probably believed that he would face a severe

indictment charged defendants with hatching and carrying out a scheme beginning in 1961 by which Kosow, not himself an officer or director of MCS, purchased 700,000 shares of MCS on the open market while the stock was trading at artificially low prices of \$8 to \$12 per share—considerably below book value.<sup>157</sup> Simultaneously, defendants caused MCS to enter into a secret binding agreement to repurchase Kosow's stock at \$18.75 per share, thus assuring a substantial profit, while concealing the arrangement from stockholders and the SEC.<sup>158</sup> The government claimed this constituted a conspiracy to violate SEC Rule 10b-5,<sup>159</sup> which prohibits the use of deception in the purchase of securities, because MCS stockholders without knowledge of the secret repurchase agreement were deceived into selling their shares to Kosow at low prices. To prevent discovery, defendants had conspired to destroy all copies of the repurchase agreement, file false documents with the SEC and the New York Stock Exchange, testify falsely under oath that no such repurchase agreement ever existed, and influence witnesses to do likewise.<sup>160</sup>

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sentence upon a second conviction. SHOGAN, *supra* note 22, at 206. Wolfson had tried to discourage Rittmaster from cooperating with the government in February 1966 by hinting of access to friends in high places who would intervene on their behalf if necessary. *Id.* at 206-07. After connecting the dots and deducing that Wolfson had been referring to Justice Abe Fortas, Rittmaster revealed this information, together with the fact that Fortas had become a consultant to the Wolfson Family Foundation, to Morgenthau's office (which was initially incredulous). LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 360 (1990); SHOGAN, *supra* note 22, at 207-08. According to Morgenthau, he asked Attorney General Ramsey Clark to pass the information along to Chief Justice Earl Warren. Carter, *supra* note 112, at 39. After waiting a couple of weeks for Clark to act, Morgenthau decided to take the bull by the horns and called Justice Byron White, a law school classmate. *Id.* Justice White reported that he spoke to the Chief Justice who told him that Clark had not spoken to him, but that the Chief Justice had spoken with Fortas who denied taking money from Wolfson. *Id.*

157. 437 F.2d at 866-67. The artificially low share price reflected losses suffered as a result of MCS having expanded beyond its capacity, undertaking vast construction projects in the mid-1950s, including dams, power plants, and sections of the Mackinac and Throgs Neck bridges. *See* SHOGAN, *supra* note 22, at 187-88; *Retreat*, TIME, Oct. 8, 1956, at 100, 100. New York Shipbuilding Corp., an MCS subsidiary, was engaged in a bitter dispute with the Navy in connection with the construction of the super-carrier *Kitty Hawk*. SHOGAN, *supra* note 22, at 188. MCS was forced to borrow from lenders under terms that prevented MCS from using its cash to make stock purchases. The stock repurchase deal was designed to circumvent these terms. 437 F.2d at 866-67.

158. 437 F.2d at 867. The government suspected, but offered no specific proof, that Wolfson shared in Kosow's financial windfall. SHOGAN, *supra* note 22, at 203.

159. *See* 437 F.2d at 863, 865.

160. *Id.* at 864. Although the government conceded there was nothing wrong with MCS contracting with Kosow to purchase his stock, prosecutors believed it was a fraud upon stockholders who sold their shares to Kosow not to be told about the repurchase agreement, and therefore a violation of SEC Rule 10b-5. *Id.* at 866. The perjury, subornation of perjury, and obstruction of justice through destruction of documents and filing of false reports were clearly criminal violations. *Id.*

At the end of the government's case, Judge Palmieri dismissed the portion of the conspiracy count dealing with violation of the securities laws because there was no basis for the jury to find that the defendants had violated SEC Rule 10b-5 on these facts.<sup>161</sup> As ultimately submitted to the jury, the case thus would be limited to perjury, subornation of perjury, obstruction of justice, and conspiracy to do so.<sup>162</sup>

The seven-week trial ended on August 8, 1968, with the conviction of all defendants on all counts.<sup>163</sup> In December 1968, Judge Palmieri, for the second time in twelve months, pronounced sentence on Wolfson, this time to imprisonment for eighteen months (to follow his sentence in the Continental Enterprises case) and a \$32,000 fine.<sup>164</sup>

On appeal, the Second Circuit reversed the defendants' convictions on all counts.<sup>165</sup> The court agreed with the defendants' argument that deletion of the securities fraud portion of the conspiracy count constituted a material alteration of the indictment as returned by the grand jury.<sup>166</sup> The court did not think the amendment of the indictment constituted grounds for a mistrial.<sup>167</sup> However, because four weeks of evidence concerning defendants' alleged stock fraud and \$3 million profit had been offered in proof of a portion of a count that had been dismissed, Judge Palmieri committed reversible error by waiting until his instructions to inform the jury of the amendment, not striking the evidence introduced in proof of the deleted portion of the count, and not adequately explaining the effect of its elimination to the jury.<sup>168</sup>

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161. *Id.* at 865. According to Judge Palmieri, the defendants' conduct might well have constituted a civil violation of the securities laws, but not criminal fraud because it could not be said that a person of ordinary intelligence would understand that the conduct delineated by the government's evidence was forbidden by the terms of SEC Rule 10b-5. *Merritt-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358, 359 (Del. Super. Ct. 1970).

162. 437 F.2d at 866.

163. *Id.* at 864-65.

164. *See id.* at 864. Judge Palmieri refused to postpone the sentencing date despite the fact that Wolfson's wife was fatally ill at the time. *United States v. Wolfson*, 558 F.2d 59, 61 (2d Cir. 1977). Florence Monsky Wolfson died the day after sentencing. *Id.* at 61 n.5. Wolfson sent a telegram to the judge a few days later pledging "to do everything to have you [Judge Palmieri] removed from the bench." *Id.* at 61 & n.5 (alteration in original).

165. 437 F.2d at 879.

166. *Id.* at 872-73.

167. *Id.* at 869.

168. *Id.* at 873. A separate basis for reversal was Judge Palmieri's curtailment of defense counsel's effort to challenge Rittmaster's credibility on cross-examination. *Id.* at 875. On the grounds that it would "unduly prolong this trial" and "complicate the already complicated issues . . . with a peripheral and complex question," Judge Palmieri refused to permit defense attorneys to impeach Rittmaster based upon the fact that he had lied before under oath in the parking meter case, and had a specific motivation to testify favorably for the government in this case. *Id.* at 874. Rittmaster owned \$500,000 worth of unregistered shares of MCS stock for which he needed the SEC's permission to sell publicly. LIMAN, *supra* note 34, at 90-91. SEC approval, granted

Although Rittmaster died in 1969 and Kosow was not retried, the government retried Wolfson twice, resulting in hung juries in favor of acquittal by 11-1 and 10-2.<sup>169</sup> Famed criminal defense attorney Edward Bennett Williams represented Wolfson in both retrials.<sup>170</sup> A fourth trial was avoided when Wolfson agreed to plead *nolo contendere* to one felony count of filing a false corporate statement in return for the government dropping the rest of the charges.<sup>171</sup> Wolfson received a suspended eighteen month sentence and a \$10,000 fine.<sup>172</sup>

Wolfson's long legal battle with the government cost him an estimated \$10 million, and he had fallen upon hard times.<sup>173</sup> Following the reversal of his conviction in the MCS case and two inconclusive retrials, Wolfson sought reimbursement from MCS—which had begun the process of liquidation—for legal fees incurred in defending against the multiple counts dropped by the government as part of his agreement to plead *nolo contendere*.<sup>174</sup> The 1974 opinion by the Superior Court of

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almost immediately following Rittmaster's grand jury testimony in the MCS case, was clearly "part and parcel of his plea bargain." *Id.* at 91.

169. ROBERT PACK, EDWARD BENNETT WILLIAMS FOR THE DEFENSE 360 n.\* (1983). The decision to retry Wolfson for a third time following a previous trial in which the jury was hung 11-1 for acquittal is evidence of over-zealous prosecution. Other evidence includes the decision to pursue the MCS case at all, given the lack of proof that Wolfson profited personally, and the decision to retry the case once it was determined at the first trial that the underlying subject of the cover-up was not itself securities fraud.

170. *Id.*

171. *Id.* It has been speculated that the Nixon administration may have intervened on Wolfson's behalf in 1972, and that being allowed to plead no contest to the charges in the MCS case may have been his reward for making himself available to the government in 1969 to answer questions about his involvement with Fortas. KALMAN, *supra* note 156, at 363. See *infra* text accompanying note 231. Although John Mitchell had resigned as Attorney General in 1972, his successor, Richard Kleindienst, had been in the Justice Department in 1969 and surely knew about the discussions with William Bittman, Wolfson's attorney at the time. "Significantly, [a]lthough Edward Bennett Williams had replaced Bittman as Wolfson's attorney, Bittman was brought in to negotiate with the Department of Justice." KALMAN, *supra* note 156, at 363.

172. *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 140 (Del. Super. Ct. 1974).

173. SHOGAN, *supra* note 22, at 213. Wolfson was named as a defendant in multiple civil suits by stockholders of Continental Enterprises and MCS. See *Wolfson v. Baker*, 444 F. Supp. 1124, 1127 (M.D. Fla. 1978). A derivative suit filed by MCS stockholders seeking disgorgement of compensation paid to Wolfson since 1961 was dismissed. *Citron v. Merritt-Chapman & Scott Corp.*, 409 A.2d 607, 608, 613 (Del. Ch. 1977). In 1972, Wolfson agreed to pay \$250,000 to settle a similar suit. *Id.* at 609.

174. In the earlier stage of the proceedings, MCS sought a declaratory judgment determining that Wolfson and his co-defendants were not entitled to reimbursement for legal expenses after the first trial in which Judge Palmieri had dismissed the securities fraud portion of the conspiracy count. *Merritt-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358, 358 (Del. Super. Ct. 1970); see also *supra* text accompanying note 161. Defendants claimed they were entitled under the language of the Delaware indemnification statute to reimbursement for legal expenses attributable to this part of their defense, on the basis of being "successful on the merits or otherwise." DEL. CODE ANN. tit. 8, § 145(c) (West 2006); 264 A.2d at 359-60. Because only a portion of the conspiracy count had been dismissed, and defendants ultimately were found guilty of conspiracy, the court held they were

Delaware granting partial indemnification of Wolfson's expenses in the MCS case has been cited extensively,<sup>175</sup> and is studied in Corporations and Business Associations courses. The opinion is controversial in requiring indemnification of a convicted felon for expenses incurred in connection with each charge that was not proven.

The Delaware statute in effect at the time provided as follows: "To the extent that a director, officer, employee or agent of a corporation has been successful on the merits *or otherwise* in defense of any action, suit or proceeding . . . he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith."<sup>176</sup> In ruling on cross-motions for summary judgment, the court rejected MCS's argument that the public policy underlying the statute required vindication by a finding of innocence, not the dropping of charges for pragmatic reasons.<sup>177</sup>

The opinion established several important points. First, "[t]he statute does not require complete success."<sup>178</sup> Each count of an indictment is an independent criminal charge.<sup>179</sup> A corporate manager is entitled to partial indemnification if successful on any count of a multi-count indictment, even if unsuccessful on other counts.<sup>180</sup> Second, the language of the statute limits judicial inquiry into the reason the charges may have been dropped or claims not pursued.<sup>181</sup> The definition of

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not entitled to partial indemnification. "It would be anomalous, indeed, and diametrically opposed to the spirit and purpose of the statute and sound public policy to extend the benefits of indemnification to these defendants under the facts and circumstances of this case." 264 A.2d at 360.

175. See *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974). "The reasoning of *Merritt-Chapman* has not been limited to criminal proceedings; it has also been applied to partial indemnification of civil actions." Edward Tsai, *Success by Another Name: Recognizing a Limited Exception Under Delaware Law to the Indemnification of Derivative Action Settlements*, 64 N.Y.U. ANN. SURV. AM. L. 879, 891 (2009). Compare *MCI Telecomms. Corp. v. Wanzer*, Nos. 89C-MR-216, 89C-SE-26, 1990 WL 91100, at \*9 (Del. Super. Ct. June 19, 1990) (explaining that partial indemnification should be required where defendant prevails in some but not all causes of action brought against him in a civil proceeding), with *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 95 (2d Cir. 1996) (holding that a director who settled an administrative proceeding by voluntarily paying a fine conclusively established that he lacked the requisite good faith to be entitled to indemnification).

176. 321 A.2d at 141 (emphasis added) (citation omitted).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* By way of contrast to Delaware's broad system of indemnification, the Model Business Corporation Act (the "Model Act") entitles directors to indemnification only if "wholly successful." The comments to the Model Act state that this language was specifically intended to preclude the result in *Merritt-Chapman*. MODEL BUS. CORP. ACT § 8.52 cmt. (2002). See also Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 760-61 (2001).

181. See 321 A.2d at 141.

“successful” is not limited to securing a judgment of acquittal.<sup>182</sup> In a criminal case, “any result other than conviction must be considered success.”<sup>183</sup> Third, the statutory policy of indemnification is designed in part to induce capable persons to serve as corporate officers and directors.<sup>184</sup> Accordingly, in assessing the reasonableness of expenses incurred by managers facing criminal charges in successfully defending themselves, the court should consider their position at the time they incurred the expenses, when they assumed the risk of not being indemnified.<sup>185</sup> The court thus rejected MCS’s contention that attorneys’ fees incurred by Wolfson were unreasonable because the Williams, Connolly & Califano law firm charged a flat fee of \$250,000 for each trial rather than an hourly rate.<sup>186</sup>

#### IV. THE FIRST COVER-UP<sup>187</sup>

To the extent Wolfson’s name registers with most Americans, it is likely for his role in the scandal involving Supreme Court Justice Abe Fortas.<sup>188</sup> Wolfson had retained the law firm of Arnold, Fortas & Porter in June 1965 to try and settle a \$65 to \$70 million claim against the

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182. *See id.*

183. *Id.*

184. *Id.*

185. *Id.* at 143.

186. *Id.*

In this case, Wolfson retained the Williams firm after he had been convicted of all counts. He faced the possibility of a prison sentence, not to mention other consequences of criminal convictions. The indictment against Wolfson, which presented novel legal and complex factual problems, was vigorously and persistently prosecuted. In retaining the Williams firm, particularly its senior partner, Edward Bennett Williams, Wolfson sought the best possible legal counsel. Williams has acquired a national reputation based upon twenty-eight years of experience in active trial practice, often in major criminal cases. He personally spent about 1600 of his firm’s 2633 hours in preparation for and in two long trials, while he had to lay all other work aside. He does not charge by the hour.

*Id.*

187. According to wordsmith William Safire, the term “cover-up” first entered the political lexicon in a 1968 telephone conversation Wolfson recorded on tape, in which Justice Abe Fortas can be heard describing with prophetic accuracy the inevitable perception that would result when the 1966 consultancy arrangement between Fortas and the Wolfson Family Foundation became public knowledge. William Safire, *On Language: Masterful Meltdown*, N.Y. Times Mag., June 5, 1994, § 6, at 22. *See infra* notes 195-97 and accompanying text. “‘Your letter’ . . . ‘and the subsequent acceptance of the foundation post will be put together and will be construed as follows: That your giving me and my accepting the foundation post was nothing but a *cover-up* and that what was really happening was that I was taking a gratuity from you in terms of . . . supplementing my salary. You see? And that is very bad.’” Safire, *supra*.

188. HENRIQUES, *supra* note 31, at 208. More than four decades after Fortas’ resignation, fascinating new details concerning the matter continue to emerge with Morgenthau’s willingness to make himself available for media interviews following his retirement in 2010. *See supra* note 156 and *infra* note 232.

Navy on behalf of New York Shipbuilding Corp., arising from construction of the *Kitty Hawk*, and in connection with the SEC investigation into trading irregularities in MCS stock.<sup>189</sup>

President Lyndon Johnson offered Fortas a seat on the Supreme Court in July 1965,<sup>190</sup> replacing Justice Arthur Goldberg who resigned to become ambassador to the United Nations.<sup>191</sup> Aware of Fortas's reluctance to give up his lucrative law practice,<sup>192</sup> Wolfson helped persuade Fortas to accept the nomination.<sup>193</sup> It was characteristic of Wolfson, a multi-millionaire at the time, to support friends, and countless philanthropic and political causes.<sup>194</sup> Although he had known Fortas less than two months at the time of his nomination, by letter dated

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189. MURPHY, *supra* note 29, at 194. Paul Porter was placed in charge of the SEC matter. But Fortas met with Wolfson in his capacity as managing partner, and later when Porter had a scheduling conflict that prevented him from attending a MCS board meeting. *Id.*

190. *Id.* at 172; SHOGAN, *supra* note 22, at 185.

191. MURPHY, *supra* note 29, at 171.

192. Fortas made it clear to Wolfson that the financial sacrifice involved weighed heavily on his mind. *Id.* at 174. A child of the Great Depression, Fortas was concerned about financial security. KALMAN, *supra* note 156, at 377. A Justice of the Supreme Court in 1965 earned \$39,500. *See* SHOGAN, *supra* note 22, at 192. Fortas earned \$200,000 a year before joining the Court. *See id.* Fortas did not want to alter the Georgetown lifestyle to which he and his wife, tax attorney Carolyn Agger, had become accustomed. *See id.* at 192-93.

193. MURPHY, *supra* note 29, at 174-75.

194. SHOGAN, *supra* note 22, at 188. Wolfson donated a share of MCS stock each June to every graduate of the University of Georgia, his alma mater. *Id.* at 189. He was a major contributor to George McGovern's unsuccessful presidential campaign. SALE, *supra* note 9, at 142. He tried to persuade Edward Bennett Williams to run for president, offering to raise money and pay for a national poll to prove that Williams had high name recognition. EVAN THOMAS, *THE MAN TO SEE* 329 (1991). He encouraged former Oklahoma football coach Bud Wilkinson to run for Senate, promising a \$30,000-a-year job if he was defeated. SHOGAN, *supra* note 22, at 191. He helped finance Mel Brooks's first film, *The Producers*. Kerr, *supra* note 30. The Wolfson Family Foundation supported medical, educational, and religious charitable entities in Jacksonville, including the Wolfson Student Center at Jacksonville University, the River Garden/Wolfson Health and Aging Center, and the Louis E. Wolfson Wellness Center at Baptist Medical Center. *Id.* In 1968, Wolfson agreed to contribute \$25,000 toward the investigation by New Orleans District Attorney Jim Garrison of President John F. Kennedy's assassination. *State v. King*, 275 So. 2d 274, 275 (Fla. Dist. Ct. App. 1973). It was arranged that Wolfson would deliver checks in increments of \$5000 to Larry King, then a radio talk show host in Miami, who would pass them along to Garrison through an intermediary. WILLIAM W. TURNER, *REARVIEW MIRROR: LOOKING BACK AT THE FBI, THE CIA AND OTHER TAILS* 143 n.\* (2001); Stevens, *supra* note 78, at 38. Before reporting to prison in 1969, Wolfson fulfilled his pledge, giving King five checks for \$5000. TURNER, *supra*; Stevens, *supra* note 78, at 38. Garrison never received the full amount. TURNER, *supra*. King admitted he failed to deliver \$5000. 275 So. 2d at 276. King was not arrested until December 20, 1971, at which time he was charged with grand larceny. *Id.* Because the two-year statute of limitations had expired, the charge was dropped, but King was off the air for three years after being fired by the station as a result of the incident. *Id.*; Interview with Larry King, Broadcaster, in Sun Valley, Idaho (June 29, 1996), available at <http://www.achievement.org/autodoc/page/kin0int-4>.

July 22, 1965, Wolfson offered Fortas “any financial assistance that he felt necessary.”<sup>195</sup>

A New Deal liberal, Fortas likely was attracted to Wolfson in part by the Wolfson Family Foundation’s focus on civil rights, race relations, and juvenile justice.<sup>196</sup> Perhaps to relieve the suffocating sense of isolation that the energetic Fortas experienced upon joining the Court, he agreed to consult with the foundation on matters of mutual interest, attend one meeting per year, and prepare pamphlets and brochures.<sup>197</sup>

On October 22, 1965, the Wolfsons attended a reception in Fortas’s honor at the Supreme Court.<sup>198</sup> They dined together afterwards. During a visit to Fortas’s home in Georgetown the next day to discuss the foundation, Wolfson mentioned the SEC investigation into trading in MCS.<sup>199</sup> Fortas purportedly reassured Wolfson that this appeared to involve nothing more than “technical violations.”<sup>200</sup> Wolfson exchanged correspondence with Fortas about the investigation, receiving a hand-written letter from Fortas urging him not to resign the chairmanship of MCS.<sup>201</sup> Wolfson remained confident in the outcome, secure in the knowledge that his contact on the Court would intercede if it became necessary.<sup>202</sup>

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195. MURPHY, *supra* note 29, at 174-75. Wolfson previously attempted to offer financial assistance to Justice Goldberg, who refused to accept. *Id.* at 174. “It was always nice to have friends in high places,” Wolfson believed. *Id.* The funneling of money to politicians was commonplace in Wolfson’s era. Wolfson’s bother, Cecil, for example, was among the many people who flew to Tennessee from all over the country to pay top dollar for purebred Angus cattle at auctions conducted by Albert Gore, Sr., former senator and father of the former vice president. See Timothy Noah, *Was Albert Gore Sr. a Crook?*, SLATE (Apr. 6, 2000, 3:00 AM), <http://www.slate.com/id/78634/>.

196. Wolfson established the Wolfson Family Foundation in 1951. Wolfson, *supra* note 20. Financing for the construction of Wolfson Memorial Children’s Hospital, the pediatric wing of Baptist Memorial Hospital in Jacksonville, was provided in memory of Morris Wolfson. *Id.* Fortas was reported to have been impressed by a plaque indicating that the facility was for the healing of the “sick and the afflicted . . . irrespective of race, color, or creed.” MURPHY, *supra* note 29, at 195.

197. MURPHY, *supra* note 29, at 195-96. The agreement called for Fortas to receive \$20,000 a year, plus expenses, for consulting work from a source he knew to be under investigation by the SEC. *Id.* at 196. The Wolfson Family Foundation gave away \$77,680 in 1965, a quarter of which was to Fortas. *Id.* at 197. Fortas would later insist that he had agreed to the arrangement “simply to prevent dying on the bench, to get away from that isolation. . . . It wasn’t anything financial.” *Id.* at 196. Had altruism been Fortas’ motivation, he could have accepted a dollar per year plus expenses. *Id.* “Money was important to him and, as had been made manifestly clear at the White House, to his wife as well.” *Id.*

198. *Id.* at 195-96.

199. SHOGAN, *supra* note 22, at 195.

200. *Id.*

201. MURPHY, *supra* note 29, at 207-08.

202. *Id.* at 208. Wolfson knew that Fortas had been responsible for the Johnson administration’s appointment of SEC Chairman Manuel F. Cohen. *Id.*

Wolfson sent a \$20,000 check to Fortas in January 1966 to cover services to the foundation for 1966.<sup>203</sup> An exchange of correspondence and formal letter agreement followed in February.<sup>204</sup> Two weeks after receiving Wolfson's check, Fortas wrote to Johnson suggesting the President might "'get some pleasure' from . . . an 'excellent' resolution adopted by [MCS] . . . as a 'policy of non-discrimination.'"<sup>205</sup>

On June 14, four days after the MCS case had been referred to the Justice Department, Fortas flew to Jacksonville for a meeting of the foundation's trustees concerning the juvenile justice system.<sup>206</sup> After the meeting, Fortas traveled with Wolfson to Ocala, where Wolfson's stable was located, and stayed overnight.<sup>207</sup> Wolfson expressed concern to Fortas about his legal troubles and recalled being assured by Fortas that they were technicalities.<sup>208</sup> Wolfson discussed his legal problems with Fortas again after he was indicted.<sup>209</sup> "There seems little doubt that Louis Wolfson believed that he was getting important advice on his growing legal troubles from a sitting member of the United States Supreme Court."<sup>210</sup>

President Johnson tried to reach Fortas during his trip to Florida.<sup>211</sup> Unable to locate him, a persistent White House operator called the home of his law clerk, Daniel Levitt, who knew Fortas was visiting Wolfson in Florida.<sup>212</sup> When Levitt mentioned the call to Fortas's secretary the next day, she told him the Justice had recently received a substantial check from the Wolfson Family Foundation.<sup>213</sup> Levitt knew about Wolfson's problems with the SEC.<sup>214</sup> He asked Fortas's secretary to convey his concerns about the appearance of impropriety.<sup>215</sup> The secretary relayed Fortas's response: "'He said you should mind your own business.'"<sup>216</sup>

Fortas followed his law clerk's advice. On June 21 he wrote to Wolfson to terminate their arrangement.<sup>217</sup> However, he did not return

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203. *Id.* at 199.

204. *Id.*

205. *Id.* at 200.

206. *Id.* at 208.

207. *Id.*; SHOGAN, *supra* note 22, at 210.

208. MURPHY, *supra* note 29, at 208.

209. *Id.* Fortas continued to see Arnold & Porter attorneys from time to time after becoming a Justice, and discussed cases, including Wolfson's. SHOGAN, *supra* note 22, at 199.

210. MURPHY, *supra* note 29, at 208.

211. SHOGAN, *supra* note 22, at 211.

212. MURPHY, *supra* note 29, at 208-09.

213. SHOGAN, *supra* note 22, at 211.

214. *Id.*

215. *Id.*

216. *Id.*

217. MURPHY, *supra* note 29, at 209.

the money until December 15, 1966, eleven months after its receipt and three months after Wolfson's indictment in the MCS case.<sup>218</sup>

Richard Nixon took office in January 1969, after campaigning for President, in part by promising to nominate strict constructionist Justices to replace the liberal majority on the Supreme Court.<sup>219</sup> Nixon and Attorney General John Mitchell were particularly eager to replace Fortas and William O. Douglas with more conservative Justices.<sup>220</sup>

On April 1, 1969, the Supreme Court denied Wolfson's petition for a writ of certiorari in the Continental Enterprises case.<sup>221</sup> On April 11, 1969, Wolfson wrote to Fortas: "'Abe, I want you to do something for me, . . . I cannot go to prison right now; if you could do anything to get me a Presidential [sic] pardon—have President Johnson call Mr. Nixon.'"<sup>222</sup> In his last days of freedom, Wolfson wrote letters to legislators, including Senator Spessard Holland of Florida, asking them to personally appeal to the President to delay his imprisonment until he could file more appeals.<sup>223</sup> Holland did so on April 22, asking for an appointment with Nixon.<sup>224</sup> After checking with Mitchell, Nixon instructed an aide to turn down the request.<sup>225</sup>

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218. *Id.* Porter claims Fortas's motivation for not returning the money immediately was humanitarian, citing the fact that Wolfson's wife was dying from cancer and that Wolfson himself had a heart condition. *Id.* Others point to Fortas's returning the money near the end of the calendar year in which it was received as evidence that he was motivated by tax considerations. *Id.*

219. Quoting a memoir by Nixon aide John Ehrlichman, former White House counsel John W. Dean wrote, "'Nixon cleared his desk of other work to focus on getting Fortas off the Court.'" JOHN W. DEAN, *THE REHNQUIST CHOICE* 5 (2001). Woodward and Armstrong share Dean's belief that Nixon took great interest in the Wolfson affair. "The Fortas investigation became one of [Attorney General] Mitchell's first action projects, and Nixon demanded almost minute-by-minute reports, personally calling the shots from the Oval Office." BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 19 (1979). Sensitive to judicial independence, Mitchell enlisted the intellectually adroit William Rehnquist, then Assistant Attorney General, for help in navigating the constitutionality of the executive branch investigating a Supreme Court Justice. DEAN, *supra*, at 6-7.

220. LIMAN, *supra* note 34, at 93. Until the Wolfson scandal unexpectedly fell into the Nixon administration's lap, Douglas seemed the most vulnerable among the justices. WOODWARD & ARMSTRONG, *supra* note 219, at 18. "Nixon lost no time putting various federal agencies to work," including the Internal Revenue Service ("IRS"), which began an audit of Douglas's tax returns five days after Nixon's inauguration. *Id.*

221. *United States v. Wolfson*, 394 U.S. 946 (1969). In the announcement of denial of the writ, Fortas was noted as recused. *Id.*

222. MURPHY, *supra* note 29, at 552.

223. SHOGAN, *supra* note 22, at 4.

224. *Id.* at 4-5.

225. *Id.* at 5.

Wolfson, who had been released on bail pending the determination of his appeals,<sup>226</sup> finally entered the prison camp at Eglin Air Force Base near Pensacola on April 25, 1969.<sup>227</sup>

A six-page story by reporter William Lambert, describing Fortas's connection to the Wolfson Family Foundation, appeared in *Life* magazine on May 9, 1969.<sup>228</sup> On May 6, Wolfson surrendered to the Justice Department, the agreement showing that the \$20,000 fee was not a one-time payment, but the first installment of an annual retainer for the rest of Fortas's life, or to his widow as long as she lived.<sup>229</sup>

On the weekend of May 9, FBI agents traveled to Eglin Air Force Base with a subpoena for Wolfson.<sup>230</sup> Asked what Fortas had done for him, Wolfson emphatically exonerated Fortas of complicity, telling the agents Fortas had not lifted a finger to help him, but only gave Wolfson hand-holding assurances that his problems were of a technical nature.<sup>231</sup> Fortas had offered no assistance, or even hinted that he might.<sup>232</sup>

226. *United States v. Wolfson*, 297 F. Supp. 881, 882 (S.D.N.Y. 1968).

227. *See* SOBEL, *supra* note 7, at 11; SHOGAN, *supra* note 22, at 3. Nicknamed "Club Fed," the Eglin Air Force Base prison camp was long a minimum-security facility for non-violent offenders before being closed as a cost-cutting measure in 2006. Ameet Sachdev, *Black's Prison Pick, 'Club Fed' is Closed*, CHI. TRIB. (Dec. 13, 2007), [http://articles.chicagotribune.com/2007-12-13/business/0712120897\\_1\\_minimum-security-prison-camp-low-security-facility](http://articles.chicagotribune.com/2007-12-13/business/0712120897_1_minimum-security-prison-camp-low-security-facility). Other notable inmates included Watergate conspirator E. Howard Hunt and former Maryland Governor Marvin Mandel.

228. Lambert, *supra* note 111. The source for *Life's* story may have been a mid-level official of the IRS (the federal agency responsible for monitoring how foundations spend their money), motivated not by politics but simply offended by the impropriety of the transaction. DAVID BURNHAM, *A LAW UNTO ITSELF: POWER, POLITICS, AND THE IRS* 248 (1989); KALMAN, *supra* note 156, at 360. The Commissioner of Revenue Sheldon Cohen, a Johnson appointee himself, would not have approved the leak. BURNHAM, *supra*, at 248. Alternatively, the Department of Justice may have passed along the information received by Morgenthau's office from Rittmaster. *See* WOODWARD & ARMSTRONG, *supra* note 219, at 18 n.\* (citing a 1969 memorandum to Mitchell from J. Edgar Hoover); *supra* note 156. *See also* DEAN, *supra* note 219, at 5 (attributing the leak of information to the Justice Department); LIMAN, *supra* note 34, at 93.

229. WOODWARD & ARMSTRONG, *supra* note 219, at 19. Mitchell's aides showed him the papers. "Mitchell was incredulous. He thought they might be phony." *Id.* The otherwise brilliant Fortas somehow failed to appreciate the perception created by the "tail" for Carolyn Agger. Why continue payments for work no longer being performed? Perhaps the pension to which a Justice is entitled seemed small to Fortas. "Obviously, Fortas viewed his contract with Wolfson as an annuity . . ." KALMAN, *supra* note 156, at 377.

230. MURPHY, *supra* note 29, at 567.

231. DEAN, *supra* note 219, at 10; MURPHY, *supra* note 29, at 567-68.

232. DEAN, *supra* note 219, at 10. Justice Douglas sat up with Fortas for two nights during this period. WILLIAM O. DOUGLAS, *THE COURT YEARS* 358 (1980). In response to Douglas's questions, Fortas denied intervening on Wolfson's behalf with Johnson or any SEC official. *Id.* "He apparently had held Wolfson's hand, so to speak, but had never undertaken to give legal advice or acted as counsel after coming on the Court." *Id.* Morgenthau believes otherwise. In a recent interview, he recalled receiving weekly calls during the Wolfson investigation from Fred Vinson Jr., head of the Justice Department's criminal division. Carter, *supra* note 112, at 39. Vinson would say, "'You're being abusive and unfair to Wolfson.'" Morgenthau recalled that he would say to his assistants, "'Let's not waste any time and move this case along.'" *Id.* Morgenthau believes Fortas contacted

Although Wolfson's statement was not the smoking gun for which he had hoped, Mitchell decided to go to the Supreme Court to meet with Chief Justice Earl Warren and use the mere fact that the government had a statement from Wolfson to create the impression that the Attorney General was on top of a "rapidly unfolding investigation" in which "far more serious evidence" against Fortas would come out unless he resigned.<sup>233</sup> Mitchell's bluff succeeded.<sup>234</sup> Having lost the support of his fellow Justices,<sup>235</sup> and amid growing calls for his impeachment, Fortas resigned on May 15, 1969.<sup>236</sup>

With time off for good behavior, Wolfson was released after serving nine months and one day in federal custody.<sup>237</sup> He would later recall watching the 1969 Triple Crown races on a black-and-white prison television with an assortment of "con artists, thieves, bootleggers, and draft dodgers."<sup>238</sup>

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President Johnson who got the Justice Department to pressure Morgenthau to drop the investigations, and that Fortas later asked Johnson to pardon Wolfson. *See id.*

233. MURPHY, *supra* note 29, at 567-70.

234. DEAN, *supra* note 219, at 10.

235. Although Douglas was the only one to overtly resist Earl Warren's campaign to secure the support of the Justices to ask Fortas resign, even Douglas was surprised, wondering at one point, "God, how did Abe do such a stupid thing?" WOODWARD & ARMSTRONG, *supra* note 219, at 20. If Douglas was unaware before, the Fortas scandal clearly served to focus his attention on the danger of being in Nixon's cross-hairs. "Having disposed of Fortas, Nixon turned loose on me . . . ." DOUGLAS, *supra* note 232, at 359. Douglas soon resigned as a \$12,000-a-year director of the Albert Parvin Foundation. WOODWARD & ARMSTRONG, *supra* note 219, at 20. Douglas believed Nixon was trolling for adverse information about Douglas from Wolfson. According to Douglas, a lawyer in private practice hired by a Louisiana congressman contacted William O. Bitman, an attorney for Wolfson, seeking an interview with Wolfson, and offering assistance in return for Wolfson's cooperation. DOUGLAS, *supra* note 232, at 372-73. Wolfson replied that he had no information adverse to Douglas. *Id.* at 373.

236. KALMAN, *supra* note 156, at 376. Disclosure of his association with Wolfson was the final straw for Fortas, whose reputation was already tainted by his having continued to serve as adviser to Johnson after joining the Court. SHOGAN, *supra* note 22, at 10. During an unsuccessful 1968 struggle in the Senate over his nomination to replace Warren as Chief Justice, it had been disclosed that Fortas had received a \$15,000 fee, solicited from wealthy businessmen, to conduct seminars at law schools. *Id.* Dean believes Fortas broke no law, or did anything that other Justices had not done, citing Douglas's relationship with the Parvin Foundation and Chief Justice Burger's service as a board member of the Mayo Clinic for which he received remuneration. DEAN, *supra* note 219, at 9. According to Fortas's biographer, even Mitchell would later admit that Fortas had committed no crime. KALMAN, *supra* note 156, at 369. For a dissenting opinion, see GERALD R. FORD, A TIME TO HEAL 91 (1979) ("The statutes were clear that members of the federal judiciary could not earn income from sources outside the government."). Comparing Fortas and Johnson, it has been suggested that "'Wolfson was Fortas's Vietnam war.'" KALMAN, *supra* note 156, at 378.

237. SOBEL, *supra* note 7, at 11.

238. Reed, *supra* note 30, at 71. Wolfson's relationship with Fortas remained cordial. In 1973, Wolfson again offered Fortas \$20,000 annually to consult with the Wolfson Family Foundation, an offer Fortas declined in a letter stating that he was too busy. KALMAN, *supra* note 156, at 393.

## V. AFFIRMED

Wolfson bought his first racehorses in 1958 as a hobby undertaken on the advice of his doctor to find some relaxation.<sup>239</sup> He established Harbor View Farm on 478 acres near Ocala, and turned his attention and considerable ambition to breeding champion thoroughbreds.<sup>240</sup> By 1964, Harbor View Farm, identified by flamingo-pink and black silks,<sup>241</sup> was the second highest money-winning stable.<sup>242</sup>

Harbor View Farm was nearly crippled in the wake of Wolfson's conviction and imprisonment.<sup>243</sup> Wolfson resumed racing in 1971,<sup>244</sup> a year after his release from prison. In 1972, he married Patrice Jacobs, daughter of training legend Hirsch Jacobs.<sup>245</sup> Harbor View Farm was restored to fourth place in winnings by 1977.<sup>246</sup>

Conceived in Kentucky and born in Florida, Affirmed was one of 28,271 thoroughbred foals in the class of 1975.<sup>247</sup> Affirmed was the great-great-grandson of War Admiral,<sup>248</sup> winner of the Triple Crown in 1937,<sup>249</sup> whose legendary rivalry with Seabiscuit was the subject of Laura Hillenbrand's best-seller and 2003 Oscar-winning film.<sup>250</sup> Like

239. Kerr, *supra* note 30. Wolfson had previously been an occasional visitor and heavy bettor at the race track. Hirsch, *supra* note 25, at 34.

240. *A Nice, Quiet Life*, *supra* note 17, at 62, 66.

241. The Harbor View Farm colors were once as famous in racing circles as the New York Yankee pinstripes are to baseball fans. Stevens, *supra* note 78, at 14, available at <http://www.posttimeusa.com/Portals/16/v35%20number%202/PT%20Feb%2008%20%20WOLFSON2.pdf>.

242. *A Nice, Quiet Life*, *supra* note 17, at 66.

243. *Id.* The issuance and renewal of horse racing licenses to convicted felons is restricted by New York and other states. *Id.* Forced to sell most of its horses to pay Wolfson's debts, Harbor View Farm's purses dried up and earnings dwindled to virtually nothing. Reed, *supra* note 30, at 71.

244. *A Nice, Quiet Life*, *supra* note 17, at 66.

245. *Id.* at 60. At the time of his death in 1970, Hirsch Jacobs had won 3596 races, more than any other trainer in horse racing history. *Hirsch Jacobs*, INT'L JEWISH SPORTS HALL OF FAME, <http://www.jewishsports.net/BioPages/HirschJacobs.htm> (last visited July 20, 2011).

246. *See A Nice, Quiet Life*, *supra* note 17, at 66.

247. CAPPS, *supra* note 22, at 26. Blessed with extraordinary agility, grace, speed, stamina and courage, the thoroughbred is a distinct, created breed of horse that evolved from mixing the bloodlines of three Arabian stallions in the early 18th century. It is very rare to find two thoroughbreds without at least one recent common ancestor. For example, Affirmed and archrival Alydar were blood relatives. Alydar's sire, Raise a Native, was Affirmed's paternal grandsire. Reed, *supra* note 30, at 76. Alydar's name is itself the subject of dispute among racing historians. The explanation most frequently offered is that the name is a contraction for "'Aly dahling[,]'" intended by owners Gene and Lucille Markey as a sentimental homage to their dear personal friend, Prince Ali Solomone Aga Khan (known informally as Aly Khan), a former Vice President of the United Nations General Assembly. J.B. FAULCONER, *THE NAMES THEY GIVE THEM* 3 (Jim Bolus & Suzanne Bolus eds., 1998); Bob Diskin, *Affirmed Beat Alydar in 7 of 9 Meetings*, ESPN CLASSIC (Nov. 19, 2003), [http://espn.go.com/classic/s/add\\_affirmed\\_alydar.html](http://espn.go.com/classic/s/add_affirmed_alydar.html).

248. BOWEN, *supra* note 25, at 208 tbl.

249. *The Triple Crown*, *supra* note 5.

250. Kamalsharma444, *Synopsis for Seabiscuit*, IMDB, <http://www.imdb.com/title/tt0329575/>

Seabiscuit, Affirmed was laid-back in demeanor.<sup>251</sup> Archrival Alydar of Calumet Farm was more physically-imposing, muscular, and powerful looking.<sup>252</sup> Affirmed was more relaxed and sociable around people.<sup>253</sup> Alydar was more popular among racing fans, but Affirmed reportedly ran with the precision of a timepiece.<sup>254</sup> “[H]e had a heart of steel and a reservoir of class that, combined with dashing speed and classic stamina, made him a racehorse of engulfing style and efficiency.”<sup>255</sup>

The 1978 Triple Crown has the distinction of being the only time in history when the same horses finished first and runner-up in all three legs.<sup>256</sup> Affirmed’s margin of victory over Alydar in the three races was a combined total of less than two lengths.<sup>257</sup> They would race against each other ten times,<sup>258</sup> with Affirmed winning seven by a combined total of ten lengths.<sup>259</sup> Only once, in their first meeting at age two, were they separated by other horses.<sup>260</sup> Theirs has been described as the most celebrated rivalry in American racing history.<sup>261</sup>

Over the course of his career, Affirmed won twenty-two of the twenty-nine races he entered.<sup>262</sup> He finished out of the money only

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synopsis (last visited July 20, 2011).

251. Brant James, *Looking Back at a Legend*, ST. PETERSBURG TIMES (June 4, 2003), [http://www.sptimes.com/2003/06/04/Sports/Looking\\_back\\_at\\_a\\_leg.shtml](http://www.sptimes.com/2003/06/04/Sports/Looking_back_at_a_leg.shtml).

252. BOWEN, *supra* note 25, at 208.

253. William Nack, *Old Foes, New Race*, SPORTS ILLUSTRATED, June 8, 1987, at 44, 57, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1066054/index.htm>.

254. *Id.*

255. BOWEN, *supra* note 25, at 208.

256. Jackie, *Horse Racing's Greatest Rivalry: Affirmed vs. Alydar*, REGARDING HORSES (Feb. 25, 2009), <http://www.regardinhorses.com/2009/02/25/horse-racings-greatest-rivalry-affirmed-vs-alydar/>. To view videos of the three races, see *id.* Affirmed was ridden during the Triple Crown by eighteen-year-old jockey Steve Cauthen, and trained by Lazaro “Laz” Barrera. Esther Marr, *Affirmed Exhibit Opens at Kentucky Horse Park*, BLOOD-HORSE (June 6, 2007, 8:12 PM), <http://www.bloodhorse.com/horse-racing/articles/39254/affirmed-exhibit-opens-at-kentucky-horse-park>.

257. Affirmed beat Alydar in the Kentucky Derby, Preakness, and Belmont Stakes by 1-1/2 lengths, a neck, and a head, respectively. Jackie, *supra* note 256. Their duel in the 1978 Belmont is considered one of the greatest horse races ever run. See Sean Magee, *The 10 Greatest Horse Races of All Time*, OBSERVER (Sept. 1, 2002), <http://observer.guardian.co.uk/osm/story/0,,782470.00.html>.

258. BOWEN, *supra* note 25, at 209.

259. *Id.*

260. See Tom Reed, *1: Affirmed, 2: Alydar*, COLUMBUS DISPATCH (June 6, 2008, 3:11 AM), [http://www.dispatch.com/live/content/sports/stories/2008/06/06/affirmed\\_alydar.ART\\_ART\\_06-06-08\\_C1\\_PQADJPU.html?sid=101](http://www.dispatch.com/live/content/sports/stories/2008/06/06/affirmed_alydar.ART_ART_06-06-08_C1_PQADJPU.html?sid=101).

261. *Affirmed: The Making of a Champion*, INT’L MUSEUM OF THE HORSE, <http://imh.org/online-exhibitions/> (last visited July 20, 2011).

262. Marr, *supra* note 256. In 1979, Affirmed became the first thoroughbred racehorse in history to win \$2 million. *Affirmed: The Making of a Champion*, *supra* note 261.

once.<sup>263</sup> In 1978 and 1979, Affirmed was named Horse of the Year, the highest honor in thoroughbred racing.<sup>264</sup>

Following a bout of laminitis, a circulatory hoof disease, Affirmed was euthanized on January 12, 2001, at the age of twenty-six.<sup>265</sup> In the ultimate tribute to a champion thoroughbred, Affirmed was buried intact, in the flamingo-pink and black silks of Harbor View Farm, at Jonabell Farm in Lexington, Kentucky.<sup>266</sup>

## VI. THE NAMING OF A THOROUGHBRED

The meaning of Affirmed's name has long been the subject of speculation among equine historians and journalists.<sup>267</sup> None have considered why Wolfson would think to name a race horse "Affirmed" after his conviction for securities law violations had been affirmed on appeal. As the final word of an appellate opinion which Wolfson understood would likely end his freedom, "Affirmed" could not possibly have held a positive connotation.

Responding to questions about Affirmed's name, Wolfson gave a pat answer. At a press conference following the 1978 Kentucky Derby, Wolfson said, "My wife likes "Aff" on account of Affectionately and we've had some good luck with these kinds of names—so far."<sup>268</sup>

To take Wolfson's explanation at face value would ignore the fact that there is nothing casual about the naming of a racehorse.<sup>269</sup> It is not

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263. See Marr, *supra* note 256.

264. *Affirmed: The Making of a Champion*, *supra* note 261. After the Belmont, Affirmed was syndicated into thirty-six shares (of which Harbor View Farm retained fifteen), for a total of \$14.4 million. Capps, *supra* note 22, at 118. Affirmed's lifetime progeny earned \$43,618,008, well above average for a stallion, but exceeded by Alydar's who earned \$60,604,510. *Id.* at 211-12; Jockey Club Info. Sys., Inc., *Alydar's Promise*, EQUINELINE.COM, [http://www.test.equineline.com/Free-5X-Pedigree.cfm?source=free5x&page\\_state=GENERATE&reference\\_number=942277&registry=null&horse\\_name=&dam\\_name=&foaling\\_year=&NICKING\\_STATS\\_INDICATOR=Y&sire\\_reference\\_number=0&dam\\_reference\\_number=0&color=&sex=&hypo\\_foaling\\_year=&breeder=&n2=2%2C12](http://www.test.equineline.com/Free-5X-Pedigree.cfm?source=free5x&page_state=GENERATE&reference_number=942277&registry=null&horse_name=&dam_name=&foaling_year=&NICKING_STATS_INDICATOR=Y&sire_reference_number=0&dam_reference_number=0&color=&sex=&hypo_foaling_year=&breeder=&n2=2%2C12) (last visited July 20, 2011).

265. Jackie, *supra* note 256; Marr, *supra* note 256.

266. Reed, *supra* note 260.

267. Research by racing historian Timothy Capps failed to uncover any reference to the naming of Affirmed. E-mail from Timothy T. Capps (Jan. 26, 2010, 4:28 PM) (on file with author).

268. FAULCONER, *supra* note 247, at 1. Affectionately was a champion mare trained by Hirsch Jacobs in the 1960s, and the mother of Personality, winner of the 1970 Preakness. *Id.*; *Preakness Stakes Results*, PREAKNESS STAKES, <http://www.preakness-stakes.info/preakness-results.php> (last visited July 20, 2011). Wolfson's horse Affiliate finished ninth in the 1977 Derby won by Seattle Slew. *1977 Kentucky Derby (G1)*, HORSE RACING NATION, [http://www.horseracingnation.com/race/1977\\_Kentucky\\_Derby\\_G1](http://www.horseracingnation.com/race/1977_Kentucky_Derby_G1) (last visited July 20, 2011).

269. Strict rules govern the naming of thoroughbreds. Names cannot be more than eighteen characters in length, including spaces and punctuation. A thoroughbred cannot be named after a person without permission. JOCKEY CLUB, *THE AMERICAN STUD BOOK: PRINCIPAL RULES AND REQUIREMENTS 17-18* (2008), available at [http://www.jockeyclub.com/pdfs/rules\\_08\\_final.pdf](http://www.jockeyclub.com/pdfs/rules_08_final.pdf).

by random coincidence, but after much serious thought, that a thoroughbred's name is bestowed.<sup>270</sup> Proud owners typically want their horses to have meaningful names, appropriate for what they hope will be a champion. Having bred the horse through three generations,<sup>271</sup> the Wolfsons, and especially Patrice whose understanding of breeding was equal if not superior to her husband's, may have had an inkling that Affirmed had the bloodlines to develop into something special.<sup>272</sup>

"The name Affirmed sounds like a statement, not a name[.]" blogged equine journalist Donna Campbell Smith.<sup>273</sup> Indeed it is, but what statement was his owner trying to make? Equine historian Edward Bowen recalls Patrice Wolfson explaining that Affirmed's name came from a situation in which the couple expected to have an opinion affirmed on appeal.<sup>274</sup> While an intriguing theory, *Merritt-Chapman & Scott Corp. v. Wolfson*, decided on May 31, 1974,<sup>275</sup> is the only known case involving Wolfson that may have been on appeal at the time of Affirmed's birth. Research and correspondence with counsel in the case reveals no evidence that the decision of the Delaware Superior Court was ever appealed.<sup>276</sup>

It has been suggested that the name Affirmed is emblematic of the vindication Wolfson spent the second half of his life seeking to gain.<sup>277</sup> Michael Goldman, a Delaware attorney who represented MCS in *Merritt-Chapman & Scott Corp.*, puts a slightly different spin on this theory. He believes Wolfson was angry at the Supreme Court for

270. Of course, there are exceptions. Some racehorse names are created simply by merging the names of their parents. Wolfson named horses Garwol and Marwol for sons Gary and Martin. Hirsch, *supra* note 25, at 35.

271. *A Nice, Quiet Life*, *supra* note 17, at 60.

272. "In Affirmed, the Wolfsons had the phenotype of the bench mark Thoroughbred. . . . [I]t was almost assured that Affirmed would become legendary." John Williams, *Bench Mark Thoroughbred*, BLOOD-HORSE (Jan. 16, 2001, 9:30 AM), <http://www.bloodhorse.com/horse-racing/articles/2479/bench-mark-throughbred>.

273. Donna Campbell Smith, *I'm Rooting for Big Brown*, DONNA CAMPBELL SMITH TALKS EQUINE (June 6, 2008, 8:16 PM), <http://donnacampbellsmith.blogspot.com/2008/06/im-rooting-for-big-brown.html>.

274. E-mail from Edward L. Bowen (Jan. 18, 2010) (on file with author).

275. *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 138 (Del. Super. Ct. 1974).

276. E-mail from Jack B. Jacobs (Jan. 20, 2010) (on file with author). Jacobs, now a justice of the Delaware Supreme Court, was one of Wolfson's attorneys in the case. Another of Wolfson's lawyers, Bruce Stargatt, believes the case may simply have been affirmed without opinion, although he also was unable to find any evidence of its having been appealed. E-mail from Bruce Stargatt (Jan. 25, 2010) (on file with author).

277. "A guess might be made that Patrice Jacobs sees in Affirmed a chance for vindication of both men in her life—for the attainment of the one goal denied her father and a way of bringing honor to her husband, who has been attacked so often in the past." *A Nice, Quiet Life*, *supra* note 17, at 66. "I think she wanted vindication for him, as he wanted for himself." E-mail from Timothy T. Capps, *supra* note 267.

refusing to hear his appeal of the Continental Enterprises case.<sup>278</sup> The naming of Affirmed may have been Wolfson's way of demonstrating contempt for the judicial process that had treated him so unfairly.<sup>279</sup> "Affirmed - I'll give you 'Affirmed'!"<sup>280</sup>

There is no evidence that Wolfson was a student of psychology. So, it may be sheer coincidence that the name he selected for his champion thoroughbred is the term used to describe the mechanism for coping with a threat to one's self-integrity by seeking an alternative source of self-worth in another competency.<sup>281</sup> With his meteoric business career in ruins, Wolfson seemed to channel the power and determination of Affirmed to give his own life new direction and purpose. There is no doubt that Wolfson appeared to bask in Affirmed's success. In the words of equine historian Timothy Capps, "the horse was clearly a restorative to him."<sup>282</sup> According to son Stephen, "'Affirmed and his offspring took Dad back to a world where he felt good about life again . . .'"<sup>283</sup>

It seems fitting that Wolfson's most loyal and trusted confidante should have the last word on the subject. Monteen Clements Tomberlin was associated with Wolfson since 1935, when she went to work for Florida Pipe and Supply Co. at the age of sixteen.<sup>284</sup> Tomberlin has said that Patrice Wolfson "'gave Affirmed its name based on many important decisions, personal, business and otherwise, that have been affirmed over the years.'"<sup>285</sup>

278. Telephone Interview with Michael D. Goldman, Partner, Potter, Anderson & Corroon, LLP (Jan. 19, 2010).

279. *Id.* At his sentencing in the MCS case, Wolfson addressed the court in bitter terms, claiming he was a victim of "bias and discrimination[.]" and led "to conclude 'that there is one set of rules for me and one set of rules for the others.'" SHOGAN, *supra* note 22, at 213-14.

280. Interview with Michael D. Goldman, *supra* note 278.

281. See generally *Self Affirmation Theory*, CHANGINGMINDS.ORG, <http://changingminds.org/explanations/theories/self-affirmation.htm> (last visited July 20, 2011) ("This theory explains how people will reduce the impact of a threat to their self-concept by focusing on and affirming their competence in some other area."). First proposed by psychologist Claude M. Steele, self-affirmation theory holds there is a basic human need to defend one's self-integrity, i.e., the sense that one is a "good" person. When a person's valued self-image is threatened, as when one feels humiliated and ashamed rather than proud and pleased, a person may adopt a defensive strategy aimed at restoring one's sense of self-worth by affirming a valued sense of the self in a domain unrelated to the threat. See *Self Affirmation Theory*, *supra* ("Example: If you show me how I cannot sing, I'll go and play guitar even more, which I know I am better at.").

282. E-mail from Timothy T. Capps, *supra* note 267.

283. Kerr, *supra* note 30. "He, Patrice, and the whole family rose again. Affirmed was the catalyst to the return of my father . . ." Marr, *supra* note 256.

284. Jessie-Lynne Kerr, *Funeral-Goers Pay Respect to Amazing Man; Wolfson Did It All*, FLA. TIMES-UNION (Jan. 3, 2008, 6:42 PM), <http://news.jacksonville.com/justin/2008/01/03/funeral-goers-pay-respect-to-amazing-man-wolfson-did-it-all/>.

285. FAULCONER, *supra* note 247, at 1.

## VII. CONCLUSION

Wolfson died at home in Bal Harbour, Florida on December 30, 2007, at the age of ninety-five.<sup>286</sup> His is a complex tale of respectability and social status gained, lost, and re-gained through extraordinary effort and innate skill. The American ideal of the self-made man, Wolfson did it twice by inventing himself in the role of corporate raider in the 1950s, and then repurposing himself through horse-racing in the 1970s.

Although he would achieve great wealth and celebrity, Wolfson would always be a first-generation Floridian, and the son of poor Russian Jewish immigrants. He seemed to embrace the role of quintessential outsider, perhaps realizing he had no choice in the matter.<sup>287</sup> Always a maverick in business, Wolfson was considered a menace by leaders of the nation's major corporations and their political allies.<sup>288</sup> He considered himself the victim of a vendetta waged by those who felt threatened by his activities.<sup>289</sup>

Wolfson built a career by identifying companies ripe for take-over because the value of their net assets exceeded share prices that were discounted by the market to reflect inefficient management. Remembered as the inventor of the modern conglomerate and the original corporate raider,<sup>290</sup> the use of the hostile tender offer as a disciplinary force on managerial behavior is Wolfson's legacy.<sup>291</sup>

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286. Wolfson died on his 35th wedding anniversary. Official causes of death were Alzheimer's disease and colon cancer, although he had been substantially incapacitated for several years after suffering several small strokes. Kerr, *supra* note 30; E-mail from Timothy T. Capps, *supra* note 267. He was survived by his wife, Patrice, daughter Marcia, sons Stephen, Gary, and Martin, three brothers, nine grandchildren, and five great-grandchildren. Kerr, *supra* note 30.

287. SOBEL, *supra* note 7, at 13; *A Nice, Quiet Life*, *supra* note 17, at 60. Racing historian Capps believes Wolfson reveled in being identified as the "enfant terrible" of corporate America. E-mail from Timothy T. Capps, *supra* note 267.

288. SOBEL, *supra* note 7, at 13. Ironically, Wolfson was reported to have had admirers within the SEC itself. "Even to some of the staff people of the SEC, the lawyers down in Washington, Wolfson was something of a hero. He was kind of an outsider who was busting up the cabal that was running the country economically. . . . He had a following, and that's where a bit of the sadness was, and the hurt." Interview by Kenneth Durr with Paul Windels, *supra* note 78, at 16.

289. SHOGAN, *supra* note 22, at 197. Even after he achieved extraordinary success in horse racing, membership in the exclusive Jockey Club, "that Caucasian circle of Anglo-Saxons who for generations controlled the racing industry," was denied to him, as it had been denied to his illustrious father-in-law before him. E-mail from Timothy T. Capps, *supra* note 267; *A Nice, Quiet Life*, *supra* note 17, at 62.

290. See Manne, *supra* note 6.

291. "Before Wolfson's innovation, executing a 'hostile' (i.e., against the wishes of incumbent management) takeover required winning a long and potentially costly proxy contest. Now, potential bidders could appeal directly to shareholders, asking them to 'tender' their shares at the offered price, bypassing the incumbent management team altogether." Peter Klein, *The Original Corporate Raider*, ORGS. & MKTS. (Feb. 3, 2008), <http://organizationsandmarkets.com/2008/02/03/the-original-corporate-raider/>.

Wolfson is said to have worked “assiduously and flawlessly” to create his own legend while still living.<sup>292</sup> According to Wolfson, management failed to appreciate the importance of the American investor.<sup>293</sup> In a trope to be perfected in the 1980s by Carl Icahn, T. Boone Pickens, Michael Milken, and Sir James Goldsmith, Wolfson articulated his role as a crusader for stockholders against entrenched incumbent management.<sup>294</sup> Like another shipbuilder, George Steinbrenner, who decades later would arise as a self-styled surrogate for baseball fans,<sup>295</sup> Wolfson saw himself as a strong voice for the interests of shareholders, including interests that stockholders may not have understood themselves.<sup>296</sup> It is ironic, therefore, that Wolfson would twice stand accused of selling unregistered securities and defrauding stockholders in his own companies, and that it would be his downfall.

If not a true visionary, Wolfson was certainly a forerunner decades ahead of his time.<sup>297</sup> Conglomeration would become commonplace in the 1970s. By the 1980s the role of corporate raider would achieve the respectability it lacked in Wolfson’s time. If it was Wolfson’s tragedy to have been born too soon,<sup>298</sup> it was his good fortune to enjoy a successful second act.

Long regarded as an enigma himself,<sup>299</sup> his life story was distilled into the enigmatic name Wolfson gave his champion racehorse. Toward the end of Orson Welles’s classic motion picture, *Citizen Kane*, the reporter-narrator Jerry Thompson remarks, “I don’t think any word can explain a man’s life.”<sup>300</sup> Like “Rosebud,” Affirmed may well represent

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292. SOBEL, *supra* note 7, at 11.

293. HENRIQUES, *supra* note 31, at 169. Wolfson believed managers failed to appreciate the significance of the transition that had taken place in the U.S. economy, whose industries had long been owned by a handful of plutocrats with names like Mellon, Morgan, Vanderbilt, and Rockefeller. *Id.* at 170. “Without his willingness to provide the funds to build factories and buy machinery, management would have nothing to manage.” *Id.* at 169.

294. Sir James Goldsmith, for example, has described his role as corporate raider as being in the nature of a “cleansing” agent. *Anatomy of a Corporate Takeover*, GOOGLE VIDEOS <http://video.google.com/videoplay?docid=-3101006047652152216#> (last visited July 20, 2011).

295. Richard Hoffer, *Bye George, You Got It*, SPORTS ILLUSTRATED, July 26, 2010, at 12, 13.

296. It is unclear whether Wolfson himself understood his own impact on corporate governance. “I met Wolfson in his later years,” Henry Manne reported. “As an academic interested in the theory of the market for corporate control, I pressed him for his understanding of the real thrust of his innovation and of the merciless animosity that it generated. He seemed to harbor no grudge—or even to understand what I was talking about. Happily, the market does not require theoretical understanding, just action.” Manne, *supra* note 6.

297. See *supra*, note 75 and accompanying text.

298. See SOBEL, *supra* note 7, at 12.

299. “[A]lthough countless attempts have been made to produce the ‘real’ Wolfson, none has succeeded . . . The enigma—what makes Wolfson run and what is he after—is also intact and unresolved.” *Id.* at 11-12.

300. Roger Ebert, *Citizen Kane (1941)*, ROGEREBERT.COM (May 24, 1998),

something Wolfson felt he could not obtain or something he lost.<sup>301</sup> In the naming of *Affirmed*, Louis Wolfson succeeded in capturing the essence of a long and difficult journey.

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<http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=%2F19980524%2FREVIEWS08%2F401010334%2F1023>. If and when a movie is made about the lives of Wolfson and *Affirmed*, *Seabiscuit* will surely provide a tempting model. The story of *Affirmed*, much like *Seabiscuit*'s before him, illustrates the redemptive power of the sport of horse racing on the lives of the connections to a champion thoroughbred. However, Orson Welles's *Citizen Kane*, featuring a reporter's obsessive search for the meaning behind the title character's famous last word, "Rosebud," may be the better cinematic model.

301. "Had he been capable of accepting his place as a successful horse owner and breeder who achieved things very few such people do, without tilting at windmills in an effort to resurrect his own view of himself, he might well have left this life a more content person." E-mail from Timothy T. Capps, *supra* note 267.