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Jo Anne Zoff Sellner
Director

Senate

State of Minnesota

June 13, 1994

To: Senator Carol Flynn, Chair
Special Committee on Ethical Conduct

From: Peter S. Wattson, Senate Counsel PSW
296-3812

Subj: Appropriate Disciplinary Action

Senate Rule 75 requires that, "[i]f, after investigation, the [Special Committee on Ethical Conduct] finds [a] complaint substantiated by the evidence, it shall recommend to the Senate appropriate disciplinary action." This memorandum updates my memorandum of December 8, 1993, outlining the choices the committee has when deciding upon "appropriate disciplinary action."

1. Expulsion

The Minnesota Constitution, article IV, § 7, provides:

> Each house may determine the rules of its proceedings, sit upon its own adjournment, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member; but no member shall be expelled a second time for the same offense.

The United States Senate has expelled only 15 members, one during the late 1700s for disloyal conduct and 14 during the Civil War for disloyalty to the Union. The United States House of Representatives has expelled only four members, three during the Civil War for disloyalty and one in 1980 after he was convicted of bribery and conspiracy in office. J. Maskell, *Expulsion and Censure Actions Taken by the Full Senate Against Members*, CRS Report to Congress (1993).

2. Censure

In addition to authorizing the Senate to expel a member, section 7 also authorizes the Senate to "punish its members for disorderly behavior." The United States Senate has used the identical authority in the federal constitution to censure a member. A resolution of censure, adopted by the U.S. Senate, may use that term or others, such as "condemn" or "denounce," to describe the Senate's disapproval of a member's conduct. Maskell, *supra*, at CRS-10.

a. Condemnation

In 1929, the United States Senate condemned Senator Hiram Bingham for placing on the payroll of a committee an employee of a trade association that had a direct interest in the legislation before the committee. The employee was given access to secret committee deliberations because of his position. Senator Bingham was an unsuccessful candidate for re-election in 1932. Maskell, *supra*, at CRS-4, CRS-11 n.53.

Senator Joseph R. McCarthy was removed as chairman of the Permanent Subcommittee on Investigations and condemned by the United States Senate in 1954 for his "contemptuous" conduct toward a subcommittee that had investigated his finances in 1952 and for his abuse of the committee that had recommended his censure. He died in office in 1957. *Id.*

b. Censure

Senator Thomas Dodd was censured by the United States Senate in 1967 for personal use of campaign funds. He was an unsuccessful candidate for re-election in 1970. Maskell, *supra*, at CRS-5, CRS-11 n.53.

Representative Randy Staten was censured by the Minnesota House of Representatives in 1986 for deliberately and repeatedly failing to file accurate campaign finance reports and for pleading guilty to a charge of felony theft. JOURNAL OF THE HOUSE 7456-75 (1986).[1]

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[1] The Minnesota Constitution, art. IV, § 6, says that "senators and representatives must be qualified voters of the state . . . ." Article VII, § 1, says that a convicted felon is not eligible to vote, unless restored to civil rights. Article IV, § 6, makes each house the judge of the eligibility of its own members. That judgment is made by a majority vote. The House's Select Committee on the Staten Case found that, although Representative Staten was convicted of a felony, his sentence of 90 days in jail was within the limits for a misdemeanor and therefore, under Minn. Stat. § 609.13, was deemed a misdemeanor, rather than a felony. Therefore, he could not be disqualified by a majority vote, but could only be expelled by a two-thirds vote. The Select Committee recommended that he be expelled, but the vote to expel him failed 80-52 (90

c. Denunciation

Senator Herman Talmadge was denounced by the United States Senate in 1979 for converting campaign funds to personal use, claiming excess reimbursements for his expenses, and failing to file accurate financial disclosures and reports. He was defeated for re-election in 1980. *Id.*

Senator David Durenberger was denounced by the United States Senate in 1990 for using a book-selling scheme to evade the Senate's limit on honoraria and for billing the Senate for lodging in a condominium he owned. On September 16, 1993, he announced that he would not seek re-election. Maskell, *supra*, at CRS-6, CRS-11 n.53.

3. Reprimand

On March 24, 1994, the Minnesota Senate reprimanded Senator Sam G. Solon for providing the Senate's long-distance telephone access code to others and for allowing others to use his Senate office and telephone to make calls on their own personal and private business. 1994 JOURNAL OF THE SENATE 7024-27 (daily ed. Mar. 24, 1994).

The United States Senate Committee on Ethics reprimanded Senator Alan Cranston, a member of the "Keating Five," in 1991. S. Rep. No. 102-223, 102nd Cong., 1st Sess. 36 (1991). He did not seek re-election.

The full United States Senate has chosen not to use the term "reprimand" because:

> It just does not mean anything. It means what you might call just a slap on the wrist. It does not carry any weight.

Senator John Stennis, Chairman of the Select Committee on Standards and Conduct, 113 *Cong. Rec.* 16984 (June 22, 1967), quoted in Maskell, *supra*, at CRS-18.

The United States House of Representatives, on the other hand, has made a custom of including in a censure resolution a requirement that the censured member to go down before the bar and be publicly "reprimanded" by word of mouth by the Speaker. *Id.*

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votes were required). A subsequent motion to censure passed 99-31. JOURNAL OF THE HOUSE 7457-75 (1986).

4. Apology

Senator Solon apologized to the Senate that his "indiscretion in giving out the Senate's credit card number" had "tainted this body with public ridicule." He admitted to the Special Committee on Ethical Conduct that his conduct was inappropriate.

5. Payment of a Fine

Mason's Manual says that, in order to compel attendance at a session, a house "may inflict such censure or pecuniary penalty as may be deemed just." *Mason's Manual of Legislative Procedure*, § 561, ¶ 5 (1989). I presume this broad power to punish a member would apply to discipline for other improper conduct as well as for missing meetings.

The civil fine imposed by the Ethical Practices Board for violations of the campaign spending laws ranges from the amount of the excess spending (for inadvertent violations) to four times the amount of the excess (for more serious violations). Minn. Stat. § 10A.28.

6. Restitution

Senator Solon repaid the Senate the amount of his excess telephone charges. He did not pay the Senate any compensation for the embarrassment it suffered.

7. Loss of Privileges

a. Removal as Committee Chair

One of the most important privileges afforded to a senior member of the Senate is the opportunity to serve as chair of a standing committee. Removal from that position of honor and trust would be a severe punishment to the member removed.

The only member of Congress I have found who was removed from his position as a committee chair was Senator Joseph R. McCarthy in 1954. COMPTON'S ENCYCLOPEDIA, ONLINE EDITION (downloaded from America Online, November 22, 1993). Two other committee chairs resigned under pressure from their caucus. In 1974, U.S. Representative Wilbur Mills resigned as chairman of the House Ways and Means Committee after he appeared on stage with Fanne Foxe to congratulate her on a striptease performance and it became clear his caucus would not retain him as chair when the next

Congress reconvened. He did not seek re-election in 1976. CONGRESSIONAL QUARTERLY, CONGRESS AND THE NATION 1973-76, VOL. IV, 764 (1977). In 1976, U.S. Representative Wayne Hays resigned as chairman of the House Administration Committee for employing Elizabeth Ray in a secretary's position to serve as his mistress. Speaker O'Neill had bluntly told Hays he must resign immediately. *Id.* at 779-80.

A disadvantage of removing a member as chair of a committee is that it could disrupt the Senate as other members competed to replace him as chair and proposed various other shifts in committee assignments following his removal.

b. Removal from Committee Membership

A senator who was found to have engaged in improper conduct could be removed from membership on one or more standing committees. However, this too could disrupt the Senate as other members competed to fill the vacancy.

c. Reduce Staff

A committee chair has both a Committee Secretary and a Committee Administrative Assistant. One staff could be eliminated. Other members have a secretary, and perhaps a legislative assistant, one of which might be taken away. But any reduction in staff would depart from the staffing pattern for all other members, increase the burden on the remaining staff, and perhaps make it difficult for the Senate to operate, thus harming the other members of the Senate as well.

d. Reduce Miscellaneous Privileges

Other possible punishments would include reducing the member's postage allowance, curbing the member's out-of-state travel, moving the member's office location, and changing the member's parking space.

PSW:ph

cc: Senator Sheila M. Kiscaden
Senator LeRoy A. Stumpf
Senator Roy W. Terwilliger

THOMAS M. NEUVILLE
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Senate

State of Minnesota

December 28, 1994

DEC 29 1994

Senator Harold R. "Skip" Finn
Room 306, Capitol

Dear Senator Finn:

I am enclosing, for your review, the pre-sentence investigation report submitted to the Federal District Court by U.S. Attorney David L. Lillihaug, concerning the matter of State Senator Harold "Skip" Finn.

As you are aware, Senator Finn plead guilty to misdemeanor charges of misapplying tribal funds from the Leech Lake Chippewa Tribe. Senator Finn accepted Lillihaug's plea bargain agreement and admitted to misapplication of over $13,000. As a portion of the plea agreement, Senator Finn agreed to pay a fine of $100,000.

These conditions were agreed to in early August. The U.S. Attorney completed and submitted a pre-sentence investigation report to the court in October. The court agreed to accept Finn's guilty plea to the misdemeanor charges, but reserved the right to determine the sentence after completion of pre-sentence investigation findings. If the material contained in the report is fact, the misdemeanor agreement is truly a lienient plea.

Because of the magnitude of the report findings, I feel that it is important for each member of the Senate to know the real story surrounding the allegations against Senator Finn.

As you are also aware, the Senate may sit in judgement of its membership. I can assure you that when the 1995 Legislative Session begins the Independent-Republican Caucus will request a full report by the Special Ethics Committee. If the findings are consistent with the federal pre-sentence investigation report, we will request that Mr. Finn be expelled from membership in the Senate. This type of action requires consent of two-thirds of our membership.

While Senator Finn represents the people of District 4, I am equally concerned about the image and reputation of our institution. For that reason I urge you to read the enclosed pre-sentence report.

Tom N

TOM NEUVILLE
District 25

Senate
State of Minnesota

Senator Carol Flynn, Chair
Senate Special Committee on Ethical Conduct
State Capitol
St. Paul, MN 55155

Senators Dean Elton Johnson, Thomas M. Neuville and Linda Runbeck, each first being duly sworn, state and allege upon oath that:

1. Reservation Risk Management ("RRM") was a corporation formed by the tribal government of the Leech Lake Band for the stated purpose of administering a "self-insurance" plan for the Band.

2. The corporation was formed by the Band on the advice if its attorney, Harold "Skip" Finn, who then became one of the principals of the corporation and the administrator of the tribal "self-insurance" plan.

3. The United States Attorney has stated that while RRM purportedly offered the Band $8.6 million in property coverage for tribal buildings, RRM never had the assets necessary to pay that amount. By Harold Finn's own projections, RRM assets after five years of payments by the Band to RRM did not even reach $1 million. In addition, the RRM agreement drafted by Harold Finn shifted the risk of any loses back to the Band.

4. The U.S. Attorney has stated that Harold Finn avoided any close scrutiny of this scheme by allowing certain high level tribal officials to share in the profits of RRM.

5. The U.S. Attorney further states that before the U.S. Department of the Interior could initiate an investigation of this scheme, Harold Finn liquidated RRM and Finn kept for himself hundreds of thousands of dollars that the Band had been paying to RRM for self insurance.

6. While RRM was still in operation, Harold Finn engaged in a fraudulent invoice/"kick back" scheme. Harold Finn created and submitted to the Band two fictitious invoices in April and August of 1988 for services that were not in fact rendered. These transactions netted Myron Ellis, who was a high ranking member of the Band's tribal government, $13,345.

7. On August 17, 1994, on a plea bargain arrangement, Senator Finn pleaded guilty to preparing and submitting over $13,000 of false insurance invoices to the Band.

8. The U.S. Attorney further states that Senator Finn, after taking office, attempted to obstruct the criminal investigation by directing the destruction of subpoenaed documents. It is the U.S.

Attorney's contention that Senator Finn instructed a tribal accountant to destroy a document that was subpoenaed by the federal grand jury. This document was the fraudulent RRM invoice from April 1988 for $7,600 that Harold Finn created and submitted to the Band.

9. As such, it is your affiants' belief that Senator Finn has breached his ethical duty to the Minnesota State Senate and the people of Minnesota by:

a.) using a trusted position as the lawyer for the Band to convince the Band to take a course of action which personally benefitted Senator Finn;

b.) committing fraud upon the Band by the undercapitalization of RRM;

c.) engaging in a pattern of concealment and collusion by sharing profits with high level tribal members in order to avoid scrutiny of this scheme;

d.) misappropriating an admitted $13,345 to the personal benefit of a tribal member;

e.) allegedly misappropriating additional hundreds of thousands of dollars of tribal funds;

f.) liquidating RRM in order to avoid a federal investigation; and,

g.) ordering the destruction of subpoenaed documents.

Affiants hereby formally complain of the conduct of Senator Harold "Skip" Finn in this matter and respectfully request the Minnesota State Senate Special Committee on Ethical Conduct to investigate this matter pursuant to Rule 75 of the Temporary Rules of the Minnesota State Senate and to recommend to the Senate the expulsion of Senator Finn.

Date: January 3, 1995

Dean Elton Johnson

Senator Dean Elton Johnson

Thomas M. Neuville

Senator Thomas M. Neuville

Linda C. Runbeck

Senator Linda Runbeck

Subscribed and sworn to by Senator Dean Elton Johnson, Senator Thomas M. Neuville and Senator Linda Runbeck this 3rd day of January, 1995, before Gen Olson, Senator, 34th District, Minnesota, ex officio notary public. My term expires January 1, 1997.

Gen Olson

Ex officio Notary Public

DPW/vjr

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Senate
State of Minnesota

January 23, 1995

State Senator Ember Reichgott Junge
306 Capitol
St. Paul, MN. 55155

In regards to: Senator Finn complaint

Dear Senator Reichgott Junge:

This letter is to summarize our meeting last week and to propose a process or procedure for the handling of the ethics complaint against Senator Finn.

First of all, we would request that the process be defined as soon as possible, preferably this week.

Secondly, we see no reason to delay the hearings on the ethics complaint until after Senator Finn is sentenced in Federal Court on March 3rd. Frankly, if our proceedings were delayed past that date, our members believe that any ethics hearings would interfere with other important business that the Senate must complete in March and April, and would potentially deprive Senator Finn's district of representation with respect to the budget bills if Senator Finn were to resign or be expelled from the Senate in the middle of the session. Therefore, we believe that we must determine what type of sanction, if any, should be imposed upon Senator Finn as soon as possible.

Thirdly, we don't believe that it is essential that we know whether or not Judge Rosenbaum will accept the misdemeanor plea on March 3rd. We also do not believe that it is important to our process whether Senator Finn is given jail time or not. Our process is based upon respect for the institution of the State Senate and our rules of ethics and standards of conduct. In fact, it may actually assist Senator Finn if we proceed prior to the time of sentencing, since the question of whether he receives jail time or not, would not be an issue.

We propose the following process or procedure for this ethics hearing:

1) The decision as to whether or not the hearing should be open or closed will be left to Senator Finn. If Senator Finn desires to have the hearing closed to the public, we will not object, nor attempt to make this a partisan issue. However, all parties to the proceeding would obviously still be free to discuss this matter outside of the hearing, although such discussions should be conducted with great deference and discretion.

   We would like to know whether the hearing will be open or closed by the end of this week.

2) We propose that the hearing on the ethics complaint be scheduled sometime between February 15th and February 22nd.

3) Each side shall propose the names of any witnesses, and deliver copies of any documents that will be offered in evidence, by no later than February 10th.

4) Evidence may be presented by personal testimony, public and court records, and other written statements which are relevant and reliable. We would not propose to adhere strictly to rules of hearsay. Rather, all reasonable evidence shall be admissible.

5) We propose that the complainants present their evidence first, with Senator Finn then having a chance for rebuttal and the complainants having a final opportunity for sur-rebuttal. Each side would be entitled to an opening statement and a final statement.

6) The ethics committee should render their final decision and recommendation to the full Senate within four days after the conclusion of the hearing.

7) Senator Finn may be represented by counsel, at his option. However, any legal memorandum or written final argument must be submitted by both the complainants and the respondent within two days following the conclusion of the hearing.

8) We propose that the recommendation of the ethics committee be sent directly to the full Senate membership. We see no reason that this matter need be referred to the Rules Committee before consideration by the entire Senate.

Obviously, we would withdraw our complaint if Senator Finn would resign voluntarily, and stand in judgment before his own voters in a special election.

By a copy of this letter to Senator Finn, I am advising him of our recommended process.

Sincerely,

TOM NEUVILLE

cc: Senator Finn

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JO ANNE ZOFF SELLNER
DIRECTOR

Senate

State of Minnesota

January 26, 1995

To: Senator Ember D. Reichgott Junge
Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Past Proceedings of the Special Committee on Ethical Conduct

The predecessor of the Special Committee on Ethical Conduct, known as the Lobbyist Registration Committee, met in 1974 to consider a complaint by Senator Charles A. Berg that a lobbyist, Gordon Forbes, had exerted undue influence on Senator Berg's secretary, Ms. Betty Henry. The committee held several hearings in closed session but did not conclude its proceedings before the 1974 session adjourned. The committee asked for authority to continue its investigation during the 1974 interim, but did not hold any further hearings or take any action.

The Special Committee on Ethical Conduct met in 1975 to consider a complaint by Senators Nicholas D. Coleman and Robert Ashbach that Senate employees had been improperly soliciting campaign contributions. The committee conducted several hearings and found that improper conduct had occurred. It issued recommendations to curtail solicitation of campaign contributions by Senate employees.

In March of 1987, Senators Gary W. Laidig and Fritz Knaak filed a sworn complaint that Senators Douglas J. Johnson and Ron Dicklich had failed to disclose to the Senate their knowledge that the FBI had been investigating a firm named Endotronics, Inc., before the Senate voted on a bill that would have made the firm eligible for a $24 million loan from the State. The two senators withdrew their sworn complaint before the committee met to consider it.

In April of 1987, the committee met to consider a letter from Senators Duane Benson and Fritz Knaak requesting an advisory opinion on the conduct of Senators Johnson and Dicklich in the Endotronics case. The committee issued an advisory opinion as follows:

> A member of the Senate who asks another member to support a proposal should, to the best of the member's ability, inform the other member of all relevant, extraordinary and significant facts the first member knows that directly affect an individual or company benefiting from the proposal.

Later in April of 1987, the committee received a complaint from former Senator Carl Jensen that Senator Knaak's campaign workers had stolen Mr. Jensen's lawn signs during the 1986 campaign. Mr. Jensen was pursuing essentially the same complaint in a civil action in Ramsey County District Court. No member ever filed a complaint, and the committee did not pursue the matter further.

On April 8, 1993, Senator James P. Metzen and the other members of the Committee on Governmental Operations and Reform filed a sworn complaint against Senator Charles A. Berg. The complaint alleged that at the conclusion of the hearing on Friday, April 2, on S.F. No. 104 Senator Berg had suggested that "some of the committee members got bought off." The complaint charged that Senator Berg's comments were "scurrilous, derogatory, totally false, are unbecoming an individual member of the Minnesota Senate, and bring disrepute to the Minnesota Senate as an institution." On April 27, 1993, all twelve members who had signed the original complaint withdrew the complaint on the ground that Senator Berg's remarks did not constitute a violation of the Senate rules.

On May 13, 1993, one day after he had apologized to the Senate for having tainted it with public ridicule by allowing others to use the Senate's long-distance telephone access code for personal calls, Senator Sam G. Solon submitted himself to the Special Committee on Ethical Conduct for appropriate disciplinary action. A criminal investigation was undertaken by the Attorney General. When it appeared that Jennifer Pruden, an employee in the Attorney General's office, was one of those who had used Senator Solon's office phone to make long-distance personal calls, and that the Ramsey County Attorney's ex-wife was a close friend of Chuck Westin, another person who had used Senator Solon's telephone access code to make personal calls, the investigation was turned over to the Olmsted County Attorney. On February 24, 1994, the Olmsted County Attorney announced that his investigation of persons who had used Senator Solon's long-distance telephone access was complete and that he was filing criminal charges against Chuck Westin and Jennifer Pruden, but not against Senator Solon or the others who had used his Senate telephone access for their personal or private business. On March 21, 1994, the Special Committee on Ethical Conduct, which then consisted of Senators Flynn, Frederickson, Novak, and Terwilliger, recommended to the Committee on Rules and Administration a Senate resolution that Senator Solon

be required to apologize and make restitution to the Senate (which he had already done) and be reprimanded. On March 23, 1994, the Rules Committee recommended the resolution to pass, and it was adopted by the Senate on March 24, 1994.

On November 4, 1993, Senator Duane D. Benson filed a sworn complaint against Senators Betzold, Cohen, Kroening, Luther, Marty, Metzen, Morse, Pappas, and Reichgott that they had misused the nonprofit postal permits held by the State DFL Party and the Fourth Congressional District DFL Party. Both Senator Benson and Senator Marty asked to be removed from the Committee on Ethical Conduct because of this complaint, Senator Benson for that issue only and Senator Marty for the balance of 1994. Senator Frederickson and Senator Flynn were appointed to replace them.

On February 16, 1994, Senator Terwilliger filed a sworn complaint against Senator Chandler. The complaint alleged that Senator Chandler, who during 1993 was employed by the law firm of Opperman, Heins, Paquin, and whose wife, Kathleen Chandler was employed by the firm as a lobbyist on issues before the Senate, had voted to support the interests of his firm's clients and had failed to disclose those potential conflicts of interest. On April 20, 1994, Senator Terwilliger withdrew his complaint, saying he no longer believed that Senator Chandler had had a conflict requiring disclosure or recusal and expressing his regret that he had inadvertently misrepresented Senator Chandler's voting record in several respects and inaccurately stated that he failed to notify the Senate as required by Minnesota Statutes, section 10A.07.

On February 28, 1994, Senator Chandler filed a sworn complaint against Senator Terwilliger, alleging that Senator Terwilliger's complaint contained false and misleading statements about Senator Chandler's voting record and that the allegation that Senator Chandler had "made no disclosure on potential conflicts of interest" was false. On April 21, 1994, Senator Chandler withdrew his complaint, saying that it was now apparent to him that any inaccurate representations made with respect to his voting record were inadvertent or based upon inaccurate information provided to Senator Terwilliger by others.

By a letter dated March 28, 1994, Kristina K. Pranke of St. Paul requested an ethics probe of the previous week's meeting between members of the Senate Committee on Environment and Natural Resources and James Howard, Chief Executive Officer of Northern States Power Company (NSP), which she alleged had been closed in violation of Minnesota Statutes, section 3.055. The Special Committee on Ethical Conduct directed Senate Counsel Peter Wattson to conduct an investigation of the complaint and report his findings to the Committee. On June 28, 1994, the Committee held a hearing at which Senate Counsel presented his report and counsel for Ms. Pranke presented his response. The Committee concluded that a quorum of the Environment and Natural Resources Committee had met privately with Mr. Howard on March 23, 1994, but that they had not taken any action regarding a matter within the jurisdiction of the Committee. Therefore, they had

not violated the open meeting law. The Committee reported its conclusion to the Committee on Rules and Administration, along with a recommendation that the Rules Committee request the appropriate standing committee or committees to review the Legislature's open meeting law for possible amendment of the definition of the word "action," to make it more clear what kinds of meetings must be open to the public.

PSW:ph
Enclosure

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Senate

State of Minnesota

TO: Special Subcommittee on Ethical Conduct

FROM: Senator Skip Finn

DATE: January 26, 1995

RE: I-R Caucus Complaint

As you consider the process and procedures to handle the I-R Caucus complaint against me, I respectfully ask you to consider the following:

1. I have attached a copy of the January 23, 1995 letter of Senator Neuville to Senator Reichgott Junge; a copy of a December 28, 1994 letter of Senator Neuville to members of the Senate; and a copy of a recent letter To the Editor printed in the Park Rapids Enterprise from I-R Caucus leader Senator Dean Johnson. If this is an I-R Caucus complaint as clearly stated by Senators Dean Johnson and Tom Neuville, how can I expect your proceedings to be fair? From the statements made by Senators Dean Johnson and Tom Neuville, the I-R Caucus position is already determined on the facts and anything short of expulsion or resignation is unacceptable. Also, the Senate I-R Caucus appears to be using public funds to prosecute their complaint? If so, will I be entitled to public financing of my defense against these charges?

2. What is the authority of the Senate to sit in judgment of its members?

   The Minnesota Constitution is the basic grant of authority to the Legislature. Article IV, Section 6 authorizes the Legislature to judge "the election returns and eligibility of its own members." The section continues to speak to "contested seats." The complaint before you is clearly not authorized by that section of our Constitution.

Article IV, Section 7 authorizes the Legislature to "punish its members for disorderly behavior." That authority is limited to behavior of members of the Senate once seated. The complaint is not authorized by this section of our Constitution. This section also raises the question of what constitutes disorderly behavior subject to punishment.

3. Before I can consider a response to the I-R Caucus complaint, basic fairness requires identification of the "rules of ethics and standards of conduct" which I allegedly breached.

The complaint appears to be that I somehow breached an ethical duty to the Minnesota State Senate. This is restated in the January 23, 1995 memo of Senator Neuville to Senator Reichgott Junge:

> "Our process is based upon respect for the institution of the State Senate and <u>our rules of ethics and standards of conduct</u>." (emphasis added)

What particular "rules of ethics and standards of conduct" did I allegedly breach? And considering the allegations of the complaint, can the Minnesota State Senate hold an individual to rules of ethics and standards of conduct for Senators either before or after that individual serves in the Minnesota Senate?

I do not know the specific rules of ethics and standards of conduct even today. How can the Minnesota Senate impose such rules and standards, ex post facto, upon someone who is not even serving here? Also, consider Oliver North. If he had been elected to the United States Senate, could that body expel him under its rules of ethics and standards of conduct based upon the charges against him in the Iran-Contra matter?

4. The accusations in the complaint involve disputed factual matters which are within the jurisdiction of the Lawyers Professional Responsibility Board and law enforcement agencies. Do our rules and our procedures allow us to put a member in double jeopardy? Should a member be required to defend against these charges in the forum to which they have been committed by law and then again before the Minnesota Senate? Should a member be subject not only to double jeopardy but to possibly inconsistent results should the Senate assert unprecedented authority by compelling members to be tried twice for the same allegations?

5. Consider the following statement of Senator Tom Neuville which is contained in the January 23, 1995 letter to Senator Reichgott Junge:

> "Obviously, we would withdraw our complaint if Senator Finn would resign voluntarily, and stand in judgement before his own voters in a special election."

This statement lays bare the essence of the charges brought against me. They are purely political. How would the Minnesota Senate's "rules of ethics and standards of conduct" be honored if I resigned and won a special election? If there are "rules of ethics and standards of conduct" underlying these charges, a special election would not alter the application of the rules and standards to the allegations made.

I respectfully request your consideration of these points prior to moving forward. I have a right to know what "rules of ethics and standards of conduct" I have supposedly breached. I cannot even suggest procedures until this is determined. In fact, the need to try to develop procedures in response to these charges suggests the precedent setting nature of this matter should you move forward on the allegations.

Thank you for your consideration

cc: Senator Roger D. Moe, Majority Leader
Peter S. Wattson, Senate Counsel

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Jo Anne Zoff Sellner
Director

Senate
State of Minnesota

January 26, 1995

To: Senator Ember Reichgott Junge, Chair
Special Committee on Ethical Conduct

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Issues to Address in *Johnson v. Finn*

You have asked me to outline the major issues that the committee will need to resolve in considering the complaint of Senator Johnson, et al. against Senator Finn.

1. What are the Facts?

The complaint against Senator Finn is based on a newspaper article that published a memorandum from the U. S. Attorney that commented on a presentence report to U.S. District Judge James Rosenbaum that was prepared by the United States Probation Office. The memorandum, dated October 28, 1994, said that the U.S. Attorney planned to present to the Court an additional "sentencing memorandum" at a later date.

Today I spoke to Michael Ward, the Assistant U.S. Attorney who wrote the memorandum. He said I should contact Judge Rosenbaum after the sentencing and that he would probably release the presentence report for use by the committee at that time, but not before. Mr. Ward said the U.S. Attorney has filed an additional memorandum in response to Senator Finn's motion for an evidentiary hearing, and that I may obtain a copy from the Clerk of District Court. Mr. Ward said that the parties have agreed that, rather than conduct an evidentiary hearing, they will both submit affidavits of witnesses on the remaining points in dispute a couple of weeks before the March 3 sentencing date. The submission of affidavits may substitute for the sentencing memorandum he had planned earlier. He does not want in any way to interfere with our investigation, but would rather that we not subpoena any witnesses before he has had an opportunity to get their affidavits.

In addition to reviewing the materials submitted to Judge Rosenbaum, the committee may want to question witnesses or gather documents of its own. I believe that could best be done after, rather than simultaneously with, the federal court proceedings.

2. What Relationship is there Between Senator Finn's Conduct in the Federal Court Case and His Conduct as a Senator?

Once the committee is satisfied it knows what happened, it must decide whether there is any relationship between Senator Finn's conduct as described in the federal court action and his conduct as a member of the Senate.

3. Does his Conduct in this Matter make him Unfit to Hold Legislative Office?

If there is a relationship between this conduct and his conduct as a member of the Senate, does this conduct make him unfit to hold legislative office?

a. Did it violate any Senate rule?
b. Did it violate any Senate administrative policy?
c. Did it violate accepted norms of Senate behavior?
d. Did it betray the public trust expected of a Senator?
e. Did it bring the Senate into dishonor or disrepute?

4. What Disciplinary Action is Appropriate?

If the committee decides that Senator Finn's conduct was improper, it must decide what disciplinary action to recommend to the full Senate. A separate memorandum listing possible options, sent to the committee June 13, 1994, is enclosed.

PSW:ph

SPECIAL COMMITTEE ON ETHICAL CONDUCT

FRIDAY, JANUARY 27, 1995
10:30 a.m.
ROOM 237 CAPITOL

AGENDA

1. Past proceedings of the Committee

2. Types of disciplinary action

3. Issues to address

4. Discussion whether proceedings on the complaint should be held in executive session

5. Current rules of procedure; consideration of additions

6. Consideration of complaint in *Johnson v. Finn*
   a. Relevant activity affecting timetable
   b. Schedule of witnesses and documents
   c. Exchange of information prior to hearings
   d. Hearing procedures (cross-examination of witnesses required?)
   e. Time limit for written submissions by parties after the hearings
   f. Time limit for decision by the Committee after final submissions by the parties

7. Other matters

8. Adjourn

Marcia Seelhoff
Secretary

Ember Reichgott Junge
Chair

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

January 27, 1995
Room 237 Capitol

The subcommittee was called to order at 10:38 a.m.

PRESENT: Senators Frederickson, Novak, Reichgott Junge, Terwilliger

Peter Wattson, Senate Counsel; presented attached materials on past proceedings of the subcommittee, types of disciplinary action, rules of procedure, and issues to address.

Sen. Terwilliger moved to defer any further hearings on the complaint until after March 3, that the subcommittee reconvene as soon thereafter as practical, that Senate counsel continue to monitor the federal proceedings and provide information to the subcommittee and the parties as it becomes available.

Discussion of the motion followed.

Sen. Terwilliger withdrew the above motion, and moved that the subcommittee proceed in executive session. The motion passed by voice vote.

The motion prevailed by voice vote.

Sen. Terwilliger renewed his motion to defer further hearings until after March 3.

Discussion of the motion followed. The motion prevailed by voice vote.

Sen. Frederickson moved that the information provided to the subcommittee and the parties in executive session be treated as nonpublic, that the subcommittee and the parties not discuss it with their colleagues or the public, and that the caucus leaders be informed of this policy.

The motion prevailed by voice vote.

The meeting adjourned at 11:15 a.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

MOTIONS OF SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT
January 27, 1995
Pertaining to complaint of Johnson v. Finn

Sen. Terwilliger moved to defer any further hearings on the complaint until after March 3, that the subcommittee reconvene as soon thereafter as practical, that Senate counsel continue to monitor the federal proceedings and provide information to the subcommittee and the parties as it becomes available.

The motion prevailed by voice vote.

Sen. Frederickson moved that the information provided to the subcommittee and the parties in executive session be treated as nonpublic, that the subcommittee and the parties not discuss it with their colleagues or the public, and that the caucus leaders be informed of this policy.

The motion prevailed by voice vote.

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JO ANNE ZOFF SELLNER
DIRECTOR

Senate

State of Minnesota

January 30, 1995

To: Senator Ember Reichgott Junge

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: *United States v. Durenberger*

Enclosed is a copy of the *Durenberger* case I referred to in committee today. The grand jury's indictment of Senator Durenberger was dismissed because the government had included in its submission to the grand jury selected pages from the report of the Senate Select Committee on Ethics on the senator's ethical lapses. The Court found that those pages related to Senator Durenberger's legislative activity, and therefore could not serve as the basis for a prosecution of him. The government argued that their inclusion was harmless, because the government never read from the pages nor did it refer to them in its presentation to the grand jury. Nevertheless, the Court found that their inclusion in the volumes of material given to the grand jury tainted the proceedings, and required the indictment to be dismissed. It permitted the government to seek a new indictment without giving those pages to a new grand jury.

Since the federal court proceedings against Senator Finn are so far along, it is unlikely that any material from the Special Committee on Ethical Conduct would ever reach the prosecution, so there is almost no risk that this prosecution would be tainted and have to be dismissed. However, the *Durenberger* case does illustrate the serious danger to a criminal prosecution that a legislative ethics investigation may create.

PSW:ph
Enclosure
cc: Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger

Not Reported in F.Supp.
(Cite as: 1993 WL 738477 (D.Minn.))

UNITED STATES of America, Plaintiff,

v.

David F. DURENBERGER, Michael C. Mahoney, Paul P. Overgaard, Defendants.

Crim. No. 3-93-65.

United States District Court,

D. Minnesota.

Dec. 3, 1993.

Thomas C. Green, Mark D. Hopson, Sidley & Austin, Washington, DC, William Joseph Mauzy, Mauzy Law Office and Joseph Stuart Friedberg, Friedberg Law Office, Minneapolis, MN, for defendants.

Robert J. Erickson, Patty Merkamp Stemler, U.S. Dept. of Justice, Environment & Natural Resources Div., and Robert Phillip Storch and Raymond N. Hulser, U.S. Dept. of Justice, Public Integrity Section, Washington, DC, for the U.S.

MEMORANDUM AND ORDER ON DEFENDANT DURENBERGER'S MOTION TO DISMISS

URBOM, Senior District Judge.

*1 Following an in camera review of the testimony and exhibits from the federal grand jury proceedings against David Durenberger, I isolated two documents from an exhibit and granted the defendant an opportunity to review the documents and issue a response. The government was also granted the opportunity to reply to the defendant's response. Having carefully reviewed the submitted responses, I shall now consider the defendant's motion to dismiss, which is founded on two grounds. Durenberger first argues that his indictment should be dismissed because the government violated the Speech or Debate Clause ("Clause") when it submitted to the grand jury selected pages from the Report of the Select Committee on Ethics and the Report of Special Counsel on Senate Resolution 311 ("Reports") pertaining to his alleged misconduct. Second, Durenberger contends the indictment against him should be dismissed because government counsel have committed prosecutorial misconduct in this case. I shall consider each ground separately.

I. SPEECH OR DEBATE CLAUSE

A. The Reports

In preparation for the resolution of this motion to dismiss, the parties extensively briefed the purposes and boundaries of the Clause. In addition, Magistrate Judge Cudd issued a well-reasoned Report and Recommendation, filing 127, in which he detailed both the historic and present-day judicial interpretations of the Clause. Therefore, I find it unnecessary to augment the impressive scholarship already submitted on the subject.

Rather, I find it necessary to resolve two issues: Did the submission of select pages from the Reports on Senator David Durenberger to the grand jury violated the Speech or Debate Clause? If so, does the constitutional violation mandate the dismissal of the indictment against him?

The Clause broadly protects members of Congress "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts," United States v. Brewster, 408 U.S. 501, 525 (1972), and "precludes any showing of how [a member of Congress], acted, voted, or decided." Id. at 527. The Supreme Court has declared that "past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause." United States v. Helstoski, 442 U.S. 477, 489 (1979). By submitting evidence of legislative acts the government may reveal to a grand jury "information about the performance of legislative acts and the legislator's motivation in conducting official duties." Id. Disclosing information on legislative acts subjects a member of Congress to being "questioned" in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause." Id

Relying on Federal Election Comm'n v. Wright, 777 F.Supp. 525, 530 (N.D.Tex.1991), the government argues that committee reports, if privileged, are only privileged as to the members who participate in the report's preparation, not to the member whose conduct is at issue before the committee. I find the notion of extending the evidentiary privilege to a member of congress serving on a senate or house committee but not to a member of congress appearing before a committee illogical, and I decline to follow Wright.

*2 The United States Supreme Court has declared that the Speech or Debate Clause should be construed "broadly to effectuate its purpose." United States v. Johnson, 383 U.S. 169, 180 (1966). As I construe the Clause, the privilege extends to a senator, representative, or high-ranking legislative aide engaged in a legislative act. The acts of investigating, conducting hearings, providing testimony, preparing reports, are all "integral part[s] of the deliberative and communicative process by which Members participate in committee ... proceedings ... with respect to ... matters which the Constitution places within the jurisdiction of either House." See Does v. McMillan, 412 U.S. 306, 313

(1973) (quoting United States v. Gravel, 408 U.S. 606, 625 (1972)). As such, the official acts performed by senators sitting on the Senate Select Committee on Ethics, as well as acts by senators and their high-ranking aides appearing before the Committee, are protected by the Clause. Cf. McMillan, 412 U.S. at 313.

The record establishes that David Durenberger appeared before the Senate Ethics Committee as a United States senator under investigation for alleged misconduct. Douglas Kelly appeared before the Committee as a former high-ranking aide to Durenberger. As such, I find both the representations of Durenberger and Kelly in the Reports as well as the Reports themselves to be within the sphere of protected legislative activity and, therefore, privileged. Hutchinson v. Proxmire, 443 U.S. 111, 124-25 (1979); United States v. Swindall, 971 F.2d 1531, 1543 n. 12 (11th Cir.1992); and Miller v. Transamerican Press, Inc., 709 F.2d 524, 529 (9th Cir.1983).

The government advances the argument that submission of the Reports to the grand jury was harmless because the government never read from or referred to the Reports, and the grand jury never considered the Reports. Moreover, the government argues that submission of the Reports was harmless because the grand jury was given a precautionary instruction not to consider any findings and conclusions from other investigations.

Considering that the government submitted hundreds of pages of exhibit materials, it is conceivable that the grand jury never found, let alone read, the selected pages from the Reports. On the other hand, the government has conceded that the select pages from the Reports were marked and admitted into evidence as part of exhibit 2B to the December 2, 1992, testimony. The pages from the Reports accompanied the testimony of an important and prominent witness. It seems equally plausible that the grand jury members attached great significance to the factual findings of the Select Committee on Ethics and Special Counsel and relied on the Reports to justify, in whole or in part, its indictment against Durenberger. Because no one--including government counsel-- knows what weight, if any, the grand jury attached to the selected pages from the Reports, I cannot find that the constitutional error was harmless.

*3 Nor does the claim that the government allegedly issued a precautionary instruction to the grand jury cure the constitutional violation. As the colloquy between government counsel and the grand jury was not transcribed, no record of a precautionary instruction is before me for review. Accordingly, I cannot find that the instruction was constitutionally sufficient.

Rather, I must find that the government, by including select pages from the Reports in the exhibit materials, impermissibly exposed the grand jury to privileged evidence and violated the defendant's rights under the Clause.

B. The Indictment

The more difficult issue before me is whether my finding mandates dismissal of the indictment. In its brief opposing the motion to dismiss the government cites the case of United States v. Brewster, 408 U.S. 501 (1979) in support of its claim that the indictment is facially valid and should not be dismissed. I have studied the case and find that it does not control the disposition of the instant case. Brewster did not involve an explicit constitutional challenge that the government had improperly submitted to the grand jury evidence of a legislative act in violation of the Clause. The defendant in Brewster did not contend, as in this case, that the government had introduced tainted evidence in violation of the Clause which mandated that the indictment be invalidated.

In its brief in support of dismissal the defendant claims that two appellate cases should persuade me to dismiss the indictment. United States v. Swindall, 971 F.2d 1531 (11th Cir.1992) and United States v. Helstoski (Helstoski II), 635 F.2d 200 (3rd Cir.1980). The legal issues in these cases are closely analogous; however, the underlying facts are distinguishable from the instant case. In Swindall, the Eleventh Circuit dismissed the indictment because the Government had conceded that "evidence of Swindall's legislative acts was an essential element of proof with respect to the affected counts." Id. at 1549. There is no claim in this case that the government relied on the select pages of the Reports to secure the indictment against Durenberger. In Helstoski, the Third Circuit dismissed an indictment because the improper admission of privileged evidence "permeated the whole [grand jury] proceeding." Id. 635 F.2d at 205. Despite the defendant's contention to the contrary, I am not persuaded that this case involves of a pervasive, widespread violation of the Clause. Rather case involves the submission to the grand jury of eleven pages taken from privileged Reports, which were included as part of a larger exhibit not prepared by the government nor ever referred to by the government.

After examining the facts of the case I have determined that United States v. Gravel, 408 U.S.

606 (1972) controls the disposition of the defendant's motion to dismiss. In Gravel the Supreme Court declared that "the Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." Id. at 616. The Clause, the Court declared, "protects Members against prosecutions that directly impinge upon or threaten the legislative process." Id.

*4 Both Swindall and Helstoski emphasize that the Clause is intended to protect a member of Congress engaged in legislative acts from criminal or civil liability. Swindall 971 F.2d at 1544; Helstoski, 635 F.2d at 202. Protection from criminal liability includes protection not only from conviction but from prosecution. Id. See United States v. Helstoski (Helstoski I), 442 U.S. 477, 488 (1979). Indeed, the Supreme Court has declared that "the central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." United States v. Johnson, 383 U.S. 169, 181 (1966).

Under the United States Constitution the Senate has a duty to discipline its members. U.S. Const. art. I, s 5, cl. 2. The Senate has delegated this important legislative duty to the Select Committee on Ethics. The defendant contends and I agree that if a member of the Senate believes that his statements to the Committee or the findings of the Committee and its Special Counsel could be introduced as evidence against him one day in a grand jury proceeding, then the intimidation caused by the prospect of criminal liability will chill senators and severely undermine the ability of the Committee to effectively investigate and discipline members. In order for the Committee to procure full cooperation in its investigations and proceedings, committee members, senators under investigation, and their high-ranking legislative aides must have the assurance of knowing that their testimony is privileged, as are the factual findings and conclusions of any reports issued by the Committee.

Unlike other constitutional challenges to indictments which the Supreme Court has rejected, the purpose served by the Clause is fundamentally different. In marked contrast to other constitutional guarantees, the Supreme Court has declared that "[t]he Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." United States v. Helstoski, 442 U.S. 477, 491 (1979) (emphasis added). Accordingly, I find that in order to protect the integrity and independence of the Committee, I must dismiss the indictment against David Durenberger.

I have considered and rejected the option of staying the motion to dismiss until after trial. See United States v. Mechanik, 475 U.S. 66, 76 (1986) (O'Connor, J., concurring). I agree with the decision rendered by the Third and Eleventh Circuit that when a violation of the Speech or Debate Clause privilege occurs during the grand jury proceedings, the privilege must be vindicated prior to trial. Helstoski, 635 F.2d at 204; Swindall, 971 F.2d at 1546-47. As the Third Circuit stated: It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Invocation of the constitutional protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning. *5 Helstoski, 635 F.2d at 205 (emphasis added).

When presenting evidence to the grand jury, a prosecutor must uphold the Constitution and refrain from submitting evidence of past legislative acts or the motivation for performing such acts. Id. at 206. In this case government counsel did not uphold the Constitution. Therefore, the indictment against Senator Durenberger cannot stand.

The dismissal shall be without prejudice, because reliance upon the offensive evidence does not appear to be necessary.

II. PROSECUTORIAL MISCONDUCT

On an alternative theory the defendant moves the court to dismiss the indictment and disqualify the responsible government counsel on the basis of prosecutorial misconduct. Specifically, the defendant claims that (1) the government emphatically denied that the grand jury had been exposed to select portions of the Reports; (2) the government attempted to dissuade this court from conducting a full in camera review of the grand jury testimony and exhibits; and (3) the government sent an ex parte letter to the court informing the court that the grand jury had access to select pages from the Reports.

In United States v. Morrison, 449 U.S. 361, 365 (1981), the Supreme Court declared that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate,

even though the violation may have been deliberate." In this case the defendant has made no showing of either actual prejudice or a substantial threat of prejudice. It is true that had I not ordered a full in camera inspection of the grand jury proceedings, the selected pages from the Reports would not have been discovered and the defendant's constitutional right to prepare an adequate defense would have been impaired. However, I find no prospective threat of prejudice in allowing government counsel to proceed to trial.

After reviewing the arguments in favor of and in opposition to dismissal and disqualification, I am not persuaded that sufficiently serious misconduct has occurred in this case to warrant either dismissal or disqualification based on prosecutorial misconduct. Dismissal and disqualification founded upon prosecutorial misconduct are drastic remedial measures which I should hesitate to impose except when absolutely necessary. See Matter of Grand Jury Subpoena of Rochon, 873 F.2d 170, 176 (7th Cir.1989) (quoted by Eighth Circuit in United States v. Rosnow, 977 F.2d 399, 411 (8th Cir.1992)).

That I decline to impose these measures at this stage does not signify that I am not concerned with government counsels' conduct. Whether their conduct represents a case of overzealous prosecution by attorneys having little or no regard for prosecutorial ethics or a case of repeated inadvertence bordering on recklessness need not be resolved in the absence of a showing of prejudice or threat of future prejudice. I do remind counsel Storch and Hulser that as government prosecutors and as officers of the court they are charged with the duties of due diligence and candor. Henceforth, government counsel shall make no misrepresentations to opposing counsel or to this court, lest I reconsider the request for disqualification.

***6** IT IS THEREFORE ORDERED that:

(1) the defendant Durenberger's motions to dismiss the indictment, filings 37 and 144, are granted and the indictment is dismissed without prejudice as to the defendant Durenberger on the ground that the government violated the Speech or Debate Clause but are denied on the ground of prosecutorial misconduct; and

(2) defendant Mahoney's joinder with Durenberger's motion to dismiss for alleged prosecutorial misconduct, filing 147, is denied.

END OF DOCUMENT

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Senator 25th District

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Senate
State of Minnesota

February 1, 1995

Senator Ember Reichgott-Junge
Chair, Special Subcommittee on Ethical Conduct
306 Capitol Building
St. Paul, MN. 55155

RE: Senator Skip Finn Ethics Complaint

Dear Senator Reichgott-Junge:

On Monday, January 30, 1995 I received a copy of a letter dated January 26, 1995 from Senator Skip Finn. The issues raised in Senator Finn's letter prompt me to write to you again to request an immediate reconvening of the Special Subcommittee on Ethical Conduct.

When the Ethics Subcommittee met on January 27, I do not recall any mention of this letter from Senator Finn.

In his letter, Senator Finn raises several procedural and substantive issues which do require clarification before any evidentiary hearing is conducted, including:

1. Whether he is entitled to public financing to assist in his defense against these ethics charges.

2. Whether the Ethics Subcommittee or the Senate as a whole even has the authority or jurisdiction to recommend expulsion from the Senate.

3. Senator Finn requests clarification of precisely what rules of ethics and standards of conduct he has breached. That is, he wishes to know with more particularity the nature of the complaint against him.

4. He raises issues concerning whether action by the subcommittee would constitute double-jeopardy.

5. Senator Finn specifically requests consideration of all of these issues "prior to moving forward".

Senator Finn's letter implies that he will forcefully defend against the ethics complaint. If so, it would be detrimental to the Senate to only begin the processing of this complaint after March 3rd. At the very least, the procedural and other collateral issues raised by Senator Finn must be resolved as soon as possible.

Because of the nature of the complaint and the requested relief, it is perhaps understandable why Senator Finn would attribute partisan political motives to our complaint. However, since no member of the majority party was willing to initiate a complaint, it is up to the Senate Republican members to file the complaint on behalf of the general public and the institution of the Senate.

I have privately told Senator Finn that we will attempt to handle this complaint with as much sensitivity and respect as possible. As long as Senator Finn does not raise the question of our partisan political motives, we will do our best to avoid a political partisan debate as well.

The complainants would specifically request that the following actions be taken:

1. That you reconvene the Special Subcommittee on Ethical Conduct within the next week. This meeting should be open to the public, and will deal only with procedural matters and the issues raised in Senator Finn's January 26, 1995 letter.

2. That the Special Subcommittee on Ethical Conduct then convene in closed session <u>solely</u> for the purpose of determining whether or not probable cause exists to continue with the ethics complaint. The complainants have already submitted sufficient documentation to you to establish probable cause. The probable cause determination does not require Senator Finn's testimony or submission of evidence.

3. In the event that the Special Subcommittee on Ethical Conduct finds that there is probable cause, further proceedings will be open to the public under Rule 75. As I have stated in the past, if Senator Finn wishes to request that further proceedings be closed, we will not object to such a request. However, it would require a modification of Rule 75. We do not think it appropriate that the probable cause and evidentiary hearings be held simultaneously in closed session, even though that may have been the procedure in the past. Such a procedure is clearly contrary to the principle and intent of Rule 75.

4. We will not object to the final evidentiary hearing being scheduled for the first available date after March 3rd. However, there is absolutely no reason why the committee cannot rule on the question of probable cause, and address other collateral and procedural issues before March 3rd.

Thank you for your consideration of these issues.

Sincerely,

Tom Neuville

Tom Neuville

cc: Senator Dean Johnson
Senator Linda Runbeck
Senator Roy Terwilliger
Senator Dennis Frederickson
Senator Steve Novak
Senator Skip Finn

EMBER D. REICHGOTT
Senator 46th District
Majority Whip
Room 306 State Capitol
St. Paul, Minnesota 55155
Phone: 296-2889
and
7701 48th Avenue North
New Hope, Minnesota 55428

Senate

State of Minnesota

February 14, 1995

MEMO:

TO: Sen. Dennis Frederickson
Sen. Steve Novak
Sen. Roy Terwilliger

FROM: Sen. Ember Reichgott Junge ERJ
Chair, Special Subcommittee on Ethical Conduct

RE: Response to Neuville Letter of February 1

Attached please find my draft response to Sen. Neuville's letter of February 1. I would appreciate your suggestions and/or approval. Please note that I speak for all members of the subcommittee in the last several paragraphs, and I want to be sure that my comments reflect your position accurately.

Although I have not talked to each of you about all points in this letter, I am moving ahead in this way for expediency. Mr. Wattson has advised me that our Ethics Subcommittee is subject to general open meeting rules. Although our resolution to close proceedings may still be applicable, I prefer to err on the side of caution.

Please contact my secretary, Marcia at 296-2889 by the end of Wednesday with your affirmative approval of the letter as is, or your suggested changes. Thank you for your assistance in this matter.

ERJ:ms

Attachment

EMBER D. REICHGOTT
Senator 46th District
Majority Whip
Room 306 State Capitol
St. Paul, Minnesota 55155
Phone: 296-2889
and
7701 48th Avenue North
New Hope, Minnesota 55428

Senate
State of Minnesota

February 21, 1995

PERSONAL AND CONFIDENTIAL

Sen. Thomas Neuville
Room 123 State Office Building
St. Paul, MN 55155

RE: Johnson vs. Finn Ethics Complaint

This letter is in response to your letter of February 1, 1995, regarding procedures to be followed by the Special Subcommittee on Ethical Conduct in addressing your complaint against Sen. Finn.

In visiting further with you, your first concern appears to be the completion of proceedings on this matter prior to the end of the 1995 legislative session. It is my intent as Chair of the Special Subcommittee to proceed as expeditiously as possible on this matter should the circumstances warrant going ahead after March 3. It will be appropriate to further define the issues at that time, after the Committee has the benefit of the work product of the U.S. District Court investigation and the sentencing memoranda from both parties.

Your second concern centers on resolution of certain procedural matters prior to the March 3 sentencing date, so that the Subcommittee can move forward quickly after that date on the probable cause investigation. You raise a legitimate point in that regard. However, the nature of the procedural issues raised are better resolved by the Senate Rules Committee through its Subcommittee on Permanent and Joint Rules ("Rules Subcommittee"), than in the context of our Special Subcommittee on Ethical Conduct ("Ethics Subcommittee"). These issues raise significant questions of precedent.

I have asked an I-R member of the Ethics Subcommittee to join me in preparing a proposed revision of Rule 75 to the Rules Subcommittee as well as a list of questions for which we will seek advice. These questions will be derived from your letters of January 23 and February 1, along with Sen. Finn's memo of January 26.

As Chair of the Rules Subcommittee, I intend to call a hearing on these matters prior to March 3. Of course, all meetings of the Rules Committee are open to the public.

I believe this process addresses your main concerns, and I therefore see no reason to convene the Ethics Subcommittee prior to March 3. You will recall that the Ethics Subcommittee voted unanimously to defer its proceedings until as soon after March 3 as practical.

I would also like to confirm your verbal consent to sharing this letter and your letter of February 1, 1995 with Sen. Roger Moe, in his capacity as Chair of the Rules Committee. Both letters deal strictly with procedural matters which directly affect the Rules Committee. I have checked with members of the Ethics Subcommittee and Sen. Finn, and no one has voiced objection.

Finally, I must share my disappointment and surprise when I was approached by a reporter about information directly relating to your letter of February 1. In discussing this situation with other Subcommittee members, I found we shared the same understanding that all matters relating to our proceedings in executive session were to be discussed only with Subcommittee members and the parties involved. We hope that by bringing this matter to your attention now, there will be no further misunderstandings/breaches of confidence in the future.

If you have any questions regarding this matter, do not hesitate to contact me.

Sincerely,

Ember Reichgott Junge

Ember Reichgott Junge
Chair, Special Subcommittee on Ethical Conduct

ERJ:ms

cc: Sen. Roger Moe
Sen. Dennis Frederickson
Sen. Steve Novak
Sen. Roy Terwilliger
Sen. Skip Finn
Peter Wattson

Senate Counsel & Research

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JO ANNE ZOFF SELLNER
DIRECTOR

Senate

State of Minnesota

February 24, 1995

To: Senator Ember Reichgott Junge, Chair
Subcommittee on Permanent and Joint Rules

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Election Litigation Costs

Enclosed are materials that give a history of the Senate's payment of election litigation costs since 1972. The policy developed at that time was:

> A party to an election contest should receive full payment for all expenses reasonably incurred in prosecuting or defending an election contest unless the contest was not brought in good faith in which case the plaintiff should receive no payment for expenses.

The policy has never been adopted, but it has been consistently followed since then. Both parties to the contest have been paid their reasonable attorneys fees, which have usually been the full amount billed. At the end of the 1992 session, however, one of the closing resolutions imposed a limit on the hourly rate that the Senate would pay for election and litigation costs as follows:

> The Secretary of the Senate may pay election and litigation costs up to a maximum of $125.00 per hour as authorized by the Committee on Rules and Administration.

Sen. Res. No. 146, JOURNAL OF THE SENATE 9568 (April 16, 1992).

The most recent litigation costs paid were to Senator Pappas in 1993 relating to the 1990 election. Her costs were billed at $180 and $175 per hour, but she was paid $8,876.75, at the rate of $125 per hour.

PSW:ph
Enclosures
cc: Representative Phil Carruthers

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Senate
State of Minnesota

February 27, 1995

State Senator Ember Reichgott Junge
Chair of the Special Subcommittee on Ethical Conduct
205 Capitol
St. Paul, MN. 55155

Dear Senator Reichgott Junge:

Thank you for your letter dated February 21, 1995. If the language of Rule 75 is to be reviewed, I agree that it should be done so promptly through the Rules Subcommittee and then the full Rules Committee. Thank you for promising to schedule a review of Rule 75 prior to March 3rd.

I would request a notice of any hearings to be scheduled for the Rules Subcommittee.

I would like to comment on the final paragraph of your February 21, 1995 letter. I want you to know that I did not disclose information which was circulated to the complainants or Subcommittee members pursuant to the agreement reached in executive session with any reporter.

However, it is also important for the Ethics Subcommittee to function according to the present Senate rules. Rules 75 now provides that only probable cause hearings should be closed to the public. It is inappropriate for the Ethic Subcommittee to impose confidentiality on all matters dealing with the complaint now before it.

I will continue to hold confidential all documents which have been circulated to the complainants pursuant to agreement. However, it is certainly my right, and on occasion, my duty to discuss the status of the Ethics complaint against Senator Finn with reporters. This is particularly true when discussing procedural aspects of the Ethics Complaint.

There has been no breach of confidence in regard to this matter. If there has been any rules violation, it occurred when the Ethics Subcommittee went into executive session to discuss matters other than probable cause to support the complaint. All procedural matters relating to this complaint are certainly public information and can be discussed by any member of the Senate. If my understanding of this duty to maintain confidence is in error, please clarify immediately and with specificity.

Finally, I want to thank you for your commitment that the complaint with respect to Senator Finn will be resolved before adjournment in the 1995 legislative session.

Sincerely,

Tom Neuville
State Senator

Senate Counsel & Research

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Jo Anne Zoff Sellner
Director

Senate
State of Minnesota

February 28, 1995

To: Senator Ember D. Reichgott Junge, Chair
Special Committee on Ethical Conduct

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Legislator's Conduct Before Taking Office

As you requested, I contacted Tommy Neal, NCSL's expert on elections and the legislative institution, to research the laws and rules of other states to determine whether they might provide us with any precedents on how a legislator's conduct before taking office might be relevant to a disciplinary proceeding brought against him while in office.

Mr. Neal searched the statutes of the 50 states and the rules of the 99 legislative bodies and found they were almost completely silent on the subject. However, he did find one rule of the Delaware House that is on point. It provides, in part:

> A member shall be subject to sanction for any prohibited conduct occurring subsequent to being elected to the House. *A member shall also be subject to sanction for any prohibited conduct occurring prior to being elected to the House provided that the conduct bears a reasonable relationship to the member's fitness to hold legislative office.* (Emphasis added.)

Rule 16, Rules of Legislative Conduct, Delaware House (1991).

The Pennsylvania Senate requires that a member in a position of leadership be suspended from that position while an indictment is pending and that:

> Upon a finding or verdict of guilt by a judge or jury, plea or admission of guilt or plea of nolo contendere of a member of the Senate of a *crime, the gravamen of which relates to the member's conduct as a Senator*, and upon imposition of sentence, the Secretary-Parliamentarian of the Senate shall prepare a resolution of expulsion under the sponsorship of

> the Chairman and Vice-Chairman of the Senate Committee on Ethics and Official Conduct. The resolution shall be printed and placed on the calendar for the next day of Senate session. (Emphasis added.)

Rule XXXVIII, Status of Members Indicted or Convicted of a Crime, Pennsylvania Senate (1989).

Under either of these rules, the task of the Special Committee on Ethical Conduct would be to decide whether the conduct for which Senator Finn was convicted was relevant to his conduct as a member of the Senate or to his fitness to serve in the Senate.

Copies of the rules are enclosed.

PSW:ph
Enclosures

cc: Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger

liation with the complainant or the alleged violator.

(4) All proceedings of the committee shall be secret, and the committee shall require an oath of secrecy from all witnesses appearing before them, except on the request of the accused for an open hearing. The accused shall be entitled to be present during the proceedings. The committee members shall not release any information about the conduct of their proceedings or the testimony received until they report to the President and the Speaker and then only if they recommend that remedial measures be prescribed.

(5) After receiving the facts and information from the committee and after such facts and information have been provided to the person who is the subject of the written complaint, and after such person has received a reasonable opportunity to be heard by the President and the Speaker, the President and Speaker may dismiss the complaint or may prescribe such remedial measures as they deem appropriate, including, but not limited to, the issuance of a letter of admonition or recommendation of a resolution of censure to be acted upon by the General Assembly. However, such measures may not include suspension of lobbying privileges. Alternatively, the President and the Speaker may refer a complaint, together with the facts and information provided by the committee of legislators, to the executive committee of the Legislative Council. The executive committee shall act on d complaint at its next meeting or at a special meeting called for that purpose; however, the person who is the subject of the written complaint shall receive a reasonable opportunity to be heard by the executive nittee and has the right to be present during its deliberations. The utive committee may dismiss the complaint or, if it determines that said violation occurred, it may prescribe such remedial measures as it deems appropriate, including, but not limited to, suspension of lobbying privileges before the General Assembly or any of its committees, or it may issue a letter of admonition or recommend a resolution of censure to be acted upon by the General Assembly. If the executive committee of the Legislative Council finds that the issuance of subpoenas is necessary in any such investigation, it may request such power, in accordance with Joint Rule No. 33, from the General Assembly or when the General Assembly is not in session from the entire Legislative Council.

DOCUMENT ID: RAP9108366
RULE TITLE: Rules of Legislative Conduct
RULE NUMBER: Rule 16
CODE: DE
CHAMBER: House
EFFECTIVE DATE: 01/01/91
TOPICS: DISCIPLINE, CONFLICT OF INTEREST, CONDUCT OF MEMBERS, ETHICS

Rule 16
Rules of Legislative Conduct

(a) A member of the House shall be subject to discipline by the House for

violation of any of the following Rules of Legislative Conduct which shall be deemed to constitute "disorderly behavior" within the meaning of Article ..., Section 9 of the Delaware Constitution:
(1) Restrictions relating to "personal or private interests" within the meaning of Article II, Section 20 of the Delaware Constitution and Chapter 10, Title 29 of the Delaware Code:

(A) A member who has a personal or private interest in any measure or Bill pending before the House shall disclose the fact and shall not participate in the debate nor vote thereon; provided that,
(i) upon the request of any other member of the House, a member who has such a personal or private interest may nevertheless respond to questions concerning any such measure or Bill, or
(ii) a member who has a personal or private interest may add factual matter to the debate which he believes will correct wrong or false information. A personal or private interest in a measure or Bill is an interest which tends to impair a member's independence of judgment in the performance of his or her duties with respect to that measure or Bill.
(B) A member has an interest which tends to impair his or her independence of judgment in the performance of his or her legislative duties with regard to any Bill or measure when,
(i) the enactment or defeat of the measure or Bill would result in a financial benefit or detriment to accrue to the member or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons,
(ii) the member or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by a measure or Bill to a greater extent than like enterprises or other interests in the same enterprise, or
(iii) a person required to register as a legislative agent pursuant to Chapter 16 of Title 29 of the Delaware Code is a close relative of the legislator and that person acts to promote, advocate, influence or oppose the measure or Bill.
(C) If the member is present the disclosure required under Subsection (A) shall be made in open session,
(i) prior to the vote on the measure or the Bill by any Committee of which the member is a member, and
(ii) prior to the vote on the measure or Bill in the House. Disclosure may be made by written statement submitted to the Chairman of a Committee or the Speaker of the House and read in open session in the Committee or the House as the case may be. If the member is absent when a measure or Bill is voted on which would have required disclosure required under Subsection (A) then the member shall make the required disclosure as soon as possible upon returning to committee or House.
(D) For the purposes of this Rule:
(I) A "close relative" means a person's parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.
(II) A "private enterprise" means any activity whether conducted for profit or not for profit and includes the ownership of real or personal property; provided that 'private enterprise' does not include any activity of the State of Delaware, any political subdivision or any agency, authority or instrumentality thereof.

(III) A person has a 'financial interest' in a private enterprise if he or

(i) has a legal or equitable ownership interest in the enterprise with a fair market value in excess of $5,000,
(ii) is associated with the enterprise and received from the enterprise during the last calendar year or might reasonably be expected to receive from the enterprise during the current or the next calendar year income in excess of $5,000 for services as an employee, officer, director, trustee or independent contractor, or
(iii) is a creditor of an insolvent private enterprise in an amount in excess of $5,000.
(IV) A "person" means an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities.
(2) Receiving unlawful gratuities in violation of Section 1206, Title 11, Delaware Code.
(3) Receiving a bribe in violation of Section 1203, Title 11, Delaware Code.
(4) Profiteering in violation of Section 1212, Title 11, Delaware Code.
(5) Engaging in conduct constituting official misconduct in violation of Section 1211, Title 11, Delaware Code.
(6) Failure to comply with the financial disclosure requirements of Chapter 58, Title 29, Delaware Code.
(7) Appearing for, representing or assisting another in respect to a matter before the General Assembly or one of its Committees for compensation other than that provided by law.
(8) Releasing without authorization of the Ethics Committee any confidential matter pertaining to proceedings of the Ethics Committee.
(9) Knowingly filing a false statement with the Ethics Committee or the House in connection with any proceeding involving a Rule of Legislative Conduct.
(10) Engaging in conduct which the House determines (i) brings the House into disrepute or, (ii) reflects adversely on the member's fitness to hold legislative office.

(b) A member shall be subject to sanction for any prohibited conduct occurring subsequent to being elected to the House. A member shall also be subject to sanction for any prohibited conduct occurring prior to being elected to the House provided that the conduct bears a reasonable relationship to the member's fitness to hold legislative office.

(c) A complaint alleging a violation of a Rule of Legislative Conduct shall be filed in writing by a member with the Ethics Committee for investigation and recommendation to the House as to disposition. A complaint must be accompanied by a written statement signed by any person, sworn under oath, setting forth the facts supporting the complaint. No such complaint shall be considered by the House prior to its consideration and recommendation by the Ethics Committee.

(d) If the Ethics Committee recommends some disciplinary action with respect to a complaint, a Resolution shall be presented to the House that the House conduct a proceeding to consider the matter. If the Ethics Committee votes to dismiss a complaint, and there are no dissenting votes in the Committee, House shall take no action with respect thereto. If the Ethics Committee votes to dismiss a complaint, but there are dissenting votes in

the Committee, the House may consider the matter upon the petition of any ber approved by a majority vote of the House. In any proceeding before tne House involving an alleged violation of a Rule of Legislative Conduct, the accused member shall be given an opportunity to be heard after notice, to be advised and assisted by legal counsel, to produce witnesses and offer evidence and to cross-examine any witnesses; a transcript of any such proceeding shall be made and retained; and rules of procedure for ethics violations as may be adopted by the House shall apply.

(e) If the House finds by a majority vote that a member has violated a Rule of Legislative Conduct, it may impose such disciplinary action as it deems appropriate provided that no member may be suspended or expelled without the vote of 2/3 the House concurring therein.

DOCUMENT ID: RAP9108381
RULE TITLE: Ethics Committee
RULE NUMBER: Rule 32
STATE: DE
CHAMBER: House
EFFECTIVE DATE: 01/01/91
TOPICS: COMMITTEE, ETHICS, STANDING COMMITTEE, CONDUCT OF MEMBERS, DISCIPLINE

Rule 32
ics Committee

(a) The Ethics Committee shall be a standing committee consisting of five members, three appointed by the Speaker and two appointed by the Minority Leader at the beginning of each General Assembly.

(b) The powers and duties of the Ethics Committee shall be as follows:
(1) To recommend to the House from time to time such rules of conduct for members of the House as it shall deem appropriate.

(2) To issue written advisory opinions upon the request of any member as to the applicability of any Rule of Legislative Conduct to any particular fact situation.

(3) To investigate any alleged violation by a member of any Rule of Legislative Conduct and, after notice and hearing, to recommend to the House by Resolution such disciplinary action as it may deem appropriate.

(4) To report to the appropriate federal or State authorities any substantial evidence of a violation by any member of any law involving a Rule of Legislative Conduct which may come to its attention in connection with any proceeding whether advisory or investigative.

(5) To maintain a file of its proceedings and advisory opinions with a view toward achieving consistency of opinions and recommendations. Upon the iest of a legislator involved in an advisory opinion, to publish that advisory opinion.

The Legislative Audit Advisory Commission shall submit copies of its reports to the committee which shall review them and proceed, where appropriate, as provided in section 7.

13. Whenever the committee shall employ independent counsel or shall incur other expenses pursuant to its duties under this rule, payment of costs of such independent counsel or other expenses incurred by the committee pursuant to this rule, shall be paid by the Chief Clerk upon submission of vouchers and necessary documentation which vouchers shall be signed by both the chairman and vice chairman of the committee. Included in such allowable expense items shall be travel and per diem for the members of the committee. The Chief Clerk shall pay such expenses out of funds appropriated to the Chief Clerk for incidental expenses.

DOCUMENT ID: RAP9139038
RULE TITLE: STATUS OF MEMBERS INDICTED OR CONVICTED OF A CRIME
RULE NUMBER: Rule XXXVIII
STATE: PA
CHAMBER: Senate
EFFECTIVE DATE: 01/03/89
TOPICS: CONDUCT OF MEMBERS, DISCIPLINE, ETHICS, MEMBER

e XXXVIII
TUS OF MEMBERS INDICTED OR CONVICTED OF A CRIME

1. When an indictment is returned against a member of the Senate, and the gravamen of the indictment is directly related to the member's conduct as a committee chairman, ranking minority committee member or in a position of leadership, the member shall be relieved of such committee chairmanship, ranking minority committee member status, or leadership position until the indictment is disposed of, but the member shall otherwise continue to function as a Senator, including voting, and shall continue to be paid.

2. If, during the same legislative session, the indictment is quashed, or the court finds that the member is not guilty of the offense alleged, the member shall immediately be restored to the committee chairmanship, ranking minority committee member status, or leadership position retroactively from which he was suspended.

Upon a finding or verdict of guilt by a judge or jury, plea or admission of guilt or plea of nolo contendere of a member of the Senate of a crime, the gravamen of which relates to the member's conduct as a Senator, and upon imposition of sentence, the Secretary-Parliamentarian of the Senate shall prepare a resolution of expulsion under the sponsorship of the Chairman and Vice-Chairman of the Senate Committee on Ethics and Official Conduct. The resolution shall be printed and placed on the calendar for the next day of Senate session.

From : AP
To : ALL South Carolina
Subj : ~~California~~ Lawmaker Expelled
umb : 2399 of 2419 Date : 01/17/95 6:40pm
ead : [N/A] Reference : None
Conf : 52 - GOV/STATE&LOCL-Clari.news Private : NO

Xref: csn clari.news.usa.gov.politics:6409 clari.local.south_carolina:684 clari
Path: csn!111-winken.llnl.gov!looking!bass!clarinews
Approved: jill@clarinet.com
From: C-ap@clarinet.com (AP)
Newsgroups: clari.news.usa.gov.politics,clari.local.south_carolina,clari.news.c
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Date: Tue, 17 Jan 95 16:40:21 PST
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ACategory: usa
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Priority: regular
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Codes: APO-1110
Lines: 25

COLUMBIA, S.C. (AP) -- A veteran legislator in prison for tax-law violations was expelled from the state Senate on Tuesday.

State Sen. Theo Mitchell's attorney, Suzanne Coe, said she would challenge the action because the Greenville Democrat had no chance to defend himself before the Senate voted 38-7 to remove him.

Mitchell is serving a 90-day sentence for failing to report cash transactions to the government, a misdemeanor. He is expected to be released from a federal prison camp near Atlanta later this month.

His supporters said the Senate should wait until he could return to the Legislature to defend himself. Critics said he should be removed because he pleaded guilty.

''Senator Mitchell has had his day in court,'' said Republican Sen. Greg Ryberg, who had earlier asked Mitchell to resign. ''The future of our state is based on the political integrity of our government and its elected officials.''

Mitchell, 56, considered the resignation request over the weekend and rejected it. He said Republicans who pushed for his expulsion were racially biased and wanted his seat as chairman of the Senate Corrections Committee.

Mitchell has been a state legislator for 20 years and was the first black to run for governor of South Carolina this century, losing in 1990 to Republican Carroll Campbell.

He pleaded guilty last fall to failing to tell the Internal Revenue Service about $154,000 in cash transactions he handled on behalf of a client later convicted of dealing drugs.

Senate Counsel & Research

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JO ANNE ZOFF SELLNER
DIRECTOR

Senate

State of Minnesota

March 1, 1995

To: Senator Ember Reichgott Junge, Chair
Special Committee on Ethical Conduct

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Costs of Ethics Complaints

You have asked for a short list of options for paying the cost to the affected parties of bringing and defending against complaints of unethical conduct. Some possibilities follow.

1. Pay all costs of both sides, including outside attorneys fees.

2. Pay no out-of-pocket costs of either party, but permit both parties to be assisted by Senate employees in preparing and defending against the complaint.

3. Pay no costs of either party and prohibit them from using Senate employees, other than clerical help, to assist them in preparing or defending against the complaint.

PSW:ph

cc: Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger

HAROLD "SKIP" FINN
Senator 4th District
Majority Whip
306 State Capitol
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Senate

State of Minnesota

TO: Senator Ember D. Reichgott Junge, Chair
Special Committee on Ethical Conduct

FROM: Senator Skip Finn

DATE: March 2, 1995

RE: IR Caucus Complaint

I am enclosing copies of Leech Lake Reservation Tribal Council resolutions No. 95-76 and No. 95-77. These are both related to the accusations brought by Senator Dean Johnson, et. al. The abstaining vote on both resolutions was Myron Ellis, the other named party in the federal information. The chairman only votes to break a tie.

I am also enclosing a copy of the sentencing memorandum which we submitted to Judge Rosenbaum on March 1, 1995. The appendix is not included because of its volume but is available through the Court or myself.

cc: Senator Steven G. Novak
Senator Dennis R. Frederickson
Senator Roy W. Terwilliger
Senate Counsel Peter S. Wattson

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FOR YOUR INFORMATION

UNITED STATES OF AMERICA, Plaintiff, vs. HAROLD R. "SKIP" FINN, Defendant.	CRIMINAL ACTION File No. 5-94-18 (01) **DEFENDANT FINN'S SENTENCING MEMORANDUM**

INTRODUCTION

In August of 1994 the government filed an Information charging that the defendant misapplied ~~$10,945~~ less than $100 in tribal business council funds in 1988. The defendant plead guilty and the parties agreed that the offense resulted in an adjusted offense level of 9 pursuant to the Sentencing Guidelines.

The government now advances the argument that the Court should increase the defendant's sentence based upon his interest in Reservation Risk Management which provided insurance coverage to the Tribal Business Council from 1985 to 1990. The government's argument suggests illegality in the creation and operation of RRM. The government advances no credible proof to support its suggestion. The Grand Jury never charged that RRM was created or operated in such a way as to support criminal charges against the defendant or anyone else. The government should not be allowed to establish by innuendo what it failed to establish by proof.

Additionally, the government claims that the defendant

obstructed its investigation. To sustain this claim, the government offers the recycled testimony of co-defendant Myron Ellis whose credibility is compromised by a desire to favorably influence his sentence. The government also offers the testimony of Burton Howard who bargained for transactional immunity as a pre-condition to the rendition of his current account of events.

Finally, the government argues the defendant's sentence should be enhanced based upon its claim that the defendant abused a position of trust or used a special skill. Fatal to this argument is the fact that the argument focuses on conduct of the defendant in relation to Reservation Risk Management which the Grand Jury failed to charge as criminal.

> When factual allegations contained in a PSR are disputed
>
> the Court must either state that the challenged facts will not be taken into account at sentencing, or it must make a finding on the disputed issue. See Fed.R.Crim.P. 32(c)(3)(D). If the latter course is chosen, the government must introduce evidence sufficient to convince the Court by a preponderance of the evidence that the fact in question exists.

United States v. Streeter, 907 F.2d 781, 792 (8th Cir. 1990). If the court elects to consider the disputed facts at sentencing, it cannot simply rely on the conclusions contained in the PSR. Rather, the court is bound to consider actual evidence. See United States v. Greene, 41 F.3d 383, 386 (8th Cir. 1994). The court must refuse to consider unreliable allegations, insisting instead that its findings are supported by evidence bearing "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. §6A1.3(a).

When sentencing factors are in dispute, the burden of persuasion rests with the party seeking the adjustment. United States v. Khang, 904 F.2d 1219, 1222 (8th Cir. 1990). Here, the government advocates the sentence enhancements. Accordingly, the government bears the burden of proving the disputed conduct by, at a minimum, a preponderance of the evidence. United States v. Saunders, 957 F.2d 1488, 1493 (8th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 256, 121 L.Ed.2d 187 (1992) and ___ U.S. ___, 113 S.Ct. 991, 122 L.Ed.2d 143 (1993).[1] Because the government has failed to come forth with reliable evidence proving that Finn obstructed justice, abused a position of trust, or abused his special skill as a lawyer in connection with the instant offense, the proposed sentence enhancements are unwarranted. In addition, the uncharged conduct is unsupported by the evidence and falls far short of the mark justifying an increased sentence.

BACKGROUND

The LLRBC is a five member tribal council elected to govern

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[1]Both the guidelines (see §6A1.3, comment) and Eighth Circuit authority recognize that due process requires that the government prove disputed factors by a preponderance of the evidence. In deference to the wide discretion afforded sentencing courts to ensure that the information they rely upon is accurate and reliable, however, the Eighth Circuit has repeatedly affirmed cases wherein the district court required proof of disputed facts by clear and convincing evidence. See, e.g., United States v. Matthews, 29 F.3d 462, 464 (8th Cir. 1994); United States v. Pierce, 907 F.2d 56, 57 n.4 (8th Cir. 1990); United States v. Wayne, 903 F.2d 1188, 1197 (8th Cir. 1990); United States v. Murphy, 899 F.2d 714, 716-17 (8th Cir. 1990); and United States v. Ehret, 885 F.2d 441, 444 (8th Cir. 1989), cert. denied, 493 U.S. 1062 (1990). For the myriad of reasons shown below, Finn respectfully submits that the clear and convincing evidence standard should be employed in evaluating the evidence presented in the case at bar.

the Leech Lake Band. The RBC is comprised of a chairperson, a secretary-treasurer and three district representatives. In 1985, the RBC members were Hartley White (chairman), Alfred "Tig" Pemberton (secretary-treasurer), James Michaud, Gladys Drouillard, and Dan Brown (district representatives). Myron Ellis served as Executive Director for the RBC and Burton Howard was its Controller.

1. RRM provided RBC with otherwise unavailable or unaffordable insurance coverage

Prior to 1985, the RBC obtained casualty, liability and other necessary insurance through outside commercial vendors. In 1985, however, the insurance industry crash and tribal financial difficulties combined to render traditional sources of insurance coverage unattainable by the RBC. In August 1985 the tribe's insurance broker, Thomas Peterson, presented the dismal results of his five month effort to determine the availability of traditional insurance coverage. See Special Report on Insurance Coverage for 1985/86, attached hereto as Exhibit 1. Peterson informed the RBC that twelve of the thirteen companies he provided with the RBC specs declined to even provide a premium quote. The sole bidder Home Insurance Company, the RBC's previous carrier demanded premium increases ranging from over 200% for property coverage (from $121,810 to $254,448) to more than 600% for general liability coverage (from $30,622 to $186,616) from the previous year's rates.

Due to the skyrocketing premium increases, the RBC could no longer afford traditional insurance and was therefore uninsured from July to October 1985. To address this crisis the RBC

considered Peterson's suggestion that self-insurance was one method of reducing premium costs. See Exhibit 1, p. 3. During meetings with the full RBC on October 1 and 29, 1985 Finn discussed the adoption of a modified self-insurance plan. Under the plan, the tribe would charter a corporation, Reservation Risk Management ("RRM"), which would provide insurance coverage and also administer claims. The goal of the modified self insurance plan was to build sufficient reserve amounts to cover future losses. In the event reserves were insufficient to cover losses, Finn and his partner Kimball Mattson pledged $450,000 of personal assets to satisfy claims. See Shareholders' Agreement (1/14/86) at ¶3.c, attached hereto as Exhibit 2; Debenture Agreement (12/1/85), attached hereto as Exhibit 3. Finn openly acknowledged his ownership interest in RRM and presented the RBC with a funds flow chart outlining reserve accumulations after deducting operating costs and amounts due Finn and Mattson on the basis of their debenture guaranty.

To address cash flow crisis, the RBC had previously exhibited a tendency to liquidate any available assets to satisfy current financial obligations. To ensure that insurance reserves were not raided for other purposes, the RBC agreed to include a termination provision in the plan documents providing that RBC would forfeit all rights to accumulated reserves if it terminated the plan any time within the first five years of operation. See Shareholder's Agreement at ¶2.f. The termination provision was an agreed upon incentive to prevent tribal officials from terminating the plan simply to access cash reserves.

After thorough consideration of the "modified Self Insurance Plan," the full RBC voted unanimously to adopt the plan. See RBC Resolution No. 86-26 attached hereto as Exhibit 4.[2] Chairman White and Secretary-Treasurer Pemberton were authorized to execute all necessary documents to establish the modified self-insurance plan.

2. Finn urged the RBC Secretary-Treasurer Pemberton to secure an independent legal appraisal of RRM's modified self insurance plan fifteen months before Pemberton acquired any interest in RRM

Finn sent a letter to Pemberton reiterating that Finn could not advise the RBC with respect to the transaction and urging Pemberton to obtain independent legal counsel to review the plan documents and advise the RBC regarding the same. Finn wrote:

> It is important that you obtain independent legal counsel to review these documents. I would obviously have a personal conflict of interest. Disinterested legal advice on these agreements is extremely important. Perhaps you could have Kent Tupper review these for you without cost since he does provide general counsel services to the Minnesota Chippewa Tribe.

Letter from Finn to Pemberton (11/5/85), attached hereto as Exhibit 5. The government erroneously argues that this "warning was wholly ineffective because, as a co-owner of RRM, Mr. Pemberton's interests were actually aligned with the defendant's interests."

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[2]The government makes much of references in the plan documents to "self insurance" to suggest that the plan approved was a true self insurance plan. A close reading of the RBC resolution adopting the plan reveals the hybrid nature of the plan. Resolution No. 86-26 clearly recites the RBC's consideration and adoption of a modified self insurance plan although the resolution variously characterizes the plan as a "modified self insurance plan" and a "self insurance plan." The plan documents taken as a whole bear out the defendant's interpretation. The court should not countenance the government's attempts to selectively pull references to the plan as "self insurance" out of context to "prove" the plan offered self insurance in the traditional sense.

United States' Memorandum Concerning Remaining Sentencing Factors (October 28, 1994) at 10. In fact, Pemberton did not become a part owner of RRM until March 1987. See RRM Share Cert. No. 004 (3/13/87), attached hereto as Exhibit 6. Pemberton first broached the possibility of his investing in RRM only after he had been appointed to the RRM Board of Directors by Chairman White in January 1987. See Letter from Hartley White to Finn (1/15/87), attached hereto as Exhibit 7.[3] The government has produced no evidence that Pemberton's independent judgment was clouded by a personal interest in RRM in 1985. Finn urged Pemberton to obtain independent legal representation on behalf of the RBC over two months prior to the formal adoption of the plan in January 1986.

Pursuant to a pre-organization subscription agreement, the RBC was issued a one-quarter ownership interest in RRM. See RRM Stock Certificate No. 001 (1/14/86), attached hereto as Exhibit 8. Throughout the course of RRM's administration of the insurance plan, the RBC experienced financial difficulties. Premium payments were repeatedly tardy.

3. Two federal audits approved RRM

In late 1988, the Bureau of Indian Affairs concluded a comprehensive audit of the Leech Lake Reservation for the year ended September 30, 1986. Initially, auditors from the Office of Inspector General questioned payments to RRM because it was not a

[3]Pursuant to an Insurance Agreement between RRM and the RBC dated January 16, 1986, the RBC was entitled to nominate candidates to fill two of the five RRM board seats. It was not until January of 1987 that Chairman White nominated Pemberton and Dan Brown to serve as directors.

"state approved or regulated insurance company." See BIA Memo to OIG (12/22/88), attached hereto as Exhibit 9, at p. 9. The BIA responded:

> it has been determined that expenditures for general liability insurance paid to a non-related insurance company, need not be state approved, based on the tribe's sovereign immunity.

Id. at 10. After acknowledging the hybrid nature of the RRM plan ("a self-funded/co-insurance"), the BIA concluded

> The BIA has reviewed the policy and determined the policy to be acceptable. It is recommended that the Reservation Risk Management, Inc. be approved as the provider for General Liability and additionally be retroactively approved upon the initiation of this policy, of December of 1985.

Id. As a result of the BIA's endorsement, all questioned costs were resolved and the audit closed. Id.

A 1989 audit conducted by the United States Department of Labor, Employment & Training Administration also approved the RRM plan. See Final Determination (6/20/89), attached hereto as Exhibit 10. The Department of Labor, as the OIG had before it, questioned RRM's lack of state approval. Ultimately, however, the Department of Labor followed in the footsteps of the BIA, endorsing the RRM plan. Id.

4. RRM made a disguised bridge loan to enable the RBC to pay Ellis for a retroactive pay raise and for other wages

Tribal council members and employees traditionally received annual pay raises ranging from six to ten percent. See Affidavit of John McCarthy (2/15/95), attached hereto as Exhibit 11 at ¶4. Financial constraints frequently prevented the RBC from awarding annual raises in a timely fashion; retroactive raises sometimes

going back several years were regularly awarded. In the Spring of 1988, neither Myron Ellis nor RBC Deputy Director John McCarthy had received a raise for several years. Exhibit 11 at ¶4. McCarthy computed a ten percent retroactive raise, totalling $7,600 on behalf of Ellis and provided his computations to Ellis. Exhibit 11 at ¶6; See also Affidavit of George Wells (2/22/95) at ¶4, attached hereto as Exhibit 12. The RBC approved Ellis's retroactive pay raise. Id.; see also Memorandum of Interview of James Michaud (8/30/94), attached hereto as Exhibit 13.

For political reasons, the pay raise awarded Ellis was not reflected in any RBC meeting minutes. Exhibit 11 at ¶5. When the raise was approved, the RBC was experiencing significant cash flow problems. Id. Finn was present at the meeting where the RBC approved the retroactive raise for Ellis. Michaud interview. Finn volunteered that RRM could pay Ellis on behalf of the RBC so long as RBC would repay RRM when it had the funds to do so. Id. Based on this arrangement RBC approved the retroactive wage increase sought by Ellis. Finn withdrew $7600 from RRM and paid it to Ellis on April 12, 1988.[4] Later, Finn generated an RRM invoice purporting to be for insurance services and provided it to the RBC for reimbursement.

Ellis resigned his position as Executive Director to run for election to the RBC on May 13, 1988. Tribal policy prohibited

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[4]Finn clearly wrote Ellis's name on the withdrawal ticket and obtained a cashier's check made payable to Ellis from his bank. Finn recorded the transaction as a "loan" on RRM's ledger and noted its repayment on April 22, 1988 after the RBC's check was received.

employees from remaining on the payroll while they campaigned for office. Despite this policy, the RBC had previously agreed to pay for lost wages suffered by employee/candidates. For example, an employee named Eli Hunt was reimbursed for wages he lost after resigning to run for the council in 1986. Exhibit 12 at ¶7; Exhibit 11 at ¶7. Ellis was elected to the RBC in June 1988. Ellis felt he was entitled to reimbursement for wages lost between the time of his resignation as Executive Director until he went on the payroll as an RBC member. Exhibit 12 at ¶6. In August 1988, the RBC approved payment of Ellis's wages totalling $5,745.14. Id.; see also Exhibit 11 at ¶7. Finn again agreed RRM would loan RBC the money to pay Ellis. He prepared a false invoice which was signed by four of the five RBC members authorizing repayment to RRM of the funds it advanced Ellis.

5. The 1988 Leech Lake tribal elections lead to tribal office occupation and record disruption

The 1988 elections were bitterly contested and resulted in a great deal of tribal turmoil. Dan Brown defeated Hartley White for the RBC chairmanship in perhaps the most acrimonious race of the election. Following his defeat, White and his supporters staged an occupation of tribal offices. See Bemidji Pioneer newspaper article dated July 19, 1988, attached hereto as Exhibit 14. As a result, files were rifled and documents were destroyed. In the words of one administrative assistant, "[t]he file cabinets were in complete disarray with files all thrown into the wrong drawers." See August 9, 1988 memo from Donna Murray, attached hereto as Exhibit 15. An employee of the tribal accounting department

reported complete files missing. See August 5, 1988 memo from Bonnie Cutbank, attached as Exhibit 16.

6. RRM dissolution prompted by change in Interior policy

RRM administered the tribe's modified self insurance plan without interruption until 1989. All valid claims filed were paid. Reserves accumulated at a level exceeding initial projections, largely because Finn and Mattson did not take out all of the amounts they were entitled to under the insurance agreements.

In May of 1989, RBC Chairman Dan Brown received a form letter from the BIA stating that tribes could no longer do business with insurance entities that were not state licensed. See Letter from Earl Barlow to Brown (5/23/89), attached hereto as Exhibit 17. Because RRM operated only under a tribal charter and was not licensed by the State of Minnesota, the RBC undertook efforts to obtain coverage from a licensed company to comply with this new mandate from the Department of the Interior. See Letter from Brown to Barlow (6/12/89), attached hereto as Exhibit 18.[5]

As a result of this change in BIA policy, the affairs of RRM were subsequently wound up and its assets distributed in the summer of 1990. RRM choose to waive its right to enforce the forfeiture clause in the insurance agreements. Instead, RRM assets were distributed based on projected reserve accumulations to October 1,

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[5]The government mistakenly suggests that RRM was liquidated in a preventive strike to avoid an impending investigation by the OIG. See United States' Memo re Disputed Sent. Factors (10/28/94) at 8. The directive threatens no such investigation. Furthermore, having previously been twice approved by federal auditors, RRM had no reason to fear another inquiry.

1989 less an estimated reserve to fund two pending personal injury claims. The RBC, as a 25% owner of RRM, received more than a quarter of the assets distributed. In addition to forgiveness of loans totalling over $187,000, the RBC received a cash distribution of $204,000. RRM also purchased and conveyed to the RBC free and clear the Dutchman property, real estate sought by the tribe for future development, having an approximate value of $460,000.[6]

7. The grand jury investigation

a. The 1991 Grand Jury subpoena

In January 1991, a grand jury subpoena was served on the RBC seeking production of all correspondence with RRM. See Sworn Statement of Special Agent James Hanbury (2/03/95), attached hereto as Exhibit 19, at ¶3. The subpoena also sought production of all canceled checks from the RBC to RRM. Id.

In his capacity as RBC Controller, Burton Howard was directed to collect the responsive documents by tribal attorney Kim Mattson.[7] See Sworn Statement of Burton Howard (2/17/95), attached hereto as Exhibit 20, at ¶5,. Howard assembled both the RRM invoices and the RBC checks reimbursing RRM for its payments to

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[6]The government ignores the full benefits received by the RBC when RRM's affairs were wound up, choosing to focus only on the cash distribution made to the RBC. See United States' Memo. re Sentencing Factors (10/28/94) at 7, n.3. When all components (both cash and non-cash) of the distribution are viewed as a whole, the RBC received far in excess of its proportionate share of RRM assets.

[7]Finn and Mattson's law partnership dissolved effective June 1, 1990. No longer a tribal attorney, Finn was not involved in any way with the RBC response to the federal subpoenas. See letter from Finn to Drouillard (5/18/90), attached hereto as Exhibit 19.1.

Ellis and transmitted them to Mattson for production. See Agent Hanbury's Rough Notes of Howard interview dated August 6, 1993, attached hereto as Exhibit 21, at p. 4B. According to Howard, both the $7,600 and the $5,745 RRM invoices and the corresponding RBC checks were mailed to AUSA Thor Anderson whose name appeared on the subpoena. Id. Specifically, Agent Hanbury's notes of the Howard interview state:

> Re: $5,700 payment
>
> First subpoena
> gave RRM financial docs Mailed them to Thor Invoices & checks believes were in there
>
> gave file to Anita Fineday
>
> Believes $7,600 chk & invoice were in RRM vendor file. I mailed docs to Thor. K. Mattson reviewed docs he kept it for a couple of days

Id. For whatever reason, Agent Hanbury did not ultimately receive copies of either of the RRM invoices or the RBC checks in response to the first grand jury subpoena. Id at ¶5. If Howard is telling the truth, then one would have to conclude that the records were lost in the mail or misplaced by the U.S. Attorney's Office.

b. The 1993 Grand Jury subpoena

A second grand jury subpoena was served on the RBC in May 1993. Agent Hanbury states he received a "single, very poor quality photocopy" of the August 1988 RRM invoice in response to a 1993 subpoena. Hanbury Statement at ¶5. According to Agent Hanbury the invoice was wedged between two other file folders and was not contained in separate organized folders like the other documents produced. Id. Hanbury states that responsive materials

including the $5,745.14 RRM invoice were received in May 1993. Id. In fact, however, the RBC did not respond to the subpoena until the end of June 1993. See Letter from tribal attorney Anita Fineday to AUSA Christopher Bebel dated May 17, 1993, attached hereto as Exhibit 22 (confirming an extension until June 23, 1993 to supply the subpoenaed documents since the RBC was not even served with the subpoena until 10:00 a.m. on May 17, 1993, one hour after the designated return time).[8] As of the time of the submission of this memorandum, the government has been unable to provide grand jury or other records documenting exactly when RBC records were received in response to the 1993 subpoena.

Both tribal attorney Fineday and outside counsel Paul Applebaum worked on the RBC's response to the second grand jury subpoena. Applebaum asked Howard to gather all documents he sent to the government in 1991. See Exhibit 21 at ¶4B. When interviewed by the government on August 9, 1993, Howard stated he gave Applebaum the "chks payable to RRM, invoices, letters." Id. Howard continued: " I believe invoices from RRM were there gave

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[8]The timing of when the government first received a copy of the August 1988 RRM invoice for $5,745.14 is important. Howard testifies that he was summoned to a meeting with Finn in May of 1993. Howard Statement at ¶8. Howard claims that Finn was aware at that time that the federal investigators were asking questions about the $5,745 invoice and asked whether Howard had provided the government with a copy of the same. Id. Howard claims he told Finn the invoice had been produced and, thereafter, Finn instructed him to lie about its purpose. Id. at ¶9. Obviously, if the government had not yet received the "poor quality" copy described by Agent Hanbury, federal investigators could not have been asking questions about it. This leads to one of two conclusions: either the government is way off on its timing or Howard, who professes to recall facts so clearly, has submitted an extremely inaccurate sworn statement.

them to Fineday." Id. Howard's recollection is corroborated by that of fellow tribal employee George Wells. Wells recalls that in the summer of 1993 he and Howard discussed Howard's upcoming appearance before the grand jury. In a sworn statement, Wells relates the following:

> I personally saw a box of documents that Howard had gathered in 1991, which were to be turned over to the Grand Jury in 1991. These documents were given to the Tribal attorney, Paul Applebaum, for review prior to turning them over to the government in 1993. I distinctly remember seeing the RRM invoice for the $7,600 which had been received by the RBC included within the box of records sent to Attorney Paul Applebaum. Subsequent to the date Burton Howard and I reviewed the box of records he [Howard] had no further access to them without a second party present.
>
> * * *
>
> I was also familiar with a $5,745.14 loan to the tribe paid to Myron Ellis by RRM. I saw the invoice associated with this payment as well.

Exhibit 12 at ¶¶5, 6.

8. Burton Howard's story changes after repeated government contacts

Howard was initially interviewed by the government on July 9, 1993. During that interview, Howard stated that the $7,600 check and invoice were for insurance and that there was no connection between the payment and Myron Ellis. Memorandum of Interview of Howard (7/9/93), attached hereto as Exhibit 23. Howard indicated that the original canceled check and the invoice were filed in the 1988 RRM vendor file. Id. Howard disavowed any knowledge of the $5,745.14 check and invoice. Id. During the interview, Howard agreed to look for the $7,600 check and invoice upon his return. Id. Howard later called Agent Hanbury and advised that he was

unable to locate either the $7,600 invoice or the RBC check. Id.

Howard reiterated his story that the checks and invoices were present in the RBC files when he met with AUSA Ward and Agent Hanbury on August 6, 1993 in preparation for his grand jury testimony. See Exhibit 21. On August 10, 1993, Howard testified before the grand jury. According to Howard, he "decided to admit his past lies and start telling the truth." Howard Statement at ¶11. Howard testified that the $7,600 RRM invoice actually was for Ellis's wages which had been authorized by the tribal council. Howard Grand jury testimony, pp. 21, 25, 27. Howard further testified that the $5,745 invoice also resulted in money being paid to Ellis. Id. at 39.

Howard now states "I was not asked any questions about any destruction of records during my August 1993 grand jury testimony and I did not mention these actions on my own." Exhibit 20 at ¶12. Howard's final testimony before the grand jury, however, reveals his true lack of candor. As part of the ongoing effort by the government to track down the missing RRM invoice and RBC checks, Howard and AUSA Ward engaged in the following colloquy:

> Q: You've turned over some documents pursuant to a Grand Jury subpoena that you were given, is that right?
>
> A: Yes.
>
> Q: Okay. But not all of the documents that were subpoenaed were provided yet, is that right?
>
> A: Yes.
>
> Q: So you're going to go back and get some more of those documents that were originally subpoenaed is that right?

A: Yes.

Q: And you're going to bring those back?

A: Yes.

Q: And you'll come back and return those to this Grand Jury, is that right?

A: Yes.

Howard Grand Jury testimony, pp. 58-59, attached hereto as Exhibit 24.

Ostensibly to "clear his conscience," Howard later decided to tell the government that he personally had destroyed the missing invoice at Finn's direction. After Howard's attorney first negotiated a broad grant of transactional immunity from the government for her client, immunizing not only Howard's previous lies to government investigators and the grand jury but also his exposure to obstruction of justice charges,[9] Howard consented to a

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[9]In his sworn statement, Howard wholly misconstrues the scope and breadth of his immunity. First he falsely states: "I have not been promised that I won't be prosecuted for my lies to the federal investigators." Howard Statement at ¶11. In fact, an immunity letter from AUSA Henry Shea to Howard's attorney provides in relevant part:

> The United States represents that it will not prosecute Mr. Howard for any offenses involving Reservation Risk Management (RRM), including, but not limited to, any RRM payments to Myron Ellis, or any offenses involving any prior statements by Mr. Howard to federal agents or the grand jury, or any offenses relating to obstruction of justice of the federal investigation involving RRM, including but not limited to, any payments to Myron Ellis.

See Letter from AUSA Shea to Katherian Roe (7/29/94), attached hereto as Exhibit 25. Next, Howard suggests "if I am not telling the truth about [destroying] the invoice, I could be prosecuted." Howard Statement at ¶12. The immunity letter, however, simply concludes: "a failure by Mr. Howard to provide complete and

final interview with the government. There for the first time, after at least five prior contacts with the government, Howard claimed that he had destroyed the $7,600 RRM invoice some time in 1992 following Finn's instructions during their 1991 meeting. See Memo of interview of Howard (8/9/94), attached hereto as Exhibit 26.

9. Myron Ellis recalls the meeting with Finn after the government promises leniency

Prior to his guilty plea, co-defendant Ellis had only a solitary contact with the government. On March 16, 1993, Ellis was interviewed by Special Agent Tim Reed. During his interview, Ellis professed no recollection of ever receiving any money from RRM for any reason. See Memo of Interview of Ellis (3/16/93), attached hereto as Exhibit 27. Ellis's inability to recall the payments persisted even after he was shown a copy of RRM's $7,600 check by Agent Reed. Id. Ellis speculated the check, if he received it, may have been a campaign contribution. Id.

In exchange for the government's promise to recommend leniency on his behalf, Ellis agreed to provide a sworn statement for the government's use in the instant matter. In his statement, Ellis now purports to vividly recall the two RRM invoices and corresponding RBC checks. See Ellis Sworn Statement (1/9/95), attached hereto as Exhibit 28, at ¶¶3-4. Ellis goes on to describe his recollection of a meeting at Finn's office in January 1991 wherein he "overheard" Finn tell Howard to destroy some undefined

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truthful information ... will end any governmental interest in further information from him."

"specific documents." Id. According to Ellis, Finn said "if discovered, those documents could send people to jail."[10]

ARGUMENT

I. Finn did not obstruct justice by instructing Burton Howard to destroy the $7,600 RRM invoice

A. Howard's accusations lack sufficient indicia of reliability to support an obstruction enhancement

Howard's allegations that he destroyed the missing $7,600 RRM invoice first surfaced during his interview with the government in August 1994. Prior to this revelation, Howard had communicated with the government on numerous occasions.[11] Not once during these contacts did Howard admit to destroying the $7,600 invoice or suggest that Finn played any part in its disappearance.

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[10]Ellis's reference to documents in not trivial. Howard suggests he knew nothing was wrong with the second RRM invoice (for $5,745.14) until May of 1993. If one were to believe Ellis's claim that Finn and Howard discussed destroying both invoices Howard would certainly recall that fact and would have removed both the invoices from the RRM files in 1991.

[11]Howard was initially interviewed by the government on July 9, 1993. At the conclusion of that interview he was asked to go back to the office and look in the RRM vendor file for the $7,600 RRM invoice and to locate the original RBC check used to pay that invoice. See Exhibit 23, p.2. Howard later called the government back to advise he was unable to find the requested copies. Either during that conversation or in a separate contact, Howard called Agent Hanbury a few weeks after the interview and stated that the two RRM payments actually went to Ellis. See Hanbury Statement at ¶8. Howard next met with the government on August 6, 1993 to prepare for his grand jury testimony. The interview lasted for over two and one-half hours. See Exhibit 21 (indicating that the meeting ran from 1:17 p.m. to 3:48 p.m.). Four days later, on August 10, 1993, Howard testified before the grand jury. Howard may have met with the government on July 29, 1994. See Exhibit 25 (confirming interview on 7/29/94). Finally, Howard met with the government on August 9, 1994 and leveled his accusations against Finn.

In Howard's words, he decided to "stop lying" and endeavored to "admit his past lies and start telling the truth" when he testified before the grand jury. Howard Statement at ¶11. Howard would have the court believe that notwithstanding his personal transformation prior to his grand jury testimony, he simply failed to volunteer that he was responsible for the missing invoice because he wasn't asked. Id. at ¶12. Howard's characterization of AUSA Ward's questioning, although convenient, does not comport with his grand jury testimony. Howard clearly was asked to go back and return with the missing documents. If he is to be believed, Howard knew full well that the documents were destroyed by his own hands. Nonetheless, Howard promised to return with the missing documents. See Exhibit 24.

To "clear his conscience" Howard later told the complete "truth" about the missing invoice. Howard glosses over the fact that his new found candor came on the heels of a broad grant of complete transactional immunity from the government. Incredibly, Howard would have the court believe that although he repeatedly lied to and misled the government, now that he is insulated from all personal criminal exposure, he can only tell the truth. This preposterous suggestion flies in the face of common sense and reason. Howard's testimony is inherently unreliable and should not be countenanced.

Assuming, *arguendo*, that Howard is telling the truth (a proposition that Finn vehemently opposes), Howard's story makes absolutely no sense. As shown above, neither RRM invoice was

produced to the Grand Jury in response to its original subpoena in 1991. The $5,745 invoice wasn't produced to the Grand Jury until the end of June 1993, in response to its 1993 subpoena. Clearly, if Finn and Howard were out to destroy evidence to impede the government's investigation, it defies reason that they would focus on one invoice and not the other. Furthermore, neither check from the RBC to RRM was ever produced to the Grand Jury. If someone took the effort to get rid of both checks, why wouldn't they similarly destroy both invoices?

Finally, non suspect evidence before the court contradicts Howard's story. George Wells, a tribal employee and close friend of Howard's with no reason to lie to the government, testifies that he personally saw both invoices in a box of documents assembled for production to the grand jury in 1993. Given this testimony, there is serious doubt whether Howard ever destroyed the $7,600 invoice as he claims. Certainly, Howard's claim that he destroyed the $7,600 invoice in 1992 must fail. In summary, Howard's varying claims are so confused and replete with inconsistencies that his latest account bears none of the indicia of reliability required to prove the disputed sentencing factors at issue.

B. Ellis's claims similarly lack the requisite indicia of reliability to support an obstruction enhancement

In pleadings filed with the court last October, Finn assailed Howard's credibility on the basis of then known information demonstrating his lack of veracity. In a last ditch effort to buttress Howard's transparent allegations, the government reached out to Myron Ellis. In his sworn statement of January 9, 1995,

Ellis purports to recall a January 1991 meeting during which he overheard Finn instructing Howard to get rid of some documents. Ellis's recollection lacks the vivid detail of Howard's. Similar to Howard, however, Ellis offered his recollection only after the government agreed to reward him for testimony. Although the final details of the government's agreement have not been disclosed to defense counsel, the government has confirmed it will make a recommendation of leniency in exchange for Ellis's "cooperation."

The government is apparently not troubled by the sudden recollection of a man who, when first interviewed, could not even remember receiving either of two sizeable checks from RRM. As indicated above, when the government first questioned Ellis nearly two years ago, he could not recall ever receiving any money from RRM for any reason. He speculated that the $7,600 payment may have been a "campaign contribution." Ellis had no other documented contacts with the government until his sudden recollection.

II. Finn did not abuse a position of trust or his special skill as a lawyer in a manner that significantly facilitated the commission of the instant offense

The PSR recommends a two level increase pursuant to U.S.S.G. §3B1.3 after concluding

> The defendant occupied a position of trust and special skill as the attorney for the reservation. He was also in a position of trust as the president of RRM to which tribal insurance funds were entrusted. The defendant used his position as the tribal attorney to recommend and develop the RRM "self-insurance program" and sell it to the LLRBC. As president of RRM, he mismanaged the funds as they were intended as evidenced by the payments to Myron Ellis and the purchase of numerous personal items with tribal funds. According to §3B1.3, two levels are added.

PSR at ¶43. For the abuse of a position of trust or use of a special skill enhancement to apply, a defendant must abuse his position of trust or special skill "in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. §3B1.3. Merely occupying a position of trust or possessing a special skill will not suffice. Absent abuse of a trust relationship or application of special skills to further commission or concealment of the crime at issue, the enhancement will not lie. As with obstruction of justice, the government bears the burden of proving, by at least a preponderance of the evidence, facts which support the requested enhancement. Because the government's "evidence" consists of little more than self-serving conclusions, an adjustment for abuse of trust or special skill is unwarranted.

A. Finn did not abuse his role as a tribal lawyer to commit or conceal the misapplication

It is undisputed that Finn served as one of the Band's attorneys prior to the implementation of RRM in 1985. The record is totally devoid of any evidence, however, that Finn utilized his special skills as a lawyer to misapply tribal funds or conceal the same. In an effort to skirt the "significantly facilitated" prong required by §3B1.3, the government advances two arguments. First, it urges the court to consider the economics of the RRM modified self-insurance plan which it characterizes as "unconscionable." Second, the government claims that Finn breached his ethical responsibilities by contracting with the tribe in apparent violation of professional rules against conflict of interest.

Neither argument is persuasive.

1. Finn made complete disclosure of the RRM plan - neither providing legal advice to the Band about the contracts nor coopting the judgment of RBC officials

As we show above, Finn openly discussed all aspects of the modified self insurance plan with the full tribal council prior to its adoption and implementation. But he did not stop there. Finn clearly and unequivocally acknowledged that he could not advise the RBC with respect to the plan and urged the RBC to obtain the advice of independent and disinterested counsel. See Exhibit 5. In stark contrast to the government's sweeping allegations, the Band recently reaffirmed that

> the Leech Lake Reservation Tribal Council was informed of the personal financial interest of Skip Finn in Reservation Risk Management, Inc., [it] had the opportunity to consult with other independent legal counsel, and [it] discussed the proposed business relationship at several open Tribal Council meetings prior to accepting the proposal.

See Leech Lake Reservation Tribal Council Resolution No. 95-76, attached hereto as Exhibit 29.

The government, substituting its business judgment for that of the RBC in 1985, brands the transaction "unconscionable" and "fraudulent." Therefore, the government concludes, Finn violated Rule 1.8 of the Minnesota Rules of Professional Responsibility by contracting with a client in a manner that was not fair and reasonable. The government further maintains that Finn failed to disclose the terms of the arrangement in a manner that the RBC could understand. Once again, however, the government's after-the-fact characterizations stand in marked contrast to that of the

Band's. In the Band's words:

> the Leech Lake Reservation Tribal Council made an informed decision as to what was in the best interest of Leech Lake based upon its financial situation and insurance needs in 1985 when it entered [into] the business arrangement with Reservation Risk Management, Inc.

See Exhibit 29.

Despite the government's conclusions, the only evidence before the court leads to the inescapable conclusion that the RBC received everything that it bargained for in voting to adopt the modified self-insurance plan. The government refuses to acknowledge that the plan was a hybrid measure embraced by the RBC to provide the tribe with protection while, at the same time, ensuring that premium payments could accumulate free from tribal raiding for other purposes. Viewed in its true context, the RRM plan was neither unconscionable nor fraudulent.

Without question, an enhancement for use of a special skill requires a defendant to employ that skill for some purpose to carry out or conceal his crime. In the instant case, all of Finn's actions with respect to RRM were taken only in his capacity as administrator of the RRM plan. There is simply no evidence that Finn employed any of his skills as a lawyer to substantially facilitate the commission or concealment of his crime.[12]

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[12]Howard suggests that he took direction from Finn to destroy the $7,600 RRM invoice because of Finn's position as tribal attorney. In fact, Finn did not serve as tribal attorney after June 1990. Consequently, Finn was in no position of authority to direct Howard to do anything at the time of their purported meeting in 1991.

2. Finn did not abuse any trust arising from his role as tribal attorney in other matters to prevent scrutiny of RRM

The government further suggests that Finn headed off close scrutiny of the plan by coopting tribal officials, thereby ensuring that the plan was adopted. This argument likewise wilts under the glare of close scrutiny. When the plan was adopted in 1985 none of the RBC members had any ownership interest in RRM. Clearly, the most powerful RBC member was Chairman White. As shown above, White was one of two council members authorized to finalize details of the plans and execute all necessary documents. Moreover, White dictated who would be appointed to serve on the RRM Board of Directors. Curiously, the government notes that White's attempts to personally invest in RRM were rebuffed by Finn. Short of Brown and Pemberton's investment in RRM nearly one and one-half years after its creation, the government can point to no evidence supporting its accusations much less meet its burden of proving them by a preponderance of the evidence. Accordingly, any enhancement for abuse of trust with respect to the formation of RRM is totally without factual support and must be denied.[13]

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[13]In a disingenuous attempt to point to something warranting an increase for abuse of trust, the government points to the application notes for §3B1.3 which cite the example of a lawyer who embezzles his client's money. See United States' Memo re Sentencing Factors (10/28/94). As the government is well aware, misapplication and embezzlement are separate and distinct offenses in the eyes of the law. See Manual of Model Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.18.656, comment (1994)(citing United States v. Holmes, 611 F.2d 329, 331 (10th Cir. 1979) and distinguishing misapplication and embezzlement in the context of §656 violations). Here, both the information and the plea agreement explicitly characterize the offense conduct as misapplication. Given this backdrop the

B. Finn did not abuse a position of trust as President of RRM by diverting funds to Ellis

The government argues that Finn abused his position of trust as President of RRM to divert funds to Ellis. See United States' Memo re Disputed Sentencing Factors (10/28/94) at 9. The PSR reaches a similar conclusion. PSR at ¶43.[14] The government misconstrues the payments to Ellis as a "kickback" to quash Ellis's scrutiny of the RRM operation. The payments were anything but kickbacks, however, having been previously approved by the RBC. See Michaud Memo of interview, *supra*; see also Leech Lake Tribal Council Resolution No. 95-77, attached hereto as Exhibit 30.

The government focuses on the concealment prong of §3B1.3, arguing that Finn "exploited his position of trust and exclusive control over RRM operations by creating and submitting to the Leech Lake Band two false RRM invoices for services that were not in fact rendered." See United States' Memo re Disputed Sentencing Factors at 12. Although the RRM invoices accomplished the RBC's goal of insulating the council from potential political fallout should the

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government's embezzlement example is patently offensive.

[14]The PSR further suggests that Finn used tribal funds on deposit with RRM to make personal purchases in violation of §3B1.3. Under any interpretation, such action could not support a §3B1.3 enhancement because it did nothing to substantially facilitate the commission or concealment of the instant offense. Assuming, for purposes of discussion, that the questioned conduct was relevant, the PSR erroneously suggests that tribal funds were used. As we point out above, and as Exhibit 2 reveals, Finn and Mattson were entitled to fifteen percent of each premium payment in consideration for their debenture guaranty. They customarily left those amounts in the RRM account to build reserve accumulations. No evidence proving that the funds in question were the tribe's as opposed to sums to which Finn and Mattson were contractually entitled, is presently before the court.

payments to Ellis become known, the invoices did nothing to significantly facilitate the commission or concealment of the offense. As a practical matter, the RBC members were fully aware of the true reason for the presentment of the invoice. Finn took the highly unusual step of having four of the five RBC members personally sign the invoice, approving it for payment.

The government portrays Finn as a crafty and devious planner who prepared and submitted the invoices to conceal his activity. In truth, Finn took no measures to conceal his actions. Finn did not simply withdraw cash and hand it to Ellis. Nor did he disguise the delivery of the funds. Instead, in each case Finn took the extraordinary measure of writing Ellis's name on the withdrawal slips he gave the bank to purchase the respective cashier's checks made out to Ellis. See RRM withdrawal slips, attached as Exhibit 31. Similarly, Finn had RRM listed as the remitter of each check. See cashier's check to Ellis, attached hereto as Exhibit 32. In sum, Finn did nothing to abuse a position of trust in a manner significantly facilitating the instant offense. Accordingly, no increase pursuant to §3B1.3 is appropriate.

III. Having failed to file any charges regarding the creation or operation of RRM, the government should not be permitted to advance its uncharged and unproven theories at sentencing

Despite a federal investigation spanning nearly four years, the Grand Jury returned no indictment against Skip Finn. Instead, the government filed a one-page information charging Finn with a misapplication of tribal funds of $100 or less. In its plea agreement with Finn, the government stipulated that the loss for

sentencing purposes is $13,345.14. Notwithstanding this stipulation, the government reserved the right to argue that Finn's "other conduct" regarding the operation of RRM could be presented at sentencing to demonstrate his "motive" for the offense of conviction. The government, pursuant to U.S.S.G. §1B1.4, urges the Court to consider the creation and operation of RRM to sentence Finn to the high end of the applicable guideline range.

Essentially, the government strives to argue for sentencing purposes, that as a result of Finn's operation of RRM the tribe lost a great deal of money. Having previously stipulated to a loss of no more than $13,345.14, the government is precluded from now arguing that a greater loss was suffered. See United States v. Shields, 1995 W.L. 6045 (Jan. 10, 1995).

Prior to the creation of RRM, Finn met with the full tribal council and explained all facets of the proposed modified self insurance plan. Finn cautioned the RBC that he could not provide it with advice regarding the plan and strongly encouraged the RBC to obtain independent legal counsel before it proceeded. After thoroughly considering the proposed plan, the RBC unanimously voted to move forward with the plan. A series of contracts governing the creation and operation of RRM were subsequently executed by Chairman White and Secretary-Treasurer Pemberton on behalf of the RBC. There is no evidence before the Court suggesting that Finn failed to comply with any of the contractual provisions during the course of RRM's operation.

Instead, RRM provided the full range of services provided for

in the contracts and paid all valid claims. Despite the questions the government now raises about the propriety of the RRM plan, the plan itself was twice approved by federal auditors. When the affairs of RRM were wound up in 1990, Finn waived the forefeiture provision which entitled RRM to retain all accumulated reserves. As a result, RBC received far more than it was legally entitled to receive under the insurance contracts. Even though the forfeiture clause in the insurance agreements could have been enforced, the RBC was paid more than its proportionate share of the accumulated reserve fund.

The Eighth Circuit has previously addressed the situation currently facing the Court. In United States v. Galloway, 976 Fed.2d 414 (8th Cir. 1992) (en banc), cert. denied, ____ U.S. ____, 113 S.Ct. 1420, 122 L.Ed.2d 790 (1993), the Eighth Circuit addressed the case where the government obtains an indictment for a less serious offense but later seeks a substantially increased sentence based on uncharged conduct. In response to this problem, the Court recommended that the following procedure be employed:

> When uncharged conduct is alleged as relevant conduct to substantially increase the sentencing range, district judges are authorized to require the United States attorney to undertake the burden of presenting evidence to prove that conduct.

Id. at 427-28. For the reasons we show above, the government has totally failed to sustain its burden of presenting evidence proving that the operation of RRM was anything but in accordance with the insurance contracts. Implicit in the government's position is the assumption that there was something per se illegal in the formation

and operation of RRM. The Grand Jury never so charged nor does the government presently substantiate this theory. The operation of a lawful insurance plan should not be a basis for enhancing the sentence of the defendant for misapplying $13,345 in tribal funds. Accordingly, this Court should exercise its control over the sentencing process to refuse to consider the government's claims.

CONCLUSION

In pleading guilty to the Information, the defendant acknowledged that in the Summer of 1988 he used $13,345 in RRM funds to make a disguised loan to the Tribal Business Council on behalf of its Executive Director. At the time, the RBC was short of funds and, owing to an explosive political climate, wished to disguise the nature of the payments. RRM was created during 1985 in response to a critical pressing need for the RBC to manage skyrocketing insurance costs and address the fact that affordable conventional insurance protection was virtually unavailable to the Tribe. When the proposed plan creating Reservation Risk Management was submitted to the RBC, none of its members had a personal stake in RRM. Finn wrote the RBC to emphasize that his personal involvement in RRM created a need for the RBC to obtain an independent assessment of the proposed plan from outside counsel.

The government has not established that Finn obstructed the investigation. The record suggests multiple scenarios regarding the missing RRM invoice and Tribal Council checks:

(1) they were misplaced, lost or destroyed in the 1988 occupation of the tribal officers;

(2) they were sent to AUSA Anderson in 1991 in response to the first Grand Jury Subpoena and lost somewhere along the line;

(3) they were destroyed by a contractor remodeling tribal offices in 1992. See Exhibit 11 at ¶ 8;

(4) the $7600 invoice, but evidently not the $5745 invoice, was destroyed in 1992 after Finn instructed Howard to destroy it in 1991; and/or

(5) they were last seen during 1993 in records assembled for shipment to counsel representing the Tribal Business Council.

The government advances the self-contradictory and admittedly bargained for testimony of Burton Howard and co-defendant Ellis in support of the fourth scenario. In view of the extended and confusing record regarding the existence and production or non-production of these documents, including the inherently contradictory and self-serving explanations provided by Howard and co-defendant Ellis, no objective fact-finder could conclude that the government has sustained its burden of proof to support the claim that defendant Finn obstructed the investigation. This is particularly so considering the disinterested testimony of George Wells who saw both invoices in a box of documents assembled for counsel in 1993.

The government has not substantiated its claim that Finn abused a position of trust or utilized a special skill in a manner which substantially facilitated the offense to which Finn pled guilty. The government's claim that Finn, as tribal attorney, took advantage of the RBC in 1985 is not germane to the Information

charging that he made a $13,345 bridge loan with RRM funds in 1988. There is no Grand Jury charge that Finn devised and carried out a scheme to defraud in connection with the formation or operation of RRM. Nor does the government articulate facts which would prove such a charge. Finn's November 1985, letter cautioning the RBC to seek an independent legal review of the RRM documents and the Tribe's own resolution No. 95-76 negate the claim that Finn unduly influenced the RBC members to adopt the RRM plan.

The government has not sustained its claim that the 1988 payments to Ellis were kickbacks. To the contrary, the record reflects that Finn agreed to the Tribal Council's proposal that RRM monies be used to satisfy wage claims of the RBC Executive Director. This bridge loan addressed the RBC's liquidity problem and gave them cover from dissident complaints at a time when an explosive political climate prevailed on the reservation. In summary, the government fails to meet its burden of proving facts to support sentence enhancements it seeks. Accordingly, the proposed adjustments must be denied.

Respectfully submitted,

DOUGLAS A. KELLEY, P.A.

Dated: March 1, 1995

Steven E. Wolter

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(612) 337-9594

ATTORNEYS FOR HAROLD "SKIP" FINN

Leech Lake Tribal Council

IN REPLY REFER TO:

LEECH LAKE RESERVATION TRIBAL COUNCIL
RESOLUTION NO. 95-76

WHEREAS, the Leech Lake Reservation Tribal Council is the duly organized governing body of the Leech Lake Reservation and has full authority for managing tribal governmental and business affairs; and

WHEREAS, the Leech Lake Reservation Tribal Council has the greatest respect for what Harold "Skip" Finn, a Leech Lake Band member, has accomplished since his election in 1990 as the first Indian to the Minnesota State Senate; and

WHEREAS, the Leech Lake Reservation Tribal Council is aware that the Minnesota State Senate and the State Lawyers Board of Professional Responsibility are being asked to review the business and professional relationship which existed from 1985 to 1990 between Harold "Skip" Finn, Reservation Risk Management, Inc. and the Leech Lake Reservation Tribal Council; and

WHEREAS, the original investigation which began in 1990 was not at the request of the Leech Lake Tribal Council but rather at the request of individuals who did not understand and did not want to understand the nature of the business factors which led to the relationship with Reservation Risk Management, Inc., and

WHEREAS, Leech Lake was without casualty and liability insurance for several months in 1985 because insurance costs had risen dramatically for several years and Leech Lake could no longer afford to purchase a commercial policy at the only quote Leech Lake could get in 1985; and

WHEREAS, Leech Lake had requested and considered several alternatives including self-insurance before settling upon an option through Reservation Risk Management, Inc.; and

WHEREAS, the Leech Lake Reservation Tribal Council was informed of the personal financial interest of Skip Finn in Reservation Risk Management, Inc., had the opportunity to consult with other independent legal counsel, and

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discussed the proposed business relationship at several open Tribal Council meetings prior to accepting the proposal; and

WHEREAS, the Leech Lake Reservation Tribal Council made an informed decision as to what was in the best interest of Leech Lake based upon its financial situation and insurance needs in 1985 when it entered the business arrangement with Reservation Risk Management, Inc.; and

WHEREAS, all claims arising under the insuring arrangement with Reservation Risk Management, Inc. were timely paid and resolved, and the Leech Lake Reservation ended up saving a substantial amount of money that otherwise would have been wasted on other commercial insurance arrangements; and

WHEREAS, this matter was reviewed by the United State Department of Interior--Office of Inspector General and Bureau of Indian Affairs in 1988 at the request of Leech Lake's independent auditors, and having been retroactively approved to the date of its inception by the Bureau of Indian Affairs after review of costs and coverage;

NOW, THEREFORE, BE IT RESOLVED, that the Leech Lake Reservation Tribal Council extends its full support to Senator "Skip" Finn, suggests that any state investigation into the relationship between the Leech Lake Band and Senator Finn is unwarranted, and further concludes that any such investigation and unwanted intrusion into the affairs of a separate sovereign government.

BE IT FURTHER RESOLVED, that the Chairman and Secretary/Treasurer are directed to notify both the Minnesota State Senate and the State Lawyers Board of Professional Responsibility of this resolution.

WE DO HEREBY CERTIFY that the foregoing resolution was duly presented and adopted by a vote of 3 for, and 0 against, and 1 abstaining, at a Special Meeting of the Leech Lake Tribal Council, a quorum being present, held on January 6, 1995 at Walker, Minnesota.

Alfred R. Pemberton, Chairman
LEECH LAKE TRIBAL COUNCIL

Daniel S. Brown, Secretary-Treasurer
LEECH LAKE TRIBAL COUNCIL

Leech Lake Tribal Council

IN REPLY REFER TO:

LEECH LAKE TRIBAL COUNCIL
RESOLUTION NO. 95-77

WHEREAS, the Leech Lake Reservation Tribal Council is the duly organized governing body of the Leech Lake Reservation and has full authority for managing tribal governmental and business affairs; and

WHEREAS, Myron Ellis has entered a plea of guilty to a federal misdemeanor charge of misapplication of less than $100.00 in tribal funds belonging to the Leech Lake Reservation; and

WHEREAS, the charge relates to April 1988 and August 1988 payments made by the Reservation Risk Management, Inc. to Myron Ellis and having conducted extensive research into the matter, it is clear that the Leech Lake Reservation Tribal Council did request and authorize the payments to Myron Ellis which represented a retroactive pay raise and back wages; and

WHEREAS, these payments to Myron Ellis were not in violation of policies and procedures of the Leech Lake Reservation which existed in 1988, although the method of reimbursement to Reservation Risk Management violated federal law;

NOW, THEREFORE, BE IT RESOLVED, that the Leech Lake Reservation Tribal Council extends its unqualified support to Myron Ellis; and

BE IT FURTHER RESOLVED, that the Chairman and Secretary/Treasurer are directed to provide a certified copy of this Resolution to Judge James Rosenbaum.

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(218) 335-8200 • FAX (218) 335-8309

* * * * * * * * * *

WE DO HEREBY CERTIFY, that the foregoing Resolution was duly presented and adopted by a vote of 3 for, 0 against, and 1 abstaining, at a SPECIAL meeting of the LEECH LAKE RESERVATION TRIBAL COUNCIL, a quorum being present, held on January 6, 19 95, at Walker, Minnesota.

Alfred R. Pemberton, Chairman
LEECH LAKE RESERVATION TRIBAL COUNCIL

Daniel Brown, Secretary/Treasurer
LEECH LAKE RESERVATION TRIBAL COUNCIL

HAROLD "SKIP" FINN
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Senate

State of Minnesota

TO: Senator Ember Reichgott Junge, Chair
Senate Subcommittee on Ethical Conduct

FROM: Senator Skip Finn

DATE: March 9, 1995

I will not attend the meeting of the Subcommittee scheduled for Friday, March 10th. I am not sure what your agenda includes. Until I know what ethical rule or rules or standard or standards of conduct against which the allegations are to be measured, I am not in any position to respond to the IR Caucus complaint. I also restate my very firm belief that the Minnesota Senate has no constitutional authority to consider any allegations or accusations against me which are based upon conduct prior to the commencement of my service in the Minnesota Senate.

Under Pavlak v. Growe, 284 N.W.2d 174 (Minn. 1979), the Minnesota Senate cannot impose requirements for membership in this body beyond those authorized by the Minnesota Constitution. The Minnesota Supreme Court therein held that there is no basis to give Article IV, Section 6 of the Minnesota Constitution a meaning different from that given to the federal provision by the United States Supreme Court in Powell v. McCormack, 395 U.S. 486, 89 S.Ct 1944 (1969). The Minnesota Supreme Court went on to adopt the restrictive interpretation of Powell. The attempt of the IR Caucus to seek my expulsion/exclusion from the Minnesota Senate based upon accusations relating to activities prior to my service in the Minnesota Senate is clearly an effort to impose a requirement upon me that is not required by the Minnesota Constitution. You have no such authority.

COMMITTEES: Vice Chair, Judiciary • Environment and Natural Resources • Environment and Natural Resources Funding Division • Health Care • Taxes and Tax Laws • Chair, Public Lands and Waters Subcommittee of Environment and Natural Resources • Co-Chair, Privacy Subcommittee of Judiciary and Crime Prevention

The only other constitutional provision which gives you any authority to review my actions is strictly limited to behavior and conduct occurring after my election and commencement of service as a State Senator. In this context, I do not believe that you can retroactively apply the rules and standards which were adopted in 1994 to measure the allegations of misconduct which arose before the rules were adopted.

I again respectfully request that I be informed of the specific rule or ethical standard against which the accusations are to be measured. You cannot determine "probable cause" in a vacuum. If you are to consider whether or not there is "probable cause" to proceed, you can only do so by determining that there is "probable cause" to believe that I have violated Rule or Standard X, Y or Z.

cc: Senator Roger Moe, Majority Leader

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

March 10, 1995
Room 125 Capitol

The subcommittee was called to order at 9:15 a.m.

PRESENT: Senators Frederickson, Novak, Reichgott Junge, Terwilliger

Sen. Reichgott Junge; presented introductory comments.

Sen. Frederickson; additional comments regarding proper proceedings and action of the subcommittee.

Sen. Terwilliger; additional comments.

Sen. Novak moved for subcommittee representatives (Sens. Reichgott Junge, Frederickson, and Senate Counsel Peter Wattson) to seek counsel with the U.S. Attorney. The motion passed by voice vote.

Sen. Reichgott Junge presented changes to Rule 75 as passed by the Permanent and Joint Rules Subcommittee. Discussion followed.

Sen. Frederickson moved to recommend passage of the new language to Rule 75. The motion passed by voice vote.

Peter Wattson, Senate Counsel; presented background of plea agreement in United States vs. Finn. Discussion followed.

Peter Wattson; discussed issue of conduct prior to legislative service and the role of the Senate to investigate members' conduct and impose disciplinary action. Presented materials on Powell vs. McCormack (attached).

The meeting adjourned at 10:50 a.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

3/18/94

COMMITTEE ON ETHICAL CONDUCT
RULES OF PROCEDURE

1. All proceedings of the Committee will be conducted in accordance with Senate Rule 75.

2. Upon receipt of a properly executed complaint, the chair will notify the accused and the other members of the Committee.

3. The Committee will try to complete its work and report to the Senate before adjournment.

4. While the Committee is proceeding in executive session, all members, staff, and witnesses shall keep the proceedings of the Committee in confidence, except that after each meeting the chair shall make available to the public a brief statement about the general subject of the Committee's inquiry for that meeting.

5. Witnesses will be called at the request of any member of the Committee.

6. As soon as the agenda for a meeting has been finalized committee members and the public will be notified. If a meeting will be in executive session, the notice will so state.

7. All evidence provided by witnesses will be under oath.

8. Evidence presented at hearings conducted by the Committee will be in the following order:

   a. Evidence provided by complainant.
   b. Evidence provided by accused.
   c. Evidence requested by Committee.
   d. Rebuttal evidence by complainant or accused.

9. The order of procedure on the testimony of each witness will be as follows:

   a. Testimony by the witness either in the form of a statement or in response to questions by the party calling the witness.
   b. Examination of the witness by members of the Committee or Committee counsel.
   c. Cross-examination of the witness by the accused or in case of witnesses for the accused, by the complainant.
   d. Additional examination in the same order as a, b, and c.

10. The committee will consider all evidence that is competent, relevant, and material, and will not be strictly bound by the rules of evidence applicable to judicial proceedings.

11. All parties and witnesses are entitled to appear with counsel.

12. Tape recordings and minutes of proceedings in executive session shall be kept confidential until the Committee has concluded the confidential portion of its inquiry and shall then be made available to the public through the Legislative Reference Library and the Secretary of the Senate as provided in Rule 65.

13. Relevant portions of the taped record of Committee proceedings will be transcribed at the request of any member of the Committee, subject to the requirements of confidentiality while the Committee is meeting in executive session.

14. A witness will be furnished a certified transcript of the witness' testimony upon request and at the witness' expense.

15. The Committee, after hearing all evidence, will make findings of fact and recommendations to the Senate in accordance with Rule 75.

16. Findings of fact will be based upon a fair preponderance of the evidence.

17. The burden of proving a violation of Rule 75 is on the complainant.

18. After action by the Senate on recommendations of the Committee, all evidence will be returned to its proper owner.

PSW:lar

Introduction of visitors

73. No introduction of a visitor or visitors in the galleries shall be made from the floor or rostrum of the Senate.

Smoking

74. No person is permitted to smoke in the Senate Chamber, Retiring Room, hearing rooms, or other spaces under the control of the Senate. There shall be no smoking in the visitors section of the galleries.

Ethical conduct

75. The Subcommittee on Committees shall appoint a Special Committee on Ethical Conduct consisting of four members, two from the majority and two from the minority.

The committee shall serve in an advisory capacity to a member or employee upon written request and shall issue recommendations to the member or employee.

A lobbyist shall not appear before a Senate committee pursuant to his employment unless the lobbyist is in compliance with the law requiring lobbyist registration, Minnesota Statutes, Sections 10A.03 to 10A.06. A lobbyist when appearing before a committee shall disclose to the committee those in whose interest the lobbyist speaks and the purpose of the lobbyist's appearance. A lobbyist shall not knowingly furnish false or misleading information or make a false or misleading statement that is relevant and material to a matter before the Senate or any of its committees when the lobbyist knows or should know it will influence the judgment or action of the Senate or any of its committees thereon. A lobbyist shall not exert undue influence or expend improper sums of money in connection with any legislation.

The committee shall investigate a complaint by a member of the Senate in writing under oath received during a legislative session regarding improper conduct by a member or employee of the Senate or a lobbyist. The committee has the powers of a standing committee to issue subpoenas pursuant

to Minnesota Statutes, Section 3.153. In order to determine whether there is probable cause to believe that improper conduct has occurred, the committee may, by a vote of three of its members, conduct a preliminary inquiry in executive session to which the requirements of Rule 58 do not apply. Upon a finding of probable cause, further proceedings on the complaint are open to the public. If, after investigation, the committee finds the complaint substantiated by the evidence, it shall recommend to the Senate appropriate disciplinary action.

Any person may submit to the Chair of the Committee on Rules and Administration a complaint that members have violated the open meeting requirements of Minnesota Statutes, section 3.055. A member of the Senate may submit the complaint either orally or in writing; others must submit the complaint in writing. Whether the complaint was written or oral, the Chair of the Committee on Rules and Administration shall immediately forward it in writing to the Special Committee on Ethical Conduct without disclosing the identity of the complainant. The complaint must not be further disclosed, except to the members against whom the complaint was made, unless the complaint was made by a member of the Senate in writing under oath, in which case the investigatory procedures of this rule apply.

Members shall adhere to the highest standard of ethical conduct as embodied in the Minnesota Constitution, state law, and these rules.

A member shall not publish or distribute written material if the member knows or has reason to know that the material includes any statement that is false or clearly misleading, concerning a public policy issue or concerning the member's or another member's voting record or position on a public policy issue.

POWELL v. McCORMACK (1969)

rather than without the House. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves.[25] In *Kilbourn* and *Dombrowski*

506

we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, though this action may be dismissed against the Congressmen petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell.[26] As was said in *Kilbourn*, in language which time has not dimmed:

> "Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution: and if they have not, to treat their acts as null and void." 103 U.S., at 199.

25. A Congressman is not by virtue of the Speech or Debate Clause absolved of the responsibility of filing a motion to dismiss and the trial court must still determine the applicability of the clause to plaintiff's action. See Tenney v. Brandhove, 341 U.S. 367, 377, 71 S.Ct. 783, 788 (1951).

26. Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available. Cf. Kilbourn v. Thompson, 103 U.S. 168, 204–205 (1881).

IV.

EXCLUSION OR EXPULSION.

[16] The resolution excluding petitioner Powell was adopted by a vote in excess of two-thirds of the 434 Members of

507

Congress—307 to 116. 113 Cong.Rec. 5037–5038, Article I, § 5, grants the House authority to expel a member "with the Concurrence of two thirds." [27] Respondents assert that the House may expel a member for any reason whatsoever and that, since a two-thirds vote was obtained, the procedure by which Powell was denied his seat in the 90th Congress should be regarded as an expulsion, not an exclusion. Cautioning us not to exalt form over substance, respondents quote from the concurring opinion of Judge McGowan in the court below:

> "Appellant Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues * * * to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a ⅔ vote was forthcoming. It was. Therefore, success for Mr. Powell on the

27. Powell was "excluded" from the 90th Congress, i. e., he was not administered the oath of office and was prevented from taking his seat. If he had been allowed to take the oath and subsequently had been required to surrender his seat, the House's action would have constituted an "expulsion." Since we conclude that Powell was excluded from the 90th Congress, we express no view on what limitations may exist on Congress' power to expel or otherwise punish a member once he has been seated.

merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade." 129 U.S.App.D.C., at 383–384, 395 F.2d, at 606–607.

508

Although respondents repeatedly urge this Court not to speculate as to the reasons for Powell's exclusion, their attempt to equate exclusion with expulsion would require a similar speculation that the House would have voted to expel Powell had it been faced with that question. Powell had not been seated at the time House Resolution No. 278 was debated and passed. After a motion to bring the Select Committee's proposed resolution to an immediate vote had been defeated, an amendment was offered which mandated Powell's exclusion.[28] Mr. Celler, chairman of the Select Committee, then posed a parliamentary inquiry to determine whether a two-thirds vote was necessary to pass the resolution if so amended "in the sense that it might amount to an expulsion." 113 Cong.Rec. 5020. The Speaker replied that "action by a majority vote would be in accordance with the rules." *Ibid.* Had the amendment been regarded as an attempt to expel Powell, a two-thirds vote would have been constitutionally required. The Speaker ruled that the House was voting to exclude Powell, and we will not speculate what the result might have been if Powell had been seated and expulsion proceedings subsequently instituted.

Nor is the distinction between exclusion and expulsion merely one of form. The misconduct for which Powell was charged occurred prior to the convening of the 90th Congress. On several occasions the House has debated whether a member can be expelled for actions taken during a prior Congress and the House's own manual of procedure applicable in the 90th Congress states that "both Houses have distrusted their power to punish in such cases." Rules of the House of Representatives, H.R.Doc. No. 529, 89th Cong., 2d Sess., 25 (1967);

509

see G. Galloway, History of the House of Representatives 32 (1961). The House rules manual reflects positions taken by prior Congresses. For example, the report of the Select Committee appointed to consider the expulsion of John W. Langley states unequivocally that the House will not expel a member for misconduct committed during an earlier Congress:

> "[I]t must be said that with practical uniformity the precedents in such cases are to the effect that the House will not expel a Member for reprehensible action prior to his election as a Member, not even for conviction for an offense. On May 23, 1884, Speaker Carlisle decided that the House had no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected a Member, and added, 'That has been so frequently decided in the House that it is no longer a matter of dispute.'" H.R.Rep. No. 30, 69th Cong., 1st Sess., 1–2 (1925).[29]

28. House Resolution No. 278, as amended and adopted, provided: "That said Adam Clayton Powell * * * be and the same hereby is *excluded* from membership in the 90th Congress * * *." 113 Cong. Rec. 5020. (Emphasis added.)

29. Other Congresses have expressed an identical view. The Report of the Judiciary Committee concerning the proposed expulsion of William S. King and John G. Schumaker informed the House:

> "Your committee are of opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. This is purely a legislative body, and entirely unsuited for the trial of crimes. The fifth section of the first article of the Constitution authorizes 'each house to determine the rules of its proceedings, punish its members for disorderly behavior, and,' with the con-

510

Members of the House having expressed a belief that such strictures apply to its own power to expel, we will not assume that two-thirds of its members would have expelled Powell for his prior conduct had the Speaker announced that House Resolution No. 278 was for expulsion rather than exclusion.[30]

[17] Finally, the proceedings which culminated in Powell's exclusion cast considerable doubt upon respondents' assumption that the two-thirds vote necessary to expel would have been mustered. These proceedings have been succinctly described by Congressman Eckhardt:

"The House voted 202 votes for the previous question [31] leading toward the adoption of the [Select] Committee report. It voted 222 votes against the previous question, opening the floor for the Curtis Amendment which ultimately excluded Powell.

511

"Upon adoption of the Curtis Amendment, the vote again fell short of two-thirds, being 248 yeas to 176 nays. Only on the final vote, adopting the Resolution as amended, was more than a two-thirds vote obtained, the vote being 307 yeas to 116 nays. On this last vote, as a practical matter, members who would not have denied Powell a seat if they were given the choice to punish him had to cast an aye vote or else record themselves as opposed to the only punishment that was likely to come before the House. Had the matter come up through the processes of expulsion, it appears that the two-thirds vote would have failed, and then members would have been able to apply a lesser penalty." [32]

currence of two-thirds, expel a member.' This power is evidently given to enable each house to exercise its constitutional function of legislation unobstructed. It cannot vest in Congress a jurisdiction to try a member for an offense committed before his election; for such offense a member, like any other citizen, is amenable to the courts alone." H.R.Rep.No.815, 44th Cong., 1st Sess., 2 (1876). See also 15 Cong.Rec. 4434 (1884) (ruling of the Speaker); H.R.Rep.No.81, 42d Cong., 3d Sess., 8 (1873) (expulsion of James Brooks and Oakes Ames); H.R. Rep.No.179, 35th Cong., 1st Sess., 4–5 (1858) (expulsion of Orsamus B. Matteson).

30. We express no view as to whether such a ruling would have been proper. A further distinction between expulsion and exclusion inheres in the fact that a member whose expulsion is contemplated may as a matter of right address the House and participate fully in debate while a member-elect apparently does not have a similar right. In prior cases the member whose expulsion was under debate has been allowed to make a long and often impassioned defense. See Cong. Globe, 42d Cong., 3d Sess., 1723 (1873) (expulsion of Oakes Ames); Cong. Globe, 41st Cong., 2d Sess., 1524–1525, 1544 (1870) (expulsion of B. F. Whittemore); Cong. Globe, 34th Cong., 3d Sess., 925–926 (1857) (expulsion of William A. Gilbert): Cong. Globe, 34th Cong., 3d Sess., 947–951 (1857) (expulsion of William W. Welch); 9 Annals of Cong. 2966 (1799) (expulsion of Matthew Lyon). On at least one occasion the member has been allowed to cross-examine other members during the expulsion debate. 2 A. Hinds. Precedents of the House of Representatives § 1643 (1907).

31. A motion for the previous question is a debate-limiting device which, when carried, has the effect of terminating debate and of forcing a vote on the subject at hand. See Rules of the House of Representatives, H.R.Doc.No.529, 89th Cong., 2d Sess., §§ 804–809 (1967); Cannon's Procedure in the House of Representatives, H.R.Doc.No.610, 87th Cong., 2d Sess., 277–281 (1963).

32. Eckhardt, The Adam Clayton Powell Case, 45 Texas L.Rev. 1205, 1209 (1967). The views of Congressman Eckhardt were echoed during the exclusion proceedings. Congressman Cleveland stated that, although he voted in favor of and supported the Select Committee's recommendation, if the exclusion amendment received a favorable vote on the motion for the previous question, then he would support the amendment "on final passage." 113 Cong.Rec. 5031. Congressman Gubser was even more explicit:

"I shall vote against the previous question on the Curtis amendment simply be-

We need express no opinion as to the accuracy of Congressman Eckhardt's prediction that expulsion proceedings would have produced a different result. However, the House's own views of the extent of its power to expel

512

combined with the Congressman's analysis counsel that exclusion and expulsion are not fungible proceedings. The Speaker ruled that House Resolution No. 278 contemplated an exclusion proceeding. We must reject respondents' suggestion that we overrule the Speaker and hold that, although the House manifested an intent to exclude Powell, its action should be tested by whatever standards may govern an expulsion.

V.

SUBJECT MATTER JURISDICTION.

[18, 19] As we pointed out in Baker v. Carr, 369 U.S. 186, 198, 82 S.Ct. 691, 699, 7 L.Ed.2d 663 (1962), there is a significant difference between determining whether a federal court has "jurisdiction of the subject matter" and determining whether a cause over which a court has subject matter jurisdiction is "justiciable." The District Court determined that "to decide this case on the merits * * * would constitute a clear violation of the doctrine of separation of powers" and then dismissed the complaint "for want of jurisdiction of the subject matter." Powell v. McCormack, 266 F.Supp. 354, 359, 360 (D.C.D.C. 1967). However, as the Court of Appeals correctly recognized, the doctrine of separation of powers is more properly considered in determining whether the case is "justiciable." We agree with the unanimous conclusion of the Court of Appeals that the District Court had jurisdiction over the subject matter of this case.[33] However, for reasons set forth in Part VI, *infra*, we disagree with the Court of Appeals' conclusion that this case is not justiciable.

[20, 21] In Baker v. Carr, *supra*, we noted that a federal district court lacks jurisdiction over the subject matter (1) if the

513

cause does not "arise under" the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Art. III); or (2) if it is not a "case or controversy" within the meaning of that phrase in Art. III; or (3) if the cause is not one described by any jurisdictional statute. And, as in Baker v. Carr, *supra*, our determination (see Part VI, B(1) *infra*) that this cause presents no nonjusticiable "political question" disposes of respondents' contentions[34] that this cause is not a "case or controversy."[35]

cause I believe future and perfecting amendments should be allowed. But if the previous question is ordered, then I will be placed on the horns of an impossible dilemma.

"Mr. Speaker, I want to expel Adam Clayton Powell, by seating him first, but that will not be my choice when the Curtis amendment is before us. I will be forced to vote for exclusion, about which I have great constitutional doubts, or to vote for no punishment at all. Given this raw and isolated issue, the only alternative I can follow is to vote for the Curtis amendment. I shall do so, Mr. Speaker, with great reservation." *Ibid.*

33. Although each judge of the panel wrote a separate opinion, all were clear in stating that the District Court possessed subject matter jurisdiction. Powell v. McCormack, 129 U.S.App.D.C. 354, 368, 384, 385, 395 F.2d 577, 591, 607, 608 (1968).

34. We have determined that the case is not moot. See Part II, *supra*.

35. Indeed, the thrust of respondents' argument on this jurisdictional issue is similar to their contentions that this case presents a nonjusticiable "political question." They urge that it would have been "unthinkable" to the Framers of the Constitution for courts to review the decision of a legislature to exclude a member. However, we have previously determined that a claim alleging that a legislature has abridged an individual's constitutional rights by refusing to seat an elected representative constitutes a "case or controversy" over which federal courts have jurisdiction. See Bond v. Floyd, 385

Rule 75 is amended to read:

ETHICAL CONDUCT

75. The Subcommittee on Committees shall appoint a ~~special committee~~ Subcommittee on Ethical Conduct of the Committee on Rules and Administration consisting of four members, two from the majority and two from the minority.

The ~~committee~~ subcommittee shall serve in an advisory capacity to a member or employee upon written request and shall issue recommendations to the member or employee.

~~A lobbyist shall not appear before a Senate committee pursuant to the lobbyist's employment unless the lobbyist is in compliance with the law requiring lobbyist registration, Minnesota Statutes, Sections 10A.03 to 10A.06. A lobbyist when appearing before a committee shall disclose to the committee those in whose interest the lobbyist speaks and the purpose of the lobbyist's appearance. A lobbyist shall not knowingly furnish false or misleading information or make a false or misleading statement that is relevant and material to a matter before the Senate or any of its committees when the lobbyist knows or should know it will influence the judgment or action of the Senate or any of its committees thereon. A lobbyist shall not exert undue influence or expend improper sums of money in connection with any legislation.~~

The ~~committee~~ subcommittee shall investigate a complaint by

a member of the Senate in writing under oath received during a legislative session regarding improper conduct by a member or employee of the Senate or a lobbyist. Improper conduct includes conduct that violated a rule or administrative policy of the Senate, that violated accepted norms of Senate behavior, that betrayed the public trust, or that tended to bring the Senate into dishonor or disrepute. Conduct that occurred before the accused became a member or employee of the Senate or a lobbyist is subject to disciplinary action if it bears a reasonable relationship to the accused's fitness to continue as a member or employee of the Senate or as a lobbyist. If criminal proceedings relating to the same conduct have begun, the subcommittee may defer its own proceedings until the criminal proceedings have been completed. The ~~committee~~ subcommittee has the powers of a standing committee to issue subpoenas pursuant to Minnesota Statutes, Section 3.153. In order to determine whether there is probable cause to believe that improper conduct has occurred, the ~~committee~~ subcommittee may, by a vote of three of its members, conduct a preliminary inquiry in executive session to which the requirements of Rule 58 do not apply. The executive session may be ordered by a vote of three of its members whenever the subcommittee determines that matters relating to probable cause are likely to be discussed. Upon a finding of probable cause, further proceedings on the complaint are open to the public. To minimize disruption of its public proceedings, the subcommittee may require that television coverage be pooled or be provided by Senate media services. If, after investigation, the ~~committee~~ subcommittee finds the complaint substantiated by the evidence, it shall recommend to the ~~Senate~~ Committee on Rules and Administration appropriate disciplinary action.

~~Any person may submit to the Chair of the Committee on Rules and Administration a complaint that members have violated the open meeting requirements of Minnesota Statutes, section 3.055. A member of the Senate may submit the complaint either orally or in writing; others must submit the complaint in~~

~~writing.--Whether the complaint was written or oral, the Chair of the Committee on Rules and Administration shall immediately forward it in writing to the Special Committee on Ethical Conduct without disclosing the identity of the complainant.--The complaint must not be further disclosed, except to the members against whom the complaint was made, unless the complaint was made by a member of the Senate in writing under oath, in which case the investigatory procedures of this rule apply.~~

Members shall adhere to the highest standard of ethical conduct as embodied in the Minnesota Constitution, state law, and these rules.

A member shall not publish or distribute written material if the member knows or has reason to know that the material includes any statement that is false or clearly misleading, concerning a public policy issue or concerning the member's or another member's voting record or position on a public policy issue.

Rule 76 is added to read:

LOBBYISTS

76. A lobbyist shall not appear before a Senate committee pursuant to the lobbyist's employment unless the lobbyist is in compliance with the law requiring lobbyist registration, Minnesota Statutes, sections 10A.03 to 10A.06. A lobbyist, when appearing before a committee, shall disclose to the committee those in whose interest the lobbyist speaks and the purpose of the lobbyist's appearance. A lobbyist shall not knowingly furnish false or misleading information or make a false or misleading statement that is relevant and material to a matter before the Senate or any of its committees when the lobbyist knows or should know it will influence the judgment or action of the Senate or any of its committees thereon. A lobbyist shall not exert undue influence or expend improper sums of money in connection with any legislation.

Rule 77 is added to read:

OPEN MEETING COMPLAINTS

77. Any person may submit to the Chair of the Committee on

Rules and Administration a complaint that members have violated the open meeting requirements of Minnesota Statutes, section 3.055. A member of the Senate may submit the complaint either orally or in writing; others must submit the complaint in writing. Whether the complaint was written or oral, the Chair of the Committee on Rules and Administration shall immediately forward it in writing to the Subcommittee on Ethical Conduct without disclosing the identity of the complainant. The complaint must not be further disclosed without the consent of the complainant, except to the members against whom the complaint was made, unless the complaint was made by a member of the Senate in writing under oath, in which case the investigatory procedures of rule 75 apply.

U.S. Department of Justice

United States Attorney
District of Minnesota

234 United States Courthouse
110 South Fourth Street
Minneapolis, Minnesota 55401

612/348-1500

March 14, 1995

VIA MESSENGER

State Senator Ember Reichgott Junge
Room 205, State Capitol
St. Paul, Minnesota 55155

State Senator Dennis Frederickson
139 State Office Building
St. Paul, Minnesota 55155

Re: **State Senator Harold "Skip" Finn**

Dear Senators:

It was a pleasure to meet with you and Senate Counsel Peter S. Wattson on Friday, March 10, to receive information concerning the Minnesota State Senate's disciplinary rules and procedures. As has been publicly disclosed, a criminal charge is pending against Senator Harold "Skip" Finn and this Office plans to present the case to a grand jury for possible indictment.

Notwithstanding this pending matter, I understand and respect the need for the State Senate to address issues of ethics and integrity involving one of its members. Accordingly, this Office does not wish to interfere in any way with State Senate ethics proceedings against Senator Finn.

By the way, press reports that my Office asked that the State Senate take no action until Senator Finn's March 3 sentencing are erroneous. This Office asked only that the State Senate not convene hearings until certain affidavits were received by the United States. Those affidavits were, in fact, received in January and, by letter dated January 30, 1995 to Senate Counsel Wattson, this Office confirmed that the State Senate could and should proceed however it wished.

Sincerely,

DAVID L. LILLEHAUG
United States Attorney

DLL:rmh
cc: Senate Counsel Peter S. Wattson

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

March 21, 1995
Room 237 Capitol

The subcommittee was called to order at 8:45 a.m.

PRESENT: Senators Frederickson, Novak, Reichgott Junge, Terwilliger

Sen. Reichgott Junge; opening statements and introduction.

Sen. Frederickson; additional opening comments.

Sen. Reichgott Junge; began presentation of proposed changes to Rule 75.

Dan Wolf, Senate I-R Caucus; presented the RULE75A-6 amendment. Discussion followed.

Sen. Finn; gave comments regarding proposed changed to Rule 75. Discussion followed.

Sen. Reichgott Junge; standard of proof issues and the use of public dollars in ethics complaints. Discussion followed.

Sen. Neuville; presented I-R caucus complaint and suggestions as to subcommittee procedure. Discussion followed.

Sen. Finn; comments regarding the complaint and procedure of the subcommittee. Discussion followed.

The meeting adjourned at 10:35 a.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

Senate Counsel & Research

G-17 STATE CAPITOL
ST. PAUL, MN 55155
(612) 296-4791
FAX (612) 296-7747

JO ANNE ZOFF SELLNER
DIRECTOR

Senate

State of Minnesota

March 28, 1995

To: Senator Ember Reichgott Junge

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: *Johnson v. Finn* Procedural Questions

At the meeting of the Special Committee on Ethical Conduct March 21 you asked two procedural questions, which I shall answer here.

1. What is the standard of proof in disciplinary proceedings before the Lawyers Board of Professional Responsibility?

"The director [of the board] must prove misconduct by clear and convincing evidence." *In re Jensen*, 468 N.W.2d 541 (Minn. 1991). *See also*, Rule 9 (I), Rules on Lawyers Professional Responsibility ("the Panel's purpose is to determine whether the Panel should affirm the admonition on the ground that it is supported by clear and convincing evidence")

The Minnesota Supreme Court has rejected arguments that the criminal standard of proof "beyond a reasonable doubt" should apply in lawyers' disciplinary proceedings. *In re Schmidt*, 402 N.W.2d 544 (Minn. 1987). The court has observed that criminal sanctions cannot be invoked for violations of the disciplinary rules, and therefore, criminal safeguards do not apply. *In re Hanratty*, 277 N.W.2d 373, 376 (Minn. 1979).

2. What restrictions does Rule 11 of the Federal Rules of Criminal Procedure place on actions of the Special Committee on Ethical Conduct?

Rule 11 of the Federal Rules of Criminal Procedure provides in part:

(e) (6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;
(B) a plea of nolo contendere;
(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Rule 11 is a federal procedural rule that must be observed scrupulously by the federal courts, but the precise terms of the rule are not constitutionally applicable to state courts. *Roddy v. Black,* 516 F.2d 1380 (6th Cir. 1975), *cert. denied* 423 U.S. 917, 96 S.Ct. 226, 46 L.Ed.2d 147.

The requirement that a plea agreement and related statements be inadmissible in other proceedings is not a constitutional requirement, but rather a rule designed to promote efficiency in the administration of justice by encouraging defendants to enter into plea negotiations. The argument in its favor is that, if defendants can be assured that they may speak freely in plea negotiations, they will be more likely to negotiate a plea and thus reduce the burden on the federal courts of conducting trials in criminal cases.

The federal government has adopted a similar rule, Rule 410 of the Rules of Evidence, for civil proceedings in the federal courts.

While state courts are not bound by Rule 11 of the Federal Rules of Criminal Procedure or Rule 410 of the Federal Rules of Evidence, Minnesota has adopted similar rules for our state courts. Rule 15.06 of the Rules of Criminal Procedure provides:

15.06 Plea Discussions and Agreements Not Admissible
If the defendant enters a plea of guilty which is not accepted or which is withdrawn, neither the plea discussions, nor the plea agreement, nor the plea shall be received in evidence against or in favor of the defendant in any criminal, civil, or administrative proceeding.

Rule 410 of the Minnesota Rules of Evidence provides:

Rule 410 Offer to Plead Guilty; Nolo Contendere, Withdrawn Plea of Guilty
Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an

> offer to plead guilty or nolo contendere to the crime charged or any other crime or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil, criminal, or administrative action, case, or proceeding whether offered for or against the person who made the pleas or offer.

Note that, while the federal rule prohibits use of the plea and related statements *against* the defendant in another proceeding, the state rule prohibits their use either for or against the defendant.

So, it is clear that the statements made by Senator Finn in connection with his plea of guilty to the charge of wilfully misapplying not more than $100 in funds of the Leech Lake Band would not be admissible against him in federal court and would not be admissible either for or against him in state court in Minnesota.

What rules apply to the Special Committee on Ethical Conduct? The Minnesota Constitution gives each house of the Legislature the right to set its own rules for its proceedings and discipline its own members. Article IV, § 7 provides:

> Sec. 7. **Rules of government.** Each house may determine the rules of its proceedings, sit upon its own adjournment, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member; but no member shall be expelled a second time for the same offense.

The Senate has adopted Rule 75 to govern proceedings of the Special Committee on Ethical Conduct, and the Committee has adopted Rules of Procedure that say:

> 10. The committee will consider all evidence that is competent, relevant, and material, and will not be strictly bound by the rules of evidence applicable to judicial proceedings.

Thus, the Committee has reserved to itself the right to decide what evidence is appropriate for it to consider. In making its decision in this case, the Committee will want to consider whether to exercise comity in recognizing the rules of evidence in the state and federal courts and the policies of efficient administration of justice that have caused both state and federal courts to exclude evidence of a withdrawn plea of guilty and the defendant's statements related to the withdrawn plea from proceedings under their respective jurisdictions.

PSW:ph
cc: Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger
Senator Harold R. "Skip" Finn
Senator Thomas M. Neuville

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

March 29, 1995
Room 125 Capitol

The subcommittee was called to order at 8:15 a.m.

PRESENT: Senators Frederickson, Novak, Reichgott Junge, Terwilliger

Sen. Reichgott Junge provided opening remarks and presented action taken by the Permanent and Joint Rules Subcommittee regarding Rule 75. Discussion of application of changes to Rule 75 in the Johnson vs. Finn complaint. Discussion of payment of attorney and staff costs for proceedings and the use of Senate staff.

Sen. Frederickson moved that the Senate pay no attorney fees relating to the proceeding. The motion passed by voice vote.

Peter Wattson: Discussion of procedural questions from previous meeting; presentation of tribal sovereignty issues and the subpoena of witnesses.

The meeting adjourned at 9:40 a.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

Rule 75 is amended to read:

ETHICAL CONDUCT

75. The Subcommittee on Committees shall appoint a ~~special committee~~ Subcommittee on Ethical Conduct of the Committee on Rules and Administration consisting of four members, two from the majority and two from the minority.

The ~~committee~~ subcommittee shall serve in an advisory capacity to a member or employee upon written request and shall issue recommendations to the member or employee.

~~A lobbyist shall not appear before a Senate committee pursuant to the lobbyist's employment unless the lobbyist is in compliance with the law requiring lobbyist registration, Minnesota Statutes, Sections 10A.03 to 10A.06. A lobbyist when appearing before a committee shall disclose to the committee those in whose interest the lobbyist speaks and the purpose of the lobbyist's appearance. A lobbyist shall not knowingly furnish false or misleading information or make a false or misleading statement that is relevant and material to a matter before the Senate or any of its committees when the lobbyist knows or should know it will influence the judgment or action of the Senate or any of its committees thereon. A lobbyist shall not exert undue influence or expend improper sums of money in connection with any legislation.~~

The ~~committee~~ subcommittee shall investigate a complaint by

a member of the Senate in writing under oath received during a legislative session regarding improper conduct by a member or employee of the Senate ~~or a lobbyist~~. Improper conduct includes conduct that violated a rule or administrative policy of the Senate, that violated accepted norms of Senate behavior, that betrayed the public trust, or that tended to bring the Senate into dishonor or disrepute.

Within 30 days after receiving a complaint, the subcommittee must meet and either make a finding of no probable cause, vote to defer action until a certain time, or proceed with its investigation. If criminal proceedings relating to the same conduct have begun, the subcommittee may defer its own proceedings until the criminal proceedings have been completed.

The ~~committee~~ subcommittee has the powers of a standing committee to issue subpoenas pursuant to Minnesota Statutes, Section 3.153. In order to determine whether there is probable cause to believe that improper conduct has occurred, the ~~committee~~ subcommittee may, by a vote of three of its members, conduct a preliminary inquiry in executive session to which the requirements of Rule 58 do not apply. The executive session may be ordered by a vote of three of its members whenever the subcommittee determines that matters relating to probable cause are likely to be discussed. The executive session must be limited to matters relating to probable cause. Upon a finding of probable cause, further proceedings on the complaint are open to the public. To minimize disruption of its public proceedings, the subcommittee may require that television coverage be pooled or be provided by Senate media services.

If, after investigation, the ~~committee~~ subcommittee finds the complaint substantiated by the evidence, it shall recommend to the ~~Senate~~ Committee on Rules and Administration appropriate disciplinary action.

~~Any person may submit to the Chair of the Committee on Rules and Administration a complaint that members have violated the open meeting requirements of Minnesota Statutes, section 3.055. A member of the Senate may submit the complaint either~~

~~orally-or-in-writing;-others-must-submit-the-complaint-in writing.--Whether-the-complaint-was-written-or-oral,-the-Chair of-the-Committee-on-Rules-and-Administration-shall-immediately forward-it-in-writing-to-the-Special-Committee-on-Ethical Conduct-without-disclosing-the-identity-of-the-complainant.--The complaint-must-not-be-further-disclosed,-except-to-the-members against-whom-the-complaint-was-made,-unless-the-complaint-was made-by-a-member-of-the-Senate-in-writing-under-oath,-in-which case-the-investigatory-procedures-of-this-rule-apply.~~

Members shall adhere to the highest standard of ethical conduct as embodied in the Minnesota Constitution, state law, and these rules.

A member shall not publish or distribute written material if the member knows or has reason to know that the material includes any statement that is false or clearly misleading, concerning a public policy issue or concerning the member's or another member's voting record or position on a public policy issue.

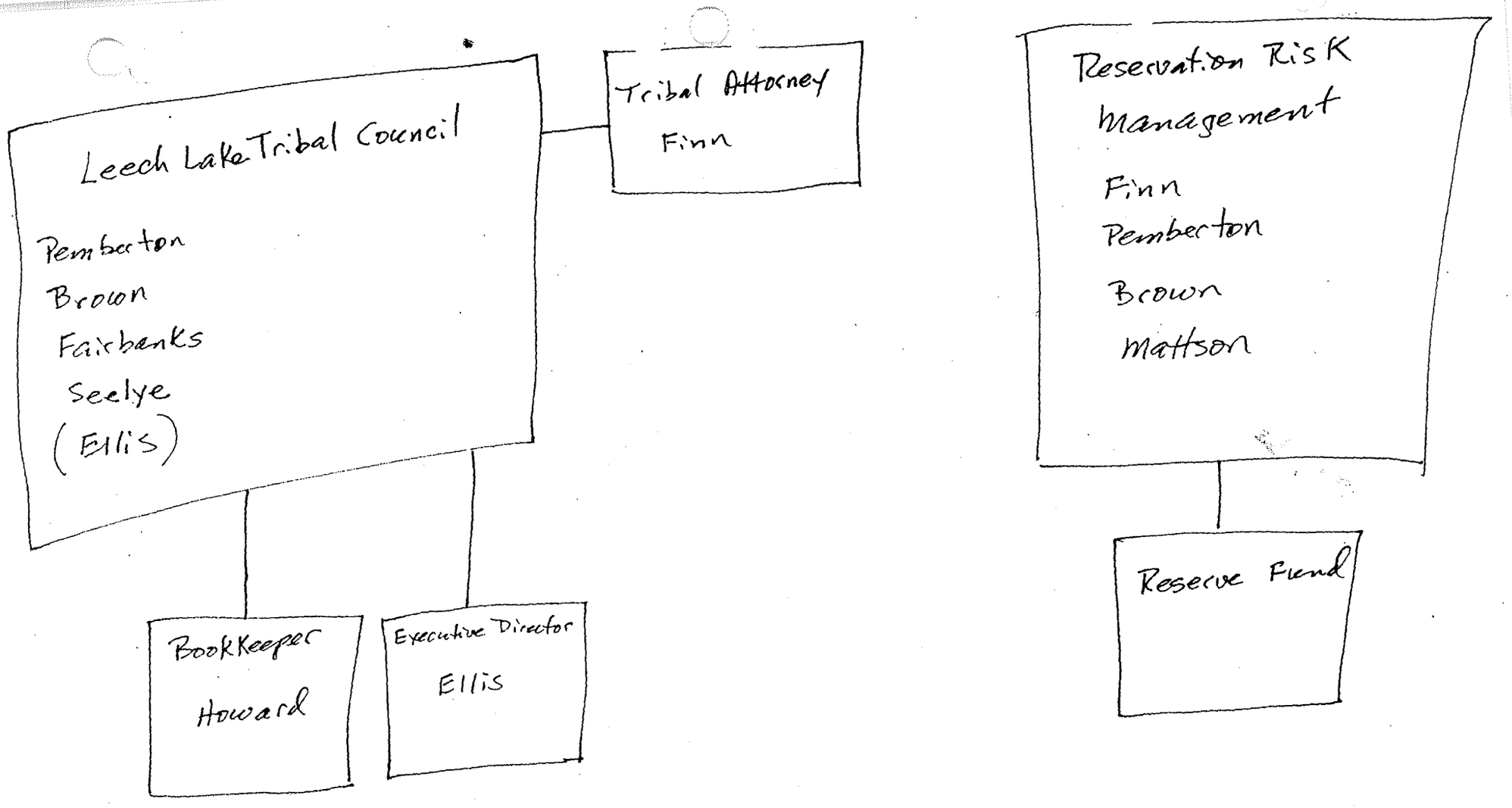
LOBBYISTS

76. A lobbyist shall not appear before a Senate committee pursuant to the lobbyist's employment unless the lobbyist is in compliance with the law requiring lobbyist registration, Minnesota Statutes, sections 10A.03 to 10A.06. A lobbyist, when appearing before a committee, shall disclose to the committee those in whose interest the lobbyist speaks and the purpose of the lobbyist's appearance. A lobbyist shall not knowingly furnish false or misleading information or make a false or misleading statement that is relevant and material to a matter before the Senate or any of its committees when the lobbyist knows or should know it will influence the judgment or action of the Senate or any of its committees thereon.

The Subcommittee on Ethical Conduct shall investigate a complaint by a member of the Senate in writing under oath received during a legislative session regarding a violation of this rule by a lobbyist. The investigatory procedures of Rule 75 apply.

OPEN MEETING COMPLAINTS

77. Any person may submit to the Chair of the Committee on Rules and Administration a complaint that members have violated the open meeting requirements of Minnesota Statutes, section 3.055. A member of the Senate may submit the complaint either orally or in writing; others must submit the complaint in writing. Whether the complaint was written or oral, the Chair of the Committee on Rules and Administration shall immediately forward it in writing to the Subcommittee on Ethical Conduct without disclosing the identity of the complainant. The complaint must not be further disclosed without the consent of the complainant, except to the members against whom the complaint was made, unless the complaint was made by a member of the Senate in writing under oath, in which case the investigatory procedures of rule 75 apply.


Leech Lake Tribal Council
Pemberton
Brown
Fairbanks
Seelye
(Ellis)
Tribal Attorney
Finn
Reservation Risk Management
Finn
Pemberton
Brown
Mattson
Reserve Fund
Bookkeeper
Howard
Executive Director
Ellis

3/29/95

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

April 3, 1995
Room 125 Capitol

The subcommittee was called to order at 3:20 p.m.

PRESENT: Senators Frederickson, Novak, Reichgott Junge, Terwilliger

Sen. Reichgott Junge; opening remarks.

Peter Wattson; progress report on four witnesses and the possibilities for getting testimony.

Sen. Finn; comments regarding procedure and possible witnesses.

Sen. Neuville; comments regarding procedure and possible witnesses.

Discussion followed.

The meeting adjourned at 4:20 p.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

April 19, 1995
Room 125 Capitol

The subcommittee was called to order at 4:25 p.m.

PRESENT: Senators Frederickson, Novak, Reichgott Junge, Terwilliger

Sen. Reichgott Junge; opening remarks.

Peter Wattson; update on possible witnesses.

Sen. Frederickson moved to authorize counsel to work with the attorney general and other necessary counsel regarding granting witnesses immunity from state prosecution. The motion passed by voice vote.

Sen. Frederickson moved to authorize counsel to draft a letter requesting the Leech Lake Band of Chippewa to appear before the subcommittee. The motion passed by voice vote.

Sen. Frederickson moved to set a tentative date of May 5 to hear testimony from Messrs. Howard and Ellis, or to negotiate an alternate date. The motion passed by voice vote.

Sen. Frederickson moved to authorize counsel to go to court to get writ of habeas corpus ad testificandum, etc. The motion passed by voice vote.

Discussion of committee jurisdiction regarding matters occurring before member's term of legislative service.

Sen. Frederickson moved that subcommittee action will focus on whether Sen. Finn engaged in improper conduct after he became a member of the Senate. The motion passed by voice vote.

Sen. Terwilliger moved that subcommittee documents previously provided to subcommittee members be used as background information to supplement testimony from witnesses as they appear. The motion passed by voice vote.

Sen. Frederickson moved to direct counsel to take whatever steps necessary to secure testimony from the two federal agents. The motion passed by voice vote.

The meeting adjourned at 5:30 p.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

EMBER REICHGOTT JUNGE
ASSISTANT MAJORITY LEADER
Senator 46th District
Room 205 State Capitol
75 Constitution Avenue
St. Paul, MN 55155-1606
Phone: 296-2889
and
7701 48th Avenue North
New Hope, Minnesota 55428

Senate

State of Minnesota
April 26, 1995

Mr. Myron Ellis
HCR 84
Box 1404
Walker, MN 56484

Subj: In the Matter of Senator Harold R. "Skip" Finn

Dear Mr. Ellis:

As I believe you know, a complaint has been filed with the Special Committee on Ethical Conduct of the Minnesota State Senate relating to the conduct of Senator Harold R. "Skip" Finn. The complaint questions his conduct in helping to create Reservation Risk Management ("RRM"), in submitting two invoices to the Leech Lake Reservation Business Committee for insurance services that had not been provided, and in directing Mr. Burton Howard to destroy one of the invoices that was subject to a grand jury subpoena.

The Special Committee has decided not to investigate Senator Finn's conduct in helping to create RRM or in submitting the false invoices, since these actions occurred before he became a member of the Senate. However, the Special Committee will proceed to investigate his conduct in January and February of 1991, after he became a member of the Senate, when you have said he directed Mr. Howard to destroy the April 1988 invoice. If that charge is true, it could warrant the Special Committee in recommending to the Senate appropriate disciplinary action against Senator Finn.

The Special Committee has reviewed the sworn statements and memoranda filed in the 1994 criminal case against Senator Finn, and would like you to appear before the committee to answer questions from the committee, Senator Finn, and his accuser, Senator Neuville. The questions will center on the meeting at which you say Senator Finn directed Mr. Howard to destroy the April 1988 invoice, with questions about the earlier events as necessary to help the committee understand the significance of that meeting.

As requested by your attorney, Mr. Michael J. Colich, the Cass County Attorney has agreed not to prosecute you based on your testimony in this matter.

The committee has set Friday morning, May 5, 1995, as the time for this hearing, to begin at 9:00 a.m. in Room 125 of the State Capitol in St. Paul. If you would care to suggest an alternate time, please do so.

Sincerely,

Ember Reichgott Junge

Ember Reichgott Junge, Chair
Special Committee on Ethical Conduct

Dennis R. Frederickson

Dennis R. Frederickson, Ranking Member
Special Committee on Ethical Conduct

ERJ:DRF

cc: Katherain Roe, Esq.
Michael J. Colich, Esq.
Andrew Small, Esq.
Earl Maus, Esq., Cass County Attorney
Paul Murphy, Esq., Assistant U.S. Attorney
Senator Steven G. Novak
Senator Roy W. Terwilliger

EMBER REICHGOTT JUNGE
ASSISTANT MAJORITY LEADER
Senator 46th District
Room 205 State Capitol
75 Constitution Avenue
St. Paul, MN 55155-1606
Phone: 296-2889
and
7701 48th Avenue North
New Hope, Minnesota 55428

Senate
State of Minnesota

April 26, 1995

Mr. Burton Howard
HCR 84
Box 1401-B
Walker, MN 56484

Subj: In the Matter of Senator Harold R. "Skip" Finn

Dear Mr. Howard:

As I believe you know, a complaint has been filed with the Special Committee on Ethical Conduct of the Minnesota State Senate relating to the conduct of Senator Harold R. "Skip" Finn. The complaint questions his conduct in helping to create Reservation Risk Management ("RRM"), in submitting two invoices to the Leech Lake Reservation Business Committee for insurance services that had not been provided, and in directing you to destroy one of the invoices that was subject to a grand jury subpoena.

The Special Committee has decided not to investigate Senator Finn's conduct in helping to create RRM or in submitting the false invoices, since these actions occurred before he became a member of the Senate. However, the Special Committee will proceed to investigate his conduct in January and February of 1991, after he became a member of the Senate, when you have said he directed you to destroy the April 1988 invoice. If that charge is true, it could warrant the Special Committee in recommending to the Senate appropriate disciplinary action against Senator Finn.

The Special Committee has reviewed the sworn statements and memoranda filed in the 1994 criminal case against Senator Finn, and would like you to appear before the committee to answer questions from the committee, Senator Finn, and his accuser, Senator Neuville. The questions will center on the meeting at which you say Senator Finn directed you to destroy the April 1988 invoice, with questions about the earlier events as necessary to help the committee understand the significance of that meeting.

As requested by your attorney, Ms. Katherain Roe, the Cass County Attorney has agreed not to prosecute you based on your testimony in this matter. He will confirm that agreement by a separate letter to your attorney.

The committee has set Friday morning, May 5, 1995, as the time for this hearing, to begin at 9:00 a.m. in Room 125 of the State Capitol in St. Paul. If you would care to suggest an alternate time, please do so.

Sincerely,

Ember Reichgott Junge, Chair
Special Committee on Ethical Conduct

Dennis R. Frederickson, Ranking Member
Special Committee on Ethical Conduct

ERJ:DRF

cc: Katherain Roe, Esq.
Michael J. Colich, Esq.
Andrew Small, Esq.
Earl Maus, Esq., Cass County Attorney
Paul Murphy, Esq., Assistant U.S. Attorney
Senator Steven G. Novak
Senator Roy W. Terwilliger

EMBER REICHGOTT JUNGE
ASSISTANT MAJORITY LEADER
Senator 46th District
Room 205 State Capitol
75 Constitution Avenue
St. Paul, MN 55155-1606
Phone: 296-2889
and
7701 48th Avenue North
New Hope, Minnesota 55428

Senate
State of Minnesota

April 26, 1995

Mr. Alfred R. Pemberton, Chair
Leech Lake Tribal Council
R.R. 3, Box 100
Cass Lake, MN 56633

Subj: In the Matter of Senator Harold R. "Skip" Finn

Dear Mr. Pemberton:

As I believe you know, a complaint has been filed with the Special Committee on Ethical Conduct of the Minnesota State Senate relating to the conduct of Senator Harold R. "Skip" Finn. The complaint questions his conduct in helping to create Reservation Risk Management ("RRM"), in submitting two invoices to the Leech Lake Reservation Business Committee for insurance services that had not been provided, and in directing Mr. Burton Howard to destroy one of the invoices that was subject to a grand jury subpoena.

The Special Committee has decided not to investigate Senator Finn's conduct in helping to create RRM or in submitting the false invoices, since these actions occurred before he became a member of the Senate. However, the Special Committee will proceed to investigate his conduct in January and February of 1991, after he became a member of the Senate, when Mr. Howard and Mr. Myron Ellis have said he directed Mr. Howard to destroy the April 1988 invoice. If that charge is true, it could warrant the Special Committee in recommending to the Senate appropriate disciplinary action against Senator Finn.

The Special Committee has reviewed the sworn statements and memoranda filed in the 1994 criminal case against Senator Finn, and has invited Mr. Howard and Mr. Ellis to appear before the committee to answer questions from the committee, Senator Finn, and his accuser, Senator Neuville. The questions will center on the meeting at which Mr. Howard and Mr. Ellis say Senator Finn directed Mr. Howard to destroy the April 1988 invoice, with questions about the earlier events as necessary to help the committee understand the significance of that meeting.

The committee has set Friday morning, May 5, 1995, as the time for this hearing, to begin at 9:00 a.m. in Room 125 of the State Capitol in St. Paul. Copies of our letters inviting Mr. Howard and Mr. Ellis are enclosed.

The committee has been told by your counsel, Mr. Andrew Small, that the Tribal Council may object to the committee questioning Mr. Howard and Mr. Ellis. The purpose of this letter is to permit you to express any objections you may have directly to the committee, so as to avoid the need to litigate them. You are invited to attend the May 5 meeting to voice your concerns, or to bring them to our attention at once so that any disagreements may be resolved before then.

Sincerely,

Ember Reichgott Junge

Ember Reichgott Junge, Chair
Special Committee on Ethical Conduct

Dennis R. Frederickson

Dennis R. Frederickson,
Ranking Member
Special Committee on Ethical Conduct

ERJ:DRF
Enclosures

cc: Katherain Roe, Esq.
Michael J. Colich, Esq.
Andrew Small, Esq.
Earl Maus, Esq., Cass County Attorney
Paul Murphy, Esq., Assistant U.S. Attorney
Senator Steven G. Novak
Senator Roy W. Terwilliger

BLUEDOG, OLSON & SMALL
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KURT V. BLUEDOG *
STEVEN F. OLSON **
ANDREW M. SMALL †
VANYA S. HOGEN-KIND **
TRY MASON MOORE ††

ALSO ADMITTED IN:
* WISCONSIN
** SOUTH DAKOTA
ONLY ADMITTED IN:
† MONTANA
†† OKLAHOMA

May 4, 1995

VIA FACSIMILE ONLY
(612) 296-7747

Peter Watson
Senate Counsel
17 State Capital
St. Paul, MN 55155

RE: *Ethical Conduct Subcommittee*

Dear Mr. Watson:

This brief letter will re-iterate my notice to you of 2 May 1995 regarding proceedings of the subcommittee identified above.

The government of the Leech Lake Band of Chippewa will not attend the subcommittee meeting scheduled for 11:00 a.m., 5 May 1995. Neither the Band government, the Tribal Council, nor its duly elected representatives are amenable to whatever subpoena authority the committee may have.

Please correct the implication in Senator Junge's letter of April 27, 1995, that either government had threatened or suggested litigation regarding the subcommittee's deliberations.

Sincerely,

/51

Andrew M. Small

AMS:kaw

llbc\corres\54wats.maf

Senate Counsel & Research

G-17 STATE CAPITOL
ST. PAUL, MN 55155
(612) 296-4791
FAX (612) 296-7747

JO ANNE ZOFF SELLNER
DIRECTOR

Senate

State of Minnesota

May 3, 1995

To: Senator Ember Reichgott Junge

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Status of Invitations to Friday Meeting

Myron Ellis has been incarcerated in federal prison in Leavenworth, Kansas, not Rochester, Minnesota as had been requested. He went in on or about April 12 and will be released after serving at least 72 days of his 90 day sentence, probably sometime in July. I elected not to attempt to get a writ of habeas corpus *ad testificandum* from a Kansas state court to bring him back to testify on May 5. Larry Kitto, his friend of 25 years, advised me that Mr. Ellis would not be a willing participant in our proceedings and thus would not be amenable to a telephone interview from Leavenworth.

Burton Howard's attorney, Katherain Roe, will be out of the state on May 5, and thus Mr. Howard will not appear. Mr. Howard was invited to meet with the U.S. Attorney in Minneapolis beginning May 1. Ms. Roe advised me that the visit would probably include Mr. Howard giving testimony to the federal grand jury. She also advised me that he would not appear before the Special Committee on Ethical Conduct except in response to a subpoena. Ms. Roe will be back in the state and prepared to represent Mr. Howard on and after May 15.

Andrew Small, attorney for the Leech Lake Tribal Council, has informed me by telephone that Mr. Pemberton declines our invitation to attend the May 5 meeting. Mr. Small also said that the Tribal Council would resist any attempt by the Committee to subpoena the testimony of any tribal official concerning tribal business. He also said the Tribal Council was not claiming they had any legal right or intention to challenge by means of litigation the right of the Committee to subpoena Mr. Howard's testimony, since he is now a private citizen and not a tribal official.

PSW:ph

enate Counsel & Research

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PSW:ph

STATE OF MINNESOTA

COUNTY OF RAMSEY

SENATE
SPECIAL COMMITTEE
ON ETHICAL CONDUCT

In the Matter of the Complaint of Senator Dean Elton Johnson, Senator Thomas M. Neuville, and Senator Linda Runbeck,

vs.

Senator Harold R. "Skip" Finn.

REQUEST FOR SUBPOENA

To: Patrick E. Flahaven, Secretary of the Senate

In accordance with Minnesota Statutes, section 3.153, and Rule 75 of the Rules of the Minnesota State Senate you are requested by the Special Committee on Ethical Conduct, two-thirds of its members concurring, to issue a subpoena requiring Burton Howard, residing at HCR 84, Box 1401-B, Walker, Minnesota, to appear before the Committee at Room 125 of the State Capitol, St. Paul, Minnesota, on _____, 1995, at _____.m., and give testimony in the above-entitled matter.

Dated: _____, 1995

_____

Ember Reichgott Junge, Chair
Special Committee on Ethical Conduct
205 Capitol
St. Paul, MN 55155

STATE OF MINNESOTA

COUNTY OF RAMSEY

SENATE
SPECIAL COMMITTEE
ON ETHICAL CONDUCT

In the Matter of the Complaint of Senator Dean Elton Johnson, Senator Thomas M. Neuville, and Senator Linda Runbeck,

vs.

Senator Harold R. "Skip" Finn.

SUBPOENA

The State of Minnesota to Burton Howard:

You are commanded to appear before the Special Committee on Ethical Conduct of the Minnesota State Senate, appointed under Rule 75 of the Rules of the Senate, a copy of which is attached, to give testimony in the above-entitled matter, whose subject is more fully explained in the Statement of Subject of Committee Inquiry attached to this Subpoena, at Room 125 of the State Capitol, St. Paul, Minnesota, on _____, 1995, at _____.m. For failure to respond without lawful excuse, you will be deemed liable to the penalties prescribed by law.

Notice: You may be accompanied by counsel of your own choosing when you appear and give testimony.

Dated: _____, 1995

_____

Patrick E. Flahaven
Secretary of the Senate
231 Capitol
St. Paul, MN 55155

STATE OF MINNESOTA
COUNTY OF RAMSEY
MINNESOTA STATE SENATE
SPECIAL COMMITTEE ON
ETHICAL CONDUCT

In the Matter of the Complaint of Senator Dean Elton Johnson, Senator Thomas M. Neuville, and Senator Linda Runbeck,

vs.

Senator Harold R. "Skip" Finn.

SUBPOENA

Peter S. Wattson
Senate Counsel
17 Capitol
612-296-3812

STATE OF MINNESOTA

COUNTY OF RAMSEY

SENATE
SPECIAL COMMITTEE
ON ETHICAL CONDUCT

In the Matter of the Complaint of Senator Dean Elton Johnson, Senator Thomas M. Neuville, and Senator Linda Runbeck,

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Senator Harold R. "Skip" Finn.

STATEMENT OF SUBJECT OF COMMITTEE INQUIRY

The Special Committee on Ethical Conduct has been appointed under Rule 75 of the Minnesota State Senate to investigate complaints by members of the Senate in writing under oath received during a legislative session regarding improper conduct by a member or employee of the Senate.

On or about January 3, 1995, a complaint was filed by Senators Dean Elton Johnson, Thomas M. Neuville, and Linda Runbeck alleging that Senator Harold R. "Skip" Finn had, among other things, attempted to obstruct a criminal investigation being carried out by the United States Attorney for the District of Minnesota by directing the destruction of subpoenaed documents. The complaint requested that the Special Committee on Ethical Conduct investigate this matter and recommend to the Senate the expulsion of Senator Finn.

The Special Committee has been provided with copies of various papers filed on the public record by the U.S. Attorney and counsel for Senator Finn in the case of *United States of America v. Harold "Skip" Finn*, Criminal No. 5-94-18 (D. Minn.). From those papers the Special Committee has determined as follows:

1. The person to whom Senator Finn allegedly gave an instruction to destroy

documents that had been subpoenaed by the grand jury was the controller for the Leech Lake Reservation Business Committee, Burton Howard.

2. Mr. Howard has admitted that he destroyed the tribe's copy of an April 1988 invoice that was subject to the grand jury's subpoena. He testified that he did so at the direction of Senator Finn, given to him at a meeting with Senator Finn and Myron Ellis in January of 1991.

3. Myron Ellis has submitted a sworn statement to the U.S. Attorney wherein he describes his recollection of a meeting in January 1991 in Senator Finn's office wherein he "overheard" Senator Finn tell Mr. Howard to destroy some undefined "specific documents."

4. According to Mr. Ellis, Senator Finn said at that meeting, "if discovered, those documents could send people to jail."

5. U.S. Department of Interior Special Agent James Hanbury personally served the grand jury subpoena *duces tecum* on Senator Finn, who personally attested to complying with it. However, Special Agent Hanbury has said that Senator Finn did not comply with the subpoena, because he did not produce the April 1988 invoice and he did not produce an August 1988 invoice. Both of these invoices had been created by Senator Finn and submitted to the Leech Lake Band for insurance services that were not in fact provided.

6. Special Agent Tim Reed of the Office of Inspector General of the U.S. Department of Interior interviewed Mr. Ellis on or about March of 1993 concerning the invoices and the fact that the payments made by the Leech Lake Band to Reservation Risk Management pursuant to the missing invoices had been used by Reservation Risk Management to make payments in the same amount to Mr. Ellis.

The Special Committee on Ethical Conduct desires to question Mr. Howard, Mr. Ellis, Special Agent Hanbury, and Special Agent Reed about the missing invoices and the allegations of Mr. Howard and Mr. Ellis that Senator Finn directed Mr. Howard to destroy the April 1988 invoice. The reason for these questions is that, if those allegations are true, they could warrant that the Special Committee recommend to the Senate appropriate disciplinary action against Senator Finn.

Dated: _____, 1995

_____
Ember Reichgott Junge, Chair
Special Committee on Ethical Conduct

_____
Peter S. Wattson
Senate Counsel

PERMANENT RULES OF THE SEVENTY-NINTH MINNESOTA STATE SENATE
Adopted April 27, 1995

ETHICAL CONDUCT

75. The Subcommittee on Committees shall appoint a Subcommittee on Ethical Conduct of the Committee on Rules and Administration consisting of four members, two from the majority and two from the minority.

The subcommittee shall serve in an advisory capacity to a member or employee upon written request and shall issue recommendations to the member or employee.

The subcommittee shall investigate a complaint by a member of the Senate in writing under oath received during a legislative session regarding improper conduct by a member or employee of the Senate. Improper conduct includes conduct that violated a rule or administrative policy of the Senate, that violated accepted norms of Senate behavior, that betrayed the public trust, or that tended to bring the Senate into dishonor or disrepute.

Within 30 days after receiving a complaint, the subcommittee must meet and either make a finding of no probable cause, vote to defer action until a certain time, or proceed with its investigation. If criminal proceedings relating to the same conduct have begun, the subcommittee may defer its own proceedings until the criminal proceedings have been completed.

The subcommittee has the powers of a standing committee to issue subpoenas pursuant to Minnesota Statutes, Section 3.153. In order to determine whether there is probable cause to believe that improper conduct has occurred, the subcommittee may, by a vote of three of its members, conduct a preliminary inquiry in executive session to which the requirements of Rule 58 do not apply. The executive session may be ordered by a vote of three of its members whenever the subcommittee determines that matters relating to probable cause are likely to be discussed. The executive session must be limited to matters relating to probable cause. Upon a finding of probable cause, further proceedings on the complaint are open to the public. To minimize disruption of its public proceedings, the subcommittee may require that television coverage be pooled or be provided by Senate media services.

If, after investigation, the subcommittee finds the complaint substantiated by the evidence, it shall recommend to the Committee on Rules and Administration appropriate disciplinary action.

Members shall adhere to the highest standard of ethical conduct as embodied in the Minnesota Constitution, state law, and these rules.

A member shall not publish or distribute written material if the member knows or has reason to know that the material includes any statement that is false or clearly misleading, concerning a public policy issue or concerning the member's or another member's voting record or position on a public policy issue.

3.153 **LEGISLATIVE SUBPOENAS.**

Subdivision 1. Commissions; committees. A joint legislative commission established by law and composed exclusively of legislators or a standing or interim legislative committee, by a two-thirds vote of its members, may request the issuance of subpoenas, including subpoenas duces tecum, requiring the appearance of persons, production of relevant records, and the giving of relevant testimony. Subpoenas shall be issued by the chief clerk of the house or the secretary of the senate upon receipt of the request. A person subpoenaed to attend a meeting of the legislature or a hearing of a legislative committee or commission shall receive the same fees and expenses provided by law for witnesses in district court.

Subd. 2. Service. Service of a subpoena authorized by this section shall be made in the manner provided for the service of subpoenas in civil actions at least seven days before the date fixed in the subpoena for appearance or production of records unless a shorter period is authorized by a majority vote of all the members of the committee or commission.

Subd. 3. Counsel. Any person served with a subpoena may choose to be accompanied by counsel if a personal appearance is required and shall be served with a notice to that effect. The person shall also be served with a copy of the resolution or statute establishing the committee or commission and a general statement of the subject matter of the commission or committee's investigation or inquiry.

Subd. 4. Attachment. To carry out the authority granted by this section, a committee or commission authorized by subdivision 1 to request the issuance of subpoenas may, by a two-thirds vote of its members, request the issuance of an attachment to compel the attendance of a witness who, having been duly subpoenaed to attend, fails to do so. The chief clerk of the house or the secretary of the senate upon receipt of the request shall apply to the district court in Ramsey county for issuance of the attachment.

Subd. 5. Failure to respond. Any person who without lawful excuse fails to respond to a subpoena issued under this section or who, having been subpoenaed, willfully refuses to be sworn or affirm or to answer any material or proper question before a committee or commission is guilty of a misdemeanor.

HIST: 1971 c 227 s 1; 1986 c 444; 1988 c 469 art 1 s 1; 1992 c 385 s

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

May 5, 1995
Room 125 Capitol

The subcommittee was called to order at 11:15 a.m.

PRESENT: Senators Frederickson, Reichgott Junge, Terwilliger

ABSENT: Senator Novak

Sen. Reichgott Junge; status and update on witnesses per Wattson memo.

Sen. Frederickson moved to request counsel to issue a subpoena for Burton Howard's testimony before the subcommittee on May 17, 1995 at 1:00 p.m. in Room 125 Capitol, and to waive the seven-day notice requirement.

A roll call vote was requested. Senators Frederickson, Terwilliger and Reichgott Junge voted in favor of the motion. The motion passed on a 3-0 vote.

The meeting adjourned at 11:30 a.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

STATE OF MINNESOTA

Office of the Attorney General

TO : **PETER S. WATTSON**
Senate Counsel

DATE : May 10, 1995

FROM : RICHARD B. GREGORY
Director of Security

PHONE : 282-9898

SUBJECT: **SERVICE OF BURTON HOWARD SUBPOENA**

At about 5:30 p.m. on May 8, 1995, I served the subpoena upon Burton Alan Howard at his residence in Cass County, Minnesota. Mr. Howard lives with Vicky F. White, telephone number (218) 547-2923. The correct address is HCR-84, Box 1407B, Walker, Minnesota 56484. The residence actually is located in Onigum, Minnesota.

Mr. Burton commented that he expected the subpoena. He reviewed the subpoena and commented that "at least they have given me some time." He then commented about the appearance date as "next Wednesday."

I asked Mr. Burton for identification and he showed me three picture identification cards as follows:

1. **Minnesota Identification Card**
   #H630101040 252 displaying his date of birth as 3/30/59.

2. **Reservation Identification Card**

3. **Bemidji State University Student Identification Card**

I also gave Mr. Burton the Minnesota Senate Check #75050011 for the amount of $128.08 for witness fees and mileage expenses.

STATE OF MINNESOTA

COUNTY OF RAMSEY

SENATE
SPECIAL COMMITTEE
ON ETHICAL CONDUCT

In the Matter of the Complaint of Senator Dean Elton Johnson, Senator Thomas M. Neuville, and Senator Linda Runbeck,

vs.

Senator Harold R. "Skip" Finn.

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) SS.
COUNTY OF Ramsey)

Richard B. Gregory, being first duly sworn, deposes and says that in the County of Cass, Minnesota, on May 8, 1995, he served the attached subpoena upon Burton Howard by delivering to him personally

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a true and correct copy thereof, and that affiant verily believes that the person upon whom the service was made is the same as the person to whom the subpoena was addressed.

Richard B. Gregory

Subscribed and sworn to before me this

10th day of May, 1995

Lynn M. Jeanette

NOTARY PUBLIC

HAROLD "SKIP" FINN
Senator 4th District
Majority Whip
306 State Capitol
75 Constitution Avenue
St. Paul, MN 55155-1606
Phone: (612) 296-6128
Home Address:
P.O. Box 955
Cass Lake, Minnesota 56633
Phone: (218) 335-6954

Senate
State of Minnesota

May 11, 1995

The Honorable Ember Reichgott Junge, Chair
Special Subcommittee on Ethical Conduct
Room 205, State Capitol
St. Paul, MN 55155

Re: Scheduling and Procedures

Dear Senator Reichgott Junge:

It has come to my attention that the Subcommittee has issued a subpoena for Burton Howard seeking his appearance on May 17th at 1:00 p.m. As of this date, I still have not heard what procedures the Subcommittee will be utilizing as you move ahead with your investigation. Before the Subcommittee begins taking testimony, I would like to know what the procedures will be, what evidentiary rules might apply and whether we are going to be extended the opportunity of cross-examination, rebuttal, and the use of the subpoena power of the Subcommittee. Also, besides the four individuals which the Subcommittee has identified for interview, I believe that the Subcommittee should at least consider including on its initial list those individuals who supplied supporting affidavits for our memorandum in the federal proceedings.

I also believe that it will be impossible for the Subcommittee to make a fair judgment on the credibility issues if the witnesses are heard, testimony taken and argument made at disjointed and irregular times. The only reasonable way to handle this matter is to schedule it as a trial to begin at a date and time certain and to continue until all witnesses are heard, evidence presented and arguments made.

I have consulted with my legal counsel. We cannot proceed on May 17th and respectfully request that the Subcommittee set the matter for a date and time certain sufficiently far enough ahead

COMMITTEES: Vice Chair, Judiciary • Environment and Natural Resources • Environment and Natural Resources Funding Division • Health Care • Chair, Public Lands and Waters Subcommittee of Environment and Natural Resources • Co-Chair, Privacy Subcommittee of Judiciary and Crime Prevention

so that we have at least three weeks notice. My earlier discussions before the Subcommittee indicated that we would require at least three weeks preparation time. We will also need to know the procedures and evidentiary rules to be utilized. We also respectfully request the use of your subpoena power should that be necessary to secure attendance of any rebuttal witnesses we might feel necessary to bring before the Subcommittee. Finally, before any hearing and as soon as possible, we would like to have a copy of any immunity agreements made by the Subcommittee with any individuals.

Sincerely,

Harold "Skip" Finn

RULES & ADMINISTRATION SPECIAL SUBCOMMITTEE ON ETHICAL CONDUCT

May 17, 1995
Room 125 Capitol

The subcommittee was called to order at 1:30 p.m.

PRESENT: Senators Frederickson, Novak, Reichgott Junge, Terwilliger

Sen. Reichgott Junge; status and update on the serving of subpoena to Burton Howard.

Peter Wattson, Senate Counsel; update on witnesses:

Burton Howard: Further immunities from prosecution needed.
Myron Ellis: Serving 90-day sentence.
Federal agents: No proceedings yet.
Possibility of George Wells as an additional witness.

Sen. Frederickson moved to authorize subpoena to be issued to Mr. Wells at a time to be determined by the Chair. The motion passed by voice vote.

Discussion followed regarding future proceedings of the subcommittee.

Sen. Frederickson moved that the subcommittee direct counsel to pursue subpoena of individuals who want to appear before the subcommittee, and to take any steps necessary to overcome impediments. Sen. Frederickson further moved that the subcommittee meet later in the year in as short a time frame as possible, and that the next meeting is at the call of the chair.

Discussion followed. The motion passed by voice vote.

Sen. Frederickson moved that the subcommittee request that the Secretary of the Senate, upon request from Mr. Wattson, that Myron Ellis be subpoenaed upon his return to Minnesota. The motion passed by voice vote.

Discussion followed regarding the scheduling of future meetings.

The meeting adjourned at 2:00 p.m.

The meeting was taped.

Respectfully submitted,

Marcia Seelhoff, Secretary

Sen. Ember Reichgott Junge, Chair

Senate Counsel & Research

G-17 State Capitol
St. Paul, MN 55155
(612) 296-4791
FAX (612) 296-7747

Jo Anne Zoff Sellner
Director

Senate

State of Minnesota

May 17, 1995

To: Senator Ember Reichgott Junge

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Transcript of Telephone Conversation

Enclosed is a copy of a transcript of a telephone conversation between Burton Howard and George Wells that occurred in or about August 1993, immediately following Mr. Howard's testimony to a federal grand jury. The transcript was provided to the *Duluth News-Tribune*, which published it in some form and provided it to the Bureau of Criminal Apprehension. The Bureau was concerned because recording private telephone conversations without a court order is illegal. So far, the person recording it has not been identified, but the recording was apparently made possible because one of the participants was using a portable phone.

PSW:ph
Enclosure

BARON HOWARD
GEORGE WELLS

8/7

BH: "First thing they asked. Very first question, 'Did you talk about this with anyone else?' I said, 'no.' [laughs] [They] said, 'You're lying.' [repeats stmt.] I said, 'no.'

Nobody, not even Applebaum?

I said, 'no.'

He said, 'You're lying. Myron just told us this morning he talked to you about it. And he told you to call us. Do you know the penalty for perjury.'"

OTHER: You should of told him, this isn't a fuckin' courtroom. I think that you, I mean, not like Roger does, but in that case you _____ fully right away. Anyhow, go ahead.

BH: Yeah, so anyway, lets, _____ well. I kinda ... on my knees, that I knew [Eric?] I just more or less laid it all out for them. They wouldn't believe that these checks were from _____. That was the majority of them of the meeting. Ten after one. We got out of there at 4:00.

OTHER: Oh is that right?

BH: About 2-1/2 hours of questions and answers.

OTHER: HMMM

BH: They kept trying to say that Myron was skipping up the story of them, of the wages deal.

They kept saying, 'you're going to perjure yourself. If you get up the stand and say that. That these were for Myron's wages, and I'll just have to stick to that through the whole thing.'

OTHER: Do you think down to one basic thing. What the hell they wanted.

BH: "Yeah, so anyway they gave me a subpoena to appear before the grand jury on Tuesday at 3:00. Now they want, huh, what the heck was it. There's three other things they wanted. Shoot. They want the general ledger, that shows that we charged those checks to insurance. And, huh, Myron's personnel records, payroll records to show how the checks, those figures came about. And, what else was there. There was one more. General ledger, payroll... Can't think of it right now, personnel payroll and uh, I think they already have one of the items.

OTHER: They already have payroll and personnel stuff.

BH: They have that, huh? Well, employee file and payroll records. Account that shows we charged it to insurance.

OTHER: They _____ already. Well, I suppose they can see it in the ledger, but _____. I think Applebaum was right that somebody should of went and talked to them.

BH: Yeah, I don't know. I should of. Well, the deal is too that Myron should of told me that he was gonna do it. He went in and told them that I (she went) (shows up) went golfing.

OTHER: Next step, but you end up telling them the same thing, didn't you?

BH: Well, I...

OTHER: When was it, Myron knows.

BH: I told him that, yeah, they went into great detail and how. I, I charged'em to insurance and I knew that they were for Myron's wages. And he asked me if I knew it was illegal to do that. And, [laughs]...

OTHER: There again I know you should of told'em. Do you realize this isn't the U.S. government? This isn't Cass County. This isn't the state of Minnesota.

BH: Well, you know it's already.

OTHER: You know it wasn't ... it suppose
they could know
There's a lot of things that are coded differently than what they are?
You know it's not illegal. Maybe not right....[laughs].

BH: Well, your sittin' there. You got two guys looking at you.

OTHER: I know it, I know, yeah, that's what.

BH: And you know all the way.

OTHER: Kind of pisses you off afterwards, doesn't it?

BH: Yeah, all the way through the whole meeting. I really wanted to quit and say, 'I'd like to speak to my attorney and I kept thinking, geez, but then if I do that then I all of a sudden I make it even more suspicious of those wages story. So, I just tried to keep on that. Keep trying to convince them that I believed it was. That's what I know it was. The ...

OTHER: (What was ...you) Know wages and _____ at the time though when you get the bill from them and you.

BH: Yeah, came at me from all different angles trying to get me to say that Skip and Myon concocted the story and being actually Myron. They tried every angle even the good cop, bad cop routine.

OTHER: Is that right?

BH: Yup.

OTHER: You can, sometimes, how new they are.

BH: Yeah, I know. They were getting stupid in there.

OTHER: Now that you had time to think about and you think actually, um, actually they maybe, they didn't hear what they wanted to hear?

BH: Yeah, I know. They were going [illegible] in there.
OTHER: Now that you had time to think about and you think actually, um, actually they [illegible] maybe, they didn't hear what they wanted to hear?
BH: Yeah, yeah, I know they were frustrated and then I think why he, um, why he's asking for this, additional documentation is, uh, is that they are not going to get him for outright fraud. Then they're going to try to pin some, some thing other, maybe tax evasion or falsifying documents or something. Which is probably a felony, just as well.
OTHER: On tax evasion, it would. The big thing, I don't know, why it never did get declared for that as wages and stuff?
BH: I don't know.
OTHER: It would be a good thing for him to file it right now. Then, he's filed. Before the thing comes up. They could say, well you [didn't] know this thing would happen.
BH: Well, yeah, well Myron...when he went there and talked to them he told them that. He just basically told them that yeah he got those wages and [You know] [they] know they are going to come right out and ask him, 'Did you, well did you declare those on your income taxes?' And so, I don't know whole lotta bunch [we didn't really] get into it but,
OTHER: Did they give you a ride back to the airport?
BH: Yeah.
OTHER: Oh they did, ahhh.
BH: Very good, yeah. Is he going? He wasn't in the _____
OTHER: Yeah, it was him/Tim and Mike Ward. I asked him, Mike Applebaum, are you talking to Mike Ward? He said, yeah, what whould you like you prick?
BH: [laughs] Yeah, he seemed like a real [creep]_____ at first but changes. where its at.
OTHER: _____ what he wanted to know what takes _____ to get to that point.
BH: I don't know. I was really.

OTHER: Applebaum, I talked to him and he never really did get a chance to get a hold of him, ahh.
BH: No, no. I called his office twice. He wasn't there. I had to page him. I stuck around Cass Lake until 10:30 and he still hadn't called back. I think he never did call.
OTHER: About 11:00.
BH: He did call, uh, oh shit, yeah, I was in Bemidji then. And then I thought the damn plane got in late I was trying to get [you] to the airport to call him. then I thought your meeting was at 3:00 not at 1:00. I don't know why I thought 3:00.
BH: Oh, yeah, well as soon as I got to the airport I got the cab and I got to the federal building at 5..10 after 11:00 and they were sitting up there waiting for me.
OTHER: Yeah and then, I tried to get ahold of Mike Ward down there, they said they never heard of him at the federal building and at the attorney general's office. [laughs]
BH: [You] They said they never heard of him?
OTHER: Yeah, I had, I thought, well, I'll have the ____ [what's his] guy get ahold of you, and ah, well, maybe, I thought if you were still at it at 2:00 Probably, nothing, I thought.
BH: Well, yah know, when I first walked in there, this one, you see it's a sealed in, I mean, they have a door. A security door.
OTHER: Hmmm.
BH: It's like you're going into a jail or something and you got two glass windows there and so I went to the first one I asked the receptionist there, 'I'm here for a meeting with Mike Lord/Ward.' She said 'what?' I said, 'I'm here for a meeting with Mike Ward. Mike Ward or James Hanberry.' She said, 'I don't know who you are talking about.' And, ah another guy came up there. Or it was the other window and so I walked over to the other window and I asked him. 'Oh,' he said, 'wait here.' The whole damn deal about releasing Mike Ward's name.
OTHER: Heard that nobody like that there.
BH: Oh, I don't know, Bert. I guess that's when I talked to [Ken] Henry, J.C., what happened to our game plan?
OTHER: He said, 'Nobody was supposed to talk to anybody. Pretty soon it's all bunch of canaries. Everybody's fucking calling this and calling this and talking to people. Christ. It's like...But, well you see Dan Hanberry calls me right before you left. No, not right before I left. The day before on Thursday and he said, 'I need to have you down in attorney's office to talk to Mike Ward tomorrow at 1:00. I've already spoke to the chairman and he said, 'It's alright.' And Tig called me yesterday morning, he said yeah, well, he called me beforehand and told me Myron wants you to go down there and talk to Mike Ward. Then Tig called me again yesterday. He says, 'Didn't you go down there yet?' So, he was. Yeah, even Tig was in there wanting me to go down and talk to them guys.'
OTHER: About what?
BH: Thinking that you know my little story of wages will get the whole
OTHER: off?
BH: Yeah, so. Yeah, it was pretty frustrating. Yeah, when I got out of there I don't know. I felt like tying one on. [laughs]
OTHER: You don't have time though.
BH: Luckily no, I refrained the drinking on the plane too. But, I just wanted to get home.
OTHER: Came home and _____.
BH: Yeah.
OTHER: More _____ problem.
BH: I'm still really apprehensive about that.
OTHER: The worse part is, or, I don't know, but, um, Myron and all those other guys are saying the same thing as you are. I can see why they'd be frustrated.
BH: Yeah, yeah.
OTHER: You know, because then it would come down that, hell it wasn't Myron and it wasn't any big plan. It was an out in the open plan. The whole board decided to do it. Ya know, You could say, I don't know.
BH: Well, it seemed like they got some sort of vendetta against Myron. Ah, he kept saying this whole story about Myron's wages is stupid he kept saying and that this is/was just made up by Skip and Myron. They told me to say this because it was just a scheme to give money to Myron.
OTHER: Well, that might be true.
BH: I don't know. And that't what I had to tell them. I don't know because I wasn't involved in that. I said, I don't know. I said, 'All I know is what I believed at the time was right. What I still believe is wages for Myron and that's when I start talking about how I figures out those, ah, those amounts. $7,600 and $5,700. I didn't even know about it. I just knew that when the invoice came in it was something [funny/phoney].
OTHER: Because it wasn't even large enough to pay the insurance amount.
BH: Yeah, and ah. But I know that person. $7,600 was, yeah, I made a mistake on that one. I told them it was Myron's retroactive pay raise. I don't think it was a retroactive pay raise. I think it was a pay out to personnel leave.
OTHER: ...something like that in there.
BH: Because a retroactive pay raise, um, they sort of could fall on my ass because it went back two years and that $7,600 would be an amount for two years.

OTHER: ...something like that in there.

BH: Because a retroactive pay raise, um, they sort of could fall on my ass because it went back two years and that $7,500 would be an amount for two years.

OTHER: How much does Myron make at _____?

BH: 35-36.

OTHER: That's it.

BH: That would be for two years. It could of been that, that would of been a pay out for his personal leave, but ya know what I remem about his personal leave is, ah, I don't remember if we put paid out of the ...of our general fund or if we paid it or if that's what he got from Skip. But, I remember that we didn't, ah, we didn't adjust the leave records. I remember telling Myron that we didn't adjust [your] leave records. His leave records still had a lot of annual leave left. I remember it after he got paid for it, that we still didn't adjust them. I kept telling him RTC was in today with someone's leave records.

OTHER: Yeah, we did for that.

Never took any of it.

BH: Well, no. So, anyway they asked me if there were anymore payments that were like that but I thought for individuals. Well, I said, ah, that just one I though of Tig had personal leave payments made out of an insurance fund. They already knew about that. And the said they already knew about that.

OTHER: Maybe.

BH: Well, [he] said that's why Alfred Pemberton had to pay taxes on his contribution to our risk management, so I think Tig told him that.

OTHER: Tig owes you ..... In the morning. He must owe them -- about $20,000 dollars.

BH: So, he probably didn't declare that, so Myron might ...he should still file, right?

OTHER: Yeah.

BH: If he files before the fact that he's charged with that
OTHER: _____ mentioned it. Hell, Myron has. I think he can beat it. Investigation coming up. He can file a return. Turn it in. Then it would be there, and they could say, well, you did this. He's say, oh yeah. He's in and it's straight now. Charge me for something. Didn't. I paid it. Ya know.
BH: You wanted that.
OTHER: Wednesday or Thursday morning. Myron's had to get a different attorney and, ah. They can't have Applebaum. That's what the attorney general told Myron. Applebaum couldn't represent him anymore.
BH: Why's that.
OTHER: There's a conflict of interest between the RTC and Myron
BH: Ah, is he represents the RTC then?
OTHER: Yeah.
BH: Oh, I see.
OTHER: So, I don't know. So, he's going to be looking for a different attorney. Then he has to pay him up front. _____ go through the RTC to pay him. He's now trying to subterfuge [word?] Because the bank could make a $20,000 loan without having it secured by the Resolution from the RTC saying they'd pay it back. Put money into a CD and they would hold the CD. Ya know. And they did do it. After a [little] explanation from them.
I told 'em he was being subpoened too on his travel records because of the Nett Lake thing. ___ response he's going back. Chairman of White Earth.
BH: Oh yeah.
OTHER: Which is maybe the reason they have a hard on for the subpoena _____.
BH: Could be yeah.
OTHER: I think they're pretty small minded to think that this. BH: Yeah, I don't know.
OTHER: Bunch of _____ Probably sitting around drinking one night and thinking which one they could raise hell with.
BH: Sure.
OTHER: And, uh, I don't know.
BH: Myron is in the national eye.
OTHER: Yeah and they will just give him a black eye. A lot of stuff I think Myron overreacts to. Let them give him a black eye. Pretty ____ half the people aren't. The rest are understanding if you know what happened.
BH: Sure.
OTHER: Not worry about it. Agains, it's not me, ya know. They even said something of the stuff you did was illegal. Ah.
BH: Yeah.
OTHER: ____ I _____ think _____ legal.
BH: There's a lot of things they could add to that I suppose. In order to be like that.
OTHER: ... initiative anymore.
BH: Yeah.
OTHER: Back into a jurisdiction.
BH: Could be...yeah.
OTHER: I guess BIA things. How much can they do on a, oh Myron, have you talked to him yet?
BH: No, I've... I'm just leery to talk to anybody at this point. I, if they, got back into this. I suppose, I should talk to Applebaum. I suppose [he], I don't know anyone right now that could give, I suppose, give me a good response.
OTHER: The thing is to do what you did like you did last week.
BH: I know that was so stupid, but.
OTHER: But I mean everybody else tells you to do that. Ya know Myron's called up 17-18 times a day to go down and call this guy. Take ---.
BH: Yeah.
OTHER: Maybe Tig's. Tig's said, 'somebody sounded a little nervous yesterday.'
BH: He did. You know he was never ever very cordial to me. Shit, he was being so nice to me. [Figure, yeah, he has.
OTHER: Never has been, huh?
BH: Nah, maybe once or twice, but not very often either.
OTHER: Rude to Charlie one day. Charlie Brown when he went over to talk to him. Charlie thought Mike ___ came back and said had a real nice conversation with him. You, Tig. Backstage (?), he called him over and up one side, down the other.
Jesus Christ, you know he hired his daughter in the training deal or whatever it was and ya know fired em both.
BH: Actually, I thought it was pretty stupid.
OTHER: Yeah, we'll, people, will hear about that.
BH: Yeah.
OTHER: I think that one was because of what's his name, Eugene Whitebird, out there. He'd been complaining that he's only making $6.00 &

OTHER: Yeah, we'll, people, will hear about that.
BH: Yeah.
OTHER: I think that one was because of what's his name, Eugene Whitebird, out there. He'd been complaining that he's only making $6.00 an hour. Shirley brought this guy in and he's paying $8.00 [an hour]. I think that's what precipitated it all.
BH: Oh, I see.
OTHER: Well, I don't know Bert, another chapter, huh?
BH: Yeah.
OTHER: You get to go on Tuesday again?
BH: Yup.
OTHER: That's the 10th Four days before the 14th. Myron's going to be down there Monday, I think.
BH: He is, ahh.
OTHER: I think he said he's leaving Monday morning to meet with a new attorney.
BH: Oh, I see.
OTHER: Mike, big time trouble _____ mentioned something about 20, but he to kill ____ some boy was in the car. Got back around 1:30 yesterday.
BH: I suppose they really raked him over the coals. The put 'em in there. I mean, when they met with him.
OTHER: Huh? You know he, um.
BH: Unless they were waiting for me.
OTHER: We got to put our head s together, because he said he met them at 7:30. He got back to Walker a little after 1:00. He couldn't of been in there very long Eight hours. I mean, an hour.
BH: Yeah, anyway I feel like I really sold the farm.
OTHER: I don't know. Maybe not.

BH: Well, you know I kind of. I was ___ expecting to see someone else there or even to see Myron or at least talk to him before I went in there and, ah, I was sitting over at, ah, Vicki's office just before I took off to the airport and there he calls up Ron Day, tells him to meet me in Walker at 2:00 to play golf.
OTHER: That doesn't ____ ask about you.
BH: No.
OTHER: Yeah, then he calls me to ask where you are. (In the) interim (things are) really getting tough here. _____ make that same connection there.
BH: Yeah, well I was over there when he talked to Ron. I mean I wasn't on the phone in the backroom. Carol told me that she just transferred Myron back there and all of a sudden Ron comes walking up and says,'leave it' He was going to meet _____ at 2:00 _____?
OTHER: He's got the goods on. Maybe not. Probably the trust still offends, defense deal out and that's what you told em. Exactly what happened. Each time you can tell the same waitress there's only one way to tell it.
BH: Yup, true.
OTHER: And, ah.
BH: We'll see thats what really got me in the soup. There is when I, the first time it came I told 'em I believed, truthfully, believed it was insurance and then I turn around and say, 'No, it was for Myron's wages.
OTHER: He asked you a point blank question.
BH: Yeah, well I know that's what he is going to use against me again in front of the grand jury.
OTHER: Yeah, but hopefully Applebaum will be the one. I suppose he has the best answer, is ah, the fact that it was the first time and that's what it was. That's what we reported it as.
BH: Yeah.
OTHER: Your first question, my first answer.
BH: Yeah.
OTHER: Your second question after I think about it. Well, yeah, I suppose you can to bill insurance and take out quote it as insurance. Try to find out.
OTHER: You don't check every invoice that comes in to find if that's really what happened.
BH: Right.
OTHER: But ya know, this invoice for $1,500 was at the time on my desk. I thought I already paid it once. To Bob Michaud. [inaudible] already.
BH: I think so. I was kind of concerned, you know about, what was going to happen to those guys, but there is nothing _____ yesterday. I was just riding the cycle ...
doing now.
OTHER: Ya know, actually the trouble any concern before that and Myron probably told him all that stuff anyhow.
BH: Yeah.
OTHER: He's going after the attack now that the office is in a state of disruption, because of the, before the election and uh, you know that the checkbook was all _____ some place else, but I think that was all after the election.
BH: Yeah, that's it.
OTHER: Well, I don't know, but he
BH: Yeah, that was in July.
OTHER: Yeah, this happened in, what was it May?
BH: Yeah, it was done in May. There was two checks for ___.
OTHER: Yeah, I think there is ah,
BH: Hold on, the last check was in August. You see , how that occurred was ah, Hartley let Eli, let Eli get paid for that time when he was campaigning. Until Myron spoke to him.Then Eli get paid too, so I mean that was when Eli just married her.
OTHER: Oh, okay.
BH: And uh, and that the they had Hanberry goes too, are you expecting us to believe that. I said, 'If that's the way it happened.' He said, 'well then, Skip,' he says, 'has got to be really greedy,' he said. He says, 'he had _____Bob and Larry and he had to tried to turn around and try to rip off the reservation for another $5,700 more. He said, 'Talk about a greedy fucker.'[laughs]
OTHER: You know, I think that's the one they are really after.
BH: Yeah.
OTHER: I don't think they are after Myron so much as they are...cause I think that everybody realizes that $1,300 isn't a whole lot of money, $13,000. You know. And when, certainly when it was, certainly when it was done out in the open like that. You know, but I think he's right about one thing, personally, that he is a greedy fucker.
BH: Yeah.
OTHER: I mean, why didn't he let that go?
BH: Yeah.

BH: Yeah.
OTHER: I mean, why didn't he let that go?

BH: Yeah.
OTHER: Ya know, if the whole thing would of been let go, then it wouldn't of ...nobody would of ever seen any difference on it probably.
You know it would n't of implicated the RBC in any way, shape or form. It would of risk management, his management of it. You know he did set up that little sucker tight, you know that.
BH: Ah, excuse me.
OTHER: Skip, he set that whole plan up.
BH: Oh yeah, sure.
OTHER: It still a fucking masterpiece. You know, they really looked at, you know, Reservation Risk Management, that whole transaction. You know I thought one time a couple of years ago, he must of spent a week solid 24 hours a day plotting it and laying this thing out. And little flow charts, you know, with like yes and nos if this happens, what do you do if this happens.
BH: Yeah.
OTHER: Cause it, you know, you watch every little thing that flows through there. I think there's an answer for everything.
BH: Yeah.
OTHER: And a good answer and it all ties back in again, like _____ back together.
BH: Yeah.
OTHER: In this one he just devote that wolve in.
BH: Yeah.
OTHER: It kind of hangs out in the end, but it still might wash.
BH: Yeah, well his little statements to me is like, at first he says well money to protect Myron and then, last, last. words to me then

and then leaving his office he said, ah, he said, whatever he said, protect yourself. So he must know that, that everything is that shit was going to hit the fan.
OTHER: _____ think he would. As for my _____ to the other part of it, it all comes back changed and the -_____

BH: Yeah, right.
OTHER: Well, then in August. There's one more case out. Well, I don't know, I keep, you know if I think about things, I don't know what value your opinion is but I keep thinking that it's all too, that there's
too many other parallels that say we shouldn't of did that. Well, hell, that's the only time we did something like that.
BH: Yeah sure.
OTHER: There's too many more of em.
BH: Yeah, I know I was sitting there talking to them.
He says, Is that how, ah, you were running, is that how you were doing your job? This ah, he said, isn't that pretty stupid to do something like that. And, I was going to say, what letter.
I (inaudible)
heard.
be like that.
OTHER: Well, yeah, they come back and make you all stupid and exceptional. run of the mill.
BH: Yup.
OTHER: Make you go do this and
seem like this wasn't the right transaction. You could say, well, excuse me, but you know we did a lot of them like that.
BH: Yeah, well, I was a bit, I was embarrassed, scared to take my tape, the other data, those other payouts. And Tig got pissed off and says that means your not making the payments. How come your not paying our insurance bill. You know.
OTHER: That's the first thing I said. ____ machine makes little. Show them all that money and quick payments. She said then you know they have been saying that there's
a loan.__ _____
And ah, so I don't know we might end up paying 'em two and a half million dollars, but if we would of listed them on the contract we would of paid them 13-14 million dollars. _____ right or wrong on that. BUt, yeah I guess Dan Brothers, kept both of those letters too. Paid Mr. _____, too you know Post office isn't catching this stuff. .
there again, you know he said stop and think about this, he said. The main thing, it wasn't Skip and would made a run at that thing, but you always wonder about those things when everybody gets so excited about them selling a bad deal. In order to get paid the same, how much of that.
(inaudible.)
BH: Well, I;m gonna, pick up my kids at the all night state.
OTHER: When you get a chance, got a hold of you.
BH:
OTHER:
BH:
OTHER:

BH:
OTHER:
BH:
OTHER: I still think we should organize that better.
BH: Yeah I think so too.
OTHER: But then of course I talked to Roger a little bit. (_____), I shouldn't be that way. And then he was going on again about how everyone is talking and I thought, well you dip. Well actually, I think he was referring back to the day that Hamberry was up there you know.
BH: Yeah
OTHER: And I just talked to you guys, holy fuck, he neglected, you and I. And um Ken and these other guys says Myron 's taking everybody, kissing everybody that's talking to those guys.
BH: Well.
OTHER: But, I think your, until we get down to the bear bones of it. At least you can, you know, you can stay right where you are.
BH: Yeah, yeah.
OTHER: And that's probably an old thing, you know. Shoot your brother in the back.
BH: Yeah, I'd really rather not talk to him, so.
OTHER: I can almost hear them. that's what they said. as long as they said the same thing.

OTHER: And that's probably an old ...ig, you know. Shoot your brother in the back.
BH: Yeah, I'd really rather not talk to him, so.
OTHER: I can almost hear them, that's what they said, as long as they said the same thing.
BH: Right, okay, Bert. I'll talk to you on Monday.
OTHER: Well have a nice weekend Bert.
BH: Okay. [laughs]
OTHER: All right, don't worry about it it will all come out. I think it will blow over. I think it will blow this time.
BH: I think so too.
OTHER: I think it will blow this time, I don't think it will I mean, _____ an enemy down there.
That's what I am saying, I just don't maybe I 'm off, but sometimes [you] get those little feelings about things. I don't got any on this one.
BH: Yeah, okay,
see you bert.

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Senate

State of Minnesota

May 22, 1995

To: Senator Roger D. Moe, Chair - Committee on Rules and Administration
Senator Dean E. Johnson, Minority Leader

From: Senator Ember Reichgott Junge, Chair - Subcommittee on Ethical Conduct
Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger

Subj: Investigation of Senator Harold R. "Skip" Finn

1. Introduction

The purpose of this memorandum is to set forth the procedural history of the complaint against Senator Harold R. "Skip" Finn filed with the Special Committee on Ethical Conduct January 3, 1995. Since that time the Committee has held several hearings and gathered an extensive record of documents filed in the federal criminal case against Senator Finn. However, the Committee has encountered numerous obstacles to getting live testimony from witnesses and so has been unable to complete its work at this time. The Committee proposes to continue its investigation during the interim and have recommendations for the Committee on Rules and Administration by the time the 1996 session convenes.

2. Guilty Plea

On August 17, 1994, Senator Finn entered a plea of guilty to the misdemeanor charge of willfully misapplying not more than $100 of the funds of the Leech Lake Band, an Indian tribal organization, in violation of 18 U.S.C. § 1163. The maximum statutory penalty for that offense was a term of imprisonment for up to one year, a criminal fine of up to $100,000, and a term of supervised release for one year. Senator Finn agreed that on or about April 28, 1988, and again on or about August 16, 1988, he knowingly submitted to the Leech Lake Band fictitious invoices for insurance services he claimed to have provided to the Leech Lake Band when, as he then well knew, those services had not been provided. By those actions, Senator Finn admitted

he willfully caused to be misapplied funds belonging to the Leech Lake Band in the amount of $7,600 in April of 1988 and $5,745.14 in August of 1988.

Senator Finn's guilty plea, however, was conditional. In the plea agreement, he reserved the right to withdraw his guilty plea if the court found that the adjusted offense level for sentencing purposes was higher than a level ten.

3. Presentence Investigation

As part of the presentence investigation, both the United States and Senator Finn submitted extensive memoranda to the court describing the facts of the case and why Senator Finn's sentence should or should not be extended.

4. Complaint

On January 3, the first day of the 1995 legislative session, Senators Dean Johnson, Thomas Neuville, and Linda Runbeck filed with Senator Carol Flynn, the chair of the Special Committee on Ethical Conduct, a complaint against Senator Finn based on the conduct described in the federal criminal proceedings. The Subcommittee on Committees appointed Senator Reichgott Junge chair and Senators Frederickson, Novak, and Terwilliger as members of the Special Committee to hear the complaint.

5. Meeting Jan 27, 1995

On January 27, 1995, the Committee held its first meeting. It reviewed the history of the Committee and the Committee's disciplinary powers and discussed procedural questions such as the use of executive sessions, the schedule of witnesses and documents, exchange of information prior to hearing, hearing procedures, and its timetable for action. The Committee voted to defer further action on the complaint until after Senator Finn's sentencing in federal court, which was then scheduled to occur March 3. The Committee agreed to convene as soon thereafter as practicable. It further instructed Senate Counsel to continue gathering information about the complaint and provide it to the members as it became available.

6. Sentencing March 3, 1995

At the sentencing before District Judge James Rosenbaum on March 3, 1995, Judge Rosenbaum made findings on the record relating to the various sentencing factors and concluded that Senator Finn should be sentenced at level 13. In accordance with his conditional guilty plea, Senator Finn exercised his right to withdraw his guilty plea. The U.S. Attorney, David Lillehaug, later announced to the press that he would ask a grand jury to indict Senator Finn on felony charges. As of this date, no indictment has been announced.

7. Meeting March 10, 1995

Senator Finn chose not to appear at the Committee's meeting held March 10, 1995, but he did send a letter wherein he questioned the Committee's authority to consider any

allegations or accusations against him that were based on conduct prior to his becoming a member of the Minnesota Senate. He also questioned the right of the Committee to put him into double jeopardy, considering that he was already facing federal criminal prosecution, as well as an investigation by the Lawyers Board of Professional Responsibility. He asked whether public financing would be available to assist in his defense.

The Committee considered a draft amendment to Senate Rule 75 that would have allowed it to consider conduct that occurred before he became a member of the Senate "if it bears a reasonable relationship to the accused's fitness to continue as a member or employee of the Senate or as a lobbyist." This proposed language was based on language in the rules of the Delaware House of Representatives.

The Committee discussed several questions it had regarding its relationship with the federal prosecution, including what charges were then pending against Senator Finn, what new charges were planned, what the timetable would be for that prosecution, and whether there would be any interference between the two proceedings in interviewing witnesses and gathering documents. The Committee agreed that Senator Reichgott Junge, Senator Frederickson, and Senate Counsel should visit with the U.S. Attorney, Mr. Lillehaug, and discuss these issues.

8. Meeting with U.S. Attorney March 10, 1995

Later that same day, representatives of the Committee met with U.S. Attorney David Lillehaug and Assistant U.S. Attorneys Paul Murphy and Doug Peterson. They were informed that the misdemeanor charge to which Senator Finn had plead guilty in August was still pending, but that the U.S. Attorney would be presenting a felony case to a grand jury. They were told that the plea agreement entered into in August could not be used as evidence in the new proceeding. They were told that the normal time from indictment to trial is six to eight months.

9. Meeting March 21, 1995

On March 21, 1995, the Committee met to hear the report on the visit with the U.S. Attorney and to receive copies and an explanation of various documents that had been filed in the federal criminal case.

The Committee reviewed a revised draft of the proposed amendment to Senate Rule 75, which omitted any reference to conduct before becoming a member. Senator Neuville appeared and expressed his approval of the proposed language and suggested that a probable cause hearing be held the week of April 7-14.

Senator Finn made a special appearance before the Committee to question its jurisdiction. He repeated his assertion that the Committee had no jurisdiction over his conduct before he was elected to the Senate. He also noted that the Committee should not

apply any standards adopted in 1994 or 1995 to conduct of his that occurred in 1991 and before. He called the Committee's attention to Mason's Manual, § 111, ¶ 3, which says "Any matter awaiting adjudication in a court should not be debated or discussed in a legislative body." He cited Rule 11 of the federal Rules of Criminal Procedure, which says that a plea of guilty that was later withdrawn is not admissible as evidence in any civil or criminal proceeding against the defendant who made the plea. Further, Senator Finn pointed out that the Leech Lake Reservation Business Committee had not complained about the false billing and that any action by the Committee to discipline him in connection with the false billing would be an interference with tribal sovereignty. He warned the Committee against getting involved in Indian politics.

The Committee discussed the different standards of proof used in different proceedings. The standard used in a criminal case is "beyond a reasonable doubt," whereas the standard used by the Lawyers Board of Professional Responsibility in a disciplinary proceeding is "clear and convincing evidence."

10. Meeting March 29, 1995

The Committee discussed whether to pay the legal costs incurred by one or both sides in this proceeding. Senator Finn said he did not want the Senate to pay both sides, and the Committee agreed to pay no costs of either party and to prohibit them from using Senate employees, other than clerical help, to assist them in preparing or defending against the complaint.

Senator Finn reserved the right to challenge the jurisdiction of the Committee.

The Committee confirmed that the standard of proof and disciplinary proceedings before the Lawyers Board of Professional Responsibility is "clear and convincing evidence."

The Committee considered a memorandum from Senate Counsel pointing out that, while Rule 11 is a federal procedural rule that must be observed scrupulously by the federal courts, its precise terms are not constitutionally applicable to state courts or to the Special Committee.

The Committee discussed the issue of tribal sovereignty and how it might impact the Committee's proceedings. Senate Counsel explained that the conduct described in the complaint was the conduct of an Indian on Indian land with other Indians relating to the business of the Reservation Business Committee and the reservation's insurance company. State courts do not generally have jurisdiction over these matters and that's why they are heard in federal court. The members of the tribe would have a legal basis for refusing to testify on these matters, if they chose to do so.

In addition to their right to assert tribal immunity, Burton Howard and Myron Ellis might also choose to assert 5th amendment immunity from having to testify in a way that might incriminate them. Burton Howard has already been granted immunity from prosecution in federal court, and Myron Ellis has been convicted in federal court. They could not be compelled to testify about matters that might incriminate them under state law, unless the state agreed not to prosecute them for their testimony. Since the likelihood of state prosecution under the circumstances is remote, Senate Counsel was instructed to discuss with the attorney general obtaining the necessary agreements not to prosecute.

Senate Counsel explained that Myron Ellis could not be compelled by subpoena to testify before the Committee in the near future because he was about to be incarcerated in federal prison. In order for him to be released to testify, it would be necessary to begin an action in state court for a writ of *habeas corpus ad testificandum*. It would then be necessary to present the writ to the warden of the prison wherein Mr. Ellis was incarcerated. The warden would not be required to honor the writ, but would be expected to do so if given reasonable assurance that Mr. Ellis would be safely guarded and returned to custody after being questioned by the Committee. The Committee would be required to pay the cost of employing sheriff's deputies to escort Mr. Ellis to and from the Committee hearing.

Two other witnesses the Committee would like to question are agents of the Bureau of Indian Affairs. They cannot testify in court without the permission of their department head. Further, since the testimony requested of them relates to matters that they have already presented to a grand jury, the Committee would need to obtain an order from a federal court permitting them to testify, since the law provides that all grand jury proceedings are to be kept confidential, unless otherwise ordered by the court.

The Committee agreed to meet again in the following week to work out the details for a hearing to be held near the end of April.

11. Meeting April 3, 1995

Senator Finn appeared and again urged the Committee to address only his conduct that occurred after he was elected. That would exclude his role in creating and operating the reservation's insurance company and his role in submitting the false invoices from the insurance company to the Reservation Business Committee. It would leave only the allegation that he directed Mr. Howard early in 1991 to destroy the invoices rather than turn them over to the grand jury in response to a grand jury subpoena.

Senator Finn asserted that since he was acting as attorney for the Leech Lake Reservation Business Committee, his attorney-client privilege prevented the Committee from inquiring about any conversations he may have had with tribal officials. He further objected to the use of documents from the federal criminal court action without being afforded the opportunity to cross-examine the witnesses whose statements are contained in the

documents, even though he had waived his right to a hearing on those documents in federal court. He asked that the Leech Lake Reservation Business Committee be invited to attend the hearing and that he be given three to four weeks' notice to prepare for it. He asked the Committee to interview George Wells and John McCarthy, who had submitted statements on his behalf in connection with his sentencing memorandum.

Senator Neuville argued that Senator Finn's conduct before becoming a member of the Senate was relevant as a breach of the public trust. He argued that the Committee is not subject to federal Rule 11. His list of witnesses included Burton Howard, Myron Ellis, James Hanbury, and Tim Reed. He suggested the Committee should have independent counsel if Senator Finn should challenge its subpoenas in court.

12. Meeting April 19, 1995

The Committee agreed to seek immunity from prosecution for Burton Howard and Myron Ellis, in order to encourage them to testify to the Committee.

The Committee also agreed to write a letter to the Leech Lake Band, expressing the Committee's desire to question Mr. Ellis and Mr. Howard about their statements to the federal prosecutors that Senator Finn had directed Mr. Howard to destroy the April 1988 invoice that was subject to a grand jury subpoena, and the Committee's willingness to discuss with the Tribe any objections the Tribe might have to this questioning.

The Committee agreed to seek a writ of *habeas corpus ad testificandum*, if necessary to secure Mr. Ellis' appearance before the Committee.

The Committee agreed to focus its inquiry on whether Senator Finn had engaged in any improper conduct after he became a member of the Senate.

The Committee agreed to use the documents filed in the federal criminal case as background material, and to supplement that material with the live testimony of witnesses.

The Committee authorized Senate Counsel to take the necessary action to secure the testimony of special agents James Hanbury and Tim Reed.

The Committee agreed that, if necessary, they would hear the testimony of witnesses at separate times.

The Committee agreed to invite Mr. Howard, Mr. Ellis, and the Leech Lake Tribal Council to attend a meeting in the Capitol on May 5.

13. Agreements not to Prosecute

On April 28, 1995, the Cass County Attorney, Earl Maus, wrote to Katherain Roe, the attorney for Burton Howard, and to Michael Colich, the attorney for Myron Ellis, agreeing not to prosecute them for any crimes related to the matters the Committee planned to question them about.

14. Meeting May 5, 1995

Senate Counsel informed the Committee that Myron Ellis had been incarcerated in federal prison in Levenworth, Kansas, on or about April 12 and would be unable to attend. Burton Howard also declined the Committee's invitation to attend the meeting. His attorney, Katherain Roe, would be out of the state May 5, and she advised Senate Counsel that Mr. Howard would not appear before the Committee, except in response to a subpoena. She said she would be back in the state and prepared to represent Mr. Howard on or after May 15.

Andrew Small, attorney for the Leech Lake Tribal Council, informed Senate Counsel by telephone that the Tribal Council declined the Committee's invitation to attend the May 5 meeting and that the Council would resist any attempt by the Committee to subpoena the testimony of any tribal official concerning tribal business. However, he also said the Tribal Council is not claiming they had any legal right or intention to challenge, by means of litigation, the right of the Committee to subpoena Mr. Howard's testimony, since he is now a private citizen and not a tribal official.

The Committee voted to subpoena Mr. Howard to attend a hearing in the Capitol on May 17.

15. Meeting May 17, 1995

The Committee subpoena was served on Mr. Howard on May 8 at his residence in Cass County, Minnesota. Senator Finn then wrote the Committee chair objecting that he still did not know what procedures the Committee would be utilizing in its investigation and that he would not be prepared to proceed on May 17. He asked that he be given at least three weeks preparation time before any scheduled hearing and that all witnesses should be heard within a short time of each other.

The chair spoke with Mr. Howard's attorney, Ms. Roe, who advised her that she would advise Mr. Howard not to testify because, even though the Cass County attorney had agreed not to prosecute, he still faced potential prosecution by the county attorneys of St. Louis, Ramsey, and Hennepin Counties. The chair called Mr. Howard and asked him not to appear on the 17th.

At its meeting on May 17, the Committee voted to subpoena Myron Ellis and George Wells, in addition to Mr. Howard, and directed Senate Counsel to take whatever steps were necessary to get the testimony of special agents James Hanbury and Tim Reed.

The Committee agreed it would be most desirable to schedule all of the witnesses in one short block of time, perhaps a series of half day meetings next fall in September or October, as close together as possible.

The Committee directed Senate Counsel to prepare a report to the Rules Committee describing its proceedings to date, to be delivered before the end of session, and to prepare during the interim a summary of the facts as developed by the Committee from the written materials it has gathered.

The Committee adjourned to the call of the chair.

ERJ:PSW:ph

cc: Peter S. Wattson

EMBER REICHGOTT JUNGE
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August 28, 1995

Senate
State of Minnesota

To: All Senators

From: Senator Ember Reichgott Junge, Chair - Special Subcommittee on Ethical Conduct
Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger

Subj: Johnson v. Finn Complaint

1. Introduction

At the May 17, 1995 meeting of the Special Subcommittee on Ethical Conduct, the subcommittee recommended that an information memorandum be sent to members of the Senate as to the procedural history of the complaint against Senator Harold R. "Skip" Finn filed with the subcommittee on January 3, 1995. This memo will summarize proceedings on the complaint to date.

2. Complaint

The complaint, filed by Senators Dean Johnson, Thomas Neuville, and Linda Runbeck, alleged that Senator Finn had breached his ethical duty to the Minnesota State Senate and the people of Minnesota by his actions in helping to create and operate a company that provided insurance services to the Leech Lake Band of Chippewa Indians at a time when he served as legal counsel to the Band and before he was elected to the Senate. It further alleged that, after he was elected to the Senate, he attempted to obstruct a criminal investigation of those actions by ordering the destruction of documents that had been subpoenaed by a federal grand jury.

3. Jan 27 - March 3, 1995 (Sentencing)

The subcommittee met once on January 27, 1995 to review the complaint and address a number of procedural issues. After being informed of the U.S. Attorney's request that the subcommittee not interview witnesses until interviews were completed by the prosecuting attorneys, the subcommittee voted to defer further action on the complaint until after the sentencing scheduled March 3.

4. March 10 - May 17, 1995

When Senator Finn withdrew his guilty plea and the U.S. Attorney announced that he would call a grand jury to indict Senator Finn on felony charges, the subcommittee authorized the Chair and ranking member (Sen. Frederickson) to meet with the U.S. Attorney to determine whether the Senate proceedings should move ahead in light of the ongoing federal criminal investigation. The U.S. Attorney did not raise objection to the Senate moving forward.

The subcommittee then held a series of meetings to determine rules of its proceedings and address a number of complex procedural questions, most of which were without precedent. The following decisions were made by the subcommittee (nearly all reached by unanimous consensus of the four members):

1. The subcommittee should proceed with a fact-finding investigation, rather than a probable cause proceeding, to determine the following: the subcommittee's jurisdiction, if any; whether the allegations against Sen. Finn are credible; and if credible, the extent to which those allegations relate to Sen. Finn's service as a state senator. The subcommittee determined that the written record should be supplemented with live testimony from key witnesses, because credibility of witnesses was in issue, and the record consisted of affidavits, rather than testimony subject to cross-examination.

2. The subcommittee should pursue its ethics investigation concurrent with federal criminal proceedings, in that the subcommittee is charged to investigate all complaints where ethical misconduct in violation of Senate rules is alleged. The complaint, on its face, raises issues of ethical misconduct independent of allegations of criminal wrongdoing. The subcommittee voted to adopt the same standard of proof of "clear and convincing evidence" as required by the Lawyers Board of Professional Responsibility in acting on complaints within its jurisdiction. (The Lawyers Board routinely investigates ethical complaints concurrent with criminal proceedings).

3. The subcommittee would focus its inquiry only on conduct occurring since Sen. Finn became a member of the Senate in January, 1991, based on case law precedent from the U.S. House of Representatives and possible constitutional challenge.

4. The subcommittee sought voluntary testimony through written request from four key witnesses to assist in the fact-finding investigation above. None of the witnesses appeared voluntarily. One witness (who may yet assert tribal immunity) is serving a 90-day prison sentence in Leavenworth; and two federal agents will not appear until permission is obtained from the federal courts and U.S. Attorney.

5. The subcommittee voted to subpoena the fourth witness, who is most key to the post-January, 1991 allegations. Counsel for the witness requested that he be provided immunity from state prosecution. Senate counsel Peter Wattson negotiated state immunity with the Cass County attorney; however, that immunity apparently was not broad enough. Prior to a scheduled hearing, the witness was advised by his attorney to take the Fifth Amendment. The subcommittee postponed the witness' appearance until additional state immunity could be negotiated. The possible objection of tribal immunity has not yet been reached in these negotiations.

6. The subcommittee voted at its last meeting on May 17, 1995 to request testimony from (and, if necessary, subpoena) a fifth witness, who had been suggested by Sen. Finn.

7. Also at its meeting on May 17, the subcommittee directed Mr. Wattson to pursue obtaining testimony of these witnesses over the legislative interim for possible hearing later in the year. Counsel would keep the subcommittee updated in writing on his progress (or lack thereof). The subcommittee would not meet again until later in the year. At that time, the subcommittee would reassess the situation and determine whether a hearing is feasible.

Since the May 17, 1995 meeting, Sen. Finn has been indicted on 24 counts. Four of the counts relate to Sen. Finn's conduct after he became a member of the Senate. Any modification of the subcommittee's decisions to date made necessary due to interim events will be discussed when the subcommittee reconvenes.

ERJ:ms

cc: Peter S. Wattson

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JO ANNE ZOFF SELLNER
DIRECTOR

Senate

State of Minnesota

September 18, 1995

To: Senator Ember Reichgott Junge
Senator Dennis R. Frederickson
Senator Steven G. Novak
Senator Roy W. Terwilliger

From: Peter S. Wattson, Senate Counsel PSW
296-3812

Subj: Update on Finn Case

The purpose of this memorandum is to bring you up to date on the proceedings against Senator Finn.

As you may remember, only 4 of the 24 counts in the federal grand jury's indictment of Senator Finn relate to his conduct after he became a member of the Senate. (There were 26 counts in all, two of which concerned only his alleged co-conspirators, Alfred "Tig" Pemberton and Daniel Brown.)

Count 25 charges Senator Finn with Obstruction of Justice in violation of 18 U.S.C. § 1503, based on his allegedly having directed Burton Howard on or about February 1991 to destroy an RRM, Inc. invoice dated in April 1988 in the amount of $7,600, when Senator Finn allegedly knew that the federal grand jury was investigating expenditures of tribal funds through RRM, Inc..

Count 21 charges him with Mail Fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2, based on his allegedly having caused the Department of Natural Resources, on or about January 15, 1993, to mail him a title in his name to a 1990 21-foot Lund Baron boat that had been purchased on or about April 19, 1990, with money of the Leech Lake Reservation Business Committee in the name of the Leech Lake Reservation Business Committee.

Count 22 charges him with Mail Fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2, based on his allegedly having caused the Department of Natural Resources, on or about July 30, 1993, to mail him a title in the name of his former law

firm (Finn and Mattson) to a 1987 20-foot Lund boat that had been purchased on or about June 27, 1987, with money of the Leech Lake Reservation Business Committee in the name of the Leech Lake Reservation Business Committee.

Count 1 charges him with Conspiracy in violation of 19 U.S.C. § 371, based on his allegedly having conspired with "Tig" Pemberton and Dan Brown to use the Reservation Business Committee's money to purchase the two boats for his personal use.

On July 13, 1995, Senator Finn moved to dismiss the indictment for lack of federal jurisdiction. He argued that a law passed by Congress in 1953, Public Law No. 83-280 (commonly known as "Public Law 280"), which gave the State of Minnesota jurisdiction to prosecute crimes committed by an Indian on an Indian reservation, had given the State *exclusive* jurisdiction over those crimes and removed them from the jurisdiction of the federal government. In other words, he is arguing that he may only be tried in state court for violations of federal law.

At the same time, Senator Finn moved to dismiss the Mail Fraud Counts 21 and 22 on the theory that the mailings in 1993 were sent after the alleged schemes had reached fruition and were not necessary to the perpetration of the alleged fraud. He also moved to dismiss various other counts for various reasons that I will not detail here because the other counts relate to events before he became a member of the Senate.

On August 18, 1995, the United States filed a series of memoranda in opposition to Senator Finn's several motions. Regarding federal jurisdiction, the United States argued that Public Law 280 transferred to the states only federal *enclave* jurisdiction (jurisdiction to enforce federal laws that apply only on federal property), not jurisdiction to enforce federal laws that apply throughout the land. The United States argued that Public Law 280 was intended to give the named states, including Minnesota, the same jurisdiction over Indians and Indian country that the states possess over other persons located elsewhere in the state. It was intended to integrate the Indian lands into the states in which they were located, not deprive the federal government of its ability to enforce federal laws there.

Regarding mail fraud, the United States argued that a mailing need not be an essential element of the scheme to defraud, it is sufficient if it is of tangential importance to the scheme, so that the scheme depended in some way on the mailing. It argued that whether the scheme to defraud the tribe depended on the mailing was for the jury to decide.

Oral argument on these and the other motions was heard before U.S. Magistrate Judge Raymond Erickson in Duluth on August 30. He has taken the motions under advisement.

Pending a ruling on the motions to dismiss, the trial is set to begin before Judge Michael Davis in St. Paul on January 8, 1996.

In its response to Senator Finn's motion to order the United States to disclose any "bad act" or "similar course of conduct" that it intends to offer at trial, the United States produced evidence of additional questionable conduct of Senator Finn after he became a member of the Senate. It produced copies of deeds and Ethical Practices Board filings relating to property Senator Finn now owns called "The Two Points Property," consisting of about 32 acres in Cass County. One deed, dated July 29, 1987, conveys the property from Zenith Dredge Company to Reservation Risk Management, Inc.. It was filed on August 3, 1987. A second deed, dated July 29, 1987, conveys the property from Reservation Risk Management, Inc., to Harold R. Finn and Teri S. Finn, husband and wife. Notwithstanding the date on the second deed, Senator Finn did not list the property on his Statements of Economic Interest filed with the Ethical Practices Board in 1990, 1991, or 1992 (twice). The second deed was not filed with the Cass County Recorder until December 9, 1992. Senator Finn did list the property on his Statement of Economic Interest filed with the Ethical Practices Board on April 1, 1993, and indicated "No Change" in his real property ownership on the statements filed in 1994 and 1995.

As the United States pointed out, Senator Finn's failure to list this property on the four forms he filed with the Ethical Practices Board before April 1, 1993, would be a gross misdemeanor in violation of Minn. Stat. § 10A.10. Senator Finn's secretary who signed the second deed has testified under oath that the deed was not backdated. According to the U.S. Attorney:

> If that testimony is true, it makes it certain that Finn's failure to list the property on the Minnesota Ethical Practices forms was a crime. It seems unlikely that her testimony is true, since the notary stamp used on Deed #2 would not even have been issued on July 29, 1987. Thus, the evidence may also show a violation of M.S.A. § 609.65, and since that violation was done by Finn with intent to defraud, it is a felony punishable by imprisonment of up to three years and a fine of $5,000.00.

Copies of the deeds and Statements of Economic Interest are enclosed.

I shall keep you informed of further developments.

PSW:ph
Enclosures

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Senate
State of Minnesota

October 3, 1995

Senator Roger D. Moe
Rules and Administration Committee
208 State Capitol
St. Paul, MN 55155

Dear ~~Senator Moe~~ Roger,

It is with regret I am today requesting you to relieve me from my duties as a Majority Whip for the Senate DFL Caucus, as well as Chair of the Senate Public Lands and Waters Subcommittee of Environmental and Natural Resources, Vice-Chairman of the Senate Judiciary Committee, and Co-Chair of the Joint Judiciary and Crime Prevention Subcommittee on Privacy.

I have contemplated this move for sometime, and feel compelled to take this action now. I don't want my situation reflecting on my caucus colleagues.

Please accept this letter of resignation from these duties, effective immediately.

Sincerely,

Harold R. "Skip" Finn

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Jo Anne Zoff Sellner
Director

Senate

State of Minnesota

April 17, 1996

To: Senator Roger D. Moe

From: Peter S. Wattson, Senate Counsel
296-3812

Subj: Vacancy in Senate District 4

On Friday, April 12, 1996, a jury in federal district court in St. Paul returned its verdict finding Senator Harold R. "Skip" Finn guilty on 12 felony counts, including misappropriation of tribal funds, theft from federally funded programs, and mail fraud. Senator Finn has remained free pending a hearing on whether he should be incarcerated before sentencing. A time for sentencing has not yet been set, but should be no more than six to eight weeks away. You have asked what will be the impact of his conviction on Senator Finn's Senate seat. In my opinion, the impact will be to create a vacancy in Senate district 4.

The Minnesota Constitution, art. IV, § 6, says that "Senators and representatives must be qualified voters of the state . . . ." Article VII, § 1, says that "a person who has been convicted of treason or felony, unless restored to civil rights" is not eligible to vote. Once convicted of a felony, Senator Finn would be no longer eligible to vote, and no longer eligible to hold office. But, would his office automatically become vacant? I believe it would.

Minn. Stat. § 351.02 provides, in part, that:

> Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:
>
> . . .
>
> (5) The incumbent's conviction of any infamous crime, or of any offense involving a violation of the official oath . . . .

There is some question whether this statute may be applied to offices created by the constitution, if the conviction is for a crime that is not "treason or felony." But, if the crime falls within the constitutional prohibition, the statutory policy is clear: the vacancy occurs immediately, without the need for further removal proceedings.

Several questions remain, however. For example:

1. When is the person "convicted?"
2. What is the impact of an appeal on the conviction and the forfeiture of office?
3. What is an "infamous crime?"
4. What is a felony?
5. Should the consequences of a federal conviction be defined under federal law, or under Minnesota law?

1. When is the person "convicted?"

I have found no Minnesota court cases on this question. But there have been some opinions of the attorney general regarding the status of a local official who has been convicted of a felony. And, the Minnesota Constitution is similar to the constitutions of other states on this point, so there are many cases from other states construing similar language. Unfortunately, neither the attorney general opinions nor the cases from other states are uniform in their interpretations.

In 1928, a village mayor was convicted in state district court of a felony. Sentence was imposed, but stayed pending appeal. The county attorney asked the attorney general whether the mayor had lost his right to vote and whether the mayor's office had become vacant on account of his conviction. The attorney general answered "yes" to both questions. Op. Att'y Gen. 196 (1928). As the attorney general said, "the conviction of the defendant was complete when sentence was imposed and his office was thereby immediately vacated." *Id.*

In a similar vein, in determining whether a person was entitled to vote and hold office after pleading guilty to a felony in federal court but before being sentenced or having judgment entered, the attorney general advised that the person was "still entitled to vote and hold office until such time as a judgment of conviction shall have been entered against him." Op. Att'y Gen. 186 (1932).

In a later opinion, however, the attorney general expressed a different view. In 1952, a village clerk was charged in St. Louis county district court with wrongfully receiving or disposing of money, a felony. He was found guilty by the verdict of a jury. Before sentence was imposed the county attorney inquired of the attorney general whether a vacancy had occurred by reason of the verdict or whether the vacancy would not occur until judgment was entered. The attorney general reviewed his past opinions and the many cases from other states on the subject and concluded that "an office of an official incumbent is vacated when a verdict of guilty is returned." Op. Att'y Gen. 296, 299 (1952). The attorney general quoted approvingly from the California case of *McKannay v. Horton*, 151 Ca. 711, 91 P. 598 (1907). Three justices, concurring, had

opined that "it is entirely immaterial whether or not judgment has been given upon the conviction . . ." *Quoted in* Op. Att'y Gen. 296, 299 (1952). The attorney general attributed this quotation to the court's holding. But that is not what the court held. Rather, the court's opinion declined to consider the question, since the judgment had been entered before the vacancy was declared, making a decision on the question unnecessary. 151 Ca. at 718, 91 P. at 600. The California court has since held that the better rule is to require the entry of judgment before finding that an office has become vacant. *Helena Rubenstein International v. Younger*, 71 Cal. App. 3d 406, 139 Cal. Rptr 473 (2nd Dist. 1977).

California has now joined the majority of states, whose courts have said that a vacancy does not occur until the sentence has been imposed. *See* 10 ALR5th 139, 163-72 (1993). The majority includes Delaware,[1] Georgia,[2] Illinois,[3] Massachusetts,[4] Pennsylvania,[5] Texas,[6] Virginia,[7] and Washington.[8] The reason for the majority rule is that, while in the popular mind "conviction" means only the verdict of a jury, in its technical and legal sense a conviction requires the concurrence of the judge, who acts by imposing a sentence and entering a final judgment of guilty in accordance with the verdict of the jury. If the judge does not concur with the verdict of the jury and grants the defendant a new trial or dismisses the charges, the defendant is treated as not guilty and the office should be treated as not vacant. As the author of the ALR annotation explained it:

> [W]hile a public official should not be permitted to remain in office too long after being found guilty, such as the months and years often required by the appellate process, because of the need for the public's trust and confidence in public officers, it is also important that an officer not be permanently removed from office with

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[1] *Fonville v. McLaughlin*, 270 A.2d 529 (Del. Sup. 1970); *Slawik v. Folsom*, 410 A.2d 512 (Del. Sup. 1979), *later proceeding* 480 A.2d 636 (Del. Sup. 1984).

[2] *Summerour v. Cartrett*, 220 Ga. 31, 136 S.E.2d 724 (1964).

[3] *People ex rel. Grogan v. Lisinski*, 113 Ill. App. 3d 276, 68 Ill. Dec. 854, 446 N.E.2d 1251 (1st Dist. 1983).

[4] *Commonwealth v. Lockwood*, 109 Mass 323 (1872).

[5] *Shields v. Westmoreland County*, 253 Pa. 271, 98 A. 572 (1916); *Commonwealth ex rel. McClenachan v. Reading*, 336 Pa. 165, 6 A.2d 776 (1939).

[6] *Eckels v. Gist*, 743 S.W.2d 330 (Tex. App. Houston (1st. Dist.) 1987).

[7] *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707, 24 ALR 1286 (1922).

[8] *Mattsen v.* Kaiser, 74 Wash.2d 231, 443 P.2d 843 (1968); *Kitsap County Republican Cent. Committee v. Huff*, 94 Wash.2d 802, 620 P.2d 986 (1980).

undue haste, before he has had a full and complete "day in court."

10 ALR5th 139, 163 (1993).

Three states take the opposite view, holding that the vacancy occurs upon the return of the jury's verdict: Kentucky,[9] Michigan,[10] and New York.[11]

I believe that Minnesota should follow the majority rule, both to allow the defendant to make post-verdict motions for acquittal or for a new trial, and to permit the severity of the offense to be determined by the judge in sentencing. The importance of the judge's participation in the process is more fully explained in answer to question 3.

2. What is the impact of an appeal on the conviction and the forfeiture of office?

The attorney general's 1928 opinion stated clearly that an appeal has no impact on the conviction and the forfeiture of office:

> This consequence of the conviction is not suspended or set aside by any stay of execution of sentence or other subsequent proceedings. Even though the conviction may later be set aside by the trial court or by the supreme court upon appeal, the defendant will not be entitled to have his office restored to him. The statute makes no provision for such restoration. An absolute vacancy in the office is created upon the conviction of the incumbent, and it thereupon becomes the duty of the proper authorities to fill the vacancy at once in the manner prescribed by law so that the business of the office may be transacted by a qualified person.
>
> The law which declares a public office vacant upon the conviction of the incumbent is based upon considerations of public policy and welfare. The law deals with the office rather than with the incumbent personally, and was enacted to protect the interests of the public in having public affairs administered by persons of good repute. When a person is convicted of a felony he immediately loses the presumption of innocence which he previously enjoyed, and is thereafter presumed to be guilty unless and until his conviction is set aside. Hence, though he may in fact be innocent and though his conviction may thereafter be set aside, he has

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[9] *Woods v. Mills*, 503 S.W.2d 706 (Ky. 1974).

[10] *Atty. Gen. ex rel. O'Hara v. Montgomery*, 275 Mich. 504, 267 N.W. 550 (1936).

[11] *Thaler v. State*, 79 Misc.2d 621, 360 N.Y.S.2d 986 (1974); *Gunning v. Codd*, 65 App. Div.2d 415, 411 N.Y.S.2d 280, *aff'd* 49 N.Y.2d 495, 427 N.Y.S.2d 209, 403 N.E.2d 1208 (1978); *Lemieux v. Niagra Falls*, 138 App. Div.2d 945, 526 N.Y.S.2d 281, *app. den.* 72 N.Y.2d 806, 532 N.Y.S.2d 847, 529 N.E.2d 177 (1988).

> inevitably lost to some extent the confidence of the public, and his usefulness as a public officer has thereby become materially impaired. If a convicted official be in fact innocent, the loss of his office is, of course, a personal misfortune to him, but that consequence cannot be avoided. The interests of the public are paramount to those of the individual, and must be given first consideration. The incumbent of an office has no inalienable personal right thereto. He takes the office subject to all the conditions imposed by law, including the condition that the office shall become vacant in case of his conviction of an offense within the terms of the statute above mentioned.

Op. Att'y Gen. 196 (1928).

This aspect of the 1928 opinion is in line with the vast majority of states. *See* 10 ALR5th 139, 178-88 (1993). Seventeen states have so held.[12] Only three states have held that an appeal serves to delay the occurrence of a vacancy.[13]

3. What is an "infamous crime?"

Section 351.02 creates a vacancy upon the incumbent's conviction of any "infamous crime." An infamous crime has been defined by the attorney general as "[a]ny crime punishable by imprisonment in the state prison." Op. Att'y Gen. 291 (1942). The crimes punishable by imprisonment in the state prison are felonies. *See* Minn. Stat. § 244.01, subd. 2. So, an "infamous crime" is a felony. This part of the statute conforms to the constitutional proscription of persons convicted of "treason or felony."

4. What is a felony?

A felony, under Minnesota law, is any crime "for which a sentence of imprisonment for more than one year may be imposed." Minn. Stat. § 609.02, subd. 2.

The attorney general, as was appropriate in 1942, focused on the maximum punishment authorized by the statute, rather than the actual punishment imposed by the court. But in 1963, Minnesota law changed. As part of the Criminal Code of 1963, Minnesota adopted a California law that classifies convictions according to the punishment actually imposed. It provides:

Notwithstanding a conviction is for a felony:

---

[12] Arizona, California, Colorado, Georgia, Illinois, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Utah, and Washington.

[13] Florida, Kentucky, and Texas.

> (1) The conviction is deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor as defined in section 609.02; or
> (2) The conviction is deemed to be for a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.

Minn. Stat. § 609.13, subd. 1 (1994).

The Advisory Committee that proposed the new criminal code recommended the new treatment of felony convictions because it had worked well in another state:

> There is no similar provision in the present law. It adopts the California law which has worked successfully.
>
> It is believed desirable not to impose the consequences of a felony if the judge decides that the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors.

Comment, Minn. Stat. Ann. § 609.13 (West 1987).

The new treatment of felony convictions was recognized by the Minnesota House of Representatives in 1986 when it undertook disciplinary proceedings against Representative Randy Staten, who had been convicted of the crime of felony theft by check. The House's Select Committee on the Staten Case found that, since his sentence was only 90 days in jail, Minn. Stat. § 609.13 deemed his conviction to be for a misdemeanor. He could not be declared, by a majority vote, ineligible to hold office. Rather, he would have to be expelled, which required a two-thirds vote. The Select Committee recommended that he be expelled, but the vote to expel him failed 80-52 (90 votes were required). A subsequent motion to censure him passed, 99-31. JOURNAL OF THE HOUSE 7457-75 (1986).

Unlike the California law on which it was based, § 609.13 does not apply to convert a felony to a misdemeanor "for all purposes." *In the Matter of the Disciplinary Hearing Regarding the Peace Officer License of Stephen Joseph Woollett a/k/a Stephen Joseph Engles*, No. C1-94-1295, slip op. at 6 n. 3 (Minn. Sup. Ct., Dec. 22, 1995). Where there is an administrative rule providing that a person is ineligible to be licensed as a peace officer if convicted of a felony, without regard to "a stay of imposition or stay of execution" of the sentence, as was the case in *Woollett/Engles,* or the court finds that a statutory scheme evidences the intent of the legislature that a person not be permitted to possess a firearm if convicted of certain felonies, without regard to the sentence imposed, *State v. Moon*, 463 N.W.2d 517 (1990), the Minnesota Supreme Court has found that Minn. Stat. § 609.13 does not apply. As the Supreme Court observed in

Woollett/Engles:

> Similarly, the court of appeals has upheld the use of felony convictions where sentencing was stayed under section 609.13 for the purposes of computing criminal history scores under Minnesota Sentencing Guidelines II.B.1, and impeaching the defendant at trial under Minn. R. Evid. 609(c). *State v. Clipper*, 429 N.W.2d 698, 701 (Minn. App. 1988); *State v. Skramstad*, 433 N.W.2d 449, 452-53 n. 1 (Minn. App. 1988). Like the Board's rules, the provisions of the Sentencing Guidelines and the Rules of Evidence at issue in *Clipper* and *Skramstad* specifically addressed the treatment of felony convictions with stayed sentences in subsequent criminal prosecutions. *Clipper*, 429 N.W.2d at 701; *Skramstad*, 433 N.W.2d at 452 & n. 1.

Slip op. at 7-8.

There is neither an administrative rule, a rule of evidence, nor a statutory scheme evidencing a legislative intent that the provisions of § 609.13 should not apply when determining whether an official has been convicted of a felony for purposes of being disqualified to hold public office. Therefore, under Minnesota law, whether an official's office becomes vacant depends upon whether the official is sentenced to more than one year in prison.

5. Should the consequences of a federal conviction be defined under federal law, or under Minnesota law?

Senator Finn's conviction was on 12 felony counts of violating federal law. Federal law has no counterpart to the California and Minnesota laws that classify crimes according to the sentence actually imposed. Therefore, a question arises whether to define the felony convictions in accordance with Minnesota law, or in accordance with federal law.

The Minnesota Supreme Court has held that, where Minnesota law differs from federal law, what is a felony for purposes of the constitutional disqualification from office should be determined according to Minnesota law. *State ex rel. Arpagaus v. Todd*, 225 Minn. 91, 29 N.W.2d 810 (1947). In that case, the respondent had been elected to the office of alderman in the city of Minneapolis in 1947, after having been convicted in federal court in 1930 of a crime that was a felony under federal law but was only a misdemeanor under state law. The court considered the disparate impact that applying the federal law might have in a hypothetical case:

> If two men, both citizens of this state, were jointly engaged in an illegal act in this state and both of them were arrested, one by the federal authorities and the other by the local authorities, and one was convicted in the federal court of a crime constituting a felony under the federal law and the other was convicted of an

> offense constituting a misdemeanor under Minnesota law, it does not seem reasonable that, for the commission of the same act, the one convicted in federal court should forfeit his civil rights, while the one convicted in the state court should not. The discrimination seems unfair.
>
> . . .
>
> '. . . Acts constituting a felony may differ in different jurisdictions. Statutes simply embody the standards established by the public conscience in those jurisdictions where they are enacted. Public sentiment may vary and standards change accordingly.'

225 Minn. at 99, quoting *State ex rel. Olson v. Langer*, 65 N.D. 68, 93, 256 N.W. 377, 388 (1934). The court found the alderman eligible to hold office, notwithstanding his conviction of a federal felony.

The attorney general has likewise chosen to apply Minnesota law to determine whether a person convicted of a federal felony is eligible to vote, because to do otherwise would deny the person the equal protection of the laws. Op. Att'y Gen. No. 68-h (Dec. 27, 1971).

For perhaps the same reason, the federal courts have chosen to apply federal law to Minnesota convictions. When determining the consequences of a state court conviction for felonious theft, which was deemed a gross misdemeanor under § 609.13, subd. 1, because the sentence imposed was no more than one year in the workhouse, the federal district court in Minnesota found that a defendant had been convicted of a felony within the meaning of the federal firearms statute. *U.S. v. Glasgow*, 478 F.2d 850 (8th Cir. 1973), cert. denied 414 U.S. 845 (1973). Likewise, where a defendant was convicted in state court of felonious theft, but was sentenced to one year in jail, the federal district court found that the defendant had been convicted of a felony within the meaning of the federal firearms statute, even though the conviction was deemed not a felony under § 609.13. *U.S. v. Pederson*, 359 F.Supp. 1151 (D. Minn. 1973). So, the consequences of a conviction are the same under federal law, whether the conviction is in federal court or in state court.

In the same spirit, it is appropriate for Minnesota to apply Minnesota law to federal convictions. This insures that all offenders are treated the same under Minnesota law, whether their conviction is in state court or in federal court, just as all offenders are treated the same under federal law.

For Senator Finn, this means that the consequences of his conviction in federal court can not be determined until he is sentenced and the severity of his crimes, under Minnesota law, can be determined in accordance with Minn. Stat. § 609.13. Once he is sentenced, if sentenced to more than a year in prison, his office will automatically become vacant.

PSW

cc: Senator Ember Reichgott Junge
Patrick E. Flahaven, Secretary of the Senate
Kenneth Raschke

APR 30 1996

HAROLD "SKIP" FINN
Senator 4th District
Majority Whip
306 State Capitol
75 Constitution Avenue
St. Paul, MN 55155-1606
Phone: (612) 296-6128
Home Address:
P.O. Box 955
Cass Lake, Minnesota 56633
Phone: (218) 335-6954

Senate
State of Minnesota

April 26, 1996

Governor Arne Carlson
130 State Capitol
75 Constitution Avenue
St. Paul, Minnesota 55155

Dear Governor Carlson:

I hereby resign from the Minnesota State Senate effective July 1, 1996. I have enjoyed my service in the Legislature and consider myself to be very fortunate to have had the opportunity to serve the people of Senate District 4 in this capacity.

Sincerely,

Harold "Skip" Finn

cc: Senator Allan Spear, President
Minnesota State Senate

Mr. Patrick E. Flahaven
Secretary of the Senate

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Criminal No. 5-94-18

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	SWORN STATEMENT OF BURTON HOWARD
HAROLD "SKIP" FINN, Defendant.	)	

I, Burton Howard, being duly sworn under oath, hereby testify and state, under penalty of perjury, as follows:

1. I am an enrolled member of the Leech Lake Band and for many years worked as an accountant for the Leech Lake Reservation Business Committee ("LLRBC").

2. From late 1985 through 1990, the LLRBC self insured its real property by establishing a separate insurance corporation named Reservation Risk Management ("RRM"). RRM was operated and partially owned by the tribe's attorney, Harold "Skip" Finn. Pursuant to a ten year agreement, the LLRBC made "premium" payments to RRM. Most all of the approved payments to RRM were scheduled well in advance. However, in 1988, Skip Finn submitted and I paid two separate RRM invoices that had not been scheduled and preapproved. Both of these invoices were fraudulent.

3. In April 1988, Finn submitted an RRM invoice charging the tribe $7,600 for "insurance" coverage on the tribe's Neighborhood Facilities Center. At the time Finn submitted this invoice I knew that it was fraudulent because the $7,600 was actually being paid to the tribe's Executive Director, Mr. Myron Ellis. I paid the

invoice because LLRBC member Alfred "Tig" Pemberton had told me to always pay all RRM invoices. Pemberton was a part owner of RRM.

4. In August 1988, Finn submitted another RRM invoice that had not been scheduled and preapproved by the LLRBC. This invoice purportedly billed the tribe for administrative expenses related to the worker's compensation policy through August 1988. At the time that this invoice was paid, I believed it was actually for legitimate administrative expenses. However, in July 1993 I learned from Skip Finn that this invoice was also fraudulent and the money had also gone to Myron Ellis. In fact, the tribe's workers' compensation policy with RRM had been terminated no later than March 1988.

5. In January 1991, the Leech Lake Band received a federal grand jury subpoena seeking all RRM correspondence and all records of any payments by the tribe to RRM. As Controller, I was directed to collect the documents that were sought by the subpoena and I did so. However, prior to the delivery of the documents to the grand jury, I was asked to attend a meeting with Harold "Skip" Finn. The meeting was at Finn's office and I believe the meeting was in February. Also in attendance at the meeting was LLRBC member Myron Ellis.

6. During the meeting, Finn asked me if the April 1988 $7,600 invoice from RRM was included in the documents that were collected and ready to be submitted to the grand jury. I told him that the invoice was included in the documents. Finn then said the following to me: "Get rid of it, I don't want to know what you do

with it, just get rid of it." Finn also said, "That's the piece of paper that could send us all up the river." I understood Finn to mean that Finn, Ellis and I could all be sent to jail if the fraudulent invoice was ever discovered by the federal government. Myron Ellis was present when Finn said this but Ellis did not say anything. Finn did not mention the August 1988 RRM invoice during this meeting.

7. After the meeting I removed the April 1988 RRM invoice from the subpoenaed documents as I had been told. I did what Finn said because he was the tribe's lawyer. Also, because I had paid the fraudulent RRM invoice, I believed that I was one of the people (along with Finn) who could be "sent up the river." I told Finn that I had destroyed the invoice but I actually removed the $7,600 RRM invoice from the subpoenaed documents and simply put it in my desk drawer at the tribal government building. The invoice stayed in my desk drawer for over one year until I finally threw it away.

8. In the Spring of 1993, after I had thrown away the invoice, the Department of Interior investigators started asking questions about LLRBC payments to RRM. In approximately May 1993, after the federal investigators started asking questions, I was asked to attend another meeting with Finn to discuss the payments to Ellis. At this meeting Finn told me that the federal investigators were then asking questions about a $5,700 invoice from August 1988 and he asked me if I had provided the grand jury with a copy of the August 1988 RRM invoice for $5,745.14. I told Finn that the $5,700 invoice from August 1988 had been produced.

I then learned that the $5,700 from this payment to RRM had also been paid to Myron Ellis.

9. Finn then "asked" me what I remembered that the two invoices were for and I said that "I remember that they were for insurance." Finn then told me, "Okay, if you are asked about them, that's what we'll say they were for." A few weeks later, on July 9, 1993, I was interviewed by federal investigators who asked me about the two payments to RRM. As Finn had instructed me, I lied to the investigators and said that the payments were for insurance and that I was not aware of any connection to Myron Ellis.

10. Shortly after I was interviewed by the federal investigators, Finn contacted me and asked me to tell him exactly what the investigators asked me and exactly what I told them. I told him that I had said the payments were for insurance. Finn then changed his earlier instructions to me and said I shouldn't say that because the investigators already knew that Ellis received the money. Finn now said that I should tell the investigators that the payments to RRM were for Ellis' wages that he was entitled to receive from the Leech Lake Band. Finn told me that I should call the federal investigators and tell them that I now remember the payments were wages for Myron Ellis. I then did as Finn requested.

11. On August 10, 1993, after I relayed Finn's new explanation for the payments, I was subpoenaed to testify before the federal grand jury about the two false RRM invoices and the true purpose of the payments. At the beginning of my testimony I

was warned by Assistant U.S. Attorney Mike Ward that if I lied under oath I could be prosecuted for perjury. He also warned me that anything I said could be used against me in a criminal prosecution. I knew that I had already committed a crime by lying for Finn to the federal investigators and that I had to decide if I was going to keep lying for him or admit my past lies and start telling the truth. I decided I had to stop lying for Finn and so I admitted to the grand jury that I had previously lied for Mr. Finn. Attached are the relevant excerpts from my testimony. I admitted my lies even though I was admitting I had committed a crime. I was not influenced in my testimony by any promises of immunity. I just decided to tell the truth and accept the consequences. I have not been promised that I won't be prosecuted for my lies to the federal investigators. I hope that I won't be prosecuted but I am glad that I stopped lying for Finn.

12. I was not asked about any destruction of records during my August 1993 grand jury testimony and I did not mention these actions on my own. I thought about my actions and later discussed it with my attorney, Katherian Roe, Assistant Federal Defender. I decided that I wanted to clear my conscience and tell the federal prosecutors what had happened to the missing invoice. In agreement with Ms. Roe, the federal prosecutors promised to take my admission and not use it to prosecute me for obstruction of justice. However, if I am not telling the truth about the invoice, I could be prosecuted. On August 9, 1994, I met with the investigators and told them everything about the missing invoice. An investigator's

memorandum from the meeting is attached.

13. I have not received or been promised any payments or rewards of any kind in exchange for my testimony. I swear under oath and declare under penalty of perjury that all of the above statements are true.

Dated:

BURTON HOWARD

SUBSCRIBED and SWORN to before me this 17th day of February, 1995.

NOTARY PUBLIC

KATHLEEN M. MILLER
NOTARY PUBLIC—MINNESOTA
CASS COUNTY
My Commission Expires JAN. 31, 2000

INTERVIEW OF BURTON HOWARD

On August 9, 1994, Assistant United States Attorney Michael WARD, District of Minnesota, and Special Agent Timothy REED, U.S. Department of the Interior, Office of Inspector General (OIG), interviewed Burton HOWARD, Leech Lake Band (LLB) member and former tribal comptroller, regarding recollections and clarifications of his prior grand jury testimony pertaining to Reservation Risk Management (RRM). AUSA Hank SHEA also joined the interview while it was in progress. The interview occurred at the United States Attorneys Office, 234 United States Courthouse, 110 South 4th Street, Minneapolis, Minnesota 55401.

AUSA WARD advised HOWARD that his participation in the interview was voluntary and with the concurrence of his attorney, Katherian ROE, Federal Public Defenders Office, Howard agreed to participate in the interview and provided the following information.

HOWARD recalled that upon service of the first RRM grand jury subpoena, Kim MATTSON, LLB Tribal Attorney, requested HOWARD to assemble all of the tribe's Reservation Risk Management records and correspondence as required by the subpoena. He advised that Ella CAMPBELL assisted him with the records production. The federal grand jury subpoena was served on the tribe in late January 1991, and the documents were delivered by the tribe in late February 1991. HOWARD stated however, that just prior to sending the records to the U.S. Attorneys Office, he met with Harold "Skip" FINN and Myron ELLIS and was instructed by FINN not to submit an April 1988 invoice in the approximate amount of $7,600, to the grand jury. HOWARD recalled the invoice reflected a $7,600 RRM insurance premium for coverage on the tribe's Neighborhood Facilities Center. HOWARD stated shortly after he received the invoice in April of 1988, he was aware the invoice was fraudulent because the payment was not listed on the schedule of payments to RRM and no such invoice had been provided. HOWARD also knew that the payment was actually going to Myron ELLIS. HOWARD stated that the $7,600 equalled a figure that ELLIS felt he was entitled to receive as a retroactive pay raise. Howard explained that he had assisted ELLIS with researching the retroactive pay raise and was familiar with the monetary amount that ELLIS claimed to be entitled. HOWARD stated that the LLB was experiencing financial difficulties at the time the invoice was submitted, and opined the false RRM invoice was produced to conceal ELLIS' receipt of the $7,600 from others in tribal government. Regarding FINN's instructions to get rid of the invoice, he recalled FINN making statements to the effect of, "Get rid of it, I don't want to know what you do with it, just get rid of it." HOWARD also remembered FINN's reference to the invoice as, "That's the piece of paper that could send us all up the river." HOWARD stated FINN's request and statements were sincere and he understood that FINN was including him (HOWARD) with those who would be "sent up the river". Howard stated that Myron ELLIS was present throughout this meeting with FINN, but did not himself tell HOWARD to destroy the subpoenaed invoice.

He recalled a subsequent contact by FINN soon after their initial meeting during which FINN inquired whether HOWARD had disposed of the invoice. HOWARD told FINN the invoice had been destroyed, however HOWARD stated that he had not destroyed the invoice as requested by FINN. In fact, HOWARD kept the invoice in his desk drawer for about two years. HOWARD explained he did not initially dispose of the invoice because he did not want to be responsible for its destruction and subsequently become a party to FINN and ELLIS' scheme. He added that in 1991, he moved into a different office and intentionally threw away the invoice while cleaning out his desk.

(On March 16, 1993, Myron ELLIS was interviewed by S/A Timothy REED regarding Reservation Risk Management, Incorporated. ELLIS initially stated that he had not received any funds from RRM. ELLIS initially stated he did not recall receiving the April 1988 $7,600 payment from RRM, but subsequently added that the payment may have been a "campaign contribution." On March 17, 1993, S/A REED asked ELLIS's lawyer to ask ELLIS about a $5,700 payment from RRM to ELLIS. On April 2, 1993, ELLIS's attorney advised S/A REED that no further information would be provided.)

HOWARD stated that in May 1993, he was told by ELLIS that FINN wanted to meet with them at his law office located in Walker, Minnesota. ELLIS then drove HOWARD to FINN's office and during the trip, ELLIS advised HOWARD that he (ELLIS) had received a second check from RRM. HOWARD stated he was previously unaware that ELLIS had received this check. HOWARD advised that upon arrival at the law office, FINN, ELLIS and HOWARD met in FINN's office. FINN then said to HOWARD that there was another RRM invoice from August 1988 that was in the amount of $5,700 that the OIG was looking at and FINN asked HOWARD if he had sent that second invoice in with the subpoenaed documents. HOWARD said "Yes." At this point Myron ELLIS stated, "Yes, I received two checks." FINN then asked HOWARD, "Do you remember what the invoices were for?" and HOWARD responded, "I remember that they were for insurance." FINN then replied to HOWARD, "Okay, if you are asked about them, that's what we'll say they were for."

(On July 9, 1993, HOWARD was interviewed by S/A's HANBURY and REED about the $7,600 RRM invoice that was received and paid by the tribe in April 1988. HOWARD stated that he believed the payment was for insurance on a tribal school and was not aware of any connection to Myron ELLIS. HOWARD stated that he had no knowledge of the August 1988 payment of $5,700 to RRM.)

HOWARD advised that after his initial interview by S/A's HANBURY and REED, he was instructed by FINN that in the event of subsequent inquiries regarding the purpose of RRM checks payable to Myron ELLIS, HOWARD was to explain the payments were for ELLIS' wages. FINN said to HOWARD that the government could not be told the invoices were for insurance, when ELLIS had received the money.

(On August 10, 1993, HOWARD testified before the federal grand jury and admitted lying to S/A HANBURY when he told HANBURY that the $7,600 was for insurance.)

HOWARD recalled asking ELLIS in April 1988, after he had received $7,600, if ELLIS wanted his payroll records adjusted to reflect the purported retroactive pay raise, to which ELLIS replied, "Hold off on it." He advised that he subsequently adjusted the payroll records to prohibit ELLIS from resubmitting his claim to the tribe at a later date. HOWARD stated that accurate leave statements were generated with each tribal paycheck and added these records were backed up by computer.

HOWARD stated that he believed ELLIS had requested FINN to facilitate the payments through RRM and initially thought that the reason FINN had participated in the scheme was because he and ELLIS were good friends. Upon reflection however, he opined these payments may have been made to keep ELLIS from questioning the business practices of RRM. HOWARD stated that Assistant Executive Director John McCARTHY had complained to HOWARD that, "they were ripping off the Reservation," referring to FINN and LLB Reservation Business Committee members and RRM co-owners "Tig" PEMBERTON and Dan BROWN. HOWARD said that before the April 1988 payment to ELLIS, ELLIS had complained that "they" would not let him invest in RRM. Hartley WHITE, former RBC Chairman, had also complained about not being allowed to invest.

HOWARD stated he had knowledge that Leech Lake tribal officials had a financial interest in RRM prior to signing a January 11, 1989 letter to Hank MOLLER, a Certified Public Account performing contract audit work for the tribe. The letter detailed that no such financial interest was held by tribal officials and reflected the signatures of said officials. HOWARD stated that when RRM was first approved by the LLRBC, it was supposed to be owned by the tribe and administer insurance claims. At some point, it was changed from that approach to a privately held company owned by Skip FINN and later, PEMBERTON and BROWN. HOWARD also stated he was not aware when that business plan had changed to allow FINN to retain the RRM insurance premiums paid by the tribe.

HOWARD stated that Joe SHEPARD, LLB landfill employee, had advised him that monies from the tribe's environmental fund had been used by PEMBERTON and BROWN to invest in RRM. HOWARD recalled that during the course of a prior conversation with PEMBERTON, PEMBERTON had mentioned that he had considered converting some of his accrued leave into cash and investing in RRM. HOWARD advised neither PEMBERTON nor BROWN requested that he convert accrued leave prior to their taking moneys from the environmental fund. HOWARD stated it was improper for PEMBERTON and BROWN to convert their accrued leave from the environmental fund, which facilitated their investment in RRM.

HOWARD advised that a 1988 Single Audit conducted by MOLLER, raised issues regarding LLB disallowed costs from U.S. government funding agencies. HOWARD detailed the disallowed costs pertained to insurance related issues administered by RRM. HOWARD opined the audit findings contributed to the demise of RRM.

ORIGINAL

UNITED STATES OF AMERICA)
)
DISTRICT OF MINNESOTA)

BEFORE A GRAND JURY OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA

TESTIMONY OF:

BURTON ALAN HOWARD

The following is a transcript of the testimony of the above witness before a United States Grand Jury for the District of Minnesota on this 10th day of August, 1993, in the United States Courthouse at Minneapolis, Minnesota, commencing at 3:05 p.m.

APPEARANCE:

MICHAEL W. WARD
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF MINNESOTA

Q I'll then again briefly advise you of what your rights are. Under the Fifth Amendment of the United States Constitution, you have the right to refuse to answer any question if you believe that a truthful answer to the question might tend to incriminate you. You may answer some questions and you may refuse to answer other questions which you believe incriminate you. Do you understand what that means?

A Yes.

Q Do you understand that right?

A Yes.

Q If you answer any questions, the answers that you give may be used against you in a court of law or other proceedings. Do you understand that?

A Yes.

Q Okay. Risk Management provided insurance coverage to the tribe, is that right?
A Correct.
Q Did they provide any other services to the tribe that you're aware of?
A No.
Q Okay. On April 22, 1988, Skip Finn submitted an invoice to you for payment, is that right?
A Yes.
Q And the amount of the invoice or the bill to the tribe was $7,600, right?
A Yes.
Q And the invoice claimed to be seeking payment for insurance services that Risk Management had provided to the Leech Lake Tribe, right?
A Yes.
Q Was that invoice true and correct?
A No. I believe it was for Myron Ellis' wages.
Q Why do you believe it was for Myron Ellis' wages?
A That's what Mr. Finn told me it was for.
Q When did Mr. Finn tell you that it was for Myron Ellis' wages?
A Around the time that the invoice was submitted.

Q In August of 1988, there was another invoice submitted by Skip Finn?

A Yes.

Q Okay. Specifically on August 22, 1988, Mr. Finn on behalf of Reservation Risk Management submitted an invoice for $5,745.14, right?

A Yes.

Q And what was that invoice for?

A I believe it said "administrative services."

Q Was that on the schedule of payments that you were given to pay Risk Management?

A No.

Q So this was an unexpected payment?

A Yes.

Q And the $7600 in April was also an unexpected payment?

A Yes.

Q To your knowledge, was the $5745 invoice submitted by Mr. Finn in August of 1988 really for administrative services provided by Risk Management to the tribe?

A No.

Q When did you find out that the money, the $5745 that was billed the tribe by Risk Management for administrative services was actually money to be paid to Myron Ellis?

A I was told this by Mr. Finn and Mr. Ellis.

Q When?

A In July of this year.

Q So from August of 1988 up until July of 1993, you believed that the $5745 invoice submitted by Risk Management was actually for administrative services?

A Yes.

Q And in July of this year, you learned that that money actually went to Myron Ellis?

Q Okay. You were interviewed by Special Agent Jim Hanbury from the Department of Interior on July 9, 1993. Do you remember that?

A Yes.

Q The conversations that you had with Mr. Finn and Mr. Ellis about the August '88 invoice, did those take place before or after you talked with Mr. Hanbury?

A Before and after.

Q Tell us first about the meetings you had prior to July 9, 1993.

A I don't recall real clearly but it was -- they were at different times and they were -- some were held in Mr. Finn's office and some I think were in the Tribal Council Building.

Q These are the meetings before July 9 of '93?

A Yes.

Q Okay. When approximately were these meetings held?

A In May; I believe in May, May of '93.

Q And what was the subject matter of these meetings?

A The invoices that were paid to Risk Management.

Q Did Mr. Finn have any documents with him when you had this meeting with him?
A No.
Q Okay. Did he say what he believed the purpose of the payments to be?
A Yes.
Q What did he say?
A For Myron Ellis' wages.
Q And this was in May of 1993?
A Yes.
Q Did you have any other meetings with Mr. Finn or Mr. Ellis about these payments after May of '93?
A Yes, I did, in July of '93.
Q Was that after you talked to Special Agent Hanbury?
A Yes.
Q Okay. On July 9, 1993, you met with Special Agent Hanbury, right?
A Yes.
Q He asked you what the purpose of these two payments were?
A Yes.
Q And concerning the $7600 payment in April of 1988, you told Special Agent Hanbury that that payment

was made to Risk Management as either a payment on a premium for one of the tribal schools or payment on an insurance premium for a piece of equipment at the Tribal Council Facility Center, is that right?

A Yes.

Q You told him that you recalled receiving an invoice from Risk Management billing the Business Committee for the $7600 and you told him that that invoice and the copy of the check paying it would be in the files maintained by the tribe?

A Yes.

When you talked to Mr. Hanbury in July of 1993, you were aware that the payment was not for any insurance premium owed to Risk Management but instead it was money for Myron Ellis?

A Yes.

Q Did you lie to Mr. Hanbury?

A Yes.

Q Why did you lie to Mr. Hanbury?

A Because in our conversations -- in my

conversations with Harold Finn, I -- or -- I was told to say that I remembered those payments as insurance.

Q Skip Finn told you in May of 1993 to tell the Government that the payments were for insurance?

A Let me say that over. I told him that I could remember the payments being for insurance.

Q You told who?

A Mr. Finn.

Q When you met with Mr. Finn -- just to make this clear. When you met with Mr. Finn in May of 1993, you told Mr. Finn that you remembered that the payments were for insurance that was billed by Risk Management, is that right?

A No. I remember the invoice being for insurance but actually they were for wages.

Q Okay, let's just make this clear. In May of 1993, you had a meeting with Skip Finn and Myron Ellis about the invoices and the payments to Myron Ellis, right?

A Yes.

Q Back in April of 1988, you knew that the money was going to Myron Ellis, right?

A Yes.

Q In May of 1993, when you met with Skip Finn and Myron Ellis about the payments, you knew that those

were payments for Myron Ellis and they weren't for any insurance provided for the tribe?

A Yes.

Q And in July of 1993 when you met with Interior Special Agent James Hanbury, you knew that the payments weren't for any insurance but they were money for Myron Ellis?

A Yes.

Q Okay. Why did you tell Special Agent Hanbury that the payments were for insurance when you had known back in 1988 and in May of 1993 and in July of 1993 that they weren't for insurance but they were just money for Myron Ellis?

A Because in our meetings -- in my meetings with Mr. Finn, that's what I told him I would say.

Q Okay. You told Mr. Finn that you would say that because that's the way -- why did you tell Mr. Finn you would say it was for insurance if you knew it was money for Myron Ellis?

A Because that's what the invoice said.

Q Okay. When you told Mr. Finn that you were going to say it was for insurance and not for Myron Ellis, what did he say?

A He said, "Okay, that's fine."

Q And he knew that wasn't true?

A Yes, I think so.
Q Well, you said that in April of 1988, you talked with him about the payment of that invoice, right?
A Yes, I think I did.
Q So he knew it wasn't for any insurance premium, right?
A Yes.
Q Okay. After you told Special Agent Hanbury that it was for insurance payments, that the $7600 payment to Risk Management was for an insurance premium and you didn't tell him it was anything about money for Myron Ellis, right?
A Right.
Q After that meeting with Special Agent Hanbury, did you talk again with Skip Finn about the payment of that $7600 invoice?
A Yes.
Q When was that?
A About the second week in July.
Q So about a week after your meeting with Special Agent Hanbury?
A Yes.
Q What did you talk about with him?
A He asked me what I exactly told Mr. Hanbury.
Q Did you tell him what you told Special Agent

Hanbury?

A Yes.

Q All right. What did Mr. Finn say?

A He said, "You should tell him that they're for wages."

Q So back in May when you told Mr. Finn that you were going to say it was for an insurance premium because that's what the invoice said, he said, "Okay." And now in July, after you told Special Agent Hanbury that it was for insurance, Mr. Finn is now asking you to say that it was for wages?

A Yes.

Q All right. What specifically did Mr. Finn ask you to do?

A To call Mr. Hanbury and tell him that the payments were for wages.

Q Did you do that?

A Yes.

Q When did you do that?

A It was last week sometime. I don't remember the exact date. I think it was Wednesday or Thursday of last week.

INTERVIEW OF BURTON HOWARD

On July 9, 1993, Burton HOWARD, Accountant, Gaming Division, Leech Lake Reservation Business Committee (LLRBC), Cass Lake, Minnesota, was interviewed by Special Agent James HANBURY in the presence of Special Agent Timothy REED regarding HOWARD's knowledge of financial transactions between the LLRBC and Reservation Risk Management (RRM). HOWARD stated substantially as follows:

He has been employed by the LLRBC, Gaming Division in his current capacity as an accountant for approximately seven months. HOWARD's employment telephone number is (218) 335-8329, and his home telephone number is (218) 547-2923. HOWARD's home address is HCR 84, Box 1401-B, Walker, Minnesota.

From approximately 1984 through 1991, HOWARD was employed as the Controller for the LLRBC. His duties and responsibilities as Controller included daily oversight of the LLRBC check writing procedures; oversight of all deposits made to LLRBC accounts; preparation of LLRBC financial ledgers and providing supervision to the LLRBC accounting personnel.

In regard to LLRBC disbursements generally, HOWARD advised that he had authority to approve disbursements up to $1,000. Disbursements which exceeded $1,000 but were less than $2,500 required approval of the LLRBC Chairman and Secretary/Treasurer. Disbursements in excess of $2,500 required the approval of five members of the LLRBC. Disbursements by the LLRBC were routinely supported by a payment voucher reflecting the payee, the amount of the payment, and a description of the billing along with the billing invoice from the vendor requesting payment. Approval of payment vouchers by members of the LLRBC was routinely provided orally rather than in writing.

Regarding the issuance of LLRBC checks, HOWARD advised that the LLRBC routinely issues computer generated checks. These computer generated checks are issued once a week. The LLRBC also issues checks which are handwritten. The handwritten checks are disbursed when the disbursement cannot wait until the next scheduled computer generated check run. In each case, both computer generated and handwritten checks are stamped with the making signatory of the LLRBC Chairman and Secretary/Treasurer.

HOWARD was shown and requested to examine a photostat of a LLRBC check, dated April 22, 1988, payable to RRM in the amount of $7,600. He recalled this check and indicated that it was issued to RRM as either payment on a premium for the Bugonaygeshig School or payment on a premium for a piece of some type of equipment FGJ

EXHIBIT B

at the LLRBC Facility Center. He recalled receiving an invoice from RRM billing the LLRBC for this $7,600 and advised that the original canceled check and supporting invoice would have been filed in the 1988 RRM vendor file. FGJ

This $7,600 check was never represented to him as being a payment to RRM on behalf of any prior indebtedness Myron ELLIS had with RRM. To his knowledge, this $7,600 check had no connection or affiliation with ELLIS. He was not aware of any payments by RRM to ELLIS. He was not aware of any affiliation between ELLIS and RRM. FGJ

He understood RRM to be a private insurance company operated by Harold FINN. The only individual HOWARD ever dealt with from RRM regarding invoices from or payments to RRM was FINN.

HOWARD had no knowledge of a LLRBC check issued to RRM on August 22, 1988, in the amount of $5,745.14. He had no knowledge of a RRM Invoice, dated August 16, 1988, billing the LLRBC for administrative expenses for the workman's compensation fund. FGJ

At the conclusion of this interview, HOWARD was requested to voluntarily check the 1988 RRM vendor file in an attempt to locate the previously described RRM invoice to the LLRBC for $7,600. HOWARD subsequently advised that he was unable to locate either the RRM invoice or the original canceled $7,600 LLRBC check.

Q But is your testimony that in April of 1988, you were aware that the money was going to Myron Ellis?
A Yes.
Q Mr. Howard, do you think that that payment actually was for wages for Mr. Ellis that he had earned?
A Yes.
Q And it was money that he was properly entitled to and not merely funds that he was being paid by Risk Management or the tribe?
A Yes.
Q It was actually for work he had done?
A Yes.
Q If it were in fact for wages or money that he had earned, why was it necessary for you and Mr. Finn to conceal the payment and label it as an insurance bill that was submitted and paid?
A I don't know.
Q Because that was a lie, right? It wasn't an insurance payment?
A Yes.
Q So you and Mr. Finn would appear to have gotten together and submitted a phony invoice and you would have falsified the books of the tribe to conceal the fact that Myron Ellis was paid money that he was

Risk Management for Myron Ellis, was it?
A Right.
Q In August of 1988, there was another invoice submitted by Skip Finn?
A Yes.
Q Okay. Specifically on August 22, 1988, Mr. Finn on behalf of Reservation Risk Management submitted an invoice for $5,745.14, right?
A Yes.
Q And what was that invoice for?
A I believe it said "administrative services."
Q Was that on the schedule of payments that you were given to pay Risk Management?
A No.
Q So this was an unexpected payment?
A Yes.
Q And the $7600 in April was also an unexpected payment?
A Yes.
Q To your knowledge, was the $5745 invoice submitted by Mr. Finn in August of 1988 really for administrative services provided by Risk Management to the tribe?
A No.
Q What was that for?

A Wages for Myron Ellis.
Q Just like the wages back in April?
A Yes.
Q Let me back up. At the time the invoice was submitted, did you talk with Skip Finn about the invoice?
A I don't recall.
Q At the time the invoice was submitted in August, did you know it was for Myron Ellis?
A No, I didn't.
Q When did you find out that the money, the $5745 that was billed the tribe by Risk Management for administrative services was actually money to be paid to Myron Ellis?
A I was told this by Mr. Finn and Mr. Ellis.
Q When?
A In July of this year.
Q So from August of 1988 up until July of 1993, you believed that the $5745 invoice submitted by Risk Management was actually for administrative services?
A Yes.
Q And in July of this year, you learned that that money actually went to Myron Ellis?
A Yes.
Q Who told you first that Myron Ellis got the

was made to Risk Management as either a payment on a premium for one of the tribal schools or payment on an insurance premium for a piece of equipment at the Tribal Council Facility Center, is that right?

A Yes.

Q You told him that you recalled receiving an invoice from Risk Management billing the Business Committee for the $7600 and you told him that that invoice and the copy of the check paying it would be in the files maintained by the tribe?

A Yes.

Q At the time you talked with Mr. Hanbury, you're saying that you were aware that the $7600 was for the purpose of going to Mr. Ellis?

A Excuse me. Can you say that over again?

Q Yeah, I think I should. It wasn't very clear.

When you talked to Mr. Hanbury in July of 1993, you were aware that the payment was not for any insurance premium owed to Risk Management but instead it was money for Myron Ellis?

A Yes.

Q Did you lie to Mr. Hanbury?

A Yes.

Q Why did you lie to Mr. Hanbury?

A Because in our conversations -- in my

were payments for Myron Ellis and they weren't for any insurance provided for the tribe?

A Yes.

Q And in July of 1993 when you met with Interior Special Agent James Hanbury, you knew that the payments weren't for any insurance but they were money for Myron Ellis?

A Yes.

Q Okay. Why did you tell Special Agent Hanbury that the payments were for insurance when you had known back in 1988 and in May of 1993 and in July of 1993 that they weren't for insurance but they were just money for Myron Ellis?

A Because in our meetings -- in my meetings with Mr. Finn, that's what I told him I would say.

Q Okay. You told Mr. Finn that you would say that because that's the way -- why did you tell Mr. Finn you would say it was for insurance if you knew it was money for Myron Ellis?

A Because that's what the invoice said.

Q Okay. When you told Mr. Finn that you were going to say it was for insurance and not for Myron Ellis, what did he say?

A He said, "Okay, that's fine."

Q And he knew that wasn't true?

Q Did he say whether or not he knew why it had been invoiced as an insurance premium?

A I don't recall.

Q Did you tell Special Agent Hanbury and I on Friday that Mr. Finn had told you that he didn't know why it had been invoiced as an insurance premium?

A Yes.

Q Specifically what did he say and when did he say it?

A He said, "I don't know why it was written up like this." And that was -- I don't remember the date on that one. It was -- I believe that was in August sometime.

A JUROR: Could you speak up, please?

THE WITNESS: I'm sorry. I believe that was in August, the last time I spoke with him.

BY MR. WARD:

Q August of '93?

A Yes.

Q So it would have been in the last week, if you're right?

A Yes.

Q Okay. When was the last time you met with Mr. Finn? Most recent meeting? Did you meet with him this weekend?

A No. Last time I spoke to him, it was by phone. And that was last week I believe on Thursday morning, Wednesday or Thursday of last week.

Q Okay.

A And he asked if I had called Mr. Hanbury and I told him that I did.

Q And you called Mr. Hanbury because Mr. Ellis had asked you to?

A Yes.

Q Okay. Now, let's go back to contacts with Mr. Ellis about the invoice. Following the payment in April of 1988, did you have any conversations with Myron Ellis about the $7600 payment?

A I don't recall.

Q Did you ever ask Mr. Ellis why the $7600 was to be paid to him through Risk Management instead of directly by the tribe?

A I don't -- I don't remember.

Q Following the August 1988 payment of $5745, you were aware at that time that that money was going to Myron Ellis, is that right?

A No.

Q Not until May of '93, is that right?

A Yes.

Q Okay. When you learned that that money had gone

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Criminal No. 5-94-18

UNITED STATES OF AMERICA, Plaintiff, v. HAROLD "SKIP" FINN, Defendant.	)	SWORN STATEMENT OF MYRON ELLIS

I, Myron Ellis, being duly sworn under oath, hereby testify and state, under penalty of perjury, as follows:

1. My name is Myron Ellis and I am an enrolled member of the Leech Lake Band. Since 1977 I have been employed by the Leech Lake Band tribal government. My previous positions were Manpower Director, Grants and Contracts Administrator and Executive Director. I have been an elected member of the Leech Lake Reservation Business Committee ("LLRBC") since July 1988.

2. In late 1985 the LLRBC considered and approved a self insurance plan for tribal property. The self insurance plan was proposed by tribal attorney, Harold "Skip" Finn. The company that was formed to operate the self insurance plan, Reservation Risk Management ("RRM"), was owned by Harold Finn, his law partner, Kimball Mattson and LLRBC members Alfred "Tig" Pemberton and Dan Brown.

3. In April 1988, while I was the Executive Director of the LLRBC, I received a $7,600 cashiers check from RRM. This check was provided to me by Harold "Skip" Finn. The $7,600 payment to me was reimbursed by the LLRBC because Harold "Skip" Finn submitted a

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(14)

fraudulent RRM invoice to the LLRBC for "insurance services." The invoice falsely asserted that the money was due and payable to RRM because of insurance coverage that RRM had supposedly provided to the Leech Lake Band.

4. In August 1988, after I was elected a member of the LLRBC, I received a $5,745.14 cashiers check from RRM. This check was also provided to me by Harold "Skip" Finn. This payment to me was also reimbursed by the LLRBC because Harold Finn submitted another fraudulent invoice to the LLRBC. This August 1988 invoice falsely asserted that the $5,745.14 was due and payable to RRM because of "administrative expenses" that RRM had allegedly provided in connection with the tribe's workers' compensation policy through August 1, 1988. In fact, that policy had been terminated months earlier.

5. On August 17, 1994, Harold "Skip" Finn and I each pleaded guilty to federal charges of misapplying Indian tribal funds in connection with the two fraudulent RRM invoices.

6. In January of 1991, the federal grand jury issued a subpoena for all of the LLRBC records and files concerning RRM and the self insurance plan. Among the documents sought were the two RRM invoices that had been submitted by Finn in connection with the payments I received.

7. After the subpoena was received, I attended a meeting at Harold Finn's law office. The LLRBC Controller, Burton Howard, was also at the meeting. During the meeting I overheard Harold Finn asking Burton Howard about some specific documents. I then heard

Finn tell Howard to get rid of the documents and also that, if discovered, those documents could send people to jail. There was no further conversation about the documents and the meeting concluded.

8. I swear under oath and declare under penalty of perjury that all of the above statements are true.

Dated:

Myron F. Ellis

MYRON ELLIS

SUBSCRIBED and SWORN to before me this 9th day of January, 1995.

Mary Ann Boda

NOTARY PUBLIC

MARY ANN BODA
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
My Commission Expires Jan. 31, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Criminal No. 5-93-~~3~~ 94-18

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	SWORN STATEMENT OF SPECIAL AGENT JAMES HANBURY
HAROLD "SKIP" FINN, Defendant.	)	

I, James Hanbury, being duly sworn under oath, hereby testify and state, under penalty of perjury, as follows:

1. I am a Special Agent with the United States Department of Interior, Office of Inspector General and I am the case agent for the federal investigation of Reservation Risk Management, Inc. and the defendant, Harold "Skip" Finn. In 1993, the investigation turned its focus to two questionable payments made to RRM by the Leech Lake Band. The first was in April 1988 for $7,600 and the second payment was in August 1988 for $5,745.14. Eventually, in 1994, Mr. Finn pleaded guilty to federal criminal charges and admitted that the payments to RRM were the result of two separate fictitious insurance invoices that he prepared and submitted to the Leech Lake Band.

2. On January 8, 1991, I had personally served a federal grand jury subpoena on Harold R. Finn in his capacity as President (and record custodian) of Reservation Risk Management, Inc. Among the items that the grand jury subpoena required the production of was the following:

(13)

"all correspondence generated by Reservation Risk Management, Inc., to Leech Lake Reservation Business Committee and all correspondence generated by Leech Lake Reservation Business Committee to Reservation Risk Management, Inc."

3. On January 9, 1991, I personally served a federal grand jury subpoena on Mr. James Michaud, the Secretary of the Leech Lake Reservation Business Committee ("LLRBC"). The grand jury subpoena to the LLRBC also required production of all copies of the same correspondence between RRM and the Leech Lake Band. The subpoena served on the Leech Lake Band also required the production of any and all cancelled checks made payable to RRM.

4. On or about February 26, 1991, the defendant, Harold "Skip" Finn provided documents to the grand jury on behalf of RRM. The defendant then attested in a signed statement that the documents submitted were in purported compliance with the above described federal grand jury subpoena. (See attached). I have thoroughly reviewed the documents submitted to the grand jury by the defendant and neither of the two fictitious RRM invoices (April 1988 or August 1988) was submitted to the grand jury as was required by the subpoena.

5. On or about January 22, 1991, the Leech Lake Band, through Mr. James Michaud, provided documents to the grand jury in response to the subpoena. I have thoroughly reviewed the documents submitted to the grand jury by the Leech Lake Band. Neither the RRM invoice from April 1988 for $7,600 nor the August 1988 invoice was submitted as was required by the grand jury subpoena. Subsequently, in May 1993 in response to an additional grand jury

subpoena for tribal meeting minutes I did discover a single, very poor quality photocopy of the August 1988 RRM invoice. Moreover, although all of the other documents produced to the grand jury by the tribe were contained in separate organized file folders, the August 1988 invoice was not contained in a file folder. The August 1988 invoice was wedged between two other file folders. This poor quality photocopy of the invoice is the only copy of the invoice provided to the grand jury. Tribal officials could find no additional copies of the invoice in the LLRBC offices and not a single copy of this RRM invoice was provided by the defendant Harold "Skip" Finn.

6. In the Spring of 1993, federal investigators obtained bank records pertaining to RRM and the LLRBC. Through an analysis of expenditures of RRM, it was discovered that Myron Ellis, an official of the LLRBC, had received two large payments from RRM during the time that RRM had substantial business dealings with the LLRBC. Investigators later discovered that the LLRBC had made payments to RRM in the exact same amount and at approximately the same time as the two payments from RRM to Ellis.

7. In March of 1993 investigators had already confronted Ellis about why RRM had made the two payments to him. Ellis could provide no explanation for the payments and, subsequently, on April 2, 1993, Ellis' attorney indicated that Ellis would provide no further information about the payments.

8. In July 1993, investigators interviewed the Controller of the LLRBC, Burton Howard. When asked about the two payments from

the LLRBC to RRM, Howard stated that he believed they were for insurance services. When asked why Myron Ellis had received payments in the exact same amount from RRM, Howard stated that he knew of no connection to Myron Ellis.

9. A few weeks later, Howard called me and told me that he had since remembered that the two payments to RRM were actually payments to Ellis for wages that he was owed by the LLRBC. The following week, on August 10, 1993, Howard was subpoenaed to testify before the federal grand jury and admitted that he had previously lied to investigators because Harold "Skip" Finn had told him to lie.

10. Howard has subsequently, in August 1994, admitted to destroying the LLRBC's copy of the false RRM invoice submitted by Finn in April 1988. Howard stated that Finn told him to get rid of the invoice. The federal investigation has not discovered any financial gain or profit to Mr. Burton Howard from the tribe's contract with RRM or the payment and concealment of the fraudulent invoices.

Dated:

James V. Hanbury

JAMES HANBURY

SUBSCRIBED and SWORN to before me this

3rd day of February, 1995.

Janice Hammerquist

NOTARY PUBLIC

Commission expire 1-23-2001

RESERVATION
RISK MANAGEMENT
INCORPORATED

POST OFFICE BOX 835
CASS LAKE, MINNESOTA 56633
218/547-3448

INVOICE

Leech Lake RBC
Route 3, Box 100
Cass Lake, MN 56633

Re: Administrative Expenses
for Workers' Compensation Fund
through August 1, 1988

GOVERNMENT EXHIBIT
1
5-94-18

AFFIDAVIT

COUNTY OF RAMSEY }
}ss.
STATE OF MINNESOTA }

John McCarthy, being first duly sworn, deposes and states on his own knowledge, as follows:

1. I am self employed as a business consultant for gaming, a position I have held for the past 2 and 1/2 years. Prior to this I was employed by the Leech Lake Reservation Business Council for the previous 26 years. I served as Deputy Director of the Reservation Business Council (RBC) from 1985 through 1989. I was the Director of Gaming for the RBC from 1990 through 1991. My experience working for the RBC allowed me to be closely associated with both Myron Ellis and Burton Howard. I have dealt with Skip Finn on numerous occasions on various business and legal matters related to the RBC.

2. I was shown a Reservation Risk Management (RRM) invoice for $5745.14 by Investigator R. M. Haggard, which had been received by the RBC in August 1988. I had never seen the invoice prior to this time and can not identify who might have written information in the upper right portion of the document. The four signatures at the bottom of the document are those of Tig Pemberton, Dan Brown, Jim Michaud, and Myron Ellis.

3. In my experience it was not unusual that an invoice of this amount would be signed by some of the board but normally four signatures would not be required for approval to pay a bill. It is policy that an amount over $2500 requires board approval. The amount of $5745 was familiar to me and I believe Myron Ellis had submitted another document to the RBC for that amount requesting payment of back wages.

4. My recollection of the circumstances surrounding this invoice was in the Spring of 1988 Myron Ellis and I had not received pay raises due us for several years. It was standard policy that employees and council members received annual pay raises of from 6% to 10%. I remember that Myron Ellis and I discussed this problem and decided we needed to discuss this with the council. I prepared a program which would allow Ellis and me to receive our raises and the related retroactive payments without getting a large cash payment. My plan called for the retroactive payments to be put into a retirement fund, pay my health insurance, and add to my IRA. Based on this program set up by me we would not get any cash payments directly.

5. My experience with the RBC is that the RBC's approval of Ellis' and my pay raise would not be reflected in any RBC meeting minutes for political reasons. Certain issues such

as payments to tribal employees and RBC members usually were not reflected in RBC meeting minutes so as to keep them out of politics on the reservation. In my position with the RBC in 1988 I was familiar with the fact the RBC had significant cash flow problems. In addition the elections conducted in the summer of 1988 fueled a lot of political unrest on the reservation and there were problems in seating the newly elected RBC members.

6. In April 1988 I also set up a similar program for Ellis and recall I computed the retroactive amount due was $7600. I gave the information to Ellis who said he could not do it that way as he needed the cash as he would be resigning from his employment in order to run for tribal office. The plans were submitted to the RBC and the council did approve our pay raises and the retroactive salary payments.

7. Ellis was elected to the council effective July 1, 1988 but did not take office until sometime around the first of August. Subsequent to his being seated Ellis advised me he had gone to the council and asked them to pay for the two months he was unemployed which they agreed to do. I am aware that the council had done this previously with another employee, Eli Hunt, who had run for office.

8. As Deputy Director I was not directly involved in the handling of financial documents. Burton Howard served as controller for the RBC for several years and would have had control of such records. I am aware that some records were accidentally destroyed in June 1992 when a building contractor removed and destroyed some records while doing remodeling work in a building behind the tribal offices where records were stored..

9. In my association with Burton Howard I am familiar with the fact he has had a drinking problem. In 1991 he was terminated as controller of the RBC for misconduct relating to his drinking problem and the resultant lack of attention he was giving to his job. Im also aware of some impropriety by Burton Howard in the handling of tribal financial matters.

FURTHER AFFIANT SAYETH NOT.

John R McCarthy
John McCarthy

Subscribed and sworn to before me this 15th day of February, 1995.

AFFIDAVIT

COUNTY OF RAMSEY }
}ss.
STATE OF MINNESOTA }

George Wells, being first duly sworn, deposes and states on his own knowledge, as follows:

1. I am currently employed as the Gaming Division Controller for the Leech Lake Tribal Council. My address is 6610 30th St. SE, Bemidji, MN 56601.

2. I began my employment with the Leech Lake Reservation as a general business division accountant in December 1983. From November 1987 through September 1988 I served as accounting supervisor for St. Joseph's Hospital in Park Rapids. I returned to work for the Leech Lake Reservation as a general business division accountant in September 1988.

3. I am quite familiar with both Myron Ellis and Burton Howard as both were employees of the Leech Lake Reservation Business Council ("RBC") during my employment. Ellis is currently a board member of the RBC.

4. I am familiar as to the reason a $7600 payment from Reservation Risk Management ("RRM") was made to Myron Ellis in April 1988. I specifically recall an RRM invoice in that amount for an insurance premium for the facility center. I know RRM paid the money to Ellis as a loan to the RBC. This payment represented a retroactive 10% pay raise going back a couple of years and was approved by the council. The RBC repaid the loan to RRM based on the insurance premium invoice.

5. In the summer of 1993 I had discussions with Burton Howard concerning his appearance before a Federal Grand Jury. I personally saw a box of documents that Howard had gathered in 1991, which were to be turned over to the Grand Jury in 1991. These documents were given to the Tribal attorney, Paul Applebaum, for review prior to turning them over to the government in 1993. I distinctly remember seeing the RRM invoice for the $7600 which had been received by the RBC included within the box of records sent to Attorney Paul Applebaum. Subsequent to the date Burton Howard and I reviewed the box of records he had no further access to them without a second party present.

6. I also was familiar with a $5745.14 loan to the tribe paid to Myron Ellis by RRM. I saw the invoice associated with this payment

as well. The reason for this payment was that Myron Ellis resigned his position as executive director of the business council to run for a council seat. The $5745.14 was for Myron's wages from the time of his resignation to July 1, 1988. The tribal council approved the payment and four of the council members signed the invoice. I later calculated Myron's wages due for that period, using his personnel records and arrived at the $5745 figure.

7. I am aware of the precedent for paying wages for employees running for office. In 1986 Eli Hunt ran for Secretary/Treasurer against Tig Pemberton. Hunt lost and was later paid for his lost wages during the campaign.

8. I am aware that Burton Howard has had problems with alcoholism and during the period 1988 through 1994 it has been difficult for him to hold a job. During this time period I have talked to him on numerous occasions. Based on his drinking problems he has exhibited an inability to recall specific details concerning his contact with government officials and or matters discussed with Skip Finn and other tribal officials. He has changed his description of events in which he was involved. I know that he was fired from his position as controller for the RBC, in approximately August 1991, for misconduct.

FURTHER AFFIANT SAYETH NOT.

George Wells.
George Wells

Subscribed and sworn to before me this 22nd day of February at St Paul. Mn.

Rodney M. Haggard

INTERVIEW OF JAMES MICHAUD

On August 30, 1994, James MICHAUD, HCR 1 Box 67, Bena, Minnesota, was interviewed about Reservation Risk Management (RRM) by Special Agent James HANBURY. This interview occurred at the Highway Host Restaurant, Bemidji, Minnesota. During this interview MICHAUD stated substantially as follows:

From 1979 until 1990, MICHAUD served as District I Representative for the Leech Lake Reservation Business Committee (LLRBC). From 1990 until July 1994, MICHAUD served as Treasurer for the LLRBC. Each of these positions were attained through tribal elections.

In 1986, Harold "Skip" FINN, while serving as attorney for the LLRBC, submitted a proposal to the RBC regarding self insurance. FINN explained to the RBC that self insurance would be cheaper for the RBC than paying the exorbitant premiums which were being charged to the tribe. FINN explained to the RBC that RRM would handle self insurance for the tribe and the RBC would save money in insurance premiums by adopting this proposal regarding RRM. FINN explained to the RBC at the time he submitted this proposal that if RRM was dissolved that any remaining money which was not spent by RRM would be returned to the tribe. FINN's proposal regarding RRM was outlined in what MICHAUD described as a brochure or pamphlet. This proposal emphasized the benefits of self insurance, however, MICHAUD did not recall any cost comparisons or dollar amounts being outlined in this plan. FINN's proposal concerning

RRM handling self insurance for the tribe was approved by the RBC during approximately 1986, when the plan was submitted by FINN.

MICHAUD understood when RRM was established that RRM was not a tribally owned or a tribally chartered corporation. He understood that RRM was a private corporation initially owned by FINN and Alfred PEMBERTON, then Secretary Treasurer, LLRBC. He also understood that Dan BROWN, then District III Representative, LLRBC, later bought into RRM sometime during approximately 1986 or 1987. MICHAUD's understanding that FINN, PEMBERTON and BROWN were owners of RRM was based on general conversation and the fact that those three individuals remained after RBC council meetings to attend RRM meetings.

MICHAUD was never afforded the opportunity to buy into RRM. He believed that RRM was managing the tribe's self insurance plan and that tribal assets would have been used to pay claims submitted to RRM. He had no knowledge of the frequency or dollar amount of any claims submitted to RRM for payment.

He was shown and examined a RRM Insurance Policy dated October 1, 1985, and a RRM Insurance Agreement dated January 14, 1986. He had never before seen either of these documents and was unfamiliar with their contents.

He was also shown and examined a RRM Shareholders Agreement dated January 14, 1986. He had never previously seen this document, however, he advised that the

contents of this document contradicted FINN's earlier statements to the RBC regarding remaining assets of RRM going to the tribe. This Shareholders Agreement contains a provision which reflects that if the RBC withdraws from this agreement or its insurance agreement with RRM prior to October 31, 1990, RBC shall forfeit any claim of any assets of RRM.

He was shown and examined a RRM Debenture Agreement dated December 1, 1985. He had never previously seen this document and he was not knowledgeable about the term debenture.

He was also shown and examined a letter dated January 11, 1989, to the RBC from Henry MOLLER, CPA, Bemidji, Minnesota. He identified the signature, James MICHAUD appearing as District I RBC Representative, as his signature. He claimed he had not read this letter prior to signing it. He was specifically asked about the portion of this letter which reads "all prior Leech Lake Tribal Council resolutions establishing some type of control over RRM by the Leech Lake RBC have been rescinded. There are no RBC elected officials who exercise control or who share in the profits of RRM."

MICHAUD never recalled the RBC rescinding any resolutions regarding RRM and the only RBC resolution he was aware of regarding RRM was the resolution in which the RBC initially approved RRM as the manager for the tribe's self insurance plan. He advised that PEMBERTON and BROWN, who were RBC members during the time when they served on the RRM Board of Directors, must have exercised control over RRM and

shared in the profits of RRM. Consequently, MICHAUD advised that the two previously described portions of this MOLLER letter are false.

MICHAUD advised that during a RBC meeting which was held sometime in 1988, a retroactive pay raise for Myron ELLIS was discussed during the time when ELLIS was seeking elective office. He recalled that when this issue of ELLIS' raise was discussed, the RBC did not have sufficient funds to pay for a retroactive raise. FINN, who was present during the RBC meeting when ELLIS requested this raise, volunteered that RRM could pay ELLIS for his retroactive raise and the RBC could then repay RRM when the RBC could afford to do so. MICHAUD recalled that the RBC approved ELLIS' retroactive pay raise with the understanding that RRM would pay ELLIS and the RBC would later repay RRM. MICHAUD had no knowledge of the amount of this retroactive pay raise for ELLIS nor did he know how this raise was calculated. He did not even know whether ELLIS was actually paid by RRM.

During 1988, there were discussions by the RBC about whether or not ELLIS would be required to resign his Executive Directorship while campaigning for elective office. MICHAUD did not recall whether the RBC required ELLIS to resign. MICHAUD acknowledged that the RBC has a policy which requires tribal employees to resign while campaigning for elective office.

MICHAUD was shown and examined a RRM invoice dated August 16, 1988, wherein RRM billed the LLRBC for $5,745.14 regarding administrative expenses for the Workers

Compensation Fund. He never before saw this invoice and claimed that the second approving signature on this invoice, James MICHAUD, does not appear to be his signature. He did not know who may have forged his signature on this invoice. MICHAUD would not have approved a RRM invoice for administrative expenses if he knew it was to pay RRM for money paid to ELLIS. He did not know why RRM would submit a phony invoice to recover from the RBC money paid to ELLIS.

He was also unaware of a $7,600 payment made to ELLIS by RRM in April 1988.

MICHAUD advised that the RBC's approval of ELLIS' retroactive pay raise would not be reflected in any RBC meeting minutes for political reasons. He explained that certain issues such as payments to tribal employees and RBC members are not reflected in RBC meeting minutes so as to keep them out of politics on the reservation.

In regard to leave records maintained by the LLRBC, MICHAUD stated that for tribal employees such as ELLIS while he served as Executive Director, vacation and sick leave would have been recorded on his time cards. However, no records of leave are kept for RBC members as they do not earn any leave. Beginning about 1988 or 1989, RBC members stopped earning leave and in return for no longer earning leave, RBC members were free to come and go from work as they wish.

He heard through general conversation at the RBC that shortly after the service of one of the FGJ subpoenas, Alfred "Tig" PEMBERTON reportedly removed a box of

documents from the LLRBC. MICHAUD did not hear about the specific contents of this box. MICHAUD has no other information regarding anyone removing or destroying any information subpoenaed by the FGJ.

S/A HANBURY read to MICHAUD the following statements contained in a press release issued by FINN's attorney: "In April, 1988 and again in August, 1988, at the Leech Lake RBC's request, Reservation Risk Management, Inc. made payments for salary-related adjustments to Myron F. Ellis, an elected tribal official who had been the Reservation's Executive Director. The salary adjustments had been previously authorized by the Leech Lake Reservation Business Committee".

"All of Finn's actions were taken at the request of the RBC and with its knowledge and approval".

MICHAUD advised that FINN's actions were not taken at the request of the RBC. He had no knowledge of any phony RRM invoices being submitted by FINN to the RBC. He never approved such phony invoices knowing that they were submitted to recover money FINN paid to ELLIS.

He had no knowledge of Kimball MATTSON, FINN's then law partner, having any financial interest in RRM. MICHAUD advised that MATTSON and FINN occasionally argued about RRM during RBC meetings during which MATTSON protested about FINN's involvement in RRM while also acting as legal counsel for the RBC.

During 1990, shortly after MICHAUD's election as RBC Treasurer, he met with FINN at FINN's request at the Chawekagon, a coffee shop adjacent to the RBC building in Cass Lake. FINN asked MICHAUD what he (MICHAUD) wanted out of this now that MICHAUD was Treasurer. MICHAUD told FINN that he did not want anything. Although MICHAUD never asked FINN to clarify his statement, MICHAUD believed that FINN was making an overture to offer MICHAUD something of value in regard to FINN's operation of RRM.

MICHAUD, after learning of all the money FINN received from his operation of RRM to include the administrative fees; personal loans; debenture fees and his retention of the remaining assets of RRM, claimed that the RBC was ripped off by FINN.

Miller, Mc Donald, Erickson & Moller, Ltd.

CERTIFIED PUBLIC ACCOUNTANTS
MEMBER, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
513 BELTRAMI AVENUE, P.O. BOX 486
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KENNETH A. McDONALD, C.P.A.
JOHN E. ERICKSON, C.P.A.
HENRY E. MOLLER, C.P.A.
BRYAN WESTERMAN, C.P.A.

OTHER OFFICES:
PARK RAPIDS, MN
INTERNATIONAL FALLS, MN

January 11, 1989

Leech Lake Reservation Business Committee
Route 3, Box 100
Cass Lake, Minnesota 56633

To Leech Lake Reservation Business Committee Officials and Officers:

This letter explains our understanding of the relationship between Reservation Risk Management and the Leech Lake Reservation Business Committee. This understanding is necessary because of auditing requirements imposed on CPA's to determine if there are any related party relationships between the audited entity and various third parties. If it is determined that a related party relationship exists, this fact is to be commented on in the audit report. The reason for this reporting requirement is that by reporting all related party relationships a reader of the financial statements will have a clearer picture of how the related party relationships reflect on the audited figures.

1. The relationship between RRM and the RBC with regard to workers' compensation insurance is that of a custodial relationship. That is, the workers' compensation insurance of Leech Lake Reservation is a self-funded plan. RRM is only acting as a custodian or investment administrator with regard to the workers' compensation premiums paid to RRM by Leech Lake.

2. The general liability insurance (both property and bodily injury) is purchased from RRM. All prior Leech lake Tribal Council resolutions establishing some type of control over RRM by the Leech Lake RBC have been rescinded. There are no RBC elected officials who exercise control or who share in the profits of RRM.

3. The premium rates charged for workers' compensation and for the general liability (bodily injury) are insurance competitive rates.

4. No property insurance premiums are charged to any grant program.

Leech Lake Reservation Business Committee

If you agree with our understanding of the relationship between Reservation Risk Management and the Leech Lake Reservation Business Committee as described in this letter, please sign the enclosed copy and return it to us.

Very truly yours,

By _____
Henry E. Moller,
Certified Public Accountant

LEECH LAKE RESERVATION BUSINESS COMMITTEE

Daniel Brown, Chairman	Signature	Date 4-24-89
Alfred Pemberton, Secretary, Treasurer	Signature	Date 5/3/89
Myron Ellis, District III Representative	Signature	Date 5-3-89
Gladys Drouillard, District II Representative	Signature	Date 5-4-89
James Michaud, District Representative	Signature	Date 5-3-89
Richard Robinson, Jr. Executive Director	Signature	Date 5-4-89
Burton Howard, Controller	Signature	Date 5-3-89

TO THE LEECH LAKE PEOPLE

I'm sure most of you are aware that I was sentenced in Federal Court on March 10, 1995. I pled guilty to these charges last August. Now that I have been sentenced, I feel free to be able to talk about this case. Lately a lot of people in the media tend to bad mouth others or put them down or ridicule them. I will not do this. I will only tell you about the charges against me.

In April of 1988, I asked the Tribal Council for a pay raise, retroactive back two years, because I had not received a raise. A check was issued to me and my wife Denise picked it up and deposited it in our savings account. I was not aware that the check was drawn from the account of R.R.M. and my wife wasn't even aware of what R.R.M. was. I'm sure you all remember the chaos that took place in the 1988 election. I had resigned my position in May, 1988 as Executive Director, so after I was sworn in as District III Representative I requested that I be paid from the time I was laid off until the time I was finally sworn in. I received a check for $5,400.00. I was aware that this check was drawn off the R.R.M. account. All the RBC members at the time approved this payment and I have documentation to prove it. The fictitious vouchers that have been mentioned in previous articles were not submitted by me, nor had I ever seen them. In no way was this any form of a kickback. The word kickback came about when the media started using it.

The truth is I received $13,345.14 of money that was owed me. I have paid income tax on that money as part of my income. The only crime that was committed was being paid from the wrong account. I should never have received the two checks that were issued out of the R.R.M. account. I should have received these two checks from the RBC account. This is the only money I ever received from R.R.M.. I had nothing else to do with it. I have seen articles in recent papers that state that much more money was involved. I was not involved with any other money.

The reason that I pled guilty of misapplied Tribal funds was for two reasons. One was my health, I am a diabetic, a disease that affects many of our Indian people. I have had many complications from this disease and had open heart surgery in June of 1994. Number two was the cost involved in going to trial. I guess that there is also a third reason. I wanted to be able to put this behind me and get on with my life. I am tired of this cloud hanging over my head.

I was sentenced to serve ninety (90) days in a hospital detention center in Rochester, MN. I was fined $5,000.00 and one year probation. The Federal sentencing guidelines were six months to a year. Judge Rosenbaum gave me only half of the minimum sentence. I have made restitution of $13,345.14 which will be returned to the Leech Lake people. But keep in mind this $13,345.14 was money that was owed to me. The U.S. Attorney also agreed that I was indeed owed this money.

This sentence was very hard for me and my family. It broke my heart to see my wife Denise sitting in the court room with tears. The ninety days is something that I will have to do and then go onward with my life. I have tried to serve my people well and I have always had my reservation in my heart when I have to make difficult decisions. After my ninety days are served I will return to work hard for this reservation. I hope that you can still have enough faith in me to see me through all of this. I will not resign my position as I see no point in doing this. I have never done anything that I am ashamed of and I hope you can all understand this.

Sincerely,

Myron F. Ellis

Myron F. Ellis

Written & paid for by M.F.E. on his own behalf

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Sincerely,

Myron F. Ellis

Myron F. Ellis

Written & paid for by M.F.E. on his own behalf

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Criminal No. 5-94-18

UNITED STATES OF AMERICA, Plaintiff, v. HAROLD "SKIP" FINN, Defendant.	)	UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR EVIDENTIARY HEARING

The defendant, Harold "Skip" Finn, has pleaded guilty to misapplying funds belonging to the Leech Lake Band in violation of 18 U.S.C. § 1163. The defendant committed the offense by preparing fraudulent insurance invoices and submitting them to the Leech Lake Band. The defendant then diverted the money to his co-defendant, Myron Ellis. A presentence report by the U.S. Probation Office has recommended that the defendant's offense level be increased two (2) levels for "obstructing or impeding the administration of justice" under Sentencing Guideline § 3C1.1. The defendant has moved for an evidentiary hearing on this issue pursuant to Local Rule 83.10(f). In an evidentiary hearing the United States would have the burden to prove by a preponderance of the evidence that the defendant did engage in the conduct on which the recommendation is based. As required by the Local Rules, the United States hereby submits its response to the defendant's motion and discloses the witnesses and their expected testimony and the exhibits that will be offered by the United States.

A. EXPECTED TESTIMONY/FACTUAL BASIS FOR OBSTRUCTION ENHANCEMENT

1. The False Invoices - 1988

The defendant's offense conduct involved his ownership and operation of Reservation Risk Management (RRM) which purported to provide self insurance services to the Leech Lake Band. The defendant was also the attorney for the Leech Lake Band. Pursuant to an insurance contract with the Band, the defendant frequently submitted invoices to the Band seeking payment for the self insurance services. However, in addition to the invoices that were approved as part of the RRM contract, the defendant also submitted to the Leech Lake Band two invoices that were wholly false. That is, the invoices did not relate to the insurance services actually provided by RRM. Instead, the money paid by the Band to RRM and the defendant was diverted by the defendant to his co-defendant Myron Ellis, the Executive Director and, later, a Tribal Council member.

The two fraudulent invoices were submitted first in April 1988 and again in August 1988. The fraudulent RRM invoice that was submitted by the defendant in April 1988 was for $7,600. That invoice purported to reflect an insurance premium owed to RRM for insurance on the Leech Lake Band's Neighborhood Facilities Center. The invoice was received by tribal controller Burton Howard and, on April 28, the Band issued a check to RRM for $7,600. However, at the time it was paid, Burton Howard knew that the money was actually being diverted by the defendant to Myron Ellis.

On August 15, 1988, another fictitious RRM invoice was prepared and presented to the Leech Lake Band by defendant Finn. This false invoice sought $5,745.14 for "Administrative Expenses for Worker's Compensation Fund through August 1, 1988." Again, the invoice was received by tribal controller Burton Howard and a $5,745.14 check was issued to RRM on August 22, 1988. In his guilty plea, the defendant has admitted that he submitted both invoices to the Leech Lake Band and he has admitted that they were fictitious. In fact, the RRM worker's compensation policy had already been terminated in March 1988; five months prior to the alleged rendering of services that were billed in the invoice.

2. The Initial Investigation (1991-1992)

The RRM "self insurance" contracts eventually came under investigation by the U.S. Department of Interior and the federal grand jury for the District of Minnesota. On January 8, 1991, the defendant (as record custodian for RRM) was served with a grand jury subpoena which required the production of:

> "all correspondence generated by Reservation Risk Management, Inc., to Leech Lake Reservation Business Committee and all correspondence generated by Leech Lake Reservation Business Committee to Reservation Risk Management Inc."

On January 9, 1991, the Leech Lake Band was also served with a federal grand jury subpoena. The subpoena to the Leech Lake Band required the same production of all correspondence generated and received between RRM and the Leech Lake Band. The subpoena also required the production of any cancelled checks made payable to RRM.

Following the receipt of the subpoena by the Leech Lake Band, tribal controller Burton Howard was directed to assemble the tribal records as required by the subpoena. Among the records collected were the two fictitious RRM invoices that had been submitted to the Band by the defendant in April and August of 1988. However, prior to providing the documents to the grand jury, Burton Howard was asked to meet with the defendant. Howard met with the defendant at the defendant's law office. Also in attendance was co-defendant Myron Ellis.

During this meeting, the defendant specifically asked Burton Howard about the fictitious April 1988 invoice for the $7,600 "insurance premium" on the Neighborhood Facilities Center and whether the document was in the records to be delivered to the grand jury. Howard responded that the invoice was collected and was part of the records. The defendant then told Howard to destroy the invoice. According to Howard, the defendant said, "Get rid of it, I don't want to know what you do with it, just get rid of it." The defendant further said, "That's the piece of paper that could send us all up the river." Because Howard knew that the money had gone to Myron Ellis, Howard believed that he was one of the people who could be "sent up the river." Following the defendant's direction, Howard removed the April 1988 invoice from the collected documents and did not produce it to the grand jury. Howard placed the invoice in his desk drawer and eventually threw it away.

Also present during that January 1991 meeting was co-defendant Myron Ellis. Ellis recalls attending a meeting with Howard and the defendant at the defendant's office. Ellis

recalls that the meeting was during the winter and they were discussing the RRM records. Ellis recalls overhearing the defendant telling Burton Howard to get rid of some documents. Ellis further recalls hearing the defendant say to Howard that the documents could send people to jail.

The witnesses' account of the meeting is corroborated by the fact that the April 1988 fictitious invoice has never been discovered. Both the defendant (RRM) and the Leech Lake Band produced some records in response to the grand jury subpoena. However, despite the fact that the defendant did produce other invoices submitted by RRM to the Leech Lake Band, the defendant did not produce either of the two fictitious RRM invoices that he had submitted to the Leech Lake Band. The Leech Lake Band did not produce a copy of the fictitious RRM invoice from April 1988.[1] The Leech Lake Band did include a very poor quality photocopy of the August 1988 fictitious invoice.

3. Later Investigation (1993)

In the Spring of 1993, U.S. Department of Interior agents began to inquire about the $5,745.14 payment that Ellis had

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[1]The subpoena to the Leech Lake Band also required it to produce all checks made payable to RRM. Although the Band did provide many other cancelled checks payable to RRM as required by the subpoena, the Band did not produce either of the two checks that were issued pursuant the fictitious invoices. The grand jury was able to obtain copies of both the April 1988 ($7,600) and August 1988 ($5,745.14) checks by subpoenaing the checks from the tribe's bank. However, even after the existence of the invoice became known to investigators the supporting invoice for the $7,600 payment has never been provided by the Leech Lake Band. On May 18, 1993, then Leech Lake Band attorney Anita Fineday finally informed the Department of Interior investigators that the Band was unable to locate any supporting documents regarding the issuance of the $7,600 check to RRM.

received from RRM in August 1988 and why it was in the same amount as the August 1988 invoice from RRM for insurance services. Through his attorney at that time (not Mr. Colich), Ellis refused to provide any information. However, in May 1993, immediately following these inquiries, Burton Howard was again summoned to a meeting with the defendant. At this meeting, the defendant asked Burton Howard about the second RRM invoice and if the invoice had been produced by Howard to the grand jury. Howard told the defendant that it had been produced. The defendant then asked Howard if he remembered what the two invoices were for and Howard said that he remembered that the invoices were for insurance. The defendant then told Howard, "Okay, if you are asked about them, that's what we'll say they were for."

Subsequently, on July 9, 1993, Howard was interviewed by the U.S. Department of Interior and, consistent with his instructions from the defendant, Howard falsely told the investigators that the $7,600 payment was for insurance on a tribal school and that Howard knew of no connection to Myron Ellis. Howard further told the agents that he believed the $5,700 payment to RRM in August 1988 was for the purpose stated on the invoice (i.e. insurance) and that he knew of no connection to Myron Ellis.

However, by late July 1993, it was becoming clear that the federal investigators could prove that the invoices were not really for insurance services and that the money had been diverted by the defendant to Myron Ellis. The defendant summoned Burton Howard to yet another meeting. The defendant now told Howard that "the government could not be told the invoices were

for insurance, when Ellis had received the money." The defendant instructed Howard that he should now tell the federal investigators that the payments were for Ellis's wages. At the instruction of the defendant, Howard contacted the federal investigators and told them of the new explanation.

On August 10, 1993, Howard was subpoenaed to testify before the grand jury and, without the benefit of immunity, Howard admitted that he had lied to federal investigators at the direction of the defendant. In August 1994, after the defendant had agreed to plea guilty, Howard also admitted that he had destroyed the tribe's copy of the missing April 1988 invoice at the direction of the defendant.

B. WITNESSES FOR EVIDENTIARY HEARING

The United States intends to present the testimony of three witnesses. First, the United States will call U.S. Department of Interior Special Agent James Hanbury. Special Agent Hanbury will testify that he personally served the grand jury subpoenas duces tecum on the Leech Lake Band and the defendant (attached as Exhibits 1 and 2). Special Agent Hanbury will also testify about the absence from the RRM production of either of the two fictitious RRM invoices. Compliance with the RRM subpoena was personally attested to by the defendant. Special Agent Hanbury will also testify to the absence from the Leech Lake Band production of the April 1988 $7,600 invoice that the defendant allegedly ordered destroyed.

The United States will also present the testimony of then Leech Lake Band controller Burton Howard. Mr. Howard will describe the conversations that he had with the defendant in January 1991 wherein the defendant ordered Howard to "get rid of"

subpoenaed documents and later when the defendant ordered Howard to lie to federal agents concerning the purpose of the payments. Mr. Howard will also testify that immediately prior to the first of the two payments from RRM to Myron Ellis, Ellis had complained that "they" would not let him invest in RRM.

Finally, the United States will present the testimony of co-defendant Myron Ellis. Mr. Ellis will admit that he was present during the meeting between the defendant and Burton Howard wherein the defendant instructed Howard to get rid of documents because those documents could send people to jail.

The United States will also introduce several exhibits. In addition to the grand jury subpoenas described above, the United States will introduce copies of the two checks to RRM (obtained from the bank only), the August 1988 invoice (produced by the Leech Lake Band only, not the defendant) and the two payments from RRM to Myron Ellis (produced by the bank).

The United States believes that the direct examination of all three witnesses may be completed within 2 hours.

Dated: 12/2/94

Respectfully submitted,

DAVID L. LILLEHAUG
United States Attorney

BY: MICHAEL W. WARD
Assistant U.S. Attorney
Attorney ID No. 190755

DOUGLAS A. KELLEY, P.A.
ATTORNEY AT LAW
SUITE 500
701 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415

TELEPHONE 612-337-9594
TELECOPIER 612-371-0574

For Immediate Release:

Wednesday, August 17, 1994

Contact: Douglas A. Kelley

(612) 337-9594

CONCERNING HAROLD "SKIP" FINN

Today in U.S. District Court State Senator Harold "Skip" Finn entered a plea of guilty to a misdemeanor relating to an August, 1988 transaction of Reservation Risk Management, Inc., a self-insuring entity created in 1985 by the Leech Lake Reservation and Finn in response to skyrocketing insurance premiums.

In April, 1988 and again in August, 1988, at the Leech Lake RBC's request, Reservation Risk Management, Inc. made payments for salary-related adjustments to Myron F. Ellis, an elected tribal official who had been the Reservation's Executive Director. The salary adjustments had been previously authorized by the Leech Lake Reservation Business Committee. RRM was asked to advance the funds to Ellis because the Reservation was having cash-flow problems.

Skip Finn did not benefit in any manner from this transaction and Myron Ellis did not receive anything more than was authorized by the RBC. The Reservation was not deprived of anything or harmed in any manner whatsoever. All of Finn's actions were taken at the request of the RBC and with its knowledge and approval.

Finn, in a statement released by his attorney Doug Kelley said "I accept full responsibility for my actions, I made a mistake and will accept the consequences. I want to get back to my family and my work in the State Senate. This happened over six years ago and before I was elected to the Legislature. I have in no way violated the public trust. The acceptance of this misdemeanor will allow me to focus my energy on my family and my full legislative duties. I've weighed the expense, time and emotional cost of trial and feel that this is the best way to resolve a matter which has already dragged on for more than four years."

-30-

U.S. Attorney Lillehaug praised the quality of the extensive investigation, which was primarily the work of the U.S. Department of Interior's Office of Inspector General with the assistance of the Federal Bureau of Investigation and the Internal Revenue Service. The investigation is continuing into related matters. The case is being prosecuted by Assistant U.S. Attorney Michael W. Ward.

# # # #

United States Attorney
District of Minnesota

NEWS RELEASE

Contact: Karen A. Jambor, Media Coordinator (612) 348-1514
David L. Lillehaug, United States Attorney (612) 348-1500

FOR IMMEDIATE RELEASE
Wednesday, August 17, 1994

MINNEAPOLIS - United States Attorney David L. Lillehaug announced today that Harold "Skip" Finn and Myron F. Ellis, both of Cass Lake, Minnesota, have been charged with, and have pleaded guilty to, misapplying funds belonging to the Leech Lake Band of the Minnesota Chippewa. The guilty pleas were taken this morning in the federal courthouse in Minneapolis before U.S. District Court Judge James M. Rosenbaum.

Harold "Skip" Finn, 45, is currently a Minnesota State Senator, and Myron Ellis, 51, is president of the Minnesota Indian Gaming Association. The criminal charges, however, do not relate to Finn's senatorial duties or to Indian gaming matters.

According to court documents on file, the offenses took place in 1988 when Finn, an enrolled member of the Leech Lake Band, was the attorney for the Band. Ellis was executive director of the Tribal Council and has been an elected member of the Council since mid-1988.

On August 12, 1994, Finn and Ellis were charged with misdemeanor violations by a criminal Information filed by the U.S. Attorney's Office and unsealed today. According to the Information and plea agreements between the government and the defendants, the crimes were committed through the submission by Finn of fictitious insurance invoices to the Leech Lake Band.

In 1988, a corporation partly owned and operated by Finn, called Reservation Risk Management, Inc. ("RRM"), had a contract to provide insurance services to the Leech Lake

(MORE)

Band. According to the guilty plea documents, in April and August of 1988 Finn submitted fictitious invoices totalling $13,345.14 from RRM to the Leech Lake Band for insurance services that, in fact, had not been provided. Ellis admits that he used his official position with the Leech Lake Band tribal government to ensure that the fictitious invoices were paid. In truth, the payments were funneled to Ellis for his personal use.

Both Finn and Ellis entered guilty pleas to the misdemeanor portion of the federal statute prohibiting misapplication of funds of an Indian tribal organization, Title 18, United States Code, Section 1163. The maximum penalty for that offense is one year in prison, a $100,000 fine, one year of supervised release, and an order of restitution. As is always the case, it will be up to Judge Rosenbaum whether to accept the plea agreements and, if so, to decide what penalty should be imposed.

If Finn's plea is accepted and he is sentenced, Finn has agreed that, at a minimum, he will pay, by cashier's check, the full $100,000 fine allowed by the statute for a misdemeanor. The government has reserved the right to request that the Court impose the maximum prison term of one year. If Ellis' plea is accepted, Ellis has agreed to pay full restitution to the Leech Lake Band of $13,345.14, the amount unlawfully received.

U.S. Attorney David Lillehaug commented, "Speaking generally, a charge of misapplication of funds of a governmental organization -- whether federal, Indian, state, or local -- is always a serious matter. It causes citizens to call into question the competence and honesty of those entrusted with the people's money."

"That general observation," said Lillehaug, "at this juncture this Office is not commenting about this case. At the sentencing in open court, which is the appropriate time, the United States will present its detailed evidence and strong

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Criminal No. 5-94-18

UNITED STATES OF AMERICA Plaintiff, v. HAROLD "SKIP" FINN, Defendant.	)	PLEA AGREEMENT AND SENTENCING STIPULATIONS

The parties to the above captioned case, the United States of America, by its attorneys, David L. Lillehaug, United States Attorney for the District of Minnesota, and Michael W. Ward, Assistant United States Attorney, and the defendant, Harold "Skip" Finn, through his attorney, Douglas A. Kelley, Esquire, hereby agree to resolve this case on the following terms and conditions:

FACTS

1. The United States and the defendant agree that in 1988 the defendant, Harold "Skip" Finn, was an officer and director of Reservation Risk Management Inc., a tribally chartered corporation organized to provide insurance and insurance administrative services in connection with the Leech Lake Band's modified self-insurance plan. At all times herein, the Leech Lake Band of the Minnesota Chippewa was and is an Indian Tribal organization. The United States and the defendant agree that on or about April 28, 1988 and again on or about August 16, 1988 the defendant knowingly submitted to the Leech Lake Band fictitious invoices for insurance services he claimed to have provided to the Leech Lake Band when, as he then well knew, such services had not been

provided. By such actions the defendant willfully caused to be misapplied funds belonging to the Leech Lake Band in the amount of $7,600 in April 1988 and $5,745.14 in August 1988. The parties agree that the defendant's actions as described above constituted a violation of Title 18, United States Code, Section 1163.

PLEA AGREEMENT

2. The defendant agrees to plead guilty to the single count of the Information filed by the United States charging the defendant with willfully misapplying not more than $100 of the funds of the Leech Lake Band, an Indian tribal organization, all in violation of 18 U.S.C. § 1163.

3. The defendant further agrees to continue to waive his right to plead the five-year statute of limitations in defense of any prosecution for the conduct described above until 30 days after the Court has either unconditionally accepted or rejected this agreement.

4. The defendant understands that the maximum statutory penalties for the offense charged in the Information is as follows:

(a) a term of imprisonment of up to one (1) year;

(b) a criminal fine of up to $100,000; and

(c) a term of supervised release of one (1) year.

5. The defendant understands that because the offense conduct occurred after November 1, 1987, he will be sentenced in accordance with the Sentencing Guidelines promulgated under the Sentencing Reform Act of 1984.

6. The parties agree to the following facts relevant to an assessment of the offense under the Sentencing Guidelines:

a) The base offense level for Count I of the Information (18 U.S.C. § 1163) is level four (4) pursuant to Guideline Section 2B1.1(a).

b) The stipulated amount of loss for sentencing purposes is $13,345.14 ($7,600 and $5,745.14). This amount of loss requires an increase in the offense level of five (5) levels pursuant to Guideline Section 2B1.1(b)(1)(F). (Note: this stipulated loss figure is for purposes of establishing the adjusted offense level only. The United States will present to the Court prior to sentencing evidence of other conduct by the defendant relevant to the operation of Reservation Risk Management that the United States contends was a motive for the offense of conviction.)

c) The offense of conviction involved the submission by the defendant of fictitious invoices to the Leech Lake Band for the purpose of funneling payments through Reservation Risk Management, Inc. to a member of the Leech Lake Reservation Business Committee. The parties agree that the offense involved more than minimal planning and requires a two (2) level increase in the offense level pursuant to Guideline Section 2B1.1(b)(4).

d) If the defendant pleads guilty to the charges in the Information and cooperates with the U.S. Probation Office, the defendant would be entitled to a two (2) point reduction for acceptance of responsibility pursuant to Guideline Section 3E1.1.

e) The parties have reached no other agreements relevant to specific offense characteristics and adjustments under the Sentencing Guidelines.

7. Based on the information currently in the possession of the United States, the parties believe that the defendant's criminal history category is I. If the Court determines that the adjusted offense level is nine (9) and that criminal history category I is appropriate, the resulting guideline sentencing range would be a term of imprisonment of 4-10 months.

8. The defendant further agrees to pay a criminal fine in the amount of no more and no less than one hundred thousand dollars ($100,000). Such fine is to be paid by the defendant no later than the date of sentencing and in the form of a bank cashier's check. Separate and apart from the criminal fine stated above, the defendant agrees to pay, on the date of sentencing, the mandatory special assessment of $25.00.

9. The defendant agrees that the above recommendations of the parties regarding the sentencing factors are not binding on the Court. The defendant reserves the right to withdraw his guilty plea if the Court finds that the adjusted offense level is higher than level ten (10). In addition, notwithstanding the calculation of the adjusted offense level, the United States reserves the right to ask the Court to impose the maximum statutory penalty of twelve (12) months imprisonment, and the defendant reserves the right to ask the Court to impose a probationary sentence.

10. The foregoing provisions set forth the entire plea agreement between the parties and no other agreements or promises have been made.

Dated: August 17, 1994

Respectfully submitted,

DAVID L. LILLEHAUG
United States Attorney

BY: MICHAEL W. WARD
Assistant U.S. Attorney
Attorney ID No. 190755

Dated: Aug 17, 1994

DOUGLAS A. KELLEY
Attorney for Defendant

Dated:

HAROLD FINN
Defendant

US Attorney's pre-sentence investigation report of Harold 'Skip' Finn's insurance sca

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA FIFTH DIVISION Criminal No. 5-94-18 (1)

UNITED STATES OF AMERICA, Plaintiff, v. HAROLD R. "SKIP" FINN, Defendant.

UNITED STATES' MEMORANDUM CONCERNING REMAINING DISPUTED SENTENCING FACTORS

On August 17, 1994, the defendant pleaded guilty to preparing and submitting over $13,000 of false insurance invoices to the Leech Lake Band. The funds were then improperly diverted to co-defendant Myron Ellis, who was a high ranking member of the Leech Lake Band tribal government.

At the time of the offense, the defendant was the Leech Lake Band's own attorney, and he used his position as the administrator of the tribal "self-insurance" plan to carry out the fictitious invoice and "kickback" scheme.

In its presentence report to the Court, the United States Probation Office has recommended that the defendant's sentence be increased beyond the base guideline sentence range because, as an attorney, the defendant abused a position of trust and special skill, and later, he attempted to obstruct the investigation by directing the destruction of subpoenaed documents.

The United States supports both of the recommendations made by the U.S. Probation Office. As is discussed below and will be presented further in a sentencing memorandum to the Court, the defendant's crime of diverting funds to tribal insider Myron Ellis was carried out to prevent Ellis' political opposition to, and any public scrutiny of, the tribal "self insurance" plan created by defendant Finn.

I. BRIEF STATEMENT OF FACTS

Taken out of context, it might appear that the defendant did not personally profit from his use of fictitious invoices to divert tribal funds to co-defendant Myron Ellis. However, the defendant's greater overall culpability is revealed by placing the false invoice/kickback scheme in its larger context. Viewed against a broader landscape which encompasses the defendant's unconscionable personal profit from the tribal self-insurance plan, it becomes clear that the defendant's fraudulent "kickback" of money to Ellis was definitely in Finn's own best interest.

RRM was a corporation that was created in 1985 by the tribal government of the Leech Lake Band upon the advice of its attorney, the defendant, Harold "Skip" Finn. The stated purpose of RRM, according to the public resolutions that were passed by the Leech Lake Reservation Business Committee ("LLRBC"), was to administer a "self insurance" plan that the LLRBC intended as a means of controlling their rising insurance costs. (See Exhibit 1, LLRBC Res. No. 86-26). However, instead of saving the Leech Lake Band on its insurance costs as was promised, the principal effect of the RRM "self insurance" plan was an unconscionable, risk free financial windfall for the owners of RRM.

It is not surprising that the LLRBC was taken advantage of in the RRM transaction since the principal owner of RRM was the person who was supposed to look out for the interests of the Leech Lake Band, their own lawyer, "Skip" Finn.

The defendant's own conflict of interest was compounded when he coopted the independent judgment of other influential officials of the Leech Lake Band by either giving them an ownership interest in RRM or otherwise letting them personally benefit from the RRM transaction. Those officials included former Chairman Dan Brown, current Chairman Alfred "Tig" Pemberton, and Executive Director and LLRBC member Myron Ellis.

The conflict of interest on the part of the defendant Finn was not academic or theoretical. The real result of this conflict was an incredibly one-sided set of agreements that wholly favored RRM and its owners and unquestionably damaged the people of the Leech Lake Band.

The RRM transaction was promoted by the defendant Finn as a "modified self insurance" plan. In reality, the RRM transaction was neither true insurance nor true self insurance. Under a true insurance contract, the Leech Lake Band would have been required to pay premiums but it would have been actually covered for any claims up to the promised coverage limit.

Under a true self insurance contract, the Leech Lake Band would have been exposed to risk and have to itself cover any property or liability losses it suffered. However, under a true self insurance contract the Leech Lake Band would also have saved money by not having to pay any premiums. Under the RRM contracts, the Leech Lake Band paid substantial premiums but did not receive anywhere near the coverage it was promised.

In terms of reasonable compensation, a provider of true insurance is entitled to a premium because it is incurring risk and if a valid claim is presented, it must pay the claim from its own funds up to the coverage limit. An administrator of a true self insurance plan incurs no risk and is usually compensated only for their administrative work. The compensation a third party administrator ("TPA") is paid by the self-insuring entity is generally only a small percentage of the claims filed and processed. Since the administrator of a self insurance plan bears no risk, the compensation should not include any "premium" or in any way be dependant on the risk taken by the self-insuring entity.

Under the RRM contracts, the Leech Lake Band received an "insurance contract" which promised them $8.6 million of property coverage and $300,000 CSL in general liability coverage. (See Exhibit 2, "Custom Insurance Policy," p. 2).

In reality, RRM had no assets and could not pay any claims. Other than the premium payments from the Leech Lake Band, the only arguable source of funds for RRM to meet the 88.6 million coverage limit was a "pledge" by Finn and his law partner Kimball Mattson that they personally possessed $450,000 of "liquid assets" with which to pay claims. (See Exhibit 4, "Debenture Agreement"). In fact, the "pledge" of even that small amount did not require either Finn or Mattson to place any assets in escrow or even identify the assets that they claimed to possess. Moreover, the "pledge" was largely illusory since it was freely and unilaterally revocable by Finn and Mattson. (See Exhibit 4, p. 2).

Also, a bank loan application that was completed by defendant Finn shortly after the pledge revealed that he did not have even $30,000 of the net "liquid assets" he had pledged to RRM.[1]

[1]Because the $450,000 pledge of assets was freely revocable by Finn, he really incurred no risk. However, he did receive substantial compensation for his "pledge." Under the RRM agreements, Finn and Mattson, by reason of their "pledge" of assets, were to receive 15% of the total annual premium, or $45,000 for the year 1985-86 and $60,000 annually for each of the years 1986-90. (See Exhibit 4, p. 1).

Clearly, RRM was incapable of providing any true insurance coverage to the Leech Lake Band as it had promised in the Insurance Agreement. A funds flow projection prepared by the defendant himself revealed that, even though it had promised $8.6 million in coverage, RRM would not reach even $1 million in reserves until it had received 5 years of premium payments from the LLRBC and even that projection assumed that there would be no significant claims against RRM during those five (5) years. (See Exhibit 5, attached).

Even if RRM had possessed or had available to it the funds necessary to provide the promised 88.6 million of coverage, the agreements that were drafted by defendant Finn had already subtly passed the true risk of any losses back to his client, the Leech Lake Band.

The January 14, 1986 "Shareholders' Agreement" shifted the risk of losses from RRM back to the Leech Lake Band by requiring, in the event of any claim in excess of $450,000, that the Leech Lake Band borrow the necessary money for RRM to pay the claim against the LLRBC. (See Exhibit 6, "Shareholders' Agreement para. (3 (C)). Thus, if a $5 million piece of Leech Lake Band

property was destroyed by a fire, the RRM agreements would require the Leech Lake Band itself to borrow $5 million for its insurance company, RRM, so that its insurance company, RRM, could pay on the claim. Another alternative under the agreements drafted by the defendant was that RRM could force the Leech Lake Band to itself pay any claims against it and RRM could then pay back the Leech Lake Band "over time."

The fact that the RRM agreements shifted all of the risk of any losses to the Leech Lake Band would not be so unconscionable if RRM was not compensated as though it had incurred risk. Yet, without incurring any risk, Finn required the Leech Lake Band to pay RRM hundreds of thousands of dollars of "premiums" every year.

Neither would it be unusual for a self-insuring entity such as the Leech Lake Band to pay substantial amounts of money into a fund from which it would pay any future claims. But under a true self insurance plan, the Leech Lake Band would still own the money it had set aside to pay future claims. The money paid by the Leech Lake Band to RRM no longer belonged to the Leech Lake Band. They were premium payments made to RRM as though RRM had incurred some risk for any losses.

The original agreements contemplated that the Leech Lake Band would own at least 25% of RRM and be entitled to at least that portion of the premiums it had paid.[2]

[2]In reality, although certain members of the LLRBC personally owned shares of RRM, the Leech Lake Band itself did not receive any ownership share of RRM.

However, the agreements drafted by defendant Finn also inexplicably provided that the Leech Lake Band would forfeit any claim to the assets of RRM
if the Leech Lake Band terminated the agreement. (See Exhibit 6, "Shareholder's Agreement," para. 1(f)).

Thus, the Leech Lake Band was not entitled to recover any of the money it had contributed to its own "self insurance" plan. The agreements drafted by the defendant provided that all of the money would be retained by the other owners of RRM including "Skip" Finn who himself never invested any money in RRM.[3]

[3]Upon liquidation of RRM in 1990, the Leech Lake Band did have refunded to it some of its premium payments. However, the Leech Lake Band received less than 22% of the nearly million dollars in cash that was on hand at RRM's liquidation in July 1990. The remaining cash was divided among the individual owners of RRM; "Skip" Finn, Kimball Mattson, Alfred "Tig" Pemberton and Dan Brown.

The defendant was able to get the RRM "self insurance" plan approved and implemented by the LLRBC for two reasons. First, the defendant was the LLRBC's own attorney who would have otherwise been responsible for scrutinizing the contracts and advising the elected members of the LLRBC about the unconscionable and one-sided nature of the contracts.

Second, the defendant headed off any close scrutiny and criticism of the transaction by allowing certain high level LLRBC officials to share in the profits from RRM. The defendant let LLRBC members Dan Brown and Alfred "Tig" Pemberton become part owners of RRM. As Executive Director, and later an elected Representative, Myron Ellis was also an important tribal official whose opposition to RRM could have hurt the defendant's economic interests.

Initially, Ellis was treated by Finn and RRM to complementary country club memberships and smaller "perks." Ellis later expressed interest in investing in RRM himself but was denied that opportunity. Although Ellis was denied an ownership interest, the defendant did funnel money to Ellis through the

The defendant headed off any close scrutiny and criticism of the transaction by allowing certain high level LLRBC officials to share in the profits from RRM

fraudulent invoice/"kickback" scheme in April and August of 1988 which netted Myron Ellis $13,345. The defendant's RRM "self insurance" transaction then continued without any opposition from Pemberton, Brown or Ellis.

In fact, the only thing that derailed the RRM transaction was a memorandum circulated by the U.S. Department of Interior warning that it would soon be investigating all such insurance contracts.[4]

[4]In fact, the U.S. Department of Interior had previously examined the question of whether RRM needed to be a licensed insurance carrier (it was not). Eventually, the Department of Interior decided that RRM did not need to be licensed by the State and approved the contract. However, throughout the period of time of the RRM contracts, the LLRBC concealed from both government and private auditors the true nature of the contracts and the inherent conflicts of interest by the tribal insiders. (See Exhibit 7, Letter to Henry E. Moller, CPA, para. 2).

Following that memorandum, and before any investigation could commence, Finn, Pemberton and Brown liquidated RRM and Finn kept for himself hundreds of thousands of dollars that the LLRBC had been paying to RRM for "self insurance."

II. ABUSE OF POSITION OF TRUST

The presentence report concludes that the defendant's guidelines offense level should be increased two levels because the defendant abused a position of trust and that abuse significantly facilitated the commission or concealment of the offense.

Specifically, the presentence report concludes that the defendant's position as attorney for the Leech Lake Band facilitated both his creation of the RRM self insurance plan and his ability to get it approved by the Leech Lake Band tribal government. Alternatively, the presentence report concludes that the defendant abused his position of trust as President of RRM by using that position to divert tribal funds to co-defendant Myron Ellis.

U.S. Sentencing Guideline Section 3B1.3 provides for an increase of two (2) levels in the adjusted offense level "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense..."

The Application Notes to 3B1.3 provide further that "public or private trust" refers to a position of trust characterized by professional or managerial discretion. Note 1 suggests that persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature.

Of particular relevance to this case, the Note specifically states that the adjustment "would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian..." Finally, in assessing whether the defendant used a "special skill," Application Note 2 defines it as "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts."

As identified in the presentence report and outlined in the facts above, the defendant's position as attorney for the Leech Lake Band and administrator of the self insurance plan was integral to the fictitious invoice/"kickback" scheme.

Ultimately, the defendant carried out the false invoice scheme to protect and conceal his conflict of interest on RRM. First, the defendant's position of trust as tribal attorney was critical in gaining approval of the "insurance" contracts between his company, RRM, and his client, the Leech Lake Band.

The defendant admitted his conflict of interest at the time but has argued that he informed Mr. Alfred "Tig" Pemberton, a member of the LLRBC, that the Leech Lake Band might want to seek independent legal advice. However, that warning was wholly ineffective because, as a co-owner of RRM, Mr. Pemberton's interests were actually aligned with the defendant's interests.

In any event, the defendant was not relieved of his ethical obligations toward his client, the Leech Lake Band, by merely warning them that they might want to seek independent legal advice.

In 1985, as an attorney licensed to practice in the State of Minnesota, the defendant had an affirmative duty under the Rules of Professional Responsibility to refrain from entering into business transactions with a client that are not fair and reasonable to the client and fully disclosed in writing in a manner which can be reasonably understood by the client. (See Exhibit 8, Minn. Rules of Professional Responsibility, Rule 1.8).

Stripped to its bare terms, the RRM "self insurance" agreements proposed by the defendant to his own client required the Leech Lake Band to pay RRM $300,000 - $400,000 each year in "premiums." In exchange, RRM appeared to promise $8.6 million of property coverage of tribal buildings. RRM never had the assets necessary to pay the stated coverage limit of $8.6 million, and the defendant himself projected that RRM would not reach even $1 million in assets for five years. Finally, the RRM agreements drafted by the defendant had shifted the risk of any losses back to the Leech Lake Band.

In one of the most unreasonable provisions, the RRM contracts drafted by the defendant required his client, the Leech Lake Band, to forfeit any claim to the funds in RRm if the Leech Lake Band terminated the agreements before five (5) years. The defendant characterizes this provision as necessary to compensate RRM for the "risk" that it incurred in extending coverage to the Leech Lake Band. However, as we have seen, through the agreements drafted by the defendant, RRM had already shifted the risk of any losses back to the Leech Lake Band and actually incurred no risk. Thus, the adoption of the "forfeiture" clause was to the extreme benefit of the defendant and contrary to the best interests of his client, the Leech Lake Band.

Unquestionably, the RRM "insurance" contracts entered into by the defendant with his client were not fair and reasonable to his client. The contracts were in fact so contrary to the interests of the defendant's client that they are unconscionable. Nor were the true terms of the transaction disclosed to the client in a manner that could be reasonably understood by the client.

As such, the defendant's conduct violated Rule 1.8 of the Minnesota Rules of Professional Conduct. The defendant's apparent violation of the state bar regulations on conflicts of interest strongly supports the recommendation of the U.S. Probation Office.

In addition to being the attorney for the victim of the offense, the defendant occupied and abused another position of trust with respect to the subject offense. As President of RRM, a tribal organization, the defendant was responsible for administering all aspects of the Leech Lake Band's insurance program. The defendant's duties included handling all claims against the Leech Lake Band and collecting insurance "premiums" from the Leech Lake Band as well as other administrative expenses. The defendant carried out this task by submitting periodic invoices to the Leech Lake Band. The defendant also was responsible for managing the funds of RRM.

The defendant exploited his position of trust and exclusive control over RRM operations by creating and submitting to the Leech Lake Band two fictitious invoices for services that were not in fact rendered. The defendant also exploited his position of trust and exclusive control over RRM funds by taking funds paid by the Leech Lake Band for insurance services and using them to pay, a "kickback" to co-defendant Myron Ellis.

If the RRM contracts are viewed as a true self insurance contract in which the Leech Lake Band was exposed to risk but was setting aside its own funds to pay future claims against it, then the defendant (and RRM) would be considered the third party administrator of the plan and the guardian of the Leech Lake Band's funds. The defendant then not only violated the trust placed in him as an attorney, but he also abused the position of trust he occupied as guardian of the tribal "self insurance" funds by using those funds to pay a "kickback" to Myron Ellis.

III. OBSTRUCTION OF JUSTICE

The presentence report of the U.S. Probation Office also recommends that the defendant's guideline offense level be increased two (2) levels because, after the federal grand jury investigation commenced, the defendant instructed a tribal accountant to destroy a document that had been subpoenaed by the grand jury. The subpoenaed document was the fraudulent April 1988 RRM invoice for $7,600 that the defendant created and submitted to the Leech Lake Band on behalf of RRm for insurance services that were not in fact provided. It was those funds that were secretly "kicked back" by the defendant to Myron Ellis.

After the subpoena was served on the Leech Lake Band in January 1991, tribal accountant Burton Howard was instructed to and did collect the documents sought. After Howard collected the documents, the defendant asked him to come to his office. The defendant first asked Howard about the invoice. Then, in an effort to conceal the crime and obstruct the investigation, the defendant told Burton Howard: "Get rid of it, I don't want to know what you do with it, just get rid of it. That's the piece of paper that could send us all up the river." Against his own interest, Mr. Howard has now admitted destroying the document at the defendant's instruction. The defendant's directions to Mr. Howard were also witnessed by his co-defendant, Myron Ellis. In corroboration of Mr. Howard and Mr. Ellis, the subpoenaed document (the $7,600 invoice) was never produced by the Leech Lake Band in response to the federal grand jury subpoena nor was a copy of the $7,600 check to RRM that was generated in response to the invoice.

U.S. Sentencing Guideline Section 3C1.1 requires that the defendant's guideline offense be increased two (2) levels "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense..."

Section 3C1.1 is intended to apply to a wide range of conduct that could be engaged in to obstruct justice. However, there can be no clearer example of obstruction of justice than the destruction of documents subpoenaed by the federal grand jury. Application Note 3 to that guideline section expressly states that the obstruction of justice enhancement applies to:

(d) "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence, or attempting to do so..."

The effect of the defendant's obstruction of justice was to greatly delay the United States' efforts in discovering and prosecuting the subject offense. In fact, the five year statute of limitations on the April 1988 invoice/"kickback" expired before sufficient evidence of the offense could be collected.

The obstruction of justice and the resultant loss of evidence was very nearly successful in preventing any prosecution. The lack of documentary evidence inhibited the United States in effectively questioning and gaining the cooperation of tribal insiders. If the Court determines that an evidentiary hearing on this issue is appropriate, the United States is prepared to present evidence and testimony in support of the Probation Office conclusion that the defendant obstructed justice.

Dated: October 28, 1994
Respectfully submitted,
DAVID L. LILLEHAUG
United States Attorney
BY MICHAEL W. WARD
Assistant U. S. Attorney
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Please note:

Copies of the 8 documentary exhibits numbering 22 pages which support the pre-sentence investigation report are available at the offices of the News and Press.