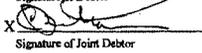
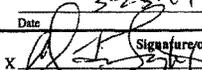
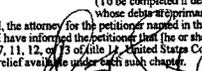


(Official Form 1) (9/97)

FORM B1	United States Bankruptcy Court Eastern District of Louisiana	Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle): Ortous, G. T.		Name of Joint Debtor (Spouse)(Last, First, Middle): Ortous, C. A.
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names): CLERK		All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Sec. Sec./Tax I.D. No. (if more than one, state all): 436-64-1366		Sec. Sec./Tax I.D. No. (if more than one, state all): 434-78-3992
Street Address of Debtor (No. & Street, City, State & Zip Code): P. O. Box 1723 Harvey, LA 70059-1723		Street Address of Joint Debtor (No. & Street, City, State & Zip Code): P. O. Box 1723 Harvey, LA 70059-1723
County of Residence or of the Principal Place of Business: Jefferson Parish		County of Residence or of the Principal Place of Business: Jefferson Parish
Mailing Address of Debtor (if different from street address):		Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above): n1-12363		
Information Regarding the Debtor (Check the Applicable Boxes)		
Venue (Check any applicable box)		
<input checked="" type="checkbox"/> Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. <input type="checkbox"/> There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.		
Type of Debtor (Check all boxes that apply)		Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)
<input checked="" type="checkbox"/> Individual(s) <input type="checkbox"/> Railroad <input type="checkbox"/> Corporation <input type="checkbox"/> Stockbroker <input type="checkbox"/> Partnership <input type="checkbox"/> Commodity Broker <input type="checkbox"/> Other _____		<input type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 11 <input checked="" type="checkbox"/> Chapter 13 <input type="checkbox"/> Chapter 9 <input type="checkbox"/> Chapter 12 <input type="checkbox"/> Sec. 304 - Case ancillary to foreign proceeding
Nature of Debts (Check one box)		Filing Fee (Check one box)
<input checked="" type="checkbox"/> Consumer/Non-Business <input type="checkbox"/> Business		<input checked="" type="checkbox"/> Full Filing Fee Attached <input type="checkbox"/> Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.
Chapter 11 Small Business (Check all boxes that apply)		THIS SPACE IS FOR COURT USE ONLY
<input type="checkbox"/> Debtor is a small business as defined in 11 U.S.C. § 101 <input type="checkbox"/> Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)		
Statistical/Administrative Information (Estimates only)		
<input checked="" type="checkbox"/> Debtor estimates that funds will be available for distribution to unsecured creditors. <input type="checkbox"/> Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.		
Estimated Number of Creditors		
	1-15 16-49 50-99 100-199 200-999 1000-over	
	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
Estimated Assets		
	\$0 to \$50,000 \$50,001 to \$100,000 \$100,001 to \$500,000 \$500,001 to \$1 million \$1,000,001 to \$10 million \$10,000,001 to \$50 million \$50,000,001 to \$100 million More than \$100 million	
	<input type="checkbox"/>	
Estimated Debts		
	\$0 to \$50,000 \$50,001 to \$100,000 \$100,001 to \$500,000 \$500,001 to \$1 million \$1,000,001 to \$10 million \$10,000,001 to \$50 million \$50,000,001 to \$100 million More than \$100 million	
	<input type="checkbox"/>	

DEF01914
PORT Exhibit 1100 (b)

(Official Form 1) (8/97)

Voluntary Petition <i>(This page must be completed and filed in every case)</i>		Name of Debtor(s): G. T. Ortous C. A. Ortous	FORM B1, Page 2
Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)			
Location Where Filed: NONE	Case Number:	Date Filed:	
Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)			
Name of Debtor: NONE	Case Number:	Date Filed:	
District:	Relationship:	Judge:	
Signatures			
<p style="text-align: center;">Signature(s) of Debtor(s) (Individual/Joint)</p> <p>I declare under penalty of perjury that the information provided in this petition is true and correct. <small>[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.</small> I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.</p> <p>X  _____ Signature of Debtor</p> <p>X  _____ Signature of Joint Debtor</p> <p>Telephone Number (If not represented by attorney) _____</p> <p>Date <u>3-28-01</u></p>		<p style="text-align: center;">Signature of Debtor (Corporation/Partnership)</p> <p>I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.</p> <p>The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.</p> <p>X Not Applicable _____ Signature of Authorized Individual</p> <p>_____ Printed Name of Authorized Individual</p> <p>_____ Title of Authorized Individual</p> <p>_____ Date</p>	
<p style="text-align: center;">Signature of Attorney</p> <p>X  _____ Signature of Attorney for Debtor(s)</p> <p>Claude C. Lightfoot, Jr., LA 17989 Printed Name of Attorney for Debtor(s) / Bar No.</p> <p>Claude C. Lightfoot, Jr. P.C. Firm Name</p> <p>3500 N. Causeway Blvd. Suite 450 Address</p> <p>Metairie, LA 70002 Address</p> <p>(504) 838-8571 (fax) (504) 838-857 Telephone Number</p> <p>Date <u>3-28-01</u></p>		<p style="text-align: center;">Signature of Non-Attorney Petition Preparer</p> <p>I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.</p> <p>Not Applicable _____ Printed Name of Bankruptcy Petition Preparer</p> <p>_____ Social Security Number</p> <p>_____ Address</p> <p>Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:</p> <p>_____</p> <p>_____</p>	
<p style="text-align: center;">Exhibit A</p> <p>(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)</p> <p><input type="checkbox"/> Exhibit A is attached and made a part of this petition.</p>		<p>If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.</p> <p>X Not Applicable _____ Signature of Bankruptcy Petition Preparer</p> <p>_____ Date</p>	
<p style="text-align: center;">Exhibit B</p> <p>(To be completed if debtor is an individual whose debts are primarily consumer debts)</p> <p>I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner (just he or she) may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.</p> <p>X  _____ Signature of Attorney for Debtor(s)</p> <p>Date <u>3-28-01</u></p>		<p>A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.</p>	

DEF01915

United States Bankruptcy Court
Eastern District of Louisiana

NOTICE TO INDIVIDUAL CONSUMER DEBTOR

The purpose of this notice is to acquaint you with the four chapters of the Federal Bankruptcy Code under which you may file a bankruptcy petition. The bankruptcy law is complicated and not easily described. Therefore, you should seek the advice of an attorney to learn of your rights and responsibilities under the law should you decide to file a petition with the court. Court employees are prohibited from giving you legal advice.

Chapter 7: Liquidation (\$155.00 filing fee plus \$30.00 administrative fee plus \$15.00 trustee surcharge)

- 1. Chapter 7 is designed for debtors in financial difficulty who do not have the ability to pay their existing debts.
2. Under chapter 7 a trustee takes possession of all your property. You may claim certain of your property as exempt under governing law. The trustee then liquidates the property and uses the proceeds to pay your creditors according to priorities of the Bankruptcy Code.
3. The purpose of filing a chapter 7 case is to obtain a discharge of your existing debts. If, however, you are found to have committed the certain kinds of improper conduct described in the Bankruptcy Code, your discharge may be denied by the court, and the purpose for which you filed bankruptcy petition will be defeated.
4. Even if you receive a discharge, there are some debts that are not discharged under the law. Therefore, you may still be responsible for such debts as certain taxes and student loans, alimony and support payments, criminal restitution, and debts for death or personal injury caused by driving while intoxicated from alcohol or drugs.
5. Under certain circumstances you may keep property that you have purchased subject to a valid security interest. Your attorney can explain the options that are available to you.

Chapter 13: Repayment of All or Part of the Debts of an Individual with Regular Income (\$155.00 filing fee plus \$30.00 administrative fee)

- 1. Chapter 13 is designed for individuals with regular income who are temporarily unable to pay their debts but would like to pay them in installments over a period of time. You are only eligible for chapter 13 if your debts do not exceed certain dollar amounts set forth in the Bankruptcy Code.
2. Under chapter 13 you must file a plan with the court to repay your creditors all or part of the money that you owe them, using your future earnings. Usually, the period allowed by the court to repay your debts is three years, but no more than five years. Your plan must be approved by the court before it can take effect.
3. Under chapter 13, unlike chapter 7, you may keep all your property, both exempt and non-exempt, as long as you continue to make payments under the plan.
4. After completion of payments under your plan, your debts are discharged except alimony and support payments, student loans, certain debts including criminal fines and restitution and debts for death or personal injury caused by driving while intoxicated from alcohol or drugs, and long term secured obligations.

Chapter 11: Reorganization (\$800.00 filing fee)

Chapter 11 is designed primarily for the reorganization of a business but is also available to consumer debtors. Its provisions are quite complicated, and any decision by an individual to file a chapter 11 petition should be reviewed with an attorney.

Chapter 12: Family Farmer (\$200.00 filing fee)

Chapter 12 is designed to permit family farmers to repay their debts over a period of time from future earnings and is in many ways similar to a chapter 13. The eligibility requirements are restrictive, limiting its use to those whose income arises primarily from a family owned farm.

I, the debtor, affirm that I have read this notice.

3-28-01

Date 3-28-01

Date

[Signature]
G. A. Ortous, Debtor

[Signature]

C. A. Ortous, Joint Debtor

Case Number

American Express Centurion Bank
Suite 0002
Chicago, IL 60679-0002

Bank of Louisiana Mastercard
P.O. Box 6972
Metairie, LA 70009-6972

Bank One
P.O. Box 32490
Louisville, KY 40232

First USA Bank, N.A.
First USA Bank, N.A.
P.O. Box 8864
Wilmington, DE 19899-8864

Chase Platinum Mastercard
P.O. Box 52050
Phoenix, AZ 85072-2050

Citibank Advantage
P.O. Box 6408
The Lakes, NV 88901-6408

Citibank Advantage
P.O. Box 6000
The Lakes, NV 89163-6000

Citibank USA
P.O. Box 15109
Wilmington, DE 19850-5109

Citifinancial
P.O. Box 17127
Baltimore, MD 21297

Dillard's
P.O. Box 52079
Phoenix, AZ 85072-2079

Dillard's
P. O. Box 52067
Phoenix, AZ 85072

Discover Platinum
P.O. Box 6011
Dover, DE 19903-6011

Edward F. Bukaty, III
One Galleria Blvd.
Suite 1810
Metairie, LA 70001-2082

Fidelity Homestead Association
222 Baronne Street
New Orleans, LA 70112

First USA Bank
P.O. Box 94014
Palatine, IL 60094-4014

J.C. Penny
P.O. Box 27570
Albuquerque, NM 87125

Jules A. Fontana, III
Fontana & Fontana, L.L.C.
1022 Loyola Avenue
New Orleans, LA 70113

MBNA America
P.O. Box 15137
Wilmington, DE 19886-5137

MBNA America
P.O. Box 15019
Wilmington, DE 19886-5019

MBNA America
P.O. Box 15137
Wilmington, DE 19886-5137

Regions Bank
301 St. Charles Avenue
New Orleans, LA 70130

Chrysler Credit Corporaiton
P. O. Box 7000
Covington, LA 70434

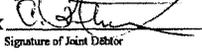
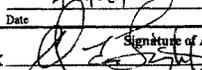
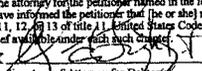
01-12363 Section "A"

(Official Form 1) (8/97)

FORM B1		United States Bankruptcy Court Eastern District of Louisiana		Voluntary Petition Amended																
Name of Debtor (if individual, enter Last, First, Middle): Porteous, Jr., Gabriel T.			Name of Joint Debtor (Spouse)(Last, First, Middle): Porteous, Carmella A.																	
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):			All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):																	
Soc. Sec./Tax I.D. No. (if more than one, state all): 436-64-1366			Soc. Sec./Tax I.D. No. (if more than one, state all): 434-78-3992																	
Street Address of Debtor (No. & Street, City, State & Zip Code): 4801 Neyrey Drive Metairie, LA 70002			Street Address of Joint Debtor (No. & Street, City, State & Zip Code): 4801 Neyrey Drive Metairie, LA 70002																	
County of Residence or of the Principal Place of Business: Jefferson Parish			County of Residence or of the Principal Place of Business: Jefferson Parish																	
Mailing Address of Debtor (if different from street address):			Mailing Address of Joint Debtor (if different from street address):																	
Location of Principal Assets of Business Debtor (if different from street address above):																				
Information Regarding the Debtor (Check the Applicable Boxes)																				
Venue (Check any applicable box)																				
<input checked="" type="checkbox"/> Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. <input type="checkbox"/> There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.																				
Type of Debtor (Check all boxes that apply)			Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)																	
<input checked="" type="checkbox"/> Individual(s) <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Other			<input type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 9 <input type="checkbox"/> Sec. 504 - Case ancillary to foreign proceeding																	
<input type="checkbox"/> Railroad <input type="checkbox"/> Stockbroker <input type="checkbox"/> Commodity Broker			<input type="checkbox"/> Chapter 11 <input type="checkbox"/> Chapter 12 <input checked="" type="checkbox"/> Chapter 13																	
Nature of Debts (Check one box)			Filing Fee (Check one box)																	
<input checked="" type="checkbox"/> Consumer/Non-Business <input type="checkbox"/> Business			<input checked="" type="checkbox"/> Full Filing Fee Attached <input type="checkbox"/> Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.																	
Chapter 11 Small Business (Check all boxes that apply)																				
<input type="checkbox"/> Debtor is a small business as defined in 11 U.S.C. § 101 <input type="checkbox"/> Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)																				
Statistical/Administrative Information (Estimates only)					THIS SPACE IS FOR COURT USE ONLY															
<input checked="" type="checkbox"/> Debtor estimates that funds will be available for distribution to unsecured creditors. <input type="checkbox"/> Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.																				
Estimated Number of Creditors																				
<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">1-15</td> <td style="text-align: center;">6-49</td> <td style="text-align: center;">50-99</td> <td style="text-align: center;">100-199</td> <td style="text-align: center;">200-999</td> <td style="text-align: center;">1000-over</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input checked="" type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>						1-15	6-49	50-99	100-199	200-999	1000-over	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
1-15	6-49	50-99	100-199	200-999	1000-over															
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>															
Estimated Assets																				
<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">\$0 to \$50,000</td> <td style="text-align: center;">\$50,001 to \$100,000</td> <td style="text-align: center;">\$100,001 to \$500,000</td> <td style="text-align: center;">\$500,001 to \$1 million</td> <td style="text-align: center;">\$1,000,001 to \$10 million</td> <td style="text-align: center;">\$10,000,001 to \$50 million</td> <td style="text-align: center;">\$50,000,001 to \$100 million</td> <td style="text-align: center;">More than \$100 million</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input checked="" type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>					\$0 to \$50,000	\$50,001 to \$100,000	\$100,001 to \$500,000	\$500,001 to \$1 million	\$1,000,001 to \$10 million	\$10,000,001 to \$50 million	\$50,000,001 to \$100 million	More than \$100 million	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>				
\$0 to \$50,000	\$50,001 to \$100,000	\$100,001 to \$500,000	\$500,001 to \$1 million	\$1,000,001 to \$10 million	\$10,000,001 to \$50 million	\$50,000,001 to \$100 million	More than \$100 million													
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>													
Estimated Debts																				
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\$0 to \$50,000	\$50,001 to \$100,000	\$100,001 to \$500,000	\$500,001 to \$1 million	\$1,000,001 to \$10 million	\$10,000,001 to \$50 million	\$50,000,001 to \$100 million	More than \$100 million													
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>													

f2

(Official Form 1) (9/87)

Voluntary Petition <i>(This page must be completed and filed in every case)</i>		Name of Debtor(s): Gabriel T. Porteous, Jr. Carmella A. Porteous	
FORM B1, Page 2			
Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)			
Location Where Filed: NONE	Case Number:	Date Filed:	
Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)			
Name of Debtor: NONE	Case Number:	Date Filed:	
District:	Relationship:	Judge:	
Signatures			
<p style="text-align: center;">Signature(s) of Debtor(s) (Individual/Joint)</p> <p>I declare under penalty of perjury that the information provided in this petition is true and correct. <small>(If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7) I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.</small> I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.</p> <p><input checked="" type="checkbox"/>  _____ Signature of Debtor</p> <p><input checked="" type="checkbox"/>  _____ Signature of Joint Debtor</p> <p>Telephone Number (if not represented by attorney) _____ Date <u>4-9-01</u></p>		<p style="text-align: center;">Signature of Debtor (Corporation/Partnership)</p> <p>I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.</p> <p>The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.</p> <p><input checked="" type="checkbox"/> Not Applicable</p> <p>Signature of Authorized Individual _____ Printed Name of Authorized Individual _____ Title of Authorized Individual _____ Date _____</p>	
<p><input checked="" type="checkbox"/>  _____ Signature of Attorney for Debtor(s)</p> <p>Claude C. Lightfoot, Jr., LA 17989 Printed Name of Attorney for Debtor(s) / Bar No.</p> <p>Claude C. Lightfoot, Jr. P.C. Firm Name</p> <p>3500 N. Causeway Blvd. Suite 450 Address</p> <p>Metairie, LA 70002 Address</p> <p>(504) 838-8571 (fax) (504) 838-8572 Telephone Number</p> <p>Date <u>4-9-01</u></p>		<p style="text-align: center;">Signature of Non-Attorney Petition Preparer</p> <p>I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.</p> <p><input checked="" type="checkbox"/> Not Applicable</p> <p>Printed Name of Bankruptcy Petition Preparer _____ Social Security Number _____ Address _____ Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document: _____</p>	
<p style="text-align: center;">Exhibit A</p> <p>(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)</p> <p><input type="checkbox"/> Exhibit A is attached and made a part of this petition.</p>		<p>If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.</p> <p><input checked="" type="checkbox"/> Not Applicable</p> <p>Signature of Bankruptcy Petition Preparer _____ Date _____</p>	
<p style="text-align: center;">Exhibit B</p> <p>(To be completed if debtor is an individual whose debts are primarily consumer debts)</p> <p>I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that (he or she) may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.</p> <p><input checked="" type="checkbox"/>  _____ Signature of Attorney for Debtor(s)</p> <p>Date <u>4-9-01</u></p>		<p>A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.</p>	

DEF01920

Form B6
(6/90)

**United States Bankruptcy Court
Eastern District of Louisiana**

In re **Gabriel T. Porteous, Jr.**

Carmella A. Porteous

Case No. **01-12363 Section "A"**
Chapter **13**

SUMMARY OF SCHEDULES

AMOUNTS SCHEDULED

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property	YES	1	\$ 235,110.00		
B - Personal Property	YES	3	\$ 28,050.27		
C - Property Claimed as Exempt	YES	1			
D - Creditors Holding Secured Claims	YES	1		\$ 158,278.13	
E - Creditors Holding Unsecured Priority Claims	YES	2		\$ 0.00	
F - Creditors Holding Unsecured Nonpriority Claims	YES	4		\$ 196,246.73	
G - Executory Contracts and Unexpired Leases	YES	1			
H - Codebtors	YES	1			
I - Current Income of Individual Debtor(s)	YES	1			\$ 7,531.52
J - Current Expenditures of Individual Debtor(s)	YES	1			\$ 6,580.00
Total Number of sheets in ALL Schedules >		16			
Total Assets >			\$ 263,160.27		
Total Liabilities >				\$ 354,524.86	

DEF01922

FORM B6A
(5/90)

In re: Gabriel T. Porteous, Jr. Carmella A. Porteous
Debtor

Case No. 01-12363 Section "A"
(If known)

SCHEDULE A - REAL PROPERTY

DESCRIPTION AND LOCATION OF PROPERTY	NATURE OF DEBTOR'S INTEREST IN PROPERTY	HUSBAND, WIFE, JOINT OR COMMUNITY	CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION	AMOUNT OF SECURED CLAIM
Family Home 4801 Neyray Drive Metairie, LA 70002	Community Property	C	\$ 235,110.00	\$ 158,278.13
Total >			\$ 235,110.00	

(Report also on Summary of Schedules.)

DEF01923

PROPERTY VALUATION ANALYSIS

Value of Property	\$ <u>266,000.00</u>
1 st Mortgage Balance	<u>113,279.54</u>
2nd Mortgage Balance	<u>44,998.59</u>
Homestead Exemption	25,000.00
Real Estate Commission (6% on 1 st 100k, 4% on bal.):	- <u>12,640.00</u>
Sales Price:	\$ <u>266,000.00</u>
Less Real Estate Commission:	- <u>12,640.00</u>
Less Closing Costs:	- 1,000.00
Less 1 st Mortgage	- <u>113,279.54</u>
Less 2nd Mortgage	- <u>44,998.59</u>
Homestead Exemption	- 25,000.00
Trustee's Commission (25% on 1 st \$5k; 10% on bal. Up to \$50K, 5% on bal. Up to \$1M; 3% over \$1M)	- <u>16,250.00</u>
Total Equity for Estate	\$ <u>51,831.87</u>

DEF01924

FORM 968
(10/89)

In re Gabriel T. Porteous, Jr. Debtor Carmella A. Porteous Case No. 01-12353 Section "A"
(if known)

SCHEDULE B - PERSONAL PROPERTY

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT OR COMMUNITY	CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
1. Cash on hand	X			
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.		Bank One Checking Account No. 002379554	C	100.00
3. Security deposits with public utilities, telephone companies, landlords, and others.	X			
4. Household goods and furnishings, including audio, video, and computer equipment.		Household Goods and Furnishings	C	15,000.00
5. Books, pictures and other art objects, antiques, stamp, coin, record, tape, compact disc, and other collections or collectibles.		Family Photos, Prints, etc.	C	250.00
6. Wearing apparel.		Wearing Apparel	C	3,000.00
7. Furs and jewelry.	X			
8. Firearms and sports, photographic, and other hobby equipment.		One Rifle	H	200.00
9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	X			
10. Annuities. Itemize and name each issuer.	X			
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Itemize.		Federal Judicial Pension (unvested)	H	NO CASH VALUE
		Fidelity Investments IRA	C	9,500.27
12. Stock and interests in incorporated and unincorporated businesses. Itemize.	X			
13. Interests in partnerships or joint ventures. Itemize.	X			

DEF01925

FORM 868
(10/89)

In re Gabriel T. Porteous, Jr. Debtor Carmella A. Porteous Case No. 01-12353 Section "A"
(if known)

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT OR COMMUNITY	CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
14. Government and corporate bonds and other negotiable and nonnegotiable instruments.	X			
15. Accounts receivable.	X			
16. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	X			
17. Other liquidated debts owing debtor including tax refunds. Give particulars.	X			
18. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property.	X			
19. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	X			
20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.	X			
21. Patents, copyrights, and other intellectual property. Give particulars.	X			
22. Licenses, franchises, and other general intangibles. Give particulars.	X			
23. Automobiles, trucks, trailers, and other vehicles and accessories.		2000 Jeep Cherokee (Lease)	C	NO CASH VALUE
		2000 Jeep Cherokee (Lease)	C	NO CASH VALUE
24. Boats, motors, and accessories.	X			
25. Aircraft and accessories.	X			
26. Office equipment, furnishings, and supplies.	X			
27. Machinery, fixtures, equipment and supplies used in business.	X			

DEF01926

FORM 858
(10/89)

In re Gabriel T. Porteous, Jr. Carmella A. Porteous Case No. 01-12363 Section "A"
Debtor (if known)

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

TYPE OF PROPERTY	HUSBAND, WIFE, JOINT OR COMMUNITY	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT OR COMMUNITY	CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
28. Inventory.	X			
29. Animals.	X			
30. Crops - growing or harvested. Give particulars.	X			
31. Farming equipment and implements.	X			
32. Farm supplies, chemicals, and feed.	X			
33. Other personal property of any kind not already listed. Itemize.	X			
<p style="text-align: center;"><u>2</u> continuation sheets attached</p>				<p style="text-align: right;">Total > \$ 28,050.27</p>

(Include amounts from any continuation sheets attached. Report total also on Summary of Schedules.)

FORM 960
(5/90)In re Gabriel T. Porteous, Jr. Carmelia A. Porteous Case No. 01-12363 Section "A"
Debtor. (if known)**SCHEDULE C - PROPERTY CLAIMED AS EXEMPT**

Debtor elects the exemption to which debtor is entitled under:

(Check one box)

- 11 U.S.C. § 522(b)(1) Exemptions provided in 11 U.S.C. § 522(d). **Note: These exemptions are available only in certain states.**
- 11 U.S.C. § 522(b)(2) Exemptions available under applicable nonbankruptcy federal laws, state or local law where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180-day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT MARKET VALUE OF PROPERTY, WITHOUT DEDUCTING EXEMPTIONS
Family Home 4801 Neyrey Drive Metairie, LA 70002	La. RS 20:1, Const. Art. 12, § 9	25,000.00	235,110.00
Family Photos, Prints, etc.	La. RS 13:3881(A)(4)(a)	250.00	250.00
Federal Judicial Pension (unvested)	U.S.C. 28 § 376	NO CASH VALUE	NO CASH VALUE
Fidelity Investments IRA	La. RS 20:33(1)	9,500.27	9,500.27
Household Goods and Furnishings	La. RS 13:3881(A)(4)(a)	15,000.00	15,000.00
One Rifle	La. RS 13:3861(A)(4)(a)	200.00	200.00
Wearing Apparel	La. RS 13:3881(A)(4)(a)	3,000.00	3,000.00

DEF01928

FORM 990
(990)

In re: Gabriel T. Porteous, Jr.

Carmella A. Porteous

Case No. 01-12363 Section "A"

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CO-DEBTOR NUMBER, PART OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNDISPUTED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO. <u>552000340000203579</u> Bank One P. O. Box 32490 Louisville, KY 40232	<u>C</u>	Second Mortgage Family Home 4801 Neyrey Drive Metairie, LA 70002 VALUE \$235,110.00				44,998.59	0.00
ACCOUNT NO. <u>9938700</u> Chrysler Credit Corporaiton P. O. Box 7000 Covington, LA 70434	<u>C</u>	2000 Lease 2000 Jeep Cherokee (Lease) VALUE: NO CASH VALUE				0.00	N/A
ACCOUNT NO. <u>9938609</u> Chrysler Credit Corporaiton P. O. Box 7000 Covington, LA 70434	<u>C</u>	2000 Lease 2000 Jeep Cherokee (Lease) VALUE: NO CASH VALUE				0.00	N/A
ACCOUNT NO. <u>2007372850</u> Fidelity Homestead Association 222 Baronne Street New Orleans, LA 70112	<u>C</u>	First Mortgage Family Home 4801 Neyrey Drive Metairie, LA 70002 VALUE \$235,110.00				113,279.54	0.00

Continuation sheets attached

Subtotal
(Total of this page)
Total
(Use only on last page)

\$158,278.13
\$158,278.13

(Report total also on Summary of Schedules)

DEF01929

BSE
(Rev. 4/98)In re: Gabriel T. Porteous, Jr. Debtor Carmella A. Porteous Case No. 01-12363 Section "A"
(if known)**SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS** Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.**TYPES OF PRIORITY CLAIMS** (Check the appropriate box(es) below if claims in that category are listed on the attached sheets) **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

 Wages, salaries, and commissions

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to \$4,300* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

 Contributions to employee benefit plans

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

 Certain farmers and fishermen

Claims of certain farmers and fishermen, up to \$4,300* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

 Deposits by individuals

Claims of individuals up to \$1,950* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

 Alimony, Maintenance, or Support

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance, or support, to the extent provided in 11 U.S.C. § 507(a)(7).

 Taxes and Certain Other Debts Owed to Governmental Units

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

 Commitments to Maintain the Capital of an Insured Depository Institution

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507(a)(9).

 Other Priority Debts

* Amounts are subject to adjustment on April 1, 2001, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

1 Continuation sheets attached

DEF01930

FORM B9E - Cont.
(10/89)

In re: Gabriel T. Porteous, Jr. Debtor Carmella A. Porteous Case No. 01-12363 Section "A"
(if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CONSEPTOR NUMBER, VALUE, PERCENT OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM	CONTINGENT		TOTAL AMOUNT OF CLAIM	AMOUNT ENTITLED TO PRIORITY
			UNLITIGATED	DISPUTED		
ACCOUNT NO.						

Sheet no. 1 of 1 sheets attached to Schedule of Creditors Holding Priority Claims

Subtotal (Total of this page)	>	\$0.00
Total	>	\$0.00

(This entry on last page of the completed Schedule E.)
(Report total also on Summary of Schedules)

DEF01931

In re: Gabriel T. Porteous, Jr. Carmelia A. Porteous Case No. 01-12363 Section "A"
 Debtor (If known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

Check this box if debtor has no creditors holding unsecured nonpriority claims to report on this Schedule F.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CREDITOR HUSBAND, WIFE, JOINT OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT		AMOUNT OF CLAIM
			UNLIQUIDATED	DISPUTED	
ACCOUNT NO. 373755583692007 American Express Centurion Bank Suite 0002 Chicago, IL 60679-0002	C	1997-2000 Credit Card			11,855.57
ACCOUNT NO. 5379000017022890 Bank of Louisiana Mastercard P.O. Box 6972 Metairie, LA 70009-6972 Jules A. Fontana, III Fontana & Fontana, L.L.C. 1022 Loyola Avenue New Orleans, LA 70113	C	1997-2000 Credit Card			1,724.23
ACCOUNT NO. 5491041170025091 Chase Platinum Mastercard P.O. Box 52050 Phoenix, AZ 85072-2050	C	1997-2000 Credit Card			10,196.82
ACCOUNT NO. 4128003275980426 Citibank Advantage P.O. Box 6408 The Lakes, NV 89901-6408	C	1997-2000 Credit Card			23,987.39
ACCOUNT NO. 4128003803329138 Citibank Advantage P.O. Box 8000 The Lakes, NV 89163-8000	C	1997-2000 Credit Card			20,719.58

3 Continuation sheets attached

Subtotal >	\$68,483.59
Total >	

FORM BGF - Cont.
(10/99)

In re: Gabriel T. Porteous, Jr. Debtor Carmelia A. Porteous Case No. 01-12363 Section "A"
(if known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CO-DEBTOR HUSBAND, WIFE, JOINT OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO. 5308951220000642 Citibank USA P.O. Box 15109 Wilmington, DE 19850-5109 Citifinancial P.O. Box 17127 Baltimore, MD 21287 Edward F. Bukaty, III One Galleria Blvd. Suite 1810 Metairie, LA 70001-2082	C	1997-2000 Credit Card				17,711.35
ACCOUNT NO. 7575000220805428 Dillards P.O. Box 52079 Phoenix, AZ 85072-2079	C	1997-2000 Credit Card				4,673.92
ACCOUNT NO. 7575000220569818 Dillard's P. O. Box 52067 Phoenix, AZ 85072	C	2000 Credit Card				243.14
ACCOUNT NO. 6011006350659489 Discover Platinum P.O. Box 6011 Dover, DE 19903-6011	C	1997-2000 Credit Card				20,783.26

Sheet no. 1 of 3 continuation sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal >
(Total of this page)
Total >
(Use only on last page of the completed Schedule F.)

\$43,411.67

DEF01933

FORM BGF - Cont.
(10/99)

In re: Gabriel T. Porteous, Jr. Debtor Carmelia A. Porteous Case No. 01-12363 Section "A"
(if known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODERITOR HUSBAND, WIFE, JOINT OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO. <u>4417125082148333</u> First USA Bank P.O. Box 94014 Palatine, IL 60094-4014	C	1997-2000 Credit Card				6,046.24
ACCOUNT NO. <u>4731616375294833</u> First USA Bank, N.A. First USA Bank, N.A. P.O. Box 8864 Wilmington, DE 19899-8864	C	1997-2000 Credit Card				6,757.42
ACCOUNT NO. <u>4164198394</u> J.C. Penny P.O. Box 27570 Albuquerque, NM 87125	C	1997-2000 Credit Card				2,980.28
ACCOUNT NO. <u>5329055073205608</u> MBNA America P.O. Box 15137 Wilmington, DE 19888-5137	C	2000-2001 Credit Card				3,212.80
ACCOUNT NO. <u>5329041616001290</u> MBNA America P.O. Box 15019 Wilmington, DE 19886-5019	C	1997-2000 Credit Card				30,931.02

Sheet no. 2 of 3 continuation sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal
(Total of this page)

Total
(Use only on last page of the completed Schedule F.)

\$49,907.76

DEF01934

FORM 966F - Cont.
(10/99)

In re: Gabriel T. Porteous, Jr. Debtor Carmella A. Porteous Case No. 01-12363 Section "A"
(If known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	DEBTOR HUSBAND, WIFE, JOINT OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM, IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT	UNDISPUTED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO. 5490990859000877 MBNA America P.O. Box 15137 Wilmington, DE 19886-5137	C	1987-2000 Credit Card				29,443.71
ACCOUNT NO. Regions Bank 301 St. Charles Avenue New Orleans, LA 70130	C	1999 Personal Loan				5,000.00

Sheet no. 2 of 3 continuation sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal
(Total of this page) >
Total >

(Use only on last page of the completed Schedule F.)

\$34,443.71
\$196,246.73

(Report also on Summary of Schedules)

DEF01935

Form BSG
(10/89)

In re: Gabriel T. Porteous, Jr. Carmella A. Porteous , Case No. 01-12363 Section "A"
Debtor (if known)

SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Check this box if debtor has no executory contracts or unexpired leases.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF OTHER PARTIES TO LEASE OR CONTRACT.	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST, STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT.
Chrysler Credit Corporaiton P. O. Box 7000 Covington, LA 70434	2000 Jeep Cherokee
Chrysler Credit Corporaiton P. O. Box 7000 Covington, LA 70434	2000 Jeep Cherokee

DEF01936

BGR
(690)

In re: Gabriel T. Porteous, Jr. Carmella A. Porteous . Case No. 01-12363 Section "A"
Debtor (if known)

SCHEDULE H - CODEBTORS

Check this box if debtor has no codebtors.

NAME AND ADDRESS OF CODEBTOR	NAME AND ADDRESS OF CREDITOR
------------------------------	------------------------------

In re Gabriel T. Porteous, Jr.

Carmella A. Porteous

Case No. 01-12363 Section "A"

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

Debtor's Marital Status: Married	DEPENDENT'S OF DEBTOR AND SPOUSE		
Debtor's Age:	NAMES	AGE	RELATIONSHIP
Spouse's Age:	Catherine A. Porteous	19	Daughter
EMPLOYMENT:	DEBTOR		SPOUSE
Occupation	Judge		
Name of Employer			
How long employed			
Address of Employer	United States of America 500 Camp Street New Orleans, LA 70130		

Income: (Estimate of average monthly income)	DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (pro rate if not paid monthly.)	\$ 7,531.52	\$ 0.00
Estimated monthly overtime	\$ 0.00	\$ 0.00
SUBTOTAL	\$ 7,531.52	\$ 0.00
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	\$ 0.00	\$ 0.00
b. Insurance	\$ 0.00	\$ 0.00
c. Union dues	\$ 0.00	\$ 0.00
d. Other (Specify) _____	\$ 0.00	\$ 0.00
SUBTOTAL OF PAYROLL DEDUCTIONS	\$ 0.00	\$ 0.00
TOTAL NET MONTHLY TAKE HOME PAY	\$ 7,531.52	\$ 0.00
Regular income from operation of business or profession or farm (attach detailed statement)	\$ 0.00	\$ 0.00
Income from real property	\$ 0.00	\$ 0.00
Interest and dividends	\$ 0.00	\$ 0.00
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	\$ 0.00	\$ 0.00
Social security or other government assistance (Specify) _____	\$ 0.00	\$ 0.00
Pension or retirement income	\$ 0.00	\$ 0.00
Other monthly income (Specify) _____	\$ 0.00	\$ 0.00
TOTAL MONTHLY INCOME	\$ 7,531.52	\$ 0.00
TOTAL COMBINED MONTHLY INCOME	\$ 7,531.52 (Report also on Summary of Schedules)	

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document: **NONE**

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
EMPLOYEE EARNINGS STATEMENT

D051AECNOLAE		MONTHLY	PAY PERIOD 06	ENDING 05/31/00	01007
LOUISIANA EASTERN			DISTRICT JUDGE & STAFF		NEW ORLEANS
PORTEOUS JR., G. THOMAS			436-64-1366	UJ 00/05	
			DIRECT DEPOSIT 065000029	RETIREMENT CODE 2	
			SALARY	141,300.00	
PAY PERIOD EARNINGS		DAYS	PAY	YTD EARNINGS	
REGULAR		30.0	11,775.00	70,266.66	
GROSS EARNINGS			11,775.00	70,266.66	
PAY PERIOD DEDUCTIONS			DEDUCTIONS	YTD DEDUCTIONS	
FICA			889.72	5,320.06	
FEDERAL TAX MS-M EXEMPT-02 EXTRA-0000			2,603.27	15,564.22	
STATE TAX LA MS-M EXEMPT-02 EXTRA-000			313.91	1,876.30	
HEALTH INSURANCE PLAN 105				135.03	
GOV/T LIFE INS. PLAN BASIC			48.36	288.48	
OPTION-A (STANDARD)			3.03	18.18	
OPTION-B (ADDITIONAL)			230.75	918.13	
OPTION-C (FAMILY)			9.75	19.50	
HEALTH INSURANCE PRE-TAX			144.69	723.45	
NET PAY			7,531.52		
MESSAGES :					
THE FOLLOWING TWO CHANGES BECAME EFFECTIVE MAY 1, 2000:					
(1) FEDERAL EMPLOYEES GROUP LIFE INSURANCE ELECTIONS MADE DURING THE 1999 OPEN ENROLLMENT PERIOD					
(2) NEW LIFE INSURANCE RATES FROM OPTION C-FAMILY COVERAGE FOR AGES 65 AND OVER					
THESE CHANGES ARE REFLECTED IN THIS PAYCHECK.					

Form B6J
(5/90)

In re Gabriel T. Porteous, Jr.

Carmelia A. Porteous

Case No. 01-12383 Section "A"

Debtor

(If known)

SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse".

Rent or home mortgage payment (include lot rented for mobile home)		\$	<u>1,429.00</u>
Are real estate taxes included?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	
Is property insurance included?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	
Utilities		\$	
Electricity and heating fuel		\$	<u>350.00</u>
Water and sewer		\$	<u>90.00</u>
Telephone		\$	<u>200.00</u>
Other _____		\$	<u>0.00</u>
Home maintenance (repairs and upkeep)		\$	<u>200.00</u>
Food		\$	<u>750.00</u>
Clothing		\$	<u>525.00</u>
Laundry and dry cleaning		\$	<u>150.00</u>
Medical and dental expenses		\$	<u>300.00</u>
Transportation (not including car payments)		\$	<u>250.00</u>
Recreation, clubs and entertainment, newspapers, magazines, etc.		\$	<u>0.00</u>
Charitable contributions		\$	<u>100.00</u>
Insurance (not deducted from wages or included in home mortgage payments)		\$	
Homeowner's or renter's		\$	<u>0.00</u>
Life		\$	<u>0.00</u>
Health		\$	<u>0.00</u>
Auto		\$	<u>350.00</u>
Other _____		\$	<u>0.00</u>
Taxes (not deducted from wages or included in home mortgage payments)		\$	
(Specify) _____		\$	<u>0.00</u>
Installment payments: (In chapter 12 and 13 cases, do not list payments to be included in the plan)		\$	
Auto		\$	<u>330.00</u>
Other <u>Second Car Lease</u>		\$	<u>330.00</u>
<u>Second Mortgage on Family Home</u>		\$	<u>495.00</u>
Alimony, maintenance or support paid to others		\$	<u>0.00</u>
Payments for support of additional dependents not living at your home		\$	<u>686.00</u>
Regular expenses from operation of business, profession, or farm (attach detailed statement)		\$	<u>0.00</u>
Other <u>Cable Television</u>		\$	<u>45.00</u>

TOTAL MONTHLY EXPENSES (Report also on Summary of Schedules)

\$ 6,580.00

[FOR CHAPTER 12 AND 13 DEBTORS ONLY]

Provide the information requested below, including whether plan payments are to be made bi-weekly, monthly, annually, or at some other regular interval.

A. Total projected monthly income	\$	<u>7,531.52</u>
B. Total projected monthly expenses	\$	<u>6,580.00</u>
C. Excess income (A minus B)	\$	<u>951.52</u>
D. Total amount to be paid into plan each _____	\$	<u>875.00</u>

Monthly
(interval)

DEF01940

In re: Gabriel T. Porteous, Jr.
436-64-1386

Carmella A. Porteous
434-78-3992

Case No.

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of **16** sheets plus the summary page, and that they are true and correct to the best of my knowledge, information, and belief.

Date: 4-9-01

Signature 

Gabriel T. Porteous, Jr.

Date: 4-9-01

Signature 

Carmella A. Porteous

(If joint case, both spouses must sign)

**DECLARATION UNDER PENALTY OF PERJURY
ON BEHALF OF CORPORATION OR PARTNERSHIP**

(NOT APPLICABLE)

Penalty for making a false statement or concealing property. Fine of up to \$500,000 or imprisonment for up to 5 years or both. 18 U.S.C §§ 152 and 3571.

UNITED STATES BANKRUPTCY COURT

Eastern District of Louisiana

In re: Gabriel T. Porteous, Jr.
436-64-1366

Carmella A. Porteous
434-78-3992

Case No. 01-12363 Section "A"
Chapter 13

STATEMENT OF FINANCIAL AFFAIRS

1. Income from employment or operation of business

None State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE	FISCAL YEAR PERIOD
146,450.00	Joint Gross Income	1998
146,799.00	Joint Gross Income	2000
35,325.00	Joint Gross Income	2001

2. Income other than from employment or operation of business

None State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the two years immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

3. Payments to creditors

None a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than \$500 to any creditor, made within 90 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING
<u>Normal Installments</u>			

None b. List all payments made within one year immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

4. Suits and administrative proceedings, executions, garnishments and attachments

None a. List all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DEF01942

-
- None b. Describe all property that has been attached, garnished or seized under any legal or equitable process within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

5. Repossessions, foreclosures and returns

- None List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

6. Assignments and receiverships

- None a. Describe any assignment of property for the benefit of creditors made within 120 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-
- None b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

7. Gifts

- None List all gifts or charitable contributions made within one year immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than \$200 in value per individual family member and charitable contributions aggregating less than \$100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

8. Losses

- None List all losses from fire, theft, other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

9. Payments related to debt counseling or bankruptcy

- None List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within one year immediately preceding the commencement of this case.

10. Other transfers

- None a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

11. Closed financial accounts

- None List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within one year immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

12. Safe deposit boxes

- None List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

13. Setoffs

- None List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within 90 days preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
-

14. Property held for another person

- None List all property owned by another person that the debtor holds or controls.
-

15. Prior address of debtor

- None If the debtor has moved within the two years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

16. Nature, location and name of business

- None a. If the debtor is an individual, list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within two years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.
- b. If the debtor is a partnership, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting securities, within the two years immediately preceding the commencement of this case.
- c. If the debtor is a corporation, list the names and addresses of all business in which the debtor was a partner or owned 5 percent or more of the voting securities within two years immediately preceding the commencement of this case.
-

17. Books, records and financial statements

- None a. List all bookkeepers and accountants who within six years immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.
-
- None b. List all firms or individuals who within the two years immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.
-
- None c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.
-
- None d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the two years immediately preceding the commencement of this case by the debtor.
-

18. Inventories

- None a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.
-
- None b. List the name and address of the person having possession of the records of each of the two inventories reported in 18a., above.
-

19. Current Partners, Officers, Directors and Shareholders

- None a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

None b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting securities of the corporation.

20. Former partners, officers, directors and shareholders

None a. If the debtor is a partnership, list each member who withdrew from the partnership within one year immediately preceding the commencement of this case.

None b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within one year immediately preceding the commencement of this case.

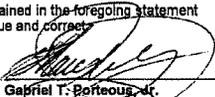
21. Withdrawals from a partnership or distributions by a corporation

None If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during one year immediately preceding the commencement of this case.

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

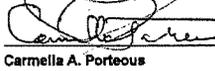
Date 4-9-01

Signature of Debtor


Gabriel T. Porteous, Jr.

Date 4-9-01

Signature of Joint Debtor


Carmella A. Porteous

UNITED STATES BANKRUPTCY COURT
Eastern District of Louisiana

In re: Gabriel T. Porteous, Jr.
436-64-1368

Carmella A. Porteous
434-78-3982

Case No. 01-12383 Section "A"
Chapter 13

CHAPTER 13 PLAN

NOTICE

THIS PLAN CONTAINS EVIDENTIARY MATTER WHICH, IF NOT CONTROVERTED, MAY BE ACCEPTED BY THE COURT AS TRUE. CREDITORS CANNOT VOTE ON THIS PLAN BUT MAY OBJECT TO ITS CONFIRMATION PURSUANT TO BANKRUPTCY CODE § 1324, AND LOCAL RULES. ABSENT ANY SUCH OBJECTION, THE COURT MAY CONFIRM THIS PLAN AND ACCEPT THE VALUATION AND ALLEGATIONS CONTAINED HEREIN.

The Debtor(s) above named hereby proposes the following plan.

1. Debts. All debts are provided for by this Plan. Only creditors holding claims duly proved and allowed shall be entitled to payments from the Trustee. (See Notice of Filing of Bar Date.) Trustee shall not file a claim on behalf of any creditor.

2. Payments. As of the date of this plan, the debtor has paid \$0.00 to the Trustee. Debtor and/or any entity from whom the debtor(s) receive income shall pay to the Trustee the sum of \$875.00 Monthly, commencing April 28, 2001, for 36 months for a total of \$31,500.00 or until such amounts are paid that will afford payment of all allowed and proven claims in the amounts payable under this Plan.

Graduated Payments: BEGIN MONTH # OF MONTHS ADJUSTMENT

3. Plan Payments. The Trustee, from available funds, shall make payments to creditors in the following amounts and order. All dates for beginning of payments are estimates only and may be adjusted by the Trustee as necessary to carry out the terms of this plan.

A. DEBTOR'S ATTORNEY	FEE REQUESTED	PAID TO DATE	BALANCE DUE	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
				PAYMENT	MONTH	LENGTH	
Claude C. Lightfoot, Jr.	1,750.00	0.00	1,750.00	833.33	1	2	1,750.00
	0.00	0.00		83.34	3	1	

B. Mortgage Arrears. (Regular monthly payments to be made by Debtor and to start on the first due date after date of filing petition.)

CREDITOR	RATE	ARREARS	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
			PAYMENT	MONTH	LENGTH	
NONE						

C. Secured Claims. (A creditor's secured claim shall be the net amount due as of date of filing or the value of the collateral to which creditor's lien attaches, whichever is less. Interest shall be allowed at contract rate or 8.00% APR whichever is less. Creditor shall retain its lien until the allowed secured portion of the claim is fully paid.)

CREDITOR & COLLATERAL	RATE	CLAIM	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
			PAYMENT	MONTH	LENGTH	

i. Secured Claims - Paid in full

NONE

ii. Secured Claims - Cure default only

NONE

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In re: **Gabriel T. Porteous, Jr.**
436-64-1366

Carmelia A. Porteous
434-78-3992

Case No. **01-12363 Section "A"**
Chapter **13**

D. Priority Claims. (Unsecured claims entitled to priority under 11 U.S.C. § 507 shall be paid in full as follows.)

CREDITOR	PRIORITY CLAIM	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
		PAYMENT MONTH	LENGTH		

E. Separate Class of Unsecured Claims. (May include co-signed debts as provided for by 11 U.S.C. § 1301, including interest at contract rate.)

CREDITOR & CLASSIFICATION	UNSECURED CLAIM RATE	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
		PAYMENT MONTH	LENGTH		

F. Unsecured Creditors. (All other creditors not scheduled above are deemed unsecured without priority and shall be paid pro rata from funds remaining after payment of above scheduled claims. Debtor estimates the unsecured claims to total \$ 193,033.93, and proposes to provide at least \$ 28,250.00 which will pay in full said creditors' claims, or in no event, provide a composition percentage of less than 14.63%. (Funds Provided/Unsecured Claims)

G. Lien Avoidance. (Debtor intends to file a motion, pursuant to Bankruptcy Rule 4003(d) to avoid all nonpossessory, nonpurchase money security interests and judicial liens as provided by 11 U.S.C. § 522(f), and the plan herein provides for payment of such liens as general unsecured claims only. Any creditors' claim or portion thereof not listed in paragraph C above is to be treated as unsecured and, unless objected to, such unsecured status, for purposes of this plan, will be binding upon confirmation, but the lien shall survive unless avoided.

H. Leases and Contracts. The Debtor hereby assumes the following unexpired leases and executory contracts, and rejects all others.

NAME OF CREDITOR	DESCRIPTION
Chrysler Credit Corporaiton	2000 Jeep Cherokee
Chrysler Credit Corporaiton	2000 Jeep Cherokee

I. Miscellaneous Provisions.

Debtors assume the vehicle leases with Chrysler Credit.

4. Secured Claims - Paid directly by debtor(s). The following creditors' claims are fully secured, shall be paid directly by the debtors, and receive no payments under paragraph 3 above:

CREDITOR	COLLATERAL	MARKET VALUE	AMOUNT OF CLAIM
NONE			

5. Future Income. Debtor(s) submits all future earnings or other future income to such supervision and control of the Trustee as is necessary for the execution of this Plan.

6. Standing Trustee Percentage Fee. Pursuant to 28 U.S.C. § 586(e)(B), the Attorney General, after consultation with the United States Trustee, sets a percentage fee not to exceed ten percent of payments made to creditors by the Trustee under the terms of this Plan.

In re: **Gabriel T. Porteous, Jr.**
438-64-1366

Carmella A. Porteous
434-78-3892

Case No.
Chapter 13

SUMMARY AND ANALYSIS OF PLAN PAYMENTS TO BE MADE BY TRUSTEE

A. Total debt provided under the Plan and administrative expenses

1. Attorney Fees	1,750.00
2. Mortgage Arrears	0.00
3. Secured Claims	0.00
4. Priority Claims	0.00
5. Separate Class of Unsecured Claims	0.00
6. All other unsecured claims	28,250.00
 Total payments to above Creditors	 30,000.00
Trustee percentage	1,500.00
* Total Debtor payments to the Plan	31,500.00

* Total payments must equal total of payments set forth in paragraph 2 on page 1 of this Plan.

B. Reconciliation with Chapter 7

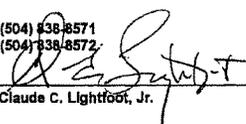
1. Interest of unsecured creditors if Chapter 7 filed	
a. Total property of debtor	263,180.27
b. Property securing debt	156,278.13
c. Exempt property	52,950.27
d. Priority unsecured claims	0.00
e. Chapter 7 trustee fee	5,598.59
f. Funds for Chapter 7 distribution (est.)	46,335.28
 2. Percent of unsecured, nonpriority claims paid under Plan	 14.63
3. Percent of unsecured, nonpriority claims paid if Chapter 7 filed (est.)	26.90

Attorney for Debtor(s):

Claude C. Lightfoot, Jr.
LA 17989

Claude C. Lightfoot, Jr. P.C.
3500 N. Causeway Blvd.
Suite 450
Metairie, LA 70002

Phone: (504) 838-8571
Fax: (504) 838-8572

Signed: 
Claude C. Lightfoot, Jr.

Signed: 
Gabriel T. Porteous, Jr., Debtor

Signed: 
Carmella A. Porteous, Joint Debtor

Dated: 4-9-01

United States Bankruptcy Court
Eastern District of Louisiana

pt

In re:

Chapter 13

GABRIEL T PORTEOUS JR
CARMELLA A PORTEOUS

Case #01-12363

PO BOX 1723
HARVEY LA 70059

TRUSTEE'S OBJECTION TO CONFIRMATION

Now into Court comes S. J. Beaulieu, Jr., Chapter 13 Trustee, who respectfully recommends that the Court deny confirmation of this case for the following reason or reasons:

DUE TO EQUITY IN THE PROPERTY, THE PLAN IS NOT IN THE BEST OF INTEREST TO THE UNSECURED CREDITORS. PLAN DOES NOT SHOW ALL DISPOSABLE INCOME AND HAS EXCESSIVE EXPENSES FOR FOOD, CLOTHING, MEDICAL/DENTAL, CHARITABLE CONTRIBUTIONS AND PAYMENT OF TUITION.

S. J. Beaulieu, Jr.
S. J. Beaulieu, Jr.
Chapter 13 Trustee

Attorney for Debtor:

CLAUDE C LIGHTFOOT JR
STE 450
3500 N CAUSEWAY BLVD
METAIRIE LA 70002

Certificate of Service

I hereby certify that a copy of the foregoing pleading was mailed this date to all parties of interest herein, including:

Debtor Atty

Creditor _____ Employer _____
S J Beaulieu, Jr. Trustee

SC00716

S. J. Beaulieu, Jr. *S. J. Beaulieu, Jr.*

DEF01955

PORT Exhibit 1100 (g)

5815

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF

CASE NUMBER

Gabriel T. Porteous, Jr.
Carmella A. Porteous

01-12363
Section "A"

DEBTORS

CHAPTER 13

AMENDED SCHEDULE F AND MODIFIED CHAPTER 13 PLAN
PRIOR TO CONFIRMATION

Respectfully submitted,

CLAUDE C. LIGHTFOOT, JR., P.C.

Claude C. Lightfoot, Jr. (17989)
3500 N. Causeway Blvd.
Suite 450
Metairie, LA 70002
PH: (504) 838-8571
Attorney for Debtors

P:\CLAUDE\PORT\20\Amend_Schedule_F_and_Modified_Chapter_13_Plan.doc 11/11/04 10:41 AM

*

DEF01956
PORT Exhibit 1100 (h)

Form 963
(8/90)

In re Gabriel T. Porteous, Jr.

Carmella A. Porteous

Case No. 01-12383 Section "A"

Debtor

(If known)

AMENDED SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse".

Rent or home mortgage payment (include lot rented for mobile home)			1,429.00
Are real estate taxes included?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	
Is property insurance included?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	
Utilities Electricity and heating fuel			\$ 350.00
Water and sewer			\$ 110.00
Telephone			\$ 200.00
Other			\$ 0.00
Home maintenance (repairs and upkeep)			\$ 200.00
Food			\$ 450.00
Clothing			\$ 200.00
Laundry and dry cleaning			\$ 150.00
Medical and dental expenses			\$ 300.00
Transportation (not including car payments)			\$ 250.00
Recreation, clubs and entertainment, newspapers, magazines, etc.			\$ 0.00
Charitable contributions			\$ 100.00
Insurance (not deducted from wages or included in home mortgage payments)			
Homeowner's or renter's			\$ 0.00
Life			\$ 0.00
Health			\$ 0.00
Auto			\$ 350.00
Other			\$ 0.00
Taxes (not deducted from wages or included in home mortgage payments)			
(Specify)			\$ 0.00
Installment payments: (In chapter 12 and 13 cases, do not list payments to be included in the plan)			
Auto			\$ 330.00
Other <u>Second Car Lease</u>			\$ 330.00
<u>Second Mortgage on Family Home</u>			\$ 495.00
Alimony, maintenance or support paid to others			\$ 0.00
Payments for support of additional dependents not living at your home			\$ 586.00
Regular expenses from operation of business, profession, or farm (attach detailed statement)			\$ 0.00
Other <u>Cable Television</u>			\$ 45.00

TOTAL MONTHLY EXPENSES (Report also on Summary of Schedules) \$ 5,875.00

[FOR CHAPTER 12 AND 13 DEBTORS ONLY]

Provide the information requested below, including whether plan payments are to be made bi-weekly, monthly, annually, or at some other regular interval.

A. Total projected monthly income		\$ 7,531.52
B. Total projected monthly expenses		\$ 5,875.00
C. Excess income (A minus B)		\$ 1,656.52
D. Total amount to be paid into plan each	<u>Monthly</u> (interval)	\$ 1,800.00

Carmella A. Porteous

UNITED STATES BANKRUPTCY COURT
Eastern District of Louisiana

In re: **Gabriel T. Porteous, Jr.**
438-84-1366

Carmella A. Porteous
434-78-3992

Case No. 01-12363 Section "A"
Chapter 13

FILED

AMENDED - CHAPTER 13 PLAN

2001 MAY 29 A 9 27

NOTICE

CLERK
UNITED STATES
BANKRUPTCY COURT

THIS PLAN CONTAINS EVIDENTIARY MATTER WHICH, IF NOT CONTROVERTED, MAY BE ACCEPTED BY THE COURT AS TRUE. CREDITORS CANNOT VOTE ON THIS PLAN BUT MAY OBJECT TO ITS CONFIRMATION PURSUANT TO BANKRUPTCY CODE § 1324, AND LOCAL RULES. ABSENT ANY SUCH OBJECTION, THE COURT MAY CONFIRM THIS PLAN AND ACCEPT THE VALUATION AND ALLEGATIONS CONTAINED HEREIN.

The Debtor(s) above named hereby proposes the following plan.

1. Debts. All debts are provided for by this Plan. Only creditors holding claims duly proved and allowed shall be entitled to payments from the Trustee. (See Notice of Filing of Bar Date.) Trustee shall not file a claim on behalf of any creditor.

2. Payments. As of the date of this plan, the debtor has paid \$0.00 to the Trustee. Debtor and/or any entity from whom the debtor(s) receive income shall pay to the Trustee the sum of \$1,600.00 Monthly, commencing April 28, 2001, for 36 months for a total of \$57,600.00 or until such amounts are paid that will afford payment of all allowed and proven claims in the amounts payable under this Plan.

Graduated Payments: BEGIN MONTH # OF MONTHS ADJUSTMENT

3. Plan Payments. The Trustee, from available funds, shall make payments to creditors in the following amounts and order. All dates for beginning of payments are estimates only and may be adjusted by the Trustee as necessary to carry out the terms of this plan.

A. DEBTOR'S ATTORNEY	FEE REQUESTED	PAID TO DATE	BALANCE DUE	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
				PAYMENT	MONTH	LENGTH	
Claude C. Lightfoot, Jr.	1,750.00	0.00	1,750.00	1,523.81	1	1	1,750.00
	0.00	0.00		228.19	2	1	

B. Mortgage Arrears. (Regular monthly payments to be made by Debtor and to start on the first due date after date of filing petition.)

CREDITOR	RATE	ARREARS	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
			PAYMENT	MONTH	LENGTH	
NONE						

C. Secured Claims. (A creditor's secured claim shall be the net amount due as of date of filing or the value of the collateral to which creditor's lien attaches, whichever is less. Interest shall be allowed at contract rate or 8.00% APR whichever is less. Creditor shall retain its lien until the allowed secured portion of the claim is fully paid.)

CREDITOR & COLLATERAL	RATE	CLAIM	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
			PAYMENT	MONTH	LENGTH	
i. Secured Claims - Paid in full						
NONE						
ii. Secured Claims - Cure default only						
NONE						

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In re: **Gabriel T. Porteous, Jr.** **Carmella A. Porteous** Case No. **01-12363 Section "A"**
436-64-1366 **434-78-3992** Chapter **13**

D. Priority Claims. (Unsecured claims entitled to priority under 11 U.S.C. § 507 shall be paid in full as follows.)

CREDITOR	PRIORITY CLAIM	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
		PAYMENT	MONTH	LENGTH	

E. Separate Class of Unsecured Claims. (May include co-signed debts as provided for by 11 U.S.C. § 1301, including interest at contract rate.)

CREDITOR & CLASSIFICATION	UNSECURED CLAIM RATE	— PAYMENT SCHEDULE —			TOTAL PAYMENTS
		PAYMENT	MONTH	LENGTH	

F. Unsecured Creditors. (All other creditors not scheduled above are deemed unsecured without priority and shall be paid pro rata from funds remaining after payment of above scheduled claims. Debtor estimates the unsecured claims to total \$ 183,033.83, and proposes to provide at least \$ 83,107.14 which will pay in full said creditors' claims, or in no event, provide a composition percentage of less than 27.51%. (Funds Provided/Unsecured Claims)

G. Lien Avoidance. (Debtor intends to file a motion, pursuant to Bankruptcy Rule 4003(d) to avoid all nonpossessory, nonpurchase money security interests and judicial liens as provided by 11 U.S.C. § 522(f), and the plan herein provides for payment of such liens as general unsecured claims only. Any creditors' claim or portion thereof not listed in paragraph C above is to be treated as unsecured and, unless objected to, such unsecured status, for purposes of this plan, will be binding upon confirmation, but the lien shall survive unless avoided.

H. Leases and Contracts. The Debtor hereby assumes the following unexpired leases and executory contracts, and rejects all others.

NAME OF CREDITOR	DESCRIPTION
Chrysler Credit Corporaiton	2000 Jeep Cherokee
Chrysler Credit Corporaiton	2000 Jeep Cherokee

I. Miscellaneous Provisions.

Debtors assume the vehicle leases with Chrysler Credit.

4. Secured Claims - Paid directly by debtor(s). The following creditors' claims are fully secured, shall be paid directly by the debtors, and receive no payments under paragraph 3 above:

CREDITOR	COLLATERAL	MARKET VALUE	AMOUNT OF CLAIM
NONE			

5. Future Income. Debtor(s) submits all future earnings or other future income to such supervision and control of the Trustee as is necessary for the execution of this Plan.

6. Standing Trustee Percentage Fee. Pursuant to 28 U.S.C. § 586(e)(B), the Attorney General, after consultation with the United States Trustee, sets a percentage fee not to exceed ten percent of payments made to creditors by the Trustee under the terms of this Plan.

In re: **Gabriel T. Porteous, Jr.**
436-64-1366

Carmella A. Porteous
434-78-3992

Case No. **01-12363 Section "A"**
Chapter **13**

SUMMARY AND ANALYSIS OF PLAN PAYMENTS TO BE MADE BY TRUSTEE

A. Total debt provided under the Plan and administrative expenses

1. Attorney Fees	0.00
2. Mortgage Arrears	0.00
3. Secured Claims	0.00
4. Priority Claims	0.00
5. Separate Class of Unsecured Claims	53,107.14
6. All other unsecured claims	53,107.14
Total payments to above Creditors	54,657.14
Trustee percentage	2,742.86
* Total Debtor payments to the Plan	57,600.00

* Total payments must equal total of payments set forth in paragraph 2 on page 1 of this Plan.

B. Reconciliation with Chapter 7

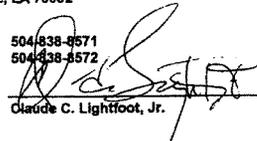
1. Interest of unsecured creditors if Chapter 7 filed	
a. Total property of debtor	283,160.27
b. Property securing debt	150,278.13
c. Exempt property	52,950.27
d. Priority unsecured claims	0.00
e. Chapter 7 trustee fee	5,598.59
f. Funds for Chapter 7 distribution (est.)	46,335.28
2. Percent of unsecured, nonpriority claims paid under Plan	27.51
3. Percent of unsecured, nonpriority claims paid if Chapter 7 filed (est.)	26.90

Attorney for Debtor(s):

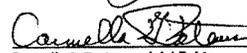
Claude C. Lightfoot, Jr.
LA 17989

Claude C. Lightfoot, Jr. P.C.
3500 N. Causeway Blvd.
Suite 450
Metairie, LA 70002

Phone: 504-838-8571
Fac: 504-838-8572

Signed: 
Claude C. Lightfoot, Jr.

Signed: 
Gabriel T. Porteous, Jr., Debtor

Signed: 
Carmella A. Porteous, Joint Debtor

Dated: 5-29-01

United States Bankruptcy Court
Eastern District of Louisiana

In Re:

Gabriel T. Porteous
Carmella A. Porteous
P.O. Box 1723
Harvey, LA 70059

Case No.

01-12363

SSN (1) 436-64-1366 SSN(2) 434-78-3992

Date: 05-29-01

SUMMARY AND ANALYSIS OF CHAPTER 13 PLAN

S.J. Beaulieu, Jr., Trustee in the above captioned cause, files the following Summary and Analysis of the Debtor(s) Chapter 13 Plan, in accordance with 11 U.S.C. Sec. 1302.

1. Exhibit 'A' reflects the Debtor's good faith estimate of income and reasonably necessary living expenses, and reflects the apparent ability to fund the Plan.
2. The Debtor proposes to pay the sum of \$1,600.00 per month, for a period of 36 months to be distributed as indicated in the following paragraphs.
3. The Plan proposes to make the following disbursement to the Debtor's attorney:

<u>Name Of Atty.</u>	<u>Mthly Pmt</u>	<u>Term</u>	<u>Total</u>
Claude Lightfoot, Jr.	\$375.00	01 Mth.	\$1750.00
	\$ 50.00	28 Mths.	

4. Secured Creditors:

- A. The following secured claims are dealt with pursuant to 11 U.S.C. Sec. 1325 (a) (5) (B):

<u>Name of Creditor</u>	<u>Clm Amt Or Sch Amt</u>	<u>Value of Collateral</u>	<u>Int. Rate</u>	<u>Mthly Pmt</u>
NONE				

- B. The following secured claims are dealt with pursuant to 11 U.S.C. Sec. 1325 (a) (5) (C):

<u>Name of Creditor</u>	<u>Clm Amt or Sch Amt</u>	<u>Value of Collateral</u>	<u>Creditor Comment</u>
NONE			

The Debtor abandons all interest in the collateral securing the claim and will surrender possession thereof upon confirmation of the Plan.

- C. The following secured claims are dealt with pursuant to 11 U.S.C. Sec. 1322 (b) (5) as follows:
1. **BANK ONE** : The debtor, in lieu of the Trustee, shall act as disbursing agent for the regular contract installment in the amount of \$ 495.00, for the duration of the plan.

SC00694

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PORT Exhibit 1100 (o)

2. CHRYSLER CREDIT CORP: The Debtor, in lieu of the Trustee, shall act as disbursing agent for the regular contract installment in the amount of \$330.00, for the duration of the plan.
3. CHRYSLER CREDIT CORP: The Debtor, in lieu of the Trustee, shall act as disbursing agent for the regular contract installment in the amount of \$330.00, for the duration of the plan.
4. FIDELITY HOMESTEAD: The Debtor, in lieu of the Trustee, shall act as disbursing agent for the regular contract installment in the amount of \$1,429.00, for the duration of the plan.

Payment of the arrearages due shall be made by the Trustee as follows:

<u>Name of Creditor</u>	<u>Arrearages Due</u>	<u>Int. Rate</u>	<u>Mthly Pmt.</u>
NONE			

D. The following creditors claims are not dealt with under the plan:

<u>Name of Creditor</u>	<u>Claimed or Scheduled Amount</u>
NONE	

5. Priority Creditors and Specially Classified Unsecured Claims:

<u>Name of Creditor</u>	<u>Clm or Sch Amount</u>	<u>Mthly Pmt.</u>
NONE		

6. Special conditions affecting creditors are noted as follows:

CONFIRMATION OF THE DEBTOR'S CHAPTER 13 PLAN SHALL NOT BE CONSTRUED AS APPROVAL OF THE FEES CHARGED BY THE DEBTOR'S ATTORNEY.

7. This summary and Analysis of this Plan is based on a review by the Trustee of the schedules, plan, claims, other pleadings on file, the testimony of the Debtor at the meeting of creditors, and other supporting documentation requested by the Trustee. In cases where a claim has not been filed by a creditor, the Trustee has relied on the schedules to establish the amount of a debt. The actual amounts of each payment, and the months in which payments are to occur may vary, as they are dependent upon the timing of payments to the Trustee by the Debtor, and the allowed amounts of certain claims which may not yet be conclusively determined. Based upon the foregoing, assuming all payments are timely made by the Debtor, the estimated dividend to unsecured creditors will be 27.51 of the amount claimed.
8. After thorough review of the Chapter 13 Statement, claims that have been filed and served on the Trustee, and other matters of record, including the testimony of the Debtor at the Meeting of Creditors, it is the opinion of the Trustee that the Plan meets the standards for confirmation contained in 11 U.S.C. Sec. 1325 (a), and should be confirmed.

Dated: 05-29-01


 S.J. Beaulieu, Jr., Trustee
 Suite 515
 433 Metairie Rd.
 Metairie, LA 70005
 (504) 831-1313

SC00695

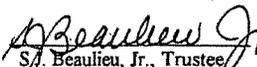
DEF01979

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Summary and Analysis of Chapter 13 Plan has been served on the Debtor(s) and the Debtor(s)' attorney by mailing a copy of same to the addresses listed below via first class mail, on this 25th day of April, 2001.

Debtor(s) Attorney:

Claude C. Lightfoot, Jr.
3500 N. Causeway Blvd.
Suite 450
Metairie, LA 70002
(504) 838-8571


S.J. Beaulieu, Jr., Trustee
Suite 515
433 Metairie Rd.
Metairie, LA 70005
(504) 831-1313

SC00696

DEF01980

United States Bankruptcy Court <i>Eastern District of Louisiana</i>		01-12363 Case Number
CHAPTER 13 TRUSTEE'S FINAL REPORT AND ACCOUNT		
In re: GABRIEL T PORTEOUS JR CARMELLA A PORTEOUS 4801 NEYREY DR METAIRIE LA 70002	This case was: COMPLETED Final Meeting of Creditors: 8:40 AM, May 18, 2004	

S. J. Beaulieu, Jr., Chapter 13 Trustee, respectfully submits for the Court's approval a report of his administration of this estate, avers that the case has been fully administered pursuant to FRBP 5009, and prays that he be relieved of his trust. The total amount received from or on behalf of the debtor was \$ 57,600.00, which was disbursed as follows:

#	NAME	TYPE	% ALLOWED	CLAIM AMT	PRINCIPAL PD	INTEREST PD
01	BANK ONE	DIRECT PAY	.00	.00	.00	.00
02	CHRYSLER FINANCIAL CORP	DIRECT PAY	.00	6,982.57	.00	.00
03	CHRYSLER FINANCIAL CORP	DIRECT PAY	.00	6,979.35	.00	.00
04	FIDELITY HOMESTEAD	DIRECT PAY	.00	109,488.96	.00	.00
05	ECAST SETTLEMENT CORP	UNSECURED	34.55	11,855.57	4,096.10	.00
06	BANK OF LOUISIANA	UNSECURED	34.55	1,910.00	659.91	.00
07	JULES FONTANA ATTY	NOTICE ONLY	.00	.00	.00	.00
08	CHASE BANKCARD SERVICES	UNSECURED	34.55	.00	.00	.00
09	CITIBANK	UNSECURED	34.55	.00	.00	.00
10	RESURGENT CAPITAL SERVICES	UNSECURED	34.55	21,227.06	7,333.95	.00
11	CITIFINANCIAL INC	UNSECURED	34.55	17,711.35	6,119.27	.00
12	CITIFINANCIAL INVESTMENT	NOTICE ONLY	.00	.00	.00	.00
13	EDWARD F BUKATY III	NOTICE ONLY	.00	.00	.00	.00
14	DILLARD NATIONAL BANK	UNSECURED	34.55	5,033.55	1,739.09	.00
15	DILLARD NATIONAL BANK	UNSECURED	34.55	597.88	205.57	.00
16	DISCOVER FINANCIAL SERVICES	UNSECURED	34.55	22,548.41	7,822.25	.00
17	AOL VISA	UNSECURED	34.55	.00	.00	.00
18	FIRST USA	UNSECURED	34.55	.00	.00	.00
19	JC PENNEY/MONOGRAM	UNSECURED	34.55	.00	.00	.00
20	MAX FLOW CORP	UNSECURED	34.55	5,366.54	1,861.05	.00
21	MAX FLOW CORP	UNSECURED	34.55	30,931.02	10,686.67	.00
22	MAX FLOW CORP	UNSECURED	34.55	29,443.71	10,172.80	.00
23	REGIONS BANK	UNSECURED	34.55	5,158.98	1,782.43	.00
25	DILLARD NATIONAL BANK	UNSECURED	34.55	251.64	86.91	.00
Paid to Trustee: \$ 3,274.29			Disbursed to PRIORITY Creditors: \$.00			
Paid to Attorney: \$ 1,750.00			Disbursed to SECURED Creditors: \$.00			
Refunded to Debtor: \$ 8.70			Disbursed to UNSECURED Creditors: \$ 52,567.01			

cc: CLAUDE C LIGHTFOOT JR
 STE 450
 3500 N CAUSEWAY BLVD
 METAIRIE LA 70002

S. J. Beaulieu, Jr.

S. J. Beaulieu, Jr.
 Chapter 13 Trustee

Certificate of Service
 I hereby certify that a copy of the foregoing pleading was mailed this date to all parties of interest herein, including:

Debtor: Attorney:

Creditor: _____ Employer: _____

S. J. Beaulieu, Jr. Trustee
 By: OMP Date: 4/1/04

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Citation: 1 Am. Bankr. Inst. L. Rev. 11 1993

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GOOD FAITH: A ROUNDTABLE DISCUSSION

INTRODUCTION

The following is a Roundtable Discussion of good faith issues in bankruptcy by four distinguished bankruptcy judges: Hon. Lisa Hill Fenning, Hon. William Greendyke, Hon. William Hillman, and Hon. Robert Mark. The discussion was moderated by Prof. Karen Gross of the New York Law School, a member of the Board of Directors of the American Bankruptcy Institute and the Advisory Board for this Law Review. The editors express their appreciation to the judges and Prof. Gross for their generous donation of time and effort to this project.

PROF. GROSS: Let me begin this RoundTable discussion by introducing our distinguished participants: The Honorable Lisa Hill Fenning from the Central District of California; the Honorable Robert Mark from the Southern District of Florida; the Honorable William Hillman from the District of Massachusetts and the Honorable William Greendyke from the Southern District of Texas. I want to begin this discussion by first providing a brief contextual overview.

Issues of good faith are arising with increasing frequency in cases under the Bankruptcy Code. Although the Code contains explicit references to good faith, for example, sections 303, 542, 921, 1129 and 1325, among others,¹ courts have increasingly scrutinized cases to determine if there is an implied standard of good faith in cases which have been filed.² Indeed, even

¹ See 11 U.S.C. §§ 303(f)(2), 542(c), 542(d), 921(e), 1129(a)(3), 1325(a)(3) (1992); see also 11 U.S.C. §§ 109(c)(5)(B), 363(m), 364(e), 548(e), 549(c), 550(b)(1), 550(b)(2), 550(d)(1), 727(a)(9)(B)(i), 1113(b)(2), 1114(f)(2), 1125(e), 1126(e), 1144(l), 1225(3) (1992).

² Chapter 7: *Industrial Ins. Servs. v. Zick* (*In re Zick*), 931 F.2d 1124 (6th Cir. 1991); see also *In re Krohn*, 886 F.2d 123 (6th Cir. 1989); *In re Khan*, 35 B.R. 718 (Bankr. W.D. Ky. 1984); John A. Majors, *In Re Zick: Chapter 7's Good Faith Threshold Standard*, 23 U. Tol. L. Rev. 583 (1992).

Chapter 11: *Little Creek Dev. Co. v. Commonwealth Mortgage Corp.* (*In re Little Creek Dev. Co.*), 779 F.2d 1068 (5th Cir. 1986); *In re Aurora Inv.*, 134 B.R. 982, 985 (Bankr. M.D. Fla. 1991) ("[I]t is now established beyond peradventure that the court may dismiss a Chapter 11 case for cause if the court finds the Petition was filed in 'bad faith.'"); *In re Victory Constr. Co.*, 9 B.R. 549 (Bankr. C.D. Cal. 1981), modified, 22 B.R. 597, vacated as moot, 37 Bankr. 222 (9th Cir. 1984). See *infra* note 7 (listing more recent decisions).

Chapter 12: *Schuldies v. United States* (*In re Schuldies*), 122 B.R. 100 (D.S.D. 1990); *In re Bird*, 80 B.R. 861 (Bankr. W.D. Mich. 1987).

Chapter 13: *In re Love*, 957 F.2d 1350 (7th Cir. 1992); *In re Earl*, 140 B.R. 728 (Bankr. N.D. Ind. 1992); *In re Powers*, 135 B.R. 980 (Bankr. C.D. Cal. 1991); *In re King*, 126 B.R. 777 (Bankr. N.D. Ill. 1991); *In re Roberts*, 117 B.R. 677 (Bankr. N.D. Okl. 1990); *In re Gaudet*, 95 B.R. 4 (Bankr. D.R.I. 1989).

the Supreme Court has entered into this debate in *Johnson v. Home State Bank*,³ where sequential filings were deemed to be not, per se, bad faith.

Implied good faith has been raised in a wide variety of contexts, and let me give several examples. One example would be a Chapter 11 case where one seeks to obtain relief from tort⁴ claims or environmental claims.⁵ Another example might be a Chapter 13 case which is filed in order to get a discharge of debts which would be non-dischargeable in a Chapter 7 case,⁶ or even a Chapter 7 case which is filed to obtain relief from a state court judgment which was granted as a result of a debtor's deliberate breach of an employment contract.⁷ Most recently, with the growing number of single asset Chapter 11 cases, courts are increasingly confronting whether these types of cases should be dismissed because they do not represent a good faith filing.⁸

For an excellent overview of the implied good faith filing requirement, see Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 N.W. U. L. REV. 919 (1991). See also Brian S. Katz, *Single Asset Real Estate Cases and the Good Faith Requirement: Why Reluctance to Ask Whether a Case Belongs in Bankruptcy May Lead to the Incorrect Result*, 9 BANKR. DEV. J. 77 (1992).

³ 111 S. Ct. 2150, 115 L. Ed. 2d. 66, 59 U.S.L.W. 4609, *remanded*, *In re Johnson*, 940 F.2d 609 (10th Cir. 1991), *and remanded*, *In re Johnson*, 1991 U.S. Dist. LEXIS 18769 (D. Kan. 1991). In *Johnson*, the debtor had defaulted on mortgage notes and filed a petition for liquidation under Chapter 7 while foreclosure proceedings were pending. After the state court entered an in rem judgment for the bank, but before a scheduled foreclosure sale, the mortgagor filed for reorganization under Chapter 13. *Id.* The Supreme Court declined to address the good faith issue (remanding it for determination below), indicating that such a sequential filing is not, per se, bad faith. *Id.* at 2156.

⁴ See *In re Johns-Manville Corp.*, 36 B.R. 727 (Bankr. S.D.N.Y. 1984), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984) (Chapter 11 filing commenced to seek respite from class action (asbestos) tort claims); *In re Whipple*, 138 B.R. 137 (Bankr. S.D. Ga. 1991) (Chapter 13 filing to avoid tort claim).

⁵ See *United States Environmental Protection Agency v. Environmental Waste Control*, 131 B.R. 410 (N.D. Ind. 1991); see also *In re Pierce Coal & Constr.*, 65 B.R. 521 (Bankr. N.D. W. Va. 1986).

⁶ See *Handeen v. LeMaire (In re LeMaire)*, 883 F.2d 1373 (8th Cir. 1989); *In re Rogers*, 140 B.R. 254 (Bankr. W.D. Mo. 1992); *In re Bush*, 120 B.R. 403 (Bankr. E.D. Tex. 1990); *In re Stewart*, 109 B.R. 998 (D. Kan. 1990); *Washington Student Loan Guar. Assoc. v. Porter (In re Porter)*, 102 B.R. 773 (9th Cir. 1989), *aff'd*, 1990 U.S. App. LEXIS 20578 (9th Cir. 1990); *In re Kosenka*, 104 B.R. 40 (Bankr. N.D. Ind. 1989); *In re Adamu*, 82 B.R. 128 (Bankr. D. Or. 1988).

⁷ See *Industrial Ins. Servs. v. Zick (In re Zick)*, 931 F.2d 1124 (6th Cir. 1991); see also *Bybee v. Geer (In re Geer)*, 137 B.R. 37 (Bankr. W.D. Mo. 1991).

⁸ *Humble Place Joint Venture v. Fory (In re Humble Place Joint Venture)*, 936 F.2d 814 (5th Cir. 1991); *In re Denver Inv. Co.*, 141 B.R. 228 (Bankr. N.D. Fla. 1992); *Pleasant Pointe Apartments, Ltd. v. Kentucky Hous. Corp. (In re Pleasant Pointe Apartments, Ltd.)*, 139 B.R. 828 (W.D. Ky. 1992); *In re Aurora Invest.*, 134 B.R. 982 (Bankr. M.D. Fla. 1991); *In re Nesenkeag*, 131 B.R. 246 (Bankr. D. N.H. 1991); *In re Reiser Ford*, 128 B.R. 234 (Bankr. E.D. Mo. 1991); *In re 1020 Warburton Ave. Realty Corp.*, 127 B.R. 333 (Bankr. S.D.N.Y. 1991); *In re I-95 Technology-Industrial Park, L.P.*, 126 B.R. 11 (Bankr. D. R.I. 1991); *In re Campus Hous. Developers*, 124 B.R. 867 (Bankr. N.D. Fla., 1991).

When the good faith issue is raised in single asset cases, most frequently by creditors, although sometimes by the courts sua sponte, there is little consensus among circuits or even districts as to what constitutes good faith and how it should be applied.⁹

This Round Table discussion is intended to elaborate on these issues and more particularly, to probe the meaning of good faith in single asset Chapter 11 cases. To get the discussion underway, let me pose my first question.

⁹ *Pleasant Pointe Apartments, Ltd. v. Kentucky Hous. Corp.*, (*In re Pleasant Pointe Apartments, Ltd.*), 139 B.R. 828 (W.D. Ky. 1992) (filing of Chapter 11 petition found to be in bad faith for a single asset debtor facing state foreclosure action). Court cited indicia of bad faith enumerated in *Little Creek Dev. Co. v. Commonwealth Mortgage Co.* (*In re Little Creek Development Co.*), 779 F.2d 1068 (5th Cir. 1986) and *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989). Court determined that debtor filed petition to hold single asset hostage rather than to reorganize asset; *RCO Inv. Co. v. Belair 301-50 S.W. Quadrant Commercial Properties*, (*In re Belair 301-50 S.W. Quadrant Commercial Properties*), 137 B.R. 191 (D. Md. 1992) (relying on analysis set forth in three separate decisions [*Little Creek*, 779 F.2d at 1072, *Carolin*, 886 F.2d at 701, and *In re Grieshop*, 63 B.R. 657 (N.D. Ind. 1986)] court reversed Bankruptcy Court's finding of good faith. Opinion relied most heavily on the standard set forth in *Carolin* and concluded that the debtor's plan was objectively futile and filed with subjective bad faith); *In re Landings Assocs., Ltd. Partnership*, 145 B.R. 101 (Bankr. M.D. Fla. 1992). In holding that a single asset debtor filed Chapter 11 petition in bad faith, the court stated:

mechanical application of the factors set forth in *Little Creek*, 779 F.2d at 1073 indicates that this case has most of the hallmarks of bad faith However, it is equally recognized that not one single factor set forth in *Little Creek*, is determinative of the issue of the lack of good faith of a debtor seeking relief under Chapter 11 of the Bankruptcy Code. While *Little Creek* is still well-recognized as persuasive authority, it is equally true that there is nothing inherently improper for a debtor with one single asset, generally an income-producing commercial property, to attempt to reorganize its affairs under the rehabilitation provisions of the Bankruptcy Code. In the last analysis, the key considerations are (1) the Debtor's motivation to file the petition; (2) the economic vitality of the Debtor; (3) the Debtor's real need to reorganize and (4) the ability of the Debtor to achieve reorganization.

Id. at 102.

In re Franklin Mortgage & Inv. Co., a separate analysis was maintained for ordinary, single asset debtors and those who fit within the "new debtor syndrome." 143 B.R. 295 (Bankr. D. Dist. Col. 1992). The court noted that the "case has all the earmarkings of the 'new debtor syndrome' . . ." *Id.* at 300. In framing its analysis the court stated:

Where a "new debtor syndrome" and resultant unfair delay of creditors is present, it makes no sense to require objective futility. The court must be able to protect its jurisdictional integrity. In contrast, other single asset cases not involving the "new debtor syndrome" usually present the question whether the case is futile and hence filed in bad faith. It makes sense to require objective futility before dismissing those cases. That is not what is at stake in a "new debtor" case. In the "new debtor" case the critical inquiry is whether the debtor has gained unfair advantage by employment of the new debtor device.

Id. at 302.

GOOD FAITH CHALLENGES IN SINGLE ASSET CASES

Are all of you seeing a large number of single asset cases in your Districts, and are these cases being challenged either by you or by creditors on the basis of good faith?

JUDGE MARK: I would guess that in the Southern District of Florida we may have the highest percentage among the panelists here of Chapter 11's that are, in fact, single asset real estate cases. It varies and it may be slowing down a bit, but we certainly see many single asset real estate cases and I would even say it's a substantial percentage of the Chapter 11's in total.

PROF. GROSS: How many of those cases are challenged on the basis of good faith?

JUDGE MARK: Virtually all of them sooner or later, unless there is some consensual arrangement that's been negotiated at the start of the case. I am overgeneralizing, of course, but typically the cases are filed right before summary judgment hearing or often right before the foreclosure sale. The creditor/borrower is sophisticated enough, given the state of law in the 11th Circuit to come in quickly with a motion for stay relief under section 362(d)(1) for cause, or for dismissal, arguing bad faith. So we are confronted with these motions early on in many cases.

JUDGE GREENDYKE: Judge Mark, what kind of numbers are we talking about in terms of total number of Chapter 11's and what percentage of that might be single asset real estate cases? I really don't have an idea what kind of numbers you are talking about.

JUDGE MARK: I probably have maybe 150 pending Chapter 11's. My numbers may be way off. I didn't really do a statistical check. And it may very well be that half of them are single asset real estate cases.

JUDGE GREENDYKE: That's a lot.

JUDGE MARK: South Florida has been over-built with shopping centers, office buildings, and less commonly, residential properties. We have visiting judges coming down to Palm Beach and they could virtually

take a Chapter 11 golf tour when they are not sitting because we also have a lot of country club developments that are in Chapter 11.

JUDGE GREENDYKE: When I started out in 1987 I had given to me 540, 550 Chapter 11 cases, and I would say hundreds of them were single asset cases that took years to get rid of. Now I have 125 cases and probably 25 of those are two large conglomerate-type debtors that are not real estate related at all.

The single asset real estate cases are virtually a thing of the past in Houston. Coincidentally, I was in a hearing for three hours this afternoon with one, but it's been since the springtime since I've had a confirmation hearing in a single asset Chapter 11.

We in Houston raise good faith issues *sua sponte*. Of course, creditors always had good faith on their minds because it was their first punch besides a motion to lift.

JUDGE FENNING: In the seven years I have been on the bench in the Central District, the percentage of single asset filings on my calendar has fluctuated with the real estate economy. And for awhile I had a lot of Texas single asset real estate cases, but those are history.

At the moment, probably about half of my Chapter 11 cases are single asset real estate cases. About a quarter of those are "house" cases, that is, where the only purpose for filing a consumer Chapter 11 is to try and stave off foreclosure on the house. In the Los Angeles housing market, a lot of fairly ordinary houses are sufficiently costly to put people over the debt limits for Chapter 13. Most of our Chapter 11 "house" cases are *pro se* filings.

The single asset cases at this point include apartment buildings, shopping centers and vacant land. Most have been filed by limited partnerships, although recently, more single asset debtors are corporations. In addition to the single asset cases, I have some very large individual Chapter 11 cases filed by entrepreneurs in the real estate development or management business who own 20 or 30 or 40 apartment buildings within their individual estates. Those Chapter 11 cases technically don't qualify as "single asset" cases. The overwhelming bulk of my current pending case load of about 620 Chapter 11 cases consists of real estate based cases of one sort or another.

JUDGE HILLMAN: The District of Massachusetts is famous for Chapter 11's. The four of us each have more 11's than any other judges in any other district in the country. I think I have 500 right now. Of those, about one-quarter of them are single asset real estate. Of those, very few are

residential. Most of them are what we call triple-deckers, small real estate folk who went out and bought themselves — they listened to the lecturers on television at night and they went out and bought themselves one asset and maybe they leveraged it and they are down to one.

PROF. GROSS: How do you get to the name "triple-decker"?

JUDGE HILLMAN: In the working class neighborhoods of the Northeast, three-story houses inhabited by three families were built, my guess is 1900 give or take 20 years, and they are called triple-deckers, and they are investment properties in the older residential areas. You live in one and you rent two, that is, if you can get tenants.

JUDGE FENNING: You also asked whether single asset cases are being dismissed for bad faith. In our district, I don't think any of the judges are raising the issues sua sponte. Bad faith is sometimes an argument that is added onto a relief from stay motion. Almost always we are seeing these cases for the first time on a relief from stay that's filed within the first 60 days or on a cash collateral motion that's filed by one or the other parties.

At the moment, the real estate market is about what it is in Massachusetts. It's entirely dead, but we are still having some evidentiary hearings because the appraisals are drastically in conflict. The outcome of the relief from stay motion usually depends upon valuation, rather than "bad faith."

PROF. GROSS: Is that true for you also, Judge Mark, that good faith is not raised sua sponte?

JUDGE MARK: There is no need for it. You would virtually be committing malpractice as a creditor attorney in the 11th Circuit if you did not raise the bad faith issue early on in a Chapter 11, if it met the criteria that have led to dismissals in the 11th Circuit.

PROF. GROSS: We'll get to the standards in a minute but first, do judges raise good faith concerns sua sponte in Massachusetts?

JUDGE HILLMAN: It's been known to happen from time to time. We very seldom see a motion to dismiss in the first few days. I think that's because the case has been in foreclosure and it's in the hands of a real estate lawyer, not a bankruptcy lawyer. But within two weeks they have

bankruptcy counsel and a (d)(1), (d)(2) motion comes tearing in. Whether they say it or not, they are arguing for dismissal on bad faith grounds.

WHAT IS A SINGLE ASSET CASE? ~

PROF. GROSS: I just want to make sure that when we talk about single asset cases that we are all talking about the same thing. For me, there is a definitional question here as to what is a single asset Chapter 11 case. The proposed legislation, that was part of the Senate bill, had a definition of single asset Chapter 11 cases. Let me just read you that section and see if you all agree with that definition. Single asset real estate cases involve "real property, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto."¹⁰

JUDGE FENNING: I think we are talking about a slightly bigger universe. The triple-deckers wouldn't come within the statutory definition. Vacant land wouldn't come within the statutory definition, but I consider those single asset real estate filings because the same issues are present; that is, is there anything to reorganize and what is the value.

PROF. GROSS: Are we all agreeing though that single asset Chapter 11 cases involve real estate?

JUDGE FENNING: Yes.

JUDGE HILLMAN: Yes.

JUDGE MARK: But interestingly, the bad faith cases, a lot of the early ones, involved vacant land and it's been an expansion of the concept or expansion of the doctrine that's been applied more and more now to income-producing properties. So it is a broader universe than the definition you just read.

JUDGE FENNING: I suspect part of that expansion occurred because a lot more properties started coming into bankruptcy with a negative

¹⁰ S. 1985, 102d Cong., 2d Sess. § 211 (1992).

cash flow. That is, they were income-producing, but with a negative cash flow that raised the question of whether the debtor could possibly confirm a plan.

JUDGE HILLMAN: Then I suppose when you get to vacant land you have to consider as a single asset the acreage that has been platted, broken out into lots and is still undeveloped.

JUDGE FENNING: We get a lot that have tentative tract maps out that are pending final plan.

JUDGE HILLMAN: It's still a single asset case. It's one mortgage on one piece of real estate.

PROF. GROSS: Let me try a hypothetical. What is your view of a corporation that was set up to hold a patent or a contract right. Is that a single asset Chapter 11 debtor for purposes of our discussion?

JUDGE MARK: Good topic for law school, but we don't see it much.

PROF. GROSS: Okay, fair enough.

JUDGE GREENDYKE: I think from a practical standpoint, we are all talking about real estate cases whether it's undeveloped real estate or somebody that's got one apartment complex or one shopping center. It can be a patent. My most humorous example of a single asset case arose at a show cause hearing in 1987 where I found out somebody had a model railroad and I inquired about what the scope of the railroad was. He said, "Well, it's about 20 feet by 15 feet," and that was a single asset. It can be anything you want. But by and large we are talking about real estate.

IS IMPOSITION OF A GOOD FAITH REQUIREMENT APPROPRIATE?

PROF. GROSS: Since you have all taken after academics, let me refer to a commentator, who is not an academic, but who has certainly written academic material. He stated the following about good faith: "The imposition of the good faith requirement appears contrary to the statute,

illogical, and unworkable in its application."¹¹ Do you have any views as to the merits of that observation?

JUDGE HILLMAN: That's Marty Bienenstock¹² and he had me two-thirds convinced before I came on the bench, and I thought about it a great deal. Then when I came on, I came into a district where we have a case called *In Re The Bible Speaks*.

PROF. GROSS: An unforgettable name.

JUDGE HILLMAN: The holy writ from Judge Queenan in *In re The Bible Speaks*¹³ is that there is a good faith test and there was a good faith test under Roman XI and there is a good faith test under Arabic 11. So the cases in my district are uniform, and there is good faith, Marty to the contrary, notwithstanding.

JUDGE FENNING: I think there is implicit good faith, but we are talking about Chapter 11's here. You cannot confirm a Chapter 11 plan without a determination that it's being proposed in good faith.

JUDGE HILLMAN: That's back end.

JUDGE FENNING: That's back end, but if there is no way they can clear that hurdle at the end of the case and it's obvious at the beginning of the case, you can address the good faith issue at the beginning.

JUDGE GREENDYKE: That is Leif Clark's *Anderson Oaks* case¹⁴ — if one can find out in a 362 hearing or a hearing on a motion to dismiss that it is impossible to confirm a plan, just stop the case right there.

JUDGE FENNING: In the interest of full disclosure, we should tell you Judge Clark just walked into the room a few minutes ago.

JUDGE GREENDYKE: I figured he'd be here.

¹¹ MARTIN J. BIENENSTOCK, *BANKRUPTCY REORGANIZATION* 28 (1987).

¹² Martin J. Bienenstock is a partner with the firm of Weil, Gotshal & Manges in New York.

¹³ 65 B.R. 415 (Bankr. D. Mass. 1986).

¹⁴ *In re Anderson Oaks*, 77 B.R. 108 (Bankr. W.D. Tex. 1987).

PROF. GROSS: I think what Martin Bienenstock is talking about is an implied good faith standard.¹⁵ I think what Judge Fenning is raising is the issue of why we need to focus on this when an explicit good faith standard shows up in section 1129(a)(3)? Can one infer from that you don't think you need —

JUDGE FENNING: I think this is an "angels on the head of a pin" question. You have to pass a good faith hurdle in order to do anything in a Chapter 11. So that can be tested at the beginning of the case as well as at the end of the case, if you have enough evidence at the beginning of the case to reach a conclusion on that question.

JUDGE MARK: Although it's not going to apply in the 11th Circuit because we have clear 11th Circuit authority to dismiss on a finding of bad faith, I think a good argument could be made that in most instances, the same results could be obtained by either stay relief for cause under section (d)(1) of 362 or just a finding under the express provisions of 1112(b) — either (b)(1), that there is continuing loss or diminution of the estate in absence of a reasonable likelihood of rehabilitation or, (b)(2), that there is an inability to effectuate a plan. And it may be that the factors we often look at in determining whether a case is right for dismissal under bad faith just go in a sense to how quickly after the filing of a case do you look at (b)(1) and (b)(2). And part of a way to do it without a separate doctrine of bad faith is just to say that you will look immediately at the ability to effectuate a plan if certain criteria exist. But as I said, in the 11th Circuit we have that doctrine that's now well-established and although lawyers alternatively argue 1112(b)(1) and (b)(2), we can plug into the 11th Circuit doctrine of bad faith and still proceed in that fashion.

JUDGE HILLMAN: It's a question of how far forward do you want to drag the confirmation issues.

PROF. GROSS: Well, if there is an implied good faith standard, where is it found? Where is the authority to create it?

JUDGE GREENDYKE: I think it's a case law creation and it probably comes in under section 105 or just a general inherent ability, at

¹⁵ MARTIN J. BIENENSTOCK, *BANKRUPTCY REORGANIZATION* 28-39 (1987).

least under the 5th Circuit case law, to protect our jurisdiction. If you find that somebody is doing something that's inappropriate or that would constitute an abuse of your jurisdiction, you can cleanse your docket, in effect.

I am paraphrasing liberally Judge Jones' words in *Little Creek* and cases that have followed that. That's where we do it and how we do it.

JUDGE FENNING: But you also find it in Rule 11.

PROF. GROSS: Some people find it in Bankruptcy Rule 9011.¹⁶

JUDGE FENNING: And 28 U.S.C. section 1927, which is an alternative source of sanction law. It's implicit in federal court that you can review all filings to determine whether they have been made in good faith. I just don't think you have to get to all of those more generic formulations where you are dealing with a statutory requirement that, in order to accomplish what you are supposed to be accomplishing in a Chapter 11 case, you have to be proceeding in good faith. I mean, I rely primarily on section 1129.

JUDGE MARK: I think the 11th Circuit cases just find that section 1112(b) is not exhaustive and that it allows the court to dismiss in the best interest of creditors for cause and then they say there is another ground for dismissal, not expressly stated, but there is a valid ground based on bad faith — and the doctrine has developed. It's sort of an unnumbered cause now under section 1112(b) in the 11th Circuit.

JUDGE HILLMAN: That's exactly how the *Bible* spoke.

JUDGE FENNING: In the 9th Circuit we have *Victory Construction*,¹⁷ which deals with the badges of fraud in "new debtor syndrome" cases. That is the primary scenario in which bad faith is pled and

¹⁶ Providing in pertinent part,

that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any purpose, such as to harass, to cause delay, or to increase the cost of litigation.

BANKR. R. PROC. 9011 (1992).

¹⁷ *Laborers' Pension Fund v. Victory Constr. Co.*, No. 85-C-07077, 1985 WL 4066 (N.D. Ill. Nov. 25, 1985).

argued strenuously as opposed to a throw-away alternative argument on relief from stay in the 9th Circuit. "New debtor syndrome" is the nickname for a new entity created to hold the real property which then is dumped into bankruptcy with no employees, no history, no other source of income.

JUDGE HILLMAN: We have adopted the Ordian test from *Victory*, but we use it also when it isn't a new debtor. If you take the catalogue of events and it just doesn't happen to be a new debtor, it still may flunk the good faith test.

WHAT IS THE TEST FOR GOOD FAITH?

PROF. GROSS: Since we are all talking about what the standard is, let's talk about that specifically. How is it that a court should determine what is good faith in a Chapter 11 single asset real estate case? As you answer, I assume you are answering for yourself, but if you have the view of your circuit or the judges in your district, it may be worth identifying that. Judge Greendyke, do you want to go first?

JUDGE GREENDYKE: I think, at least from my standpoint, it's difficult to say here's the test. It's usually four or five criteria because it is inherently a fact-intensive type of search. One of the best examples that we have had and used down here is a District Court opinion that was penned by a circuit judge who was sitting by designation, Judge Jones.

The case is called *Chemical Research*¹⁸ and it involved two quarreling factions of a joint venture. One of the venturers, Chemical Research filed for relief under Chapter 11 to gain advantage in state court. It basically represented a two-party dispute over entitlement to some intellectual property rights. There were virtually no creditors, and the company was solvent, with a wonderfully lucrative, profitable business. Judge Jones just said, look, you all don't have the right kind of attitude toward this case. You are not in subjective bad faith, but you are not in objective good faith. That is, you meant well but what you are doing is wrong. This is a two-party dispute and it needs to be resolved outside of bankruptcy court.

Well, I don't think I have ever seen a case like that since then, but lawyers like to argue its application in any apparent two-party dispute. If you

¹⁸ *IN RE Chemical Research & Licensing Co.*, No. 85-00210-H1-5, (S.D. Tex. Nov. 13, 1986) (Jones, J., sitting by designation).

are presented with a situation in which you have just two creditors fighting, there's lots of case authority to say, "send them out."

If you have a situation like Mike McConnell was confronted with in *Little Creek*,¹⁹ where he found the only reason why they went into bankruptcy court was to dodge a state court judgment and avoid the posting of a supersedeas bond, there's a line of cases that say that constitutes bad faith, but it's really an example by example situation. It's a matter of how offended the bankruptcy judge is that these parties are in front of him or her and whether or not the judge decides that the case is one that is susceptible of reorganization.

PROF. GROSS: Would you say, then, that there is an objective test to determine whether a debtor is reorganizable? Of course, in applying that test, lots of factors must be taken into account.

JUDGE GREENDYKE: Well, it's both. It can be a subjective test or it can be an objective test. My favorite approach is to be objective about it because every debtor "is a bad guy" and they are going to give you lots of evidence about how bad the debtor is and how bad the debtor has been historically. It is very difficult to establish subjective standards and thresholds. It's a lot easier to try the case from an objective standpoint and allow the subjective evidence that comes forth to be kind of a shading on what you find objectively.

While Judge Jones ruled in *Chemical Research* probably on a somewhat subjective basis, she was looking at objective evidence on what the situation was in front of her to make that determination. So, yes, I guess the first approach is objective and then I would allow the subjective evidence to just sort of help you make your decision.

PROF. GROSS: And Judge Greendyke, you also seem to be looking at this issue by categorizing types of cases: single asset cases which are on the eve of foreclosure, single asset cases which are two-party disputes, and . . .

JUDGE GREENDYKE: — the new debtor cases that we mentioned.

¹⁹ *Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068 (5th Cir. 1986).

PROF. GROSS: Or the new debtor syndrome. In essence, you are lumping single asset cases into various discrete categories.

JUDGE GREENDYKE: Well, the lawyers are going to want to lump them in categories. I guess to a certain extent they are susceptible to some type of categorization. Again, each one is usually so different that it's not fair to the parties to lump them entirely into one group.

JUDGE HILLMAN: The judges in the District of Massachusetts started with *Little Creek* and then developed a list of 14 characteristics. The best place to find it is *In Re Village Green Realty Trust*,²⁰ which is a Judge Gabriel decision in 1990, and he lists fourteen factors, which I can either read to you, or I can put them in a footnote, however you want to handle it, but they are there.²¹

Now, what most of us seem to be doing with that list is you count up how many of the fourteen they have hit and if they hit enough, they move.

PROF. GROSS: Would seven or more satisfy the test?

JUDGE HILLMAN: I don't know. In *In re Thane*,²² which I decided about four or five months ago, I said that ten out of fourteen did it.

JUDGE GREENDYKE: But it's not fair to you on a case-by-case basis to have to set a limit like that to say that it needs to be more than fifty percent. If the case is so egregious, if you will, that one factor outweighs all the others, you just need to consider all the remaining factors or to look at their potential application to make sure of your decision. It is appropriate to give different weight to the various factors.

²⁰ 113 B.R. 105 (Bankr. D. Mass. 1990).

²¹ *Id.* at 115-16. List of fourteen characteristics: Debtor has few or no unsecured creditors; previous filings, pre-petition improper conduct; the petition effectively allows the debtor to evade court orders, few debts to non-moving creditors; the petition was filed on the eve of foreclosure; the foreclosed property is the sole or major asset; the debtor has no ongoing business or employees, no possibility of reorganization; the debtor's income is not sufficient to operate; no pressure from non-moving creditors; reorganization essentially involves the resolution of a two-party dispute; a corporate debtor was formed and received title to its major assets immediately prior to filing; and/or the debtor files solely to create the automatic stay.

²² 143 B.R. 310 (Bankr. D. Mass. 1992).

JUDGE FENNING: I think that laundry list includes pretty much every factor that we look at, but it doesn't tell you what's enough, and that's the hard case. We have inexperienced counsel coming in sometimes arguing dismissal for bad faith filing simply because the case was filed on the eve of foreclosure. Our response is, "Every real estate case is filed on the eve of foreclosure." So by itself, unless we are told that real estate doesn't belong in bankruptcy, that is not enough to make this a bad faith filing. There's no magic formula.

PROF. GROSS: Well, Judge Fenning, do you have an approach that you or your district take?

JUDGE FENNING: Well, the "new debtor syndrome" cases do not last long in our district, but we don't see that many of them filed by experienced bankruptcy lawyers because they know there is no point. You are going to be out of court at the first hearing and probably damage your reputation in the process as a lawyer for filing such a case.

The marginal bad faith cases that we get tend to be somewhat more complex than that. Debtors try and use excuses about how well they really can formulate a plan, if only the following fifteen things happen but most of which would require a miracle.

But as I said, we usually are not litigating the bad faith issue. The bad faith is normally present in our cases as a back drop to relief from stay as an additional factor for relief from stay, or as an additional reason to deny confirmation of the plan, rather than as a free-standing justification to dismiss the case.

Dismissal of a case requires notice to all the creditors and sometimes it's a lot easier to file a motion for relief from stay with a more restrictive notice list under 4001 and get out on relief from stay and not worry about the procedural problems of dealing with a motion for dismissal.

JUDGE MARK: In the 11th Circuit we have the authority of several decisions. Most recently and one most often cited is *In re Phoenix Plcaddilly*,²³ which is a 1988 case, which sent shock waves through the debtor bar because in that case the court said even if the debtor has equity in the property, bad faith dismissal may be appropriate.

²³ 849 F.2d 1393 (11th Cir. 1988).

As applied, it hasn't expanded the law greatly, but as a result, we have this shorter laundry list than the District of Massachusetts, with largely the same kind of criteria. The debtor has one asset, few unsecured creditors and their claims are small in relation to the mortgage, few employees, foreclosure action, essentially a two-party dispute which is pending in the state court and the timing evidences an intent to delay or frustrate the creditors.

It's interesting, because the older 11th Circuit authority cases, such as *In re Natural Land Corporation*²⁴ involved the "new debtor syndrome" and I think the whole concept of bad faith came about in these new debtor cases that were really egregious, but in the 11th Circuit it is now argued and applied in the typical single asset real estate case.

As far as how it's applied, though, in this type of test, most of the judges, with varying degrees of flexibility, still look at the feasibility of reorganization as a very important factor. You find, for example, that Judge Paskay dismisses a lot on bad faith grounds, but also has published cases where he has denied bad faith motions or stay relief motions at the outset because there is some possibility of reorganization.

JUDGE GREENDYKE: That brings in an interesting question. In a lot of instances when you go through the checklist, you will find many of the factors are satisfied, but that there's a smell somewhere that the debtor has got something to work with. Do you all do anything to manage those cases like requiring, for instance, a capital infusion prior to the time of the disclosure statement hearing, in order to assess -- condition the case on proof of some sort of viability? If, indeed, the main argument is this debtor is a dead duck and it won't work, do you say to the debtor or its principals, I am going to find this, unless you can disprove it by coming up with the money to make the deferred improvements or to meet the deferred maintenance costs in the form of a deposit. Do you ever do anything like that?

PROF. GROSS: There is another way of asking that question. How much time do you give a debtor to make the showing that it is feasible that it will file a plan? For me, one of the differences between the good faith standard in the plan context and the implied good faith standard is that of timing. The issue ostensibly comes up later in the plan context but with implied good faith, the issue comes up right on filing. So, there is a critical timing issue in determining good faith.

²⁴ *Natural Land Corp. v. Baker Farms, (In re Natural Land Corp.)*, 825 F.2d 296 (11th Cir. 1987).

JUDGE MARK: Well, I have a procedure I have used in three or four cases and it's, I guess, a carryover of giving debtors rope to hang themselves, which I liked to do when I did creditor work before I was appointed. But if you find in a typical case that meets these basic criteria the issue becomes what does a debtor have to show to establish that there's a feasible reorganization. If the debtor hasn't gotten a judgment yet, typically stay relief, at least through the point of judgment, is given. There's usually not a lot of argument against that in these cases, but if it's a case where they already have a judgment and it's a question of delaying the sale, we put them on an extremely fast track where they may have 20 days to file a plan. We'll expedite the hearing on the disclosure statement and I, rather than hearing a lot of happy talk at the first hearing on the motion to dismiss as to what they are going to do, I will say file your plan and at the disclosure hearing, which we are going to have in 10 or 15 days after you file your plan, we'll have a further evidentiary hearing on the motion to dismiss and you will have to put on a prima facie case that your plan is feasible at the disclosure hearing. Not for disclosure purposes, because it doesn't really fit in for disclosure. What I like to see is the feasibility of an actual plan, not just what they think they are going to do. And that may mean putting up money. If they are going to put in new money to try and reorganize, that will mean putting up money.

PROF. GROSS: So the burden of proof for you, Judge Mark, is on the debtor to prove good faith as opposed to on the creditor to prove bad faith?

JUDGE MARK: I think that overstates it a bit. I think once the case fits what we use as a shorthand sort of the *Phoenix Piccadilly* mold in the 11th Circuit; it has these criteria. They have gotten a judgment. It's a two-party dispute. Conceptually, if you still believe there is some purpose to Chapter 11 for equity versus mortgagee, and you are giving them some chance, the burden shifts, I guess, for them to prove that there is a feasible plan and to prove it quickly in order to stave off complete stay relief or dismissal for bad faith.

JUDGE HILLMAN: It may be that this entire process we have been discussing is nothing more than factors you look at when you come

to a *Timbers*²⁵ decision. How are we going to get there? What are the evidentiary matters that are involved in reaching a *Timbers* decision?

JUDGE GREENDYKE: I think it's probably more akin to a jurisdictional question. Once the issue is raised, it's going to be the debtor's burden to prove its entitlement to remain in court. If a creditor shows or if I find in the context of just a review of the documents that there is some question as to whether or not the jurisdiction is being abused because of lack of good faith, it's the debtor's burden and obligation to prove and continue to prove it's entitled to be here. And that's how I support my sua sponte motion to make the debtor do something like what you all suggested such as speeding up the discovery and disclosure process and confirmation process.

JUDGE FENNING: Under section 362, it's the debtor's burden to establish feasibility of the plan and, to the extent that incorporates a good faith standard, the burden is with the debtor. To put that at issue on a motion for relief from stay at the beginning of the case, the creditor has to come forward with sufficient evidence to establish a prima facie case that the debtor can't meet the confirmation standard. That forces the debtor to make its showing earlier in the case than it might otherwise, but whenever raised, good faith is fundamentally the debtor's burden.

I often put single asset cases on a very short leash, though not as short as Judge Mark does, for a plan and disclosure statement. If it appears clear that capital infusion is necessary, I require a showing that the capital will be available. Sometimes I require that money be posted before the confirmation order under Bankruptcy Rule 3020.

PROF. GROSS: Does it strike any of you as the least bit odd that we screen bankruptcy filings on what we could call an abusive process standard that is higher than the standard that is applied *outside* of bankruptcy for ordinary civil litigation?

JUDGE GREENDYKE: Well, if you became aware of a Rule 11 violation, we probably are obligated to go ahead and do something about it. I don't think there's a fair analogy outside of bankruptcy court, unless you have a multiple filer, pro se litigant, or something like that. I just don't think there are very many analogies in plain old civil litigation.

²⁵ United States Sav. Assoc. of Texas v. *Timbers*, 484 U.S. 365 (1988).

JUDGE FENNING: In state court you have demurrers right away. There are equivalents elsewhere.

JUDGE MARK: But in the run of these typical cases, and where I put them on a very short fuse is where they filed on the day or the day before the sale and the sale has been canceled. In Florida, that means at least a 30-day delay. So the mortgagee is losing at least a month and the question is how much time -- how much extra time are they going to get by filing a Chapter 11, if any?

And I don't think we are setting a tougher standard than the state court. In these cases they have already lost in state court. Those of us who give them some time and have some flexibility still recognize there is a legitimate purpose and right to file a single asset Chapter 11 case, even if you have exhausted your remedies in state court, but you better be prepared to do something meaningful very quickly.

DO STANDARDS OF GOOD FAITH IN SINGLE ASSET CASES DIFFER FROM
OTHER CASES UNDER THE CODE?

PROF. GROSS: Let me ask all of you the following: are the standards for good faith in a single asset real estate Chapter 11 case any different from the standards for good faith in any other Chapter 11 case or any other chapter of the Code for that matter? In other words, is this standard that you have been articulating unique to single asset Chapter 11 cases or is it one you would apply to the panoply of good faith issues that are raised in all sorts of other cases and contexts?

JUDGE FENNING: I don't think it's unique to single asset cases. The only difference is that we all have a lot of experience with repetitive fact patterns in single asset filings that permit us to draw inferences and see patterns much more readily than, say, in a manufacturing company case. I think the basic standard is the same.

PROF. GROSS: Do the rest of you share Judge Fenning's view that it is the same basic good faith standard for the Chapter 11 that involves mass torts, or the Chapter 13 filed to get rid of claims that would be

dischargeable in a Chapter 7 case or the Chapter 7 case that is filed to get rid of a state court defamation judgment that you didn't like?²⁶

JUDGE HILLMAN: In a broad sense.

JUDGE GREENDYKE: I agree. I think the standards almost have to be the same. It's just that Chapter 11 single asset cases are so much different than any other fact pattern. I do not think it is a helpful question or comparison.

JUDGE MARK: I would disagree, in part. In the 11th Circuit, as the law developed and as it's been applied, and this goes back to the objective versus subjective analysis of a debtor's filing. I have looked debtor principals in the eye and said, I am not saying you are a bad person. I am not finding that you are evil or that are acting subjectively in bad faith, but objectively, under these criteria, you are gone in shorthand.

JUDGE FENNING: I have been known to say that, too.

JUDGE MARK: So to go back to your question, I don't think that it's necessarily in terms of bad faith or absence of good faith in other sections of the Code where you may be focusing more on actual proof of bad intent, which we don't really need to find in the 11th Circuit under the *Phoenix Piccadilly* test.

PROF. GROSS: The reason I raised this whole line of inquiry, and it may not be one with which you all agree, is that there are cases involving individual debtors as opposed to corporate debtors where the good faith issue is raised early and then the courts say you ought to be *much more* reluctant to dismiss those cases initially on an implied good faith standard since the philosophy of the Code is to let people have access to the system in the first instance.²⁷ The Courts go on to say, at least in the context of a Chapter 13, that good faith can be raised later in the context of the plan — where good faith is specific.²⁸ What seems to be said here about single asset real estate

²⁶ See *supra* notes 4-5.

²⁷ See *In re Love*, 957 F.2d 1350 (7th Cir. 1992); *In re Ristic*, 142 B.R. 856 (Bankr. E.D. Wis. 1992); *In re King*, 131 B.R. 207 (Bankr. N.D. Fla. 1991); *In re Powers*, 135 B.R. 980 (Bankr. C.D. Cal. 1991).

²⁸ 11 U.S.C. § 1325(a)(3).

cases is the opposite: don't be skeptical initially; make the judgment about good faith early, if you can and dismiss cases early if necessary.

JUDGE HILLMAN: I think that should be the same rule in any case. If you can make the determination early, what is the point of waiting until confirmation, when you can tell two weeks into the case that this is a sick puppy that's not going to make it?

JUDGE MARK: In the context, though, it's different. For example, in the Chapter 13, you might have an individual that files a 13 on the eve of the foreclosure sale and with few unsecured creditors, but in a 13, because it's got special rights, they can have a feasible plan. So I would have to find some real abuse and subjective bad faith to knock out a 13 early before we had a chance to really analyze the facts and the trustee had made his recommendations on the feasibility of curing the arrearage.

So you have suddenly a new bundle of rights in a 13 that you don't really have in an 11. There are different rights in 11 than you have in state court obviously, but the context, I think, does affect how you look at the good faith issue.

MR. GREENDYKE: I don't think it's the same. I agree with what you are saying. I don't think there's the same need for a judge to monitor 13's or 7's. You have trustees in both those cases and they are watching, and they are on a much quicker fuse — a quicker time track than the 11's are in large part. I can remember years ago actively looking at the 11's to try and find cases I thought were susceptible to a bad faith attack, cases in which we had new businesses or undeveloped real estate, cases that really needed to be looked at and managed actively by me — that's just a different approach than we take in 13's.

JUDGE FENNING: I guess I have a slightly different perspective. This is not the major bad faith issue in the Central District of California. Our principal bad faith problem is with a huge volume of Chapter 7's and 13's being filed solely to avoid eviction from a residential tenancy where an unlawful detainer judgment has already been entered in state court.

I haven't put that in the hopper as a single asset real estate case because they don't have any interest in real property, strictly speaking. It's a different category that's more predominant unfortunately in our jurisdiction than anywhere else for a variety of reasons. We examine the "unlawful detainer" cases very closely and if they fit a prima facie bad faith pattern, we

grant relief from stay or dismiss them immediately. So our "unlawful detainer" consumer cases are on a far shorter leash than single asset real estate cases.

I don't mean to imply that I am currently confirming a lot of Chapter 11 plans for single asset real estate cases. They are not living that long in our jurisdiction at the moment, at least not in my courtroom, because there's no equity in any of these properties and they have no way of repaying the debt or refinancing, given the fact that the bottom has fallen out of our real estate market.

So single asset cases are mostly history on the first relief from stay motion. A few survive, but most of them don't get past relief from stay because there is no equity and no prospect for successful reorganization.

WHAT IS DIFFERENT ABOUT SINGLE ASSET CASES?

PROF. GROSS: Let me play devil's advocate for a minute here. Why is it that these single asset cases where a debtor is seeking to rework secured debt any different than any other Chapter 11 where a debtor is trying to basically restructure its secured debt? Why are these particular cases being "singled" out for singular treatment as abusive?

JUDGE MARK: I don't think it's implied that they necessarily are. I like what Bill said earlier, that it's a matter of how far forward you push the analysis of the feasibility of a plan of reorganization. It's easy to say why they are different in terms of restructuring debt.

Well, they are not if they can come up with something in the way of a plan, a feasible plan to restructure the debt. What has caused the courts to look at these early cases is that many of them are simply filed to delay the foreclosure sale and there is no prospect of restructuring the debt.

It is somewhat complicated in courts, including mine, where the possibility of a new value, strip-down plan exists, even where there is no equity. That is a possible argument, even in a no equity case, that a feasible plan is possible, however I don't think we are saying single asset debtors don't have an opportunity to restructure. I think we are saying if certain criteria exists, particularly in the 11th Circuit, you have to come to the table very quickly with how you are going to do it.

PROPOSED LEGISLATION

PROF. GROSS: Let me change gears here. As everyone is aware, Congress contemplated legislation specifically to address single asset real estate Chapter 11 cases.²⁹ My first question is: Do you think we need a statutory fix or should we leave things as they are for case-by-case determination? And then more specifically, as you may know, the proposed legislation in essence provided a fast track for Chapter 11 single asset real estate cases. The legislation contemplated permitting a stay to be lifted to go up to the point of sale in the context of foreclosure, and then allowed for the plan process to be sped up.³⁰ And, if it didn't speed up or if payment wasn't made to a secured creditor, then the legislation allowed the stay to be lifted and foreclosure to conclude.³¹ So my question is: Do you think we need legislation, and if so, what is your view as to what that legislation should be?

JUDGE HILLMAN: I say, first of all, we don't need it. What it's addressing is the attitude of a number of judges that you don't get relief from stay right away. There is one judge who says to me repeatedly, you have to try three times before I grant relief from stay.

²⁹ S. REP. NO. 279, 102d Cong., 2d Sess. (1992).

³⁰ S. 1985, 102d Cong., 2d Sess. § 211 (1992). The section provides in pertinent part: With respect to a stay of an act against real property under subsection (a), if the property is single asset real estate, and the debtor has not, within 90 days after the filing of a petition under section 301 or section 302 of this title, or the entry of an order for relief under section 303 of this title, filed a plan of reorganization which has a reasonable possibility of being confirmed within a reasonable period of time, or the debtor has commenced payment to the holder of a claim secured by such real property of interest on a monthly basis at a current fair market rate on the value of the creditor's secured interest in such property. The court may extend such 90-day period only for cause and only if an order granting such an extension is entered within such 90-day period.

Id.

³¹ *Id.* The section provides in pertinent part:

Upon request of a party in interest in a case under this title in which the property of the estate is single asset real estate, the court, with or without a hearing, shall grant such limited relief from a stay provided under subsections (a)(1), (a)(3), and (a)(4) of this section, as is necessary to allow such party in interest to proceed during the pendency of the case under this title with a foreclosure proceeding, whether judicial or nonjudicial, which had been commenced before a petition was filed under this title, up to but not including the point of sale of such real property.

Id.

JUDGE FENNING: Or you have to wait a year or whatever the formula is, for other judges.

JUDGE HILLMAN: Whatever it is. Those judges who are doing that now are the reason why Congress was asked to act. No matter what Congress does, those judges will still require three motions or a year before they are going to grant relief from stay. So I don't think that the proposed legislation is going to accomplish anything.

JUDGE FENNING: I think it may change some of the practices of the judges that are inclined to extend the stay forever.

JUDGE HILLMAN: You are much more optimistic than I.

JUDGE FENNING: Well, I believe that some of the judges who hold those views and don't grant relief from stay very liberally or very often and certainly not early, strongly believe that that's the job they are supposed to be doing, per Congressional direction. And this will give clear Congressional direction that that's not what they are supposed to be doing. They are supposed to move these cases up and out. And I think it would change practice for some judges. It would not change the practice in my courtroom particularly, because I take a similar approach already and a number of my colleagues do, but not all of them.

JUDGE MARK: I suspect it would slow us down.

PROF. GROSS: You are on a faster track than the legislation?

JUDGE MARK: I suspect so.

PROF. GROSS: Judge Greendyke.

JUDGE GREENDYKE: I don't think there is any need for legislation. Without getting into other subjects, I think there are a lot of other things that need fixing besides this. I think the case law on good faith works fine and we in Texas have worked with it. Massachusetts clearly has. California has known a long time how to do it.

You are never going to iron out the differences between judges and how they practice the art of judging bankruptcy law. I just think there are

other things that Congress needs to spend its time doing besides worrying about bankruptcy cases.

PROF. GROSS: One thing that this legislation *would* do is that it would mean that it is not, per se, bad faith to file a single asset Chapter 11 real estate case.

JUDGE HILLMAN: It doesn't say that at all.

PROF. GROSS: You don't think so?

JUDGE HILLMAN: No.

PROF. GROSS: You think you could still raise the bad faith, good faith debate if this proposed legislation were in place?

JUDGE HILLMAN: Certainly.

JUDGE FENNING: It's clear from the legislative history currently that it's not per se bad faith to file a single asset real estate case. There's discussion about contemplation of single asset real estate filings. It's not a per se situation. You have to have a whole list of different kinds of factors even now.

JUDGE GREENDYKE: I agree, you would have to question the ability of many portions of section 365 if we were to get rid of single asset real estate cases.

JUDGE FENNING: I don't think it would be a good idea to get rid of single asset cases. They are a good check on the system in many states that allow creditors to just jump the gun on foreclosures where it's really not warranted. I would not favor an elimination of single asset cases. It would help, however, if there were clear standards about what constitutes confirmability for a plan. Then debtors would not have to play Russian Roulette on assignment of judges. Currently, the luck of the draw on judges can determine case outcome: some judges would let the debtor confirm this plan, but the next judge down the hall wouldn't. I think that clear standards for confirmability would simplify the single asset problem enormously and reduce the litigation.

JUDGE HILLMAN: You are right into the cram down classification issues where there is such diversity between judges. In my district people deliberately file in the Western Division because they like Judge Queenan, as opposed to the Boston judges, who have different views of classification.

JUDGE GREENDYKE: That's what circuit courts are for.

JUDGE FENNING: But the circuit courts aren't getting the cases. Because of the appellate structure in bankruptcy, the appeals are not getting as far as the circuit courts. District court and bankruptcy appellate panel decisions are not controlling precedent in most districts and therefore you don't have clear controlling precedent telling us what to do.

Now, if the Supreme Court had agreed to decide *Bryson* or *Greystone*, a clear ruling would have simplified this whole issue enormously. If the parties knew what ball park they were playing in, knew that, yes, these plans are confirmable under these circumstances, or, no, they are never confirmable where there is no equity, then it would simplify single asset filings, and eliminate a lot of them. The parties would work it out before coming to court because they would know what would happen to them with a reasonable degree of predictability without filing bankruptcy.

FORUM SHOPPING IN GOOD FAITH CASES

PROF. GROSS: Do you think there is forum shopping as to the good faith issues? Are people choosing where to file, to the extent they can on what a court's reaction will be to their filing?

JUDGE FENNING: Oh, yes. The variance among the judges is so considerable that to the extent debtors can choose, they are choosing.

JUDGE GREENDYKE: I think they will forum shop for anything — for attorney's fees, for docket loads.

JUDGE FENNING: Extensions of exclusivity.

JUDGE GREENDYKE: I think that's true.

JUDGE HILLMAN: Well, the flexibility exists. People look and see what the odds are.

PROF. GROSS: There is a recent article by two law professors, Lawrence Ponoroff and Stephen Knippenberg,³² who suggested that this good faith debate is really quite misguided and that what we are really talking about is a discussion of how we feel or how we believe that bankruptcy law should function.³³ What Professors Knippenberg and Ponoroff are really saying is that this whole discussion is really a debate about bankruptcy policy, not good faith. I'd like your view as to whether or not what we are really talking about is what is the role and function of bankruptcy law or the role and function of a Chapter 11. Alternatively, are we talking about a much narrower issue — good faith?

JUDGE MARK: I think there's policy issues here. The *Phoenix Piccadilly* case I have talked about in the 11th Circuit is applied more readily by some judges than others to knock out single asset cases. When applied in the extreme, I think it does get into almost a policy decision by judges that Chapter 11 shouldn't be used by equity when it's just equity against a secured creditor. But I think other than when applied in the extreme, I still believe most of us that deal with these single asset cases and put them on a short fuse or require a quick showing that there is a reorganization that's feasible are consistent with what I believe to be the policy of allowing single asset cases to be filed and giving them a chance to reorganize. Again, it's just a matter of timing.

SANCTIONS FOR GOOD FAITH

PROF. GROSS: If there is a finding of bad faith, do you think that sanctions are warranted and if so, what should the range of those sanctions be and against whom should they be brought?

JUDGE HILLMAN: It depends upon the circumstances. There is no hard and fast rule. I have denied sanctions in cases where there was a possible basis for the filing, even though I didn't accept it.

³² Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 N.W. U. L. REV. 919 (1991).

³³ *Id.* at 973-974.

JUDGE GREENDYKE: I think that sanctions are clearly warranted upon a finding of bad faith. The most obvious and appropriate sanction is dismissal of the case. Beyond that, and recognizing that bankruptcy judges arguably do not have the jurisdiction to impose criminal contempt or punitive sanctions, compensatory sanctions in the form of costs and attorneys fees are frequently warranted and granted. The debtor is most often the one against whom the sanctions should be awarded, however, in appropriate circumstances and given the right amount of culpability and/or knowledge, debtor's counsel can and should be held liable for sanctions.

JUDGE FENNING: A finding of "bad faith" would require, in my view, compelling evidence of "subjective" bad faith. Merely filing a Chapter 11 to delay a foreclosure is not bad faith. If the debtor happens to get a sympathetic judge, a confirmed plan may result. Another judge might grant immediate relief from stay or dismiss the case. The uncertainty of the legal standards and the wide variation among judges preclude sanctions in the typical case under "objective" Rule 9011 standards.

"Subjective" bad faith may, of course, exist in single asset real estate cases, just as in any other type. The filing of the Chapter 11 case may be part of an active scheme to defraud creditors. If proven, such factors justify Rule 9011 sanctions. Whether both the debtor and the attorneys should be sanctioned depends upon the circumstances.

After seven years on the bench, I have concluded that litigating a "bad faith" filing claim and imposing sanctions is unproductive. Shortly after I came on the bench, I did fully litigate such a case, entering an order of dismissal on grounds of bad faith and imposing sanctions on both party and counsel because of their outrageous conduct.³⁴ The amount of sanctions was based upon the attorney fees generated, the ability of the sanctioned attorney to pay, and the need to deter similar conduct in the future. Unfortunately, the cost of that litigation was high. If faced with a similar case today, I would probably just lift the stay for cause at the first hearing, sending the parties back to state court without imposing sanctions or litigating the "bad faith" issue. The Chapter 11 filing in such cases is usually just a side-show, and should be simply, and economically resolved.

³⁴ *In re Eighty South Lake*, 63 B.R. 501 (Bankr. C.D. Cal. 1986), *aff'd*, 81 B.R. 580 (Bankr. 9th Cir. 1987).

ENFORCEABILITY OF PREPETITION "BAD FAITH" AGREEMENTS

PROF. GROSS: There is one more question I would like to ask, namely, has there been some pragmatic change in how lawyers are functioning to address good faith problems? Let me present a hypothetical. Suppose a debtor and a creditor agree in a workout context that should any Chapter 11 ultimately occur, it will be deemed to be bad faith. Then, they write that into their out-of-court workout agreement. Suppose then that for any number of reasons, the out-of-court workout agreement either is not consummated or if it is consummated there is a default under it. Do you think those kinds of provisions are enforceable when the single asset Chapter 11 case is ultimately filed?

A variation on the theme is that suppose that the debtor and creditor in this context agree that if a Chapter 11 case is ultimately filed, the stay can automatically be lifted with no need for a hearing and the lender can just proceed ahead to foreclosure. Is that kind of lawyering now appropriate? Are these types of provisions enforceable?

JUDGE FENNING: I don't think it's enforceable. You are dealing with a different entity once the filing has occurred. Different parties who were not represented at the table at the time that deal was struck, namely other creditors of the estate, have an interest to be protected. Such an agreement is certainly admissible as evidence of the intent of the parties on the issue of whether the filing is in bad faith, but it would be one of several factors to be considered.

And I think it's entirely appropriate to draft agreements with recitals about the intent of the parties and all of that kind of thing as evidence that can later be used, but it's not binding on the court. Such recitals may be awfully persuasive, but they are not binding.

PROF. GROSS: But in a single asset case, where there are very few other creditors, can't you just sort of say, there aren't that many of them to be protected anyway. There may even be none.

JUDGE GREENDYKE: That may be the call. I agree with Lisa, I think it's good lawyering, but I think once the case is filed, it's sort of a public case and it becomes her call or my call as to what's going to happen to it, and I want to look at it and I want to know. The agreement may be a factor in deciding whether or not it's a bad faith filing, but it won't be a *per se* bad faith filing just because of the existence of this agreement.

JUDGE HILLMAN: I want to look at what the new debtor obtained in exchange for that promise. If there was some sort of reworking of the deal that was very much in the debtor's favor and they had the benefit of that for sometime and they just couldn't go any longer and they now filed, I think I would be inclined to say, you bargained away any rights you otherwise have in 11.

JUDGE MARK: I think there's a danger in saying that you would enforce that kind of stipulation because it will immediately wet the appetite of lenders and lenders' counsel to draft it in and it is already happening in Florida as a result of a couple of decisions that really were typical bad faith dismissals, but also mentioned in passing that there were pre-petition stipulations and implied, if not directly stating, that they were enforcing those. One was the *Citadel Properties*³⁵ case by Judge Proctor. Another was *In Re Aurora Investments*,³⁶ which was Judge Paskay. The Paskay decision noting that there was a stipulation that a bankruptcy filing would be deemed to be bad faith and the *Citadel Properties* enforcing, which I think was almost dictum, pre-petition agreement for stay relief.

I don't think we can anticipate any expansion of that concept, if that concept is even really implicit in these cases, but I agree with Bill and with Lisa, that you look at that as another indication of the pre-petition misconduct or pre-petition conduct. And I have found a case where the debtor or borrower obtained a six-month extension on the eve of a judgment in the state court promising that it will sell off enough property in the development to pay you by December. If not, it will stipulate to judgment in sale.

They didn't. They filed Chapter 11. Motion to dismiss on bad faith. What is your plan? Well, now we are going to sell it off over the next four years. I say forget it. You made a deal in state court. You bought six more months. In this instance, you don't get another chance in bankruptcy to change the deal. So I think it does get into what happened pre-petition, what consideration was given for these promises, more so than just a stipulation itself.

³⁵ *In re Citadel Properties*, 86 B.R. 275 (M.D. Fla. 1988).

³⁶ 144 B.R. 899 (M.D. Fla. 1992).

GOOD FAITH 10 YEARS AHEAD

PROF. GROSS: As a way of concluding this discussion, let me ask the following: if you were all clairvoyant, where would you see the issue of single asset Chapter 11 real estate cases and the questions of good faith in that context ten years from now?

JUDGE HILLMAN: If we are lucky, Massachusetts will be over its depression by then.

JUDGE GREENDYKE: We'll be paying attention to something else like individual Chapter 11 cases or the Chapter 13 problems we talked about earlier involving apartments. I think we are going to work through it all. I think once Massachusetts gets rid of all their real estate cases and a couple of second timers around, it will pretty much be done — that has been our experience in Houston.

JUDGE FENNING: I guess I am with Bill, I am hoping that California is out of its real estate depression by the end of the decade. I believe that norms will develop, just as they have around the "new debtor syndrome" pattern where experienced bankruptcy lawyers have a client come to them and say I want to file this case in the Central District of California. The lawyers respond, "Look at *Victory Construction*. I won't file the case for you. It doesn't make sense. Let's do something else to deal with your problem."

It would help a lot if the Supreme Court will resolve some of the major substantive legal issues surrounding these cases, like the new value exception and the classification issues. If those are resolved, these cases will sort themselves out in the wash and they won't occupy the kind of time on our calendars anymore. A turn in the real estate market will solve 90 percent of it, of course.

JUDGE MARK: With the RTC and FDIC, after fighting like crazy to get stay relief and foreclose in bankruptcy, selling properties for 20 cents on the dollar, there are such bargain prices now being paid by the new owners that they probably won't wind up in Chapter 11. So I am --

PROF. GROSS: You are optimistic.

JUDGE MARK: I hope that doesn't cause me to be audited again.

PROF. GROSS: On behalf of the American Bankruptcy Institute, I want to thank you all. Let me also say that, as an academic, where most scholarship is done in law review articles and those types of articles are viewed as the sine qua non of how to address legal issues, I think this type of format works remarkably well. Perhaps it is even better. So, in addition to addressing good faith, maybe we have begun a trend and have come up with a new format for how to think about legal issues.

S. J. Beaulieu, Jr.433 Metairie Road, Suite 307
Metairie, Louisiana 70005

CHAPTER 13 TRUSTEE

(504) 831-1313

April 1, 2004

Federal Bureau of Investigation
Attn: Wayne Horner
2901 Leon C. Simon Dr.
New Orleans, LA 70126In re: In Re Gabriel T. Porteous, Jr & Carmella A. Porteous
Case No.: 01-12363

Dear Mr. Horner:

I am Staff Attorney for S. J. Beaulieu, Jr., Chapter 13 Trustee. This letter is to respond to a conversation of Mr. Beaulieu with one of the FBI agents earlier this month.

In January, 2004, at the request of the FBI, Mr. Beaulieu met with you and several other agents. Prior to that meeting, the FBI refused to divulge why the meeting was needed or what would be discussed at the meeting. During the meeting, it was disclosed that Mr. Beaulieu was being interviewed with respect to an ongoing investigation into the captioned Chapter 13 case and debtors' activities regarding same. Also, during the meeting, the agents discussed some allegations concerning potential bankruptcy improprieties involving debtors related to: filing the original petition with their name misspelled, undisclosed income, income tax refunds, the use of credit cards, transfers of property, and lifestyle activities that might not be consistent with the debtors' schedule "J" disclosures.

In the conversation this month, the FBI agent advised Mr. Beaulieu that he should pursue further investigation into debtors' activities in this case. However, the only allegation that the Trustee has evidence of relates to debtor's FICA tax withholding which should have stopped after the FICA withholding limits were met. The additional income to debtor was not taken into account in evaluating debtors' disposable income to fund the Chapter 13 plan over three (3) years. In Mr. Beaulieu's opinion, extending the plan at this late date to recoup the difference in disposable income would not substantially increase the percentage paid to unsecured creditors.

Regarding the other allegations, the FBI has refused to provide the Trustee with any evidence of improprieties by debtors. Since Mr. Beaulieu has no evidence to support the suspicions expressed by the FBI agents, he does not intend to take further action related to these allegations.

I am enclosing a copy of the Final Account prepared in this case. The case is currently set for a Final Account hearing on May 18, 2004, at 8:40 a.m. You may file an objection to the

SC00417

DEF02300

PORT Exhibit 1108

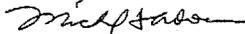
Federal Bureau of Investigation
Attn: Wayne Horner
April 1, 2004
Page 2

Trustee's Final Account or you may provide Mr. Beaulieu with evidence of wrongdoing and same will be investigated.

If further information is required, please feel free to contact me at your convenience.

With kindest regards, I am

Sincerely,



Michael F. Adoue
Staff Attorney (Ext. 222.)

Enclosure

cc: R. Michael Bolen
United States Trustee, Region 5

SC00418

DEF02301

<i>United States Bankruptcy Court</i> Eastern District of Louisiana		01-12363 Case Number
CHAPTER 13 TRUSTEE'S FINAL REPORT AND ACCOUNT		
In re: GABRIEL T PORTEOUS JR CARMELLA A PORTEOUS 4801 NEYREY DR METAIRIE LA 70002	This case was: COMPLETED Final Meeting of Creditors: 8:40 AM, May 18, 2004	

S. J. Beaulieu, Jr., Chapter 13 Trustee, respectfully submits for the Court's approval a report of his administration of this estate. avers that the case has been fully administered pursuant to FRBP 5009, and prays that he be relieved of his trust. The total amount received from or on behalf of the debtor was \$ 57,600.00, which was disbursed as follows:

#	NAME	TYPE	% ALLOWED	CLAIM AMT	PRINCIPAL PD	INTEREST PD
01	BANK ONE	DIRECT PAY	.00	.00	.00	.00
02	CHRYSLER FINANCIAL CORP	DIRECT PAY	.00	6,982.57	.00	.00
03	CHRYSLER FINANCIAL CORP	DIRECT PAY	.00	6,979.35	.00	.00
04	FIDELITY HOMESTEAD	DIRECT PAY	.00	109,488.96	.00	.00
05	ECOST SETTLEMENT CORP	UNSECURED	34.55	11,855.57	4,096.10	.00
06	BANK OF LOUISIANA	UNSECURED	34.55	1,910.00	659.91	.00
07	JULES FONTANA ATTY	NOTICE ONLY	.00	.00	.00	.00
08	CHASE BANKCARD SERVICES	UNSECURED	34.55	.00	.00	.00
09	CITIBANK	UNSECURED	34.55	.00	.00	.00
10	RESURGENT CAPITAL SERVICES	UNSECURED	34.55	21,227.06	7,333.95	.00
11	CITIFINANCIAL INC	UNSECURED	34.55	17,711.35	6,119.27	.00
12	CITIFINANCIAL INVESTMENT	NOTICE ONLY	.00	.00	.00	.00
13	EDWARD F BUKATY III	NOTICE ONLY	.00	.00	.00	.00
14	DILLARD NATIONAL BANK	UNSECURED	34.55	5,033.55	1,739.09	.00
15	DILLARD NATIONAL BANK	UNSECURED	34.55	597.88	206.57	.00
16	DISCOVER FINANCIAL SERVICES	UNSECURED	34.55	22,640.41	7,822.26	.00
17	AOL VISA	UNSECURED	34.55	.00	.00	.00
18	FIRST USA	UNSECURED	34.55	.00	.00	.00
19	JC PENNEY/MONOGRAM	UNSECURED	34.55	.00	.00	.00
20	MAX FLOW CORP	UNSECURED	34.55	5,386.54	1,861.05	.00
21	MAX FLOW CORP	UNSECURED	34.55	30,931.02	10,686.67	.00
22	MAX FLOW CORP	UNSECURED	34.55	29,443.71	10,172.80	.00
23	REGIONS BANK	UNSECURED	34.55	5,158.98	1,782.43	.00
25	DILLARD NATIONAL BANK	UNSECURED	34.55	251.54	86.91	.00
Paid to Trustee: \$ 3,274.29			Disbursed to PRIORITY Creditors: \$.00			
Paid to Attorney: \$ 1,750.00			Disbursed to SECURED Creditors: \$.00			
Refunded to Debtor: \$ 8.70			Disbursed to UNSECURED Creditors: \$ 52,567.01			

cc: CLAUDE C LIGHTFOOT JR
STE 450
3500 N CAUSEWAY BLVD
METAIRIE LA 70002

S. J. Beaulieu Jr.

S. J. Beaulieu, Jr.
Chapter 13 Trustee

SC00419

TOTAL P.04

5860



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

April 13, 2004

BY FEDERAL EXPRESS

S. J. Beaulieu, Jr.
433 Metairie Rd., Suite 307
Metairie, LA 70005

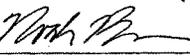
Dear Mr. Beaulieu:

We are writing with regard to an April 1, 2004, letter from your staff attorney, Michael F. Adoue, to FBI Special Agent DeWayne Horner, which Agent Horner has forwarded to us. We appreciate you sharing your thoughts and concerns.

As we previously discussed, we cannot comment on the existence or nature of an ongoing investigation or share any evidence that may have been gathered in the course of such an investigation. In Mr. Adoue's letter, he identifies several subjects about which it might be possible for you to make inquiries or take other investigative steps, but, as we stated previously, we take no position as to whether you should pursue any investigation in any case before you. It is entirely at your discretion whether you choose to do so. Please feel free to contact us with any additional questions.

Sincerely yours,

Noel L. Hillman
Chief, Public Integrity Section

By: 
Noah D. Bookbinder
Daniel A. Petalas
Trial Attorneys
Public Integrity Section
Criminal Division
(202) 514-1412

cc: Special Agent DeWayne Horner, FBI

NDB:jw

Typed: 04/13/04

Records

Bookbinder (1)

Petalas (1)

(by NDB)

Section Chron.

ACTS# 200000436

SC00420

DEF02303

PORT Exhibit 1109

CIRCUIT COUNCIL
FOR THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 285

BEFORE

Torruella, Chief Circuit Judge

ORDER

ENTERED: May 25, 2000

Complainant has filed a complaint of misconduct under 28 U.S.C. § 372(c) against two district judges in the First Circuit. Complainant alleges that the judges maliciously prosecuted complainant and coerced complainant into submitting a plea of guilty on an allegedly unsupported criminal charge over 20 years ago.¹

First, complainant alleges that the judges conspired to conceal facts that, if known, would have resulted in dismissal of an additional criminal charge against complainant for threatening to harm the son of business man with whom complainant had had contact. At the time of the alleged misconduct, one of the judges had not yet been appointed to the bench but was an Assistant United States Attorney involved in the case. Complainant asserts that the indictment was based upon false information contained in a newspaper article complainant encloses and that both judges knew the information in the article was false. Complainant concludes that the judges effectively coerced complainant into pleading guilty because the wrongfully added charge carried a far longer

¹The complaint is also directed against an Assistant United States Attorney. The complaint procedure provided for by the misconduct statute, *see* 28 U.S.C. § 372(c)(1), and the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability authorize complaints only against "judges of the Court of Appeals for the First Circuit and district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit." Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 1(c). Therefore, complainant's allegations of misconduct by the Assistant United States Attorney are not addressed herein.

prison sentence than the other charges for which complainant allegedly would have chosen to stand trial. Complainant includes the allegedly erroneous newspaper article describing complainant's arrest; a partial order of the U.S. Court of Appeals for the First Circuit issued in the case; and miscellaneous correspondence between complainant and several government offices regarding the alleged misconduct.

First, complainant's allegations of misconduct against the first judge arose when the judge was an Assistant United States Attorney, approximately 10 years before the judge was appointed to the federal bench. The misconduct statute, 28 U.S.C. § 372(c)(1), provides a procedure for alleging that a "circuit, district, or bankruptcy *judge*, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts..." [emphasis added]. "The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when *judges* have engaged in conduct that does not meet the standard expected of federal judicial officers..." Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 1(a) [emphasis added]. Therefore, the complaint against this judge is dismissed as not in conformity with the requirements of the statute. See 28 U.S.C. § 372(c)(3)(A)(i). In addition, the allegations of conspiracy and coercion by this judge are unsupported and are also dismissed as frivolous. See 28 U.S.C. § 372(c)(3)(A)(iii).

The allegations against the presiding district judge arose during the course of a criminal proceeding approximately 20 years ago. The judicial misconduct procedure is intended to address a current or recent problem in the administration of justice. "Complaints should be filed promptly... A complaint may... be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts." Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 1(d). As the allegations against this judge arose many years ago and do not reflect a current or recent problem in the administration of justice, they too are dismissed as not in conformity with the requirements of the statute. See 28 U.S.C. § 372(c)(3)(A)(i).

Further, the allegation that the presiding district judge wrongfully accepted complainant's guilty plea arises from judicial orders entered during the course of the criminal proceeding. "The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case... Only a court can do that." Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 1(e). Accordingly, the allegations against this judge are dismissed as directly related to the merits of a decision or procedural ruling. See 28 U.S.C. § 372(c)(3)(A)(ii).²

Finally, complainant presents no evidence that the presiding judge participated in a conspiracy or other wrongdoing in connection with complainant's prosecution. Therefore, the allegations against this judge are also dismissed as frivolous. See 28 U.S.C. § 372(c)(3)(A)(iii).

Consequently, the complaint is dismissed as not in conformity with the requirements of the statute, see 28 U.S.C. § 372(c)(3)(A)(i), as directly related to the merits of a decision or procedural ruling, see 28 U.S.C. § 372(c)(3)(A)(ii), and as frivolous, see 28 U.S.C. § 372(c)(3)(A)(iii).



Chief Judge Torruella

²The record shows that complainant, in fact, successfully challenged the court's acceptance of his guilty plea on appeal. The First Circuit Court of Appeals held that the district court erred in denying complainant's motion to vacate his sentence on the ground that his plea had been accepted in violation of Rule 11 of the Federal Rules of Criminal Procedure. Therefore, the legal issue arising from the court's acceptance of complainant's plea was decided in complainant's favor almost twenty years ago.

CIRCUIT COUNCIL
FOR THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 285

BEFORE

Selya, Boudin, Stahl, Lynch, Lipez, Circuit Judges
Hornby, Zobel, DiClerico, Casellas, Lagueux, District Judges

ORDER

ENTERED: SEPTEMBER 8, 2000

Petitioner, a litigant, has filed a petition for review of Chief Judge Torruella's dismissal of his complaint of misconduct under 28 U.S.C. § 372(c) against two district judges in the First Circuit.¹ The complaint alleged that the judges maliciously prosecuted petitioner and coerced him into submitting a plea of guilty on an allegedly unsupported criminal charge over 20 years ago. Petitioner asserted that the indictment on this criminal charge was based upon false information contained in a newspaper article and that both judges knew that the information in the article was false. Petitioner concluded that the judges effectively coerced him into pleading guilty because the wrongfully added charge carried a far longer prison sentence than the other charges for which petitioner claimed he would have chosen to stand trial.

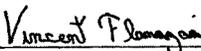
As petitioner's allegations of misconduct against the first judge arose approximately 10 years before the judge was appointed to the federal bench, this judge was involved in petitioner's case only as a federal prosecutor. The allegations against this judge were dismissed as not in conformity with the requirements of the statute. See 28 U.S.C. § 372(c)(3)(A)(i).

¹The complaint was also directed against an Assistant United States Attorney. Because the misconduct statute authorizes complaints only against federal judges, the allegations concerning the United States Attorney were not addressed in the order of dismissal. See 28 U.S.C. § 372(c)(1), and the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 1(c).

As the allegations against the second judge arose during the course of a criminal proceeding over which the judge presided approximately 20 years ago, they were dismissed as not in conformity with the requirements of the statute. See 28 U.S.C. § 372(c)(3)(A)(i); see also Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 1(d) (“Complaints should be filed promptly... A complaint may ... be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.”). Further, the allegation that the second judge wrongfully accepted petitioner’s guilty plea arose during the course of the criminal proceeding. Accordingly, this allegation was also dismissed as directly related to the merits of a decision or procedural ruling. See 28 U.S.C. § 372(c)(3)(A)(ii). Finally, because petitioner presented no evidence that the second judge participated in a conspiracy or other wrongdoing in connection with petitioner’s prosecution, these allegations were also dismissed as unsubstantiated. See 28 U.S.C. § 372(c)(3)(A)(iii).

In the petition for review, petitioner basically reiterates the original allegations, but includes a copy of the district court decision in which the court granted petitioner’s motion for dismissal of the indictment after the case was remanded by the Court of Appeals. The petition for review contains no argument or evidence in support of his claim of judicial conspiracy or other misconduct that was not appropriately disposed of by the Chief Judge’s order of dismissal. We therefore affirm that order for substantially the same reasons as set forth by the Chief Judge.

The order of dismissal is affirmed.



Vincent F. Flanagan, Secretary

ORIGINAL

THE JUDICIAL COUNCIL OF
THE SECOND CIRCUIT



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In re
CHARGES OF JUDICIAL MISCONDUCT.

- No. 04-8529
- No. 04-8530
- No. 04-8541
- No. 04-8547
- No. 04-8553

Memorandum and Order

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B e f o r e :

The Judicial Council of the Second Circuit.

In June, July, August and September 2004, five complaints of judicial misconduct were filed against a circuit judge of this Circuit ("the Judge") pursuant to 28 U.S.C. § 351 and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers ("the Local Rules").

Pursuant to 28 U.S.C. § 353(a) and Local Rule 9, Acting Chief Judge Dennis Jacobs (designated following the recusal of Chief Judge John M. Walker, Jr.) appointed a special committee to investigate the allegations in the above-referenced complaints. The special committee ("the Committee") consisted of the Acting Chief Judge, Circuit Judge Joseph M. McLaughlin, and District Judge Carol B. Amon of the Eastern District of New York. Michael Zachary, a supervisory staff attorney for the Court of Appeals, was appointed counsel to the Committee pursuant to Local Rule 10(c). The Committee submitted a report to the Judicial Council of the Second Circuit, pursuant to 28 U.S.C. § 353(c) and Rule 10(e) of the Local Rules. The report was based on a

Council of the Second Circuit, pursuant to 28 U.S.C. § 353(c) and Rule 10(e) of the Local Rules. The report was based on a thorough review of the complaints, the evidence submitted by the complainants and by the Judge, the relevant canons and authorities, and responses from the Judge written at the invitation of the Acting Chief Judge.

All five complaints present one or more misconduct claims concerning the substance of the Judge's June 19, 2004 remarks at an American Constitutional Society convention event ("the ACS remarks"); one complaint further alleges that speaking at that convention, without regard to the substance of the remarks, constituted prohibited political activity; and one complaint further alleges misconduct inferred from certain statements alleged to have been made by the Judge's wife at a May 23, 2004 political demonstration at Yale University.

I

The ACS remarks at issue were made after a panel discussion entitled "The Election: What's at Stake for American Law and Policy." The Judge spoke from the floor as a non-panelist. The remarks and context are as follows:

Okay, I'm a judge and so I'm not allowed to talk politics and so I'm not going to talk about some of the issues which were mentioned or what some have said is the extraordinary record of incompetence of this administration at any number of levels, nor am I going to talk about what is really a difficult issue which is the education issue, which is an incredibly complicated one, which I'm glad you talked about. I'm going to talk about a deeper structural issue that is at stake in this election, and that has to do with the fact that in a way that occurred before but is rare in the United States, that somebody came to power as a result of the illegitimate acts of a legitimate institution that had the right to put somebody in power. That is what the Supreme Court did in Bush versus Gore. It put somebody in power. Now, he might have won anyway, he might not have, but what happened was that an illegitimate act by an institution that had the legitimate right to put somebody in power. The reason I emphasize that is because that is exactly what happened when Mussolini was put in by the King of Italy, that is, the King of Italy had the right to put Mussolini in though he had not won an election and make him Prime Minister. That

is what happened when Hindenburg put Hitler in. I'm not suggesting for a moment that Bush is Hitler. I want to be clear on that, but it is a situation which is extremely unusual. When somebody has come in that way they sometimes have tried not to exercise much power. In this case, like Mussolini, he has exercised extraordinary power. He has exercised power, claimed power for himself that has not occurred since Franklin Roosevelt, who after all was elected big and who did some of the same things with respect to assertions of power in time of crisis that this President is doing. It seems to me that one of the things that is at stake is the assertion by the democracy that when that has happened it is important to put that person out, regardless of policies, regardless of anything else, as a statement that the democracy reasserts its power over somebody who has come in and then has used the office to take... build himself up. That is what happened after 1876 when Hayes could not even run again. That is not what happened in Italy because, in fact, the person who was put in there was able to say "I have done all sorts of things and therefore deserve to win the next election." That's got nothing to do with the politics of it. It's got to do with the structural reassertion of democracy. Thank you.

By letter to Chief Judge Walker dated June 24, 2004, the Judge apologized for the ACS remarks:

I write you as Chief Judge to express my profound regret for my comments at last weekend's American Constitution Society Conference. My remarks were extemporaneous and, in hindsight, reasonably could be - and indeed have been - understood to do something which I did not intend, that is, take a partisan position.

As you know, I strongly deplore the politicization of the judiciary and firmly believe that judges should not publicly support candidates or take political stands. Although what I was trying to do was make a rather complicated academic argument about the nature of reelections after highly contested original elections, that is not the way my words, understandably, have been taken. I can also see why this occurred, despite my statements at the time that what I was saying should not be construed in a partisan way. For that I am deeply sorry.

I will not take the time here to outline the non-partisan theoretical framework I was trying to develop. In retrospect, I fear that is properly the stuff only of an academic seminar. For, whatever I had in mind, what I actually said was too easily taken as partisan. That is something which judges should do their best to avoid, and there, I clearly failed.

Again, I am truly sorry and apologize profusely for the episode and most particularly for any embarrassment my remarks may have caused you, my colleagues, and the court.

You should feel free to share this letter with our colleagues.

Chief Judge Walker forwarded the Judge's June 24 letter to the other members of the Second Circuit Court of Appeals, with a memorandum of his own, which stated the following:

Although [the] remarks were presented as an academic point with various historical analogies, the principal issue his remarks presents has nothing to do with the merits of what he said nor with his intent in saying them. The issue is whether his remarks could reasonably be understood as a partisan political comment. Partisan political comments, of course, are violations of the Code of Judicial Conduct. As [the Judge] has acknowledged, his remarks reasonably could be--and indeed have been--so understood, whatever his intent. He has sent me the enclosed letter, which he has urged me to share with the members of the Court.

I am pleased that [the Judge] has promptly recognized that his remarks could too easily be taken as partisan and hence were inappropriate, and I urge all members of the Court to exercise care at all times, but especially in an election year, to refrain from any conduct or statements that could reasonably be understood as "political activity" or "publicly endors[ing] or oppos[ing] a candidate for public office."

The next day, the Judge's June 24 letter and Chief Judge Walker's June 24 memorandum were released to the press, with the express approval of the Judge.

II

We first consider the claim that the Judge's presence and participation at an event of the ACS is in itself a breach of ethics. Next, we consider the several claims premised on the substance of the Judge's remarks. Last, we consider the claim based on statements attributed to the Judge's wife at the Yale Protest.

A. Speaking at the ACS Conference

The complaint docketed under 04-8547 claims that, regardless of the content of the Judge's remarks, the fact that he spoke at all at the ACS convention violated the Canon 7 prohibition against political activity and making speeches for a political organization. See Canon 7(A)(2) ("A judge should not ... make speeches for a political organization..."). It is alleged in the complaint that the ACS is, "by definition[,] left-leaning and [has] always had a partisan mission and agenda."

The ACS describes itself on its web site, found at www.acslaw.org, as a "progressive legal organization" which seeks to counter "a narrow, conservative approach to the law" that (it asserts) "has come to dominate American law and public law." According to the web site, contributions to the ACS are tax-deductible; it "is a non-partisan, non-profit 501(c)(3) educational organization"; and it does "not, as an organization, lobby, litigate, or take positions on specific issues, cases, legislation, or nominations." A review of the various events listed on the web site supports the allegation that the ACS mission is "left-leaning," but it also reveals that speakers at the listed events appear to be from across the political spectrum.

The claim that speaking at an ACS event constitutes political activity does not withstand analysis under Canon 7. The phrase "political organization" in Canon 7(A)(2) likely refers to groups organized *primarily* for political purposes, such as political parties, rather than to groups organized primarily for other purposes, such as legal education or debate, even if there is sympathy between a particular group or its mission and partisan entities. This distinction is suggested by Canon 7(C), which states: "A judge should not engage in any other political activity [referring to activities specified in 7(A) and (B)]; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4." Canon 4 in turn provides: "[a] judge may engage in extra-judicial activities to

improve the law, the legal system, and the administration of justice." Among other things permitted by Canon 4, "[a] judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." Canon 4(A). The Commentary to Canon 4 states:

[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Canon 4 Commentary. "[T]o qualify as a Canon 4 activity, the activity must be directed toward the objective of improving the law, qua law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective." Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 93, Extrajudicial Activities Under Canons 4 and 5, ¶ 3 (1977, last revised Oct. 1998). Because "judicial participation in Canon 4 activities is actively encouraged[,] ... a judge will be given greater latitude when participating in extrajudicial activities expressly covered by Canon 4," id. at ¶ 2, but, when an activity is "politically oriented," Canon 4 activities are construed "narrowly, restricting them to activities that are most directly related to the law and legal process," id. at ¶ 13.

A judge may attend or speak at an event even if it is sponsored by a group that has an identifiable political or legal orientation or bias. It does not follow therefrom that the judge is an adherent of the group's political or legal mission, or a fellow traveler. See Judicial Conference of the United States, Committee on Codes of Conduct, Compendium of Selected Opinions, § 4.5(k) (2001) ("A judge who is a member of the American Bar Association is not regarded as personally supporting positions taken by the Association without the judge's involvement."); Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 93, Extrajudicial Activities Under Canons 4 and 5, ¶ 12 (1977, last revised Oct. 1998) ("a judge may remain a member of a bar association which takes controversial positions on policy issues so long as the judge abstains from

participating in the debate or vote on such matters in a manner in which the public may effectively become aware of the judge's abstention"). The ACS web site makes clear that various Supreme Court justices have attended and spoken at ACS events, and various panel members at the 2004 ACS convention and other ACS events stated or suggested that their political beliefs were opposed to the viewpoint attributed to the ACS by the complainants.¹ Legal organizations often invite speakers of divergent views as a means of fostering robust debate and attracting an audience. Balance in the roster of speakers or topics may be relevant to whether an event may be attended under Canon 4, but such balance is not required:

[t]he education of judges in various academic and law-related disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to consider and analyze them. Yet, notwithstanding the general principle that judges may attend independent seminars . . . , there are instances in which attendance at such seminars would be inconsistent with the Code of Conduct. It is consequently essential for judges to assess each invitation on a case-by-case basis.

Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 67, Attendance at Educational Seminars, ¶ 2 (1980, last revised Aug. 2004).

The Judge's presence at the ACS event, by itself, does not bespeak sympathy or support for the mission of the ACS, or for any of the speakers or groups represented at the event, because, among other reasons, the Judge's educational activities are by no means limited to groups generally aligned to the left, as a review of web sites confirms. See United States v. Pitera, 5 F.3d 624, 626-27 (2d Cir. 1993) (judge's impartiality not

¹ The political views of many of the speakers listed for the various events described on the web site are not apparent. However, in addition to various speakers who are well known for being politically left-of-center, there are various speakers described as present or former officials in the current presidential administration, the Republican National Committee, and organizations such as the American Enterprise Institute and the National Right to Life Committee.

reasonably questioned, for purposes of a recusal motion in criminal case, where she previously gave lecture to police/prosecutor drug enforcement task force "about steps they might take to increase the prospects for conviction in narcotics cases," in light of fact that lecture also included "several emphatic criticisms of prosecutors" and judge also participated in programs for defense lawyers and "commendably lectures to a variety of trial practice seminars").

For the foregoing reasons, the claim is dismissed.²

B. The ACS Remarks

The following claims based on the ACS remarks are presented in one or more of the five complaints:

1. Advocacy that the President Not be Reelected. This claim is explicitly made in one complaint and is implicit in most of the others, as most of their allegations of political bias or political advocacy rely in part on the reelection-oriented portion of the remarks.
2. Comparing the President to Hitler and Mussolini. This claim is explicitly made in one complaint.
3. Political Bias or Engagement in Political Advocacy. Aside from the reelection-related claim, four of the complaints make the more general claim that the ACS remarks, or portions of them, demonstrate the Judge's "bigotry," political bias, or political advocacy.
4. Disagreement with Bush v. Gore. One complaint claims that this demonstrates incompetence.

We review these claims one by one. The general political advocacy allegations will be discussed in tandem with the reelection claim, as there is significant overlap between the two claims and, in any event, the same principles apply to both. The political bias claim will be discussed separately since it

² To the extent that the complainants rely on the portion of Canon 7 which proscribes a judge from "mak[ing] speeches for a political organization," Canon 7(A)(2), that portion of the Canon does not apply since the Judge was not making his remarks "for" the ACS, *i.e.*, he was not purporting to represent the organization or actively soliciting support for it.

appears to be based on the independent, although questionable, principle that judges should not hold strong political beliefs.

1. Advocacy that the President not be Reelected.

Canon 7 states that judges "should refrain from political activity," and, specifically, that judges "should not ... publicly endorse or oppose a candidate for public office." Canon 7(A)(2). The Judge stated in his August 12, 2004 letter to Acting Chief Judge Jacobs that his remarks were reasonably understood as opposing a candidate in violation of Canon 7(A)(2). He also apologized for making the remarks, stated that he had not intended to make a partisan statement, and asserted that he has "every intention of seeing to it that such an episode does not happen again."

Under 28 U.S.C. § 354(a) and (b), when a Judicial Council finds that an Article III judge has engaged in judicial misconduct, the actions it may take include:

Ordering that, on a temporary basis, no further cases be assigned to the judge;

Censuring or reprimanding the judge by means of private communication;

Censuring or reprimanding the judge by means of public announcement;

Certifying disability of the judge pursuant to § 372(b);

Requesting that the judge voluntarily retire;

Referring the complaint, together with the record of any associated proceedings and recommendations for appropriate action, to the Judicial Conference of the United States; or

If the Judicial Council determines that the judge engaged in conduct which might constitute grounds for impeachment or which, in the interest of justice, is not amenable to resolution by the Judicial Council, certify that determination to the Judicial Conference of the United States.

See 28 U.S.C. § 354(a)-(b); Local Rules 14(a)-(g) and 15. Under Local Rule 14, the Judicial Council also may dismiss claims that do not state a misconduct claim under the applicable statutes,

"conclude the proceeding" on the grounds that corrective action has been taken or intervening events have made action unnecessary, or order corrective action. See Local Rule 14(a)-(g). There is no definition of "censure" or "reprimand" or any other possible sanction in the misconduct statutes or Local Rules, or the case law and scholarly writing interpreting them. However, the use of those and related terms in the ethics rules of the United States Senate and House of Representatives provides some guidance.³

For the reasons that follow, the Judicial Council (a) finds that the Judge violated Canon 7 when he made the statement concerning the President's reelection, (b) concurs in Chief Judge Walker's July 24, 2004 admonition, and (c) concludes that the dissemination of Chief Judge Walker's admonition--together with the Judge's apology--and the Judicial Council's concurrence with the admonition, constitute both a sufficient sanction and corrective action.

The Commentary to Canon 1 of the Code of Conduct for United States Judges states that the question of "[w]hether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text [of the Code] and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the

³ Based on the ordinary meaning of those terms, and their use in the Senate and House ethics rules, "censure" and "reprimand" are deemed to be more serious sanctions than "admonishment." See Rules of Procedure of the Senate Select Committee on Ethics, 149 Cong. Rec. S2677-01 at *S2677, *S2683 (Feb. 25, 2003) (§ 2(a)(2)(B), found under "Part I: Organic Authority," and Rule 4(g), found under "Part II: Supplementary Procedural Rules") (listing as most serious sanctions for Senators: expulsion, censure, payment of restitution, and change in seniority or responsibilities; listing as less serious sanctions: reprimand or payment of restitution; listing a public or private letter of admonition as least serious sanction); Rules of the House Committee on Standards of Official Conduct, 108th Congress, 149 Cong. Rec. H2375-01 at *H2381 (Mar. 26, 2003) (Rule 24) (describing reprimand as "appropriate for serious violations," censure as "appropriate for more serious violations," and expulsion as "appropriate for the most serious violations"; a "letter of reproof" is apparently the least severe sanction). A public letter of admonition is quite obviously a more severe sanction than a letter that is private.

improper activity on others or on the judicial system." See also Leonard E. Gross, Judicial Speech: Discipline and the First Amendment, 36 Syracuse L. Rev. 1181, 1256-61 (1986) (discussing factors to be weighed when state or federal tribunals are choosing between possible disciplinary sanctions).

In the present instance, certain factors militate in favor of imposing some type of sanction: the violation of Canon 7 was clear and serious; and the remarks were made before a large public audience, and they were widely reported by the news media. On the other hand, there are significant mitigating factors: the Judge conceded that his remarks could reasonably be understood as violating Canon 7; he stated that the remarks were not planned and that he had not intended to veer into remarks that could be construed as partisan advocacy; he apologized and gave assurances that there will be no recurrence; Chief Judge Walker's admonition and the Judge's apology were released to the public; and there was wide media coverage of that admonition and apology.

There is little in the way of published case law or other guidance concerning when censure, reprimand, or other sanction is warranted. However, in cases where censure, reprimand, or suspension was ordered, the behavior at issue was, in general, appreciably more egregious than anything alleged in the current five complaints. See Report of the National Commission on Judicial Discipline and Removal, reprinted as appendix to Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (Admin. Office of U.S. Courts 2000); Jeffrey N. Barr and Thomas E. Willging, Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 U. Pa. L. Rev. 25 (1993). Cases involving allegations of improper partisan activity were "generally" resolved through corrective action. See Barr and Willging, supra, at 176. It appears that the corrective action usually took the form of the subject judge acknowledging the error or improper conduct and/or apologizing. Id. at 98, 100-01, 151-52.

We conclude that all of the purposes of the judicial misconduct provisions are fully served by: the Judge's apology; Chief Judge Walker's June 24, 2004 Memorandum; the release of that apology and Memorandum to the public; and the Judicial Council's concurrence with the admonition in the Memorandum. See id. at 106 ("the collective acts of the entire council are likely to have more credibility with complainants, the judge, and the public than the individual acts of a chief judge"). These actions constitute a sufficient sanction and appropriate corrective action.

Finally, in his June 24, 2004 letter of apology to Chief Judge Walker, the Judge suggested that his remarks were only contextually inappropriate, and that they were "properly the stuff only of an academic seminar." However, in response to the Committee's report, the Judge has acknowledged that the remarks also would have been inappropriate in an academic setting. Based on the Judge's acknowledgment, the Judicial Council concludes that no further action need be taken on that issue.

2. Comparing the President to Hitler and Mussolini.

The remarks concerning Hitler and Mussolini were cast in terms of the supposed similarity in how the President, Hitler and Mussolini gained power. However, the Judge went on to make a direct comparison between the President and Mussolini: "[i]n this case, like Mussolini, he [President Bush] has exercised extraordinary power." Under the circumstances, however, there is no need to parse these remarks. The Judge's August 12, 2004 letter to Acting Chief Judge Jacobs characterized the use of the Hitler and Mussolini examples as a mistake:

With respect to the examples of other situations where persons came into power as a result of the illegitimate act of a legitimate body, I unquestionably would have been much wiser to limit my examples to those from American history.... My use of the appointment of Mussolini and Hitler as examples - however much it may have been a natural, off-the-cuff example for someone with my childhood, and however much I meant it as a comparison of the Supreme Court's use of its power to that of Victor Emmanuel III and Hindenburg, and not at all a comparison of President Bush to the dictators - was obviously not so reported or read. That was reason enough for me to apologize, as I have said, "profusely" and "deeply." I stand by my apology completely.

The Hitler and Mussolini analogy is contextually subsumed in the reelection remarks, which are discussed above. See, e.g., Complaint docketed under 04-8541 (describing comparison as part of "a pattern of thinly disguised political advocacy"). No incremental action is required or justified. Moreover, even if the comparison remarks are treated as independent of the reelection remarks, no incremental action would be needed for the following reasons.

Although the comparison remarks were inflammatory to a reasonable person of ordinary sensibilities, it is not clear that they constituted judicial misconduct. In the complaint docketed under 04-8547, the complainants reasonably argue that the comparisons violated the Canon 1 requirement that judges maintain, enforce, and personally observe "high standards of conduct ... so that the integrity and independence of the judiciary may be maintained." However, there is no guidance in the Canons (which are advisory in any event)--and little elsewhere--on when out-of-court remarks that may be intemperate or disrespectful transcend the merely distasteful or the inadvisable and amount to misconduct. The available cases (mostly applying state canons to state court judges) reflect that sanctions have been imposed primarily for inappropriate remarks made in the courtroom, or for inappropriate out-of-court remarks more offensive than the comparison remarks, or for repeated instances. The cases involving federal judges who made questionable remarks outside the courtroom generally were resolved through corrective actions taken either before or after the filing of misconduct complaints; however, the available descriptions of those cases do not indicate whether a finding or acknowledgment of misconduct was made in conjunction with the corrective action. See Barr and Willging, supra, 142 U. Pa. L. Rev. at 66, 76, 98, 102, 176 (discussing federal misconduct proceedings); American Law Reports Annotation, Disciplinary Action Against Judge on Ground of Abusive or Intemperate Language or Conduct Toward Attorneys, Court Personnel, or Parties to or Witnesses in Actions, and the Like, 89 A.L.R.4th 278 (1991, 2004) (discussing state and federal cases); cf. Talbot D'Alemberte, Searching for the Limits of Judicial Free Speech, 61 Tul. L. Rev. 611, 612 (1987) (describing newspaper article which had reported that a Federal Bar Association ethics expert had opined that federal judge's public statement that President Reagan was a racist "probably didn't violate judicial ethical canons prohibiting federal judges from engaging in politics").

As part of the media coverage of the ACS remarks, at least one article reported on the opinions of several law professors concerning the ethical implications of those remarks. See Josh Gerstein, Judge's 'Mussolini' Comments Violated Ethics, Critics Say, NEW YORK SUN, June 23, 2004. Professor Volokh of the University of California at Los Angeles School of Law, the only professor who distinguished between the reelection and comparison remarks, was reported as opining that the reelection remarks violated the Canon 7 prohibition against political advocacy, but that the "analogy to Hitler and Mussolini was factually inaccurate and unfair, but not a breach of ethics." Id. at last paragraph.

The Judicial Council concludes that no additional action is necessary based on the comparison language because the Judge acknowledged that the comparison was a mistake and has apologized for the ACS remarks, and because there is no precedent or authority clearly defining the comparison remarks as misconduct under the misconduct statutes or the Canons: "[m]any of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed." Canon 1 Commentary at ¶ 3.

3. General Political Bias.

The general allegations of political bias, when considered separately from the political advocacy allegations, do not state a claim under Canon 7 or the misconduct statutes. Under Canon 7, a judge is free to have a preference or bias as between political candidates, and vote accordingly, as long as he or she does not publicly advocate for or against a candidate. To the extent that any of the complaints are based on the belief that a judge must be politically neutral or hold no strong political beliefs, they are without merit. To the extent that any of the complaints are based on the belief that the Judge's alleged bias renders him unable to sit as a judge in a case involving the President or any particular issue, they are (at least) premature as any such claim would await an actual instance. The general "political bias" claims are dismissed.

4. Disagreement with *Bush v. Gore*.

Canon 3 requires federal judges to "maintain professional competence in the law." Canon 3(A)(1). Although "incompetence" may not fit comfortably within the definition of "misconduct," it is arguably "conduct prejudicial to the effective and expeditious administration of the business of the court" or (less arguably) a "mental or physical disability" within the meaning of § 351(a). In any event, even assuming that demonstrated incompetence would constitute misconduct or a disability, we dismiss this claim as meritless. As shown by the closely divided vote in the *Bush v. Gore* decision itself, and the numerous analyses of that decision, reasonable people disagree over the soundness of the opinions in that case. See *Bush v. Gore*, 531 U.S. 98 (2000). Nothing in the Judge's comments about that decision raises an issue of competence.

C. The Yale Protest.

The complaint docketed under 04-8541 cites a report by the Associated Press that, on May 23, 2004, the Judge's wife attended a protest against the President and the war in Iraq, that she said that "she was protesting on behalf of herself and her husband" (identifying him by title, court and name), and that she expressed anger about the President's veracity and conduct of the war. The complainant argues that, by failing to "publicly correct[] his wife's comments that she was protesting on his behalf," the Judge "has allowed the impression to fester that he does take partisan political stands." As with the ACS remarks claims, this claim is construed as alleging a violation of Canon 7.

Both the Judge and his wife submitted letters in response. She had "no recollection of saying that [she] was protesting on behalf of [her] husband"; "[m]ore important, [the Judge] never authorized any such statement"; and she did not "believe that [she] would have said such a thing, as [she is] well aware of [the Judge's] obligation to avoid publicly opposing or endorsing candidates for public office, and [she is] vigilant against attribution of [her] own political views to [her] husband." Finally, she stated, as did the Judge in his response, that she was unaware of the allegation until it appeared in a June 25, 2004 newspaper story, over four weeks after the protest.

The Judge observes that his wife "is well aware of [his] obligation to avoid publicly opposing or endorsing candidates for public office, ... [he has] always counseled her that she must make every effort to avoid conveying the impression that she might be speaking on [his] behalf when expressing her political views," and "[o]ver the years she has been very faithful to that admonition." In any event, the Judge emphasizes that he "did not instruct or authorize her to make any statements on [his] behalf." Finally, the Judge states that he would have attempted to correct the article had he known of it at the time it was published (though he concedes no obligation to do so), but that he first became aware of the allegation approximately a month after the protest, by which time he felt that "it was too late to make a meaningful correction."

The dispositive question is whether the Judge authorized his wife to make the alleged comments. The only direct evidence bearing on that question indicates that he did not do so. Moreover, the Judge and his wife acknowledge that the Judge must avoid publicly endorsing or opposing political candidates, either directly or through his wife, and affirm their intention to abide

by that rule.

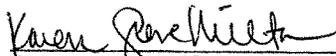
As to whether the Judge should have corrected the Associated Press story once he became aware of it, we conclude that he had no ethical duty to do so. He became aware of the story approximately a month after it was published, and it would have been reasonable at that point to decide against reviving the story by correspondence to the editor.

The claim is dismissed for lack of evidence of misconduct.

IV. Conclusion

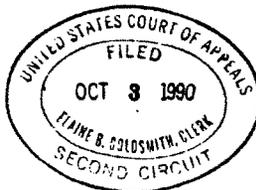
For the foregoing reasons, the Judicial Council finds that the Judge's remarks concerning the President's reelection violated Canon 7, concurs in Chief Judge Walker's July 24, 2004 admonition, concludes that the dissemination of Chief Judge Walker's admonition--together with the Judge's apology--and the Judicial Council's concurrence with the admonition, constitute both a sufficient sanction and corrective action, and dismisses the five complaints in all other respects.

So ordered.



Karen Greig Milton, Secretary
Of the Judicial Council

Dated: April 8, 2005
New York, New York



JUDICIAL COUNCIL OF THE
SECOND CIRCUIT

In re
CHARGE OF JUDICIAL MISCONDUCT

No. 91-8500
Memorandum and Order

Before: Chief Judge James L. Oakes
Circuit Judges Thomas J. Meskill
Jon O. Newman
Amalya L. Kearse
Richard J. Cardamone
Ralph K. Winter
George C. Pratt
Chief Judges Charles L. Brieant
Thomas C. Platt
Michael A. Telesca
Franklin S. Billings, Jr.
Ellen Bree Burns
Neal P. McCurn

On January 4, 1991, the complainant filed a complaint pursuant to 28 U.S.C. § 372(c) and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers (Local Rules), making allegations of improper conduct against a Bankruptcy Judge of the Southern District of New York (the "Judge"). The initial complaint consisted of the complaint form adopted pursuant to the Local Rules, a typed statement of facts, and exhibits.

By orders dated January 23, 1991 and April 29, 1991, Chief Judge James L. Oakes appointed a Special Committee (Committee) pursuant to 28 U.S.C. § 372(c)(4) and Rule 9 of the Local Rules, and notified both the complainant and the judge of its formation. In addition to the Chief Judge, the Committee includes Circuit Judges Amalya L. Kearse and George C. Pratt, Eastern District Judge Eugene H. Nickerson and District of Connecticut Judge Alan H. Nevas.

The Judicial Council of the Second Circuit has received a comprehensive written report from the above Committee.

The complaint concerns the Judge's testimony in a case over which complainant, himself a former Bankruptcy Judge, presided during his judicial tenure. The testimony was by the Judge after

he was appointed to the bench but it pertained to matters in a bankruptcy proceeding when he was a United States Trustee.

The question presented by the complaint is whether the charge that the Judge committed perjury is an allegation that he "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" within the meaning of section 372(c)(1). The Judicial Council agrees with the conclusion of the Committee that in the circumstances alleged by the complaint, the alleged perjury is beyond the scope of the Act. The testimony alleged to be false does not concern any aspect of the Judge's judicial duties or any aspect of his conduct during his tenure as a judge. It concerns solely matters occurring before he became a judge. As such, it is beyond the scope of the Act, for the reasons fully explained by then-Chief Judge Browning in In re Charge of Judicial Misconduct, No. 83-8037 (9th Cir. Mar. 5, 1986). We need not decide in this matter whether we would go as far as Judge Browning in disclaiming jurisdiction under the Act. Perjury is an extremely sensitive problem for the judicial system, but an allegation that a judge gave perjurious testimony in a matter unrelated to his own judicial duties and unrelated to activities occurring while he is a judge falls outside the statute authorizing disciplinary action.

Accordingly, the complaint is hereby dismissed in its entirety as outside the scope of the Act, pursuant to 28 U.S.C. § 372(c)(6)(B)(vii) and Rule 14(c)(1) of the Local Rules.

So Ordered.


Steven Flanders, Secretary
of the Judicial Council

Dated: October 3, 1991
 New York, New York

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 04-35 & 05-16

IN RE: COMPLAINTS OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

MEMORANDUM OPINION

(Filed: August 2, 2005)

Present: SCIRICA, Chief Judge.

These are complaints filed pursuant to 28 U.S.C. § 351 against a United States District Judge (Respondent). The complaints are a continuation of Complainant's efforts to have Respondent disqualified from hearing a now concluded civil action. The underlying civil action was removed to federal court from state court by the defendants and was assigned to Respondent's docket in 2002 when he became a federal judge.¹

Complainant's principal allegation is that Respondent had been employed by a law firm that represented one of the defendants in the case. Respondent was employed by the

¹ The dismissal of Complainant's civil action was affirmed by the Court of Appeals. That dismissal was based, in part, on determinations that some of the claims presented were *res judicata* because they had been, or could have been, considered in earlier state court proceedings and because the statute of limitations had run on other claims.

law firm for approximately six months in 1987.² Complainant also seeks to establish later post-employment ties between Respondent and the law firm, which Respondent has denied.³

Complainant also alleges that Respondent committed perjury during his Senate confirmation hearings, contending that a conspiracy has shielded discovery of these allegedly false statements. At least some of the allegations contained in the complaints were previously considered by the Court of Appeals, which declined to grant relief to Complainant.⁴

In the first complaint, the Complainant states:

The following evidence is “clear and convincing” that [Respondent] did in fact, knowingly and willfully, provide false statements to the Senate of the United States in violation of U.S. Code, Chapter 18, Sec. 1001. Such conduct is without question prejudicial to the effective and expeditious administration of the courts. [Respondent] must be held accountable for his actions. Since October 12, 2002, [Respondent] has managed to avoid that accountability and has been aided and abetted by a cabal of individuals all of whom are in violation of the following appropriate sections of the U.S.

² In two petitions for writs of mandamus, and in the direct appeal from the dismissal of the civil action, the Court of Appeals held that Respondent was not disqualified.

³ In the second complaint, Complainant alleges, “It appears that [Respondent] was groomed to be [the law firm’s] friend on the court and that his recusal on [law firm] cases was unacceptable.” There is no factual basis for this claim.

⁴ Complainant had also requested the prior Chief Judge to take action under Rule 19(A), Rules of the Judicial Council of the Third Circuit Governing Complaints of Judicial Misconduct and Disability. The prior Chief Judge declined to take action under that provision of the rules. Complainant was advised through the clerk of court that he should file a formal complaint if he believed that Respondent had committed misconduct.

Code [citing 18 U.S.C. § 1001, statements or entries generally; 18 U.S.C. § 4, misprision of felony; 18 U.S.C. § 1512, tampering with an informant; and, 18 U.S.C. § 371, conspiracy to commit offense].

The complaint concludes by stating:

It is clear that [Respondent] cannot document his sworn statements to the Senate Judiciary Committee or he would have. The docket numbers and dates of [Respondent's] court appearances in the trials in state and federal courts where he appeared as lead counsel for [the firm] on behalf of [the asbestos manufacturer] simply do not exist. [Respondent's] conduct has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts.

Complainant alleges that although the resume Respondent sent to the Department of Justice as part of the nomination process did not reflect the circumstances of his employment with the law firm, this information was disclosed in Respondent's sworn

questionnaire submitted to the Senate's Committee on the Judiciary.⁵ The crux of the complaint is that:

[Respondent] swore he "...represented the interests of [], a manufacturer of asbestos cloth in depositions and trials in state and federal courts" during his employment with [the firm]. A red flag arose as to the credibility of these claims when [Respondent's] legal experience consisted of nine years of criminal law no known civil experience and he was suddenly trial counsel in a major class action asbestos litigation in state and federal courts.

Exhaustive measures were taken to confirm [Respondent's] sworn statements concern his contact with [the firm]. A comprehensive search of the state and federal dockets did not reveal any entry of appearance by

⁵ The relevant portions of the questionnaire as identified and quoted by Complainant are:

[Question] 18(b)(2) Describe your typical former clients, and mention the areas, if any in which you have specialized.

[Answer] [], a manufacturer of asbestos blankets, was my sole client during my tenure at [the firm].

[Question] 18(c)(1) Describe whether you appeared in court frequently, occasionally or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

[Answer] I occasionally appeared in court while employed at [the firm].

[Question] 18(c)(4) State the number of cases in courts of record you tried to verdict or judgment rather than settled, indicating whether you were sole counsel, chief counsel or associate counsel.

[Answer] I served as lead counsel in all matters in which I appeared in court. I was counsel of record in several thousand bench trials and approximately seventy jury trials.

[Respondent] in state of federal court on behalf of [the asbestos manufacturer].

Aside from searching the dockets of various courts for cases in which Respondent, “appeared as lead counsel on behalf of [the firm] on behalf of the [asbestos manufacturer],” Complainant avers that he contacted Respondent, the prior Chief Judge of the Court of Appeals, the chairperson of the law firm and a United States Senator to request assistance in finding these cases. He also avers that he filed a Freedom of Information Act request (for which Respondent declined to waive privacy restrictions) seeking this information. Additionally, Complainant filed a petition for a writ of mandamus in the Court of Appeals seeking to compel Respondent to provide him with the information. The Court of Appeals declined to issue a writ because the information requested was a matter of public record.

In the second complaint, Complainant elaborates on the details of his attempts to obtain information about Respondent’s employment at the law firm from the Respondent and others. Complainant concludes that his failure to receive responses to his inquiries demonstrates the existence of a conspiracy to thwart him from receiving the requested information.

Besides reiterating and elaborating on many of the same allegations made in the first complaint, Complainant in the second complaint alleges that Respondent has participated in two other cases in which he had conflicts of interest resulting from the judicial selection process that led to Respondent’s nomination to the federal bench.

These two cases are cited as examples of the improper acts in furtherance of the alleged conspiracy. In these cases, there was an appearance by the law firm of the Chair of the judicial selection committee that made recommendations as to candidates for federal judgeships.⁶ That committee, according to Complainant, rated Respondent as “recommended.” No request for Respondent’s disqualification was made by the parties in either of the two cases to which Complainant refers.

Both cases were pending at the time that Respondent joined the District Court. The first case was reassigned to Respondent shortly after he joined the Court. Six months later, an attorney from the selection committee chair’s law firm entered an appearance in the case. After six days of trial, the case settled.

As to this case, Complainant alleges that Respondent, “participated in the orchestration of the assignment of a [] firm case for his adjudication.” Complainant alleges that Respondent appointed the Chair’s law firm to represent the pro se plaintiff in the case. But the record proves otherwise. The docket demonstrates that plaintiff was at all times represented by counsel. Nor is there any indication that the Chair’s law firm was appointed or that Respondent was responsible for its involvement in the case.

⁶ This “committee” is not official and is appointed by the two United States Senators.

In the second case, the Chair had entered an appearance in the case four days before it was reassigned to Respondent. That case also settled. Complainant suggests that bribery may have occurred, but offers no factual basis for this allegation.

I

The judicial misconduct statute provides a remedy if a federal judicial officer, “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a).⁷ A Chief Judge may dismiss a complaint brought under the statute if, after review, he finds that it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is legally frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. § 352(b)(1)(A)(i-iii).

Section 352(b)(1)(A)(ii) (formerly 28 U.S.C. § 372(c)(3)(A)(ii)), which provides for dismissal of complaints related to the merits of a decision or procedural ruling, reflects Congress’ concern that a misconduct complaint not be used as vehicle by which disappointed litigants may challenge judicial action or inaction occurring in the course of litigation which is reviewable by appeal or mandamus. The Senate Report on 28 U.S.C. § 372(c) states, “It is important to point out what subsection (c) does not mean; it is not

⁷ Effective November 2, 2002 the Judicial Improvements Act of 2002 replaced the former 28 U.S.C. § 372(c), which governed complaints of judicial misconduct or disability, with 28 U.S.C. § 351, *et seq.* Although certain additions and minor changes were made in regard to the complaint procedures, the substance of the former 28 U.S.C. § 372(c) remains intact.

designed to assist the disgruntled litigant who is unhappy with the result of a particular case.” S. Rep. No. 362, 96th Cong., 2d Sess. 8 (1980), reprinted in 1980 U.S.C.C.A.N. 4315, 4322.

II

The complaints must be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i)(ii) and (iii) as not being cognizable under the statute, being directly related to Respondent’s judicial decisions and procedural rulings and as legally frivolous or lacking sufficient evidence to raise an inference of misconduct.

To the extent that Complainant contends that Respondent should have disqualified himself from his case because of his prior association with the law firm, this allegation must be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) as being directly related to Respondent’s judicial decisions and procedural rulings. Such case-related claims are not cognizable in a judicial misconduct proceeding. As noted, the Court of Appeals previously considered and rejected most of the same allegations presented in the complaints.

Insofar as Complainant alleges that Respondent in his confirmation process made statements which were, “knowingly and willfully, fabricated,” about his legal career at the law firm, these allegations are subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A)(i) as not being cognizable under the statute. Because this conduct occurred during a legislative proceeding before Respondent became a member of the federal

judiciary, the alleged discrepancies in the information provided to Congress are not subject to challenge in a judicial administrative disciplinary proceeding.

Even if the alleged inconsistencies in testimony and submissions to the Senate Judiciary Committee were a proper subject for a complaint filed pursuant to 28 U.S.C. § 351, dismissal of these complaints pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) would be required. Complainant asserts that Respondent's answer to question 18(c)(4) misstated or overstated his role in regard to his representation of the asbestos manufacturer and may not have been consistent with answers given to other questions. But there is no evidence that Respondent intentionally misled or knowingly made materially false statements to the Senate. Complainant's allegations of criminal conduct by Respondent are conclusory and not supported by the evidence.

Complainant's allegations that Respondent (and others) have improperly failed to assist him in locating the docket numbers and dates are frivolous. Neither Respondent, nor others, were obligated to assist Complainant in researching matters of public record in various state and federal courts. There is no evidence presented in the complaint to even suggest the existence of a conspiracy.

Finally, Complainant's assertions concerning the alleged conflicts of interest are without merit and must also be dismissed as legally frivolous pursuant to 28 U.S.C. §

352(b)(1)(A)(iii).⁸ The claims alleging either an actual impropriety or an appearance of impropriety do not rise to the level of judicial misconduct.

Complainant's allegations involving a conflict of interest in his case because of Respondent's former association with the law firm, have been considered and rejected by

⁸ As noted, in regard to Complainant's case the Court of Appeals rejected many of Complainant's arguments in three different appellate proceedings. In one of those decisions, the Court noted that Respondent stated that he had no continuing relationship with the firm after leaving in 1987, after six months of employment.

The Judicial Conference's Committee on Codes of Conduct has suggested that a disqualification of at least two years from hearing cases involving a judge's former law firm is adequate and appropriate unless some type of extenuating circumstances are present:

Apart from recusal during the period when the judge is receiving payments from a former law firm, there is a broader question of the appearance of impropriety in the judge's hearing cases involving that firm. Many judges have an automatic rule of disqualification for a specified number of years after leaving the law firm. How long a judge should continue to recuse depends upon various circumstances, such as the relationship the judge had at the law firm with the lawyer appearing before the judge, the length of time since the judge left the law firm, and the relationship between the judge and the particular client and the importance of that client to the firm's practice. The Committee recommends that judges consider a recusal period of at least two years, recognizing that there will be circumstances where a longer period may be more appropriate. In all cases in which the judge's former law firm appears before the judge, the judge should carefully analyze the situation to determine whether his or her participation would create any appearance of impropriety.

Advisory Opinion No. 24 (September 1, 1972 as revised July 10, 1998). Here, Respondent severed his ties with the firm fifteen years ago. There are no circumstances that would create an appearance of impropriety, or an actual impropriety as to Complainant's case.

the Court of Appeals. To the extent that Complainant seeks to embellish these claims with allegations of perjury and conspiracy, his allegations are conclusory, speculative and not supported by the evidence.

Nor do Complainant's allegations involving the selection committee chair's law firm rise to the level of judicial misconduct. The allegations are too remote and attenuated to create an appearance of impropriety in regard to either his, or his firm's, appearance in cases before Respondent. Furthermore, Complainant has provided no factual basis for his bare allegations.

Accordingly the complaints are dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i)(ii) and (iii).

/s/ Anthony J. Scirica
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 04-35 & 05-16

IN RE: COMPLAINTS OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

ORDER

(Filed: August 2, 2005)

Present: SCIRICA, Chief Judge.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaints brought pursuant to 28 U.S.C. § 351 are hereby dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i)(ii) and (iii).

This order constitutes a final order under Rule 4(B), Rules of the Judicial Council of the Third Circuit Governing Complaints of Judicial Misconduct and Disability.

The Complainant is notified in accordance with Rule 5, Rules of the Judicial Council of the Third Circuit Governing Complaints of Judicial Misconduct and Disability, of his right to appeal this decision by the following procedure:

(A) Petition. [A] petition for review may be addressed to the Judicial Council of the Third Circuit.

(B) Time. A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter transmitting the chief judge's order.

DEF02341

(C) Form. A petition should be in the form of a letter addressed to the clerk of the court of appeals, beginning "I hereby petition the judicial council for review of the chief judge's order...." There is no need to enclose a copy of the original complaint.

The full text of Rule 5 is available from the Clerk's Office of the Court of Appeals of the Third Circuit.

/s/ Anthony J. Scirica
Chief Judge

Dated: August 2, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3289

United States

v.

Jaimes-Lopez

(E.D. Pa. No. 04-cr-00164)

ORDER

The following order is issued in accordance with procedures established by the court for cases raising issues based on United States v. Booker, 125 S. Ct. 738 (2005). If appellant wishes to raise an issue based on United States v. Booker, appellant must do so by filing within 14 days of the date of this order a letter that succinctly states the factual and legal basis of the challenge. The letter must not exceed 750 words. Cf. Fed. R. App. P. 28(j). If appellant wishes to challenge only the sentence, the letter must state that only the sentence, and not the conviction, is being challenged. This statement will be construed as waiving any issues related to the conviction. Appellant must file with the clerk an original and three copies of the letter, with certificate of service.

Any response by the government must be made within 14 days of service and must be similarly limited. An original and three copies, with certificate of service, of the response must be filed. Further briefing on the Booker issue will be permitted only at the court's direction.

For the Court,

/s/ Marcia M. Waldron

Clerk

Date: March 1, 2005

DMM/cc: Stephen J. Britt, Esq.

Richard J. Zack, Esq.

DEF02343

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 06-24

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

AMENDED MEMORANDUM OPINION

(Filed: July 5, 2006 and Amended August 17, 2006)*

Present: SCIRICA, Chief Judge.

This is a complaint filed pursuant to 28 U.S.C. § 351 against a United States District Judge (Respondent). Complainant was convicted of drug trafficking and a related firearms offense in a trial before another District Judge and received a lengthy prison sentence. After that Judge retired, a pending 28 U.S.C. § 2255 motion was re-assigned to Respondent for decision. This complaint, alleging bias, conflict of interest and undue delay, was filed after the § 2255 motion was dismissed.

Complainant claims that Respondent has demonstrated:

“a personal bias or prejudice towards movant or favoritism towards the prosecution due to his duties in his former capacity as an assistant united states attorney, in which he worked hand-in-hand In criminal investigations/prosecutions with AUSA [the prosecuting attorney in his case] in the 1980's and 90's.

* The August 17, 2006 amendment corrected typographic errors in the Memorandum Opinion as it was originally issued.

DEF02344

PORT Exhibit 1111 (e)

He also claims that Respondent has a close personal friendship with Complainant's trial counsel, developed when they worked together in a law firm, which precluded Respondent from fairly considering the claims of ineffective assistance of counsel presented in the § 2255 motion.¹

It is also alleged that there was inappropriate delay in deciding the § 2255 motion.² That motion was assigned to Respondent in April, 2003 and decided in March, 2006. During that time a great deal of litigation occurred. An amended brief was filed by Complainant as well as motions by the government for leave to file an amended answer and to expand the record. The government's motions were contested by Complainant. In the Memorandum Opinion dismissing the § 2255 motion, not only were at least ten substantive issues raised by Complainant in his § 2255 motion addressed, but also motions for reconsideration of the decisions granting the government's motions were considered. In addition, a motion for enlargement on bail filed by Complainant was decided during the time that the § 2255 motion was pending before Respondent.

¹ Respondent was an associate in the law firm from 1985 until 1987. From 1987 until 1992 he was an Assistant United States Attorney. He has been a federal judge since 2002.

² Complainant also appears to suggest that there has been undue delay in deciding a post-decision motion challenging the dismissal of the § 2255 motion. That post-decision motion has been pending approximately two months, having been filed in April, 2006.

The judicial misconduct statute provides a remedy if a federal judicial officer, “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A Chief Judge may dismiss a complaint brought under the statute if, after review, he finds that it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is legally frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. § 352(b)(1)(A)(i-iii).

Section 352(b)(1)(A)(ii) (formerly 28 U.S.C. § 372(c)(3)(A)(ii)), which provides for dismissal of complaints related to the merits of a decision or procedural ruling, reflects Congress’ concern that a misconduct complaint not be used as vehicle by which disappointed litigants may challenge judicial action or inaction occurring in the course of litigation which is reviewable by appeal or mandamus.³ The Senate Report on 28 U.S.C. § 372(c) states, “It is important to point out what subsection (c) does not mean; it is not designed to assist the disgruntled litigant who is unhappy with the result of a particular case.” S. Rep. No. 362, 96th Cong., 2d Sess. 8 (1980), reprinted in 1980 U.S.C.C.A.N. 4315, 4322.

³ Effective November 2, 2002 the Judicial Improvements Act of 2002 replaced the former 28 U.S.C. § 372(c), which governed complaints of judicial misconduct or disability, with 28 U.S.C. § 351, *et seq.* Although certain additions and minor changes were made in regard to the complaint procedures, the substance of the former 28 U.S.C. § 372(c) remains intact.

II

The complaint must be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) since determination of all the claims presented would ultimately require consideration of the merits of judicial decisions and procedural rulings. Referring to 28 U.S.C. § 372(c)(3)(A)(ii) (now 28 U.S.C. § 352(b)(1)(A)(ii)), the Judicial Council of the Ninth Circuit has stated:

There is...a statutory directive for dismissal of complaints of judicial misconduct which in substance are simply objections to substantive or procedural error. This principle is supported by compelling policy. To determine whether a judge's rulings were so legally indefensible as to mandate intervention would require the same type of legal analysis as is afforded on appeal.

In re: Complaint of Judicial Misconduct, 685 F.2d 1226, 1227 (Ninth Circuit Judicial Council 1982). Since resolution of the claims presented in the complaint would require exactly the same type of legal analysis necessary to determine an appeal concerning those allegations, the claims cannot be considered in a judicial misconduct proceeding.

It is well established that absent extraordinary circumstances claims of bias or conflict of interest in regard to an individual case or litigant are not cognizable in a judicial misconduct proceeding since they may be reviewed through the normal case related processes. In re: Latimer, 955 F.2d 1036 (Fifth Cir. Judicial Council, 1992); In re: Charge of Judicial Misconduct, 595 F.2d 517 (Ninth Circuit Judicial Council, 1979). No extraordinary circumstances are presented in this complaint.

As to the propriety of Respondent's hearing cases prosecuted by the United States Attorney's Office in light of his prior employment by that office, guidance is provided by Canon 3(C)(1)(e) of the Code of Conduct for United States Judges which requires disqualification when:

[T]he judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.⁴

This is amplified by §3.3.3(b) of the Compendium of Selected Opinions of the Committee of Codes of Conduct.⁵ That section states:

A judge who formerly served as Assistant or Deputy United States Attorney should recuse from all cases involving matters with which the judge came in contact during the judge's tenure, or for which the judge bore some responsibility, but need not recuse from cases in which the judge did not participate. Similarly, a judge who participated in investigation of a defense contractor need not recuse from unrelated cases involving the contractor, where the subject and issues are completely unrelated.

Accordingly, there is no blanket prohibition which would require Respondent to disqualify himself from all cases in which the United States Attorney's Office is involved. Instead, he must make a determination concerning recusal in each individual case in

⁴ The language of this Canon mirrors that of 28 U.S.C. § 455(b)(3) which requires automatic disqualification if any of the listed situations exist.

⁵ The Compendium is a summary of selected published and unpublished advisory opinions issued by the Committee on Codes of Conduct.

which the United States Attorney's Office appears.⁶ Since this determination must be made on a case by case basis, it is a merits-related decision which is not cognizable in a misconduct proceeding.

Likewise, the allegations that Respondent knows and has personal relationships with both counsel in Complainant's case must be dismissed not only as being related to the merits of the Respondent's decisions or procedural rulings but also as legally frivolous pursuant to 28 U.S.C. § 352(b)(1)(A)(iii).⁷

A judge is permitted to have friends and participate in society, even when that means coming into contact with attorneys or others who might appear before him or her on the bench. See e.g. Judicial Conference Committee on Codes of Conduct Advisory Opinion 11 (January 21, 1970, as revised January 16, 1998)(disqualification by judge not required when one of the attorneys appearing before him was the godfather of the judge's

⁶ Given the length of time which has passed since Respondent left that office, it would appear that disqualification would seldom, if ever, be required because of a conflict resulting from his prior employment with that office.

⁷ Complainant also avers that Respondent has a personal bias or prejudice against him. Other than this conclusory allegation, there is no basis for this claim as presented in the complaint.

All of Complainant's allegations that the Respondent acted with some inappropriate animus are speculative and conclusory in nature and not supported by any factual allegations in the record, but rather, appear to be based solely on Complainant's opinion as to what the outcome of the decision on his § 2255 motion should have been. These allegations, therefore, are not only subject to dismissal as being merits-related but also as legally frivolous.

child; absent special circumstances a friendly relationship does not require automatic disqualification).

In a misconduct case alleging that a judge was improperly influenced because of the judge's friendship with a United States Senator, it was aptly stated about the judge's personal relationships with the Senator and within the community at large:

By itself, the judge's friendship with the Senator poses an insufficient incentive for wrongdoing to lead a reasonable observer to doubt the judge's impartiality. Reasonable observers understand that federal judges may in the course of their lives have established friendships with those serving in other branches of government; reasonable observers also presume that federal judges, like the vast majority of unelected public officials, are able to disregard the political views of their friends and carry out their responsibilities in a fair and impartial manner. See United States v. Jordan, 49 F.3d 152, 157-59 & n.6 (5th Cir. 1995)(friendship between a judge and a person with an interest in the case does not necessarily result in an appearance of impropriety); United States v. Murphy, 768 F.2d 1518, 1537-38 (7th Cir. 1985)(an ordinary friendship between judge and lawyer appearing in case does not create an appearance of impropriety).

In the Matter of a Charge of Judicial Misconduct or Disability, 85 F.3d 701, 707 (Judicial Council of the District of Columbia Circuit, 1996)(Tatel, J., concurring).

Allegations of delay in an individual case are also not cognizable in judicial misconduct proceedings, absent truly extraordinary circumstances, because remedies exist using the normal judicial processes. In re: Charge of Judicial Misconduct, 593 F.2d 879 (9th Cir. Judicial Council 1979). The type of circumstances in which delay in a single case might be considered in a misconduct proceeding are discussed in the Commentary to Rule 1, Rules of the Judicial Council of the Third Circuit Governing Complaints of

Judicial Misconduct and Disability. Nothing has been demonstrated in this complaint which approaches those types of circumstances. Therefore, consideration of Complainant's allegations of delay is not appropriate in a judicial misconduct proceeding.

Accordingly the complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii).

/s/ Anthony J. Scirica
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 06-24

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

ORDER

(Filed: July 5, 2006)

Present: SCIRICA, Chief Judge.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii).

This order constitutes a final order under Rule 4(B), Rules of the Judicial Council of the Third Circuit Governing Complaints of Judicial Misconduct and Disability.

The Complainant is notified in accordance with Rule 5, Rules of the Judicial Council of the Third Circuit Governing Complaints of Judicial Misconduct and Disability, of his right to appeal this decision by the following procedure:

(A) Petition. [A] petition for review may be addressed to the Judicial Council of the Third Circuit.

(B) Time. A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter transmitting the chief judge's order.

DEF02352

(C) Form. A petition should be in the form of a letter addressed to the clerk of the court of appeals, beginning "I hereby petition the judicial council for review of the chief judge's order...." There is no need to enclose a copy of the original complaint.

The full text of Rule 5 is available from the Clerk's Office of the Court of Appeals of the Third Circuit.

/s/ Anthony J. Scirica
Chief Judge

Dated: July 5, 2006

U. S. COURT OF APPEALS

FILED

MAY 17 2001

CHARLES R. FULBRUGE III
CLERK

BEFORE THE JUDICIAL COUNCIL OF THE
FIFTH CIRCUIT

IN RE: NO. 01-05-372-0034

PETITION FOR REVIEW BY [REDACTED] OF THE
FINAL ORDER FILED FEBRUARY 26, 2001, DISMISSING
JUDICIAL MISCONDUCT COMPLAINT AGAINST [REDACTED]
[REDACTED], UNDER THE
JUDICIAL CONDUCT AND DISABILITY ACT OF 1980.

ORDER

An Appellate Review Panel of the Judicial Council of the Fifth Circuit has reviewed the above-captioned petition for review, and all the members of the Panel have voted to affirm the Order of Chief Judge King, dated February 26, 2001, dismissing the Complaint of [REDACTED] against [REDACTED] [REDACTED] under the Judicial Conduct and Disability Act of 1980. The Order is therefore

AFFIRMED.

15 MAY '01



Date

E. Grady Jolly
United States Circuit Judge,
For the Judicial Council of
The Fifth Circuit

DEF02354

PORT Exhibit 1111 (f)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS

FILED**FEB 26 2001**CHARLES R. FULBRUGE III
CLERK

Docket Number: 01-05-372-0034

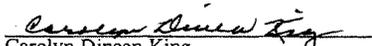
M E M O R A N D U M

Complainant complains of actions taken by the subject United States District Judge while he served on the state court bench, before his appointment to the federal judiciary. She states that the judge should not have dismissed her two pro se civil suits, should not have permitted an amendment to the pleadings in one suit, and should not have granted a continuance in the other. She urges that the judge's acts were "prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1).

Even if a judge's pre-appointment conduct could be said to meet this statutory standard so that it might be subject to review under § 372(c), this complaint would be subject to dismissal under § 372(c)(3)(A)(ii) because it relates directly to the merits of the judge's rulings.

Judicial misconduct proceedings under 28 U.S.C. § 372(c) are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

An order dismissing the complaint is entered simultaneously herewith.


Carolyn Dineen King
Chief Judge

February 19, 2001

DEF02355

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS

FILED

JUN 29 2004

CHARLES R. FULBRUGE III
CLERK

Docket Number: 04-05-372-0069

MEMORANDUM

Complainant complains of actions taken by the subject United States District Judge while he served on the state court bench, before his appointment to the federal judiciary. She submits that the judge should have recused himself because his wife is distantly related to one of the defendants.

Even if a judge's pre-appointment conduct could be said to be subject to review under 28 U.S.C. §§ 351-364 et. seq., the complaint would be subject to dismissal under 28 U.S.C. § 352 (b)(1)(A)(ii) and (b)(1)(B).

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

This is complainant's second merits-related misconduct complaint relating to proceedings that took place sixteen years ago in a state court. She is WARNED that should she again try to use the complaint process to attack the merits of a judicial ruling, she may be required to show cause why she should not be barred from filing

future complaints. See Rule 19(c), Fifth Circuit Rules Governing Complaints of Judicial Misconduct or Disability.

An order dismissing the complaint is entered simultaneously herewith.



Carolyn Dineen King

Chief Judge

June 28, 2004

FILED

BEFORE THE JUDICIAL COUNCIL OF THE
FIFTH CIRCUIT

AUG 12 2004

IN RE: NO. 04-05-372-0069
 PETITION FOR REVIEW BY [REDACTED] CHARLES R. FULBRUGE III
 THE FINAL ORDER FILED JUNE 29, 2004, DISMISSING CLERK
 JUDICIAL MISCONDUCT COMPLAINT AGAINST [REDACTED]
 [REDACTED] UNDER THE
 JUDICIAL CONDUCT AND DISABILITY ACT OF 1980.

O R D E R

An Appellate Review Panel of the Judicial Council of the Fifth Circuit has reviewed the above-captioned petition for review, and all the members of the Panel have voted to affirm the Order of Chief Judge King, dated June 29, 2004, dismissing the Complaint of [REDACTED] against [REDACTED] [REDACTED], under the Judicial Conduct and Disability Act of 1980. The Order is therefore

A F F I R M E D.



9 AUG '04

Date

 E. Grady Jolly
 United States Circuit Judge,
 For the Judicial Council of
 the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket Number: 06-05-351-0027

U. S. COURT OF APPEALS

FILED

MAR 30 2007

CHARLES R. FULBRUGE III
CLERK

MEMORANDUM

The complainant attorney has submitted a misconduct complaint against the subject District Judge based on the judge's actions in three environmental mass tort lawsuits. The first of these suits was filed in state court, removed to the subject judge's court, and assigned to the subject judge. The second was also filed in state court in 1996, removed to another district, and eventually transferred and consolidated with the first. Complainant served as class counsel in these two cases. The third case was filed in the subject judge's court as a diversity class action to implement a settlement agreement reached in the first two cases.

Complainant was allowed to intervene in the class action to seek fees and costs arising from his work in the earlier litigation, but the Plaintiffs Steering Committee (PSC) filed a motion to disqualify (and preclude any award of fees to) him. His motion to recuse the subject judge from handling the disqualification and fees matters was referred to another district judge for consideration and denied. His petition for writ of mandamus seeking a finding that the transfer of the motion to recuse was improper and also seeking a reversal of the order denying the motion to recuse has been denied by the Fifth Circuit. Complainant's mandamus petition makes clear that he waited to file a motion to recuse until after efforts to resolve the matter of attorneys fees between him

and his former co-counsel were unsuccessful. His for fees and the PSC's motion for disqualification remain pending.

Complainant states that the subject judge made a diligent effort to settle the case and that he has "no problem" with the judge's mediation efforts. "My disagreement with [the judge] began" later on during settlement negotiations.

Complainant alleges that because the subject judge's son worked for one of the plaintiff firms appearing in his court, he should have recused himself. The judge's son worked as a law student intern at the offices of both plaintiff and defense counsel, and complainant does not allege that he worked on any matter related to the litigation pending before his father. Nothing complainant alleges demonstrates that the judge was required to recuse himself. This aspect of the complaint is subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also alleges that one of the judge's law clerks worked for counsel representing the plaintiffs in the first of the listed cases at the same time that she was also clerking for him. The clerk did associate herself with one of the plaintiffs' lawyers after her clerkship with the subject judge ended, appeared in the second case when it was filed in 1999, and was appointed to the PSC in 2001. Complainant cites the clerk's *curriculum vitae* as showing that her federal clerkships lasted from 1997 to 1999. However, the dates given on the resume are incorrect, as court records reflect that she clerked in another federal court from 1995-96 and then for the subject judge from 1996-97. The first of the underlying cases in the litigation complained about was not removed to the subject judge's court until November 1999. The clerk's future employer was also plaintiff's counsel in another case pending before the subject judge, which was substantially resolved by his order approving a settlement in June 1997. Nothing in the

record ties her to plaintiffs' counsel while this earlier case was pending before the subject judge. Other than his bald assertion, complainant has provided no information that the judge was aware of her working on any private matter or case outside of his docket while in his employ, or had any information about her future employment plans. This aspect of the complaint is subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A) (iii).

Complainant also complains that the clerk was named liaison counsel for the PSC so as to exert influence over the subject judge. Nothing in the record indicates that she was appointed liaison counsel. He states that the judge "ordered" that the parties could present *ex parte* comments to him concerning settlement which facilitated improper *ex parte* communications. Such an order is not apparent from a review of the docket sheet, which does reflect separate settlement discussions with defendants. Nevertheless, *ex parte* communications in connection with settlement efforts are standard procedure for mediators. Canon 3A(4) of the Code of Conduct provides that a judge may, with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

In the context of the PSC's motion to disqualify him, complainant issued a subpoena for various documents, including those concerning *ex parte* communications with the judge and the employment of his son.¹ The PSC moved to quash, and the subject judge referred the motion to another district judge. Complainant filed a petition for writ of mandamus asking this court to vacate the referral order. In its order denying the petition, our court wrote that it found no merit in complainant's accusations.

¹ Complainant states in the complaint that his attorney submitted discovery requests, which were referred to another district judge, in anticipation of filing a motion to recuse against the subject judge.

Furthermore, the fact that an attorney may have clerked for a judge does not compel the conclusion that the attorney will then be in a position to exert undue influence over the judge. In fact, another of the subject judge's former law clerks was also involved in the on the defense side. This aspect of the complaint is subject to dismissal pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).

Complainant also claims that the judge was informed that a class representative was an employee or spouse of an employee of one of the plaintiff firms, and that a class representative's spouse had received a car from one of the plaintiff attorneys, but did not take any action. Complainant appears to suggest that these allegations were raised by counsel for objectors in the context of their opposition to the settlement agreement, but later states that they "agreed to drop the allegations against class counsel". In essence, this aspect of the complaint is related to the merits of the judge's decision not to investigate the allegations and is subject to dismissal. 28 U.S.C. § 352(b)(1)(A)(ii).

Complainant claims that the subject judge should not have presided over the class action fairness hearing because he could not be neutral about a settlement he helped create. There is no doubt that the judge was substantially involved in the settlement process. In discussing the Code of Conduct for United States Judges and Federal Rules of Civil Procedure Rule 16, the Committee on Codes of Conduct has stated that neither the Canons nor Rule 16 *require* a judge who engaged in settlement discussions to recuse from presiding over subsequent proceedings in the case. Advisory Opinion No. 95, "Judges Acting in a Settlement Capacity". Instead, the question of recusal should be decided on a case-by-case basis. *Id.* The objectors' motion to recuse the judge from presiding over the fairness hearing on this ground was denied by him and later withdrawn after certain protections for individuals seeking additional relief in state court

were put in place.² No appeal was taken. This contention is therefore merits-related and subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A)(ii).

Complainant asserts that the subject judge should have recused himself because of close personal ties to counsel. For example, the judge attended the out-of-state wedding of one of plaintiffs' counsel (at the judge's own expense) and complainant alleges that he also attended "at least one" college football game as a guest of counsel. Canon 5 of the Code of Conduct for United States Judges provides that judges may engage in social and recreational activities if such activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's duties. The Commentary to Canon 5 states that a judge should not become isolated from the society in which the judge lives. Nothing in the complaint leads to the conclusion that the judge's ability to carry out his judicial responsibilities with integrity, impartiality and competence was impaired. Moreover, a complaint of judicial misconduct is not to be used as a substitute for the normal appellate process. This aspect of the complaint is subject to dismissal pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).

Complainant states that the subject judge became overly invested in promoting settlement. For example, he complains that after the first case had been pending before the judge for three years and nine months, the judge called one of the firms representing the plaintiffs to alert them to the fact that counsel representing a recently-added defendant was retained to represent the Judge's wife in a suit involving an automobile accident, and that as a result of the phone call the new defendant was dismissed from the suit. Complainant's description of the situation implies that the judge was trying to

² Though complainant was not counsel of record for the objectors, he did provide them with affidavits in support of their motion to recuse, and he did represent individuals who had opted out of the settlement in order to preserve their rights to pursue further relief in state court.

avoid an unnecessary disqualification after the judge and the parties had invested much time and effort in the case.

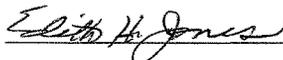
Whether the dismissal was provoked by the judge's telephone call or by other independent reasons is beyond the scope of my investigation. However, Canon 3D of the Code of Conduct for United States Judges provides that (with exceptions not pertinent to this inquiry) when a judge might be disqualified in a proceeding because "the judge's impartiality might reasonably be questioned", the judge may participate in the proceeding if all parties and lawyers, after notice, agree to waive the disqualification. It is apparent from the Canon that the alleged situation is one that can be cured, and the judge chose to cure it by requesting dismissal of the party. This aspect of the complaint is subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) as it is, in effect, a complaint challenging the merits of the judge's action in this respect.

Complainant also alleges that in his zeal to promote a compromise, the subject judge imposed settlement terms on the parties and refused to consider motions to remand filed by defendants uncomfortable with his settlement strategy. If the judge applied undue pressure on the defendants to settle the case, one would expect them to complain, but there is no record of their having done so. Arguably, while settlement discussions appeared to be productive, the more efficient course was first to see if they would be successful and not divert the focus of court and counsel. Regardless, any complaint addressing the judge's actions while assisting the parties to negotiate a settlement or relating to his management of the case are merits-related and subject to dismissal. 28 U.S.C. § 352(b)(1)(A)(ii).

I have conducted a limited inquiry pursuant to 28 U.S.C. § 352. Certain aspects of this complaint should be dismissed as either merits-related or lacking sufficient

evidence to raise an inference that misconduct has occurred. Pursuant to 28 U.S.C. § 352(b)(2), a complaint may also be concluded after appropriate remedial action has been taken. The issues raised in this complaint have been addressed with the subject judge. I am assured that these concerns have been appropriately noted and that due care will be given in future judicial proceedings to avoid situations that could be misinterpreted in ways that might have the effect of undermining the public's confidence in the judicial process.

An order dismissing and concluding the complaint is entered simultaneously herewith.



Edith H. Jones

Chief Judge

March 27, 2007

85-7-372-10

CHAMBERS OF
WALTER J. CUMMINGS
CHIEF JUDGE
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

FOR MAY 7TH RELEASE TO THE MEDIA

May 7, 1985

Honorable Charles B. McCormick
United States Bankruptcy Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge McCormick:

As I advised you by letter on May 1, the Judicial Council of the Seventh Federal Circuit has completed an investigation of a written misconduct complaint under 28 U.S.C. § 372(c)(1) concerning your conduct of the Wisconsin Steel Company Chapter 11 reorganization proceedings in which International Harvester Co. filed a claim of \$146,627,830 against the bankrupt estate. Subsequently, debtor Wisconsin Steel Company filed a counterclaim against Harvester alleging fraud in Harvester's sale of Wisconsin Steel to Envirodyne Industries, Inc. These proceedings are numbered 80 B 03766 through 80 B 03773 and Adversary No. 81 A 0442, and still pend in the United States District Court for the Northern District of Illinois in Chicago.

On March 29 of this year, I advised you that in the investigation of the complaint, the following documents were reviewed: correspondence from District Judge John Grady concerning this matter; the transcript of the January 22, 1985, proceedings before you; the transcript of proceedings later that day before Judge Grady; Harvester's motion to disqualify you and for other relief filed on that same date; your January 29, 1985, reply to that motion; Judge Grady's order and memorandum opinion of March 6, 1985, disqualifying you from further participation in the Wisconsin Steel Company case, ordering its reassignment to another bankruptcy judge, and ordering you and Wisconsin Steel's counsel to list other orders similar to those you issued on November 18, 1982, and January 7, 1985, and involved in the complaint.

On March 27, 1985, you advised the district court that your December 3, 1981, order in the Wisconsin Steel Company case might have been issued under similar circumstances to the November 18, 1982, and January 7, 1985, orders. At the same time, Wisconsin Steel's counsel advised Judge Grady that your December 3, 1981, order requiring parties other than

DEF02366

PORT Exhibit 1111 (i)

May 7, 1985

International Harvester to produce certain documents for Wisconsin Steel's inspection, and your March 15, 1982, order denying the Chicago, West Pullman & Southern Railroad Co.'s application for payment of \$75,180 demurrage charges by Wisconsin Steel were prepared by Wisconsin Steel's counsel pursuant to your request through your law clerk. Your letter to me of April 11, 1985, confirmed that you entered the four orders after directing your law clerk to obtain drafts from Wisconsin Steel's counsel which you released as your own. The January 7, 1985, ruling was denominated an "Opinion and Order" and consisted of 11 pages and contained numerous citations. The November 18, 1982, decision was labelled "Order" and was of the same length and also studded with citations. The December 3, 1981, "Order" was only four pages but referred to numerous federal opinions. Finally, the March 15, 1982, "Order" was five pages and again referred to prior federal cases and one from Colorado. At least colloquially all of them might well be denominated opinions and represent considerable scholarship.

The record reveals that in the above four instances, you did not reveal to any counsel other than Wisconsin Steel's how you planned to decide the matters covered by those orders, and that through your law clerk you directed Wisconsin Steel's counsel to prepare the drafts which you eventually released without change under your name. Your letter of April 11 indicates that you have no recollection of other ex parte communications with counsel for a litigant requesting its counsel directly, or through your law clerk upon your direction, to prepare orders in cases being litigated before you without notifying opposing counsel in advance of your decisions and requests.

By resolution of the Judicial Conference of the United States, the Code of Conduct for United States judges is applicable to bankruptcy judges and United States magistrates as well as to the other federal judges. Canon 1 requires a judge to "uphold the integrity and independence of the judiciary" and Canon 2 requires a judge to "avoid impropriety and the appearance of impropriety in all his activities." Particularly applicable to the facts brought to the attention of the Judicial Council of the Seventh Federal Circuit with respect to yourself, Canon 3A(4) provides:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives

DEF02367

May 7, 1985

notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

The four instances brought to our attention in which you directed your law clerk to have Wisconsin Steel's counsel prepare proposed orders in its favor and which you subsequently released without change and without prior notice to Harvester's counsel clearly violate all three of the above Canons. These violations would not have come to light except that counsel for Harvester discovered that your order of January 7, 1985, had been received by counsel for Wisconsin Steel a day before its receipt by counsel for Harvester. This prompted the law firm representing Harvester to conduct an investigation which disclosed that your November 18, 1982, and January 7, 1985, orders had been prepared by counsel for Wisconsin Steel on paper bearing their watermark and their type face.

If you had announced your rulings in advance to both concerned parties and then in the presence of both had directed counsel for one of them to prepare orders carrying out your rulings, there would have been no violation of the Canons. Because no secrecy is involved, it is also blameless for a judge to ask counsel for both sides to prepare and serve on the other side proposed findings of fact and conclusions of law and orders. The judge can then select the version, altered or unaltered, which he prefers. However, counsel for Harvester and others were never told how you would rule with respect to Wisconsin Steel's motion to dismiss Harvester's counterclaim, Wisconsin Steel's motion for discovery of documents in Harvester's possession that were allegedly protected by the attorney-client privilege, Wisconsin Steel's motion to compel parties other than Harvester to produce documents, and Chicago, West Pullman & Southern Railroad Co.'s application for Wisconsin Steel's payment of demurrage charges. The misconduct lay in your ex parte having your law clerk request counsel for Wisconsin Steel to prepare those four orders and then releasing them as your own. All four orders were in Wisconsin Steel's favor and counsel for Harvester never had a chance to object to them in advance. In fact, there could have been no plausible ethical objection to the procedure used as to the four orders except for the foregoing mailing incident revealing dramatically the covert unethical practices employed. It is no defense that you retained one of the draft orders four to six months before entering it on January 7, 1985, without change.

The knowledge that a judge will rule in a particular way is invaluable information to the lawyer and the client, particularly when the other lawyers and their clients do not share in that information.

DEF02368

Honorable Charles B. McCormick -4-

May 7, 1985

In the course of the January 22 transcript, when this practice surfaced, you defended your action by stating that you frequently ask lawyers to submit proposed orders. On the other hand, your letter of April 11 reveals only four such ex parte instances. That feature is of course the vice involved. While you stated in the same transcript that you do not have time to sit down and draft orders and therefore you have lawyers submit proposed orders, your April 11 letter does not admit to any other instances where this was done ex parte. You also stated in the January 22 transcript that you do not regard as improper the procedure you employed, adding that you "think it's a procedure that's followed from time to time not only in this court but probably in most every other court." Your April 11 letter to me does not reveal any other instances except these four, and you add therein that you have "no knowledge of whether any of my fellow judges engage in that practice." I do not agree with you that your secret procedure in these four instances has been followed by other members of your court or by other judges. No such instance has ever been brought to our attention, and all of us were shocked when we learned of your practice in at least these four instances.

The misconduct here is especially disquieting since counsel for Wisconsin Steel was successful in all four uncovered instances. It is understood that the Executive Committee of the United States District Court for the Northern District of Illinois is looking into that firm's unfortunate behavior in these four instances.

As you know, there has been considerable publicity about your conduct in this bankruptcy proceeding, thus persuading the Judicial Council of this Circuit that a written public censure is essential in addition to the oral reprimand that I have meted out this day. These sanctions are warranted under 28 U.S.C. § 372(c)(6).

As you admitted in your April 11 letter to me, you now realize that your conduct in this case has "given rise to the appearance of unprofessional conduct." In the future, in accordance with the Canons of Judicial Ethics, you must of course eschew any incidents which would ever again give rise to the "appearance of impropriety."

Very truly yours,


Walter J. Cummings,
Chief Judge of the
Seventh Circuit

DEF02369

5924

May 7, 1985

Honorable Walter J. Cummings
Chief Judge of the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Cummings:

I hereby resign as Chief Judge of the Bankruptcy
Court in the Northern District of Illinois but am
retaining my position on that Court.

Sincerely,


Charles B. McCormick
United States Bankruptcy
Judge

DEF02370

FILED

JUDICIAL COUNCIL
FOR THE NINTH CIRCUIT

SEP 11 2000

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re Charge of)	
)	
)	No.00-80018
Judicial Misconduct)	No.00-80045
)	ORDER AND
)	MEMORANDUM
_____)	

Before: HUG, Chief Judge, SCHROEDER, NELSON, TASHIMA and SILVERMAN, Circuit Judges, HOGAN, EZRA and SINGLETON, Chief District Judges, and KEEP, District Judge.

On February 3, 2000, a complaint of judicial misconduct was identified by the chief judge against District Judge Alan A. McDonald. On April 4, 2000, a separate complaint against Judge McDonald was received and filed. The complaints were consolidated on April 26, 2000. Administrative consideration of such complaints is governed by the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules), issued pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. § 372(c).

Pursuant to 28 U.S.C. § 372(c)(4)(A) and Rule 4(e), the chief judge appointed a special committee to investigate press reports (and the subsequent complaint) alleging that the judge wrote and passed notes that made disparaging comments about people in his courtroom. This matter comes before the Council upon the filing of the special committee's report.

DEF02371
PORT Exhibit 1111 (j)

After due consideration of the special committee's report, the Council adopts the findings and recommendations of the committee and attaches as a part of this order that report. For the reasons stated by the committee, the Council reprimands Judge McDonald for his conduct, having concluded that such conduct is prejudicial to the effective administration of the business of the courts.

This order shall be made public. 28 U.S.C.
§ 372(c)(6)(B)(vi); Misconduct Rules 14(f)(1) and 17(d).*

Dated this eleventh day of September, 2000.

JUDICIAL COUNCIL OF THE NINTH CIRCUIT

Proctor Hug, Jr., Chief Judge
Mary M. Schroeder, Circuit Judge
Thomas G. Nelson, Circuit Judge
A. Wallace Tashima, Circuit Judge
Barry G. Silverman, Circuit Judge
Michael R. Hogan, Chief District Judge
David A. Ezra, Chief District Judge
James K. Singleton, Chief District Judge
Judith Keep, District Judge

* Judge McDonald has waived his right to petition for review by the Judicial Conference of the United States and therefore the Judicial Council is releasing this Order immediately.

JUDICIAL COUNCIL FOR THE NINTH CIRCUIT
In Complaints of Judicial Misconduct
No. 00-80018
No. 00-80045

FILED

SEP 11 2000

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Report and Recommendation of the Special Committee

This Report is submitted to the Judicial Council of the Ninth Judicial Circuit by the Special Committee appointed by the Chief Judge to investigate the claims of judicial misconduct filed against Senior District Judge Alan A. McDonald of the Eastern District of Washington. The Report is made pursuant to the authority of 28 U.S.C. § 372(c) and the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability ("Misconduct Rules"). The procedural history of these complaints and the events surrounding them are set forth in Part I, below; the findings of this Committee are set forth in Part II; and the reasons for the Committee's recommendation are set forth in Part III.

I.

This investigation was initiated when the Chief Judge of the Ninth Circuit entered an order on February 3, 2000, identifying a complaint of judicial misconduct. The order recited that the complaint against Judge McDonald was based on "the allegations detailed in several recent news stories that the judge made disparaging comments about people in his courtroom." Beginning in January 2000, newspapers had reported that Judge McDonald and his courtroom deputy had exchanged a series of notes in court, commenting about litigants and lawyers. Some of the quoted notes were interpreted in newspaper reports as being disparaging to African Americans, Hispanics, Mormons, Jews, and Chinese people.

Pursuant to Misconduct Rule 4(e), Judge McDonald was afforded an opportunity to respond to the complaint. Judge McDonald noted that most of the notes were made public by his former court reporter, who had been terminated by the district court some years earlier and

had filed suit against Judge McDonald and the Clerk of Court. The suit was dismissed. The notes were released to a reporter shortly before the U.S. Supreme Court denied certiorari review.

Thereafter, on March 21, 2000, the Chief Judge filed with the Council an order appointing this Special Committee, pursuant to 28 U.S.C. § 372(c)(4)(A) and Misconduct Rule 4(e), to investigate the charges in the Order Identifying a Complaint of Judicial Misconduct and to make a report and recommendation to the Judicial Council.

On April 4, 2000, a second complaint of judicial misconduct was filed. The complainant was the Mexican American Legal Defense and Education Fund ("MALDEF"). The complaint alleged that "Judge McDonald's remarks and his tolerance of offensive comments by staff" constituted conduct prejudicial to the effective and expeditious administration of the business of the courts. The MALDEF complaint referred to the same news articles referenced in the original complaint. On April 26, 2000, the Chief Judge entered an order consolidating the two complaints, pursuant to Misconduct Rule 4(i).

The Committee conducted an investigation, which included review of the available print media articles, review of a series of notes written by Judge McDonald or his staff, correspondence from Judge McDonald and his counsel concerning the notes and the allegations of misconduct, a meeting with Judge McDonald and his counsel, an interview with a representative of MALDEF, and interviews with and review of written materials from a number of judges, current and former court personnel, and local attorneys. In all, 18 people were interviewed in person or by telephone.

During the course of the investigation, the Washington State Bar Association issued a statement criticizing Judge McDonald for allegedly writing disparaging notes in court, and Representative John Conyers introduced a Congressional resolution condemning Judge McDonald for "bringing the appearance of improper racial, ethnic and religious bias upon the federal judiciary."

II.

The notes that are the subject of both complaints first came to light in a January 2000 newspaper article. Although most of the notes were obtained from Judge McDonald's former court reporter, some of them came from an attorney who removed them from a courtroom wastebasket after court had recessed. The notes are not dated, but the evidence indicates that they date from the latter half of the 1980's to perhaps as recently as three years ago. Judge McDonald himself stated that he and staff members passed "literally thousands" of notes over a period of 12 or 13 years.

It is undisputed that the notes supplied to the Committee were either written by Judge McDonald on the bench, or by his former courtroom deputy, in the courtroom. Some notes were passed to or from him to his staff, while others were exchanged between his former courtroom deputy and his former court reporter without being seen by him. Judge McDonald said that most notes dealt with courtroom business such as scheduling and were a matter of necessity. He further indicated that sometimes the notes between his deputy and him "would include comments on the way cases developed, the interesting incidents that would occur, the performance of counsel or a witness and on occasion some effort at humor or jest to break the tedium of long court days."

It is also undisputed that a note stating "It smells like oil in here - too many Greasers" was written by the courtroom deputy during a trial with Hispanic defendants and lawyers present, and was not shown to Judge McDonald prior to this investigation. Furthermore, although there was evidence that the courtroom deputy told racial jokes at times, there was no evidence that Judge McDonald was ever aware of her remarks. Indeed, Judge McDonald stated that his deputy was aware that such conduct would not be tolerated by him, based on his earlier disciplinary counseling of a court secretary who made a racially insensitive remark in chambers. The courtroom deputy confirmed during the Committee interview that Judge McDonald would not tolerate such conduct.

Among the notes reviewed by the Committee were the following:

(1) "Old shoeless Jesse is going to argue – Hey that was signed after I was hired – So how can I be bound –That's Nancy's bias, too But – all of his claim re [unknown] is evidence by what he heard after he came to work, too!"

(2) "Ah is im po tent!"

(3) [Deputy] "He's been a con man for a long time! [Judge] Yes and in my experience, a Mormon money man makes the Jews & Chinese look like rank amateurs! [Deputy] That doesn't sound right to me – [Judge] Mormons never cheat steal lie or use birth control (my daughter Sara went to Ricks College too!"

(4) "Guys in Black suits are union mafia

Don't they look like gangsters

why would any"

(5) "Wm. Powell looks like a cadaver with his eyes open! He needs some sun (or gin!)"

(6) [Judge] "Rice (as in Rice Aroni) tells Nancy that his rebuttal will take us into next week at least most of Monday! If so we certainly are going to quit at noon tomorrow. [Deputy] Why didn't he tell us that yesterday in chambers?? [Judge] Because he is a devious little bastard."

The circumstances of these notes, and the notes themselves, were carefully reviewed by the Committee with Judge McDonald and counsel, his former court reporter and counsel, his former courtroom deputy, and lawyers who appeared before Judge McDonald. Regarding the "old Shoeless Jesse" reference, Judge McDonald was quite confident that this note was written to himself. The plaintiff in that case was an African American named Jesse Jackson. Judge McDonald said the reference was not to race, but rather to the white baseball player Shoeless Joe Jackson. The note stating "Ah is Im potent" was written by Judge McDonald during or immediately following testimony by an African American witness. There is some dispute as whether this note was written to himself or passed to the courtroom deputy. Judge McDonald stated that it was a reference to himself, and one that he frequently made in a self-

deprecating way. He said that it did not refer to the witness, whom he said was likable and had not come across as self-important in his testimony.

The note referencing Mormons began with a statement written by the courtroom deputy that was responded to by the judge during the testimony of a Mormon witness. Judge McDonald told the Committee that his daughter is a Mormon, that the note went on to reference that fact, and that he meant no insult to any of the identified groups. The "mafia" reference was a note by the judge to himself, conveying that the trial lawyer should not have permitted his clients to appear in court dressed in a stereotypical manner. The notes referencing attorneys Powell and Rice were personal comments about their appearance and performance. In addition, there were a number of notes written in court by the judge commenting on the appearance or performance of certain other attorneys and witnesses, as well as several notes exchanged with his courtroom deputy that were aptly characterized in the press as constituting "offensive banter."

All interviewees - judges, court personnel, and public and private attorneys who appeared repeatedly before Judge McDonald, including several Hispanic attorneys - told the Committee that they never witnessed any racial, religious, or ethnic bias of the judge, either in or outside of the courtroom. One judge noted Judge McDonald's efforts to include additional questions about bias on the court's jury questionnaire, in order to ensure impartiality of juries, and two judges noted Judge McDonald's support for increased hiring of minorities and women by the probation department.

III.

Disciplinary action is appropriate when a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c). Canon 2 of the Code of Conduct for United States Judges provides guidance by stating: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." Subsection A of Canon 2 explains that: "A judge should . . . act at all times in a

manner that promotes public confidence in the integrity and impartiality." Canon 3A(3) of the Code further provides that: "A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control"

It must be reiterated that the evidence indicates and the Committee specifically finds that Judge McDonald is not and was not biased against any ethnic, racial, or religious group. Nonetheless, the Committee concludes that Judge McDonald on occasion violated the statutory standard of conduct by his practice, and by his condoning the practice among his courtroom staff, of writing and exchanging in open court, notes that could reasonably be interpreted as reflecting bias. Regardless of their intent as to meaning or audience, they certainly created an appearance of impropriety, undermined the public's confidence in an impartial judiciary, and impugned the dignity and seriousness of the ongoing court proceedings. For these reasons, the Committee concludes that more than a private reprimand is warranted.

The Committee therefore recommends that the Judicial Council issue a public reprimand to Judge McDonald for engaging in conduct in open court that both created an appearance of impropriety and violated Canons 2A and 3A(3).

Respectfully submitted,

Thomas G. Nelson, Circuit Judge, Chair
Proctor Hug Jr., Chief Circuit Judge
Mary M. Schroeder, Circuit Judge
Terry J. Hatter, Chief District Judge (C.D. Cal.)
Michael R. Hogan, Chief District Judge (D. Ore.)

Special Committee

JUDICIAL COUNCIL
FOR THE NINTH CIRCUIT

FILED

AUG - 7 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re Charge of)	No. 97-80629
)	ORDER AND
Judicial Misconduct)	MEMORANDUM
)	
_____)	

Before: HUG, Chief Judge, SCHROEDER, THOMPSON, NELSON, and SILVERMAN,* Circuit Judges; LODGE and HOGAN, Chief District Judges; and KEEP and EZRA, District Judges.

On November 25, 1997, a complaint of judicial misconduct was identified by the Chief Judge against District Judge James Ware. Administrative consideration of such complaints is governed by the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules), issued pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. § 372(c).

Pursuant to 28 U.S.C. § 372(c)(4)(A) and Rule 4(e), the Chief Judge appointed a special committee to investigate press reports that Judge Ware publicly misrepresented himself as the James Ware whose younger brother, Virgil, was shot and killed in 1963 while both were riding a bicycle in Birmingham, Alabama. This matter comes before the Council upon the filing of the Special Investigative Committee's report.

*Sitting in lieu of Judge Michael Daly Hawkins.

After due consideration of the special committee's report, the Council adopts the findings and recommendations of the committee majority and attaches as a part of this order that report and a dissent. For the reasons stated by the committee majority, the Council reprimands Judge Ware for his conduct, having concluded that such conduct is prejudicial to the effective administration of the business of the courts.

This order shall be made public. 28 U.S.C. § 372(c)(6)(B)(vi); Misconduct Rule 14(f)(1).

Dated this 5th day of August, 1998.

JUDICIAL COUNCIL OF THE NINTH CIRCUIT

Mary M. Schroeder, Circuit Judge

David R. Thompson, Circuit Judge

Thomas G. Nelson, Circuit Judge

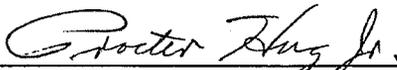
Barry Silverman, Circuit Judge

Michael R. Hogan, Chief District Judge

Edward J. Lodge, Chief District Judge

Judith Keep, District Judge

David A. Ezra, District Judge



Procter Hug, Jr., Chief Judge, Ninth Circuit Courts

JUDICIAL COUNCIL FOR THE NINTH CIRCUIT
In Complaint of Judicial Misconduct
No. 97-80629

FILED

JUN 29 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Report and Recommendation of the Special Investigative Committee

This report is submitted to the Judicial Council of the Ninth Judicial Circuit by the Special Investigative Committee appointed by the Chief Judge to investigate the claim of judicial misconduct filed against District Judge James Ware of the Northern District of California. The Report is made pursuant to the authority of 28 U.S.C. § 372(c) and the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability. This Committee recommends that the Judicial Council publicly censure and reprimand Judge James Ware for engaging in conduct prejudicial to the effective and expeditious administration of the business of the courts. The procedural history of this complaint and the events leading to it are set forth in Part I, below; the findings of this Committee are set forth in Part II and the reasons for the Committee's recommendations are set forth in Part III.

I.

This investigation was initiated when the Chief Judge of the Ninth Circuit entered an order on November 25, 1997, identifying a complaint of judicial misconduct. The order recited that the basis for the complaint against Judge Ware was "his recent admission that he had falsely misrepresented in numerous speeches and interviews that he was the James Ware whose younger brother, Virgil, was shot and killed in 1963 while both were riding a bicycle in Birmingham, Alabama."

DEF02381

That order was prompted by a number of events that were reported widely in the media. Judge Ware had been nominated in 1997 for elevation from the District Court to the Court of Appeals. The Senate Judiciary Committee held its confirmation hearing on October 29, 1997. The nomination was reported in the Birmingham, Alabama press because Judge Ware had been raised in that city. An earlier speech by Judge Ware had been televised nationally in which he described how, while he was pedaling a bicycle in Birmingham, Alabama, in 1963, his brother, Virgil, was shot off the handlebars and killed by white youths. Judge Ware's speech described the event as having occurred on the same day that four black girls had been killed in the bombing of the Sixteenth Street Baptist Church in Birmingham. Also reported in the Birmingham press in 1997 was the reopening of the investigation of the 1963 Sixteenth Street Baptist Church bombing. These reports included an interview with James Ware, a power plant employee living in Birmingham, who was the true brother of the Virgil Ware killed in 1963. During the first week of November 1997, family members of Virgil Ware publicly disputed Judge Ware's claims that he was the brother of the Virgil Ware killed in 1963.

On November 6, 1997, Judge Ware withdrew his nomination in a public statement admitting that he had publicly misrepresented being the James Ware whose brother was killed in 1963.

On December 5, 1997, the Chief Judge filed with the Council an order appointing this Special Investigative Committee, pursuant to 28 U.S.C. § 372(c)(4)(A) and Misconduct Rule 4(e), to investigate the charges in the Order Identifying a Complaint of Judicial Misconduct and to make a report and recommendation to the Judicial Council.

The Committee conducted an investigation which included review of the available print media articles, correspondence received by the Chief Judge and Judge Ware concerning the misrepresentations, and interviews with Judge Ware, Mr. James Ware of Birmingham, and District Judge U. W. Clemon of Birmingham. The Committee also reviewed the transcripts of the Senate Judiciary Committee hearings on both Judge Ware's district court and circuit court nominations, as well as the "Questionnaire for Sensitive Positions" (OPF Form 86) that he submitted in connection with each application.

II.

The most comprehensive information about the facts underlying the subject matter of the complaint is possessed by Judge Ware. In its review of Judge Ware's written statements, its personal questioning of him under oath, and interviews of other affected individuals, the Committee found no significant inconsistencies or disagreements about the origins of Judge Ware's admitted misrepresentations, their nature, the manner in which they came to public light, and what Judge Ware did by way of making amends to the family that suffered the tragic loss of Virgil Ware in 1963.

Judge James Ware was born in Birmingham, Alabama, in 1946. His immediate family included an older sister, a younger sister, and a brother, Webster. While he was growing up, he heard his father discuss the existence of other relatives in the Birmingham area named Ware. At the time that Virgil Ware was killed in 1963, Judge Ware stated that he was struck by the similarity of ages between himself and his brother, Webster, and between Virgil Ware and James Ware. After his mother's death, Judge Ware learned that his father had had a second family in the Birmingham area. Judge Ware stated that he came to believe that he may have been related to the Virgil Ware who was killed in 1963.

Judge Ware left Alabama in the mid 1960s to attend college in California. He remained in California throughout college and law school, graduating from Stanford Law School in 1972. Judge Ware states that he has no recollection of ever representing to anyone during that period that he was the brother of the murdered Virgil Ware, and there are no reports of any public statements by him to that effect. He states, however, that his college roommate went on a visit with him to Alabama in 1968 and, according to Judge Ware, his roommate recalls hearing him say during that visit that he probably had a half brother named Virgil.

After graduating from law school in 1972, Judge Ware went into private practice. The first public speech he recalls referring to the 1963 tragedy was a public forum in 1973. Judge Ware states that in researching civil rights history for that presentation he found a description of Virgil Ware's death. He read the description to the group. He concluded the presentation with what he recalls as an ambiguous statement that "this James Ware stands with you today committed to civil rights." Judge Ware realized that, although his statement was made for dramatic effect, it could have given the erroneous impression that Judge Ware was the James Ware who was on the bicycle in 1963. Although Judge Ware states that he regrets giving that impression, he did not take any steps to correct it. The meeting in 1973 was not publicly reported.

Judge Ware was confirmed to the district court bench in 1990. The Committee has found no evidence that Judge Ware ever told anyone involved with his 1990 nomination and confirmation to the district court about the 1963 tragedy in Birmingham or that anyone involved in that process had any knowledge of any misrepresentations Judge Ware made prior to 1990 about that episode.

In 1994, when Judge Ware was on the district court bench, a reporter related to the organizer of the 1973 forum asked for an interview with Judge Ware. During the course of the interview, she asked Judge Ware to repeat the Virgil Ware story that had first been heard back in 1973. Judge Ware stated to the Special Investigative Committee that he told the story in the first person, misrepresenting himself as the James Ware on the bicycle in 1963 in that interview in order to be consistent with earlier speeches that he had given.

In 1996, Judge Ware attended a conference of federal judges and practitioners in the Napa Valley. He was called upon to appear as a last minute replacement on a panel discussing the Civil Rights movement of the '50s and '60s. As part of that presentation, Judge Ware gave a dramatic first person description of the murder of Virgil Ware as seen through the eyes of his brother, James Ware. The event is vividly remembered by those in attendance and left no doubt with the audience that Judge Ware was describing himself as the James Ware on the bicycle. After that time, Judge Ware was asked to repeat the story, and he did so. Judge Ware stated to the Committee that he used the story to convey his strong feelings about the struggle of the Civil Rights Movement and that he was aware at all times that he was misrepresenting his relationship to the events in Birmingham.

Judge Ware was nominated by President Clinton to the Ninth Circuit Court of Appeals in 1997. In filling out the "Questionnaire for Sensitive Positions," known as OPM Form 86, which must be completed by all presidential nominees, Exec. Order No. 10450, Judge Ware was asked to list all relatives. He listed "Virgil Lamar Ware" as his only half brother. Judge Ware stated to the Committee that he listed Virgil because he had been advised by a member of the White House staff to be over inclusive in filling out the questionnaire. Judge Ware stated that he was now aware that he listed Virgil Ware in an effort to be

consistent with the way he had presented himself publicly, but that at the time he believed that he may well have been related to a Virgil Ware in Birmingham. There is no evidence that Judge Ware ever repeated the Virgil Ware story or asserted any relationship to Virgil Ware during interviews for the Ninth Circuit position. The subject did not come up at his confirmation hearing in October 1997.

By late August 1997, District Judge U. W. Clemon of the Northern District of Alabama had learned that Judge Ware had been nominated for the Ninth Circuit through a newspaper article in the *Birmingham World*. Judge Clemon also had knowledge of Judge Ware's version of the 1963 events from viewing a C-SPAN telecast of one of Judge Ware's speeches. Judge Clemon had also recently seen an article in a different newspaper, the *Birmingham News*, commemorating the events of 1963, including the murder of Virgil Ware. The article included a photograph of Virgil's brother, James Ware of Birmingham, who had been on the bicycle.

Realizing that Judge Ware had made serious misrepresentations and was now being considered for a higher judicial post, Judge Clemon communicated his concerns to Chief Judge Thelton Henderson of the Northern District of California. He also endeavored to contact Judge Ware, who was on vacation.

Unfortunately, the newspaper article in the *Birmingham World* describing Judge Ware's nomination had erroneously included a photograph of someone other than Judge Ware, and Judge Ware had seen that article. Judge Ware did not know, however, in August and September of 1997, about the article and photograph of Mr. James Ware in the *Birmingham News*, describing Mr. Ware's role in the 1963 tragedy.

In early September when Judge Clemon first reached Judge Ware to convey his concerns that Judge Ware had misrepresented his identity, Judge Clemon referred to a recent newspaper article. Judge Ware assumed that Judge Clemon was referring to the article in the *Birmingham World* about his nomination that contained the wrong picture. When Judge Ware told Judge Clemon that he must be referring to the article with the "wrong picture," Judge Clemon erroneously assumed that Judge Ware was referring to the *Birmingham News* article concerning the Birmingham James Ware and was, in effect, denying that he had made any misrepresentations concerning his own identity. Judge Clemon then contacted Chief Judge Henderson to express his concerns regarding what he viewed as Judge Ware's apparent denial of misconduct. When Chief Judge Henderson spoke with Judge Ware, he received exactly the same response about the "wrong picture" as Judge Clemon had received. Judge Henderson also mistakenly believed that Judge Ware was denying any misconduct.

Judge Clemon reported the entire matter to Mr. James Ware and his family in Birmingham. As a result of miscommunications, Judge Clemon and the Birmingham Ware family mistakenly believed that Judge Ware had been confronted with Judge Clemon's knowledge of the misrepresentations and that Judge Ware had refused to admit to any wrongdoing.

Faced with the apparent denial by Judge Ware, Judge Clemon discussed the situation in a routine court meeting in Birmingham on October 30. This prompted one of the district judges to communicate directly with Senator Sessions, a member of the Senate Judiciary Committee. At this point, Judge Ware was confronted directly and for the first time with the fact that his misrepresentations were now a matter of public knowledge. On

November 6, 1997, Judge Ware publicly admitted his misrepresentations and withdrew his nomination for the Court of Appeals.

On November 7, 1997, Judge Ware made plane reservations to go to Birmingham to apologize to the Ware family. Judge Ware also asked to see Judge Clemon to express his regrets and explain the misunderstandings concerning Judge Ware's silence in the time that elapsed since Judge Clemon communicated with Judge Henderson in August. Judge Ware arrived in Birmingham on November 9, accompanied by his son, where he met with Judge Clemon and James Ware and his brother Melvin Ware. Judge Ware and Judge Clemon discussed the chronology of the newspaper article confusion, reaching a mutual understanding of the facts surrounding the miscommunications. Judge Ware apologized to Judge Clemon for the inconvenience and difficulties he had caused. More important, Judge Ware apologized to the Ware brothers in Birmingham, who graciously accepted the apologies. James Ware has told the Committee that he believed Judge Ware's apologies were sincere, and that he believed Judge Ware had not deliberately set out from the beginning to misrepresent his identity. Nevertheless, the Ware family remains understandably saddened that Judge Ware did not put an early end to the misunderstandings he had fostered.

III.

Disciplinary action against a judge is called for when a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c). Canon 2 of the Code of Conduct for United States Judges provides guidance by stating: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." Subsection A of Canon 2 explains that: "A judge should

respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Committee concludes that Judge Ware has violated the statutory standard by knowingly misrepresenting his relationship to the tragic events in Birmingham. The misrepresentations reflect negatively not only on Judge Ware's integrity, but quite possibly have had a regrettable effect on public confidence in the Judiciary. The Committee is also sensitive to the acute pain inflicted on the Birmingham Ware family by Judge Ware's public exploitation of their very private grief.

Because of the very public nature of the original tragedy and the public nature of the misrepresentations, as well as their discovery, it is important that discipline of Judge Ware be public and a part of the historical record. For these reasons, the Committee concludes that more than a private reprimand is called for.

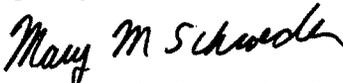
We find no indication, however, that the conduct here under discussion, all of which occurred off the bench, had any effect on the judge's otherwise highly regarded abilities as a judge. The Committee therefore does not recommend reducing or withdrawing the judge's judicial caseload.

There remains the question of whether there is in the record sufficient indication of impeachable conduct to warrant the Council's forwarding the matter to the Judicial Conference of the United States pursuant to 28 U.S.C. § 372(c)(7)(A). The making of false statements, even in public, is not criminal activity. Judge Ware did not reap material reward from his misstatements. A criminal statute of the United States does, however, proscribe the making of a material false statement to a government agency, when the statement is made knowingly and wilfully. 18 U.S.C. § 1001. Judge Ware made no statement to any

government agency that he was the James Ware who rode the bicycle in 1963. Judge Ware did state under oath in his 1997 OPM Form 86 that he had a half brother named Virgil Ware. Judge Ware has credibly stated to the Committee that at various times in his life he came to believe that he might have had a half brother named Virgil and that he knew that his father had family members with whom he was unacquainted. Although Judge Ware now acknowledges that the belief had little if any corroboration, it is not clear that Judge Ware knowingly and wilfully made a material false statement at the time he completed the OPM Form 86.

For the foregoing reasons, the Committee recommends that the Judicial Council issue a public reprimand to Judge Ware for falsely misrepresenting in numerous speeches and interviews that he was the James Ware on the bicycle with a younger brother, Virgil, who was shot and killed in Birmingham, Alabama, in 1963.

Respectfully submitted,



Mary M. Schroeder, Circuit Judge, Chair

Procter Hug, Jr., Chief Circuit Judge
Alfred T. Goodwin, Senior Circuit Judge
Terry Hatter, Chief District Court Judge,
(C.D. Cal.)
John Coughenour, Chief District Court Judge,
(W.D. Wash.)
Special Investigative Committee

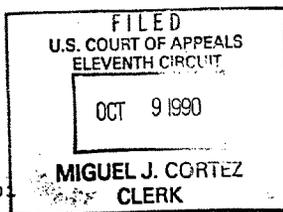
Dissent of Judge Coughenour:

I must respectfully dissent from the recommendation of my fellow members of the Special Investigative Committee that Judge Ware be publicly censured and reprimanded.

While I concur with the factual recitation of the events which are the subject of this investigation, I cannot, for several reasons, agree that censure or reprimand is necessary. First, the family of Virgil Ware has, with profound grace, accepted the apology of Judge Ware, and stated that they believe he has suffered enough. Second, Judge Ware has publicly and forthrightly acknowledged his error, and apologized to the family of Virgil Ware. Third, Judge Ware made the statements about the Virgil Ware tragedy as part of an effort to heighten the public's awareness of the evil of racial hatred, and not for any personal gain or as part of any judicial function. Last, Judge Ware has already suffered serious public embarrassment over this episode and, in my view, no purpose would be served by adding to this burden.

For these reasons, I dissent from the conclusion of the majority.

DEF02391



BEFORE THE JUDICIAL COUNCIL
OF THE ELEVENTH CIRCUIT
Miscellaneous Docket No. 88-2101

IN THE MATTER OF A COMPLAINT FILED BY
GEORGIA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AND NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Judicial Complaint Pursuant to 28 U.S.C. § 372(c)

ORDER

This order is issued by the Judicial Council of the Eleventh Judicial Circuit in the exercise of its authority under 28 U.S.C. § 372(c)(6)(B)(vi) to censure or reprimand a judge or magistrate by means of public announcement for engaging in conduct prejudicial to the effective and expeditious administration of the business of the courts. In this case, the Judicial Council publicly censures and reprimands the Honorable John W. Dunsmore, a United States Magistrate of the Southern District of Georgia. The conduct giving rise to this action by the Judicial Council is set forth in part I below; the reasons therefor are set forth in part II.

I.

The conduct giving rise to the Judicial Council's action in this matter took place on March 31, 1988. On that date,

DEF02392

PORT Exhibit 1111 (I)

Magistrate Dunsmore was in Savannah, Georgia, to hear the government's application for an injunction in United States v. Blackshear. In that case, Tony Blackshear had been charged with six violations of federal law for trafficking cocaine, and the government was seeking the forfeiture of assets he had allegedly acquired with money derived from the criminal activity. On March 4, 1988, following Blackshear's arraignment, the district court had entered a temporary restraining order to prevent Blackshear from disposing of those assets and had directed Magistrate G. R. Smith to hear the government's application to convert the temporary restraining order into a preliminary injunction. Magistrate Smith noticed a hearing on the government's application for March 18, but, on March 17, continued the hearing to March 31, at 10:00 a.m., because Blackshear's attorney, Chevene B. King, Jr., was unavailable. Mr. King's father had passed away earlier in the week, and Mr. King was in the process of arranging the funeral and attending to his family's needs. On March 29, Magistrate Smith, concluding that it would be inappropriate for him to handle the government's application for a preliminary injunction (because he had been in the United States Attorney's office while the Blackshear case was being processed for indictment), asked Magistrate Dunsmore, who was assigned to the Augusta Division of the Southern District of Georgia, to take the March 31 hearing. Magistrate Dunsmore agreed to do so, and on March 30 drove to Savannah for that purpose.

On March 29, after he agreed to handle the March 31 hearing, Magistrate Dunsmore learned that Blackshear's attorney, Chevene B. King, Jr., was engaged in the trial of a criminal case in Brunswick, Georgia, in the state superior court, and that there was a good chance that the trial would continue into March 31 and thus prevent Mr. King from appearing in Savannah for the injunction hearing that day. Mr. King said he would try to have his associate attend the hearing in Savannah and Magistrate Dunsmore understood that either Mr. King or his associate would cover the hearing in Savannah.

On March 31, a few minutes before the injunction hearing was to begin, the district court clerk's office in Savannah informed Magistrate Dunsmore that Mr. King was still in trial in Brunswick and that the lawyer (an associate in his law firm) he had hoped would be available for the hearing would not be attending the hearing because he was tied up in state court--in a criminal case--in Albany, Georgia. Upon hearing this, Magistrate Dunsmore called the superior court judge presiding over the criminal trial in Brunswick and confirmed that the trial was still in progress and that Mr. King would not be able to get to Savannah in time for the injunction hearing. The judge asked Magistrate Dunsmore if he would like to speak to Mr. King, who was standing nearby, and Magistrate Dunsmore stated that he would not. Magistrate Dunsmore then told the judge that he would be sending two deputy U. S. Marshals to Brunswick with instructions to bring Mr. King to Savannah as soon as the trial was over and to relay this

information to him. The judge relayed this message to Mr. King, and the trial resumed--with counsel's closing arguments to the jury.

After he made this telephone call, Magistrate Dunsmore ordered the U. S. Marshals Service in Savannah to go to Brunswick and bring Mr. King to Savannah when the trial there was over. The Marshals Service told Magistrate Dunsmore that, if it was to carry out his order, it would have to take Mr. King into custody and secure him with handcuffs and chains as mandated by the applicable U. S. Marshals Service procedures. Magistrate Dunsmore instructed the Marshals Service to proceed in that fashion--if that is what their procedures required--but to be discreet in the manner in which it handled Mr. King. Thereafter, two deputy Marshals went to Brunswick--to the courtroom where the trial Mr. King was engaged in was in progress. After the jury returned its verdict, the deputies took Mr. King into custody, placed him in handcuffs and chains, and drove him to Savannah--to Magistrate Dunsmore's courtroom. There, pursuant to Magistrate Dunsmore's instructions, they removed the handcuffs and chains; thereafter, Magistrate Dunsmore entered the courtroom, assumed the bench, and began the hearing on the government's application for a preliminary injunction in the Blackshear case. At this point, Mr. King interrupted the magistrate, stating that, in view of what had transpired, he was in no condition to give his client the competent professional representation he was due. Magistrate Dunsmore, responding, announced that the hearing on the

government's application would continue and that the matter of Mr. King's arrest would be taken up later. Mr. King then asked for a recess, so that he could obtain counsel for his client, and at 2:40 p.m. Magistrate Dunsmore declared a recess. During the recess, Mr. King contacted Fletcher Farrington, a Savannah lawyer, and when Magistrate Dunsmore resumed the injunction hearing, at 3:30 p.m., Mr. Farrington was present, with Mr. King. Mr. Farrington moved Magistrate Dunsmore to recuse himself, contending that his conduct toward Mr. King that day rendered him disqualified to preside over the Blackshear matter. Magistrate Dunsmore denied the motion, continued the hearing, and, when it was finished, granted the government's application for a preliminary injunction. Magistrate Dunsmore then declared a recess, stating that he would take up the matter concerning Mr. King that evening.

At 6:25 p.m., the court reconvened, so that Magistrate Dunsmore could decide what to do about Mr. King. Present, in addition to the magistrate, were Mr. King, his attorney Fletcher Farrington, and William H. McAbee, an assistant United States Attorney. Magistrate Dunsmore opened the proceeding with a brief statement for the record, and, then, asked Mr. King "to explain to [him] what [had] happened." He told Mr. King that he lacked the authority to hold him in contempt of court, but that he "could certify facts to [United States District] Judge Edenfield and ask that he hold a hearing to show cause as to whether [King] should be found in contempt of Court." He said that he intended

to make such certification "unless [King gave him] some facts . . . to indicate that [he] should not make that certification to Judge Edenfield." Mr. Farrington responded for Mr. King. He suggested that Magistrate Dunsmore had assumed the role of the prosecutor in the matter and should not, in addition, assume the role of the judge, take evidence, and decide the case. A colloquy with counsel ensued, and Magistrate Dunsmore decided to certify the matter to Judge Edenfield. On April 4, he did so. In his certification, Magistrate Dunsmore stated that he "fully expected that Mr. King would provide an associate [counsel] or himself appear" at the March 31 hearing"; Magistrate Dunsmore then found that, when Mr. King realized that he could not attend the hearing, his failure "to provide . . . associate counsel for the . . . hearing" amounted to "an act of contempt for the orders of this Court." Judge Edenfield subsequently held a bench trial--to determine whether Mr. King should be convicted of criminal contempt for his failure to have an associate at the March 31 hearing--and, after considering the evidence and argument of counsel, found Mr. King not guilty.

II.

The Judicial Council concludes that a public censure and reprimand is necessary in this case for the following reasons.

First, Magistrate Dunsmore had no authority to order the U. S. Marshals Service to arrest Mr. King on March 31, 1988. Magistrate Dunsmore did have the authority to issue a warrant for

Mr. King's arrest if presented with a written complaint, made upon oath before him, charging Mr. King with a federal offense, see Fed. R. Crim. P. 3, but no one had presented him with such a complaint. If Magistrate Dunsmore believed that Mr. King had acted contumaciously and should be sanctioned for contempt of court, all that he could do was to "certify the facts [constituting the contempt] to a judge of the district court . . . and serve or cause to be served [upon King] an order requiring [him] to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified," 28 U.S.C. § 636(e).

Second, during his March 31 conversation with the superior court judge who was presiding over the trial in Brunswick, Magistrate Dunsmore learned that the case would go to the jury that morning after the prosecutor and Mr. King delivered their closing arguments to the jury. Magistrate Dunsmore also knew that, prior to delivering his closing argument to the jury, Mr. King learned that two deputy U. S. Marshals would be taking him into custody immediately after the jury returned its verdict.

Third, in making Mr. King proceed with the injunction hearing after the deputy U. S. Marshals had brought him--handcuffed and chained--to the courthouse in Savannah, Magistrate Dunsmore also disregarded the rights of Mr. King's client, Tony Blackshear. Under the circumstances, Mr. King was in no condition to render his client the effective assistance of

counsel due him under the sixth amendment to the United States Constitution--a right Magistrate Dunsmore had a duty to protect.

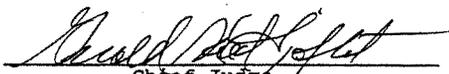
Fourth, in asking Mr. King, when court reconvened at 6:25 p.m. on March 31, to explain what had happened--in effect, to show cause why he should not be cited for criminal contempt--Magistrate Dunsmore exceeded his authority. He knew that, under 28 U.S.C. § 636(e), all that he could do--if he thought that Mr. King's conduct in not providing associate counsel to cover the injunction hearing that morning constituted criminal contempt--was to certify the facts constituting the contempt to the district court.

In summary, the Judicial Council concludes that Magistrate Dunsmore in dealing with Mr. King's inability to appear, or to obtain counsel to appear for him, at the March 31 injunction hearing exhibited a degree of insensitivity for the rights of a member of the Bar and his clients, that cannot be tolerated. There was no reason whatever for taking Mr. King into custody. If it was not clear to Magistrate Dunsmore that he was taking some drastic action against Mr. King in the matter, it should have become clear when the Marshals Service informed Magistrate Dunsmore that it would have to place Mr. King in handcuffs and chains if it carried out his directive to seize Mr. King and bring him to Savannah. When he instructed the Marshals Service to proceed, Magistrate Dunsmore in effect, if not in fact, directed the Marshals Service to handcuff and chain Mr. King and to subject him to the personal and public humiliation he

eventually suffered. Such treatment of a member of the Bar by a magistrate cannot be accepted if the bench and bar of the federal courts are to adequately administer justice to the citizens of this nation.

It is, accordingly, ordered that the Chief Judge of the United States District Court for the Southern District of Georgia cause this order to be filed with the clerk of that court in Augusta, Georgia, and that the clerk make the same available to the public.

FOR THE JUDICIAL COUNCIL



Chief Judge
of the Eleventh Judicial Circuit

Dated: October 8, 1990

Service: **Get by LEXSEE®**
Citation: **644 F.2d 351**

644 F.2d 351, *; 1981 U.S. App. LEXIS 14089, **

Louis HAMILTON et al., Plaintiffs-Appellees, v. Ernest N. MORIAL, Mayor et al., Defendants-Appellants; Louis HAMILTON et al., Plaintiffs-Appellees, v. Ernest N. MORIAL, Mayor of the City of New Orleans et al., Defendants-Appellees; Oliver HOWARD et al., Plaintiffs-Appellees, v. C. Paul PHELPS et al., Defendants-Appellants.

Nos. 80-3392, 81-3111, 81-3146

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT. UNIT A

644 F.2d 351; 1981 U.S. App. LEXIS 14089

April 21, 1981

PRIOR HISTORY: [**1] On Petition for Writ of Mandamus.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant Louisiana Department of Corrections sought a writ of supervisory mandamus in an effort to stay further proceedings in federal district courts within the State of Louisiana, for cases dealing with interrelated issues of unconstitutional overcrowding in the state penitentiary, parish prisons, and parish and city jails.

OVERVIEW: Throughout the state of Louisiana, numerous lawsuits were instigated concerning issues related to unconstitutionally overcrowded conditions in the state prisons for the purpose of protecting the constitutional rights of inmates in the state penitentiary, parish prisons, and all jails throughout the state. Appellant Louisiana Department of Corrections sought to consolidate those actions and sought a writ of supervisory mandamus with the purpose of staying further proceedings in federal district courts. A panel of the court granted a stay pending appeal and consolidated the cases. The court granted the writ, finding that appellant had asserted proper grounds for such. The court held that it had jurisdiction to order such a writ as was delegated by Congress. Meeting the requirements of that delegation, the court found that it had an independent basis for exercising its jurisdiction to issue the writ and that the issuance of such writ would aid in its jurisdiction. The court ordered that all such prison overcrowding cases were to be heard in one district court in order to achieve uniformity in the application of justice.

OUTCOME: The court granted a writ of supervisory mandamus on behalf of appellant Louisiana Department of Corrections and stayed further proceedings concerning jail overcrowding when it determined that it had an independent basis for jurisdiction and that the issuance of such writ would aid in jurisdiction. The court assigned all related cases, both current and future, to be heard by a designated district court in order to achieve uniformity in justice.

CORE TERMS: prison, jail, inmate, state penitentiary, overcrowding, transferred, issue writs of mandamus, writ of mandamus, pending appeal, consolidation, interrelated, Penitentiary, supervisory, overcrowded, coordinated, alleviate, entertain, prisoners, issuance, maximum, backup, decree, moot, state prisoners, action pending, constitutional rights, future action, consolidated, assigned, unified

LEXISNEXIS® HEADNOTES

[Civil Procedure > Remedies > Writs > All Writs Act](#)

[Governments > Courts > Creation & Organization](#)

HN1 & See [28 U.S.C.S § 1651](#).

[Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview](#)

[Civil Procedure > Remedies > Writs > All Writs Act](#)

[Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus](#)

HN2 & Under [28 U.S.C.S § 1651](#), the court of appeals must have an independent basis of jurisdiction for the issuance of a writ of mandamus and that the writ must issue in aid of that jurisdiction. [More Like This Headnote](#) |

Shepardize: Restrict By Headnote

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review 
 HN3 See 28 U.S.C.S. § 2106.

COUNSEL: Galen S. Brown, Deputy City Atty., New Orleans, La., for Morial et al.

Luke Fontana, New Orleans, La., Mark Moreau, New Orleans, Legal Assistance Corp., New Orleans, La., for Hamilton et al.

J. Marvin Montgomery, Asst. Atty. Gen., La. Dept. of Justice, Baton Rouge, La., for Phelps et al.

R. James Kellogg, Robert M. Hearin, Jr., New Orleans, La., for Howard et al.

Richard F. Knight, R. Bradley Lewis, Bogalusa, La., for Robert Lyons.

JUDGES: Before CHARLES CLARK and RANDALL, Circuit Judges, and SHARP *, District Judge.

* District Judge for the Northern District of Indiana, sitting by designation.

OPINION BY: PER CURIAM:

OPINION

[*352] In Cause No. 81-3146, C. Paul Phelps, Secretary of the Louisiana Department of Corrections, has moved this court to issue a writ of supervisory mandamus to stay further proceedings in federal district courts within the State of Louisiana dealing with interrelated issues of unconstitutional overcrowding in the state penitentiary, parish prisons, and parish and city jails. A panel of this court previously granted the stay pending appeal and ordered consolidation of the above-styled and numbered [**2] related causes now pending in this court. The court has heard argument of counsel in the consolidated actions.

This court has previously dealt with conditions in Louisiana prisons. In *Williams v. Edwards*, 547 F.2d 1206, 1219 (5th Cir. 1977), this court approved the judgment of the United States District Court for the Middle District of Louisiana which imposed a limit on the prison population of the Louisiana State Penitentiary at Angola, based upon available space of 80 square feet per inmate, but remanded the action for further consideration of a maximum inmate population for the institution in light of a more complete record which was to be developed. We cautioned that these remand procedures should be accomplished as soon as possible to alleviate the backup of prisoners in parish jails and in other forwarding institutions. Our opinion further specifically directed the district judge's attention to overcrowded conditions in the Orleans Parish and Washington Parish prisons, then and now the subject of pending appeals. See note 9, 547 F.2d at 1219. A maximum limit on the number of inmates was ultimately placed on the Angola Penitentiary. In *Hamilton v. Landrieu*, Docket No. 77-2087, [**3] we received reports from the United States District Court for the Middle District of Louisiana, and the United States District Court for the Eastern District of Louisiana regarding the interrelation of then pending state penitentiary and parish prison and jail [*353] litigation. The report of the Eastern District, dated July 11, 1977, concluded with the following paragraph:

Finally, with the plethora of similar prison cases that are clogging the dockets of the Eastern, Middle and Western Districts of Louisiana, we would urge that the Appellate Court, if at all possible, designate one Court in the State of Louisiana to handle all prison cases, thus eliminating possible conflicts or interpretations as conflicts between the various courts.

The report of the Middle District of Louisiana, dated eight days later, disagreed. No consolidation was effected. The petitioner in this case represents that at the present time 25 Louisiana parish jails either are subject to pending suits concerning or are under court orders imposing limits upon jail populations.

We conclude that litigation in the United States District Courts in the State of Louisiana seeking to protect the constitutional [**4] rights of inmates in the state penitentiary, parish prisons and all jails throughout the state due to overcrowded conditions must be considered as a unified whole and not in piecemeal fashion. If coordinated consideration and a unified judicial overview at the trial level is not provided, adequate constitutional protection cannot be accorded either by district courts through individual adjudications or by this court through episodic review of separate cases. The backup of state prisoners in local prisons and jails caused by limits imposed to protect against overcrowding at the state penitentiary may deprive local prisoners of constitutional rights in those prisons and jails. The expense of housing state prisoners in local institutions and the financial burden of providing for their boarding and care impose improper capital costs and operating expenses on local governmental institutions. The alternative of releasing or not imprisoning dangerous criminals is equally unacceptable.

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To this time, the Courts have limited relief from unconstitutional overcrowding to prohibitory injunctive measures. The Louisiana legislature, which is now in session, is the political body which can and **[**5]** should deal affirmatively to effect critically needed changes in the entire system. The legislature is in the best position to determine whether and where to provide additional inmate housing or whether and how to establish alternatives to imprisonment for non-violent offenders or both. Working with a single Court will enable the executives charged with administration of these institutions to best advise lawmakers where constitutional minimums will require changes. The magnitude and seriousness of the problem bring with them a challenge to Louisiana to lead the nation in finding the best answers. Consolidating all court actions allows the issues that will not go away to be squarely faced without harassment.

Congress has given this court authority to issue writs of mandamus: **HN2** "All courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." **28 U.S.C. § 1651**.

This court has jurisdiction to entertain the petition for supervisory writ of mandamus in these cases because of the necessity to achieve proper judicial administration in the federal system. **[**6]** LaBuy v. Howes Leather Co., 352 U.S. 249, 259, 77 S. Ct. 309, 315, 1 L. Ed. 2d 290 (1957). See also United States v. Denson, 603 F.2d 1143 (5th Cir. en banc 1979); Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977); Wright, Miller, Cooper & Gressman, Federal Practice and Procedure, Jurisdiction § 3934; 9 Moore's Federal Practice P 110.28. This situation is one that involves extraordinary circumstances which permit extraordinary action. Koehring Co. v. Hyde Const. Co., 382 U.S. 362, 86 S. Ct. 522, 15 L. Ed. 2d 416 (1966). "A part of the extraordinary nature of what is before us is the compelling need to settle a new issue so that it can become only an ordinary issue." United States v. Hughes, 413 F.2d 1244, 1249 (5th Cir. 1968), vacated as moot, 397 U.S. 93, 90 S. Ct. 817, 25 L. Ed. 2d 77 (1970).

HN2 **[**354]** Under **28 U.S.C. § 1651**, the court of appeals must have an independent basis of jurisdiction for the issuance of a writ of mandamus and that the "writ must issue "in aid of that jurisdiction." Wright, Miller, Cooper & Gressman, Federal Practice and Procedure, Jurisdiction § 3932 at 188. The first requirement is met here. While the plaintiffs argue that the appeal in No. 81-3146 **[**7]** is moot and that the order appealed from is non-appealable, there is no dispute that we have independent jurisdiction in the other causes. Further, we will be able to entertain appeals in Howard v. Phelps at some future stage of the proceedings. Thus, we have power "in proper circumstances ... to issue writs of mandamus reaching" that case. LaBuy v. Howes Leather Co., 352 U.S. 249, 255, 77 S. Ct. 309, 313, 1 L. Ed. 2d 290, 296 (1957). That the issuance of the writ will aid our jurisdiction is certain. That it will enable the district court to make and us to enforce a just and consistent judgment in these interrelated cases is equally certain. No other adequate means is available to attain the relief desired. Allied Chemical Corp. v. Dalfton, Inc., 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980). The coordinated procedures we must require here cannot be achieved through review in the course of subsequent appeals. In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980).

To achieve justice under the circumstances, our order must extend to every court under our supervision wherein the problem exists or may arise. We direct any United States district **[**8]** court in the Fifth Judicial Circuit which now has an action pending before it or in which a future action may be filed seeking to alleviate crowded conditions in the Louisiana State Penitentiary, or any prison or jail operated or maintained by any political subdivision of the State of Louisiana which is or may be affected directly or indirectly by an order of a United States district court limiting inmate population, to transfer such pending or future action to the United States District Court for the Middle District of Louisiana. The Chief Judge of that court is directed to cause all such actions pending in or transferred to his district to be assigned to a single judge for consideration and disposition. The judge to whom such actions are assigned may determine whether all or any part of such actions shall be consolidated for hearing or disposition and whether any portions of such actions not dealing with or affected by limitations on inmate population should be transferred back to the district from which it was transferred.

FOOTNOTES

1 **HN3** "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." **28 U.S.C. § 2106**.

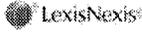
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The Parish of Jefferson; Government Matters

Part III
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Criminal Justice System

September 1994

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Scott C. Griffith
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Special thanks are due to the following appointed officials and employees for their valuable responses to repeated requests for information: Dr. John V. Baiamonte, Jr., Executive Director of the Jefferson Parish Criminal Justice Coordinating Council; Richard M. Tompson, Director of the Twenty-fourth Judicial District Indigent Defender Board; Robert Pitre, Executive Assistant to the District Attorney; and Stephanie Rondenell, Director of Information Services for the Jefferson Parish Clerk of Court's Office.

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Judith Curry, Supervisor, Jefferson Parish Regional Office of Probation and Parole	John Nobles, Clerk to Judge Calvin Hotard, Second Parish Court of Jefferson
Rodney De la Gardelle, Judicial Administrator, Second Parish Court of Jefferson	Deputy Chief Gary Schwabe, Warden, Jefferson Parish Correctional Center
Dr. Eric Gorham, Chair, Juvenile Services Advisory Board	Beatrice Trancini, Judicial Administrator, First Parish Court of Jefferson
Chief Glen Jambon, Assistant Warden, Jefferson Parish Correctional Center	Dr. Leslie Tremaine, Executive Director, Jefferson Parish Human Services Authority
Luceia LeDoux, Director, Pretrial Diversion, Jefferson Parish District Attorney's Office	Willard Tucker, Chief Administrator, Jefferson Parish Regional Office of Probation and Parole
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Executive Summary

The Criminal Justice System in Jefferson Parish

The Jefferson Parish Criminal Justice System, like its counterparts across the nation, is less a "system" than an accumulation of parts, with sometime overlapping and sometime barely intersecting jurisdictions. For purposes of this BGR report, the parish criminal justice system was defined to include the following agencies:

Jefferson Parish Sheriff and Jefferson Parish Correctional Center

Jefferson Parish District Attorney

Twenty-fourth Judicial District Indigent Defender Board

Jefferson Parish Clerk of Court

Twenty-fourth Judicial District Court

First and Second Parish Court

Jefferson Parish Regional Office, Division of Probation and Parole,
Louisiana Department of Public Safety and Corrections

Jefferson Parish Juvenile Court

Jefferson Parish Department of Juvenile Services and Rivarde Detention Center

Jefferson Parish Criminal Justice Coordinating Council (CJCC)

These agencies, together with the municipal law enforcement agencies, employed approximately 2,500 people and spent approximately \$94 million in 1993, as shown in Exhibits 1 and 2. These figures do not reflect the additional sales tax approved for the sheriff's office in 1993, estimated at \$10 million per year, or the hiring of 82 new deputies anticipated for 1994. Nor do they include the parish Human Services Authority's intensive probation program, which began in May 1994, with a budget of \$100,000 and a staff of four.

The Study

This BGR study is an overview of the system as a whole and the individual agencies which make up the system. Within this system perspective, BGR's scope of review was designed to focus on two separate but related questions: Is additional parish jail space needed, or is the apparent jail overcrowding a result of other parts of the criminal justice system's not working properly?

The rationale for the focus on jail overcrowding was based on the recognition that this is a major public policy matter resulting in the citizens of Jefferson Parish's being asked to decide, in recent years, on two proposals for financing and constructing jail space. In addition, it is quite possible that voters will be asked to consider another proposal to approve the financing of additional jail space in an election later this year or early 1995.

Jefferson Parish Criminal Justice System—1

DEF02409

The Findings

The study finds:

- a jail at its legal capacity and beyond its functional design capacity
- the lack of a fully-functioning system to accumulate information about the operations of the criminal justice system that is both complete and accessible to all who need it (a problem shared with the rest of the state)
- a lack of clear and undivided responsibility for constructing or otherwise securing and funding the operation of the facilities needed by the various elements of the criminal justice system (such as space for detaining pretrial defendants, courtrooms, and space for housing sentenced offenders), due to the legal framework provided by state law
- a lack of authority or ability to coordinate policy-making, decision-making, and funding for "system" needs, due to the legal and financial structure provided by state law
- a system in which resources of personnel, technology, and facilities are unevenly distributed and in a number of cases inadequate to the task
- a district court system which (1) lacks a uniform management approach and performance standards that are consistent from division to division and (2) has made inadequate use of modern technology, both in its own management and in reporting to its overseers and the public
- no clearly-stated community policy on what classifications of suspects and sentenced offenders citizens want and are willing to pay to have held behind bars, and no mechanism for devising such a policy that would be binding on all the decision-makers and operators in the system

The Conclusions

Based on the study findings, BGR concludes that the Jefferson Parish criminal justice system is not working as a "system" or with optimum effectiveness. In answer to the orienting questions of the study, BGR concludes that additional jail space is needed but is far from all that is needed. On the basis of the limited analysis of jail data currently readily available to the public, BGR is unable to make a specific recommendation on the number of jail beds needed. Additional planning and analysis are required in order to make that determination.

BGR is convinced that additional jail space alone will not solve the problems of the Jefferson Parish criminal justice system. Experience across the nation as well as in Jefferson Parish indicates that if jails are built, they will be filled; and if other shortcomings of the criminal justice system are not addressed *directly*, those shortcomings will remain. What is needed in Jefferson Parish is system-wide improvement incorporating *all* of the recommendations outlined below.

The Recommendations

BGR makes the following recommendations:

- All the elements of the Jefferson Parish criminal justice system should actively cooperate with the Clerk of Court in continued development of an integrated information system that can be used and is used by all parts of the criminal justice system for planning, budgeting, management, and reporting purposes.
- Comprehensive, system-wide improvements should be aggressively pursued, including:
 - pursuit, by the judiciary, of judicial system management improvements, including development and refinement of a case tracking system, provision of caseload information to judges and other interested parties, development of baseline data and formulation and adoption of case processing time standards, and adoption of an effective continuance policy
 - formulation, under the auspices of the CJCC as planning and coordinating entity, of a community policy on the use of acceptable alternatives to traditional incarceration
 - careful consideration, by all parties in the system and under the auspices of the CJCC, of alternative methods for addressing jail overcrowding (including the options from the national perspective review that have not been implemented, as shown in Exhibit 3 of the body of the report)
- The Criminal Justice Coordinating Council, as the planning and coordinating entity for Jefferson Parish, should, on an ongoing basis, state clearly the existing responsibilities and authority for the funding and operations of all the elements of the criminal justice system, so that citizens, as well as officials, can understand who is responsible for what.

Consolidation and clarification of authority in state law may be desirable but is not within the ability of Jefferson Parish alone to accomplish.

- The entity designated to be responsible for jail planning should clearly put forward its case for a specific recommendation of how much additional jail space is needed. Such a case would entail:
 - a detailed analysis of the jail population, such as that described by the National Institute of Corrections and the National Institute of Justice. Partial information on what sorts of inmates are being held and why is currently available. A descriptive analysis of the jail population (including numbers of persons according to length of confinement, status of case, seriousness of charge or crime, criminal history) is not currently available.
 - an analysis of case flow throughout the entire criminal justice system, for the purpose of identifying specific points at which delays and inefficiencies cause unnecessary increases in jail population. Such an analysis would reflect the seriousness and complexity of cases.

Criminal Justice System Employees 1993, Total 2,477

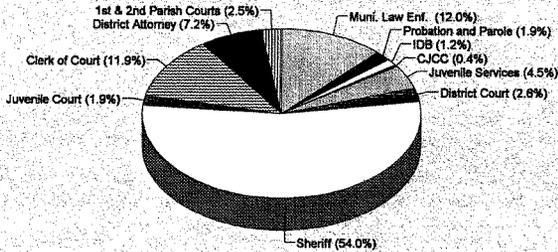


Exhibit 1

Criminal Justice System Expenditures 1993, Total \$93,664,554

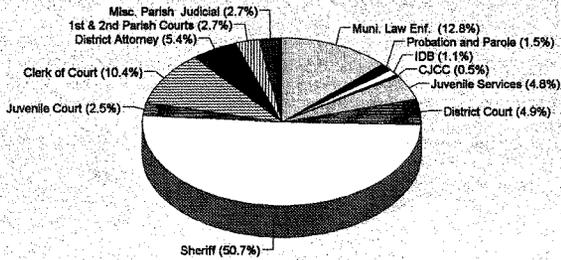


Exhibit 2

Introduction

This Bureau of Governmental Research report is the third in a three-part series on Jefferson Parish government undertaken at the request of, and with major funding by, the Jefferson Business Council.

The first report in the series, issued in July 1993, presented an overview of the general-purpose government of the Parish of Jefferson, the Parish Council and Parish President. The second report in the series, issued in December 1993, presented a financial and operational overview of the Jefferson Parish Sheriff's Office.

This third report focuses on the criminal justice system in Jefferson Parish. The criminal justice system was defined to include the following agencies:

- Jefferson Parish Sheriff and Jefferson Parish Correctional Center
- Jefferson Parish District Attorney
- Twenty-fourth Judicial District Indigent Defender Board
- Jefferson Parish Clerk of Court
- Twenty-fourth Judicial District Court
- First and Second Parish Court
- Jefferson Parish Regional Office, Division of Probation and Parole, Louisiana Department of Public Safety and Corrections
- Jefferson Parish Juvenile Court
- Jefferson Parish Department of Juvenile Services and Rivarde Detention Center
- Jefferson Parish Criminal Justice Coordinating Council (CJCC)

Despite the importance of the parish governing body as funder of portions of the criminal justice system and the importance of the parish president as ultimately responsible for the administration of the Department of Juvenile Services, the Parish Council and President are not discussed separately in this report.

Additionally, although the expenditures of and personnel in the law enforcement agencies of the municipalities in the parish are included in the total of parish criminal justice expenditures and employees, these law enforcement agencies are likewise not discussed separately in this report.

While BGR's study does include a brief overview of the system as a whole and the individual agencies which make up the system, the emphasis of this report is on the issue of the jail overcrowding in Jefferson Parish. More specifically, BGR's scope of review was designed to address two separate but related questions: Is additional parish jail space needed, or is the apparent jail overcrowding a result of other parts of the criminal justice system not working properly?

The rationale for the focus on jail overcrowding was based on several factors. First, this issue is a major public policy matter resulting in the citizens of Jefferson Parish's being asked to decide, in recent years, on two proposals for financing and constructing additional jail space. Secondly, it is quite possible that voters will be asked to consider another proposal to approve the financing of additional jail space in an election later this year or early 1995. Third, the issue of incarceration as a crime-reduction strategy is now being debated nationally, as well as locally, in numerous public forums.

By choosing this particular emphasis, BGR does not mean to suggest that this is the only important issue facing the criminal justice system in Jefferson Parish. As the overview of the system indicates, BGR found numerous examples of other issues that merit closer attention: the need for closer coordination among agencies in the system, the need to provide additional training for system personnel, the need to increase spending in areas such as indigent defense and juvenile preventive services, the lack of a comprehensive criminal justice information system, and the need for improved facilities and up-to-date equipment in court and correctional agencies. These other significant needs are all highlighted by consideration of the jail crowding.

Study Process

This report is based on (1) the review of financial and annual reports of the agencies included in the scope of review, (2) BGR staff interviews with key Jefferson Parish agency personnel in law enforcement, courts, corrections, and community services, and (3) a written survey instrument distributed to agency personnel. In addition, other local, state, and national agencies were contacted for professional and technical perspectives.

Presentation

The first part of this report focuses on defining the problem: Is the jail actually overcrowded, or is the criminal justice system overloaded somewhere else? The next section focuses on numbers of persons held in jail and on various programs and policies that have been implemented in Jefferson Parish to deal with the overcrowding problem. Particular attention is paid to alternatives to incarceration that have been successfully employed in other jurisdictions and that may have application in Jefferson Parish.

The next part of the report looks at options for securing additional jail space. The final section outlines BGR's conclusions and recommendations.

The criminal justice agency profiles are included as Appendix A to this report. Appendix B describes various non-jail measures for decreasing jail population. The final element of the report is a list of sources consulted.

A Note on the Special Legislative Session

A special anti-crime state legislative session held in June 1994 resulted in, among other actions, a number of signed acts that will impact jail and prison populations in Louisiana. Act 150 makes second-time offenders of certain crimes automatically ineligible for "good time," a system that rewards state convicts for good behavior in prison by releasing them early. Acts 15 and 39 allow 14- and 15-year-olds to be tried as adults for certain violent crimes. Act 23 allows prosecutors to use juvenile convictions to charge persons as repeat offenders when they become adult offenders. The governor also signed legislation allowing state police to set up a comprehensive criminal justice information system that will

include an automated fingerprint identification system to be used by state police and parish sheriffs, to be paid for with \$10.3 million from riverboat gambling revenues.

Jail Overcrowding in Jefferson Parish

The most visible problem facing the criminal justice system in Jefferson Parish—at least the one placed before voters twice in the past two years—is the adequacy of a jail at a judicially-established capacity of 700. According to the Jefferson Parish Criminal Justice Coordinating Council and various elected officials, jail capacity has driven the system for at least the last three years. Jail capacity had also driven the system more than ten years ago (Baiaomonte, 1990). The pressure had been relieved for a short time by the opening of the Correctional Center Annex in 1989. The next year, however, the upper limits on jail capacity were being reached again.

There are at least two major perspectives on the problem. One view is that lack of jail space deprives law enforcement officials and judges of a needed mechanism for increasing public safety and social justice. According to this view, Jefferson Parish has inadequate space to detain or sentence persons accused and/or found guilty of violent or potentially violent crimes. Particularly in the view of lower court judges, Jefferson Parish has inadequate space to lend the force of a higher-order threat to a lower-order intervention or sanction. For example, a judge cannot threaten with incarceration the chronic passer of bad checks or the person found guilty of non-support if there is no space for holding such non-violent offenders.

The other major perspective is that the problem with the criminal justice system in Jefferson Parish goes beyond and may not even be a matter of availability of jail space. In one variation of this perspective, jail space is not needed: what is needed are other measures, either alternatives to incarceration and/or improved case management, that is, improved processing of persons and paperwork making their way through "the system."

Another variation of this perspective is that jail space is not all that is needed: what is needed is a

comprehensive approach, including but not limited to additional jail space.

The Jefferson Parish Criminal Justice System, like its counterparts across the nation, is less a "system" than an accumulation of parts, with sometimes overlapping and sometimes barely intersecting jurisdictions. The parish system is comprised of approximately 33 entities—some part of parish government, some part of state government, and some independently elected officers.

These include the Sheriff's Office and other law enforcement authorities; city, parish, and district courts; the Offices of the District Attorney and the Clerk of Court; the Indigent Defender Board; the Jefferson Parish Correctional Facility (the "parish jail"); the state Office of Probation and Parole; the parish Department of Juvenile Services, the Juvenile Court, and Rivarde Detention Center; and the parish Criminal Justice Coordinating Council. A brief description of these entities may be found in Appendix A.

Together, these agencies spent approximately \$94 million in 1993, not including about \$2.5 million in miscellaneous expenditures by the Parish Council to support various parts of the judicial system as required by state law. See Table A-1 in Appendix A.

In 1993, these agencies together employed approximately 2,500 people, of which more than half were involved in law enforcement. See Table A-2 in Appendix A.

There were 22 percent more reported crimes and 76 percent more criminal cases filed in the Twenty-fourth Judicial District Court in 1992 than in 1982. There were 23 percent more persons being held in the parish correctional center in 1991, the last year the jail was at less than 100 percent legal capacity, than in 1981. Does a prison filled to capacity mean more crime or less crime, more justice or less justice? Does a crowded court docket mean more or less crime, more or less justice?

This study will narrow the focus of those questions considerably by approaching two much smaller ones currently under discussion by voters, public officials, and public employees in Jefferson Parish: Is additional parish jail space needed, or is the apparent jail crowding a result of other parts of the system not working properly?

In order to answer those questions, one needs to be able to describe the jail population: Who is in jail, with what are they charged, what risk do they pose to themselves and others? One needs to be able to identify the parts of the criminal justice system as a whole and how their actions impact the population of the parish jail.

Who's Filling the Jail?

Who's In Jail?

Who Is Held?

In March 1994, 20 percent (137) of the 700 inmates in the parish jail were serving "parish time," that is, they had been convicted of a crime that does not necessarily carry a sentence at hard labor. Three and one-half percent (24) of the inmates were awaiting transfer to the custody of the Department of Public Safety and Corrections (DPS&C), and 76.5 percent (524) were pretrial detainees.

According to the Jefferson Parish Criminal Justice Coordinating Council, the portion of the jail population consisting of pretrial detainees has been at over 70 percent since 1990. It is unclear, however, how many of these "pretrial" detainees are awaiting what step in the pretrial process. "Pretrial" detainees could be:

- awaiting booking by law enforcement officers
- awaiting initial appearance before a magistrate
- awaiting the filing of a bill of information by the district attorney
- awaiting allotment by the clerk of court
- awaiting trial, which will require coordination by judge, district attorney, and defense attorney

In mid-April, 56 percent of the jail's inmates were rated "Code 6," the designation for arrestees who are repeat and/or violent felony offenders. The Code 6 designation is used to identify these dangerous multiple offenders as high priority for continued detention or for vertical prosecution by the district attorney. Statewide implementation of this program was among the policy

recommendations of the recent Governor's Task Force on Homicide and Violent Crime.

To be evaluated by the "Code 6" criteria, a person must have a minimum of five felony arrests and/or two felony convictions. Number and recency of crimes of violence and number of felony convictions are the most-heavily-weighted Code 6 criteria. Others are the number of different crime categories involved in the arrest, drug arrest, juvenile felony arrest, arrest for a crime involving a gun, and recent felony arrest.

All individuals held in the parish jail must, under a federal court order, appear before a judge or magistrate for a bail hearing within 72 hours of being arrested. Since 1991, the Twenty-fourth Judicial District Court has handled these hearings by having an appointed magistrate hold court at the jail every weekday morning. For persons charged with a crime carrying a possible sentence of hard labor, a district court judge must set bail; and district court judges rotate this responsibility on a weekly basis.

Persons charged with misdemeanors, traffic offenses, and code violations are unlikely to appear before the magistrate because they are not brought to jail in the first place. Such individuals are customarily given tickets or citations to appear in court instead of being jailed. From January through April 1994, the magistrate handled 1,822 arrestees at their initial court appearances. Of this total, nearly 70 percent were repeat offenders. About 18 percent (325) had violated the terms of their probation or parole, and nearly 50 percent (903) had a prior conviction.

Who Is Released?

No current, comprehensive analysis is available that indicates how many arrestees are released on bail or some form of non-monetary, either supervised or unsupervised, release, and with what types of crimes they have been charged.

BGR researchers were given access to the sheriff's "Bond Book," a log used by the sheriff's office to record who is let out of jail and the type of release of each individual. The "bond book" also contains various identification numbers and other, sometimes incomplete or improperly placed, information about an individual's current criminal charge. Without reference to individual case files, the bond book is not an adequate source of information from which to analyze the release decisions

made by the sheriff and/or jail officials or to assess the potential threat of those releases to the community or to the individuals themselves.

A sample of releases over the last 12 months revealed that the majority (71 percent) of individuals released from the jail were released virtually on their own recognizance, that is, with no bail, no conditions, and no supervision. Thirty-four percent of the releases were of misdemeanants and traffic offenders, under a 1976 federal court order. Twenty-one percent were emergency releases of misdemeanor or felony offenders made at the discretion of the sheriff. Seventeen percent of the releases were released on a personal bond undertaking (PBU), in which arrestees are able to sign themselves out of jail. Fifteen percent of those in the BGR sample were released into third-party custody (personal bond surety undertaking, or PSBU) and 12 percent were released on a commercial, cash, or property bond.

In 1987, 50 percent of those released on bond had been released in effect on their own recognizance or on a "personal bond undertaking," and 20 percent were released to a third party. Twenty-seven percent were released on commercial or cash bond, and three percent were released on a property bond (Baiamonte, 1990, p. 43).

Emergency Release. Since April 1991, the sheriff has operated an emergency release program under which new arrestees or individuals already being held on a pretrial basis are released if they are regarded as less of a threat to the community than other new arrestees. About 45 inmates per week have been released under this program. Between April 1991 and August 1994, 8,754 individuals were released by the sheriff. About 6,800 were released immediately after booking, and almost 2,000 were released because of the need to accommodate more dangerous defendants. As of May 1994, personnel in the Detective Bureau of the Jefferson Parish Sheriff's Office administered the emergency release program. Prior to that time, this function had been performed by a jail population control officer at the correctional center.

"Good Time." In addition to those inmates released under the sheriff's emergency release program, others are released early by means of the sheriff's "good time" policy. This practice, optional under state law, is the granting by the sheriff of a reduction in sentence to inmates who earn such a reduction through work. Only those inmates with acceptable disciplinary records are eligible to earn "good time." The local "good time"

policy reduces an inmate's sentence by one day for every day served, effectively halving local sentences.

Early Release. Inmates serving parish time are also eligible for a 30-day early release from the jail. Good behavior is the primary criteria for eligibility. It is possible but unlikely that inmates who have not received good time credits will secure a release. Inmates are recommended for early release by the sheriff, but the district attorney and the sentencing judge must consent before an individual leaves the jail.

Who's Calling the Jail Full?

Federal Judge's Order

The capacity of the Jefferson Parish Correctional Center is established by order of a United States District Judge for the Middle District of Louisiana, specifically an Amended Consent Order in the case of *Holland v. Donelon*, the latest one signed in August, 1991. The capacity is set at a maximum of 700, with specific limits for the number of persons who can be held in specific "pods" on various floors.

Prior Increases in Space

The federal court first established jail population limits in May 1973. At that time, the sheriff and warden of the parish jail were ordered to reduce the inmate population to the jail's design capacity of 110. One month later the limit was raised to 132. In July 1975, parish officials submitted a "comprehensive jail overcrowding plan," including construction of a new facility. The new, 302-bed Correctional Center opened three years later.

Just three months after the new jail opened, however, the old jail was reopened with permission of the federal court; and the population limit was raised to 428. In 1983, the cap was raised to 602. Two years later, it was raised to 636, where it remained until 1989, when the Correctional Center Annex opened and the cap was raised to 666. The limit was raised again in 1990 and 1991, when it was set at 700, the present maximum. For only two years in the last 20 have the parish correctional facilities operated at less than 90 percent capacity, in 1985 and 1986.

Options to Jail and Jail Construction

The problem of jail overcrowding is clearly not limited to Jefferson Parish or to Louisiana. Recent national surveys have demonstrated that most states and hundreds of local jurisdictions have had to deal with increased demand for jail or prison space in the face of court-ordered capacity limits. Short of constructing new or additional jail space, what other options exist for dealing with the problem of jail overcrowding? To what extent have Jefferson Parish officials utilized these options in addressing the local problem?

In order to answer these questions, BGR developed a comprehensive inventory of approaches that have been used in other jurisdictions throughout the country to address jail overcrowding. Exhibit 3 summarizes the various options identified by BGR. These options were drawn from a search of the national literature and discussions with representatives of national criminal justice organizations. A narrative description of many of these options is included as Appendix B.

The options are intended to include a broad spectrum of system approaches ranging from speeding up the court process to providing additional community services in lieu of incarceration. Strategies include law enforcement, jail administration, court processing, probation and parole, alternatives to incarceration, and total system initiatives.

After developing this inventory of alternatives for addressing jail overcrowding, BGR interviewed key elected and appointed officials in Jefferson Parish to determine which of the alternatives had been implemented locally, to what degree, and whether an option was still in use. In some cases, BGR staff verified the information collected in the interviews with field observations.

Of the 54 options identified in the survey, Jefferson Parish has already implemented or currently utilizes almost 61 percent (33) of them. The major strategies that have been utilized in dealing with jail overcrowding in Jefferson Parish include: emergency release (#8 in the table); early release (10); diversion from prosecution (13); priority handling of jail cases (14, 18); prompt

Exhibit 3

Range of Options For Responding to Jail Overcrowding
in Jefferson Parish

OPTION	Tried or currently in use in Jefferson Parish	
	YES	NO
Law Enforcement		
1. Summons in lieu of arrest	Y	
2. Prearrest diversion to a community resource		N
3. Timely and accurate completion of incident reports		N
Jail Administration		
4. Access to defendants for pretrial screening	Y	
5. Provision of analysis of jail population data to key decision-makers		N
6. Detention and case monitors and/or expeditors	Y	
7. Citation release	Y	
8. Emergency release	Y	
9. "Good Time"	Y	
10. Early release	Y	
Prosecution		
11. Prearrest warrant screening	Y	
12. Early screening	Y	
13. Diversion from prosecution	Y	
14. Priority handling of jail cases	Y	
15. Vertical prosecution	Y	
Defense		
16. Prompt indigency screening	Y	
17. Early investigation and plea negotiation	Y	
18. Priority handling of jail cases	Y	

Judiciary		
19. Empowerment of judicial administrator		N
20. Separation of district court into civil and criminal divisions		N
21. Use of ad-hoc judges	Y	
22. Court rules to expedite case handling		N
23. Prompt signing of commitment papers of state-sentenced inmates	Y	
24. Use of time standards and goals		N
25. Adequate information system and effective monitoring of caseflow		N
26. Use of pretrial conferences	Y	
27. Trial date certainty and control of continuances		N
28. Regular plea-negotiation sessions		N
29. Use of "settlement day" conferences		N
30. Prompt bail-setting	Y	
31. Bail review	Y	
32. Use of non-financial release	Y	
Probation and Parole		
33. Expansion of "special conditions" of release	Y	
34. Reduced time for completion of PSI's for jail cases	Y	
35. Prompt action on revocation of probation	Y	
Alternatives to Incarceration (Pre- and Post-trial)		
36. Formal pretrial services agency		N
37. Supervised pretrial release		N
38. Treatment options	Y	
39. Fees, fines and restitution	Y	
40. Community service/non-monetary restitution		N
41. Home detention/electronic monitoring	Y	
42. Day reporting centers		N
43. Halfway houses	Y	
44. "Boot camp"/shock incarceration		N
45. Residential work-release facilities		N

46. Intensive probation	Y	
47. Sentencing review boards *		N
Alternatives to Using Current Parish Jail Space		
48. Contracting for beds with other jurisdictions	Y	
49. Use of temporary housing options		N
50. Timely transfer of inmates sentenced to State Department of Public Safety and Corrections	Y	
Total System Initiatives		
51. Development of an integrated criminal justice information system		N*
52. Establishment of task forces/special committees	Y	
53. System-wide planning initiatives	Y	
54. Increased utilization of community services and alternatives to incarceration		N

* The Clerk of Court has developed and has on-line in his office, as of May 23, a criminal justice information system. It is expected to be fully operational for that office by September. For that system to be truly integrated will require cooperation of all the independently elected officials and separate agencies and offices.

setting of bail (30); prompt action on probation revocation (35); the development of some additional alternatives to incarceration such as home detention and electronic monitoring (41); halfway houses (43); intensive probation (46); contracting for beds with other jurisdictions (48); and the timely transfer of inmates sentenced to state custody (50).

Taken together, the major initiatives implemented have helped to address potentially serious jail overcrowding in Jefferson Parish, although the extensive use of emergency release poses its own problems. Jefferson Parish officials should be recognized for their responsiveness in implementing many of these programs. There remain, however, a number of other options that have not been tried or are not currently used, which may have application locally.

Based on the inventory of alternative strategies, BGR determined that 21 of the 54 options have not been implemented in Jefferson Parish as of this time. BGR suggests that many of these options have potential for reducing the jail population and should be considered for

possible application in Jefferson Parish. In particular, BGR recommends the following:

- (1) measures to increase awareness of and to increase diversion to community resources in Jefferson Parish in lieu of arrest and detention
- (2) alternatives to pretrial detention and local incarceration in Jefferson Parish. These include supervised pretrial release, work-release facilities, day-reporting centers, and greater use of halfway houses, home detention and intensive probation.
- (3) earlier prosecutorial screening, which, in turn, is dependent on timely and accurate completion of incident reports
- (4) improvements in court management, to include the use of time standards and goals, effective monitoring of caseload, more public accountability on court workload and docket information, and more restrictions on the number and length of continuances

- (5) a fully-operating, fully-integrated criminal justice information system to facilitate systemwide planning, budgeting, and accountability and to enhance communication between and among agencies

Improved Case Management

Improved case management is one of the fundamental strategies for addressing jail crowding. If pretrial detainees, for example, comprise a major portion of the jail population, and can be brought to trial more speedily, that segment of the jail population may decrease. On the other hand, if trials result in conviction and there are limited non-jail custody and/or supervision methods available, speedier trials could increase the jail population.

Even if improved case management alone does not relieve pressure on local jail facilities, it can be pursued for reasons of improved employee morale and performance and increased voter and taxpayer confidence in public officials and employees.

The following opportunities for improved case management have been found by BGR to exist in Jefferson Parish.

Law Enforcement

Incident reports forwarded to the district attorney are not always complete, and incomplete reports slow down the screening division's ability to make a decision on whether to charge an individual and with what crimes. The Office of the District Attorney follows up with law enforcement agencies with requests for additional information on priority cases. Training by that office might assist law enforcement officers in the preparation of complete reports.

Among efforts currently underway at the state level to improve criminal justice records for local and statewide use is the Louisiana Incident-Based Reporting System (LIBRS) being developed by the Louisiana Commission on Law Enforcement and the Louisiana Sheriff's

Association. According to the *State of the State 1994*, this system is part of a larger effort to improve criminal justice records at the local level by (1) standardizing the information collected at point of incident and arrest and (2) creating standards for the electronic transfer of law enforcement data statewide.

Another state effort to improve law enforcement at both the local and the state level is the Criminal History Improvement Program (CHIP), a joint project of the Louisiana State Police and the Supreme Court of Louisiana. Under this program, a new criminal history computer and a new fingerprint computer are to be installed in the Louisiana State Police Bureau of Criminal Investigation and will form the foundation of a statewide integrated network with local law enforcement agencies. According to the *State of the State 1994*, Louisiana will be the first state to have such a network.

The District Attorney

The district attorney's office began using a computer system 15 years ago and appears to have in place much of the information, management, and training structure needed to reduce delays in case handling. The district attorney (DA) indicates that his office has been driven by jail cases for the past 10 years.

The DA's office receives information from the sheriff's office daily on who is held and who has been released from jail. The DA has established a goal, not yet achieved, of 90 days from arrest to trial. He indicates that excluding first degree murder cases, his office can take a case to trial in under 60 days.

Delays include, from the point of view of the DA: (1) receiving incomplete incident reports from law enforcement officers, so that the DA's screening division is delayed in deciding which cases to prosecute, (2) the time lapse between filing of the bill of information (charge) or indictment and allotment (assignment) of the case to a judge, and (3) defendants' not appearing for trial, due to the sheriff's not having enough space to hold them until the trial.

Indigent Defense

Physical access to defendants is reported to be a problem for the indigent defenders in Jefferson Parish, due to limited hours and the availability of only two visiting booths, down from four in prior years. The

difficulties of access to defendants are compounded when those defendants are held out of the parish.

Inadequate time for preparation due to heavy caseloads is also a problem for the indigent defender system statewide, as indicated in the 1992 Spangenberg study of the state system and the 1994 *Report of the Task Force on Indigent Defense*. "... [T]rials are delayed, cases retried, convictions improperly plea bargained, and, in some cases, prisoners released because of the lack of or the ineffectiveness of indigent defense counsel" (p.9).

The Task Force found that the current system as a whole is "significantly underfunded" and that the current funding structure should be revised because it is unfairly structured, volatile, and uneven across districts. Effects of inadequate indigent defense financing and management include inadequate representation of both capital murder and other defendants, delays in trials, improper plea bargaining and costly retrials.

In response to recommendations from the Task Force, the 1994 fiscal legislative session authorized \$5 million to fund a temporary statewide indigent defender board. The State Supreme Court on July 1, 1994, promulgated an emergency rule establishing the temporary board. This board is to set guidelines and standards for the unified and effective operation of a comprehensive indigent defense system for the state. It is to present

a plan to the legislature before March 1995 for the continuation of a statewide board and is to provide advice on sources and levels of funding.

Probation and Parole

While not as directly involved in the movement of cases through the system as the other entities discussed, the Office of Probation and Parole (part of the state Department of Public Safety and Corrections) is notable for having established measurements of workloads that are different from a simple count of cases. The probation and parole agents in Jefferson Parish are above the workload required by Louisiana law and established by professional association standards. Statewide, agents are 40 percent above the workload required by state law.

The Courts

The number of criminal cases filed in district court in Jefferson Parish has fluctuated throughout the past ten years, as shown in Exhibit 4. The proportion of criminal to civil cases decreased in 1984 and 1985. Criminal cases as a proportion of total cases filed started to rise again in 1986 and have increased every year. While the number of criminal trials in 1993 was less than in 1983, the proportion of criminal trials was higher in 1993. See Exhibit 5.

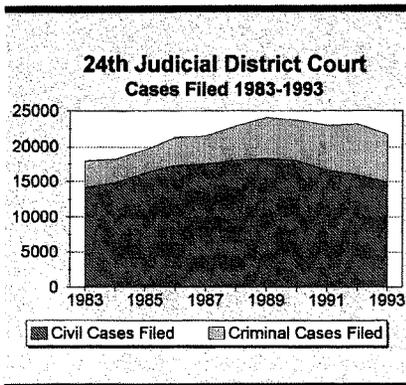


Exhibit 4

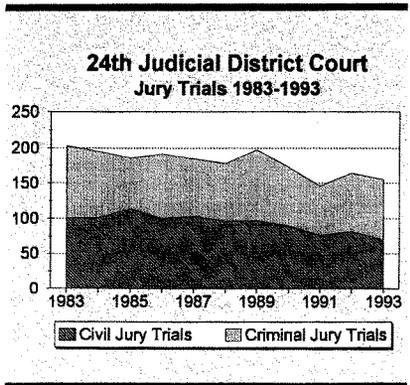


Exhibit 5

The average number of active criminal cases is about 170 cases for each division, according to the DA's executive assistant. As many as 400 additional cases in each division of court may be open because of outstanding attachments—that is, inability to locate the defendants. In 1993, according to the DA's office, over 5,700 felony attachments (orders to arrest for non-appearance in court) were issued.

While the number of cases handled is by itself far from an adequate measure of judicial workload or performance of either the court as a whole or of an individual judge, knowing the size, age and status of a pending caseload is essential to developing more adequate measures. This information will be more readily available under the clerk of court's new information management system.

In April 1991, the Jefferson Parish Criminal Justice Coordinating Council outlined the "fundamental elements" of a jail caseload management plan, many of which have still not been implemented. These elements parallel national guidelines for improved caseload management, and they need not be limited to jail cases.

These elements include:

- Judicial commitment and leadership
- Judicial consultation with all elements of the criminal justice system
- Court supervision of case progress, from allotment to sentencing
- Time standards and goals
- Adequate information system and effective monitoring thereof
- Trial date certainty
- Control of continuances

Rules Adopted by Judges

Although individuals and officials who deal with the judiciary of the Twenty-fourth Judicial District Court emphasize the independence of separately-elected judges, the separate divisions of the court exist, according to state law, "for the purpose of nomination and election of judges only." The judges *en banc* may enact rules of court to govern procedures and make the operations of the district court as a whole flow more smoothly and efficiently. They have not maximized their authority to do so in order to implement district-wide case management methods.

An example of specific steps that can be taken by the Chief Judge, with concurrence of the other judges, is a recent move that speeds up the judges' signing of papers "committing" sentenced prisoners to the State Department of Public Safety and Corrections. In February of 1994, the Chief Judge, at the sheriff's request, notified all other judges of the need to sign commitment papers as quickly as possible, in order to free up additional beds for unsentenced defendants.

The Clerk of Court set time standards for his employees, encouraging the minute clerks to have all commitment papers prepared within 72 hours following sentencing. The judiciary has complied with the Chief Judge's request.

Role of Judicial Administrator

The function of the Judicial Administrator of the Twenty-fourth Judicial District Court appears to be to provide administrative assistance and business management, rather than the proposal or administration of any court rules to enhance uniform case reporting, monitoring, and management. The Louisiana Court Administrators Association, a professional association affiliated with the National Association for Court Management, is working, however, to involve both court managers and judges in the improvement of court management in Louisiana.

Role of Clerk of Court

The Clerk of Court is in the process of implementing a computerized integrated criminal case tracking system so that any participating entity in the Jefferson Parish criminal justice system will be able to track a case from arrest to final disposition. Once this system is in place, it will be possible—as it is not now—to clearly identify points of delay in the processing of cases, identify patterns of delay and reasons for them, and implement solutions.

Role of State Supreme Court

Responsibility for administrative leadership of Louisiana courts rests with the Chief Justice and the Supreme Court of the State. The Judicial Council of the Supreme Court of Louisiana was established in 1950 to evaluate and monitor certain operations and procedures of the judicial system of the state. It "serves as a clearinghouse for ideas for simplifying and expediting judicial procedures and/or correcting shortcomings in the

system" (1993 Annual Report, p. 6). The Judicial Administrator of the Supreme Court serves as the administrative arm of both the Supreme Court and the Judicial Council.

The committees of the Judicial Council are staffed by the Office of the Judicial Administrator of the Supreme Court. A current project of the Judicial Council is expected to "dramatically improve the management information available to the Judicial Council and the Supreme Court" (1993, p. 6). The Case Management Information System (CMIS) Project is on a "fast track" to development of (1) a statewide court-based felony disposition reporting system and (2) a master plan for an automated case management system for all trial courts in the state. The disposition reporting system is expected to be in place by the end of 1994, with the master plan for an integrated case management system to be developed by the end of 1995. The CMIS project is being funded by a one-dollar court cost on all felony, misdemeanor, traffic, and ordinance convictions.

Coordinators

CJCC

The Jefferson Parish Criminal Justice Coordinating Council (CJCC) was created by councilmanic ordinance in 1980 to coordinate crime control and criminal justice activities in the parish (JP Code Div. 19, sect. 2-771ff). The council is composed of 19 members and includes citizens, representatives from community and professional organizations, and the agency heads from the criminal justice agencies in the parish, as well as the parish president and the chairman of the parish council. An executive committee directs the CJCC. All members serve during their term of office and without compensation.

The CJCC is responsible for coordinating the activities of the public and private agencies involved in the parish's criminal justice system; mediating in interagency conflicts when requested; recommending policies and priorities for criminal justice activities; conducting research on crime control programs and monitoring and evaluating criminal justice programs; advising local units of government in seeking all types of revenue for the implementation of criminal justice programs; and overseeing the parish courts' case management system.

The office has a staff of nine and had a budget of \$421,553 for 1993-1994. The office is supported both by the parish and by money it receives for administering various grant programs. The CJCC manages all federal and state criminal justice grants received by the parish, currently amounting to approximately \$640,000. These cover juvenile justice, victim assistance, and anti-drug abuse programs.

For the last thirteen years, the CJCC has been involved in monitoring the jail population in the parish. The emergency release program currently administered by the sheriff was designed in cooperation with the CJCC staff. This program has assisted the sheriff's office in maintaining compliance with the federal court order that mandates population limits and staffing standards at the jail. The CJCC has also assisted the sheriff's office and the office of probation and parole in developing and implementing the home incarceration program.

LACLE

The Louisiana Commission on Law Enforcement and Administration of Criminal Justice (LACLE) was created by Executive Order in 1967 and by statute in 1976 to serve, among other functions, as the central planning and coordinating agency for adult and juvenile correctional systems. It consists of 51 members who represent various professional associations or are appointed by the governor or other elected officials. Terms are concurrent with the governor's; and members, except for legislators, serve without any compensation or reimbursement of expenses.

There are eight law enforcement planning districts in the state, each of which has an advisory council. Until 1980, Jefferson Parish was part of the nine-parish New Orleans metropolitan planning district. Now Jefferson Parish comprises its own planning district, according to the CJCC.

Under the law establishing the LACLE, parish governing bodies are authorized to create criminal justice information system policy boards responsible for the planning, establishment, and oversight of the criminal justice information system. No such policy board has been created in Jefferson Parish.

Options for More Jail Space

"Temporary" Jails

One option for incarcerating prisoners is the use of facilities such as "tent cities," which are in fact "temporary" jails. As supplemental housing facilities, "tent cities" and other modular types of inmate housing have been erected on or near existing jail sites as a way to accommodate low-risk inmates. These arrangements however, have proven to be problematic. In 1983, the Orleans Parish Criminal Sheriff constructed a small outdoor "compound" of tents and 400 beds with the intention of filling it with municipal prisoners. It quickly became filled, however, with pretrial detainees.

Although it was intended to be a temporary measure to help reduce overcrowding, the Orleans Parish Criminal Sheriff's "tent city" was a continuing fixture of the City of New Orleans' correctional system until the new jail opened in 1994. Orleans Parish Criminal Sheriff officials point out the management challenges and liability issues associated with a "tent city": (1) it is not easily staffed, (2) it is exposed to the elements, and (3) it is usually crowded. Therefore, such a facility contains elements of confinement which are easily challenged in court.

Construction

1981 Jail Plan

In 1981 the Jefferson Parish Council contracted with Guillot-Vogt Associates, Inc., to conduct a jail facility requirements study that addressed the long-term correctional needs of the parish. At that time, the Jefferson Parish adult correctional system had a total capacity of 428 beds, 302 accredited beds in the Jefferson Parish Correctional Center and 126 substandard beds in the old parish prison.

The 1981 study recommended a 624-bed addition to the existing 302-bed center, to be completed in 1986. The study estimated the need for an additional 105 beds, for a total of 1,131, by the end of 1989. These estimates were based on a straight-line projection of the prior seven years' inmate population. The 1981 study explicitly did not address the jail needs of the "distant

future" of the 1990's and beyond. It did state that the provision of sufficient beds based on the history of previous years would be a "serious problem for the governing authorities of Jefferson Parish." It went on to suggest that a "long term, yearly updated, planning process be initiated now. . ." (p. 4).

No funds were made available to proceed with prison construction in the early 1980's. No construction was undertaken until 1987, when the parish received \$2.5 million in state funds which permitted construction of a \$2.9 million, 176-bed Correctional Center Annex.

The Annex was completed in 1989, and the substandard old parish prison was demolished. Throughout the 1980's, increases in jail space were made possible by double-bunking (a practice increasingly acceptable to federal authorities), converting a gymnasium into a 22-bed unit, and adding beds where possible. By 1989, when the Annex was completed, Jefferson Parish had 666 parish jail beds.

1991 Jail Plan

In 1991, the Jefferson Parish Council contracted with Guillot-Vogt and Associates, Inc., once again, to evaluate the feasibility of renovating existing buildings and/or constructing a new jail facility. The 1991 study used 1981 projections and concluded that at least a 500-bed facility was needed to accommodate the anticipated inmate population by the year 2000.

The 1991 study considered some eleven alternatives, from renovating existing warehouses to the construction of river barges designed for detention and incarceration. It concluded that construction of a new traditional multi-story institutional structure in the parking lot adjacent to the existing facility was the best choice. Criteria included cost, proximity to the existing complex, expandability, and floor-plan configuration.

After this site was selected for recommendation, the proposed number of beds was increased to 700, including fully building out all five floors. The projected cost of construction in 1992 dollars was \$14.8 million. To renovate the old kitchen, which serves 700 inmates from a facility designed for 300, would add another \$600,000, for a total construction and architectural and engineering fees cost of \$15.4 million.

In the fall of 1992, the Jefferson Parish Sheriff's Office proposed a 1/2 cent sales tax for construction and

operation of a new 700-bed facility at a cost of \$18 million (though early cost projections were for \$21 million). The tax did not pass. In the fall of 1993, the Jefferson Parish Council proposed a 1/4 cent sales tax for construction of the same type of facility, which also did not pass.

Non-Jail Construction Needs

In addition to the limitations on jail space, the current judicial district court facilities are also hampered by limitations of space and security. The building was not originally built as a courthouse and, as a result, has inadequate space and design features to handle the current volume of court activity. Perhaps the most serious security problem is that inmates must be led through the courthouse to arraignment and trial. There are no witness rooms in the courthouse. There is presently one more judge than there are courtrooms.

Despite any other needs, however, it is anticipated that bringing the building up to local fire standards and into compliance with the Americans with Disabilities Act will be addressed before additional space is added or physical security is provided for. According to the Chief Judge, these improvements in and modifications to the existing courthouse are anticipated to cost approximately \$600,000.

Use of Sheriff's 1993 Sales Tax for Juveniles and District Court

As part of the Jefferson Parish Sheriff's successful proposal to increase the parish sales tax by 1/4 cent in the fall of 1993, the Sheriff pledged to spend \$1 million on a juvenile intake and booking facility and \$1.5 million on additions and/or renovations to courtrooms in the Twenty-fourth Judicial District. A letter of agreement between the Parish Council and the Sheriff was signed prior to the election. The parish is legally required by state law to provide for both of these facilities.

These funds are being collected by the sheriff and held in escrow until plans are finalized for these two projects. Design planning for the construction of the juvenile facility has already begun, and requests for proposals will be sent out by late 1994. Construction is expected to begin on the \$1 million project in 1995, and completion is expected to take up to 14 months. The facility will be staffed by personnel from the

Jefferson Parish Sheriff's Office. Juvenile intake and booking currently takes place at the parish's adult correctional facility in Gretna. State and federal law both require juveniles to be separated from adult inmates and defendants.

Specific plans for additional space for the Twenty-fourth Judicial District Court have not yet been developed. The fourth floor of the courthouse annex—currently occupied by the Fifth Circuit Court of Appeal—may become available within the next three to five years, as the parish has recently donated space for the construction of a new facility for that court.

Arrangements With Other Public Authorities

Other Parish Jails

In the 1970's, one of the first responses of the Jefferson Parish Sheriff and jail warden to local jail overcrowding was to transfer an average of between 35 and 40 inmates to eight neighboring jails. This transfer was made under the authority of L.R.S. 15:706. After the Jefferson Parish Community Correctional Center opened in 1978, this practice of "farming out" state prisoners to area jails was discontinued. It was resumed in 1989 and continued until 1993.

Orleans Parish Jail

Since 1993, the Jefferson Parish Sheriff has transferred to Orleans parish the inmates sentenced to the state Department of Public Safety and Corrections. This practice frees bed space in Jefferson Parish and accounts for the comparatively low percentage of "state" inmates in the Jefferson Parish jail. The Orleans Parish Criminal Sheriff is reimbursed by the state for holding these state prisoners, at the rate of \$21 per day established by state law.

Since 1975, state law has provided for state payment of a per diem to local sheriffs to maintain those offenders who have been sentenced to the Department of Public Safety and Corrections but are housed in parish jails. The initial per diem was \$2.25. Current law sets the payment at \$21 per day, for which the legislature makes an annual appropriation based on projections from the state department.

As of April 1994, by letter of agreement between the Jefferson Parish Council and the Orleans Parish Criminal Sheriff (OPCS), the OPCS is currently holding 100 prisoners who are awaiting trial in the Twenty-fourth Judicial District Court. This agreement took about a year to finalize. Correspondence from the Council Chairman to the OPCS indicates that the agreement would terminate upon six months' written notice by either party.

Later correspondence from the Council Chairman to the Jefferson Parish Sheriff indicates that the agreement and budgetary provisions by the Council extend to the end of 1994. The Jefferson Parish Council pays \$23 per day to the OPCS under this agreement and has budgeted \$700,000 for 1994. The Jefferson Parish Sheriff's Office transports inmates between the Orleans Parish Prison and the Twenty-fourth District Court and is reimbursed \$50,000 by the Parish Council for this purpose.

For a full year, the cost of "leasing" 100 beds from the OPCS would be \$840,000 per year. Based on the current budget amount, transportation for a full year

would be \$60,000. For purposes of planning, this annual cost of providing for the detention of 100 inmates per day should be compared with the operating costs of new prison beds for 500 inmates, estimated at \$7.5 million per year (Baiamonte letter, February 14, 1992, p.3). See Exhibit 6.

Absent any major changes in state or local detention and corrections policy, there are enough unused beds in the Orleans Parish facility to continue the current practice for several years. Of about 7,100 beds, about 5,500 were in use in June 1994, according to the OPCS Chief Administrative Officer.

Multiparish Prisons

An option authorized by law but not yet in use in Louisiana is a multiparish prison, created by the governing authorities of one or more parishes (L.R.S. 15:801ff). These facilities would be governed by a board of governors, composed of the sheriff and one parish government member from each of the

Operating Costs of Housing 500 Jefferson Parish Inmates

	In existing Jefferson Parish facility	In Orleans Parish Prison, under current agreement	In new Jefferson Parish facility
Cost per inmate per day	\$34 (a)	\$23	\$41 (b)
Operating cost per inmate per year	\$12,410	\$8,395	\$14,965 (b)
Operating cost per year for 500 inmates	\$6.2 million	\$4.2 million	\$7.5 million (c)

(a) Baiamonte, April 11, 1994

(b) Baiamonte letter, February 14, 1992, and BGR calculations.

(c) Includes operating costs for renovated and expanded kitchen and food service areas; renovated and expanded medical facilities (including a psychiatric unit); a law library; staff exercise room; additional visiting areas for attorneys and clergy; and expanded administrative, storage, and laundry areas. (See CJCC and Guillot-Vogt *Study of Constitution Alternatives*, 1991, pp. 12-14)

Exhibit 6

Jefferson Parish Criminal Justice System—19

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participating parishes. The sheriff of the parish where the facility resides is the president of the board of governors and the administrator of the facility.

Multiparish prisons can be used for individuals sentenced to "parish time," that is, violators of municipal ordinances, those convicted of a misdemeanor, or those convicted of a felony punishable with or without hard labor. The governing authorities of the parishes within the multiparish prison area are required to appropriate annual operating funds in proportion to the assessed valuation of the property in the parishes.

Privatization

The privatization of corrections is an option that has gained in popularity in counties and states throughout the country, due primarily to steadily increasing inmate populations and the lack of public support for tax increases to support construction and operation of additional facilities. "Privatization" can mean privatization of ownership or privatization of management and/or operations, and Louisiana law provides for both in the case of corrections.

In 1989, the state legislature passed the Louisiana Corrections Private Management Act (L.R.S. 39:1800), which authorized state and local governments to enter into contracts for, among other things, the private construction and operation of correctional facilities. Two of the state's twelve prisons are currently privately operated. There are at present there are no privately-operated jails in Louisiana.

Private ownership and construction of the proposed new jail for Jefferson Parish, with lease-back and a buy-out provision to the parish, was considered in early 1992. At that time, the parish Finance Director indicated the parish could not afford such a lease, estimated at \$2 million a year for 20 years (Baiaomonte letter, p. 3). Since a quarter-cent sales tax would fund construction costs in two to three years (depending on whether the tax were levied parishwide or only in unincorporated areas), the long-term concern with additional jail space is operating costs. As indicated above, an additional 500 inmate beds and accompanying improvements would be expected to add 7.5 million in operating costs for the sheriff and the parish council.

Conclusions and Recommendations

Findings

The major challenges confronting the criminal justice system in Jefferson Parish include the following:

- The parish jail is at its legal capacity and, by several measures, beyond its functional capacity. The population limit of the Jefferson Parish Correctional Facility has been raised six times since the facility opened in 1978 and has for three years operated at 100 percent of its legal capacity. According to the parish Criminal Justice Coordinating Council (CJCC), the sheriff's office releases approximately 200 arrested felons per month due to jail overcrowding.
- There is no system in place to accumulate information about the operations of the criminal justice system that is both complete and accessible to all who need it. The clerk of court has set up and is beginning to implement a system that is designed: (1) to be a repository for information from all parts of the system and (2) to be accessible to all parts of the system. Not all parts of the system have computerized their operations, however, much less linked them to the clerk's system.

The prior clerk of court, whose office is the logical repository of information about elements of the system, had withdrawn completely from the parish computer system formerly used by the other justice system agencies. The sheriff has one computer system, the district attorney has another. The district court has hardly any information-processing and information-management capability. Some of the other agencies, particularly with the help of the CJCC, have developed their own capabilities.

The present clerk of court is making a major effort and significant financial investment in developing a usable, comprehensive system. Efforts currently underway under the auspices of the Judicial Council of the State Supreme Court and LCLE (the Louisiana Commission on Law Enforcement and

Administration of Criminal Justice) may also aid in development of a system of information accessible to and usable by all interested parties.

- No one government official or entity has the clear and undivided responsibility for constructing (or otherwise securing) and funding the operations of the facilities needed by elements of the criminal justice system (such as facilities for detaining pretrial defendants, courtrooms, and space for housing sentenced offenders).

This condition is the result of the state legal structure which gives various parish criminal justice officials responsibility for operating their facilities while it obligates the parish governing authority to provide those facilities. The state law authorizing the establishment of law enforcement districts with independent taxing power exacerbates the tensions and difficulties of the divided responsibilities.

- Compounding the absence of clear and undivided authority for various elements of the criminal justice system, there is no single entity with the authority or the ability to coordinate policy-making, decision-making, and funding for "system" needs.
- The resources across the system—resources of personnel, technology, and facilities—are unevenly distributed and in a number of cases inadequate to the task.

Numbers of personnel are inadequate in probation and parole and indigent defense. Technology and preparedness for use of it are inadequate in the district court and indigent defense. Facilities are inadequate for safety and security in the courthouse and for detention and other activities (such as lawyer visitation) in the parish jail. Sanctioning options are limited at all levels.

- The district court system (1) lacks a unified management approach and performance standards that are consistent from division to division and (2) has made inadequate use of modern technology, both in its own management and in reporting to its overseers and the public.

Although the separate divisions are established in state law for the purpose of election of judges only, the judges often function as separate and

independent officials. No local mechanism exists for requiring district-wide standards and reporting to the public on performance.

- There is no clearly-stated community policy on what classifications of suspects and sentenced offenders citizens want and are willing to pay to have held behind bars, nor is there any mechanism for devising such a policy that would be binding on all the decision-makers and operators in the system. Because of the magnitude of increasing costs of incarceration, safe but lower-cost alternatives to traditional jails and prisons continue to be sought statewide and nationally and should be considered locally.

Voters have been asked twice in the last two years to approve a sales tax for jail construction, and they have voted down these requests—one from the sheriff and one from the parish council—both times. The very nature of these proposals reflects two of the major problems with the criminal justice system in Jefferson Parish.

The first is the unavailability of reliable information, openly arrived at, on which to base public policy recommendations and decisions. BGR's difficulty in securing the timely, voluntary release of data on the jail population from the responsible officials is a reflection of the unavailability of such information. The second problem is the divided authority and responsibility, in state law, for providing and operating parish detention facilities. The fact that the sheriff placed the first proposal on the ballot and the parish council, the second, is a reflection of continuing struggles over areas of responsibility and legal authority.

Need for Information

There are two fundamental sets of information needed to make decisions about the adequacy of jail facilities and, thus, the need for more or different ones. The first is a detailed analysis of the jail population, such as that described by the National Institute of Corrections and the National Institute of Justice (*Local System Assessment and Alleviating Jail Overcrowding*). The other is an analysis of case flow throughout the entire criminal justice system, for the purpose of identifying specific points at which delays and inefficiencies cause unnecessary increases in the jail population.

Neither of these fundamental sets of information, as a complete set, is currently available in Jefferson Parish.

No descriptive analysis of the jail population is available; and the information needed to develop the case flow analysis system-wide is just beginning to be recorded, collected, and maintained. Raw data is available, but detailed reports and analysis for review by elected officials and citizens are not. For example, we do not know with precision the characteristics of those persons either held or released. We do know that 75 percent of the jail population is awaiting trial or sentencing. We do know that about 56 percent of those in jail in the spring of 1994 were "Code 6" violators—multiple, violent offenders. We do not, however, have complete information on the rest of the pretrial detainees, about 20 percent of the total jail population.

Much data, nevertheless, support the need for additional jail space. The 1981 jail study, based on then-current jail use, estimated the need for over 1,100 beds by the end of 1989. Current usage coupled with the release of an average of 45 inmates per week since 1991, at least some of whom are repeat felons, indicate a facility operating beyond capacity. Many experts argue that a jail operating at 80 percent capacity should be regarded as "full," for sound operational purposes. By that measure, though technically under capacity, the Jefferson Parish Correctional Center has been over its operational capacity for the last 20 years.

BGR considered the possibility that improvements in court management and a concomitant decrease in the number of pretrial detainees would eliminate the need for additional jail beds. On the basis of a CJCC evaluation of the parish's special Drug Court, an experiment in improved court management, such improvement would result in the availability of no more than 150 beds. Moreover, it is possible that enhancing court operations would increase, not decrease, demand for jail beds.

Need for Coordination

In Jefferson Parish, perhaps precipitated by the problem of a jail at its legal capacity, many successful efforts at coordination are already taking place, especially where the various authorities interact directly with each other. Many of what are generally regarded as "reform" measures for releasing pressure on a jail or prison facility are already in use in Jefferson Parish. Some, such as extensive use of citations instead of arrest, were put in place prior to the most recent wave of "overcrowding." Others, such as emphasis on supervised pretrial release, have fallen into disuse as the persons for

whom they were appropriate are no longer detained in the first place.

The Criminal Justice Coordinating Council, the position of Judicial Administrator of the District Court, and the district court judges *en banc* are all mechanisms that can be used more aggressively as instruments of coordination and improvement. Similarly, on the state level, the Judicial Council of the Supreme Court and the LCLE (Louisiana Commission on Law Enforcement and Administration of Justice) are tools that can be maximized for developing a coordinated and integrated system in which all the parts work together smoothly. The emphasis on smooth operation of the system is not a matter of speed, but of effectiveness and accountability.

The Conclusions

Based on the study findings, BGR concludes that the Jefferson Parish criminal justice system is not working as a "system" or with optimum effectiveness. In answer to the orienting questions of the study, BGR concludes that additional jail space is needed but is far from all that is needed.

BGR concludes that additional jail space is needed for the following reasons: (1) to provide space to sanction less serious offenders, whether as deterrence, constraint, or punishment; (2) to provide space for effective jail management; and (3) to provide space for holding persons charged with crimes and for whom there is a substantial risk that bail or other devices will not ensure their presence at trial. Based on the limited analysis of jail data currently readily available to the public, however, BGR is unable to make a specific recommendation on the number of jail beds needed. Additional planning and analysis are required in order to make that determination.

BGR is convinced that additional jail space alone will not solve the problems of the Jefferson Parish criminal justice system. Experience across the nation indicates that if jails are built, they will be filled; and if other shortcomings of the criminal justice system are not addressed *directly*, those shortcomings will remain. What is needed in Jefferson Parish is system-wide improvement incorporating *all* of the recommendations outlined below.

The Recommendations

BGR makes the following recommendations:

- All the elements of the Jefferson Parish criminal justice system should actively cooperate with the Clerk of Court in continued development of an integrated information system that can be used and is used by all parts of the criminal justice system for planning, budgeting, management, and reporting purposes.
- Comprehensive, system-wide improvements should be aggressively pursued, including:
 - pursuit, by the judiciary, of judicial system management improvements, including participation in the development and refinement of a case tracking system, provision of caseload information to judges and other interested parties, development of baseline data and formulation and adoption of case processing time standards, and adoption of an effective continuance policy
 - formulation, under the auspices of the CJCC as planning and coordinating entity, of a community policy on the use of acceptable alternatives to traditional incarceration
 - careful consideration, by all parties in the system and under the auspices of the CJCC, of alternative methods for addressing jail overcrowding (including the options from the national perspective review that have not been implemented, as shown in Exhibit 3)
- The Criminal Justice Coordinating Council, as the planning and coordinating entity for Jefferson Parish, should, on an ongoing basis, articulate the responsibilities and authority for the funding and operations of all the elements of the criminal justice system, so that citizens as well as officials, can understand who is responsible for what.

Consolidation and clarification of authority in state law may be desirable but is not within the ability of Jefferson Parish alone to accomplish.

- The entity designated to be responsible for jail planning should clearly put forward its case for a

specific recommendation of how much additional jail space is needed. Such a case would entail:

- a detailed analysis of the jail population, such as that described by the National Institute of Corrections or the National Institute of Justice. Partial information on what sorts of inmates are being held and why is currently available. A descriptive analysis of the jail population (including numbers of persons according to length of confinement, status of case, seriousness of charge or crime, criminal history) is not currently available.
- an analysis of case flow throughout the entire criminal justice system, for the purpose of identifying specific points at which delays and inefficiencies cause unnecessary increases in jail population. Such an analysis would reflect the seriousness and complexity of cases.

Appendix A: The Parts That Make Up the Whole

For total parish criminal justice system expenditures and number of employees for 1993, see Tables A-1 and A-2.

Law Enforcement

The Sheriff

Article V Section 27 of the State Constitution provides for the Office of Sheriff in Louisiana in all parishes except Orleans. According to the Constitution, the sheriff is the chief law enforcement officer of the parish, the executor of parish court orders and processes and the parish tax collector. The sheriff is also responsible for the operation of the correctional center. The sheriff is elected every four years at the time of gubernatorial elections.

As chief law enforcement officer of the parish, the sheriff has direct responsibility and complete authority in the unincorporated areas of the parish and concurrent jurisdiction with the law enforcement agencies in the incorporated areas. The sheriff and the parish council share overall responsibility for the parish jail. The parish is legally responsible for providing the sheriff with a facility, and the sheriff is responsible for managing the facility. Under the state law providing for special parish law enforcement districts, the sheriff is also given authority to levy sales and property taxes which can be used for jail construction, among other purposes.

The Jefferson Parish Sheriff's Office (JPSO), with nearly 1500 employees, is the second largest special-purpose government in Jefferson Parish. Only the Jefferson Parish Public School System employs more people.

The JPSO is funded from a variety of sources, but most (85 percent) of its funding is from commissions on taxes collected (45 percent), and revenue from ad-valorem taxes (22 percent) and sales taxes (8 percent). Expenditures on salaries (67 percent) and operating costs (8 percent) comprise most of the sheriff's office's expenditures. The JPSO annual budget was projected at \$60 million for 1994, including the proceeds of a half-cent sales tax passed in October 1993.

Others

Twelve agencies in Jefferson Parish in addition to the sheriff's office have arrest authority and can refer cases to the district attorney's office. These are the police departments of the incorporated areas of Kenner, Gretna, Harahan, Westwego, Grand Isle and Jean Lafitte; the Greater New Orleans

Expressway Commission (Causeway) Police; the State Police; the East Jefferson Levee District Police; the Louisiana Wildlife and Fisheries Department; the Mississippi River Bridge Authority; and the State Motor Vehicle Police.

Clerk of Court

The office of Clerk of Court is provided for by Article V Section 28 of the Louisiana Constitution. The clerk serves as clerk of the civil and criminal divisions of the Twenty-fourth Judicial District Court, clerk of the two parish courts, clerk of the parish juvenile court, recorder of mortgages, register of conveyances, custodian of notarial archives, custodian of evidence, chief elections officer, and the official in charge of jury management. Jefferson Parish's clerk of court performs the duties performed by eight elected and one appointed official in Orleans Parish.

The clerk of court is elected for a four-year term. The clerk hires his own employees and is responsible for his own budget and the receipt and disbursement of funds. State law requires the parish council to pay or provide for certain operating expenditures.

At the end of 1993, the clerk of court had 284 full-time and 14 part-time employees. The number of full-time employees has been reduced by over 20 percent (from 360) since the present clerk took office in 1988. According to the clerk, this reduction was made possible by increased automation and decentralization of management. Six supervisors handle divisions that correspond to the direct responsibilities of the clerk (various courts, recording of mortgages and conveyances). Three supervisors handle information systems, human resources and finance, and warehouse and records storage.

Total expenditures of the office of clerk of court for FY 1992 were just over \$8 million. Revenues for that office are primarily self-generated by fees and charges. In FY 1992, fees and court costs generated revenues of almost \$8 million. The parish council is obligated under state law to provide office space and support of utilities and other operating expenses. For 1992, the parish provided approximately \$531,000 for various office expenses. For 1993, the parish was expected to provide about \$711,000. Unused funds have sometimes been returned to the parish annually, and funds over a specified portion are required to be returned to the parish upon completion of the clerk of court's term of office.

Courts

Parish Courts

Jefferson Parish has two parish courts, First Parish Court on the parish's eastbank and Second Parish Court on the parish's westbank, both created in the 1960's (R.S. 13:2561.1ff and 2562.1ff). These courts have civil jurisdiction concurrent with that of the district court in cases involving \$10,000 or less. They have criminal jurisdiction concurrent with that of the district court except for capital crimes or offenses punishable by imprisonment at hard labor. Since there is a separate juvenile court in Jefferson Parish, the parish courts there have no juvenile jurisdiction.

Each parish court currently has two divisions, that is, two elected judges who serve terms of six years. Their salaries are determined and paid by the governing authority of the parish and supplemented by the state. The sheriff or his deputy serves all writs and processes issued by the parish courts, and the district attorney prosecutes the criminal cases. The court reporters' salaries are determined and paid by the governing authority of the parish but may be supplemented from the Judicial Expense Fund for the Parish Courts, upon *en banc* decision of the judges. Traffic hearing officers were authorized for these courts in 1981; one is used only in First Parish Court.

The judges of parish courts may in all cases assess a court cost of not more than ten dollars, to be transmitted to the governing authority of the parish and used for an automatic case reporting system established in 1984. These judges must impose a service charge of seven dollars per filing, to be forwarded to the parish department of finance for purposes of acquisition, construction, equipment and maintenance of any judicial facility, and payment of bonded debt. The Parish Council has control over this fund and may by ordinance, with concurrence of the judges, reduce the amount of the service charge.

District Court

The Parish of Jefferson composes the Twenty-fourth Judicial District, which since 1991 has had sixteen judges, or divisions. District courts have original jurisdiction of all civil and criminal matters and have appellate jurisdiction as specifically provided. The legislature establishes the number of judges, or divisions, for each judicial district. The "separate and distinct divisions" are "for the purpose of nomination and election of judges only" (R.S. 13:582). Each district, except in Orleans Parish, organizes itself for the handling of both civil and criminal matters. In the Twenty-fourth Judicial District, 16 judges hear both types of cases. A separate Drug Court and a "Bad Check Court" are both presided over by additional judges appointed by the State Supreme Court.

Magistrate Court. All persons arrested in Jefferson Parish must have a bail hearing within 72 hours of their arrest. Since 1991, this initial appearance has been before a magistrate appointed by the Twenty-fourth Judicial District Court. The magistrate conducts hearings in a room at the jail every weekday morning. Persons arrested for a crime that does not

**Jefferson Parish Expenditures 1993
Criminal Justice System**

Office/Agency	Amount (\$)
JPSO, including parish Correctional Center	47,696,894
District Attorney	5,069,915
Indigent Defender Board	1,033,069
Clerk of Court	9,733,052
24th Judicial District Court	4,550,158
1st and 2nd Parish Courts	2,556,671
Probation and Parole	1,380,047
Juvenile Court	2,241,197
Dept. of Juvenile Services, including Rivarde Detention Center	4,473,562
Criminal Justice Coordinating Council	421,553
Municipal Law Enforcement (est.)	12,000,000
Parish Miscellaneous Judicial	2,508,436
TOTAL	93,664,554

NOTE: 1993 amended budget figures for all agencies but the Indigent Defender Board (1993 adopted budget), District Attorney (1992 audited figures), JPSO, Clerk of Court and Twenty-fourth Judicial District Court (1993 audited figures). Municipal law enforcement figures from Criminal Justice Coordinating Council and BGR calculations.

Table A-1

carry a sentence of hard labor can have terms of release set by the magistrate. For persons arrested for a crime that carries a sentence of hard labor, a district court judge must set bail.

Judges. District court judges are elected for terms of six years and receive salaries of \$75,000 plus a Judicial Expense Fund supplement, which is variable but in the range of \$8,400 annually, the amount set as of January, 1994. Each district court is required by the state constitution to elect from its members a chief judge to carry out the administrative functions prescribed by rule of court. The length of term of the chief judge is designated by each court; in Jefferson Parish, the term is one year.

Employees. The Twenty-fourth Judicial District Court has 65 employees. The employees include a Judicial Administrator with a staff of four, whose responsibilities are primarily business management.

The Prosecution

The District Attorney

The Office of District Attorney (DA), provided for by Article V Section 25 of the Louisiana State Constitution, is responsible for every prosecution in the judicial district, represents the state before the grand jury, and is the legal advisor to the grand jury (Art. 61, C.Cr.P.).

The DA's office is actively involved with the JPSO in targeting and aggressively prosecuting career criminals and habitual offenders in a special program known as "Code 6" begun two years ago. "Code 6" replaces a career criminal program developed several years earlier. The DA's office "vertically prosecutes" some of these career criminals, meaning that one assistant district attorney handles the case from start to finish. The goal of the program is to maximize charges and thereby maximize potential sentences for these repeat offenders.

The district attorney serves a six-year term and is authorized to select his/her own assistants (L.R.S. 16:1). State law provides for 36 assistant district attorneys in Jefferson Parish. The state pays the salaries of the district attorney and the 36 assistants. The district attorney is authorized to hire additional assistants, who are paid entirely by the parish (L.R.S. 16:53). There are currently 41 assistant district attorneys in Jefferson Parish.

There are 180 employees in the DA's office. One assistant is assigned to each division of district court. Seventy-five employees of the district attorney's office are assigned to juvenile court.

Approximately 61,500 cases are handled by the DA's office on a yearly basis. The great majority of these (45,000,

or 74 percent) are traffic cases. The DA's office accepted approximately 60 percent (7,500 of 12,500) of the cases it screened in district court in 1993.

District attorneys throughout the state receive a portion of their financial support from fees and fines assessed by the judiciary, as well as commissions on amounts they collect in settlements on behalf of the state (L.R.S. 16:4.5). The office is also supported by the parish government. In 1992, the DA's office received approximately \$2.8 million from the parish. The 1994 adopted budget has earmarked approximately \$3.3 million for the DA's office.

The Defense

Indigent Defender Board

Like all judicial districts in the state, the Twenty-fourth Judicial District has an Indigent Defender Board (IDB) to coordinate the provision of defense counsel for those who qualify. In Jefferson Parish, the seven-member board is responsible for maintaining a staff of eligible attorneys to provide for the district's indigent defense (L.R.S. 15:145). The judges of each judicial district establish rules and regulations regarding the appointment of members to the IDB (L.R.S. 15:144).

In one of three ways a local board can provide for indigent defense, the Twenty-fourth Judicial District's IDB contracts with 25 attorneys who provide for the district's defense of the indigent (L.R.S. 15:145 B.(3)). These annual contracts pay each defense attorney \$25,000.

The current average felony caseload for an IDB attorney is about 100 defendants, approximately half of whom are likely to be in jail. A representative of the IDB attends the daily (Monday-Friday) hearings in magistrate court and interviews all the persons on the magistrate's list to screen them for indigence. Defense counsel is not appointed, however, until the screening division of the district attorney's office has accepted charges. If an individual eligible for indigent defense says at the time of arraignment he or she will secure his or her own attorney but is still in jail with no attorney of record ten days later, the IDB sends that person a letter restating the availability of defense counsel.

The IDB administers the district indigent defender fund, which is the primary source of funding for IDB attorneys. This fund is made up of special court costs established by state law. These court costs may range from \$17.50 to \$25.00. In Jefferson Parish, the district has recently raised the cost to the maximum \$25.00 in applicable cases. The indigent defender fund also consists of payments made by some individuals who receive IDB counsel but who are determined by the court to be financially able to provide partial payment or reimbursement.

The State Bail Bond Reform Act provides the IDB with a two percent commission on commercial bonds in criminal cases. According to the IDB Executive Director, this commission is expected to yield approximately \$80,000 for the bond in 1994. The parish is responsible for payment of attorneys other than IDB staff who are appointed by the district court to provide for indigent defense. The parish also pays for transcripts, expert witness fees, and investigation fees. In FY 1992-1993 these charges amounted to \$140,000.

Detention

The Jail

The Jefferson Parish Correctional Center, located at 100 Dolhonde Street in Gretna, is the parish's primary detention facility. With a legal capacity of 700, it provides a bed for every 640 residents in the parish. The jail is provided and maintained by the parish and operated and staffed by the sheriff. The eastbank lockup, in Metairie holds 16 people on a short-term basis. Inmates are transferred from the eastbank lockup to the Jefferson Parish Correctional Center on a daily basis for magistrate court.

Probation and Parole

State Department of Public Safety and Corrections, Division of Probation and Parole

Adult probation and parole services at the local level are a state function under the Department of Public Safety and Corrections. Jefferson Parish is one of only two parishes that comprise its own district; Orleans Parish is the other.

The primary task of the Division of Probation and Parole is to provide supervision of individuals serving a sentence of probation or who have been released on parole from a state prison parole (Art. 893 C.Cr.P.). The division also provides presentenced and postsentenced investigations. Probation and parole officers are "peace officers" and as such are authorized to make arrests. There are 36 probation and parole officers in Jefferson Parish, with an average caseload of 120 cases each. In early 1994, the Jefferson Parish caseload was about 10 percent of the total state caseload (4,032 of 40,653). The fastest-growing part of the local caseload are the 60 "good timers" who return to Jefferson Parish (their home parish) after their release from state prisons. ("Good time" is a system of rewarding inmates for good behavior by reducing their sentences.)

At any time during the term of probation the court may issue a warrant for arrest or a summons to appear in court for violation of conditions of probation. The court has authority to grant bail to a probation violator or to revoke probation status. Parole violators, on the other hand, cannot be released from jail. According to Jefferson Parish magistrate court

records, in the first four months of 1994, 18 percent of the defendants who came before the magistrate judge had violated the conditions of their probation or parole.

Probationers are charged a fee on a sliding scale of between \$20 and \$100 per month (or visit). Parolees pay a fee of \$43 per month. Twelve percent of these funds is deposited into the state treasury. The balance makes up the Probation and Parole Management Fund. These funds are appropriated by the legislature to the state Department of Public Safety and Corrections' Division of Probation and Parole on an annual basis, according to workload.

Intensive Probation Program

An intensive probation program has been developed by the Jefferson Parish Human Services Authority (JPHSA) in conjunction with the Twenty-fourth Judicial District Court and the state Division of Probation and Parole. It was developed in response to concerns about drug use among probationers, the lack of specialized and adequate care for this population, and the time delay between drug use and notification of the probation officer or the judge. The program began in May of 1994 with a budget of \$100,000 and staff of four. It was modelled after the Miami Drug Court, which is cited in a recent American Bar Association book highlighting creative solutions to problems in the nation's justice system.

The intensive probation program is a sentencing option for any judge in the Twenty-fourth Judicial District, with priority availability to the Drug Court. A judge's decision to utilize this program is made in consultation with staff assigned to the program from the JPHSA (three full-time staff are assigned at this time), a state probation officer (who is responsible for all the individuals in the program in addition to his "regular" caseload), and the defense attorney.

The program is funded jointly by the Jefferson Parish Human Services Authority and the Jefferson Parish District Attorney's Office, with plans to seek additional grant funding.

Juvenile Justice System

Juvenile Court

Jefferson Parish is one of four parishes in Louisiana with special juvenile courts that have exclusive juvenile jurisdiction. In other parishes, this jurisdiction lies with the parish and district courts.

The jurisdiction of juvenile courts in Louisiana is "very expansive, more sweeping than the laws of almost every other state," according to the Coordinator for the Louisiana Children's Code Project, which was completed with adoption of the Children's Code in 1991. Courts with juvenile jurisdiction have jurisdiction over delinquency proceedings

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except in specific cases when a child is treated as an adult under the law, child in need of care proceedings, families in need of services proceedings, traffic proceedings, voluntary and involuntary termination of parental rights proceedings, adoptions, and mental health proceedings. They have jurisdiction over adults in proceedings involving the care, custody, or control of a child, including child abuse or neglect, child custody, and child support.

The Jefferson Parish Juvenile Court is composed of three judges. The Juvenile Court employs directly 41 people and has an annual budget of \$1.9 million. In the Jefferson Parish Juvenile Court, the Judicial Administrator is directly involved in structuring the court calendar for productivity and in managing information for case handling as well as reporting purposes.

Department of Juvenile Services

The Department of Juvenile Services and the position of Director of Juvenile Services were created by parish council ordinance in 1987, to administer juvenile services for the parish (JP Code, Div.28, sect. 2-2510ff). The director is appointed by the parish president with the approval of the council.

The primary duties of the director include providing policy guidance to the parish president in the area of juvenile services; working with the parish president to formulate and evaluate operating policies, programs and procedures relating to juvenile services; and preparing reports on departmental operations.

The department has 112 employees, in five divisions: community services, volunteer services, probation, detention, and evaluation. The community services division is responsible for arranging agreements with local social service agencies. The head of that division estimates that approximately 80 percent of the juveniles who need treatment are able to receive it, but delays are a persistent problem.

The probation division currently handles over 1,200 juveniles, with each probation officer handling an average caseload of between 50 and 60 cases. The department also operates the 55-bed co-educational Rivarde Detention Center.

A Juvenile Services Advisory Board was created in 1989 to coordinate planning and policy development of juvenile programs. It is composed of seven persons nominated by local colleges, universities, and professional organizations and appointed by the parish council on recommendation of the parish president. The board meets on a monthly basis.

Jefferson Parish Employees 1993 Criminal Justice System

Office/Agency	Number of Employees
JPSO, including parish Correctional Center	1,356
District Attorney	180
Indigent Defender Board	30
Clerk of Court	298
24th Judicial District Court	65
1st and 2nd Parish Courts	63
Probation and Parole	47
Juvenile Court	44
Dept. of Juvenile Services, including Rivarde Detention Center	111
Criminal Justice Coordinating Council	9
Municipal Law Enforcement (est.)	300
TOTAL	2,477

SOURCE: Jefferson Parish 1994 Operating Budget Proposed; Jefferson Parish Sheriff's Office, 1993 Organizational Tables; Criminal Justice Coordinating Council; and BGR interviews.

Table A-2

Appendix B: Non-Jail Measures for Decreasing a Jail Population

Decisions that impact the population size at a local jail are made at a series of points in the criminal justice system. At these decision points, there are alternatives to holding an individual in jail, or even arresting a person in the first place. These alternatives range from diverting a person from the criminal justice system altogether, to sentencing a person to intense detention experiences away from jail.

Diversion Instead of Arrest

At the point of initial encounter with a law enforcement officer, an individual may be arrested or not. The decision to arrest a person lies with the law enforcement officer on or called to the scene. An individual may be diverted from the system, that is, simply released or referred or returned to a family or community resource.

Citation in Lieu of Arrest

An individual may be issued a citation (a "ticket") or a notice to appear in court (a "summons") instead of being arrested.

Diversion After Arrest

Diversion from detention can also occur after arrest. Early screening of arrestees, either by a pretrial services agency or by prosecutors, can help identify those individuals who can safely be released without conditions or released to participation in some special program.

The District Attorney's Office has since 1977 operated a voluntary diversion program for first-time, non-violent offenders. The District Attorney's Screening Division identifies eligible individuals. Program participants must be between the ages of 17 and 25, except persons arrested for shoplifting, who are eligible whatever their age. Even some felony arrestees are eligible, if they are between the ages of 17 and 25 and have no prior record.

Pretrial Services

Some of the same services that are called "pretrial" may actually occur "prearrest" or be used as an alternative sentence "posttrial." "Pretrial" services may be governmental or private. They may simply provide screening for identification of individuals with special needs. They may provide information on an arrestee or on community resources, enlarging the range of release or sentencing options that prosecutors or judges may consider. Pretrial services may also extend to the active supervision of various forms of conditional release.

Pretrial services programs are both a cost- and crime-control measure. They can reduce jail populations and, therefore, costs, by expanding the use of various forms of release. When such programs provide for supervision, they reduce the likelihood of additional criminal activity. There is no formally-established pretrial services agency in Jefferson Parish.

Bail

After arrest, an individual's initial appearance in court is customarily the most critical moment in determining detention or release at the pretrial stage. This is the stage at which bail is considered for all defendants.

The purpose of bail is to insure that the accused will appear for trial. Bail amounts are established according to both severity of the offense and the magistrate or judge's expectation that the accused will be present for trial. Misdemeanor bail limits follow a schedule, while judges have wide discretion in setting bail for felonies. In addition, bail may be non-monetary as well as monetary.

Monetary Bail. Judges can require actual cash or things of cash value to be paid or "posted" to secure release from the jail. Defendants can pay their bail amounts in full, or they can pay a commercial bonding company a deposit (usually 10 percent) and transfer the monetary responsibility of meeting bail to the bonding company. When commercial or bonding companies are used, these companies assume the responsibility of guaranteeing an individual's appearance in court and paying the court's full bail amount in the event of a defendant's non-appearance. Deposits paid to commercial bonding companies are non-refundable.

Occasionally, judges will accept partial payment of bail as sufficient for release from pretrial detention. Nominal or unsecured bail is the payment to the court of a small amount of money for which the defendant is liable if he/she does not appear in court. Deposit bail is the posting of a percentage of the full dollar bail amount. Cash bail paid by the defendant is returned if all court appearances are made.

Non-Monetary Bail. Non-monetary bail usually takes the form of community service.

Other Non-Monetary Pre-Trial Release. Other non-monetary forms of pre-trial release include: *Release on Recognizance (ROR)* or a *Personal Bond Undertaking (PBU)*, where no financial deposit or conditions are required and an

individual is released from detention unsupervised; *Conditional or Supervised Release*, where no money is required to secure release from the jail, but certain conditions imposed by the court must be met, such as regular reporting to a special reporting center, agency or outpatient clinic, or continued employment or educational activity; *Third Party Release or Personal Surety Bond Undertaking* (PSBU), where a third party—usually a family member—guarantees an individual's appearance in court; and *Emergency Release*, an extraordinary form of release on recognizance used to reduce jail overcrowding whereby a sheriff, jail administrators, and/or judges decide to release certain detainees in order to accommodate new ones. Supervised release methods are the least available option in Jefferson Parish.

Extensive use of emergency release eventually renders meaningless the conditions of other forms of non-monetary release, and there are two types of emergency release now in use in Jefferson Parish. They are the sheriff's emergency release program, in operation since April 1991, and the release of misdemeanants under a 1976 federal court order.

Other Options for Release or Partial Release

Day Reporting Centers. Day reporting centers are facilities to which persons must report daily for structured services and/or activities. Failure to report may result in revocation of release and return to jail. In many cases, individuals released to day reporting centers are required both to report physically to the center and to call in by telephone on a regular basis. No programs of this type currently exist in Jefferson Parish.

Halfway Houses. Halfway houses provide lower security supervision in a residential setting. They are especially effective as transitional facilities where inmates can be supervised in later stages of their sentences. Release from jail to some halfway houses requires participation in drug or alcohol treatment programs, work/study programs, or employment counseling. There is currently one facility of this type in Jefferson Parish, used by the Intensive Probation Program.

Electronic Monitoring. Electronic monitoring uses electronic devices worn or carried on one's person to enforce home or home-and-work detention of pretrial suspects or sentenced offenders. Jefferson Parish currently has an electronic monitoring program funded by the parish and in use since March 1991. Criteria for program participation were developed by the Criminal Justice Coordinating Council, the Jefferson Parish Sheriff's Office, and the state Office of Probation and Parole. One hundred monitoring devices are available for the program. The parish's juvenile court is using 40 units, and 20 units are being used for adults awaiting trial or sentenced to parish time. The First Parish Court expects to begin using electronic monitoring by the end of 1994.

"Boot Camp"/Shock Incarceration. "Boot camp" or shock incarceration programs are designed to minimize the likelihood that participants will become habitual offenders. Modelled after the military boot camp, these programs rely on physical drills and discipline and have a rehabilitative emphasis. Early research reveals that for the first time offender without a long criminal history and with a willingness to participate, boot camp programs can have a positive impact.

Boot camp programs were originally used as an alternative to a prison sentence, but recent research indicates that programs are being developed as a sentence at the local level. Since 1983, 41 boot camps have been opened in 26 state correctional jurisdictions, in addition to many being developed and being considered in cities and counties and for juveniles (MacKenzie et al., p. 1). The Louisiana Department of Public Safety and Corrections has operated a boot camp program since 1987 at the Hunt Correctional Center in St. Gabriel. The recent anti-crime session of the state legislature also authorized planning for boot camps for juveniles in Louisiana.

Boot camps proposed for juveniles are not to be confused with the "Young Marines" platoons operating locally. The "Young Marines" program offered by the United States Marine Reserve, with corporate sponsorship, is not for offenders. It is offered for young people who are actively seeking positive experiences to help them cultivate discipline and self-esteem.

Other Non-Jail Sentences

Suspended Sentence. Courts occasionally will order a sentence and then suspend it, meaning the individual will not actually serve the sentence unless he or she engages in further criminal activity or violates the conditions of release. When judges suspend sentences, they have the prerogative to place the defendant on active or inactive probation.

Fines, Fees and Restitution. Offenders can be required to pay part of the cost of supervision, legal proceedings, or damage incurred as a result of their crimes. Fees for probation supervision, court fees, and restitution are most common.

Community Service. Community service or some public activity is sometimes required of offenders who are not employed or who cannot reasonably be expected to make monetary payments.

Probation. Offenders can be sentenced to probation instead of jail or prison. Probation usually requires meeting on at least a monthly basis with a probation officer and paying a monthly fee. Individuals on probation must meet the special conditions of their probation as ordered by the courts. These special conditions are sometimes determined after a presentence investigation (PSI) is completed by a probation officer.

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DAVENPORT: Hard questions for Holder

By

Friday, March 19, 2010

It's been a rough few months for Attorney General Eric H. Holder Jr., and he should face more tough questioning when he reports for the Senate Judiciary Committee oversight hearing on Tuesday.

In the legal war on terror alone, he has been under fire for scheduling the trial of Khalid Shaikh Mohammed in civil court in New York rather than in a military tribunal, for Mirandaizing the Christmas Day bomber suspect, for trying to relocate Guantanamo detainees where people don't want them, for dragging his feet before finally revealing at least nine lawyers in his department who formerly represented terrorist detainees, and, most recently, for reporting that he failed to disclose in his confirmation hearings seven briefs in which he participated as a lawyer, including ones involving the war on terror.

Even with health care and the economy as the front-burner issues in Mr. Obama's first year, no Cabinet officer's department has generated more smoke than Mr. Holder's. Senators - even the president himself - should be examining these several problems and asking whether Mr. Holder is really up to the job or, perhaps worse, whether these issues add up to an agenda to tip the legal scale sharply in favor of detainee rights and away from national security concerns.

Let's start with the latest flaps because, taken together, they seem to raise questions of legal philosophy at the Department of Justice. In November, Sen. Charles E. Grassley, Iowa Republican, asked Mr. Holder to identify department lawyers who may have conflicts of interest for having represented detainees. In a surprisingly cool response, Mr. Holder said he'd consider it and then sat on it for three months. Finally, last month, he provided an incomplete answer, admitting there were at least nine department lawyers who had represented detainees, identifying just two of them.

Then the department acknowledged this week that Mr. Holder had failed to disclose some of his own work on several briefs, including one on behalf of enemy combatant Jose Padilla, during his confirmation hearings as attorney general, calling it an oversight. A case that went all the way to the Supreme Court would seem to be difficult to forget or overlook.

It does seem to be a fair concern why Mr. Holder, who works for a president promising the most transparent administration in history, would stonewall the Senate and even now fail to provide a complete response on who in his department represented detainees and their current responsibilities. Those who questioned his response, however, prompted quite a sideshow as several prominent lawyers came forward to defend the obligation of an attorney to represent unpopular causes. This neatly sidesteps the real question, which is not whether these lawyers acted properly before they came to Justice, but rather, why Mr. Holder chose to hire so many of them and what they are doing now. Believe me, had the Securities and Exchange Commission hired a suite of Fortune 100 general counsels to enforce securities laws or the Environmental Protection Agency a table full of lawyers from oil companies, such questions would be asked.

Other hard questions Mr. Holder should have to answer include why he feels a lawyer with no prosecutorial experience - who as a human rights advocate referred to military commissions as "kangaroo courts" and said freeing terrorists is a legal "assumption of risk" we must be prepared to take - is qualified to represent the department on detainee matters. Or, for that matter, what Mr. Holder's hiring of these nine lawyers or his signing of Padilla's brief might tell us about his own view of detainee rights. After all, because some of those briefs were not produced for his confirmation, that was a conversation the senators did not have with him when it counted.

There are two schools of thought about the legal war on terror. One essentially starts from the premise that terrorist suspects, enemy combatants and detainees should not be tried as "criminals" and are not entitled to the full panoply of constitutional rights afforded to U.S. citizens. Instead, they should be tried in military tribunals, with more limited rights. A very different view, held by many human rights advocates, is that terrorist suspects should be treated as one of our own citizens, even at the risk of returning enemy combatants to the field to attack again.

The U.S. Senate, and the American people, have every right to know who is setting policy for the legal war on terror and in which of these directions they are headed. Mr. Holder would do well to bring less foot-dragging and more forthright answers to these legitimate questions when he comes before the Judiciary Committee next week.

David Davenport is a research fellow at the Hoover Institution.

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GSA head says he forgot to mention loan United Press International July 16, 1982, Friday, PM cycle

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HEADLINE: GSA head says he forgot to mention loan

BYLINE: By GREGORY GORDON

DATELINE: WASHINGTON

BODY:

The head of the General Services Administration says he inadvertently overlooked a \$425,000 federal loan in stating his finances to a Senate committee before he was confirmed.

GSA Administrator Gerald Carmen told Chairman William Roth of the Senate Governmental Affairs Committee Thursday that he based his responses to a committee financial questionnaire last year on standards required in other forms he filed at the time.

Carmen failed to disclose that his used tire business in Manchester, N.H., received two Small Business Administration loans totalling \$425,000 in 1975. Forms that executive branch officials must file under the Ethics in Government Act do not require disclosure of business loans, even if they are personally guaranteed, unless the loans are delinquent.

But the Senate committee's disclosure form is more specific, demanding information on all direct and indirect loans to the party seeking appointment to a federal office. Carmen, who met with Roth and committee staff, said in a letter to the Delaware Republican that his "failure to provide this information to the committee was an oversight. I regret any embarrassment that was caused by that."

A spokesman for Roth, who sent Carmen a letter last month demanding an explanation, said the committee would review the GSA chief's letter, "but Sen. Roth seems to be satisfied that he provided the material that was left out of the original disclosure and that it was an oversight.

"It appears to satisfy the requirements the committee had," the spokesman said.

It was revealed last month that shortly after taking office as head of the government landlord and procurement agency, Carmen requested and received two six-month deferrals on the low-interest SBA loans, which were combined in 1976. As collateral for the loan, Carmen posted the property on which he ran his tire business and other property he owned personally.

Carmen, a key figure in running President Reagan's New Hampshire campaign, sold the business in 1979, but did not repay the loan.

He continued to hold the money at 6.5 percent interest, while conventional lending rates soared. SBA officials say he still owes \$405,000, plus \$30,000 in interest accrued during the deferral period.

Carmen's letter said he owed \$391,593 on the loan, which he and his wife, Anita, guaranteed. Carmen is due to resume his monthly payments of \$2,717 on the loan on July 24.

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Banking On Andy Cuomo HUD Secretary and rising Democratic star Andrew Cuomo wants to go places-- assuming he can leave some baggage behind. The American Spectator January, 1999

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**HEADLINE: Banking On Andy Cuomo
HUD Secretary and rising** Democratic star Andrew Cuomo wants to go places-- assuming he can leave some baggage behind.

BYLINE: Sam Dealey & James Ring Adams.;
Sam Dealey is TAS's assistant managing editor. James Ring Adams is an investigative writer for TAS.

BODY:

It couldn't have been more straightforward. The Senate Banking, Housing, and Urban Affairs Committee had a form. The form was entitled "Statement of Completion by Presidential Nominees." The nominee was President Clinton's choice for housing secretary, 41-year-old Andrew Cuomo, who was to complete the questionnaire and return it before his confirmation hearing in January 1997. Simple, no?

Evidently not. One question read: "Give the full details of any civil or criminal proceeding in which you were a defendant, or any inquiry or investigation by a Federal, State, or local agency in which you were the subject of an inquiry or investigation." One of the cases he listed, *Smith v. Cuomo, et al.*, had been brought against him and others by the owner of a south-Florida savings and loan, alleging an illegal takeover attempt. But Cuomo failed to disclose a later suit, brought by the S&L itself, and settled only two months before his hearing. Why? Perhaps because *Oceanmark v. Cuomo, et al.* revealed that in 1988, federal banking regulators investigated Cuomo and fellow investors for possible change-in-control violations. The nominee should have listed that investigation, too, in answer to the second part of the question. He did not.

How serious is this? Reagan White House aide Edwin Meese was investigated by an independent counsel for incomplete personal financial disclosures. Several Reagan administration officials were prosecuted in the Iran-contra matter for withholding information from Congress. Interior Secretary Bruce Babbitt has his own special prosecutor, probing the question of false statements to Congress. And then there's Cuomo's predecessor at HUD, Henry Cisneros, who resigned in the face of an independent counsel investigation. The allegation? Making false statements to the FBI about pay-offs to a blackmailing mistress during a routine background check.

The Justice Department apparently has not investigated Cuomo's responses. But it has looked at him for another reason. The issue: Did Cuomo retaliate against Oceanmark by pressuring the federal agency charged with thrift oversight to close the S&L? After a preliminary investigation, Attorney General Janet Reno concluded that the standard for appointing an independent counsel had not been met. Yet Reno's inquiry was narrowly tailored. A broader review of Cuomo's involvements with Oceanmark reveals serious questions of bank-regulation skirting.

Some of Cuomo's fellow investors in Oceanmark are also prominent figures in an array of political and financial scandals. And the secretary clearly grows anxious when asked about his past business associates and their affairs. HUD lawyers even threatened a lawsuit when TAS submitted detailed questions.

Most notable among Cuomo's past associates is Michael Blutrich, head of the law firm which Cuomo joined as a \$150,000-a-year partner in 1985. Blutrich recently pled guilty to looting an insurance company in Florida of some \$237 million, some of which went into a business controlled by the Gambino crime family. Andrew Cuomo would like to play down his close relationship with Blutrich and dismiss it as a thing of the distant past, but financial disclosure documents show a relationship lasting practically to the day of Cuomo's Senate confirmation hearing as HUD secretary in 1997.

The Son Also Rises

As the eldest son of Democratic lion Mario Cuomo, Andrew had one of the best educations in hands-on politics. He got into the game at 16, helping in his father's first state-wide race. He took part in Mario's losing bid for mayor of the Big Apple in 1977, and in his successful run for lieutenant governor a year later. But Andrew's real start came in 1982 when, at 24, he ran his father's winning gubernatorial campaign. In a primary against the formidable New York City Mayor Ed Koch, Andrew led the campaign from 37 points down to a victory margin of four. In the general run-off against the vastly better financed Republican Lew Lehrman, Andrew again prevailed. The uphill victories testified to Andrew's burgeoning campaign and management skills.

During his father's years in the governor's mansion, young Cuomo refined his political touch. He campaigned hard for Walter Mondale's presidential bid, bringing in savvy media consultants. And he was largely responsible for staging one of his father's most memorable moments, the carefully crafted speech at the 1984 Democratic National Convention.

Young Cuomo also got an education in hard-nosed politics. In 1983, the New York State Investigation Commission (SIC) concluded that Cuomo and two other aides--including current NBC News star Tim Russert--bullied members of the allied Liberal Party to support a Cuomo-favored candidate to head the party. According to the SIC report, the three men "intervened in the internal affairs of the Liberal Party in order to obtain a resolution of the factional dispute." Party members testified that the governor's aides threatened them with the loss of lucrative state jobs and patronage if the party's fight was not resolved in a way "acceptable" to the governor.

After this brush with notoriety, Andrew left Albany in 1984 for Manhattan to join the staff of New York District Attorney Robert Morgenthau. In 1985 he became a partner in the Park Avenue law firm of Blutrigh Falcone & Miller, a haven for his dad's financial boosters. One partner, Lucile Falcone, was Mario's chief fundraiser and, according to reports, Andrew's girlfriend. In his memoirs the governor even wrote he would likely join the firm when he left public service. (It ceased to exist before he could do so.)

Also in 1985, Andrew took a leaf from the playbook of his future brother-in-law Joseph Kennedy, who had started his career by founding a non-profit corporation to provide low-cost heating fuel to the poor. Andrew's variant was a non-profit called Housing Enterprise for the Less Privileged (HELP), which provides transitional homes and services to the homeless. In 1988 he quit his law practice to work full-time as president of HELP, a post he manned until joining HUD as assistant secretary for community planning and development in 1993.

Cuomo's zeal for philanthropy turned not-so-neighborly, however, when community legislators questioned the location and size of HELP projects, and when they attempted to slow what they saw as the non-deliberative, willy-nilly speed with which those project proposals were approved. One of these communities was Westchester County, a largely affluent New York suburb whose liberal denizens were shocked at the prospect of a housing project in their backyards.

Paul Feiner, then a county legislator who was skeptical toward HELP, says Cuomo interrupted a telephone conversation one night in 1988 with an emergency breakthrough by an operator. Cuomo's call was a tongue-lashing for Feiner's position on HELP. "There was a tremendous amount of pressure," recalls Feiner. At the time he told a reporter that Cuomo had threatened him, saying, "I'll ruin your career. I'll break every bone in your body," unless Feiner supported the project. Cuomo dismissed these allegations. "It's sad that (Feiner's) mind would work in such a way," he said. "I think it's even ethnically disparaging."

Now the Democratic supervisor of a Westchester town who holds a seat on HELP's advisory board, Feiner hardly seems out to get Cuomo. In fact, he calls HELP a "total success" and says that "perhaps without the pressure it would have been impossible to get the complex built... But I would have preferred a little more compromising with the community. It was a bad taste of government where things were being rammed through."

The Oceanmark Bog

Notwithstanding such unpleasantness in the non-profit sector, it's one of Andrew's for-profit ventures that has now come back to haunt him. As a corporate lawyer in the Blutrigh firm, he represented a group that in 1986 decided to invest in a family-owned, federally chartered savings and loan in North Miami Beach called Oceanmark. Andrew himself was also one of the investors. The original owners of the thrift, the Fenster family, had lived in Florida for generations, and they soon concluded that they were losing control of the bank to outsiders who wanted to plunder its assets and discard the shell.

Their suspicions were aroused by the accidental discovery that what they called Cuomo's "New York Group," supposedly five major investors, consisted of at least 22, who among them controlled more than half of Oceanmark's stock. Concealed takeover groups are a major no-no in financial regulation, and Cuomo's group had filed none of the required change-in-control papers. So the Fensters' lawyers hit them with the first of what has become a series of lawsuits.

A constant theme in this convoluted legal history is the political well-being of Andrew Cuomo. The New York Group offered to settle this first suit in 1990, just an hour before the Fensters' legal team was set to take a deposition from Andrew. (Several months before, Cuomo had backed out of another scheduled deposition, submitting an affidavit that he was sick with nausea, diarrhea, and headaches. The next day the New York Post had run a picture of Cuomo, wearing black tie at a party the previous night, over the caption, "He's one sick puppy.")

As part of the deal, Lynn Fenster and her family signed off on a press release apologizing to Andrew for "statements

made in the heat of the moment." "I regret any personal hardship this purely business dispute may have caused Mr. Andrew Cuomo," read the release. "I have always considered him an outstanding professional and count him as a friend."

The 1990 deal looked like a total victory for the Fensters. The New York investors agreed to put their stock in trust for five years and then give Oceanmark first dibs on buying it back.

What the Fensters didn't know, however, was that the Federal Home Loan Bank Board (FHLBB) had separately investigated the New York Group and entered into a secret supervisory agreement on June 17, 1988. The agreement noted that "the FHLBB believes there is an issue as to whether there has been a violation of" control laws, but "is willing to forebear from the initiation of proceedings." The terms were that Cuomo and the other group members had to dispose of their Oceanmark stock within a year. If any remained in their hands, stated the agreement, the stock "shall be donated to Oceanmark." By acceding to the agreement's stern language, Cuomo and his fellow investors avoided any fault-based action by the FHLBB.¹

¹ Cuomo and the other signatories may have misled regulators in order to close the deal. According to the agreement, these stockholders, "consistent with their desire to no longer be involved with Oceanmark, have already entered into an agreement for the sale of their stock." But that's exactly what the group did not do.

Despite its clear interest in knowing about the agreement, Oceanmark only learned about it by chance in early 1991. For the next three years, the thrift tried without success to get a copy from the Office of Thrift Supervision (OTS), the new federal regulator set up after the savings-and-loan debacle. Finally, in 1994, the Fensters took Cuomo and his group to state court in Florida, charging them with "an illegal conspiracy to commit fraud" by failing to abide by the supervisory agreement.

The suit dragged on until 1996, when suddenly an armistice was reached. Oceanmark received a copy of the federal order, and the New York Group agreed to exchange their stock for a largely worthless class of non-voting shares. The bank withdrew its suit. But what astounded Lynn Fenster was the speed with which the settlement was approved. "It went through like a rocket," she says.

The Fensters were especially impressed when Cuomo assured them he could clear up a residual problem with the OTS office in Atlanta, which supervises Florida thrifts. "One of the things that Andrew said," recalls Ms. Fenster, "was, 'Don't worry about a thing. I know people in Atlanta and I can take care of this.'"

An Independent Counsel All His Own

Why did the settlement come so quickly? To the Fensters it seemed that members of the New York Group, even those no longer active in the case, had suddenly decided to smooth the path for Andrew's career. Indeed, just three weeks later Cuomo was nominated to replace Henry Cisneros as HUD secretary. But the Fensters were less inclined to throw rose petals on his progress. The release was a nasty face-off that led to the Justice inquiry.

As part of the 1996 settlement, Cuomo asked for another public apology. This time the Fensters refused. Explains their lawyer William Friedlander, "If Oceanmark said publicly that their claim had no merit, then everything we had negotiated for--which was the right to bring it again, to dismiss it without prejudice--would have gone out the flue."

According to the Fensters, Cuomo took "no" very badly, threatened reprisal, and retaliated by pushing the OTS into an extended examination aimed at closing Oceanmark down. "Within a month after we refused to do what Andrew demanded," says Friedlander, "the OTS was back on this bank like white on rice. And they ate us for lunch."

When Oceanmark began receiving what its auditors saw as unusual demands concerning recapitalization requirements from OTS regulators, the Fensters appealed to the agency's ombudsman. In a letter of March 4, 1997, Oceanmark noted that the acting head of the OTS at the time, Nicholas Retsinas, was simultaneously HUD's assistant secretary for housing and the federal housing commissioner, and hence subordinate to Secretary Cuomo. The thrift alleged that Cuomo had used his authority to punish the Fensters and force a sale of Oceanmark, which, says Friedlander, would have incidentally produced a payoff on the non-voting stock held by the New York Group.

The ombudsman considered the charge against Cuomo a political hot potato and passed it on to the Treasury Department's inspector general. The FBI launched its own investigation. In late July 1998, even as FBI agents were still conducting interviews, the ombudsman revisited the complaint and concluded that OTS personnel might have been "plain-spoken," but they "did not act in a retaliatory manner." He found "no information" showing Cuomo's influence.

In early September 1998, the Fensters filed yet another suit, charging Cuomo, Retsinas, and current OTS Deputy Director Richard Riccobono with a "conspiracy" to ruin Oceanmark. Cuomo, they said, had used his political power to pressure the others into harassing Oceanmark. But the real news was buried deep inside the lawsuit. The Fensters said they had been interviewed by the FBI, and that the bureau appeared to be conducting its own investigation of Cuomo and his associates.

In fact, Justice did conduct a preliminary investigation of Cuomo--the kind of inquiry that can lead to the appointment of an independent counsel. Reno confirmed this on September 8, 1998, when she announced her determination that "there were no reasonable grounds to believe that further investigation (by a court-appointed special prosecutor) was

warranted." Then she went a step further, announcing that Justice lawyers would defend Cuomo, Retsinas, and Riccobono in the latest Oceanmark suit.

Cuomo's spokesmen now cite Reno's statement in rebutting the Oceanmark charges. In a letter to TAS, "HUD staff" wrote:

The real question...is will you allow your publication to be used as a mouthpiece for the bogus and self-serving allegations made by Oceanmark Bank. You are now on notice that the allegations...are false. You are also on notice that these allegations are ten years old, previously published, and now proven baseless by the Department of Justice, FBI, and Republican Senate. The publication of these statements which you now know to be false and slanderous is actionable. Your publication has a history of printing false material regarding Mr. Cuomo. The Secretary intends to pursue all legal avenues regarding this matter. 2

2 The current allegations are, of course, not ten years old, but arise from the Fensters' 1996 refusal to sign a statement similar to their 1988 apology to Cuomo. Cuomo's problems with the thrift were "previously published" in the October 1994 TAS, in connection with Oceanmark's efforts to obtain the secret supervisory agreement. The "false material" in question, HUD staff has specified, was an item on Secretary Cuomo's press conferences. (See On the Prowl, TAS, December 1997, and Correspondence, TAS, January 1998.)

A similar letter to TAS from Cuomo's private lawyers states, "We intend to protect his interests and will not tolerate any purported reporting, based on smear tactics, to enhance anyone's private business agenda or to increase circulation."

OTS recently withdrew its examiners from Oceanmark, and the Fensters' latest suit alleging an elaborate "Cuomo Conspiracy" seems strained at best. But there do appear to have been violations of the supervisory agreement, which federal regulators have failed to pursue--specifically the divestiture of the investors' stock. The case also puts a spotlight on some people who Cuomo perhaps wishes would remain in the dark.

The New York Group

Heading up the New York Group was Sheldon Goldstein. Originally from Brooklyn, Goldstein moved to nearby Rockland County in the mid-fifties, where he set up shop as a real-estate developer and businessman. By the 1980's he was a millionaire several times over and had a long list of corporations to his name.

Goldstein could also be a generous political benefactor. According to an analysis by Newsday, Goldstein, his family, and associates donated over \$102,000 to Mario Cuomo's gubernatorial campaigns from 1982 to 1989. In the 1982 campaign alone, the Goldstein machine contributed more than \$49,000. Shortly after Cuomo was first elected, Goldstein was appointed chairman of the State University Construction Fund, a lucrative patronage title.

In addition to Oceanmark, Goldstein, Cuomo, and others in the New York Group shared extensive interests in two other financial institutions, Hudson United and the Savings Bank of Rockland County. Oceanmark's Lynn Fenster recalls how the New York Group operated: "Shelley Goldstein would put out a call for money, and you would go. And if you didn't go--you almost didn't have a choice. You didn't have a say. The first time you didn't bring your money--he told me this--you didn't get to go again. And the first time you ever got worried about your money or didn't want to stay there, he would literally write you a check and you would never get called again." This seems to be borne out in an April 16, 1987 memo Oceanmark obtained from Cuomo's files. "It is imperative that you and I sit down together and discuss the whole Venture deal and on Monday I will put out the call for \$500,000," Goldstein wrote to Cuomo. "What Ed Wachtel (a New York Group investor) and I decided to do is call for all monies, put it in the Savings Bank of Rockland County and draw the money as we need it but to have it in the bank." Jeffrey Fenster, Lynn's brother and partner, paints a similar portrait: "Shelley would gin up an investment and he would put out a call for money. And Shelley had a thing that no one would ever lose money. He always gave them their money back if they lost money."

Goldstein was also a chief client of Cuomo--and Blutrach and Falcone--at their law firm. Other aspects of the cozy Goldstein-Cuomo relationship frequently cropped up in New York papers during the mid-1980's, including:

y In 1984 Arco Management won a state contract to manage the Bridge and Jackie Robinson housing projects in New York City. It later turned out that the Division of Housing and Community Renewal, the state agency that awarded the contract, had done so under a non-competitive bid. The following day the agency director claimed that the unorthodox move was in response to an emergency. The director also told the New York Times that Arco was "recommended to me but by whom I don't remember." Arco was owned by Goldstein and managed by one of his two sons, both of whom belonged to the New York Group. John O'Connell, another New York Group investor, was also a member of Arco. Andrew was his dad's right-hand man in Albany at the time, and Goldstein, as chairman of the State University Construction Fund, was a state official.3

3 Arco is currently a "prime contractor" for HUD property management in Minnesota, D.C., Puerto Rico, the Virgin Islands, and every state east of the Mississippi River. Upon becoming HUD secretary, Cuomo recused himself from decisions directly involving Arco.

y In 1987 Goldstein and Cuomo were wrapped up in a criminal and civil case and a State Investigation Committee (SIC) inquiry into a campaign quid pro quo. The allegations were that after Goldstein was denied part-ownership in a Manhattan building rented to the state, he influenced the governor's office to cancel part of the lease. A few years earlier, while a special assistant to his father, Andrew had amended the lease. According to the Times, Goldstein told the SIC, "I threatened to ruin (the building owner) in the state of New York as a window contractor." Soon after, Goldstein resigned as chairman of the State University Construction Fund for "personal reasons," according to a state spokesman, but presumably under pressure to do so after his embarrassing admissions. Cuomo testified to the committee that he had acted in the state's best interests at the time, not Goldstein's.

y In 1988, plans for a proposed thruway exit near Sterling Forest, the largest timberland tract in the New York City area, were scotched for economic and environmental reasons. The project had been pushed by Governor Cuomo. A report by the state comptroller noted that, "over the years, this project has been repeatedly rejected by past state governors and the New York State Thruway Authority as unwarranted based on the area's traffic needs and as simply a boon for private land developers." Goldstein, according to the New York Times, had extensive property interests in the area and, in 1986, attempted to purchase the 30-square-mile forest. Andrew Cuomo was his attorney in the deal.

When questioned about his ties to Goldstein, Cuomo has distanced himself. "I am one of 10, 15, 20 lawyers who represent him," he told the New York Times in December 1987. But the April memo from earlier that year suggests a closer relationship. "I really don't know what you did on your taxes," Goldstein wrote Andrew. "I called and found out you filed for an extension. Please, please let's put it together or some day it will come back and bite us."

The Witness Formerly Known as Blutrigh

Another New York investor in Oceanmark was Michael Blutrigh, a name partner in Cuomo's firm. In 1996 Blutrigh was exposed as a target in one of the largest-ever FBI fraud probes, and in November 1998 was convicted on 22 counts of racketeering, fraud, and money-laundering. In that scam, Blutrigh and others plotted with the then-chairman of the Orlando, Florida-based National Heritage Life Insurance Company to loot some \$237 million from the company through inside loans and sham real-estate deals.

In 1990 the Blutrigh group approached Heritage and offered to invest \$4 million. There was just one problem: They only had a million. So the investors illegally "borrowed" the rest from an escrow account at Blutrigh's firm. Soon after, a \$3-million advance for "future commissions" was drawn from the insurance company by the Blutrigh group and deposited into the firm's escrow account. The investors bought land near the Catskills in New York, then billed Heritage for millions more than they had paid.

Another sham loan involved a Bronx land parcel owned by 4305 Associates, a two-person corporation formed in 1988 and named for the parcel's street address. Blutrigh was vice-president and 50-percent shareholder; Lucille Falcone, president and equal shareholder. Blutrigh persuaded a cohort to pose as a real-estate appraiser, who valued the property at \$2,346,000. It was actually worth only \$700,000. Heritage made a \$1.5 million loan, a large chunk of which found its way into Blutrigh's pockets.

Predictably, Heritage soon found itself in financial straits, and its directors became uneasy for their shareholders, 26,000 (75 percent) of whom were elderly. Two years later, the insurance company collapsed, a \$440-million debacle. The Blutrigh group, meanwhile, had walked away with \$93 million in laundered money, and sunk over two and a half times that much in bad deals. By July 1996, Heritage's chairman pled guilty to the scam and received eight years in prison in exchange for his cooperation. Blutrigh, along with several associates, was indicted the following month and has since begun to cooperate with the FBI. One of the loans that federal agents are investigating was a piddling \$300,000 to underwrite Scores, a New York strip club which the Feds charge became a racket for the Gambino crime family.

In exchange for testifying and helping the FBI, Blutrigh recently entered the federal Witness Protection Program--and a substantially discounted lifestyle. In court documents, one of Blutrigh's former associates, Shalom Weiss, charges that during the heyday of the scam Blutrigh dropped \$50,000 per week "supporting a lavish lifestyle and expensive habits." The lavishness included a Porsche, a yacht, and a \$12,000 wristwatch, all of which he gave up as part of his plea agreement.

Blutrigh's expensive tastes included a passion for boys' basketball. According to Weiss, "much of Blutrigh's ill-gotten gains were spent supporting or covering up" pedophilia. "He exploited the young boys he raped and molested. He beguiled the parents of the boys whose basketball teams he coached so he could meet his prurient need." In 1994, after a two-year sting, Blutrigh was charged with multiple counts of sexual assault on a minor (to which he secured a sweetheart plea-bargain), and a story in the December 1998 Penthouse quotes an anonymous partner in Blutrigh's law firm saying, "Everyone knew what Michael was doing with these young boys. On more than one occasion a mother of one of these boys would come up to the office screaming and complaining about what Blutrigh was doing." According to the story, several sources "close to the situation" said Cuomo left the firm in 1988 in part because of Blutrigh's behavior. A former partner of Cuomo's disputes this, however. "That's a total lie. No one had knowledge that (Blutrigh) was involved in any of this s--t," says the source, who wishes to remain anonymous.

Cuomo downplays his relationship with Blutrigh. In a letter to TAS, the secretary's Fort Lauderdale attorneys wrote, "Many

years ago, Secretary Cuomo practiced in a law firm with Mr. Blutrich and participated with many investors, including Mr. Blutrich, in a tax-credit syndication." In fact, along with Blutrich and Lucille Falcone, Cuomo was one of three general partners in L&M Associates, a tax-sheltered oil and gas investment. And although the partnership began many years ago (September 17, 1986), it was not until January 21, 1997--the day before his Senate confirmation hearing to become housing secretary--that Cuomo quit doing business with Blutrich and sold his interest in L&M at a loss. A monthly disbursement check to Cuomo from the venture, a copy of which TAS has obtained, bears Blutrich's signature, and an accompanying letter shows that it was mailed in 1995 to Cuomo's HUD address, with "best personal regards."

Cuomo did not have to sell his stake in L&M to become secretary; he need only have recused himself from decisions involving the partnership (which he had done two weeks earlier). That he ultimately did sell seems to suggest he was troubled by doing business with an accused criminal. Yet Blutrich's fraud case had been widely reported months earlier, and Cuomo's former business associates had known about it almost immediately. "After...the firm was raided by the FBI...a former employee called me," says Cuomo's former partner. "I think that call, I'm sure, went out all over the city. And that's when I became aware that the FBI was investigating Michael in connection with Scores and the Mob." Presumably, it was only the prospect of public scrutiny that prompted Cuomo to finally withdraw his investment.

Better Left Unsaid

Less than a month after the ink dried on the second Oceanmark settlement in November 1996, Andrew Cuomo was nominated for HUD secretary. A month later, accompanied by his wife Kerry Kennedy (whom he had married in 1990), one of their two daughters, his mother Matilda, sister Maria, and mother-in-law Ethel Kennedy, Cuomo sailed through an adulatory confirmation hearing notable only for what was not brought up: Oceanmark Federal Savings and Loan.

The chairman of the Senate committee charged with confirming Andrew was Alfonse D'Amato, whose hearty dislike for the Cuomos was well known--and generously reciprocated--after many years' rivalry in New York politics. D'Amato might have been expected to turn the hearing into a blood bath, given the ample press coverage Oceanmark had received in the preceding decade. What's more, Florida's Connie Mack also sat on the committee. AHUD lawyer confirms that a Florida GOP official sent committee members a package alerting them to the Oceanmark imbroglio. Amazingly, however, the thrifit never came up.

Senate Banking sources say the oversight had more to do with D'Amato protecting his own chairmanship than Andrew Cuomo's well-being. There was speculation at the time that Cuomo might challenge the New York senator in his 1998 campaign, and that he posed a significant threat. (A Mason-Dixon poll conducted at the time showed Cuomo edging out D'Amato 41-38 percent.) According to these sources, it was understood that if D'Amato could protect his seat by sequestering Cuomo on HUD's top floor, so much the better. "Generally a lot of people felt there were understandings that obviously they were going to try to stay out of each other's way," says a senior committee aide.

Another reason that Cuomo's involvement with Oceanmark wasn't mentioned at the hearing may be that D'Amato had his own not-so-kosher connections to the New York Group. During the 1980's D'Amato was embroiled in a nasty HUD scandal of alleged favoritism, back-scratching, and campaign donor quid pro quos. Goldstein, a heavy D'Amato donor, and seven members of the New York Group realized a \$17-million windfall from a juicy HUD packagepatched together by a senior HUDofficial, Joseph Monticciolo, and pushed through by D'Amato. Upon leaving HUD, Monticciolo became the titular head of a Goldstein investment group that included these New York Group members. Congressional and Justice probes were launched. Ultimately Monticciolo rolled and said D'Amato asked him to cover for the senator, but the case could not be made. These eight investors at one time owned nearly half of the New York Group's shares in Oceanmark, according to documents from Cuomo's files.

If D'Amato wasn't going to bring up Oceanmark, neither was Cuomo--even if it meant a material omission on his nomination form. Cuomo will not explain why he did not list the Oceanmark suit among the court cases in which he had been a defendant. His HUD lawyers wrote TAS that "The FBI, Department of Justice, and U.S. Senate (Republican controlled) have all stated that all nomination forms and procedures were correctly complied with by Mr. Cuomo." But there is no public record of any such statements. What's more, according to the Office of Government Ethics, only the Senate Banking committee would have evaluated Cuomo's questionnaire. Asked why Cuomo did not divulge that he was investigated by federal banking regulators, HUD lawyers reply with word games. "Mr. Cuomo was merely a witness in connection with an FHLBB examination of Oceanmark," they claim, and consequently not directly the subject of the inquiry.

Young Cuomo is considered one of the Democratic Party's fastest-rising stars. He has indicated he'd like to play a major role in Al Gore's New York campaign machine in 2000, and Washington rumor holds that he's a strong contender for the second spot on a Gore ticket. More recent speculation predicts a possible run for retiring Senator Daniel Patrick Moynihan's seat in 2000. The GOP opponent in that race could turn out to be none other than Alfonse D'Amato. If that's the case, you can bet the bank on one mud ball that neither candidate will be throwing.

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SEN. LEAHY ISSUES STATEMENT ON NOMINATION OF DAVID NAHMIAS US Fed News September 30, 2004 Thursday 9:09 AM EST

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US Fed News

September 30, 2004 Thursday 9:09 AM EST

LENGTH: 1505 words**HEADLINE:** SEN. LEAHY ISSUES STATEMENT ON NOMINATION OF DAVID NAHMIAS**BYLINE:** US Fed News**DATELINE:** WASHINGTON**BODY:**

The office of Sen. Patrick S. Leahy, D-Vt., issued the following statement:

Statement of Sen. Patrick Leahy:

After months of stonewalling by this Administration, we are still trying to uncover the truth about the abuse of prisoners in U.S. custody overseas. I have long said that somewhere in the upper reaches of the executive branch a process was set in motion that rolled forward until it produced this scandal. To date, senior Administration officials have avoided any accountability for these atrocities - confirming them to presidential appointments would only underscore this Senate's willingness to ignore its oversight responsibility.

Last year, the Senate was asked to consider the nomination of Jay Bybee to the Ninth Circuit Court of Appeals. During Mr. Bybee's nomination proceedings many Members of the Judiciary Committee questioned him about his legal work - as Assistant Attorney General for the Office of Legal Counsel (OLC) at the Justice Department - on issues concerning interrogation techniques, the applicability of the Geneva Conventions to individuals in U.S. custody, and the legal underpinnings of the fight against terror. His answers were non-responsive. For example, when I asked him to discuss his thinking about the status of detainees, Mr. Bybee responded: "As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provided to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice." One of the nominees on our agenda today, Mr. Nahmias, has provided similar responses to me today on similarly crucial issues.

Despite these non-responsive answers, Mr. Bybee's nomination was strongly pushed by the Administration and he promised the Senate that he would be fair and impartial. So, he was confirmed to a lifetime position on the Ninth Circuit by the Senate on March 13, 2003 by a vote of 74-19.

Since his confirmation, we have learned of the "torture memo" that he signed in August 2002, while his nomination was pending for consideration by the Senate. In this memo he advised the President that he could ignore laws forbidding torture, in violation of international law, and that individuals acting pursuant to the president's commander-in-chief authority could be shielded from prosecution under U.S. torture statutes and the U.N. Convention Against Torture for torturing detainees. Mr. Bybee's aggressive and partisan legal work for the President apparently earned him a promotion to a lifetime job on the federal bench.

Now, however, with the scandal surrounding his recommendations, the Bush Administration has repudiated the memo and senior Justice Department officials have said that the memo would be withdrawn and rewritten. However, as a group of lawyers, including 12 former presidents of the American Bar Association and several former federal judges, wrote in a memorandum to the President in August, this subsequent repudiation "coming after public outcry, confirms [the Bybee memo's] original lawless character."

Unfortunately, because of his evasiveness, we did not know about a significant part of his record - and his failure to follow the law - prior to his confirmation. Had Mr. Bybee's role in sanctioning cruel, inhumane and degrading treatment and

abandoning the rule of law been known before his confirmation, the Senate would not have accepted his promise that he would simply follow the law. His job at the Justice Department was akin to a judicial role in which he was supposed to advise the President on what the law was, not what the President wanted it to be. Mr. Bybee distorted the law to conclude what he wanted to conclude and give the President unchecked authority to authorize barbaric acts.

The record of Mr. Bybee should give us all pause in considering Mr. Nahmias' nomination today. That record demonstrates that when we confirm individuals in this Administration who do not candidly describe their role in considering crucial legal issues we take too great a risk. New information has come to light since Mr. Bybee's confirmation - information that the nominee failed to disclose to the Senate during his consideration - that should serve as a lesson to us as we consider the nomination of David Nahmias.

We are asked to consider the nomination of David Nahmias to serve as a U.S. Attorney in Georgia. Mr. Nahmias has held senior positions at the Department of Justice and unequivocally supported broad executive power in the war on terror - positions that the Supreme Court has soundly rejected. At the Department of Justice, he has worked on the legal underpinnings of the President's war against terror and given speeches about enemy combatants and the applicability of the Geneva Conventions, among other issues.

In speeches, he has unequivocally supported the President's authority as Commander in Chief to designate and detain suspected terrorists, including American citizens, as enemy combatants without judicial review by an Article III court. In the case of the American citizens detained as enemy combatants, he argued that there was no reason for judicial review of their detentions because they, "received the absolute ultimate executive branch process," because the "President of the United States, operating as the Commander-in-Chief, personally reviewed their cases, and personally designated them as enemy combatants." The Supreme Court strongly rejected this position this year and held that the detainees in Guantanamo Bay and U.S. citizens being held as enemy combatants have the right to challenge their detentions in federal courts.

Mr. Nahmias has also made other troubling comments - such as saying that having hearings for enemy combatants would undermine national security; and that what is "unusual about the military commissions" is "the amount of procedural protection that's being offered in those commissions compared to the way they work historically and in other parts of the world."

I asked Mr. Nahmias questions about his views on the rights of enemy combatants, his role in investigating, approving, or otherwise reviewing rules, procedures, or guidelines involving the interrogation of individuals held in the custody of the U.S. government or an agent of the U.S. government, and his role in the prosecution of domestic terrorism cases. His original answers were largely non-responsive, despite the number of words used, and I sent him further questions to clarify his record and views. Again, he failed to provide complete responses.

For example, I asked him about his role in the development or review of advice from the Office of Legal Counsel on the interrogation of detainees, a serious and important issue to this Senate and the American people. As we all now know, Mr. Bybee's torture memo was written during Mr. Nahmias' tenure at the Department. This memo redefined torture to allow all sorts of brutal treatment (such as mock burial alive, simulated drowning, electrocution, tearing off of fingernails, and other such barbaric treatment) so long as the pain caused is not akin to organ failure, and concluded that, as commander in chief in the war against terror, the President and federal agents are not constrained by anti-terror laws.

Before confirming Mr. Nahmias to this important appointment, Senators should know what role he played in the development of this policy. We should know what role he continues to play in these matters. This is an area where bipartisan leaders and attorneys have called for increased Senate oversight and action. Unfortunately, however, Mr. Nahmias decided to give us as limited information as possible while on its face appearing to answer the question. He does not thoroughly describe his communications with OLC, the nature of his work, or what he was asked to do. Instead, he writes, "While I have participated in portions of that internal deliberative process [related to the interrogation of detainees], it would not be appropriate for me to comment in detail about my involvement in the process."

U.S. Attorneys serve as the nation's lead prosecutors and conduct most of the work in which the United States is a party and should not be selected merely on the basis of partisan loyalty. Mr. Bybee's nomination reminds us of the importance of careful review, and tells us something about the sort of individuals President Bush is selecting. In his case - and the case of some of the other 200 nominees confirmed for President Bush - the Senate has perhaps acted too promptly to confirm nominees with questions remaining in their records.

Despite two rounds of questions, I still do not know the full extent of Mr. Nahmias's role in the review of interrogation procedures for detainees, and whether he worked to sanction cruel, inhumane and degrading treatment, or assisted in the distortion of the rule of law to give the President unlimited authority. For this reason, I cannot support his nomination today.

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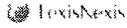
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BAXTER ROLE UPHELD IN I.B.M. CASE The New York Times June 18, 1982, Friday, Late City Final Edition

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June 18, 1982, Friday, Late City Final Edition

SECTION: Section D; Page 1, Column 6; Financial Desk

LENGTH: 677 words

HEADLINE: BAXTER ROLE UPHELD IN I.B.M. CASE

BYLINE: By ANDREW POLLACK

BODY:

A Justice Department internal investigation has concluded there was no conflict of interest involved when William F. Baxter, the Assistant Attorney General in charge of the antitrust division, dismissed the Government's suit against the International Business Machines Corporation, a department official said yesterday.

J. Paul McGrath, an Assistant Attorney General, disclosed the findings of the investigation to an appeals court in New York. He told the three-judge panel that the Justice Department considers the dismissal final and does not plan to reopen it.

"The findings do not raise any questions about the propriety of the dismissal," Mr. McGrath said. "There was no conflict of interest which barred him from doing that," he added, referring to Mr. Baxter.

Question Raised

But he said the report questions whether Mr. Baxter should have disclosed to Congress his prior dealings with I.B.M., which did not come to light until after Jan. 8, when Mr. Baxter dismissed the 13-year-old case as being without merit.

The disclosure of the Justice Department's conclusions appeared to deal a blow to attempts by opponents of the dismissal to keep the case alive.

Federal District Judge David N. Edelstein, who presided over the I.B.M. case, has scheduled a hearing Monday on whether the dismissal should be nullified because of Mr. Baxter's past consulting work for I.B.M. Last month the judge held a hearing on whether the public should be allowed to comment on the dismissal under a law known as the Tunney Act.

Yesterday's hearing before the United States Court of Appeals for the Second Circuit was in response to an I.B.M. motion that Judge Edelstein be made to cease holding hearings relating to the case and that he be removed from the case because of bias against I.B.M. The three appellate judges did not immediately rule on the I.B.M. requests.

Links With Corporation

The investigation of Mr. Baxter by the Justice Department's Office of Professional Responsibility began in March after it came to light that as a Stanford University law professor in the 1970's, he had been paid \$1,500 by a law firm defending I.B.M. to help evaluate expert witnesses.

Subsequently, several other links between I.B.M. and Mr. Baxter were discovered: Mr. Baxter in 1976 had written a letter to the incoming Carter Administration transition team saying the case should never have been brought; a grant from I.B.M. had financed part of a year's research by Mr. Baxter in the late 1960's, and last fall, while in the process of deciding to drop the I.B.M. case, Mr. Baxter was arguing on I.B.M.'s behalf before officials of the European Economic Community, which also has an antitrust suit pending against the company.

Rex E. Lee, the Justice Department's Solicitor General, who is in charge of acting on the report, said in a telephone interview from Washington that a fuller statement of findings, though not the entire report, would eventually be released. He said he had still not decided what to do about Mr. Baxter's failure to disclose his dealings with I.B.M. during his Senate confirmation hearings.

Friends of the Court

Judge Edelman did not appear at yesterday's hearing and no lawyer representing him spoke. The judge represented himself by filing a brief with the appeals court last week.

However, lawyers for two friends of the court - Philip N. Stern, a philanthropist and writer, and the Public Citizen Litigation Group, a public interest group - argued that Judge Edelman had the right to continue his actions.

They argued that the Tunney Act, which provides for public comment on Federal antitrust suit settlements, should also apply to antitrust suit dismissals. The Justice Department agreed with I.B.M. that Judge Edelman should cease his hearings but did not agree he should be removed from the case.

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The Associated Press February 1, 1980, Friday, PM cycle

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The Associated Press

February 1, 1980, Friday, PM cycle

SECTION: Washington Dateline

LENGTH: 960 words

BYLINE: By **LAWRENCE L. KNUTSON**, Associated Press Writer

DATeline: WASHINGTON

BODY:

Treasury Secretary **G. William Miller** denied today he had any knowledge of bribes or other questionable payments made by Textron Corp. while he was chairman.

But he said "questionable and improper" payments were made by other corporate officials. although he said the information was withheld from him.

"It's true I was not aware," he told a news conference. "I believed I could reasonably rely on my senior people. It turned out I was incorrect."

He said that "I deeply regret" the questionable payments.

The Securities and Exchange Commission said in a complaint Thursday that Textron had made \$5.4 million in payments to foreign officials, much of it while Miller was chairman, to win contracts to sell military equipment.

The SEC complaint also made a new charge that Textron spent \$600,000 to entertain Pentagon officials during Miller's tenure without informing stockholders, as required by federal law.

Regarding the Pentagon entertainment expenses, Miller said there was nothing improper in those payments, in Textron's view, because they were not illegal. He said they were primarily for meal expenses in connection with contract negotiations and did not exceed \$100 for any guest.

Sen. William Proxmire, D-Wis., said today the Senate Banking Committee, of which he is chairman, will soon decide whether to conduct a new investigation of what he called a "cover-up" and "a pattern of bribery" by Textron while Miller was its chairman.

Miller said the SEC complaint did not present any significant new information that should cause anyone to question his fitness to serve as treasury secretary.

"I do not intend to resign," he said in answer to a question. He said there has been "no communication from the president suggesting such a thing."

Proxmire said the foreign payments were "an extremely serious matter."

Proxmire cast the committee's lone vote against Miller's nomination to be Federal Reserve Board chairman in 1978. The senator said the SEC complaint "certainly confirms my opposition to Mr. Miller."

"Whether he knew about those bribes, we don't know, but he should have known," Proxmire told reporters following an appearance by Miller before the Joint Economic Committee, of which Proxmire is a member.

Proxmire confined his questioning of Miller today to economic matters, and did not bring up the Textron controversy.

"In this case it appears there was a cover-up by Textron when Mr. Miller was chairman, of a pattern of bribery, the SEC has now disclosed," Proxmire said.

Asked if he thought Miller ought to resign as Treasury secretary, Proxmire said, "No, no, that's entirely up to the president." But he said Americans "should insist on integrity in the highest levels of government."

Miller refused to answer reporters' questions about the SEC suit as he entered the Senate Caucus Room for the economic hearing.

The SEC says Miller knew when he headed Textron that the firm failed to disclose spending \$600,000 to entertain Defense Department officials between 1971 and 1978. Most of the money was spent on meals, the complaint said.

Although such expenditures were not illegal in themselves, Pentagon officials operate under regulations prohibiting them from being on the receiving end of such entertainment from potential defense contractors.

Moreover, federal law requires that such expenditures by publicly-held corporations be disclosed to stockholders.

It was the alleged failure to make that disclosure that prompted the SEC suit, filed Thursday in U.S. District Court.

White House press secretary Jody Powell, asked about Thursday's developments, said, "I'm not in a position to make a definitive comment on this."

A Justice Department official, who asked not to be named, said the department's criminal division has been reviewing the Textron matter since it was referred by the Senate Banking Committee at the time of Miller's confirmation hearings in 1978 on his nomination to be chairman of the Federal Reserve Board.

The official said Miller is not a subject of that review, but that the department would obtain and review the SEC filing in the case.

Textron accepted a settlement in which it neither denies nor acknowledges guilt, but agrees to take various remedial actions.

The same suit says Textron paid \$5.4 million to foreign officials in 10 countries to secure sales worth hundreds of millions of dollars over an 8-year period. It said some of the funds were funneled through bank accounts in Switzerland and Luxembourg.

The complaint cited payments -- Proxmire calls them "bribes" -- to officials in Iran, Mexico, the United Arab Emirates, Ceylon, Morocco, Indonesia, Colombia, the Dominican Republic, Ghana and Iraq.

Although many of the allegations involving foreign payments had been made previously, the SEC action filed Thursday was the first mentioning a domestic slush fund.

The complaint said "senior Textron officials and its chairman ... knew of this practice" and that "Textron entertainment expenses were recorded on its books in a manner designed to conceal that Textron was entertaining U.S. government personnel."

The SEC did not link Miller by name to any of the payments or allege that he lied about the foreign payments, some of which came up during his confirmation hearings to head the Federal Reserve Board, a post he held until being appointed treasury secretary last year.

In testimony at that time, Miller said he knew of no improper foreign payments made by Textron or any subsidiary. The matter of entertainment funds for U.S. government officials did not come up.

Miller was chief executive officer of Textron from 1968 through 1974 and chairman and chief executive officer from then until being appointed to the Fed post in 1978 by Carter.

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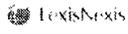
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CASEY TELLS FEDERAL ETHICS AGENCY HE OMITTED THREE STOCK HOLDINGS *The New York Times* July 31, 1981, Friday, Late City Final Edition

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July 31, 1981, Friday, Late City Final Edition

SECTION: Section A; Page 11, Column 5; National Desk

LENGTH: 510 words

HEADLINE: CASEY TELLS FEDERAL ETHICS AGENCY HE OMITTED THREE STOCK HOLDINGS

BYLINE: By EDWARD T. POUND, Special to the New York Times

DATELINE: WASHINGTON, July 30

BODY:

William J. Casey, the Director of Central Intelligence, has notified a Federal ethics agency that he failed to disclose stock holdings in three corporations when he filed a personal financial disclosure statement in January.

According to David R. Scott, chief counsel in the Federal Office of Government Ethics, Mr. Casey, through documents submitted to the ethics agency by the Central Intelligence Agency, explained that he had inadvertently failed to list his holdings in the concerns. Mr. Casey said that he was amending his financial disclosure report to reflect this.

Mr. Scott identified the corporations as Vanguard Ventures, the Energy Transition Corporation and SWC Information Company. Mr. Casey's failure to report his stockholdings in Vanguard Ventures was reported in *The New York Times* Saturday. As a result, Mr. Scott said, his agency asked the C.I.A. for information.

He Values It at \$50,000

According to the information supplied by the agency, Mr. Scott said, Mr. Casey valued his Vanguard holdings at \$50,000.

In amending the report, Mr. Casey publicly reported stock interests in the Energy Transition Corporation, a Washington concern formed in 1979 to develop energy projects, and SWC Information Company, which is involved in publishing. It was formed in the mid-1970's.

Mr. Scott said that Mr. Casey had valued his stock in Energy Transition at \$10,000 and in SWC at \$15,000 value. The Ethics in Government Act of 1978, under which Mr. Casey submitted his statement, requires a Federal official to disclose holdings valued in excess of \$1,000.

Not Reported to Senate Group

In the separate financial disclosure report he filed with the Senate Select Committee on Ethics during confirmation proceedings in January, Mr. Casey also did not disclose his interests in the three corporations. According to Stanley Sporkin, general counsel to the intelligence agency and a spokesman for the director, Mr. Casey disclosed to the intelligence committee this week that he had omitted his interest in the three companies in the report he filed with the panel. Mr. Sporkin said Mr. Casey's failure to report was "just an oversight."

Mr. Sporkin said *The Times's* article saying that Mr. Casey had not reported his Vanguard Venture stock "jogged" the director's memory. He said Mr. Casey started checking his records and discovered that he had not reported his interests in the two other companies.

In December or January, according to officials of Energy Transition, Mr. Casey resigned as a director and secretary. Robert W. Frie, president, said that the company had five stockholders and that all had once held Government posts.

He was acting administrator of the Federal Energy Research and Development Administration, a predecessor of the Department of Energy. He said that the three others were Frank G. Zarb, a former head of the Federal Energy

Administration; Charles W. Robinson, a former deputy Secretary of State; and William Turner, a former delegate to the Organization for Economic Cooperation and Development.

GRAPHIC: Illustrations: Photo of William Casey arriving for Senate hearing

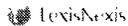
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The Associated Press

January 14, 2009 Wednesday

SECTION: WASHINGTON DATELINE**LENGTH:** 734 words**HEADLINE:** Nominees sunk by tax and nanny problems for years**BYLINE:** By MICHAEL J. SNIFFEN, Associated Press Writer**DATELINE:** WASHINGTON**BODY:**

The one excuse President-elect Barack Obama's nominees shouldn't be using if they encounter tax and nanny problems is that they didn't realize there would be a problem. Since 1993, unpaid taxes and immigration violations, usually related to household help, have sunk more than one presidential nominee with the whole world watching. But a few have survived to take office anyway.

ZOE BAIRD President Bill Clinton's first nominee for attorney general withdrew in 1993 after it was learned that the \$500,000-a-year corporate lawyer employed an illegal immigrant Peruvian couple to provide nanny services for her son and chauffeur her around and didn't pay the required Social Security taxes for them. A federal law enacted in the fall of 1986 made it illegal to hire undocumented workers. Her case gave birth to the term "Nannygate."

KIMBA WOOD Amazingly, just two weeks later, Wood, a federal judge in New York who was expected to be Clinton's second choice for attorney general, withdrew her name. She admitted her baby sitter of seven years had been in the country illegally when hired in March 1986 before such hiring was against the law. Wood stressed she had broken no laws and had paid all required employment taxes.

CHARLES RUFF After Baird and Wood, this Washington lawyer and former Justice Department official was removed from Clinton's "short list" of candidates for deputy attorney general after it was learned he failed to pay Social Security taxes for a woman who did domestic work for him one day a week over the previous eight years.

RON BROWN Clinton's then-newly confirmed commerce secretary acknowledged in 1993 he had not paid Social Security taxes for a woman who cleaned his house three hours a week over four or five years. He said he hadn't thought he owed taxes because she worked so few hours, but he scurried to pay the back taxes and penalties and remained in office.

FEDERICO PENA Like Brown, Pena had already been confirmed as to his post, transportation secretary in this case, when the Baird case prompted him to acknowledge he failed to pay Social Security taxes for a substitute baby sitter who looked after his two children while their regular caretaker vacationed in 1991. He promised to pay more than \$100 in back taxes.

SHIRLEY S. CHATER Chater, the president of Texas Woman's University was Clinton's nominee to head the Social Security Administration when the White House disclosed on Aug. 3, 1993, that she failed to pay Social Security taxes for a part-time baby sitter from 1969 to 1975. But she had paid the back taxes before her nomination, and she was confirmed.

BOBBY RAY INMAN The retired Navy admiral withdrew in January 1994 as Clinton's nominee to be defense secretary. Among many reasons, he listed his failure to pay required Social Security taxes for a former part-time housekeeper until just after Clinton nominated him.

STEPHEN BREYER When Breyer was a nominee for the Supreme Court in mid-1994, it was disclosed that the then-chief judge of the U.S. 1st Circuit Court of Appeals in Boston had failed to pay Social Security taxes for an 81-year-old U.S. citizen who worked part time in his house for 13 years. Breyer said he did not know he was supposed to pay taxes for the woman until after Baird's case, whereupon he paid the overdue taxes. He was confirmed as a justice of the high court.

MICHAEL P.C. CARNS The retired Air Force general withdrew in March 1995 as Clinton's nominee to head the Central Intelligence Agency as he acknowledged failing to make promised payments to a Filipino youth who had worked for the Carns family as a household helper overseas and whom Carns had legally brought into this country when he was transferred back.

LINDA CHAVEZ The conservative commentator withdrew in January 2001 as President George W. Bush's nominee to be labor secretary after it was disclosed that she gave a Guatemalan woman free room and board in her home and \$1,500 during a two-year period in the early 1990s even though Chavez knew she was an illegal immigrant.

BERNARD KERIK The former New York police commissioner withdrew in December 2004 as Bush's nominee to be homeland security secretary. Amid a rising list of problems with the nomination, Kerik said he was backing out because he discovered he had hired an illegal immigrant as a housekeeper and nanny and failed to pay required employment taxes and make related filings on the worker's behalf.

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May 14, 1994 Saturday

FINAL EDITION

SECTION: FRONT; A; Pg. 13**LENGTH:** 973 words**HEADLINE:** CONSENSUS-BUILDING SKILLS GAVE NOMINEE THE EDGE**BYLINE:** AARON EPSTEIN AND ANGIE CANNON Herald Washington Bureau**BODY:**

Stephen G. Breyer, a federal appeals judge in Boston, was nominated Friday to the Supreme Court -- a job he narrowly missed one year ago -- because his first-rate intellect and absence of ideology give him an unusually broad political appeal.

"I am flattered and I am honored," Breyer told reporters in Boston after Clinton announced the nomination outside the White House. "I believe very deeply in the Constitution . . . and the lives that it touches among the people."

In the end, Clinton said, he rejected Interior Secretary Bruce Babbitt because "I couldn't bear to lose him from the Cabinet" and decided against Arkansas federal Judge Richard Arnold because he has cancer and is undergoing radiation treatments.

Another factor in the president's decision may have been that, of the three finalists, Breyer, 55, would be the easiest to win Senate confirmation, as numerous senators have made clear in recent days.

In fact, confirmation will be "a slam dunk," predicted Sen. Orrin Hatch of Utah, the Senate Judiciary Committee's top Republican. Breyer is "honest, compassionate, a man with a big heart and an excellent legal scholar," Hatch said, and other Republican senators agreed.

On the liberal side, Sen. Edward M. Kennedy, D-Mass., called Breyer "a brilliant legal scholar with a profound understanding of the law and its impact on the lives of real people."

Sen. Bob Graham, D-Fla., said he supports Breyer's nomination because the judge has an outstanding record on the federal bench, adding, "I anticipate an expedited and relatively noncontroversial confirmation."

Sen. Connie Mack, R-Fla., said Breyer is a respected jurist with qualifications suited for a seat on the Supreme Court. "I will reserve final judgment on (his) nomination until there has been a thorough review of his record," he said.

Clinton reached his decision at 4:15 Friday afternoon and, in an unusual break with the past, decided to announce it two hours later without his nominee. Traditionally, presidents disclose their Supreme Court choices with their appointees at their sides, but Clinton had been criticized this week for repeatedly delaying his announcement.

Breyer and his family are to fly to Washington for a Rose Garden ceremony Monday.

Breyer is a familiar figure at the Senate Judiciary Committee, which is expected to begin confirmation hearings in July. He was the panel's chief counsel in 1979 and 1980, winning the respect of members of both parties.

President Jimmy Carter appointed Breyer to the 1st U.S. Circuit Court of Appeals in Boston in 1980 on Kennedy's recommendation.

Clinton praised his nominee as a consensus-builder with political savvy who has been exposed to "the full range of political issues" and appeals to all parts of the political spectrum.

"He's got Sen. Kennedy and Sen. Hatch together," Clinton remarked. "I wish I had that kind of political skill."

Breyer, who was informed of his appointment by telephone Friday afternoon, has strong liberal ties in his background. He was clerk to the late Justice Arthur Goldberg, lawyer for Watergate special prosecutor Archibald Cox and a former aide to Kennedy.

But he cannot be classified as a liberal.

In fact, conservative Republicans extolled Breyer for his open-minded ability to see all sides and his strong support of government deregulation of business.

"He has all the credentials that anybody would look for in a Supreme Court nominee," Hatch said.

Conservative advocate Clint Bolick, who has campaigned against liberal nominees in the past, said of Breyer: "I have not heard of anything that would give us any serious concerns about him."

But Breyer is likely to face some criticism from the left. Consumer advocate Ralph Nader, calling Breyer "the corporate candidate for the Supreme Court," said "several liberal groups will oppose the nomination even if no senators do."

Liberal Sen. Howard Metzenbaum, D-Ohio, said he had "questions about Judge Breyer's interpretation of our nation's pro-competition laws, particularly as they relate to small business."

Last year, after Clinton dropped Babbitt from his list of candidates to succeed Justice Byron White, the president concentrated on Breyer, who was recovering in a Boston hospital from a bicycling accident.

Clinton summoned Breyer to the White House for a luncheon, but decided to name another federal appeals judge, Ruth Bader Ginsburg, instead.

The Breyer candidacy also stumbled last year over his failure to pay Social Security taxes for a household helper. He since has paid, but White House counsel Lloyd Cutler said the Internal Revenue Service since has ruled that his helper did not qualify as an "employee" and that Breyer may be entitled to a refund.

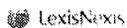
A thumbnail sketch of the Supreme Court:

- * William H. Rehnquist, 69. A member since 1972, elevated to chief justice by President Reagan in 1986. Popular with colleagues as "first among equals." Consistently conservative.
- * Harry A. Blackmun, 85. Appointed in 1970, court's senior member. Once a moderate conservative, now a liberal. Will retire at end of court term, probably in late June.
- * John Paul Stevens, 73. Appointed in 1975. May inherit Blackmun's title as court's most liberal member.
- * Sandra Day O'Connor, 64. Appointed in 1981. A moderate conservative generally considered at court's ideological center.
- * Antonin Scalia, 58. Appointed in 1986. Court's most outspoken conservative.
- * Anthony M. Kennedy, 57. A member since 1988. A conservative who has voted with the moderate-liberal faction in some high-profile cases.
- * David H. Souter, 54. Appointed in 1990. A moderate conservative whose political power on court seems to be rising.
- * Clarence Thomas, 45. A member since 1991. Consistently conservative.
- * Ruth Bader Ginsburg, 61. Appointed in 1993. Off to quick start as opinion writer and interrogator of lawyers. Widely viewed as moderate to liberal.

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Sotomayor Failed to Disclose to Senate Memo in Which She Argued Death Penalty Is 'Racist'

Friday, June 05, 2009

By Pete Winn, Senior Writer/Editor

(CNSNews.com) – The Judicial Confirmation Network (JCN) says Judge Sonia Sotomayor failed to disclose to the Senate Judiciary Committee a controversial document arguing that the death penalty is "racist" and a violation of the present "humanist" thinking of society.



President Barack Obama announces federal appeals court judge Sonia Sotomayor, right, as his nominee for the Supreme Court, Tuesday, May 26, 2009, in an East Room ceremony of the White House in Washington. (AP Photo/Alex Brandon)

The 1981 memo, they say, should have been disclosed as required under Question 12 (b) of the questionnaire that the Supreme Court nominee turned in Thursday.

Question 12(b) requires a nominee to "(s)upply four (4) copies of any reports, memoranda, or policy statements you prepared or contributed to the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member or in which you have participated."

JCN Counsel Wendy Long sent a letter Friday to Senate Judiciary Chairman Patrick Leahy (D-Vt.) and members of the committee arguing that Sotomayor had not properly complied with this requirement because she had not submitted the 1981 memo on capital punishment.

"It is . . . clear that (Sotomayor) has omitted controversial material from her past in which she asserts that '[c]apital punishment is associated with evident racism in our society' and advocated public opposition to restoring the death penalty in New York state," Long wrote to the committee.

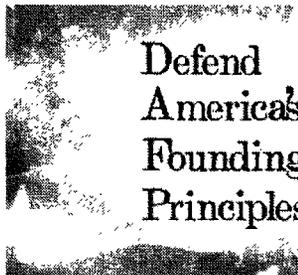
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Long told CNSNews.com that her group had obtained a copy of the memorandum from an undisclosed source--and was convinced of its authenticity. The copy of the memorandum attached to JCN's letter to the Judiciary Committee is signed by a three-person task force of the Puerto Rican Legal Defense and Education Fund (PRLDEF) that included Sotomayor.

Long said that in her **Senate questionnaire** Sotomayor had accurately disclosed the fact that she worked for the PRLDEF from 1980 to 1992, and held high-ranking positions with the organization.

She also truthfully listed on the questionnaire an April 10, 1981 letter from PRLDEF to then-New York Gov. Hugh Carey, opposing reinstatement of the death penalty.

"But what she omitted, and what is far more substantive and revealing," Long told CNSNews.com, "is the underlying policy memorandum that she and two other task force members sent to the board of the Puerto Rican Legal Defense and Education Fund with all their reasons for opposing the death penalty, and arguing for the organization itself to take the stand that it ultimately did take in its letter to Gov. Carey."

The memo that Sotomayor signed makes a number of "controversial, unsupported, and badly reasoned assertions" about the death penalty, Long added.

The memo, titled "Task Force on the Bill to Restore the Death Penalty in New York State," and dated March 24, 1981, states:

-- "An impressive array of highly respectable organizations have (sic) taken a public position opposed to the restoration of death penalty. All the major religious organizations have issued public statements opposed to it."

--"In the review of the current literature of the past two years, no publications have been found that challenge the evidence and the rationale presented in opposition to the death penalty."

--"Capital punishment is associated with evident racism in our society. The number of minorities and the poor executed or awaiting execution is out of proportion to their numbers in the population."

--"The problem of crime and violence in American society is so complex, it is unreasonable to think that capital punishment will result in preventing it or diminishing it."

Sotomayor Overturned Prison Regulations to Allow Santeria-Practicing Convicts to Wear Be

Senate Democratic Leader: 'If I'm Fortunate, Won't Have To Read One' of Sotomayor's Judicial Opinions

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Obama, in Senate, Gave Little Respect to Court Nominees, 5 Sen. Sessions



Senate Democrat Leader Hop to Never Read a Sotomayor Opinion



Sen. Brown Says Constitution Power to Mandate Health Insurance in Same Place as Medicare

--"Our present perspective on the meaning of our values in the Judeo-Christian tradition, and the state of humanistic thinking in the world judge capital punishment as a violation of those values."

--"It is counter-productive; we inflict death on the offender to manifest our opposition to his inflicting death on another."

--"It creates inhuman psychological burdens for the offender and his/her family."

The document was signed by Sotomayor and the other two members of the task force--Joseph P. Fitzpatrick, S.J., and Jorge Batista.

On Friday afternoon, a Washington Post.com story cited Fitzpatrick as the "driving force behind the document," but failed to report that Sotomayor was required to disclose the document to Congress -- but didn't.

"It is certainly a significant omission from her Senate questionnaire that is clearly called for by the terms of Question 12(b)," Long added.

Long said the memorandum provides "an important data point to flesh out the picture of Sotomayor that is emerging from her other writings, speeches and judicial opinions--a hard-left liberal judicial activist, much more akin philosophically to Justices William Brennan and Thurgood Marshall, than to Justice David Souter."

"In other words, what she's saying in this memo is that everybody agrees with this: that the death penalty is racist, that there's no other view, that it completely violates the Judeo-Christian position--all of these are highly controversial positions that are certainly contradicted by other evidence," Long told CNSNews.com.

Sotomayor is President Obama's pick to replace Souter, who is retiring from the bench.

The White House announced Thursday that Sotomayor's Senate questionnaire had been returned "in record time" for a Supreme Court nominee.

"I don't know if this is a Tom Daschle-type vetting failure on the part of the White House, or whether it was potentially an intentional omission to try to rush this confirmation through without such controversial documents seeing the light of day," Long said.

"In any case, it is clear that the Sotomayor Senate questionnaire is incomplete and unreliable. It must be sent back to her and to the White House, marked 'Return to Sender,' with instructions that it is not to be redelivered to the Senate without complete answers and all required documents," she added.

A spokeswoman for the Senate Judiciary Committee said only that "committee staff is reviewing the questionnaire now."

Calls to the offices of LatinoJustice PRLDEF -- the former Puerto Rican Legal Defense and Education Fund -- were not returned by press time.

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Comments

texasnoshoe1 (1 years ago)

al91206 what are you? Some extreme left wing liberal that believes I should pay for your health care, your family in prison, and your house payment? I can't afford you or your family anymore! Don't you democrates ever get tired of taking?

sandyinohio (1 years ago)

The trouble with some people is they are "virtuous" liberals, are naïve like Jimmy Carter, believe lies & liars, have no moral compass as relativism & humanism is their religion, hate America's history & culture of freedom, do not like liberty for ALL the people, and want to control everybody else & their money too! Other than that, though, they are nice people. Sort of. Well, in an Obama-like way; as charming as a snake :) I see more & more comments on various sites like : THROW OUT ALL INCUMBENTS EVERY ELECTION CYCLE! We don't need a professional political class. No more better health insurance than most taxpayers; no more better pensions than most taxpayers; no more bills written by lobbyists & think tanks. Talk about saving the country AND money! There you go! Let all politicians have to live by the bills they vote into being. What a great and novel idea: let's party like, say, Boston TEA Party! Coming near you over 4th of July. Be there, don't be square!

sandyinohio (1 years ago)

Gee, silly me, I always thought the standards for opinions on cases were what was written in the constitution, various laws, and past judgments, not popular opinion, no matter how many people espouse it. How can we have "rule of law" whereby people know the law beforehand and can reasonably be expected to

follow it? Must we make exceptions for people who can't or don't read popular magazines & wouldn't be expected to know the current popular opinions out in society? Or would it depend upon which "section" of society holds which opinions that one would be judged? Slippery slope indeed!

RobK (1 years ago)

Enough is enough, the Republicans needs to just stop the interviews and send this lady back to the stone age she came from. This is getting ridiculous folks and it is time to stand up and get this cougar out of the nomination process.

shooter (1 years ago)

drzarkov – the number of blacks in prison are being overtaken by whites. If trends continue, by next year, whites will be the predominant incarcerated race in prisons: (<http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf>) There are more whites than blacks in local jails and have been since 2000: (<http://www.ojp.usdoj.gov/bjs/pub/pdf/jim08st.pdf>) More whites have been on death row than any other race since 1976: (<http://www.ojp.usdoj.gov/bjs/glance/dtrace.htm>)

Underdog (1 years ago)

At least in the past (B.O. before Obama) criminals would get a trial and numerous appeals before a death sentence was carried out. Obama just had three extortionist (Somali pirates) "executed" because they thumbed their noses at his refusal to pay a ransom. Seems a death sentence is appropriate for some.

drzarkov (1 years ago)

As Bill Cosby observes, in 1950 the majority of convicts in US prisons were white, and minorities were under-represented, while today the majority of convicts are minorities and overrepresented in comparison to their percent of the population. Does this mean that the US was less racist in 1950? We have the Great Society to thank for tearing minority families apart and creating multiple generations of poor that have had their work ethic destroyed by a system of Federal dependence. It is this system that creates a population vulnerable to infiltration by criminal elements that has created a growing population of minorities on death row.

peter39 (1 years ago)

She should be fired before she gets started with her lies. God says in the Bible that all murderers must be executed. Murderers are killing millions of innocent people and the blood of these innocent people will be guilt upon all Democrats.

Jack Kinch(tuncle) (1 years ago)

Perhaps they wouldn't commit crime if they hadn't been created on welfare to vote demo. We never stop paying for demo mistakes.

realitybytes (1 years ago)

So the death penalty, "creates inhuman psychological burdens for the offender and his/her family." So what!?!? Who cares!?!? We should worry about how the murderer feels about the penalty of his actions? BS! That's as stupid as killing

your parents and pleading for mercy because your an orphan! People think this is a "wise latina?" Racist, with the intellect of an 8th grader.

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Jack Kelly

Culture of Corruption II

What happened to Obama's promise to clean up Washington?

Sunday, February 08, 2009

By Jack Kelly, Pittsburgh Post-Gazette

When in the last election Democrats spoke of a "culture of corruption" in Washington, few realized they were making a promise.

The Obama administration is not yet three weeks old but already features a growing collection of ethically challenged officials.

The late-night comics have noticed. "There was a huge scientific breakthrough today," said Jay Leno. "Researchers say they are very close to finding someone from Obama's Cabinet who's actually paid their taxes."

Mr. Leno was referring to former Senate Majority Leader Tom Daschle, whose nomination for secretary of health and human services was withdrawn after it was disclosed that he didn't pay \$101,000 worth of taxes owed for a car and driver, or \$83,000 on consulting income, and Timothy Geithner, who was confirmed as treasury secretary despite his failure to pay payroll taxes for four years.

Hours before Mr. Daschle withdrew his nomination Tuesday, Nancy Killefer withdrew hers as chief compliance officer when it was revealed that the District of Columbia had placed a lien on her Wesley Heights mansion for failure to pay unemployment compensation tax for a household employee.

Rep. Hilda Solis, D-Calif, the nominee for secretary of labor, apparently violated House rules by failing to disclose she was an officer of a group lobbying Congress.

Eric Holder was confirmed as attorney general despite having circumvented Justice Department rules -- when he was deputy attorney general in the waning days of the Clinton administration -- to obtain a pardon for fugitive financier Marc Rich. In a 2002 report, the House Government Operations Committee described Mr. Holder's behavior in the Rich affair as "unconscionable."

On Jan. 6, New Mexico Gov. Bill Richardson withdrew as the nominee for secretary of commerce when it was disclosed that the FBI was investigating him in connection with a "pay-to-play" scandal.

Gov. Richardson was, many think, President Obama's second choice. Mr. Obama was thought to have wanted to name Penny Pritzker, his campaign finance chairman, to the commerce post, but feared that doing so might bring unwelcome scrutiny to her role in the subprime mortgage crisis. (Ms. Pritzker pioneered the nefarious instruments at her now defunct Superior bank in suburban Chicago.)

President Obama on Monday chose Republican Sen. Judd Gregg of New Hampshire for the commerce post. So on Wednesday we learn that Mr. Gregg's former legislative director was tangentially involved in the Jack Abramoff scandal.

The most recent candidate in the malleable ethics sweepstakes is Ron Sims, chosen Monday to be deputy secretary of the Department of Housing and Urban Development. As King County (Seattle) executive, Mr. Sims was fined \$124,000 for "blatant" violations of Washington state's public records act for failure to release documents having to do with the financing of the stadium where the Seattle Seahawks play. Last month the state Supreme Court said the fine should be increased.

Congress has turned an indulgent eye to these ethical lapses because there are many in Congress who are guilty of the same, or worse. Charles Rangel, D-N.Y., remains chairman of the House Ways and Means Committee despite his failure to pay taxes on \$75,000 in rental income, and -- according to a report issued Wednesday -- repeatedly failing to comply with congressional financial disclosure rules.

<http://www.post-gazette.com/pg/09039/947410-373.stm>

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PORT Exhibit 1125

Sen. Chris Dodd, D-Countrywide Mortgage, remains as chairman of the Senate Finance Committee despite having received a sweetheart loan from one of the worst of the subprime mortgage villains.

The Charlotte Observer endorsed Barack Obama for president, but is having second thoughts:

"Two weeks into the Obama presidency, we like his campaign better than his administration," the Observer said Wednesday. "While some of his appointments are outstanding, others were either badly botched or reflect a half-hearted commitment to the change principle central to his ballot box success."

Jack Kelly is a columnist for the Post-Gazette and The (Toledo) Blade (jkelly@post-gazette.com, 412.263-1470). [More articles by this author](#)

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Ginsburg Hearings End In a Secluded Meeting The New York Times July 24, 1993, Saturday, Late Edition - Final

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July 24, 1993, Saturday, Late Edition - Final

SECTION: Section 1; Page 26; Column 1; National Desk

LENGTH: 646 words

HEADLINE: **Ginsburg Hearings End In a Secluded Meeting**

BYLINE: By NEIL A. LEWIS, Special to The New York Times

DATELINE: WASHINGTON, July 23

BODY:

The Senate Judiciary today held its first closed hearing ever to hear personal accusations against a Supreme Court nominee, but the session for Judge Ruth Bader Ginsburg was really just for practice, committee members said.

No substantive charges surfaced in the 20-minute session, committee aides said, and Judge Ginsburg seemed headed for an easy if not unanimous confirmation after three days of public testimony. The committee vote is scheduled for Thursday.

Senator Joseph R. Biden Jr., the Delaware Democrat who leads the committee, said this month that he would hold a closed hearing for Judge Ginsburg and any future Court nominee so that committee members could review the classified investigation of the nominee by the Federal Bureau of Investigation and any accusations brought about the candidate's personal conduct. Mr. Biden, who was criticized for his handling of Prof. Anita F. Hill's accusations against Justice Clarence Thomas during his confirmation hearings in 1991, added the closed hearing to avoid future problems.

Committee spokesmen said they would not discuss what occurred today, but an official present at the session said the main topic was one that had already been aired publicly at Thursday's session: Judge Ginsburg's initial failure to list as a gift an initiation fee for a country club near Washington. In the early 1980's, when it routinely waived fees as a courtesy to members of the Federal bench, the Woodmont Country Club waived its \$25,000 initiation fee for Judge Ginsburg and her husband, Martin D. Ginsburg, a prominent tax lawyer.

Why She Left Club

Judge Ginsburg has said that she regretted not listing the waived fee as a gift on her financial disclosure forms. But she did refer to the waiver indirectly in her statement to the committee. She said that she resigned from the club when it changed its policy to require payment of the fee. She resigned, she said, because the imposition of the fee obliged a colleague on the appeals court, Judge Harry T. Edwards, to resign because he could not afford it.

She said that she never knew whether the change in policy was aimed specifically at Judge Edwards, who was the club's only black member at the time, but that it seemed as if it might have been. As a result, she and her husband left Woodmont and then joined a different golf club, which had several black members.

Judge Ginsburg, a 60-year-old member of the United States Court of Appeals for the District of Columbia Circuit, was nominated by President Clinton last month to replace Justice Byron R. White, who retired this spring. If she becomes the nation's 107th justice, Judge Ginsburg would be the first Justice placed on the court in 26 years by a Democrat and the second woman ever, after Justice Sandra Day O'Connor.

Judge Ginsburg completed her public testimony Thursday night, ending three days in which she offered strong support for the constitutional right to abortion but fended off questions on other issues.

Most Speakers in Favor

The expedited schedule was designed to allow her to be sworn in as soon as possible so she may acquaint herself with the Court's docket this summer in preparation for the beginning of the fall term in October.

At today's final public session, the committee heard testimony from six panels of witnesses, all but one of which spoke in favor of the nomination. The opposition panel included six speakers who mainly objected to Judge Ginsburg's statement on abortion.

"Women don't need to mutilate their bodies and kill their children to be equal to any man," said Kay C. James, vice president of the Family Research Council.

Professor Gerald Gunther of the Stanford Law School, who testified in favor of the nomination, said Judge Ginsburg "possesses the requisite intellect, temperament and character" to be a great Supreme Court justice.

GRAPHIC: Photo: Judge Ruth Bader Ginsburg, second from left, walking to a session of the Senate Judiciary Committee yesterday, the last day of her confirmation hearings after three days of testimony. The committee will vote on Thursday. With her was Ron Klain of the White House Counsel's office. (Michael Geissinger for The New York Times)

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Source: [News & Business](#) > [Combined Sources](#) > [News, All \(English, Full Text\)](#)Terms: "[Bell Wins Approval in 75-21 Vote; Bell Is Confirmed as Attorney General; Attorney General May Face Clash On Ousting Kelley](#)" ([Edit Search](#) | [Suggest Terms for My Search](#) | [Feedback on Your Search](#))*Bell Wins Approval in 75-21 Vote; Bell Is Confirmed as Attorney General; Attorney General May Face Clash On Ousting Kelley The Washington Post January 26, 1977, Wednesday, Final Edition*Copyright 1977 The Washington Post
The Washington Post

January 26, 1977, Wednesday, Final Edition

SECTION: First Section; A1**LENGTH:** 1278 words**HEADLINE: Bell Wins Approval in 75-21 Vote;
Bell Is Confirmed as Attorney General;
Attorney General May Face Clash On Ousting Kelley****BYLINE:** By Spencer Rich and John M. Goshko, Washington Post Staff Writers**BODY:**

Griffin B. Bell won confirmation as Attorney General from a divided Senate yesterday, only to find himself facing a sensitive new problem - a possible clash with FBI Director Clarence M. Kelley over Kelley's departure from the FBI.

The potential confrontation was precipitated by Kelley, who sent Bell a letter stating that he does not intend to retire as FBI director until Jan. 1, 1978. That ran directly counter to the widespread impression that Bell and President Carter want to put their own man at the head of the embattled FBI at a much earlier date.

The problem with Kelley surfaced as the Senate confirmed Bell by a vote of 75 to 21. The approval came only after a heated debate in which some senators blasted Bell's civil rights record, challenged his judicial ethics and raked over his appointment as an act of political cronyism by Carter.

With the confirmation of Bell and the swearing in yesterday of Joseph A. Califano Jr. as Secretary of Health, Education and Welfare, 10 of Carter's 11 Cabinet nominees have been approved. The last, F. Ray Marshall of Texas, is expected to be confirmed as Secretary of Labor by the Senate today.

Bell, a 58-year-old Atlanta lawyer and former federal appeals court judge, was the most controversial of the Cabinet choices - a fact underscored by the substantial number of votes against him yesterday.

His nomination was vigorously opposed by several civil rights groups, and their charges were echoed by the two Republican senators. Charles McC. Mathias Jr. (Md.) and Edward W. Brooke (Mass.), who led the assault on Bell in yesterday's debate.

They said they opposed Bell because he had been an adviser to former Georgia Gov. Ernest Vandiver during that state's "massive resistance" to school desegregation in the late 1950s; because his decisions as an appeals court judge from 1962 to 1976 had an allegedly anti-civil rights cast, and because he had upheld the attempt to bar Julian Bond, a black, from the Georgia legislature for anti-war statements.

They also criticized him for failing to disclose for six years that he had received free memberships in two Atlanta clubs that exclude blacks and other minorities, for failing to disqualify himself from a 1976 case involving a similar club, and for failing to excuse himself from ruling on a 1963 Georgia desegregation case, although he had advised state officials on the issues in that case before becoming a judge.

While these charges were being rehearsed on the Senate floor, Bell's position as the Carter administration's biggest magnet for controversy received a boost from another quarter - revelation of the letter from Kelley.

Authoritative sources said last night that Kelley, in setting next Jan. 1 as the time for his retirement, has acted on his own initiative without consulting Bell. Kelley's aim, the sources said, was to tell Bell of his intentions; and, some sources added, put the new Attorney General on notice that he will resist efforts to remove him from the FBI directorship before that time.

Testifying before the Senate Judiciary Committee two weeks ago, Bell said that Kelly would give way to a new director "before too long." Although he deliberately avoided specifying a timetable, Bell's remark was widely interpreted as meaning that the changeover would take place in the near future.

Now, Kelley's letter confronts Bell with some sensitive choices. If he allows Kelley to remain until the end of the year, his action is likely to be interpreted as a backing down in the face of a challenge from the FBI director.

In addition, there is widespread feeling in law enforcement circles that Kelley's now-stated intention to retire at the end of the year would put the crisis-ridden FBI in the position of being run by a lame-duck director without influence or authority.

On the other hand, should Bell attempt to force Kelley out against his will, he would risk charges that the Carter administration is trying to bring the FBI back under the sway of partisan political influence. Such charges were heard in yesterday's Senate debate, and Kelley is understood to have made his move partly because he feels that he can count on congressional support.

Bell's reaction was to temporize by having his aides issue a statement yesterday noting that Bell does not have the legal authority to dismiss Kelley and stating that Bell "will set in motion a procedure for the orderly transfer of the directorship of the bureau." But the statement said nothing about when the new administration wants Kelley to leave.

Kelley, 65, became FBI director in July, 1973, and is serving under a law that grants the director a single term of 10 years. It was unlikely that he would have served the full term in any case, since the law states that an incumbent must retire at age 70 unless the President waives that requirement.

However, Senate sources familiar with the history of the law say categorically that the 10-year term does not preclude a President from firing the director. The FBI, they note, is part of the executive branch and its director serves at the pleasure of the President.

However, the sources note, by specifying a 10-year term the Senate did intend to insulate the office somewhat from political considerations.

Another complicating factor involves Kelley's pension. Under a new federal law, the three years that Kelley has served as director would allow his pension from earlier FBI service to be recomputed on the basis of the higher director's salary.

But the law does not take effect until Oct. 1, and Kelley would have to remain in active federal service until that date to take advantage of its provisions.

For that reason, Bell is believed to be planning to keep Kelley at the FBI in some sort of emeritus or advisory slot that would open the way for appointment of a new director.

In the Senate debate, some Republicans taunted Democratic liberals, most of whom voted for Bell although obviously uncomfortable with the appointment, for applying "a double standard."

Brooke and Sen. Bob Dole (R-Kan.) both noted that when Southern Supreme Court nominees with backgrounds similar to Bell's were sent to the Senate by a Republican President, Richard M. Nixon the Democratic majority rejected them.

Said Brooke, "I think that a Republican nominee who had engendered this kind of controversy and contradictory testimony may have been summarily rejected by this Congress."

Dole added, "Would this Senate have confirmed if President Ford had won and nominated a man with the same background . . . who belonged to restrictive country clubs . . . a close political associate, a man who contributed a substantial amount to the President's campaign? I think the answers are obvious."

"The American people are tired of watching brothers, campaign managers, law partners and old friends sprinting the inside track to the Justice Department," said Lowell P. Weicker Jr. (R-Conn.).

Mathias, in summing up the opposition, asked, "Do we automatically have to give our consent" to a Cabinet appointee merely if he "is not a convicted felon . . . or lunatic?"

On the other side, Birch Bayh (D-Ind.), who led a successful fight against two Nixon Supreme Court nominees from the South several years ago, argued that the evidence showed Bell had tired to act as a moderating influence on Vandiver during the "massive resistance" period.

"Perhaps we should not be so pious as to the standards of people 25 years ago who lived in a different part of the country," declared Bayh.

Before approving Bell, the Senate killed, 71 to 24, a move by Brooke to recommit the nomination to the Judiciary Committee.

GRAPHIC: Picture, President Carter applauds as Joseph A. Califano Jr. kisses his wife after being sworn in as Secretary of Health, Education and Welfare. By Frank Johnston - The Washington Post

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Levin: Kozinski lacks judicial temperament United Press International November 2, 1985, Saturday, PM cycle

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November 2, 1985, Saturday, PM cycle

SECTION: Washington News

LENGTH: 430 words

HEADLINE: Levin: Kozinski lacks judicial temperament

BYLINE: By CHRIS CHRYSTAL

DATELINE: WASHINGTON

BODY:

Alex Kozinski has the brains and ability to serve on the 9th U.S. Circuit Court of Appeals, but lacks proper judicial temperament, senators said at a Judiciary Committee hearing.

Kozinski, 35, the administration's nominee to the nation's second highest court, was approved by the panel Sept. 12, but Senate confirmation stalled because of allegations by former employees that he was harsh, cruel and demeaning while heading a federal office that protects government whistleblowers for exposing wrongdoing.

Committee Chairman Strom Thurmond, R-S.C., said the Senate would act on the confirmation next week and complained that a rehearing Friday into questions about Kozinski's conduct in office turned up nothing new.

"I think these are the puniest, most nitpicking charges of any I've ever heard in any hearing," Thurmond said after the daylong hearing.

Sen. Carl Levin, D-Mich., who is not on the Judiciary Committee, but was allowed to grill Kozinski, said he plans a four-hour debate of the nomination on the Senate floor.

Levin said he is "very troubled" by Kozinski's testimony that he could hardly remember terminating two sick employes, an elderly black woman suffering from cancer -- two months before her retirement -- because age and illness had slowed her performance, and a 25-year veteran who was on sick leave for high blood pressure.

"I am struck by his failure to remember the details of two very sad cases," Levin said. "I find a lack of sensitivity there."

He said Kozinski misled the committee by claiming an excellent working relationship with his former staff when six people had filed affidavits that he treated employees unfairly.

Kozinski, chief judge of the U.S. Claims Court, previously headed the Office of Special Counsel to the Merit Systems Protection Board in 1981-1982.

Sen. Charles Mathias, R-Md., the only Republican to challenge Kozinski at the rehearing, and Sen. Paul Simon, D-Ill, also questioned his temperament.

Other allegations claimed Kozinski's refusal to prosecute a sexual harassment case discouraged others from coming forward, and that he didn't tell the committee the whole story about his firing of Mary Eastwood, his predecessor at the OSC.

Eastwood testified that Kozinski was "less than honest" with the panel by implying she had dropped her appeal of the firing, when she had not, and by failing to disclose that she eventually won with back pay.

Six of eight lawyers and eight of 15 investigators quit during his regime along with half the clerical staff of the Washington office, she said.

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July 27, 1994, Wednesday, Late Edition - Final

SECTION: Section A; Page 20; Column 1; Editorial Desk**LENGTH:** 294 words**HEADLINE:** Senate Secrecy and Secretary Dalton**BODY:**

When the White House announced the choice of John Dalton as Secretary of the Navy last year, it publicly praised his management skills while concealing his leadership role in a savings and loan failure that cost taxpayers more than \$100 million. The Senate confirmed him unanimously, without debate, after the Armed Services Committee also praised him publicly -- while burying a major business failing and charges by Federal regulators that he had shown "gross negligence" in running the bankrupt Seguin Savings Association in Texas.

That is a shabby performance by both branches. The White House had a duty to disclose its nominee's business and regulatory problems. The Senate, which is supposed to monitor the executive branch and inform the public through the confirmation process, kept this important information not only from the public but from most senators as well.

Such an event in Mr. Dalton's career deserved to be part of the public phase of his confirmation, not hidden in executive session like some stale old charge in an F.B.I. report. The information bore directly on his qualifications to head a huge government agency that needs hard-headed management of the highest integrity. So did an incident in which the Federal Home Loan Bank Board, which Mr. Dalton once headed, took the unusual step of blocking a \$750,000 fee to him from an investor group for his access to board officials and information.

Perhaps the committee did a great job of questioning and deliberating behind closed doors. If so, it can vindicate its performance and reassure the public by releasing the record of its executive session on the nomination. Such belated openness could be a modest antidote to the cynicism the committee's secrecy has spawned.

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Wednesday 11:32 AM EST*Copyright 2009 HT Media Ltd.
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US Fed News

February 25, 2009 Wednesday 11:32 AM EST

LENGTH: 206 words**HEADLINE:** SEN. KYL ISSUES STATEMENT ON REP. SOLIS CONFIRMATION AS SECRETARY OF LABOR**BODY:**

WASHINGTON, Feb. 24 -- The office of Sen. Jon Kyl, R-Ariz., issued the following statement:

The U.S. Senate today approved the nomination of Rep. Hilda Solis (D-Calif.) to become the U.S. Secretary of Labor. U.S. Senate Republican Whip Jon Kyl opposed the confirmation and issued the following statement: "I opposed Rep. Hilda Solis's confirmation, in large part, due to her unwillingness to provide substantive answers during her confirmation hearing, as well as her failure to disclose her ties to the pro-labor union organization, American Rights at Work. She corrected her House disclosure forms only after the issue came to light, raising questions about her motivations to set the record straight. "And, although she was a cosponsor of the Employee Free Choice Act when she was a member of the House of Representatives, she refused to offer specifics about the issue during her hearings. "While the President is entitled to nominate those who reflect his views, I take seriously my responsibility to vet nominees. I believe Rep. Solis should have been more forthright during the confirmation process; therefore, I withheld my support."For more information please contact: Sarabjit Jagirdar, Email:- htsvndication@hindustantimes.com

LOAD-DATE: March 24, 2009Source: [News & Business](#) > [Combined Sources](#) > [News, All \(English, Full Text\)](#)Terms: ["Sen. Kyl Issues Statement on Rep. Solis Confirmation as Secretary of Labor"](#) ([Edit Search](#) | [Suggest Terms for My Search](#) | [Feedback on Your Search](#))

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THE FUGITIVE: EVIDENCE ON PUBLIC VERSUS
PRIVATE LAW ENFORCEMENT FROM
BAIL JUMPING*

ERIC HELLAND
Claremont-McKenna College

and

ALEXANDER TABARROK
George Mason University

ABSTRACT

On the day of their trial, a substantial number of felony defendants fail to appear. Public police have the primary responsibility for pursuing and rearresting defendants who were released on their own recognizance or on cash or government bail. Defendants who made bail by borrowing from a bond dealer, however, must worry about an entirely different pursuer. When a defendant who has borrowed money skips trial, the bond dealer forfeits the bond unless the fugitive is soon returned. As a result, bond dealers have an incentive to monitor their charges and ensure that they do not skip. When a defendant does skip, bond dealers hire bounty hunters to return the defendants to custody. We compare the effectiveness of these two different systems by examining failure-to-appear rates, fugitive rates, and capture rates of felony defendants who fall under the various systems. We apply propensity score and matching techniques.

I. INTRODUCTION

APPROXIMATELY one-quarter of all released felony defendants fail to appear at trial. Some of these failures to appear are due to sickness or forgetfulness and are quickly corrected, but many represent planned abscondments. After 1 year, some 30 percent of the felony defendants who initially fail to appear remain fugitives from the law. In absolute numbers, some 200,000 felony defendants fail to appear every year, and of these, approximately 60,000 will remain fugitives for at least 1 year.¹

* The authors' names are in alphabetical order. We wish to thank Jonathan Guryan, Steve Levitt, Lance Lochner, Bruce Meyer, Jeff Milyo, Christopher Taber, Sam Peltzman, and seminar participants at Claremont McKenna College, the American Economic Association annual meetings (2002), George Mason University, Northwestern University, and the University of Chicago.

¹ These figures are from the State Court Processing Statistics (SCPS) program of the Bureau of Justice Statistics and can be found in U.S. Department of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties* (various years). We describe the data at greater length below. The SCPS program creates a sample representative of 1 month of cases from the 75 most populous counties (which account for about half of all reported crimes). In 1996, the sample represented 55,000 cases, which in turn represent some 660,000 filings in a year and 1,320,000 filings in the nation. The absolute figures are calculated using this total, and

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Defendants who fail to appear impose significant costs on others. Direct costs include the costs of rearranging and rescheduling court dates, the wasted time of judges, lawyers, and other court personnel, and the costs necessary to find and apprehend or rearrest fugitives. Other costs include the additional crimes that are committed by fugitives. In 1996, for example, 16 percent of released defendants were rearrested before their initial case came to trial.² We can be sure that the percentage of felony defendants who commit additional crimes is considerably higher than their rearrest rate. We might also expect that the felony defendants who fail to appear are the ones most likely to commit additional crimes. Indirect costs include the increased crime that results when high failure-to-appear (FTA) and fugitive rates reduce expected punishments.³

The dominant forms of release are by surety bond, that is, release on bail that is lent to the accused by a bond dealer, and nonfinancial release. Just over one-quarter of all released defendants are released on surety bond, and a very small percentage pay cash bail or put up their own property with the court (less than 5 percent combined); most of the rest are released on their own recognizance or on some form of public bail (called deposit bond) in which the defendant posts a small fraction, typically 10 percent or less, of the bail amount with the court.

Estimating the effectiveness of the pretrial release system in the United States can be characterized as a problem of treatment evaluation. Treatment evaluation problems can be difficult because treatment is rarely assigned randomly. Release assignment, for example, is based on a judge's assessment of the likelihood that a defendant will appear in court as well as on considerations of public safety. Correctly measuring treatment effects requires that we control for treatment assignment. In this paper, we control for selection by matching on the propensity score.⁴

We estimate the treatment effect for three outcomes—the probability that

the release, failure-to-appear (FTA), and fugitive (defined as FTA for 1 year or more) rates from the random sample. See note 2 *infra*.

² U.S. Department of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 1996* (1999) (<http://www.ojp.usdoj.gov/bjs/pub/pdf/fiduc96.pdf>).

³ Justice delayed can mean justice denied in practice as well as in theory. Thousands of cases are dismissed on constitutional grounds every year because police fail to serve warrants in a timely manner. See Kenneth Howe & Erin Hallissy, *When Justice Goes Unserviced: Thousands Wanted on Outstanding Warrants—but Law Enforcement Largely Ignores Them*, *S.F. Chron.*, June 22, 1999, at A1.

⁴ For the matching method, see Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 *J. Educ. Psychol.* 688, 701 (1974); Donald B. Rubin, *Assignment to Treatment Group on the Basis of a Covariate*, 2 *J. Educ. Stat.* 1, 26 (1977); Paul R. Rosenbaum & Donald B. Rubin, *Reducing Bias in Observation Studies Using Subclassification on the Propensity Score*, 79 *J. Am. Stat. Assoc.* 516, 524 (1984); Rajeev H. Dehejia & Sadek Wahba, *Causal Effects in Non-experimental Studies: Re-evaluating the Evaluation of Training Programs* (Working Paper No. 6586, Nat'l Bur. Econ. Res. 1993); James J. Heckman, Hidehiko Ichimura, & Petra Todd, *Matching As an Econometric Evaluation Estimator*, 65 *Rev. Econ. Stud.* 261, 294 (1998).

a defendant fails to appear at least once, the probability that a defendant remains at large for 1 year or more conditional on having failed to appear (what we call the fugitive rate), and the probability that a defendant who failed to appear is recaptured as a function of time.

The earlier economic studies of the bail system examine the role of the bail amount in the decision to fail to appear, generally finding that higher bail reduces FTA rates.⁵ These studies did not focus on the central issue of this paper—the different incentive effects of the various release types.⁶

II. HISTORY OF PRETRIAL RELEASE AND INCENTIVE EFFECTS OF RELEASE SYSTEMS

Although money bail is still the most common form of release, money bail and especially the commercial surety industry have come under increasing and often virulent attack since the 1960s.⁷ Bail began as a progressive measure to help defendants get out of jail when the default option was that all defendants would be held until trial. In the twentieth century, however, the default option was more often thought of as release, and thus money bail was reconceived as a factor that kept people in jail. In addition, the greater burden of money bail on the poor elicited growing concern.⁸ As a result,

⁵ William M. Landes, *The Bail System: An Economic Approach*, 2 *J. Legal Stud.* 79, 105 (1973); William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 *J. Legal Stud.* 287 (1974); Stevens H. Clark, Jean L. Freeman, & Gary G. Koch, *Bail Risk: A Multivariate Analysis*, 5 *J. Legal Stud.* 341, 385 (1976); Samuel L. Myers, Jr., *The Economics of Bail Jumping*, 10 *J. Legal Stud.* 381, 396 (1981).

⁶ Ian Ayres & Joel Waldfogel, *A Market Test for Discrimination in Bail Setting*, 46 *Stan. L. Rev.* 987, 1047 (1994), demonstrates the subtlety of the distinctions made by bond dealers in setting bail bond rates. Although the courts (in New Haven, Connecticut, in 1990) set higher bail amounts for minority defendants than for whites, Ayres and Waldfogel find that bond dealers acted in precisely the opposite manner. What this pattern suggests is that judges set higher bail for minority defendants than for white defendants with the same probability of flight. Bond dealers are then induced by competition to charge minorities relatively lower bail bond rates.

⁷ Floyd Feeney, *Foreword*, in *Bail Reform in America*, at ix (Wayne H. Thomas, Jr., ed. 1976), for example, writes that “the present system of commercial surety bail should be simply and totally abolished. . . . It is not so much that bondsmen are evil—although they sometimes are—but rather that they serve no useful purpose.” American Bar Association, *Criminal Justice Standards*, ch. 10, *Pretrial Release*, Standard 10-5.5, *Compensated Sureties*, 114-15 (1985), refers to the commercial bond business as “tawdry” and discusses “the central evil of the compensated surety system.” When Oregon considered reintroducing commercial bail, Judge William Snouffer testified, “Bail bondsmen are a cancer on the body of criminal justice” (quoted in Spurgeon Kennedy & D. Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision* (1997)). Supreme Court Justice Harry Blackmun called the commercial bail system “offensive” and “odorous.” See *Schlib v. Kuebel*, 404 U.S. 357 (1971).

⁸ In order to provide appropriate incentives, money bail is typically higher for the rich than the poor. Thus, it is not a priori necessary that money bail should discriminate against the poor, although in practice this does occur owing to nonlinearities and fixed costs in the bail process. Assume that money bail is set so as to create equal FTA rates across income classes. In such a case, there is no discrimination against the poor in the setting of bail. But if the bail

significant efforts were made, beginning in the 1960s, to develop alternatives to money bail, and four states—Illinois, Kentucky, Oregon, and Wisconsin—have outlawed commercial bail altogether.

In place of commercial bail, Illinois introduced the Illinois Ten Percent Cash Bail or “deposit bond” system. In a deposit bond system, the defendant is required to post with the court an amount up to 10 percent of the face value of the bond. If the defendant fails to appear, the deposit may be lost and the defendant held liable for the full value of the bond. If the defendant appears for trial, the deposit is returned to the defendant, less a small service fee in some cases.⁹ Some counties will also release defendants on unsecured bonds. Unsecured bonds are equivalent to zero-percent deposit bonds. That is, defendants released on an unsecured bond are liable for the full bail amount if they fail to appear, but they need not post anything to be released.

The pretrial release system is designed to ensure that defendants appear in court. It is often asserted that the commercial bail system discourages appearance. In a key Supreme Court case, for example, Justice Douglas argued that “the commercial bail system failed to provide an incentive to the defendant to comply with the terms of the bond. Whether or not he appeared at trial, the defendant was unable to recover the fee he had paid to the bondsman. No refund is or was made by the professional surety to a defendant for his routine compliance with the conditions of his bond.”¹⁰

Similarly, Jonathan Drimmer said, “Hiring a commercial bondsman removes the incentive for the defendant to appear at trial.”¹¹ John S. Goldkamp and Michael R. Gottfredson suggest that the “use of the bondsman defeated the rationale that defendants released on cash bail would have an incentive to return,”¹² and in their influential set of performance standards for pretrial release, the National Association of Pretrial Service Agencies¹³ said that under commercial bail, “the defendant has no financial incentive to return to court.”¹⁴

In light of the persistent criticism that surety bail encourages failure to appear, it is perhaps surprising that the data consistently indicate that defendants released via surety bond have lower FTA rates than defendants released under other methods. Part of this might be explained by selection—FTA

amounts necessary to ensure equal FTA rates are not linear in wealth, then such rates can generate unequal rates of release across income classes.

⁹ National Association of Pretrial Service Agencies, *Performance Standards and Goals for Pretrial Release* (2d ed. 1998).

¹⁰ *Schiib v. Kuebel*, 404 U.S. at 373.

¹¹ Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 *Hous. L. Rev.* 731, 742 (1996).

¹² John S. Goldkamp & Michael R. Gottfredson, *Policy Guidelines for Bail: An Experiment in Court Reform* 19 (1985).

¹³ See note 9 *supra*.

¹⁴ See also Thomas, ed., *supra* note 7, at 13. Because of this issue, Thomas calls the surety system “irrational.”

rates, for example, may be higher for those defendants charged with minor crimes—perhaps these defendants reason that police will not pursue a failure to appear when the underlying crime is minor—and defendants charged with minor crimes are more likely to be released on their own recognizance than on surety release. A second reason, however, is that bond dealers, just like other lenders, have numerous ways of creating appropriate incentives for borrowers.

Most obviously, a defendant who skips town will owe the bond dealer the entire amount of the bond. Defendants are often judgment proof, however, so bond dealers ask defendants for collateral and family cosigners to the bond (which is not done under the deposit bond system). If hardened criminals do not fear the law, they may yet fear their mother's wrath should the bond dealer take possession of their mother's home because they fail to show up for trial. In order to make flight less likely, bond dealers will also sometimes monitor their charges and require them to check in periodically. In addition, bond dealers often remind defendants of their court dates and, perhaps more important, remind the defendant's mother of the son's court date when the mother is a cosigner on the bond.¹⁵

If a defendant does fail to appear, the bond dealer is granted some time, typically 90–180 days, to recapture him before the bond dealer's bond is forfeited. Thus, bond dealers have a credible threat to pursue and rearrest any defendant who flees. Bond dealers report that just to break even, 95 percent of their clients must show up in court.¹⁶ Thus, significant incentives exist to pursue and return skips to justice.

Bond dealers and their agents have powerful legal rights over any defendant who fails to appear, rights that exceed those of the public police. Bail enforcement agents, for example, have the right to break into a defendant's home without a warrant, make arrests using all necessary force including deadly force if needed, temporarily imprison defendants, and pursue and return a defendant across state lines without the necessity of entering into an extradition process.¹⁷

At the time they write the bond, bond dealers prepare for the possibility of flight by collecting information that may later prove useful. A typical application for bond, for example, will contain information on the defendant's residence, employer, former employer, spouse, children (names and schools), spouse's employer, mother, father, automobile (description, tags, financing),

¹⁵ See Mary A. Toborg, *Bail Bondsmen and Criminal Courts*, 8 *Just. Sys. J.* 141, 156 (1983). Bail jumping is itself a crime that may result in additional penalties.

¹⁶ Drimmer, *supra* note 11, at 793 (1996); Morgan Reynolds, *Privatizing Probation and Parole*, in *Entrepreneurial Economics: Bright Ideas from the Dismal Science* 117, 128 (Alexander Tabarrok ed. 2002).

¹⁷ Drimmer, *supra* note 11. See also *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366 (1873).

union membership, previous arrests, and so on.¹⁸ In addition, bond dealers have access to all kinds of public and private databases. Bob Burton,¹⁹ a bounty hunter of some fame, for example, says that a major asset of any bounty hunter is a list of friends who work at the telephone, gas, or electric utility, the post office, or welfare agencies or in law enforcement.²⁰

Bond dealers, however, recognize that what makes their pursuit of skips most effective is the time they devote to the task. In contrast, public police are often strained for resources, and the rearrest of defendants who fail to show up at trial is usually given low precedence.

The flow of arrest warrants for FTA has overwhelmed many police departments, so today many counties are faced with a massive stock of unserved arrest warrants. Baltimore alone had 54,000 unserved arrest warrants as of 1999.²¹ In recent years, Cincinnati has had over 100,000 outstanding arrest warrants stemming from failures to appear in court. One Cincinnati defendant had 33 pending arrest warrants against him.²² In response to the overwhelming number of arrest warrants, most of which will never be served because of lack of manpower, some counties have turned to extreme measures such as offering amnesty periods. Santa Clara County in California, for example, has a backlog of 45,000 unserved criminal arrest warrants and in response has advertised a hotline that defendants can use to schedule their own arrests.²³

Although national figures are not available, it is clear that the problem of outstanding arrest warrants is widespread. Texas, for example, is relatively well off with only 132,000 outstanding felony and serious misdemeanor warrants, but Florida has 323,000, and Massachusetts, as of 1997, had around 275,000.²⁴ California has the largest backlog of arrest warrants in the nation. The California Department of Corrections estimated that as of December 1998, there were more than 2.5 million unserved arrest warrants.²⁵ Many of these arrest warrants are for minor offenses, but tens of thousands are for

¹⁸ We thank Bryan Frank of Lexington National Insurance Corporation for discussion and for sending us a typical application form.

¹⁹ Bob Burton, *Bail Enforcer: The Advanced Bounty Hunter* (1990).

²⁰ Good bond dealers master the tricks of their trade. One bond dealer pointed out to us, for example, that the first three digits in a social security number indicate in what state the number was issued. This information can suggest that an applicant might be lying if he claims to have been born in another state (many social security numbers are issued at birth or shortly thereafter), and it may provide a lead for where a skipped defendant may have family or friends.

²¹ Francis X. Clines, *Baltimore Gladly Breaks 10-Year Homicide Streak*, *N.Y. Times*, January 3, 2001, at A11.

²² George Lecky, *Police Name "200 Most Wanted," Cincinnati Post*, September 5, 1997, at 1A.

²³ See Jane Prendergast, *Warrant Amnesty Offered for 1 Day*, *Cincinnati Enquirer*, November 19, 1999, for description of a similar program in Kenton County, Kentucky. See also Henry K. Lee & Kenneth Howe, *Plan to Clear Backlog of Warrants: Santa Clara County Offering Amnesty to Some*, *S.F. Chron.*, January 12, 2000, at A15.

²⁴ Howe and Hallissy, *supra* note 3.

²⁵ *Id.*

people wanted for violent crimes, including more than 2,600 outstanding homicide warrants.²⁶ Kenneth Howe and Erin Hallissy report that "local, state and federal law enforcement agencies have largely abandoned their job of serving warrants in all but the most serious cases." Explaining how this situation came about, they write, "As arrests increased, jails became overcrowded. To cope, judges, instead of locking up suspects, often released them without bail with a promise to return for their next court date. For their part, police, rather than arrest minor offenders, issued citations and then released the suspects with the same expectation. When suspects failed to appear for their court dates, judges issued bench warrants instructing police to take the suspects into custody. But this caused the number of warrants to balloon, and the police did not have the time or staff to serve them all."²⁷

III. THE MATCHING MODEL WITH MULTIPLE TREATMENTS

Ideally, in a treatment evaluation we would like to identify two outcomes: one if the individual is treated, Y_T , and one if no treatment is administered, Y_{NT} . The effect of the treatment is then $Y_T - Y_{NT}$. But we cannot observe an individual in both states of the world, making a direct computation of $Y_T - Y_{NT}$ impossible.²⁸ All methods of evaluation, therefore, must make some assumptions about "comparable" individuals. An intuitive method is to match each treated individual with a statistically similar untreated individual and compare differences in outcomes across a series of matches. Thus, two statistical doppelgangers would function as the same individual in different treatments.

An important advantage of matching methods is that they do not require assumptions about functional form. When the research question is about a mean treatment effect, as it is here, matching methods also allow for an economy of presentation because they focus attention on the question of interest rather than on a long series of variables that are used only for control purposes. Unfortunately, matching methods typically founder between a rock and a hard place. The technique works best when individuals are matched across many variables, but as the number of variables increases, the number of distinct "types" increases exponentially, so the ability to find an exact match falls dramatically.

In an important paper, Paul Rosenbaum and Donald Rubin go a long way to surmounting this problem.²⁹ They show that if matching on X is valid, then so is matching on the probability of selection into a treatment conditional on X . The multidimensional problem of matching on X is thus trans-

²⁶ *Id.*

²⁷ *Id.*

²⁸ Rubin, Estimating Causal Effects of Treatments, *supra* note 4.

²⁹ Paul R. Rosenbaum & Donald B. Rubin, The Central Role of the Propensity Score in Observational Studies for Causal Effects, 70 *Biometrika* 41, 55 (1983).

formed into a single-dimension problem of matching on $\Pr(T = 1|X)$, where $T = 1$ denotes treatment.³⁰ The probability $\Pr(T = 1|X)$ is often called the propensity score, or *p*-score.

The matching technique extends naturally to applications with multiple treatments through the use of a multivalued propensity score with matching on conditional probabilities.³¹ Assume that there are M mutually exclusive treatments, and let the outcome in each state be denoted Y_1, Y_2, \dots and so forth. As before, we observe only a specific outcome but are interested in the counterfactual: what would the outcome have been if this person had been assigned to a different treatment? Rather than a single comparison, we are now interested in a series of pairwise comparisons between treatments m and l . The treatment effect on the treated is written

$$\theta_0^{m,l} = E(Y^m - Y^l | T = m) = E(Y^m | T = m) - E(Y^l | T = m), \quad (1)$$

where $\theta_0^{m,l}$ denotes the effect of treatment m rather than l .

Identification of (1) can occur under appropriate conditions, the most important being that treatment outcomes are independent of treatment selection after conditioning on a vector of attributes, X (the conditional independence assumption). Formally,

$$Y^1 \dots Y^M \perp T | X = x. \quad (2)$$

If this assumption is valid, we can use the conditional propensity score to identify the treatment effect,³²

$$\theta_0^{m,l} = E(Y^m | T = m) - E_{p^{m|ml}}[E(Y^l | p^{m|ml}(X), T = l) | T = m]. \quad (3)$$

In practice, the conditional propensity score, $p^{m|ml}(x)$, is computed indirectly

³⁰ Matching methods are common among applied statisticians and natural scientists but have only recently been analyzed and applied by econometricians and economists. Papers on the econometric theory of matching include Heckman, Ichimura, & Todd, *supra* note 4; and Guido W. Imbens, *The Role of the Propensity Score in Estimating Dose-Response Functions* (Technical Working Paper No. 237, Nat'l Bur. Econ. Res. 1999). More applied work includes James J. Heckman, Hidehiko Ichimura, & Petra E. Todd, *Matching as an Econometric Evaluation Estimator: Evidence from Evaluating a Job Training Program*, 64 *Rev. Econ. Stud.* 605, 654 (1997); Dehejia & Wahba, *supra* note 4; Michael Lechner, *Programme Heterogeneity and Propensity Score Matching: An Application to the Evaluation of Active Labour Market Policies* (Contributed Paper No. 647, Econ. Soc'y World Congress 2000). Our multitreatment application is closest to that of Michael Lechner, *Identification and Estimation of Causal Effects of Multiple Treatments under the Conditional Independence Assumption* (Discussion Paper No. 91, IZA 1999).

³¹ Lechner, *Identification and Estimation of Causal Effects*, *supra* note 30; Imbens, *supra* note 30.

³² Lechner, *Identification and Estimation of Causal Effects*, *supra* note 30.

from the marginal probabilities $p'(x)$ and $p^m(x)$ estimated from a discrete-choice model. In this case,

$$E[p^{m|m'}(x)|p'(x), p^m(x)] = E\left[\frac{p^m(x)}{p'(x) + p^m(x)} | p'(x), p^m(x)\right] = p^{m|m'}(x). \quad (4)$$

We use an ordered probit model (see further below) to generate propensity scores.

It is important to emphasize that the propensity scores are not of direct interest but rather are the metric by which members of the treated group are matched to members of the “untreated” group (“differently” treated in our context). After matching, and given the conditional independence assumption, the treated and untreated groups can be analyzed as if treatment had been assigned randomly. Thus, differences in mean FTA rates across matched samples are estimates of the effect of treatment.

Less formally, matching on propensity scores can be understood as a pragmatic method for balancing the covariates of the sample across the different treatments.³³ Note that the covariates that we care most about balancing are those that affect the treatment outcome. Assume, for example, that X influences treatment selection but does not independently influence treatment outcome. If the goal of the selection model were to consistently estimate the causes of treatment selection, we would want to include X in the model, but it is not necessarily desirable to include it when the purpose is to create a metric for use in matching.³⁴ A simple example occurs when X predicts treatment exactly. Inclusion of X would defeat the goal of matching because all propensity scores would be either zero or one. Similarly, we will include model variables in the propensity score that may affect the treatment outcome even if they do not casually affect treatment selection.

IV. DATA AND DESCRIPTIVE STATISTICS

We use a data set compiled by the U.S. Department of Justice’s Bureau of Justice Statistics called State Court Processing Statistics, for 1990, 1992, 1994, and 1996 (Inter-university Consortium for Political and Social Research [ICPSR] study 2038). We supplement these data with an earlier version of the same collection, the National Pretrial Reporting Program, for 1988–89 (ICPSR study 9508). The data are a random sample of 1 month of felony filings from approximately 40 jurisdictions, where the sample was designed to represent the 75 most populous U.S. counties. The data contain detailed information on arrest charges, criminal background of the defendant (for

³³ Dehejia & Wahba, *supra* note 4.

³⁴ Boris Augurzy & Christoph M. Schmidt, *The Propensity Score: A Means to an End* (Discussion Paper No. 271, IZA 2001).

example, number of prior arrests), sex and age of the defendant,³⁵ release type (surety, cash bond, own recognizance, and so on), rearrest charges for those rearrested, whether the defendant failed to appear, and whether the defendant was still at large after 1 year, among other categories.

In addition to the main release types, there are minor variations. Some counties, for example, release on an unsecured bond for which the defendant pays no money to the court but is liable for the bail amount should he fail to appear. Because the incentive effects are very similar, we include unsecured bonds in the deposit bond category.³⁶ Instead of a pure cash bond, it is sometimes possible to put up property as collateral. Since property bonds are rare (588 observations in our data, less than 2 percent of all releases), we drop them from the analysis.³⁷ Finally, some counties may occasionally use some form of supervised release. In the first year of our data set, supervised release is included in the own-recognizance category. Supervised release often means something as simple as a weekly telephone check-in, so including these with own recognizance is reasonable. Supervised release is not a standard term, however, and other forms, such as mandatory daily attendance of a drug treatment program, are likely to be more binding. To maintain comparability across years, we follow the practice established in the first year of the data set by classifying supervised release with own recognizance. Because supervised release is more binding than pure own recognizance, this can only lower FTA rates and other results in the own-recognizance sample, thus biasing our results away from finding significant differences among treatments.³⁸

In Table 1, the mean FTA rates for release categories are along the main diagonal, with the number of observations in square brackets. The preliminary analysis suggests that FTA rates are lower under surety bond release than under most other types of release. Off-diagonal elements are the difference between the FTA rate for the row category and the FTA rate for the column category. The FTA rate for those released under surety bond is 17 percent. Compared with surety release, the FTA rate is 3 percentage points higher under cash bonds, 4 percentage points higher under deposit bonds, and 9 percentage points higher under own recognizance (all these differences are

³⁵ The State Court Processing Statistics data are more complete and better organized than the National Pretrial Reporting Program data. The former, for example, include information on the race of the defendant that the latter do not.

³⁶ We drop observations missing data on the bail amount.

³⁷ Another reason to drop property bonds is that it is difficult to compare the bail for these releases to other release types. A defendant, for example, may put up a \$250,000 house as collateral for \$25,000 in bail. Although we know the bail amount, we do not know the value of the collateral property other than that it must, by law in many cases, be higher than the value of the bail amount. A cash or surety bond, therefore, is not equivalent to a property bond for the same bail amount.

³⁸ We find similar results by restricting the data set to the years in which supervised release is given a distinct category.

TABLE 1
MEAN FAILURE-TO-APPEAR RATES BY RELEASE CATEGORY, 1988-96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond	Emergency Release
Own recognizance	26 [20,944]	5**	6**	9**	-19**
Deposit bond		21 [3,605]	1	4**	-23**
Cash bond			20 [2,482]	3**	-25**
Surety bond				17 [9,198]	-28**
Emergency release					45 [584]

NOTE.—Mean failure-to-appear (FTA) rates (in %) for release categories, rounded to the nearest integer, are along the main diagonal, with the number of observations in square brackets. Off-diagonal elements are the difference between the mean FTA rate for the row category and the mean FTA rate for the column category.

** Statistically significant at the greater than 1% level.

statistically significant at greater than the 1 percent level). Put slightly differently, compared with surety release, the FTA rate is approximately 18 percent higher under cash bond, 33 percent higher under deposit bond, and more than 50 percent higher under own recognizance.

Table 1 also presents some information on emergency release. Emergency releasees are defendants who are released solely because of a court order to relieve prison overcrowding. Emergency release is not a treatment—the treatment is own recognizance—but rather an indication of what happens when neither judges nor bond dealers play their usual role in selecting defendants to be released.³⁹ One would expect that relative to those released under other categories, these defendants are likely to be accused of the most serious crimes, have the highest probability of being found guilty, and have the fewest community ties. In addition, these defendants have neither monetary incentive nor the threat of being recaptured by a bounty hunter to induce them to return to court. As a result, a whopping 45 percent of the defendants who are given emergency release fail to appear for trial. The large differences between the FTA rates of those released on emergency release and every other category indicate that substantial and successful selection occurs in the decision to release. Emergency release is thus of some special interest, although not directly related to the focus of this paper.

Although the preliminary data analysis is suggestive, the difference-in-means analysis could confound effects due to treatment with effects due to selection on, for example, defendant characteristics such as the alleged crime.

³⁹ Even under emergency release, some selection can occur. Judges and jailers, for example, could order that more inmates be paroled to make room for the most potentially dangerous accused defendants, inmates could be shipped out of state, or the court order could be (temporarily) ignored. The costs of selection, however, clearly rise substantially when jail space is tightly constrained.

V. RESULTS

A. Propensity Scores from Ordered Probit

We generate propensity scores for matching using an ordered probit model. By law, judges must release defendants on the least restrictive conditions they believe are compatible with ensuring appearance at trial. Own recognition, the least restrictive form of release, is our first category, followed by release on deposit bond. Although defendants released on deposit bond must put up some cash, which they will forfeit if they fail to appear, the amount is typically less than \$500.⁴⁰ Few people are ever held because of a failure to raise cash for a deposit bond. Defendants who were offered financial release (but not a deposit bond) and who paid their bonds in cash are the third category of release. Cash bond is more expensive than a deposit bond but does not involve the monitoring of sureties. Defendants released via surety bond are the fourth category. Although the Constitution guarantees that excessive bail shall not be required, it does not require that bail should always be set low enough for a defendant to be able to afford release. Indeed, judges sometimes set bail in the expectation (and hope) that the defendant will not be able to raise bail. Thus, we include defendants held on bail or detained without bail as the final, most restrictive category, not released. Emergency releases are also included in the final category because, had it not been for the emergency, these individuals would have not have been released. From the ordered probit, we generate conditional propensity scores for each possible pairwise comparison.⁴¹

Variables in the ordered probit specification include individual-specific indicators that denote whether the defendant has been accused of murder, rape, robbery, assault, other violent crime, burglary, theft, other property offense, drug trafficking, other drug-related offense, or driving-related offense (with misdemeanors and other crimes in the constant). We also include variables for past experience with the criminal justice system. Three binary variables are set equal to one if the defendant had some active criminal justice status at the time of the arrest (for example, was on parole or probation), had prior felony arrests, or failed appear at trial in the past. The defendant's sex and age are also included. Note that these variables are exactly the sorts of variables that judges use to make treatment selection

⁴⁰ The median deposit bond amount is \$5,000, and releasees typically must deposit 10 percent or less of the bond amount.

⁴¹ We have also estimated the results using a multivariate logit model. The results are substantively similar (on the ordered probit model, see, for example, William H. Greene, *Econometric Analysis* (4th ed. 2000)).

decisions.⁴² Other, nonindividual variables include the police clearance rate, defined as the number of arrests divided by the number of crimes per county. The clearance rate provides a crude measure of police availability that may affect FTA rates. County and year effects are included in the selection equation (county 29 and 1988 are excluded to prevent multicollinearity).⁴³ The results of the ordered probit estimation are presented in Appendix Table A1.

B. Matching Quality

A match is defined as the pair of observations with the smallest difference in propensity scores so long as the difference is less than a predefined caliper. If a match cannot be made within the caliper distance, the observations are dropped. We use matching with replacement, so the order of matching is irrelevant, and every untreated observation is compared against every treated observation.⁴⁴

The match quality is good, as we match large proportions of the sample despite using a caliper of only .0001.⁴⁵ Figure 1A presents a box-and-whiskers plot of the propensity scores for each treatment category (including the "treatment" of not released) conditional on the actual treatment. The leftmost part of the graph, for example, gives the box-and-whiskers plot for the propensity of being in the own-recognizance, deposit, cash, surety, and not-released treatments for all defendants in the own-recognizance treatment.⁴⁶

⁴² Ayres & Waldfogel, *supra* note 6, identifies eight characteristics that judges may consider in setting bail: (1) the nature and circumstances of the offense (if relevant), (2) the evidence against the defendant, (3) the defendant's prior criminal record, (4) the defendant's prior FTA record, (5) the defendant's family ties, (6) the defendant's employment record, (7) the defendant's financial resources, and (8) the defendant's community ties. Although Ayers and Waldfogel's study deals only with Connecticut, the criteria are similar in other states.

⁴³ The use of county effects in the selection equation is noteworthy because it implies that matching will occur with "quasi"-fixed effects. A true fixed-effects estimator would require that comparable observations come from within the same county. The matching estimator takes into account county effects when seeking a match but does not insist that every match must be within county. In particular, some counties do not release on deposit bond, and others do not release on surety bond. A fixed-effects estimator would not use information from these counties in estimating the effect of the deposit and surety treatments. The matching estimator will use information from these counties if matching is strong on other variables. A pure fixed-effects estimator may also be important, however, and in the working version of this paper, Eric Helland & Alexander Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping* (Working paper, George Mason Univ. 2003), we pursue this alternative approach. Results are consistent with those discussed here.

⁴⁴ Dehejia & Wahba, *supra* note 4, finds that matching with replacement is considerably superior to matching with nonreplacement.

⁴⁵ When matching on variables with fewer observations, such as fugitive rates conditional on failure to appear as we do below, we match using a caliper of .001. The caliper size makes little difference to the results.

⁴⁶ In a box-and-whiskers plot, the box contains the interquartile range (IQR): the observations between the 75th percentile (the top of the box) and the 25th percentile (the bottom of the box). The horizontal line toward the center of each box is the median observation. The whiskers are the so-called adjacent values that extend from the largest observation less than or equal

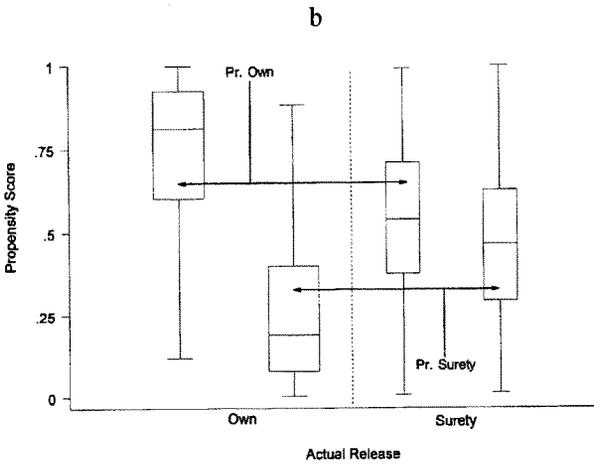
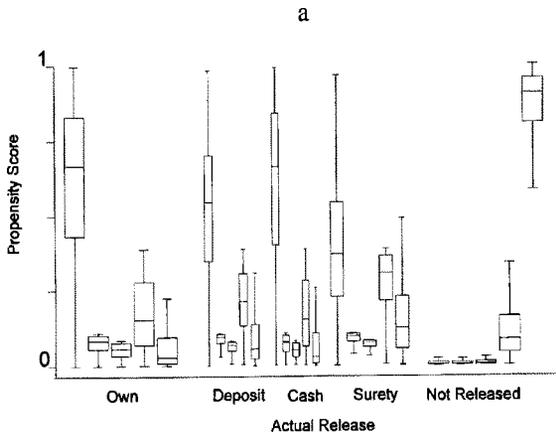


FIGURE 1.—A, p -score distribution for each release type conditional on actual release (the order within type is own recognizance, deposit, cash, surety, not released); B, pairwise p -score distributions for own recognizance versus surety.

Figure 1B gives the box-and-whiskers plot for the pairwise (conditional) probabilities for the own versus surety comparison. The “Pr. Own” and “Pr. Surety” arrows indicate that we can find comparable observations, statistical doppelgangers, for individuals released under either treatment. Many of the defendants released on surety bond, for example, were as likely to have been released on their own recognizance (third box from the left) as those who actually were released on their own recognizance (first box from the left). Similarly, many of the defendants who were released on their own recognizance were as likely to have been released on surety bond (second box from the left) as those who actually were released on surety bond (fourth box from the left). Note that it is important that the boxes overlap across treatments, not that they overlap within treatments—that is, the fact that in Figure 1A the propensity to be in the deposit bond treatment is everywhere lower than the propensity to be in the own-recognizance treatment simply reflects the fact that the deposit bond treatment is a low-probability event. More important is that the deposit bond treatment is a low-probability event regardless of actual treatment—we can thus find comparable observations across the treatments. Alternatively stated, the overlap in the boxes across treatments indicates that random factors play a large role in treatment selection, thus aiding our effort to find true comparable observations.⁴⁷

Although we can find comparable observations across the release treatments, we cannot find good comparable observations for those who were not released. Indeed, the Figure 1A box-and-whiskers plot of the propensity not to be released among those who in fact were not released does not overlap at all with the propensity not to be released for those who were released. Defendants who are not released differ greatly from released defendants.⁴⁸ (This is consistent with the very high FTA rates that we found for emergency releases in Table 1.) The fact that the model is capable of finding large selection effects if they exist, as they apparently do for those not released, bolsters the finding that selection on observable characteristics is not overly strong among the release treatments.

to the 75th percentile plus $1.5 \times \text{IQR}$ and the smallest observation greater than or equal to the 25th percentile minus $1.5 \times \text{IQR}$. Points outside the box and whiskers are called extreme values or outside points and for clarity are not plotted in this graph. In this plot, the width of the box is proportional to the square root of the number of observations in that category.

⁴⁷ Another interesting aspect of the box-and-whiskers plot is that it suggests that almost everyone can be released on their own recognizance, even those who might in another time and place be released only with high bail. Thirty percent of released defendants accused of murder, for example, were released on their own recognizance.

⁴⁸ It is possible to find defendants who were released who might not have been released—thus, the data are consistent with the adage that it is better to let 10 guilty men go free than jail one innocent man.

TABLE 2

TREATMENT EFFECTS OF ROW VERSUS COLUMN RELEASE CATEGORY ON FAILURE-TO-APPEAR RATES USING MATCHED SAMPLES, 1988-96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond
Own recognizance	26	3.2** (1.0; 1.1)	4.8** (1.1; 1.2)	6.5** (.78; .78)
Deposit bond	-3.1** (1.1; 1.2)	21	4.1** (1.5; 1.6)	3.1** (1.1; 1.3)
Cash bond	-5.8** (1.3; 1.6)	-1.5 (1.6; 2.0)	20	1.8; 2.0 (1.4; 1.8)
Surety bond	-7.3** (.78; .89)	-3.9** (1.1; 1.2)	1.7 (1.3; 1.4)	17

NOTE.—Mean failure-to-appear rates (in %) for release categories for the full sample are along the main diagonal. Off-diagonal elements are the estimated treatment effects of the row category versus the column category. Standard errors are in parentheses—the first standard error assumes that the p -score is estimated with certainty; the second uses bootstrapping to estimate the standard error including uncertainty of the p -score. Matching caliper = .0001.

** Statistically significant at the greater than 1% level (two sided).

C. Estimated Treatment Effects: Failure to Appear

In Table 2, the row variable denotes the treated variable and the column the untreated variable.⁴⁹ For reference, the main diagonal includes the mean FTA rate in that category from the full sample.⁵⁰ Reading across the surety bond row, for example, we see the estimated difference in FTA rates caused by the surety treatment relative to the column treatment—that is, the estimate of the effect of treatment on the treated. The matching estimator suggests that similar individuals are 7.3 percentage points, or 28 percent, less likely to fail to appear when released on surety bond than when released on their own recognizance. Similar individuals are also 3.9 percentage points, or 18 percent, less likely to fail to appear when released on surety bond than when released on deposit bond. The estimated treatment effect for those on surety bonds versus cash is small and not statistically significant.⁵¹

⁴⁹ Two standard errors are presented in Table 2. The first takes into account uncertainty in the matched samples but assumes that the propensity score is known with certainty. The second estimate is a bootstrapped standard error that takes into account uncertainty that propagates from the estimation of the propensity score. The “regular” and bootstrapped standard errors are close, with the bootstrapped errors being approximately 8–20 percent higher. All the statistically significant results are significant at greater than the 1 percent level using either standard error. Since the estimation of the propensity score adds very little uncertainty to the matching estimators and because calculating bootstrapped errors is very time and resource intensive, we present only the regular standard errors in future results and leave adjustments to the reader. The bootstrapped errors were calculated using 100 replications of the model. The procedure took over 48 hours on a reasonably fast Pentium computer.

⁵⁰ The mean FTA rate for the full sample is included as rough guide to absolute effects. Note, however, that the matched sample is usually smaller than the full sample, so the mean FTA rate for the matched and full samples can be slightly different.

⁵¹ As a test of matching quality, we also ran a linear regression on the matched samples that included surety bond and all the variables in Table 3. The results are similar, as they should be if the matched samples divide other covariates as if they were assigned randomly. The coefficient on surety bond in the surety versus own recognizance regression, for example, is

Unlike Table 1, both the top and bottom halves of Table 2 are filled in; this is because the estimate of the treatment on the treated is conceptually different from the estimate of the treatment on the untreated (differently treated). For example, the effect of the surety treatment relative to own recognizance for those who were released on surety bond is not necessarily the exact opposite of the effect of own recognizance relative to surety bond on those who were released on their own recognizance. As it happens, however, our estimates of these effects are similar. The estimate of the effect of own recognizance relative to surety on those who were released on their own recognizance, for example, is 6.5 percentage points, similar in size but opposite in sign to the -7.3 surety effect relative to own recognizance of those who were released on surety bond. The similarities across diagonals suggest that either (or both) treatment selection or treatment effect does not interact strongly with defendant characteristics. One possible exception is that the deposit bond treatment relative to cash is estimated at 4.1 percentage points, while the cash bond treatment relative to deposit is estimated at -1.5 percentage points.

D. *Estimated Treatment Effects: The Fugitive*

A surprisingly large number of felony defendants who fail to appear remain at large after 1 year, approximately 30 percent. Alternatively stated, some 7 percent of all released felony defendants skip town and are not brought back to justice within 1 year. Those who remain at large more than 1 year are called fugitives.

The surety treatment differs most from other treatments when a defendant purposively skips town, because this is when bounty hunters enter the picture.⁵² If the surety treatment works, therefore, we should see it most clearly in the apprehension of fugitives. Given that a defendant fails to appear, we ask what the probability is that the defendant is not brought to justice within 1 year and how this varies with release type. It is important to note that once a defendant has decided to abscond, there is no reason why anything other than the different effectiveness of public police and bail enforcement agents should have a systematic effect on the probability of being recaptured.

Table 3 provides strong evidence that bounty hunters are highly effective at recapturing defendants who attempt to flee justice—considerably more so than the public police. The main diagonal of Table 3 contains the mean fugitive rate conditional on FTA along with the number of observations in

⁵¹ -6.5 , which is within 1 standard deviation of the -7.3 matching estimate. We do a more detailed comparison of linear regression and matching results further below.

⁵² We use the term “bounty hunter” or “bail enforcement agent” to refer to private pursuers of felony defendants. Bond dealers typically pursue their own skips. Literal bounty hunters are typically not called in unless the skip is thought to have crossed state or international lines. Services like Wanted Alert (<http://www.wantedalert.com>) regularly post ads in *USA Today* that list fugitives and their bounties.

TABLE 3

TREATMENT EFFECT OF ROW VERSUS COLUMN RELEASE CATEGORY ON THE FUGITIVE RATE USING MATCHED SAMPLES, CONDITIONAL ON FAILURE TO APPEAR, 1988-96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond
Own recognizance	32 [5,440]	-3** (2.6)	-4.9** (2.9)	9.4** (2.1)
Deposit bond	-.2 (2.6)	33 [766]	-6.2 (4.1)	12.1** (2.7)
Cash bond	11.9** (3.0)	-3.8 (4.4)	40 [506]	18.6** (3.7)
Surety bond	-17** (2.0)	-15.5** (2.9)	-25.6** (4.2)	21 [1,537]

NOTE.—Mean fugitive rates (in %), defined as failures to appear that last longer than a year, for release categories for the full sample are along the main diagonal, with the number of observations in that category conditional on a failure to appear in square brackets. Off-diagonal elements are the difference between the mean fugitive rate for the row category and the mean fugitive rate for the column category estimated using matching. Standard errors are in parentheses. Matching caliper = .001.

** Statistically significant at the greater than 1% level (two sided).

each category. The estimated treatment effects for the row versus column variables are shown in the off-diagonals with standard errors in parentheses. The probability of remaining at large for more than a year conditional on an initial FTA is much lower for those released on surety bond. The surety treatment results in a fugitive rate that is lower by 17, 15.5, and 25.6 percentage points compared with the own-recognizance, deposit bond, and cash bond treatments, respectively. In percentage terms, the fugitive rates under surety release are 53, 47, and 64 percent lower than the fugitive rates under own recognizance, deposit bond, and cash bond, respectively. Similarly, the own recognizance, deposit, and cash bond treatments result in fugitive rates that are 29, 47, and 47 percent higher than under the surety treatment.

There are also some interesting nonsurety effects in Table 3. Note that the fugitive rate conditional on an FTA is higher for cash bond than for release on own recognizance. Earlier (see Table 2) we had found that the FTA rate was lower for cash bond than for release on own recognizance. This suggests that defendants on cash bond are less likely to fail to appear than those released on their own recognizance, but if they do fail to appear, they are less likely to be recaptured. The result is pleasingly intuitive. A defendant released on his own recognizance has little to lose from failing to appear and thus may fail to appear for trivial reasons. But a defendant released on cash bond has much to lose if he fails to appear, and thus those who do fail to appear do so with the goal of not being recaptured.

The propensity score method can be very informative about the entire distribution of treatment effects. In Figure 2, we graph smoothed (running-mean) FTA and fugitive rates against surety p -scores for the own-recognizance and surety treatments (conditional on being in either the surety or own-recognizance treatment). (We omit graphs for the other treatment comparisons for brevity.) The two downward-sloping, thinner curves graph smoothed FTA rates against the p -scores for those defendants released on

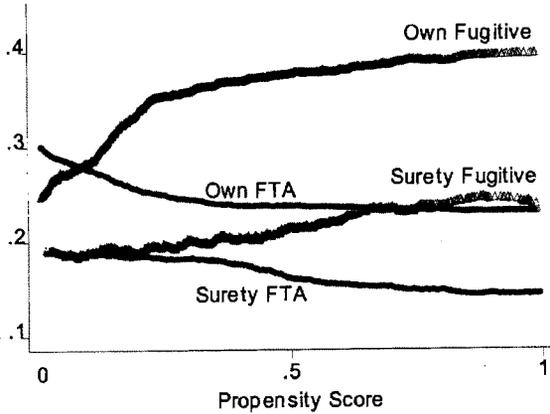


FIGURE 2.—Failure-to-appear and fugitive rates by own recognizance versus surety treatment plotted against p -scores.

their own recognizance or surety bond. The slope of each line indicates the direction and strength of the effect of observable characteristics on selection in that treatment. The difference between the own-recognizance and surety lines at any given propensity score is an estimate of the treatment effect, controlling for observable characteristics. The difference is roughly constant, which indicates that despite some mild selection, the treatment effect is roughly independent of observable characteristics.

For both the own-recognizance and surety treatments, FTA rates decrease as the propensity for being in the surety treatment increases. That is, FTA rates decrease as observable characteristics move in the direction of predicting surety release. The decline is gentle; moving from a near-zero propensity to a near-one propensity reduces the FTA rate by approximately 5 percentage points. The effect is sensible if we recall that many FTAs are short term—the defendant forgets the trial date or has another pressing engagement. These sorts of FTAs are likely to be more common for defendants with observable characteristics that predict low p -scores because judges release most defendants on their own recognizance and reserve surety release for defendants accused of more serious crimes. Few people will forget to show up for their murder trial, but some may do so if the trial involves a driving offense. At the same time, however, we expect that defendants accused of more serious crimes—who have more to lose from being found guilty—are more likely

to purposively abscond. If this is correct, we ought to see a positive correlation between the surety propensity score and the fugitive rate conditional on having failed to appear.

The two upward-sloping, thicker lines plot smoothed fugitive rates against the surety propensity score. As before, the slope of the plots gives the direction and strength of effects caused by selection on observable characteristics, and the vertical difference is the treatment effect for any given propensity score. As observable characteristics move in the direction of a greater propensity to be selected for surety release, the fugitive rate increases. It is interesting to note that the effect of selection on defendants released on surety bond is less than that on defendants released on their own recognizance (that is, the "slope" of the plot is less). This suggests that the surety treatment works well even for those defendants whose observable characteristics would predict higher FTA rates.

We examine the issue of unobservable characteristics at length below, but since selection by observable characteristics has little influence on fugitive rates, Figure 2 already suggests that observables would have to be very different from unobservables in order to greatly affect the results.

E. Kaplan-Meier Estimation of Failure-to-Appear Duration

The higher rate of recapture for those released on surety bond compared with other release types can be well illustrated with a survival function. For a subset of our data, just over 7,000 observations, we have information on the time from the failure to appear until recapture (return to the court). A survival function graphs the percentage of observations that survive at each time period. We estimate a survival function for each release type using the nonparametric Kaplan-Meier estimator. Typically, the Kaplan-Meier estimator is used only for preliminary analysis and is then followed by a parametric or semiparametric model. Although parametric and semiparametric models allow for covariates, they require sometimes tenuous assumptions about functional form. Instead, we follow our earlier approach of creating matched samples. Thus, using the same procedure, we create three matched samples: surety versus own recognizance, surety versus deposit, and surety versus cash. We then compare the survival function across each matched sample. The matching procedure ensures that covariates are balanced across the matched samples, so it is not necessary to include additional controls for covariates.

Figure 3 presents the survival functions. In each case, the survival function for those released on surety bond is markedly lower than that for those released on their own recognizance, deposit bond, or cash bond. The ability of bail enforcement agents relative to police to recapture defendants who

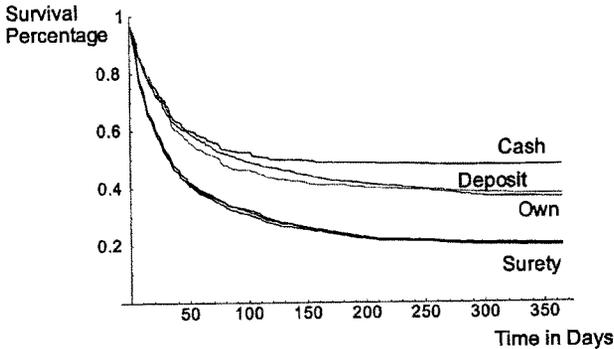


FIGURE 3.—Kaplan-Meier survival function for defendants on surety bond versus those released on cash bond or deposit bond or released on their own recognizance—using matched samples.

skip bail is evident within a week of the failure to appear.⁵³ By 200 days, the surety survival rate is some 20–30 percentage points, or 50 percent, lower than the survival rate for those out on cash bond, deposit bond, or their own recognizance; that is, the probability of being recaptured is some 50 percent higher for those released on surety bond relative to other releases. (Note that there are three surety bond survival functions, one for each comparison group, but these are nearly identical.)

A log-rank test confirms Figure 3; we can easily reject the null hypothesis of equality of the survivor functions—defendants released on surety bond are much more likely to be recaptured (that is, less likely to remain at large, or “survive”) than those released on their own recognizance, deposit bond, or cash bond.⁵⁴

⁵³ A number of estimates have been made that bounty hunters take into custody between 25,000 and 35,000 fugitives a year, depending on the year (see various sources in Drimmer, *supra* note 11; and also W. P. Barr, letter to Charles T. Canady on the Bounty Hunter Responsibility Act, NABIC Bull., March 2000). These figures are consistent with a recapture rate of over 95 percent and are consistent with the number of fugitives on surety bond. It appears, therefore, that almost all fugitives on surety bond are recaptured by bail enforcement agents and not by the police. Bounty hunters, however, will sometimes track down defendants and then tip police as to their whereabouts, so police will sometimes be involved in some aspects of recapture.

⁵⁴ The exact results of the log-rank test and similar results matching on propensity score and bail can be found in Helland & Tabarok, *supra* note 43.

TABLE 4

EFFECT OF ALTERNATIVE TREATMENT VERSUS SURETY BOND ON FAILURE-TO-APPEAR AND FUGITIVE RATES (Conditional on Failure to Appear), 1988-96

	Own Recognizance versus Surety Bond	Deposit versus Surety Bond	Cash versus Surety Bond
Treatment effect on failure-to-appear rates	+7.8** (1.6)	+6.2** (1.8)	-1.6 (4.4)
Treatment effect on fugitive rates	+14.8** (2.3)	+19.8** (2.9)	+35.7** (8.0)

NOTE.—Individuals from states that have banned surety bonds are matched with similar individuals released on surety bond. Standard errors are in parentheses. The matching caliper is .0001.

** Statistically significant at the greater than 1% level (two sided).

F. Comparison with Counties in States That Have Banned Commercial Bail

Some states have banned commercial bail. It seems plausible that matching can find two individuals who are comparable but for the fact that one individual could not have been assigned surety bail while the other could and was assigned surety bail. Comparing these individuals gives us a measure of what would happen if a county lifted its ban on commercial bail.⁵⁵

Table 4 demonstrates that states that ban commercial bail pay a high price. We estimate that FTA rates are 7-8 percentage points, or approximately 30 percent, higher for individuals released on deposit or own recognizance than if the same individuals were released on surety bond.⁵⁶ As before, we find that cash bond is about as effective as surety bond at controlling FTA rates. The fugitive rate conditional on FTA is much higher under own recognizance, deposit, or cash release than under surety—higher by some 15, 20, and 36 percentage points, or 78, 85, and 93 percent, respectively—figures even larger than we found earlier.

VI. LOOKING FOR UNOBSERVABLE VARIABLES

Matching is a powerful and flexible tool, but it is not a research design that magically guarantees the identification of causal effects. In this section, we test for robustness and attempt to rule out the potentially confounding effects of unobservable characteristics. We focus on two identification strat-

⁵⁵ Since we are interested in the cross-county variation, the propensity scores for these tests were generated from an ordered probit that did not include county fixed effects but was otherwise identical to that used earlier.

⁵⁶ Note that in Table 4, we examine the treatment effect of own recognizance, deposit, and cash relative to surety because this is the relevant comparison when considering the experiment of lifting the ban on commercial bail. As noted earlier, the treatment effect on the treated and untreated groups are similar, so we could also have examined the surety treatment effect relative to the alternative release types.

TABLE 5
MEAN REARREST RATES BY RELEASE
CATEGORY, 1988-96

	Rate (%)	N
Own recognizance	14.9	20,945
Deposit bond	13.3	3,605
Cash bond	14	2,482
Surety bond	12	9,202

egies; a number of alternative strategies, described briefly below, are developed in the working paper.

Our first identification strategy takes advantage of the fact that some 14 percent of defendants out on pretrial release are arrested for another crime before they are sentenced for the first crime. It is plausible that the probability of being rearrested is positively correlated with the probability of becoming a fugitive. Assume, for example, that guilty defendants are less likely to show up for trial than innocent defendants and that innocent defendants are less likely to be rearrested than guilty defendants. There is good evidence for some such assumption because in the raw data, defendants who are never rearrested have an FTA rate of 11 percent, but defendants who are rearrested for another crime have an FTA rate of 43 percent.

If rearrest is positively correlated with the probability of becoming a fugitive and if treatment does not influence rearrest rates, then rearrest rates by treatment will track unobserved characteristics. Table 5 provides evidence for the second clause—in the raw data, there is very little variation in rearrest rates across treatment categories.⁵⁷ Thus, Table 6 (matching on propensity score and bail) presents faux “treatment effects” for the effect of various release types on rearrest rates. We emphasize that our hypothesis is that treatment does not influence rearrest—the faux treatment effects, therefore, are indications of the influence of unobserved variables.

In Table 6, the surety versus own recognizance and surety versus deposit comparisons show positive but very small and statistically insignificant effects, which suggests that unobserved variables have little influence on FTA and fugitive rates across these comparisons. The surety versus cash bond comparison suggests that the surety treatment increases rearrest rates by 4.5 percentage points, which implies that unobserved variables operate in a direction that offsets the true treatment effect of surety on FTA and fugitive

⁵⁷ In the raw data, there appears to be a slight decrease in rearrest rates for those released on commercial bail. Although the rearrest of a defendant is not usually grounds for the forfeiture of the bond dealer's bond, bond dealers do monitor their charges, and such monitoring might reduce rearrest rates. Bond dealers might be also be able to select defendants who are unlikely to flee and thus also unlikely to be rearrested. Once we control for observable characteristics, however, the slight decrease in arrest rates for those on commercial bail disappears and in some cases reverses (see Table 6).

TABLE 6

EFFECT OF SURETY TREATMENT EFFECT VERSUS OTHER RELEASE TYPES ON REARREST RATES USING SAMPLES MATCHED ON *p*-SCORE AND BAIL, 1988-96

	Surety versus Own Recognizance	Surety versus Deposit Bond	Surety versus Cash Bond
Surety bond	.7 (.6)	.58 (1.0)	4.5** (1.3)
Matched observations	14,925	9,740	7,064

NOTE.—The matching caliper is .001.

** Statistically significant at the greater than 1% level (two sided).

rates. Recall from Table 2 that we found that FTA rates were slightly higher under surety than under the cash bond treatment. The evidence from rearrest rates suggests that unobservable characteristics may be responsible for part of this and that the true treatment effect is somewhat lower. Similarly, although we found large negative effects on fugitive rates from the surety treatment (relative to cash treatment), the evidence suggests that, if anything, the true treatment effects are even more negative.⁵⁸

The rearrest data allow for another interesting comparison. For a small subset of our data, 1,331 observations from 1988 and 1990, we know the rerelease type for those individuals who are arrested and released on a second charge. We do not know whether the individual failed to appear on the second charge, which is why we do not have repeated observations. Nevertheless, the second arrest and release data may be revealing.

Suppose that the initial release is own recognizance and the second release is via surety bond. By monitoring and possibly recapturing the defendant if he skips on the second trial, bail bondsmen and their agents create a positive externality with respect to fugitive rates on the first trial. This potential externality means that we need not compare own-recognizance to surety releases to measure a surety treatment effect. Instead, we can compare defendants released on their own recognizance with other defendants released on their own recognizance in their first release and on surety bond in their second release. Similarly, we can compare fugitive rates on the first trial for defendants whose first and second releases were own recognizance and own recognizance with those whose first and second releases were own recognizance and surety bond. With this comparison, we control for selection effects on the first release.

The unconditional fugitive rate of defendants who are released on their

⁵⁸ Since we find that rearrest rates vary little by treatment category, we should also find that treatment effects measured in the rearrest sample, that is, using only those defendants who were subsequently arrested for a second crime, should be similar to those found in the one-arrest sample. We have run these matching tests on propensity score and bail and do find similar results, which we omit for brevity.

TABLE 7
UNCONDITIONAL FUGITIVE RATES BY ARREST-
REARREST CATEGORY, 1988, 1990

Category	Rate
1. Own and not rearrested	8.48 [17,828]
2. Own-own	8.04 [191]
3. Own-surety	1.49 [134]
4. <i>t</i> -test (row 1 - row 3)	2.9; $p(1 > 3) = .0019$
5. <i>t</i> -test (row 2 - row 3)	2.6; $p(2 > 3) = .0047$

NOTE.—Own-own indicates first release on own recognizance and second release on own recognizance. Own-surety indicates first release on own recognizance and second release on surety bond.

own recognizance and not rearrested is 8.48 percent.⁵⁹ The fugitive rate of defendants who are released on their own recognizance and who are rearrested and then released again on their own recognizance is almost identical, 8.04 percent. But the fugitive rate for those defendants initially released on their own recognizance but then rearrested and rereleased on surety bond is just 1.9 percent. The difference between the own-recognizance and the own-recognizance+surety fugitive rate is statistically significant at the greater than 1 percent level. The difference between the own-recognizance+own-recognizance and own-recognizance+surety rate, which controls for rearrest, is also statistically significant at the greater than 1 percent level. Table 7 summarizes.

In the working paper,⁶⁰ we supplement the above analysis in a variety of ways to control for county effects, individual effects observed by judges but unobserved by us, and pure unobserved effects of a very general nature.⁶¹ Most generally, the cream that judges skim are released on their own recognizance and deposit bond, while the skim are released on cash or surety bond. Consistent with this, observable selection effects on fugitive rates are positive, and the evidence from a variety of independent tests suggests that unobservable characteristics are not biasing our results upward. Taken to-

⁵⁹ Earlier we focused on fugitive rates conditional on having FTA. We focus on unconditional fugitive rates here because we have fewer observations. We have data on rearrest and rerelease type for 1988 and 1990.

⁶⁰ Helland & Tabarrok, *supra* note 43.

⁶¹ One of our supplementary tests is a completely independent test using instrumental variables. When jails become overcrowded, judges are pressured to release individuals on their own recognizance rather than run the risk of setting a bail amount that the defendant might not be able to secure. (We present evidence in the working paper that bond dealers understand that overcrowded jails mean less surety business.) We define Ratio as the county jail population divided by the official jail capacity. A value of Ratio greater than one indicates overcrowding. We suggest that jail overcrowding is not likely to be correlated with unobservables that affect FTA and fugitive rates. Using Ratio as an instrumental variable, we again find that surety bail significantly reduces fugitive rates. For details, see Helland & Tabarrok, *supra* note 43.

gether, the evidence suggests that we have good estimates that surety release reduces FTA rates, survival times, and fugitive rates.

VII. CONCLUSIONS

When the default was for every criminal defendant to be held until trial, it was easy to support the institution of surety bail. Surety bail increased the number of releases relative to the default and thereby spared the innocent some jail time. Surety release also provided good, albeit not perfect, assurance that the defendant would later appear to stand trial. When the default is that every defendant is released, or at least when many people believe that "innocent until proven guilty" establishes that release before trial is the ideal, support for the surety bail system becomes more complex. How should the probability of failing to appear and all the costs this implies, including higher crime rates, be traded off against the injustice of imprisoning the innocent or even the injustice of imprisoning the not-yet-proven guilty? We cannot provide an answer to this question, but we can provide a necessary input to this important debate.

Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time. Deposit bonds perform only marginally better than release on own recognizance. Requiring defendants to pay their bonds in cash can reduce the FTA rate similar to that for those released on surety bond. Given that a defendant skips town, however, the probability of recapture is much higher for those defendants released on surety bond. As a result, the probability of being a fugitive is 64 percent lower for those released on surety bond compared with those released on cash bond. These findings indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law.

APPENDIX

TABLE A1

ORDERED PROBIT ON STRINGENCY OF RELEASE

Variable	Coefficient	
Local conditions:		
Time, in days, to scheduled start of trial	-.5821	(.0038)
Local clearance rate (total arrest/total crime)	.3957	(.1799)
Defendant is charged with:		
Murder	.35915**	(.051044)
Rape	.376661**	(.032135)
Robbery	.146899**	(.028193)
Assault	.208538**	(.039397)
Other violent crime	.048705*	(.02932)
Burglary	-.10109**	(.027554)
Theft	-.16676**	(.029142)
Other property crime	.212824**	(.026824)
Drug trafficking	-.1147**	(.027033)
Other drug crime	-.01139	(.041254)
Driving-related crime	-.18755**	(.016514)
Defendant characteristics:		
Age	.000854	(.000653)
Female (yes = 1)	.873055**	(.080055)
Active criminal justice status	.191588**	(.013974)
Previous felonies	.244761**	(.013558)
Previous failure to appear	.123918**	(.015137)

NOTE.—The model includes county and year effects (not shown). Asymptotic standard errors are in parentheses. There are 58,585 observations.

* Statistically significant at the greater than 10% level.

** Statistically significant at the greater than 1% level (two-sided test).

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