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July 15, 2013

Hon. Gary Clemmons
Clerk of the Circuit Court
18 East Market Street
Leesburg, VA 20176

RE: Delgaudio v. Board

Dear Mr. Clemmons:

Enclosed please find: (1) a cover sheet, a letter to Judge McCahill, the original complaint, affidavit, brief, and a proposed order for a temporary injunction. Except for the cover sheet, extra copies of the aforementioned documents have been included for service. A check for the filing fee is also enclosed.

In accordance with the enclosed letter, please forward this file to chambers imediately for review once the case has been initially processed.

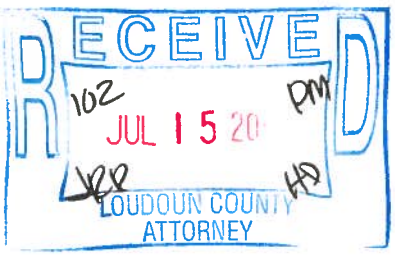
Please prepare process for service by a private process server and call my office when service has been prepared and may be picked up.

Very truly yours,

Charles L. King

CLK/rme
Enclosures

cc: client



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July 15, 2013

Hon. Burke F. McCahill
Chief Judge
Hon. Thomas Horne
Judge
Loudoun County Circuit Court
18 East Market Street
Leesburg, VA 20176

Re: Delgaudio v. Board of Supervisors
Emergency Request for Temporary Injunction

Dear Judge McCahill and Judge Horne:

I am requesting the Court review the pleadings submitted herein and either enter the enclosed order, based on the affidavit, and set a review hearing date as soon as possible or schedule a hearing prior to the Board meeting on Wednesday, July 17, 2013 at 4:00 p.m.

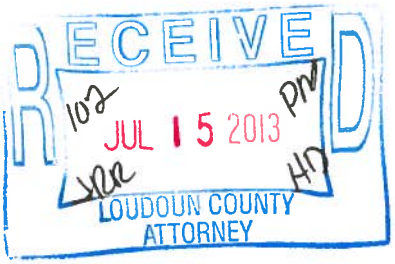
I intend to deliver copies of all of the pleadings filed herein to the County Attorney immediately after filing. I will also attempt to communicate with Mr. Roberts regarding his availability.

Please know I do not make this request lightly. I do so reluctantly with the knowledge of the incredible constraints this Court is operating under. Please accept my thank you, in advance, for your consideration of my request.

Very truly yours,

Charles L. King

cc: John R. Roberts, Esq.



VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

EUGENE DELGAUDIO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. _____**
	)	
LOUDOUN COUNTY BOARD OF SUPERVISORS,	)	
	)	
Defendant.	)	

COMPLAINT FOR TEMPORARY INJUNCTION AND DECLARATORY JUDGMENT

COMES NOW the Plaintiff, EUGENE DELGAUDIO, by counsel, and states:

1. The Plaintiff has been elected four times to the Loudoun County Board of Supervisors (hereinafter the "Board") as the Sterling district representative. He was last re-elected in November of 2011.

2. Based on newspaper reports and comments from other supervisors made at the last Board Meeting held on July 3, 2013, the Plaintiff anticipates the Board will take disciplinary action against him at the regular meeting scheduled for Wednesday, July 17, at 4:00 p.m. A newspaper article corroborating this assertion is attached hereto as Exhibit 1.

3. The Board's action stems from a report filed by a Special Grand Jury on June 24, 2013, a copy of which is attached as Exhibit 2.

4. The Plaintiff believes the Board will, at the last minute, add an action to discipline him to the agenda. The Board will likely first vote to suspend their own rules of procedure and then proceed to formally reprimand him and eliminate the budget for his staff aides.

5. The Plaintiff has not been given notice, formal or informal, of what actions the Board intends. The Plaintiff is aware only that other supervisors have been discussing the report and what actions to take among themselves. He is, of course, not a party to these discussions.

6. Because disciplinary actions taken by the Board against a member supervisor are not reviewable by the Circuit Court or any other court, he has no remedy at law.

7. There have been press reports a recall petition has been prepared and could be submitted to the Circuit Court.

8. The Plaintiff believes the Board's potential actions, especially the elimination of his staff, would be cited as evidence he is unable to discharge his duties.

9. Because the Special Grand Jury proceedings were ex-parte and confidential, if the summary actions of the Board to be cited as evidence in a trial on a recall petition and he is removed from office, Supervisor Delgaudio would be irreparably harmed by the Board's pending denial of his due process rights.

10. Should the Board act as he anticipates, the Plaintiff contends he will prevail on the merits in this action by demonstrating the Board did not comply with even rudimentary due process where other supervisors discuss taking action against him among themselves, vote to suspend the rules, announce their decision without giving him any notice of either what he is defend or the opportunity to defend himself.

11. Among the allegations in the Special Grand Jury's report are Supervisor Delgaudio accepted a $5,000 cash contribution which was not reported on his campaign finance reports, told his staff not to respond to the public, maintained a hostile work environment and used his staff to set up appointments to solicit campaign funds.

12. In January of 2013 the Board declined to appoint Supervisor Delgaudio to any Board subcommittees which can be argued was an indirect form of discipline.

13. The only significant implication of granting the injunction is Supervisor Delgaudio's office would be continued to be staffed which is simply the continuation of a normal governmental function. Whatever problems may or may not have existed in Supervisor Delgaudio's office in the past, there have been no allegations his office is not functioning normally at the present time.

14. For the reasons cited in paragraphs 12 and 13, there is no prejudice or harm to the Board caused by the delay in considering discipline against Supervisor Delgaudio.

15. There is a compelling public interest in allowing Supervisor Delgaudio to demonstrate to the Board and the citizens of Loudoun County that information in the Special Grand Jury's report is inaccurate or can be explained. He also believes there is a further compelling public interest in demonstrating whether he and other members of the Board of Supervisors have complied with the applicable campaign finance statutes.

16. Another balancing factor the Court should consider is the relief sought by Supervisor Delgaudio is fairly rudimentary. Although it would be preferable if the Board followed its own rules, he cannot ask the Court to order the Board to do so. The failure of the Board to follow its own rules is not a violation of due process. Supervisor Delgaudio submits the constitutional requirements of due process are limited and are contained in Count II of this complaint.

Count I – Request for Temporary Injunction

17. Paragraphs 1 through 16 are incorporated herein.

18. Because the issues involved do not place financial assets or government functions at risk and the identities of the parties are an elected official and the municipal subdivision of the

Commonwealth to which he was elected, pursuant to Section 8.01-631(A) an injunction bond is unnecessary.

Count II – Request for Declaratory Relief

19. Paragraphs 1 through 18 are incorporated herein.

20. The question of what action the Board should take in response to the Special Grand Jury's report has created an actual case or controversy between the Board and the Plaintiff.

21. Although the Board need not operate similar to a court, some modicum of due process must be accorded to the Plaintiff before action is taken against him.

22. The Board has Rules of Procedure which incorporate Robert's Rules of Order which include procedures for discipline. Although the Plaintiff would deem it preferable if the Board followed its existing rules, he does not contend the simple failure to follow existing rules is, in itself, a denial of due process.

23. The Plaintiff submits the applicable minimum requirements of due process include, but are not limited to: (1) written formal charges; (2) adequate advance notice of a hearing; (3) the right to cross-examine witnesses; (4) the opportunity to defend himself; (5) access to compulsory process for witnesses and documents; and (6) a transcript of the proceedings conducted by the Board.

24. Relief is sought under Sections 8.01-184 through 8.01-191 of the Code of Virginia permitting circuit courts to issue declaratory judgments in cases of actual controversy.

WHEREFORE, the Plaintiff, EUGENE DELGAUDIO, prays for the following relief:

1. As to Count I, pursuant to Section 8.01-620 et. seq. of the Code of Virginia, for the entry of a temporary order enjoining the Loudoun County Board of Supervisors from taking

disciplinary action against him until a hearing may be held on the continuation of the requested temporary injunction;

2. As to Count I, assuming relief is granted, the entry of an order continuing said injunction until the Court can determine the procedural requirements which are consistent with the Plaintiff's due process rights under the United States Constitution;

3. As to Count II, a declaration of the specific due process guarantees which the Defendant must accord the Plaintiff; and

4. For such other relief as the Court may deem appropriate.

EUGENE DELGAUDIO
By Counsel

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charleskingesq@verizon.net
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the attached pleading was hand-delivered to John R. Roberts, Esq., County Attorney, 1 Harrison Street, SE, 5TH Floor, Leesburg, VA 20175 on the 15th day of July, 2013.

Charles L. King

7/15/13
Date

Board Plans Response To Delgaudio Grand Jury

» Norman K. Styer
nstyer@leesburgtoday.com

It wasn't until the end of their July 3 meeting that county supervisors addressed what Vice Chairman Shawn Williams called "the elephant in the room," providing a public response to the June 24 report of the special grand jury investigating the conduct of Supervisor Eugene Delgaudio (R-Sterling).

While no action was taken during last Wednesday's session, supervisors made it clear some was coming.

The grand jury was convened in February to investigate allegations of misconduct raised by a former staff aide. After questioning 31 witnesses and reviewing 36 items of evidence over four months, Theophani K. Stamos, the Arlington County commonwealth's attorney appointed to lead the probe, did not ask the grand jury to consider criminal indictments. However, the panel did issue a report outlining members' concerns about Delgaudio's conduct and suggested changes to local policies and state laws to prevent the misuse of county resources and improve enforcement of campaign finance disclosure rules. In the report, Delgaudio is portrayed as using his county staff aides for fundraising and to support the activities of the nonprofit political advocacy organization he leads. Also the grand jury stated it found circumstantial evi-

Continued on Page 22

Delgaudio

Continued from Page 3

dence that the supervisor accepted, but failed to disclose, $5,000 in campaign contributions from two sources.

Supervisors are limited in their options to further punish Delgaudio. A formal censure vote seems likely and a defunding of the Sterling District supervisor's office support is a possibility. In January, supervisors stripped Delgaudio of his committee assignments and those privileges appear unlikely to be restored.

County Chairman Scott K. York (R-At Large) said the report will be on the board's July 17 meeting agenda, with the discussion likely to include whether to ask the General Assembly to enact tougher ethics laws.

A delegation of Sterling District residents speaking during the public comment session of last week's meeting urged the board—and Delgaudio—to take action.

Steven Hall said when he looks at the public facilities available to residents of other areas of the county he wonders why the long-planned Sterling Library expansion remains stalled. "When are you going to do something for us? When are you going to do something for our town? I've had it. I think you should resign," he said to Delgaudio.

Al Nevarez, who ran against Delgaudio as a Democratic candidate and spearheaded a recall petition drive, spurred a shouting protest from Delgaudio when he accused the supervisor of corruption and being a "criminal."

"You must not just have any shame in your body whatsoever. It's embarrassing. We're tired of it," Nevarez said. "I just wanted to make it clear that you did something wrong and everyone in this county knows you did something wrong."

Nervarez said many people get into politics because they don't like the way government is run. "The problem with the way government is run is because of people like Supervisor Delgaudio."

supervisor, is providing legal representation to Donna Mateer, the former Delgaudio aide who raised the misconduct allegations last year. He said that Mateer is willing to provide sworn testimony before the Board of Supervisors. "Donna Mateer has nothing to gain and she has nothing to hide. She only wants the truth about Mr. Delgaudio to be known," he said.

Supervisor Janet Clarke (R-Blue Ridge) said the board has not had enough time to review the points raised in the grand jury report. "The entire board takes the situation very seriously," she said. "We are assimilating what was recommended and we will go from there."

Clarke and Supervisor Ralph Buona (R-Ashburn) pointed out the board already had taken action to better protect staff aides and to ensure their work is directed toward county business, and to set expectations for supervisors' conduct. Buona said that earlier action by supervisors addressed most of the local policy concerns raised in the grand jury report.

Supervisor Matt Letourneau (R-Dulles) said the grand jury report was "eye-opening." Referring to the grand jury's finding that county supervisors qualify as part-time county employees who are exempt from laws governing the misuse of government resources, he said, "I was surprised to learn that most ethics laws don't apply to me." He said he supported having the General Assembly close that loophole.

"Needless to say, I think most of us did not have the expectation that when we became members of the Loudoun Board of Supervisors that we would have to worry about things like special grand juries, etc. I surely did not," Supervisor Suzanne Volpe (R-Algonkian) said. "Believe that to the best of my ability I have worked hard over the past year in a half to prove that I deserve to be up here and I will continue to do so."

"I think it has shaken many folks here in the community for us to have to go through this," Volpe said. "I believe in my heart, though, and I believe you all know it as well, that most of us who run for office in the first place are running because we want to give to our communities. We want to make things better and, God willing, we can continue to do that."

Vice Chairman Shawn M. Williams (R-Broad Run) said he was most concerned about protecting the reputation of the board as a whole and did not wan the Delgaudio investigation to overshadow the board's efforts to improve transportation and attract businesses. "I will take it very personally—as I'm sure my colleagues will, if that reputation is tarnished. We're going through an exhaustive process and we're getting our hands around the additional information that came out last week and I can tell you that additional action is going to be taken. ... Please understand that we need to be thorough and detailed as we go down that path."

During his comment period, Delgaudio did not directly address issues raised by critics, but highlighted his efforts to meet voters by going door to door and to publicize community activities in the Sterling District.

This week Delgaudio worked to raise his profile in fighting for facilities in his district and launched an attack at York, charging that the county chairman personally was blocking a proposal to establish a temporary 200-space commuter park and ride lot at the Reston Bible Church along Cascades Parkway. Action on the proposal had been delayed while VDOT evaluated whether a traffic signal was needed at a nearby intersection, concluding it was not. This issue is on the board's Transportation/Land Use Committee agenda Friday.

In a statement Delgaudio released on the subject, he accuses York of using "bully tactics" to delay a service needed "for the poorest people in Loudoun." ■

EXHIBIT
tabbies
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7/12/13
Leesburg Today

Report of the Special Grand Jury on the Investigation into the Potential Misuse of Loudoun County Resources

June 2013

We the members of the Special Grand Jury of Loudoun County operating in the Loudoun Circuit Court and impanelled by the Commonwealth's Attorney for Arlington County and the City of Falls Church from February 2013 to June 2013 submit the below report to document our findings.

Executive Summary

The Special Grand Jury (the "Jury") was impanelled by the Commonwealth's Attorney (CA) for Arlington County and the City of Falls Church, Ms. Theophani (Theo) Stamos, on February 5, 2013, after a typical jury selection process involving only residents of Loudoun County, Virginia, and was granted authority by the Loudoun Circuit Court. At the outset, the Jury was told that an allegation had been made against Loudoun County Board of Supervisor Eugene A. Delgaudio that he improperly used Loudoun County resources for personal gain. The Jury was cautioned that there was no determination that these allegations were in fact true, and that the purpose of the Jury was to investigate these allegations as well as any other issues that may come to light during the course of the investigation.

Over the course of several months the Jury heard from and questioned 31 different witnesses and reviewed 36 items of material entered into evidence. Based upon testimony, the Jury also requested additional witnesses and evidence to further investigate both the original allegation as well as related issues that arose. At the conclusion of the investigation, the CA informed the Jury that she would not ask the Jury to consider any indictments. As such, the Jury never deliberated to consider whether it would indict Supervisor Delgaudio, the original focus of the investigation, or any other individual.

While the Jury cannot speak for the CA, we believe that at least one significant reason that the Jury was not asked to return an indictment is a result of limitations imposed by the Code of Virginia. This report summarizes evidence that suggests the misuse of public assets may have occurred within Supervisor Delgaudio's office between Fall 2011 and Spring 2012 and explains why such misuse may not be criminal in this Instance. This report further summarizes evidence and testimony of other related and questionable activities, and the report concludes with several recommendations aimed at the Virginia General Assembly, Loudoun County and the voting public.

Purpose for Convening

Donna Mateer, a staff aide to Loudoun County Board of Supervisor (BoS) Eugene A. Delgaudio of the Sterling District, was fired in March 2012, and she subsequently filed a complaint that ultimately reached the office of the Commonwealth's Attorney for Loudoun County. The complaint alleges that

Supervisor Delgaudio directed Ms. Mateer to spend time while being paid by Loudoun County to set up fundraising meetings to benefit Delgaudio's campaign efforts, and she also claims that Supervisor Delgaudio created a hostile and abusive environment in the office. To bolster her claim, Ms. Mateer provided copies of numerous documents that were entered into evidence. Due to the potential for a conflict of interest, the Commonwealth's Attorney for Loudoun County referred the matter to the Commonwealth's Attorney for Arlington County and the City of Falls Church who was appointed as special prosecutor in November 2012 to conduct an investigation into allegations that Supervisor Delgaudio improperly used county resources to benefit his political campaign. The CA determined there was sufficient evidence to warrant an investigation and in February 2013 convened this Jury to evaluate the evidence against Supervisor Delgaudio and to pursue any related avenues of investigation that may arise in the conduct of its business.

It is worth quickly comparing and contrasting from a procedural standpoint a special grand jury versus a criminal trial jury (petit jury) for those that may not be familiar with a special grand jury. During special grand jury proceedings no judge is present nor is any defense present. Each witness may have a lawyer of their choosing present. However, this lawyer has no standing to object to questions and may only opt to delay questioning to confer with their client in private. Unlike criminal trials in many jurisdictions, special grand jurors are permitted to ask questions and there are virtually no bounds on the type of question the CA or special grand jurors may ask. Because there is no defense present, there is no cross examination of witnesses. The Fifth Amendment of the U.S. Constitution naturally applies at all times, and no witness need answer questions that may incriminate him/her. Like a criminal trial, all testimony is recorded by a court reporter, and witnesses provide sworn testimony that is subject to pertinent perjury laws.

Purpose of this Report

Under Virginia statute, a special grand jury impanelled by the CA is not required to produce a report. However, in light of the fact that the investigation centers around a prominent and long-serving Loudoun County Board of Supervisor, and because this case has generated media interest both before the Jury was impanelled and during the course of its investigation, the Jury believes it is in the public's best interest to understand the Jury's findings. We further believe that the parties involved deserve to know why no indictment is forthcoming. Finally, based on our findings we have discovered several recommendations that we believe could be implemented to improve the Code of Virginia and Loudoun County policies.

With the desire to produce a written report at the conclusion of this Special Grand Jury, the Jury discussed whether a report could be produced and whether such a report would be made public. The CA ultimately referred the matter to the Chief Judge of the Loudoun Circuit Court who produced an order authorizing the issuance of this report.

Summary of Investigation

This section contains an overview of key witness testimony and evidence from the investigation into the allegations that Supervisor Delgaudio misused county resources. The Jury elected to arrange the information according to several overarching themes that emerged during the course of our investigation. In this case, Supervisor Delgaudio did not testify before the Jury; however, he provided information requested by the Jury.

Atmosphere of Office

Multiple witnesses testified that there was behavior within Supervisor Delgaudio's Loudoun county office, particularly between Fall 2011 and Spring 2012, that resulted in a hostile work environment. These incidents included acts of verbal abuse that on multiple occasions brought his aides to tears and led to the departure of several employees. These actions were in direct violation of the Board of Supervisors Code of Conduct which reads: "Avoid, during either public or private meetings and during the performance of public duties, the use of abusive, threatening or intimidating language or gestures directed at colleagues, citizens, or personnel." Additionally, the Supervisor isolated his staff by strictly forbidding their interaction with other BoS aides and attendance at regular BoS staff aide meetings. However, the Jury found no criminal acts related to this behavior.

Potential Misuse of County Resources

Witness testimony revealed that an individual volunteered to help Delgaudio in 2010 or 2011 compile a list of campaign contributors from publicly available information utilizing the Virginia Public Access Project website (vpap.org). The individual who created the list testified that the list, referred to within Supervisor Delgaudio's office as the Igor list, was intended to identify potential campaign donors. While this witness could not easily imagine another purpose for this list, the witness ultimately did not know how this list was actually used or if it was used by Supervisor Delgaudio or any of his staff or volunteers.

One of Delgaudio's BoS aides, Donna Mateer, testified that Delgaudio instructed her to call people on the Igor list with a prepared script and schedule what he called Loudoun appointments or Loudoun County meetings, presumably to discuss concerns about the future of Loudoun County. Frequently, those that were contacted lived outside the Sterling District and even outside of Loudoun County. According to testimony, Delgaudio told Mateer she would get five percent of any large donations he received as a result of the meetings or calls. She was also promised a bonus for expanding the list or collecting additional donors. However, while she did receive her regular Loudoun County salary for her efforts, she never actually received any of the aforementioned bonus compensation.

After the start of 2012, Mateer was told to dedicate more time to the Igor list and draft letters in addition to making calls. Testimony indicated that she was unsure of the purpose of the list, but several other witnesses testified that they believed the Igor list was used to reduce Delgaudio's campaign debt. Additional witness testimony indicated that Delgaudio claimed the calls made from the Igor list and letters were designed to raise money for the Lower Loudoun Boys Football League (LLBFL), but separate testimony from one of Delgaudio's long time aides who had extensive experience supporting the LLBFL fundraising efforts indicated this aide was prohibited from working on the Igor list project. This aide also indicated she contacted LLBFL and discovered that they had no fundraising projects on-going at the time that the Igor list was in use. The aide was very concerned about what was actually transpiring and was told by Delgaudio to stay away from this activity. The aide further testified that numerous red flags were observed at this point in time ultimately leading to her resignation. Despite the suspicions, the aide had no absolute proof of wrongdoing. Further, the Jury heard testimony from several individuals who had been contacted from the Igor list and none of them said they had been asked about the LLBFL during their meetings with Delgaudio.

The witnesses who had been contacted from the Igor list testified that they met with Supervisor Delgaudio after receiving a call from his office to set up the meeting. One witness said that during their meeting, Delgaudio provided a pamphlet of his campaign and supervisor activities and discussed both county and more controversial issues unrelated to Loudoun County. Toward the end of the meeting Supervisor Delgaudio turned to the back of the pamphlet where there was an envelope and card soliciting money to "Retire Delgaudio Campaign Debt" and said that no amount is too small. Another such witness testified that after meeting with Delgaudio this individual believed the only purpose for the meeting was for Supervisor Delgaudio to solicit a campaign contribution.

While there is testimony that supports at least a circumstantial assertion of misuse of public assets, the Code of Virginia criminalizes such action only for "full-time" employees. Because Loudoun County pays a nominal salary to the members of the BoS there is a general expectation that BoS have another source of income. BoS members are not required to work a certain number of hours nor do they submit timecards. However, based on testimony that most BoS members do not frequent their offices during the day and only have a limited number of BoS and committee meetings to attend on a monthly basis, it would be difficult to claim that any supervisor is a "full-time" agent or officer of Loudoun County. Consequently, additional avenues of potential investigation were ultimately dropped when it was determined that criminal charges would not be filed based on the use of the term "full-time" in the Code of Virginia. In the Recommendations section, the Jury strongly urges a change to this statute.

Potential Unreported Campaign Funds

Among the evidence presented to the Special Grand Jury was a copy of an envelope from a retired pastor of a prominent Loudoun County community church in which Supervisor Delgaudio (according to multiple witnesses familiar with his handwriting) wrote "$5,000 donor" and indicated that he had met with the pastor and wanted his aide to send a thank you letter and add him to the Igor List. Upon reviewing Delgaudio's campaign finance report and the campaign account records he provided, the Jury did not find any claim for $5,000 from the retired pastor (or anyone else), but did find a smaller donation from a member of the pastor's family. However, a member of the BoS testified that he had spoken with the retired pastor who had confirmed that he had provided that money in cash to Delgaudio.

When called upon by the Grand Jury to testify, the retired pastor denied having provided $5,000 to Delgaudio and vehemently claimed he had never donated any money to any politician. Further review of campaign disclosure forms and testimony from other members of the Loudoun County BoS revealed that the retired pastor and members of his family had donated money to several members of the Board. Additionally, another Supervisor testified that during a telephone conversation with the retired pastor subsequent to the pastor's testimony to the Jury, the pastor told this Supervisor that the Jury had asked the wrong questions during his testimony. Specifically, it was reported that he had said he was acting as a conduit for other parties in delivering money to Delgaudio and therefore based his testimony on the strict interpretation that he did not give *his* money to Delgaudio, and that because he was not asked if he gave money to Delgaudio that originated from other sources he felt comfortable in answering in the negative to the Jury. This witness further claimed that the pastor had said that his lawyer advised him to never give money to a politician in that fashion again.

After uncovering evidence that the retired pastor had provided money to members of the BoS and testimony that indicated he may have committed perjury, the Jury summoned him to testify again. The retired pastor again denied donating to politicians and then was presented with a copy of a cashed check from his private bank account to a supervisor's campaign. The retired pastor admitted that it is his check and signature but claimed that he did not recall providing it, citing memory problems. He likewise claimed no memory of a check entered into evidence showing that his spouse had donated to a supervisor's campaign. When asked about the telephone conversation related to his misleading the Jury he stated that he could not remember that telephone call. He also could not remember talking to the other Supervisor on the phone. When asked if he gave money to Delgaudio regardless of the source of the money, he said he could not remember. Another witness close to the retired pastor testified that he had seen the retired pastor provide envelopes to members of the BoS with what he assumed were donations, though he was unaware of the amount. In general, whenever this pastor was presented with evidence that contradicted his original sworn testimony, he would change his testimony to indicate that he then had no recollection. Although perjury charges were considered, no action

was ultimately taken in regard to this individual due to his change of testimony and another extenuating circumstance.

The Jury found another envelope in evidence that also had "$5,000 donor" written on it with instructions to send a thank you letter and add him to the Igor list. The Jury called several witnesses to address the issue. Again, the $5,000 was not listed on Delgaudio's campaign finance report, and the witness denied providing a donation. However, some of the circumstances surrounding the alleged donation raised questions for the Jury. The individual who may have given a $5,000 donation had been conferring with various BoS members to prevent the construction of a Loudoun County building. Around the timeframe of the postmark on the envelope in which Supervisor Delgaudio wrote $5,000 donor, the BoS voted for a second time on this land use decision. Testimony indicated Supervisor Delgaudio supported this project in the original BoS vote and then voted against it the second time.

In the end, while there is some circumstantial evidence that Supervisor Delgaudio collected money for his campaign (or other private use), there is no solid evidence that would be required to pursue criminal charges. Further, while the aforementioned land use vote raised the specter of the "Herring Law," ultimately there was insufficient evidence to pursue charges under this law, which is a Virginia statute that applies only to Loudoun County and is aimed to minimize the opportunity for business relationships or gifts to influence votes on land use matters. However, the Jury did learn of specific limitations associated with both campaign finance laws and the Herring Law, and recommendations related to these laws are presented in the Recommendations section.

Lack of Focus on Constituent Services

Witness testimony indicated Delgaudio specifically instructed his aides not to answer the phones or address constituent concerns and instead focus on other priorities, to include calling and creating mailings derived from working with the Igor list. The Supervisor in at least one instance reprimanded one of his aides for trying to resolve a constituent issue instead of concentrating on the Igor list. On multiple occasions, the lack of attention to constituent concerns resulted in the Chairman of the Board as well as another supervisor to take action to address these constituent concerns, even though the constituents did not live in their district. Several additional witnesses provided similar testimony, stating that there is general knowledge among the supervisors' aides of the unresponsiveness from the Sterling office.

Although such testimony may be compelling to the constituents of the Loudoun County Sterling District, the Jury does not find that such action amounts to any criminal act.

Indistinct Association Between Public Advocate of the United States & Loudoun BoS

Supervisor Delgaudio is the founder and president of a non-profit 501(c)(4) organization known as Public Advocate of the United States ("Public Advocate"). Several of Supervisor Delgaudio's BoS staff aides, who are Loudoun County employees, also periodically worked for Public Advocate. Multiple aides testified that when they were interviewed for their position with Loudoun County they were asked their views on religion, same sex marriage and related topics.

According to testimony, staff meetings to discuss County business were often conducted during normal business hours at the Public Advocate office as a matter of convenience. During these meetings, the BoS aides, Supervisor Delgaudio and the Public Advocate staff discussed Supervisor Delgaudio's calendar as well as County and Public Advocate business. It is unclear to the Jury whether the county employees were paid with county funds for the meetings in which both county and Public Advocate business were discussed, blurring the lines between the two, especially when Supervisor Delgaudio was the one responsible for certifying time and attendance records for his BoS aides.

The same BoS aides who attended meetings at Public Advocate also worked for Public Advocate to produce several controversial videos with Delgaudio. These satirical videos were created for Public Advocate's use and show Delgaudio's BoS aides and others dressed in costume or with bags over their heads during daytime hours. The Jury was unable to determine the exact date and time that each video was filmed, limiting our ability to conduct a comparative analysis of county time and attendance records. The Jury heard conflicting testimony from those aides as to the filming timeframe and their county time sheets. Because county time and attendance records include the start and end time of work for a given date, if a precise timeframe could be developed of when the films took place one could determine if Loudoun County taxpayer dollars were used to produce these films. These videos along with still photography can be seen at http://www.publicadvocateusa.org/photogallery/ and http://www.publicadvocateusa.org/media_library/videos.php (videos are hosted by YouTube).

Additionally, witness testimony indicates that at times Delgaudio's BoS aides were directed to report to the executive assistant for Public Advocate, who was never a county employee, and routinely cc'd her on county emails.

While some individuals may be concerned about the degree to which Supervisor Delgaudio permitted these two diverse entities to intermingle, the Jury did not find sufficient evidence that would support criminal charges.

Recommendations

This section contains several recommendations the Jury is making as a result of investigating the allegations against Supervisor Eugene Delgaudio of improperly using county resources for campaign or other non-official activities. The Special Grand Jury believes all these recommendations are important

and worthy of discussion and action where appropriate. These recommendations are listed in no particular order.

Recommendation 1: Amend "misuse of public assets" statute (Virginia § 18.2-112.1) so that it applies to anyone that works for or is elected to any government body in the Commonwealth of Virginia.

Audience: Virginia General Assembly

Rationale

As currently written, any government employee or elected official who is not serving in a ***full time*** capacity can utilize public assets and other employees for private or personal purposes without any criminal liability. We the Jury believe that that the misappropriation or misuse of public assets for personal or private gain should be illegal regardless of the employment status of any public servant with or in the state of Virginia.

Discussion

Paragraph B of § 18.2-112.1 limits the applicability of misuse of public assets to "any ***full-time*** officer, agent, or employee of the Commonwealth..." Because of this language the Commonwealth's Attorney stated that no criminal charges could reasonably be filed in this case since Loudoun County Board of Supervisors are typically considered part time employees, and most Supervisors maintain another job as supplemental or primary income.

The term "full-time" is not explicitly defined, and one could attempt to make the argument that an elected official is full-time in that they can and do represent their office at any time, and they are never on the clock in the traditional sense. However, since any ambiguity is likely to be interpreted in favor of the defendant, we feel that this argument will likely not prevail. We further believe that many people would likely interpret "full-time" based on whether or not an individual is required to work a specific number of hours each week (e.g., 40 or something close to 40 hours/week). As such, we believe that amending this statute is the best course of action, especially in the view that no state or local employee or agent should misuse public resources.

Lastly, it is worth noting that the parent statute, § 18.2-112, which addresses embezzlement, notably does not contain the "full-time" clause and would appear to apply to all government employees and elected officials regardless of how frequently they work. As such, a court is likely to focus on the term "full-time" and interpret it in the defendant's interest.

Recommendation 2: Create a written process by which aides to the Loudoun County Board of Supervisors can inquire as to the legality of any tasks assigned to them or report potential illegal activities; educate every new aide on this process.

Audience: Loudoun County Administration Staff

Rationale

As a result of this investigation it appears that there is no HR or other official policy that outlines how a Loudoun BoS aide can ascertain if their supervisor's actions or directions may be illegal or how to best report activity that they believe may be illegal.

Discussion

It is apparent that aides to the BoS live largely if not entirely outside the normal HR policies and protections that apply to other county employees. Since their employers are elected officials and Virginia is an employment-at-will state, we appreciate the complexities. However, we believe it is beneficial to provide a clear path by which an aide can report activities that may be illegal or ask questions about the legality of an activity without notification to their supervisor. By providing an avenue to report potential illegal activities without having to notify their supervisor, aides are more likely to come forward in the event that inappropriate actions take place without having to be worried about being fired. While it may not be possible to shield their identification if actual illegal activities are found, in the event that no illegal acts are found their identity and reporting of an issue should be kept in confidence.

Recommendation 3: Amend "disclosure of land use proceedings" statute (Virginia § 15.2-2287.1) to apply to all Virginia Counties and to simplify the enforcement of the statute.

Audience: Virginia General Assembly

Rationale

There may be some historical and political reasons why this statute, intended to prevent members of the BoS and other specific employees from participating in zoning and land use proceedings when an applicant has a business relationship or has given significant and recent contributions to the member, applies only to Loudoun County. However, the Jury believes the possibility exists for inappropriate influence to occur within any county within Virginia, and consequently this statute should not single out any one county. Further, while well intentioned, because of the complexity of the language and a one-year statute of limitation associated with Class 1 misdemeanors, prosecution appears unlikely.

Discussion

During this investigation, testimony was introduced that brought to light a law that is sometimes referred to as the "Herring Law" (named after Virginia Senator Mark Herring who introduced the law via Senate Bill 532 in 2008). Further testimony introduced the possibility that a violation of that statute may have occurred. As a result, the Special Grand Jury investigated this topic; ultimately, there was insufficient evidence to pursue an indictment. Further, the Commonwealth's Attorney advised the Jury that essentially all misdemeanors in Virginia have a one-year statute of limitations (unless a statute says otherwise) which further restricted the possibility of pursuing this issue.

Because land use proceedings can be very involved, by the time any potential violation is highlighted and researched, it may be difficult to pursue charges within one year. As such, the General Assembly should consider extending the statute of limitations for this statute to some longer period of time

(perhaps two or even up to five years). The approach for campaign finance issues may provide a good model wherein potential violations must be discovered within three years of occurrence, and charges must be filed within one year of discovery.

What struck the Jury was that the language involved in this statute is very convoluted and difficult to read. The Commonwealth's Attorney assigned an Assistant Commonwealth's Attorney (ACA) to research this statute just to better understand what was involved, and this ACA eventually reported to the Jury what was discovered including the apparent fact that no prosecutions have ever been sought under this statute. While this Jury does not speak for the Commonwealth's Attorney, we were left with the distinct impression that from a prosecutor's viewpoint enforcing this statute is difficult at best.

Let's examine the following hypothetical example:

- Entity A wants to construct a structure in Loudoun County that would require a zoning change such as named in this statute.
- Entity A hires Entity B to perform the construction.
- Entity B alone applies for the zoning change to Loudoun County.
- Entity A contributes $1,000 to the re-election campaign of a current member of the BoS one month before the BoS votes on the matter.

In this hypothetical example, while a violation may have occurred (assuming Entity A meets certain parameters defined in the statute), the member of the BoS may not even realize that there is a connection between A and B (or at the very least could claim ignorance). As such, this statute may require that the zoning application itself require the applicant to disclose if they "are currently acting an agent, contractor, subcontractor, or intermediary for a party that has an interest in a property to be affected by the sought after zoning change," where "interest" is defined in subsections (i) through (iv) of § 15.2-2287.1(B). Then, all BoS and other parties affected by this law could easily review the application to determine if a conflict under this statute exists. To ensure applicants do not purposely misreport this information, penalties may also be appropriate for misreporting who they represent.

Consider making the following changes to § 15.2-2287.1. Disclosures in land use proceedings:

- Apply the statute to all counties in Virginia.
- Increases the statute of limitations for this one offense.
- Require the applicant to disclose any parties they are working for or representing.
    - Add a penalty for the applicant for falsifying or failing to report this information.
- List any exceptions in a separate paragraph for ease of understanding.

Ultimately we understand the intent of this law and we also appreciate the complexities associated with trying to articulate legal language to enforce the intent. However, to be truly effective it is worthwhile to revisit this statute and improve its language.

Recommendation 4: Form a committee to research and amend the Virginia Campaign Finance Disclosure Act of 2006.

Audience: Virginia General Assembly

Rationale

After reviewing the Virginia Campaign Finance Disclosure Act of 2006, comprising Virginia § 24.2-945 through § 24.2-953.5, it appears difficult to criminally prosecute a candidate who fails to report significant campaign donations. The Jury can imagine a situation in which a candidate may inadvertently fail to report a single $100 contribution, and that such a situation likely is best handled via civil fines. Conversely, the Jury believes that a candidate receiving a significant donation (e.g., $5,000, especially when no other single donation comes close to that amount) has no standing to claim forgetfulness.

Discussion

Because this Act is lengthy, the Jury is not prepared to provide a specific recommendation on language change. However, in consulting with the Commonwealth's Attorney, it does appear that pursuing criminal charges for even flagrant violations that likely are intended to deceive the public are difficult to prosecute. The Jury does find, however, that language in § 19.2-8 ("Limitation of prosecutions") does expand the statute of limitations to a reasonable degree.

The Jury recommends the General Assembly form a committee or other appropriate body to review this Act. If such body believes that maliciously disguising campaign contributions is deserving of criminal liability, then appropriate language should be modified and as part of the review process current or former prosecutors should be consulted to ensure changes are enforceable. As a few examples of possible changes to consider:

- Is there a threshold (either in terms of an absolute dollar amount or percentage of the total campaign funds received) that if not reported within a reasonable time period that such failure to report would automatically trigger criminal liability?
- Consider if a sliding scale is appropriate such that a lesser offense such as a Class 2 misdemeanor could be used for serious but less than egregious offenses.
- Consider removal or modification of the term willful such as in § 24.2-953 ("General Provisions"). The burden of proof short of a candidate's confession may be too high. The current rebuttable presumption focuses on a candidate who refuses to make a report even after being told to make such a report. However, consider the instance where the omission is so significant or where extraordinary measures were used to hide the funds that it can be presumed the omission was intentional.
- Consider in the case of § 24.2-953.3 ("Incomplete Reports") whether there are instances that should trigger penalties automatically and do not afford notification of the candidate in order for the candidate to avoid a penalty.
- Consider whether all campaign donations should be reported regardless of the amount of money donated. This would in some ways simplify the process as candidates would not have to

consider whether a $20 donation from someone puts them over the aggregate threshold or not. It likewise removes the ability of a candidate to claim that a simple oversight in tracking total donations from each entity was the reason why they did not report an aggregate contribution threshold.

- Consider whether to prohibit the donation of cash to a campaign fund in any amount instead requiring that all donations be made via a traceable monetary instrument (e.g., check or credit card), with significant civil penalties for accepting small amounts (e.g., a civil penalty equal to the donation itself) and criminal penalties for large amounts.
- Consider criminal penalties for falsifying reports (e.g., falsifying a donor's name to avoid acknowledging an association with a particular individual or group).

While this Jury does not know the legal feasibility, consider whether serious infractions could nullify an election result in the instance that a candidate won an election and was later found guilty of some threshold, such as a Class 1 misdemeanor under this Act.

Recommendation 5: Modify policies for Loudoun BoS staff aides to ensure an unbiased third-party review occurs of any outside employment or political activities.

Audience: Loudoun County BoS/Administration Staff

Rationale

The Special Grand Jury investigation revealed several instances that appeared to present a conflict of interest among Delgaudio's BoS staff activities, Public Advocate and his campaign that created the potential for perceived malfeasance and unintentional cross-over between county business and the supervisor's private activities. Presently there is no mechanism to ensure transparency of BoS staff aides outside employment or involvement in political activities.

Discussion

To avoid a situation where the perception of misconduct or conflict of interest arises and increase transparency, the Jury proposes that non-political Loudoun County staff serve as a third-party review of outside employment or political activities for Loudoun County BoS aides. Aides would need to notify the Loudoun County administrative staff of their intention to take outside employment or participate in political activities (volunteer or paid), especially when it relates to the partisan interests of their supervisor. The process is not intended to prohibit outside activities but designed to ensure general awareness and a record of BoS aide actions to prevent the appearance of misconduct and reduce the likelihood of a conflict of interest.

While the simplest solution would be to add a statement into the BoS "Standards of Conduct" preventing BoS aides from working for their Supervisor's private business, organizations or other political activities, the Jury recognizes that such a preclusion might be too stringent. However, there should be some oversight to prevent the perception that Loudoun County aides are being used for anything other than Loudoun County business.

The May 19, 2009, BoS Code of Ethics, signed by every member of the BoS except for Supervisor Delgaudio, states, "Adopt policies and programs that are in accordance with the County's EEO policy, and that support the rights and recognize the needs of all citizens regardless of race, sex, age, religion, creed, country of origin, or handicapping conditions." Every effort should be made to keep Loudon County business in line with the BoS Code of Ethics. Should Loudon County aides be used for outside interest groups, they could be seen as losing their objectivity for the citizens of Loudon County, whether paid by the interest group or not. Moreover, the BoS should take care to prevent BoS aides from participating in business ventures, organizations, or any outside activities for which a Supervisor of the Loudon County BoS is responsible that could discredit the Board. Every effort should be made to prevent any perception that the employees who are paid via taxpayer money are doing anything other than Loudon County business. By having an objective third party the Board can better provide transparency while maintaining the trust of Loudon County residents. Finally, by utilizing a responsible third party representative to examine the merits of BoS aide outside activities for which their Supervisor is also involved, the BoS can protect individual Board members from unwittingly putting the BoS in a situation that casts a shadow on Loudon County BoS business.

In the instance where Loudoun County staff disapproves of a request for an outside activity, an appeal process such as promoting the issue to a full and binding vote of the BoS could transpire. Further, Loudoun County staff should be authorized to terminate employment of any aide found to contradict the uncontested Loudoun County staff decision or the vote of the full BoS when appealed.

Recommendation 6: Individual voters need to increase their awareness of and involvement in local politics and elections.

Audience: The Voting Public

Rationale

While national elections historically tend to generate greater interest, news, debate, etc., local elections can significantly impact one's life on a wide range of matters such as property taxes, education, local transportation and community services to name a few.

Discussion

This investigation has been an eye-opening experience for this Jury. As a result we expect to all spend more time learning about our respective supervisor and other local politicians. We likewise strongly encourage every other individual who is eligible to vote to learn about his or her local representatives and candidates and to participate in voting when the time comes.

Special Grand Jury Report
Appendix A: References to Virginia Statutes

In this document we reference several Virginia statutes. This section contains the text of these statutes as obtained in June 2013 from the Virginia General Assembly Legislative Information System (http://leg1.state.va.us/).

Reference 1: § 19.2-213. Report by special grand jury; return of true bill.

This statute indicates that a special grand jury impanelled by the court must file a report of its findings. In this case, the Special Grand Jury was impanelled by the Commonwealth's Attorney for Arlington County. However, there is no exclusion preventing such an impanelled special grand jury from writing a report. Further, the special grand jury received an order from the Chief Judge of the Loudoun County Circuit Court specifically authorizing this report.

> § 19.2-213. Report by special grand jury; return of true bill.
> At the conclusion of its investigation and deliberation, a special grand jury impanelled by the court on its own motion or on recommendation of a regular grand jury shall file a report of its findings with the court, including therein any recommendations that it may deem appropriate, after which it shall be discharged. Such report shall be sealed and not open to public inspection, other than by order of the court.
>
> A majority, but not less than five, of the members of a special grand jury convened upon request of the attorney for the Commonwealth must concur in order to return a "true bill" of indictment. A "true bill" may be returned upon the testimony of, or evidence produced by, any witness who was called by the grand jury, upon evidence presented or sent to it.

Reference 2: § 18.2-112.1. Misuse of public assets; penalty.

Recommendation #1 references this statute, suggesting elimination of the term "full-time" from the beginning of paragraph B.

> § 18.2-112.1. Misuse of public assets; penalty.
>
> A. For purposes of this section, "public assets" means personal property belonging to or paid for by the Commonwealth, or any city, town, county, or any other political subdivision, or the labor of any person other than the accused that is paid for by the Commonwealth, or any city, town, county, or any other political subdivision.
>
> B. Any full-time officer, agent, or employee of the Commonwealth, or of any city, town, county, or any other political subdivision who, without lawful authorization,

uses or permits the use of public assets for private or personal purposes unrelated to the duties and office of the accused or any other legitimate government interest when the value of such use exceeds $1,000 in any 12-month period, is guilty of a Class 4 felony.

Reference 3: § 18.2-112. Embezzlement by officers, etc., of public or other funds; default in paying over funds evidence of guilt.

Although there was no testimony or evidence related to embezzlement encountered during the course of this investigation, it is useful to compare the language of this statute to Reference 2, which adds the term "full-time" to the population of people to which this statute applies.

§ 18.2-112. Embezzlement by officers, etc., of public or other funds; default in paying over funds evidence of guilt.

If any officer, agent or employee of the Commonwealth or of any city, town, county, or any other political subdivision, or the deputy of any such officer having custody of public funds, or other funds coming into his custody under his official capacity, knowingly misuse or misappropriate the same or knowingly dispose thereof otherwise than in accordance with law, he shall be guilty of a Class 4 felony; and any default of such officer, agent, employee or deputy in paying over any such funds to the proper authorities when required by law to do so shall be deemed prima facie evidence of his guilt.

Reference 4: § 15.2-2287.1. Disclosures in land use proceedings.

Sometimes called the "Herring Law," this statute appears intended to limit the ability of business relationships or gifts to influence land use decisions in Loudoun County.

§ 15.2-2287.1. Disclosures in land use proceedings.

A. The provisions of this section shall apply in their entirety to the County of Loudoun.

B. Each individual member of the board of supervisors, the planning commission, and the board of zoning appeals in any proceeding before each such body involving an application for a special exception or variance or involving an application for amendment of a zoning ordinance map, which does not constitute the adoption of a comprehensive zoning plan, an ordinance applicable throughout the locality, or an application filed by the board of supervisors that involves more than 10 parcels that are owned by different individuals, trusts, corporations, or other entities, shall, prior to any hearing on the matter or at such hearing, make a full public disclosure of any business or financial relationship that such member has, or has had within the 12-month period prior to such hearing, (i) with the applicant in such case; or (ii) with the title owner, contract purchaser or lessee of the land that is the subject of the application, except, in the case of a

condominium, with the title owner, contract purchaser, or lessee of 10 percent or more of the units in the condominium; or (iii) if any of the foregoing is a trustee (other than a trustee under a corporate mortgage or deed of trust securing one or more issues of corporate mortgage bonds), with any trust beneficiary having an interest in such land; or (iv) with the agent, attorney or real estate broker of any of the foregoing. For the purpose of this subsection, "business or financial relationship" means any relationship (other than any ordinary customer or depositor relationship with a retail establishment, public utility, or bank) such member, or any member of the member's immediate household, either directly or by way of a partnership in which any of them is a partner, employee, agent, or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent, or attorney or holds 10 percent or more of the outstanding bonds or shares of stock of a particular class, has, or has had within the 12-month period prior to such hearing, with the applicant in the case, or with the title owner, contract purchaser, or lessee of the subject land, except, in the case of a condominium, with the title owner, contract purchaser, or lessee of 10 percent or more of the units in the condominium, or with any of the other persons above specified. For the purpose of this subsection "business or financial relationship" also means the receipt by the member, or by any person, firm, corporation, or committee in his behalf, from the applicant in the case or from the title owner, contract purchaser, or lessee of the subject land, except, in the case of a condominium, with the title owner, contract purchaser, or lessee of 10 percent or more of the units in the condominium, or from any of the other persons above specified, during the 12-month period prior to the hearing in such case, of any gift or donation having a value of more than $100, singularly or in the aggregate.

If at the time of the hearing in any such case such member has a business or financial interest with the applicant in the case or with the title owner, contract purchaser, or lessee of the subject land except, in the case of a condominium, with the title owner, contract purchaser, or lessee of 10 percent or more of the units in the condominium, or with any of the other persons above specified involving the relationship of employee-employer, agent-principal, or attorney-client, that member shall, prior to any hearing on the matter or at such hearing, make a full public disclosure of such relationship and shall be ineligible to vote or participate in any way in such case or in any hearing thereon.

C. In any case described in subsection B pending before the board of supervisors, planning commission, or board of zoning appeals, the applicant in the case shall, prior to any hearing on the matter, file with the board or commission a statement in writing and under oath identifying by name and last known address each person, corporation, partnership, or other association specified in the first paragraph of subsection B. The requirements of this section shall be applicable only with respect to those so identified.

D. Any person knowingly and willfully violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

Reference 5: Campaign Finance Disclosure Act of 2006 (§ 24.2-945 through 24.2-953.5)

A recommendation is made related to this Act comprising a number of statutes. Due to the length of the statutes they are not repeated here. Please see Title 24.2, Chapter 9 of the Code of Virginia for details.

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

EUGENE DELGAUDIO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. _____**
	)	
LOUDOUN COUNTY BOARD OF SUPERVISORS,	)	
	)	
Defendant.	)	

AFFIDAVIT FOR ISSUANCE OF TEMPORARY INJUNCTION

COMES NOW the Plaintiff, EUGENE DELGAUDIO, having been duly sworn, and states as follows:

1. That he has been elected four times to the Loudoun County Board of Supervisors (hereinafter the "Board") as the Sterling district representative and was last re-elected in November of 2011.

2. Based on newspaper reports and comments from other supervisors made at the last Board Meeting held on July 3, 2013, the he believes the Board is planning to take disciplinary action against him at the regular meeting scheduled for Wednesday, July 17, 2013 at 4:00 p.m.

3. He has heard comments such as "its coming" and "this is not over" from other supervisors.

4. He was the subject of a report filed by a Special Grand Jury on June 24, 2013.

5. He believes the Board will, at the last minute, add an action to discipline him to the agenda for the meeting to be held on Wednesday, July 17, 2013.

6. After the agenda is amended, he expects the Board will likely vote to suspend their own rules of procedure and then proceed to formally reprimand him and eliminate the budget for his staff aides.

5. He has not been given notice, formal or informal, of what actions the Board intends, but is aware other supervisors have been discussing the report and what actions to take among themselves. He is, of course, not a party to these discussions.

6. There have been several newspaper articles a recall petition has been prepared and could be submitted to the Circuit Court at any time. The object of this petition is to remove him from office.

7. He is aware, by statute, recall petitions take priority on the court's docket and he will likely have to be in the position of preparing his defense very quickly.

8. He is very concerned the Board's potential actions, especially the elimination of his staff, would be cited as evidence he is unable to discharge his duties in the same manner as other supervisors.

9. Because the Special Grand Jury proceedings were ex-parte and confidential, if the summary actions of the Board to be cited as evidence in a trial on a recall petition and he is removed from office, he would suffer irreparable harm through the Board's pending denial of his due process rights.

10. Among the allegations in the Special Grand Jury's report are he accepted a $5,000 cash contribution which was not reported on his campaign finance reports, told his staff not to respond to the public, maintained a hostile work environment and used his staff to set up appointments to solicit campaign funds.

11. That he did not accept a $5,000 contribution from the donor described in the report and there is information he could present which could explain and/or mitigate the allegations found in the report.

11. That he cooperated fully with the Special Grand Jury by providing tabbed binders containing all of the documents requested.

12. In January of 2013 the Board declined to appoint him to any Board subcommittees.

13. His office is functioning normally. Until problems arose in 2011 and 2012, he ran his office without incident.

14. The Sterling district which he serves contains a majority minority population and many residents have incomes lower than in other parts of the County. Homes are often older and smaller than in elsewhere in the County. Thus, the constituent services provided by his office are vital to the residents of Sterling.

15. He believes there is a compelling public interest in allowing him to demonstrate to the Board and the citizens of Loudoun County that information in the Special Grand Jury's report is inaccurate or can be explained.

16. When the Special Grand Jury was ongoing his ability to respond to the allegations was, of necessity, limited. He believes the County would benefit from a full discussion of the issues raised in the Special Grand Jury's Report.

EUGENE DELGAUDIO

Commonwealth of Virginia
County of Loudoun, to-wit:

Personally appeared before me, a Notary Public in and for the above jurisdiction, Eugene Delgaudio, and made oath that the information contained in the above Affidavit is true to the best of his information and belief.

Notary Public

My Commission Expires: 4/30/2016
My Notary Number is: 241601

ROXANNE M. ERSKINE COMMONWEALTH OF VIRGINIA NOTARY PUBLIC

Roxanne M. Erskine
NOTARY PUBLIC
Commonwealth of Virginia
Reg. #241601
My Commission Expires
April 30, 2016

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

EUGENE DELGAUDIO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No.** _____
	)	
LOUDOUN COUNTY BOARD OF SUPERVISORS,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF INJUNCTION

Procedural Posture

The Plaintiff is a member of the Loudoun County Board of Supervisors. He was investigated by a Special Grand Jury and, by order of this Court, a written report of said investigation was released on June 24, 2013. The Special Prosecutor appointed to investigate the case did not ask the Special Grand Jury whether an indictment should be considered.

The Loudoun County Board of Supervisors has indicted there may be disciplinary action against the Plaintiff at the Board's meeting scheduled for Wednesday, July 17, 2013 at 4:00 p.m.

The Plaintiff has not been given formal notice of any action to be taken against him.

Facts

In November of 2011 the Plaintiff was elected to a fourth term on the Loudoun County Board of Supervisors as the Sterling district representative. Sterling is the smallest of the supervisor districts and includes a majority/minority population. The district includes a housing stock which is generally older than other sections of the county. Also, the incomes of Sterling residents are lower than in other portions of the county.

The allegations in the Special Grand Jury's report are that Supervisor Delgaudio may have accepted a $5,000 cash contribution which was not reported on his campaign finance reports, told his staff not to respond to the public, maintained a hostile work environment and used his staff to set up appointments to solicit campaign funds.

The Special Grand Jury's report was made public on June 24, 2013. Since the report was made public other supervisors have been discussing the report and what actions to take among themselves. For obvious reasons, the Plaintiff is not a party to these discussions, but expects the Board to take action against him, without prior announcement, at their meeting scheduled for Wednesday, July 17, 2013 at 4:00 p.m.

The Plaintiff expects the Board will, at the last minute, add an action to discipline him to the agenda. The Board will likely first vote to suspend their own rules of procedure and then proceed to formally reprimand him and eliminate the budget for his staff aides.

At the Board's organizational meeting in January of 2013 the Plaintiff was not given any committee assignments.

The Plaintiff further anticipates the Board's actions will be cited as evidence in the trial of a recall petition which, according to press reports, has been circulated, completed, but not filed. The argument would be the Plaintiff should be removed from office because he lacks a staff to serve his constituents and cannot represent Sterling's interests on the various sub-committees.

Other than the complaints found in the Special Grand Jury's report, there have not been significant other problems with the conduct of his office in his thirteen years in office.

Issue

Is it a violation of due process for the Loudoun County Board of Supervisors to secretly decide what sanctions should be imposed on the Plaintiff without giving him any notice of their intended actions or the opportunity to defend himself?

Argument

The Plaintiff's basis for relief comes only and directly from the due process clause of the United States Constitution. He does not rely on any Federal, Virginia or local statute. Although the Board has Rules of Procedure which incorporate, by reference, the procedures for disciplining members of an assembly found in Robert's Rules of Order, he does not contend it is a violation of due process for the Board not to follow its own rules in this matter.

The Plaintiff does not contend he is entitled to a particular result, only that he is entitled to a process where he is accorded at least a modicum of basic procedural guarantees such that he has an opportunity to defend himself.

To secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law. Black & White Cars, Inc. v. Groome Transportation, 442 S.E. 2nd 391, 247 Va. 426 (1994) at pp. 395-396.

The Plaintiff does not dispute the Board has the inherent authority to impose discipline on other supervisors. Discipline by a legislative body of one of its members is action is a core legislative act for which there is absolute immunity from review in the courts. Whitener v. McWatters, 112 F3d 740 (C.A. 4 (VA), 1997 at 742 to 745. The holding in Whitener means the Plaintiff cannot petition to challenge the Board's actions, for example, as being arbitrary and capricious. The legislative immunity afforded the Board's actions in disciplining him leaves him without a remedy at law.

His only remedy is to petition to require the Board to accord him procedures which comport with procedural due process.

A recall petition has been prepared with the object to remove the Plaintiff from office. The Board's actions could form the evidentiary basis for an argument he is unable to discharge his duties and should be removed from office. The loss of his office, in the context of the facts in the instant case, constitutes an irreparable harm.

There is no prejudice to the Board by the granting of the injunction. The Plaintiff was not appointed to any committees at the organizational meeting. Not closing his office would mean only that his office would continue to operate which is a normal government function.

Balancing the harms which might be suffered by the parties favors the Plaintiff. The loss of the ability to service his constituents and the possible loss of his office are far greater harms than the adverse publicity to the Board caused by a brief delay from the de-facto announced date the Board intended to act.

The closest case on point the Plaintiff could locate is McCarley v. Sanders, 309 F.Supp 8 (M.D. Ala. 1979). McCarley was a Alabama state senator who was expelled after a newspaper article alleged he solicited a bribe. On the same day the article was published, the resolution was passed establishing a committee to investigate the allegations. A committee was appointed and hearings began the next day. McCarley and his attorney were not allowed to be present when witnesses testified which, of course meant, there was no cross-examination of witnesses. Based on a report issued eight days after the newspaper article was published, a resolution was passed expelling McCarley from the state senate. Upon review of the legislature's actions, the United States District Court vacated the expulsion. Under the facts of the cited case, the Court ruled: "There can, of course, be no serious argument that McCarley has been accorded even the barest

rudiments of due process." Senator McCarley received more due process than it appears the Board is prepared to accord Supervisor Delgaudio.

Because there is a campaign finance statute involved, the Plaintiff argues there is a compelling public interest in demonstrating he has complied with the law.

For the reasons stated in the complaint, no bond should be required.

Conclusion

The Loudoun County Board of Supervisors in not a Star Chamber which can meet in secret and decide the fate of another member. Their intended actions against the Plaintiff, without notice, will cause irreparable harm and leave him with no remedy at law. Therefore, he requests the issuance of a temporary injunction.

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the attached pleading was hand-delivered to John R. Roberts, Esq., County Attorney, 1 Harrison Street, SE, 5TH Floor, Leesburg, VA 20175 on the 15th day of July, 2013.

Charles L. King

Date 7/15/13

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442 S.E.2d 391
247 Va. 426
BLACK & WHITE CARS, INC., et al.,
v.
GROOME TRANSPORTATION, INCORPORATED, t/a Norfolk Airport Shuttle, et al.
Record No. 930605.
Supreme Court of Virginia.
April 15, 1994.

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[247 Va. 427] Glen A. Huff, Virginia Beach (Timothy M. Richardson, Virginia Beach, Thomas W. Moss Jr., Norfolk, Huff, Poole & Mahoney, Virginia Beach, Moss & Callahan, Norfolk, on briefs), for appellants.

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Heather A. Mullen, Norfolk (Williams, Kelly & Greer, on brief), for appellees The Chesapeake & Potomac Telephone Co. of Virginia and C & P Telephone Co.

Philip R. Trapani, Jr., Norfolk (George H. Heilig, Jr.; Heilig, McHenry, Fraim & Lollar, on brief), for appellee Groome Transp. Inc., t/a, etc.

[247 Va. 426] Present: All the Justices.

[247 Va. 427] LACY, Justice.

In this appeal we consider whether a common carrier, certificated by the State Corporation Commission (SCC), violated a local ordinance regulating the advertisement of taxicab services and, if so, whether competing taxicab companies are entitled to an injunction prohibiting future violations of the ordinance.

The City of Norfolk enacted an ordinance that regulates taxicab operations within its boundaries, as authorized by Code §§ 56-291.3:1 through .3:7. Advertising taxicab services is addressed in Section 34-11 of the Norfolk City Code (1958):

No person shall use the term "taxi," "taxicabs," "for-hire automobile" or "for-hire car" in any advertising or hold himself out as a [247 Va. 428] taxicab or for-hire automobile operator, or represent himself to be such by means of advertising, signs, trade names, or otherwise, unless he had previously thereto complied with the conditions, regulations and restrictions prescribed by this Chapter.

The Telephone Yellow Pages Directory for South Hampton Roads (Yellow Pages) includes the cities of Chesapeake, Norfolk, Portsmouth, Suffolk, and Virginia Beach. The 1991-92 volume of the Yellow Pages contained an advertisement for Norfolk Airport Shuttle under a category entitled "Taxicabs." Norfolk Airport Shuttle is the trade name of Groome Transportation, Inc. (Groome). Groome operates as a common carrier of passengers in Chesapeake and Norfolk under a certificate of public convenience and necessity issued by the SCC. Groome is not authorized by the city of Norfolk to conduct taxicab services in that jurisdiction.

Black & White Cars, Inc. and Norview Cars, Inc. (collectively the Cab Companies) are taxicab operators certified by Norfolk to conduct taxicab operations in that city. On January 16, 1992, the Cab Companies filed a bill of complaint against Groome and the Chesapeake and Potomac Telephone Company of Virginia (C & P), the publisher and distributor of the Yellow Pages, claiming that the advertisement for Groome in the 1991-92 volume of the Yellow Pages under the category "Taxicabs"

violated the Norfolk ordinance. The Cab Companies sought an injunction prohibiting Groome and C & P from violating the ordinance in this manner. Based on the stipulated facts, briefs, and argument of counsel, the trial court denied the injunction. We awarded the Cab Companies an appeal.

Although the record is silent with regard to the basis for the trial court's decision, Groome suggests a number of theories supporting the denial of the injunction. Groome argues: (1) that it was exempt from the Norfolk ordinance regulating taxicabs and taxicab advertising by virtue of its common carrier certification from the SCC; (2) that it did not violate the Norfolk ordinance; and (3) that the Cab Companies did not have standing to pursue an injunction. The Cab Companies contend that none of these theories is supported by the stipulated facts or by the applicable law and that the trial court erred in denying the injunction. We will consider Groome's contentions in order.

PREEMPTION

Groome's Certificate of Public Convenience and Necessity was issued by the SCC pursuant to Code § 56-281.2. This certificate [247 Va. 429] allows Groome to transport passengers as a common carrier by motor vehicle over irregular routes within the geographic area of, inter alia, Norfolk, Chesapeake, Suffolk, and Virginia Beach. Groome argues that this certificate relieves it from any requirement that it comply with the ordinances regulating taxicab operations enacted by Norfolk or any other locality designated in its SCC certificate, and precludes the application of those ordinances in any way which

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would affect "what the Commonwealth has given Groome." At oral argument, Groome's counsel stated that Groome's SCC certificate allows it to operate as a taxicab service, if it chooses, without obtaining a license from the locality involved.

Groome's expansive application of the rights acquired under its SCC certificate is directly contradicted by the definitions found in Title 56, Chapter 12 of the Virginia Code, dealing with regulation of motor vehicle carriers. In defining "certificate," Code § 56-273 specifically states that "nothing contained in the chapter shall be construed to mean that the Commission can issue any such certificate authorizing intracity transportation." Furthermore, common carriers and restricted common carriers are specifically excluded from the definition of "taxicab or other motor vehicle performing a taxicab service." Code § 56-273.

Contrary to Groome's position, these definitions establish that Groome's SCC certificate does not entitle it to operate as a taxicab in Norfolk or any other locality without complying with the applicable ordinances. The General Assembly has specifically precluded the SCC from issuing certificates for intracity taxicab operation and has not preempted localities from regulating intracity taxicab activities, but, in fact, has specifically authorized such regulation. Code §§ 56-291.3:1 through 3:7.

VIOLATION

There is no contention in this case that Groome is actually operating as a taxicab business. The contention is that when Groome placed its advertisements under the category of "Taxicabs" in the Yellow Pages, it was representing itself to be a taxicab business "by means of advertising," in violation of the ordinance.

In its answer to the Cab Companies' bill of complaint, Groome admitted that it placed an advertisement in the 1991-92 Yellow Pages under the heading of "Taxicabs" and that it would do so again in the 1992-93 Yellow Pages. The stipulated facts recite that Groome's advertisement appeared under the category of "Taxicab" as well as under [247 Va. 430] three

other categories in the 1991-92 Yellow Pages and that C & P had agreed, at Groome's request, "to publish these same advertisements in the 1992-1993 edition" of the Yellow Pages.

Based on these stipulations and admissions, we conclude that Groome's request to place its advertisements under the category "Taxicabs" constitutes representation of itself as a taxicab company by means of advertising, in violation of the Norfolk ordinance.

STANDING

Groome argues that the Cab Companies do not have standing to bring this litigation because the right they seek to enforce is a public, not a private, right. Groome argues that the Norfolk ordinance does not establish or imply the establishment of a private right of action or a civil remedy. In the absence of a private remedy, the rights sought to be enforced by Groome are those of the public, enforceable by the city, not by private individuals.

Groome correctly states the general rule that a penal statute or ordinance does not automatically create a private right of action, and that equity will not enter an injunction merely because such a statute has been violated. Vansant and Gusler, Inc. v. Washington, 245 Va. 356, 359-60, 429 S.E.2d 31, 33 (1993); Woodfin v. Overnite Transp. Co., 199 Va. 165, 166-67, 98 S.E.2d 525, 526 (1957). But this rule is qualified by the long standing principle that an injunction is appropriate relief where violation of a penal statute or penal ordinance results in special damage to property rights which would be difficult to quantify. Id.; Mears v. Colonial Beach, 166 Va. 278, 282, 184 S.E. 175, 176 (1936); Turner v. Hicks, 164 Va. 612, 615, 180 S.E. 543, 544 (1935); Long's Baggage Transfer Co. v. Burford, 144 Va. 339, 353, 132 S.E. 355, 359 (1926).

In this case, the Cab Companies demonstrated both a property right and special damage to that right. Like the right given a taxicab company for a taxicab stand in Long's Baggage Transfer, or the rights conferred by the certificate of public convenience and necessity upon the common carriers in Turner, the franchises granted the

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Cab Companies by Norfolk are valuable property rights. Long's Baggage Transfer, 144 Va. at 352-53, 132 S.E. at 359; Turner, 164 Va. at 617, 180 S.E. at 545. The certificates issued by Norfolk allow the Cab Companies to operate and advertise as members of a finite class of 233 taxicabs authorized by Norfolk City Code Sec. 34-50. Attempts to participate in the rights granted to the members of this class by one without such a franchise can be enjoined by a court of equity. Long's Baggage Transfer, 144 Va. at 353-54, 132 S.E. at 359; Turner, 164 Va. [247 Va. 431] at 623, 180 S.E. at 548. While Groome maintains that it is not trying to operate as a taxicab company, advertising as a taxicab service is an attempt to enjoy some of the rights granted by the Cab Companies' franchises.

The Cab Companies also made the requisite showing of special damages. The parties stipulated that any losses suffered by the Cab Companies "as a direct and proximate result of Groome's ad" in the "Taxicabs" category could not be precisely calculated. Groome argues that this stipulation does not establish that there were, in fact, such losses. The stipulations, however, do acknowledge that the Cab Companies and Groome compete for customers traveling to and from the Norfolk airport within the City of Norfolk. Groome did not challenge the Cab Companies' allegation that, as a result of Groome's advertising itself as a taxicab service, they are harmed by fares lost to Groome. This allegation, in conjunction with the inherent difficulty in establishing the quantum of lost profits in these circumstances, satisfies the required showing of special damages.

Finally, contrary to Groome's assertion, a demonstration of repeated violations is not required in order to warrant the issuance of an injunction based on violation of an ordinance

where special damage to a property right has been shown. While a showing of repeated violations may be a factor supporting an equity court's decision to enter an injunction, such relief may be granted to protect against both actual and threatened violations. See Turner, 164 Va. at 617, 180 S.E. at 545. In this case the violation appeared in the 1991-92 Yellow Pages and Groome admitted that the advertisement would be repeated in the 1992-93 and 1993-94 Yellow Pages. During oral argument before this Court, Groome's counsel specifically noted that Groome had not said that it would not request that its advertisement be placed in the "Taxicabs" category in subsequent editions of the Yellow Pages.

Under these facts, the Cab Companies had standing to bring this suit seeking injunctive relief based on the violation of the Norfolk ordinance regulating taxicab service.

THE INJUNCTION

To secure an injunction, a party must show irreparable harm and the lack of an adequate remedy at law. Wright v. Castles, 232 Va. 218, 224, 349 S.E.2d 125, 129 (1986). The Cab Companies here have shown the difficulty of ascertaining monetary damages with precision and the need of multiple litigations over the appearance of Groome's advertisement in the "Taxicabs" category of the Yellow Pages. These types of circumstances have previously met the prerequisites for [247 Va. 432] issuance of an injunction. Overnite Transp. Co. v. Woodfin, 196 Va. 747, 85 S.E.2d 217 (1955), and cases cited therein. We hold that they likewise qualify here.

Contrary to Groome's assertion, an injunction in this case need not be overbroad and can be tailored to the relief sought here. The fact that other jurisdictions included in these Yellow Pages do not regulate taxicab advertising does not result in violation of some right of their citizens because those citizens will have to look under a category other than "Taxicabs" to locate Groome's non-taxicab services.

We also reject Groome's suggestion that an injunction would be ineffective because, by reorganizing or choosing a new trade name at any time, it could again advertise in the "Taxicabs" category without violating the injunction. Without endorsing the propriety of these projected maneuvers in the least, we think it is sufficient here to observe that the hypothesized limits on the reach of injunctive relief do not amount to a claim that entry of

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such relief would be futile or completely ineffective.

On brief and at oral argument, C & P did not object to being bound by an injunction in this case, but requested that any injunction issued be clear and that the Court take into account the publishing deadlines associated with printing and distributing the Yellow Pages.

CONCLUSION

Groome's common carrier certificate, issued by the SCC, did not immunize Groome from compliance with the Norfolk ordinance regulating taxicab service. That ordinance was applicable to Groome's actions in advertising itself as a taxicab service. Accordingly, we will reverse the judgment of the trial court and remand the case for entry of an injunction prohibiting Groome from requesting that an advertisement for its services be placed in the "Taxicabs" category of the Yellow Pages, unless it secures the appropriate franchise to operate as a taxicab service. The decree also will enjoin C & P from placing an advertisement submitted to it by Groome under the category of "Taxicabs," unless Groome provides C & P with satisfactory documentation of its authority to advertise as a taxicab service by virtue of securing the appropriate franchise.

Reversed and remanded.

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112 F.3d 740
65 USLW 2721

Steven D. WHITENER, Plaintiff-Appellant,
v.
David McWATTERS, Loudoun County Supervisor, Broad Run District; Scott K. York, Loudoun County Supervisor, Sterling District; Joan G. Rokus, Loudoun County Supervisor, Leesburg District; Eleanore C. Towe, Loudoun County Supervisor, Blue Ridge District; James G. Burton, Loudoun County Supervisor, Mercer District; Lawrence S. Beerman, II, Loudoun County Supervisor, Dulles District; Dale Polen Myers, Chairman at Large; Helen A. Markum, Loudoun County Supervisor, Catoctin District, Defendants-Appellees.

No. 96-1515.
United States Court of Appeals,
Fourth Circuit.
Argued Jan. 27, 1997.
Decided April 30, 1997.

ARGUED: John Henry Partridge, Herndon, Virginia, for Appellant. William Joseph Carter, Carr, Goodson, Lee & Warner, Washington, D.C., for Appellees. ON BRIEF: Samuel J. Smith, Jr., Carr, Goodson, Lee & Warner, Washington, D.C.; John David Grad, Grad, Logan & Klewans, P.C., Alexandria, Virginia, for Appellees.

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the majority opinion, in which Judge MURNAGHAN joined. Judge MOTZ wrote a dissenting opinion.

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OPINION

NIEMEYER, Circuit Judge.

When the Loudoun County (Virginia) Board of Supervisors disciplined one of its members for confronting other members with abusive language, the disciplined member filed suit in federal court under 42 U.S.C. § 1983, alleging that the Board violated his First Amendment and procedural due process rights. The district court dismissed the complaint, concluding that the Board members enjoyed absolute legislative immunity. Because we hold that a legislative body's discipline of one of its members is a core legislative act, we affirm.

I

Following their election on November 17, 1995, the nine members of the Loudoun County Board of Supervisors met in anticipation of their four-year term, which was to begin on January 1, 1996. During the meeting, they conducted a "straw vote" to determine committee membership, and they gave each other assurances that at the first official meeting of the Board on January 3, 1996, they would vote in accordance with the straw vote. For unexplained reasons, at the January 3 meeting certain members, including Joan Rokus and Eleanore Towe, voted differently from the straw vote with the result that certain committee chairmanships were given to others than had been indicated by the straw vote.

Steven Whitener, a member adversely affected by the change, was shocked and became incensed with the breach. After the January 3 meeting, he confronted Rokus privately and

reprimanded her, questioning her integrity and trustworthiness. Likewise, two days later, he called Towe to reprimand her. Both Rokus and Towe claim that Whitener's conversations with them exceeded the bounds of decency and civility. Rokus reported Whitener to say that "she shouldn't have let us (the Supervisors who had honored their commitments from the straw vote) all sit up there and be f--ed by her when we were counting on her to keep her word." And Whitener does not deny making the statement.

When Rokus and Towe complained to the full Board about Whitener's unseemly behavior and requested that Whitener be punished for his abusive language, the Board appointed a three-member ad hoc ethics committee to investigate the complaint and make recommendations. The committee met on January 26, 1996, and, after a contentious meeting where testimony was given and arguments made, voted 2-1 to recommend that Whitener "be formally censured for a period of [one year] and that the rules of order be changed to remove him from all standing committees of [the] Board as well as all assignments and appointments to outside committees, commissions, etc." On consideration of the ad hoc committee's recommendation, the Board voted 8-1 to censure Whitener and 5-4 to strip him of his committee assignments for a period of one year.

After the ad hoc committee made its recommendation but before the full Board of Supervisors had acted on it, Whitener filed suit against the other eight members of the Board under 42 U.S.C. § 1983, alleging, among other things, that the Board violated his First Amendment and procedural due process rights. He requested that the court enjoin the Board from disciplining him. The defendant Board members filed a motion to dismiss, asserting legislative immunity, and the district court granted the motion. It concluded:

In legislative immunity cases involving local jurisdictions where the challenged action is administrative, such as the firing of an employee, legislative immunity may not apply. However, when the challenged activity concerns a core legislative function, immunity does apply.

This case concerns the vote of the Board of Supervisors in policing its own ethics violations, obviously a core legislative activity. The plaintiff complains of an action by the board to strip him of committee and commission assignments for his conduct in confronting other members of the board and his use of abusive language. Plaintiff may not challenge legislative voting or inquire as to why votes were made. The plaintiff is asking the Court to enjoin the defendants from voting in ways he believes

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are detrimental to him. This brings the case directly into the bar of legislative immunity.

Whitener v. McWatters, No. 96-117-A, slip op. at 4 (E.D.Va. Mar. 8, 1996).

II

Whitener contends that he harbored an unpopular opinion "regarding the voting conduct" of Board members; that he expressed such opinion to two members; and that "he was punished ... for expressing his minority opinions, under the guise that he had somehow engaged in 'abusive speech'." He argues that this is "precisely the type of scenario that the First and Fourteenth Amendments were designed to prevent, and to which the doctrine of absolute legislative immunity has never been applied." Arguing particularly that the district court erred in applying legislative immunity to this case, he maintains (1) that the Board of Supervisors did not act in a legislative capacity, but rather in an administrative or judicial one, and (2) that, in any event, legislative immunity does not apply to protect legislators acting in a manner that directly abridges his constitutional rights. The resolution of these issues is a matter of law that we consider de novo. See Alexander v. Holden, 66 F.3d 62, 65 (4th Cir.1995).

None of the parties appears to challenge the threshold legal principle that absolute legislative immunity applies similarly to federal, state, and local legislative bodies. In Tenney v. Brandhove, 341 U.S. 367, 376, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951), the Supreme Court held that state legislators were cloaked with absolute immunity for their legislative actions, and the Court extended that protection to members of a regional political subdivision in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405, 99 S.Ct. 1171, 1179, 59 L.Ed.2d 401 (1979). We analogously applied principles of legislative immunity to members of a county council in Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir.1980). As we summarized in Bruce, "if legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued under the provisions of § 1983." Id.

Whitener contends, however, that the discipline imposed by the Loudoun County Board of Supervisors was not legislative because it was neither prospective nor general, but rather administrative or judicial because it applied both retrospectively and specifically to him and only him. To maintain that his discipline was not a legislative act and therefore not protected by immunity, he relies heavily on our decisions in Alexander and Roberson v. Mullins, 29 F.3d 132 (4th Cir.1994). In both Alexander and Roberson county employees, who had been dismissed by their county boards, sued their boards for the improper termination of their employment. In both cases, we held that discharging a county employee was an administrative or executive act which did not engage the county's legislative function and therefore was not protected by legislative immunity. We noted that legislative action typically involves the promulgation of prospective, general rules, rather than actions taken against specified individuals. See Alexander, 66 F.3d at 66; Roberson, 29 F.3d at 135.

In contrast to the factual circumstances presented in Alexander and Roberson, however, the challenged action before us involves a local legislative body disciplining one of its elected members, not an employee. Even though Whitener relied upon Roberson and Alexander to argue that the Loudoun County Board had not acted in a legislative capacity, to address the distinguishing facts of this case he appears to argue that the Board, in disciplining one of its members, functioned in a judicial capacity. He states, "Appellees' decision to punish Appellant on the basis of the content of his speech was more like a judicial ... act." This argument, however, provides Whitener with no comfort because judicial functions are also protected by absolute immunity. See Butz v. Economou, 438 U.S. 478, 511-12, 98 S.Ct. 2894, 2913-14, 57 L.Ed.2d 895 (1978) (finding administrative law judge within executive department entitled to absolute immunity); Brown v. Griesenauer, 970 F.2d 431 (8th Cir.1992) (giving local legislators absolute immunity

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for judicial action of holding impeachment proceedings against mayor).

While Whitener may not derive persuasive support from Alexander and Roberson, the question remains whether a legislative body disciplining one of its members acts in a legislative capacity so as to enjoy absolute immunity in courts of law. Because the nature and scope of legislative immunity "has [its] taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," Tenney, 341 U.S. at 372, 71 S.Ct. at 786, we can review the development of the immunity to inform our conclusion.

As the English House of Commons matured from a meek body, empowered only to petition the king, into a body itself responsible for the text of laws, debate within the House became increasingly important. With increased debate, the Speaker of the House changed his "plea [to the king] for forgiveness" for uttering words displeasing to the king into a general and more assertive petition for parliamentary free

speech. See David S. Bogen, The Origins of Freedom of Speech and Press, 42 Md.L.Rev. 429, 432 (1983). At the same time, the House of Commons began to punish its members who interfered with parliamentary functions. See id. Over time, members of Parliament claimed the right of free speech during parliamentary sessions and the exclusive right to punish such speech, while the king continued to maintain that the protection of speech in Parliament was merely a royally dispensed privilege. See id. at 432-33. He continued to claim the right to punish "seditious" parliamentary speech. See id.; Sources of Our Liberties 234 (Richard L. Perry et al., eds., (1991) (hereafter Sources)).

When Parliament attained supremacy after the Glorious Revolution, it clarified many points of law with the English Bill of Rights of 1689. See Sources, at 223. Among the clarifications,

the said lords spiritual and temporal, and commons ... do in the first place (as their ancestors in like cases have usually done) ... declare ... 9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

Bill of Rights of 1689, 1 W. & M., sess. 2, c. 2, art. 9, quoted in Sources, at 246-47 (emphasis added). In establishing that members' speech should not be questioned "in any court or place out of parliament," Parliament simultaneously denied the crown's authority and asserted its own power to punish members' speech. Indeed, "[t]he primary function of the privilege had been to limit jurisdiction to punish." Bogen, Origins, at 437. The Parliamentary privilege did not relieve a member of accountability for speech, because his colleagues could censure him for abuses. Id. at 436. Instead, the privilege was intended to "prevent intimidation by the executive and accountability before a possibly hostile judiciary." United States v. Johnson, 383 U.S. 169, 181, 86 S.Ct. 749, 755, 15 L.Ed.2d 681 (1966).

Colonial assemblies followed Parliament's lead and successfully asserted the freedom of legislative speech as so understood. See Bogen, Origins, at 433 (citing M. Clarke, Parliamentary Privilege in the American Colonies 62 (1971)); see, e.g., Mass. Const. of 1780, Part 2, art. XXI ("The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever." (Emphasis added)). Indeed, in Virginia, where the Loudoun County Board of Supervisors sits, "the assemblies had built up a strong tradition of [the] legislative privilege long before the Revolution." Tenney, 341 U.S. at 374 n. 3, 71 S.Ct. at 787 n. 3; see also Va. Const. art. IV, § 9. When the several colonies came together under the Articles of Confederation, the privilege was restated in language similar to that of the English Bill of Rights:

Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress,

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except for treason, felony, or breach of the peace.

Articles of Confederation and Perpetual Union art. V, cl. 5 (emphasis added).

Finally, with the ratification of the Constitution, it was again confirmed that "for any Speech or Debate in either House, [the representatives and senators] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1 (emphasis added). The Constitution also enumerates for Congress the power, long asserted by Parliament, to "punish its Members for disorderly Behavior, and, with the

Concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5, cl. 2. Commenting on the power to punish members, Joseph Story said:

No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior, or disobedience to those rules.

Joseph Story, Commentaries on the Constitution of the United States § 419 (emphasis added).

Thus, Americans at the founding and after understood the power to punish members as a legislative power inherent even in "the humblest assembly of men." Id. This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their "institutional integrity" without compromising the principle that citizens may choose their representatives. See Powell v. McCormack, 395 U.S. 486, 548, 89 S.Ct. 1944, 1978, 23 L.Ed.2d 491 (1969) (holding Congress' power to judge qualifications of members-elect limited to enumerated qualifications); see also U.S. Const. art. I, § 5, cl. 2 (granting the power to expel only by two-thirds vote). Further, because citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members. Absent truly exceptional circumstances, it would be strange to hold that such self-policing is itself actionable in a court.

This history and long practice confirm that the disciplinary action taken by the Loudoun County Board of Supervisors against one of its members was legislative in nature. And Whitener's own contentions confirm that his conduct was legislative. He alleges that he harbored an unpopular voting position on the Board; that he expressed his position using abusive language; and that the Board disciplined him for it. While he was arguably disciplined for speech, it was legislative speech, which is protected from executive or, in the United States, judicial interference, but not from the legislative body's judgment. As legislative speech and voting is protected by absolute immunity, the exercise of self-disciplinary power is likewise protected.

III

Whitener contends that even if the Board of Supervisors' action were taken in a "legislative capacity," absolute immunity should not apply because the Board's censure of him "directly abridge[d] ... [his] constitutional rights." He claims support for this broad assertion from Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). The holding in Bond, however, does not apply so broadly and, indeed, does not undermine the well-established principle that legislatures may discipline members for speech with the corollary immunity from executive or judicial reprisal for doing so.

Bond did not even address the power of legislatures to discipline members, but rather involved a question of whether the Georgia legislature could refuse to seat members-elect in the first place. See id. at 118, 87 S.Ct. at 341. The Georgia legislature refused to seat Julian Bond, based on the perception that he was not able to swear sincerely to uphold the state and federal constitutions. See id. at 123, 87 S.Ct. at 343. The Supreme Court concluded that the requirement of taking an oath "does not authorize a majority of state legislators to test the

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sincerity with which another duly elected legislator can swear to uphold the Constitution." Id. The holding in Bond establishes the principle more exhaustively analyzed three years later in

Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), that members-elect must be seated if they meet constitutionally enumerated qualifications. See id. at 553 n. 7, 89 S.Ct. at 1980 n. 7 (Douglas, J., concurring) (citing Bond). In Powell, after surveying English history, the colonial experience, the constitutional convention, the ratification debates, and the post-ratification practice, the Court concluded that the legislative power to judge the qualifications of members-elect permits exclusion only on the basis of enumerated qualifications. See id. at 521-48, 89 S.Ct. at 1963-78.

Whitener seeks to transform the narrow holdings of Bond and Powell to imply that legislative censure is unconstitutional if motivated by something the member said. But he provides no authority for the proposition, and long practice indicates otherwise. "Congress frequently conducts committee investigations and adopts resolutions condemning or approving of the conduct of elected and appointed officials, groups, corporations, and individuals. Members often vote to do so, at least in part, because of what the target of their investigation or resolution has said." Zilich v. Longo, 34 F.3d 359, 363 (6th Cir.1994). Indeed, as the well-documented history of the speech and debate privilege reveals, the privilege was an assertion of the legislature's exclusive jurisdiction to punish speeches made in the course of legislative business. Indeed, that power, which exists to protect the public reputation of legislative bodies and to make orderly operation possible, has been exercised on at least two occasions to censure United States Senators for speech that the Senate deemed inappropriate. See IV Robert C. Byrd, The Senate: 1789-1989 671 (1993) (recalling that Timothy Pickering was censured in 1811 for reading documents in the Senate before an "injunction of secrecy" was removed and that Benjamin Tappan was censured in 1844 for leaking the President's message on a treaty to the press).

Finally, Whitener's expansive interpretation of Bond flies in the face of the Supreme Court's decision in Tenney v. Brandhove. In Tenney, the Supreme Court applied absolute legislative immunity even though Brandhove alleged that the hearings in question were intended "to intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances." 341 U.S. at 371, 71 S.Ct. at 785. Whitener alleges similarly that the Loudoun County Board of Supervisors retaliated against him for his speech. To allow Whitener's case to proceed in court would require us to ignore the legislative body's exclusive right, as articulated in Tenney.

Even if, at some level, there is a judicially enforceable First Amendment constraint on a legislature's power to discipline one of its members, we certainly do not approach it in this case. Whitener was disciplined for his lack of decorum, not for expressing his view on policy. We cannot conclude that the Loudoun County Board of Supervisors was without power to regulate uncivil behavior, even though it did not occur during an official meeting. Such abusiveness, even when it occurs "behind the scenes," can threaten the deliberative process. Indeed, "[t]he greatest concern over speech within a deliberative body is that members might engage in personal invective or other offensive remarks that would unleash personal hostility and frustrate deliberative consideration." Bogen, Origins, at 436 (citing M. Clarke, Parliamentary Privilege in the American Colonies 190-94 (1971)).

IV

Because we conclude that the Loudoun County Board of Supervisors acted in a legislative capacity when it voted to discipline Whitener, its action is protected by absolute legislative immunity. We therefore affirm the judgment of the district court. *

AFFIRMED.

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DIANA GRIBBON MOTZ, Circuit Judge, dissenting.

Respectfully, I dissent. Because Whitener's removal from his committee assignments ended on February 7, 1997, this appeal is now moot. Accordingly, I would dismiss it.

Under Article III of the United States Constitution, federal courts may consider only cases or controversies. See S.E.C. v. Medical Com. for Human Rights, 404 U.S. 403, 407, 92 S.Ct. 577, 579-80, 30 L.Ed.2d 560 (1972) (citing Liner v. Jafco, Inc., 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394 n. 3, 11 L.Ed.2d 347 (1964)). Once an appeal becomes moot--when it no longer presents any "live" issues--we lack jurisdiction over it. Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950-51, 23 L.Ed.2d 491 (1969). It is well-established that "federal courts may not 'give opinions upon moot questions or abstract propositions.' " Calderon v. Moore, --- U.S. ----, ----, 116 S.Ct. 2066, 2067, 135 L.Ed.2d 453 (1996) (quoting Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895)). Nor is it sufficient that there may have been a "live" case or controversy when the case was before the lower court. Burke v. Barnes, 479 U.S. 361, 363, 107 S.Ct. 734, 736, 93 L.Ed.2d 732 (1987) (citing Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)). Here, Whitener sought to enjoin the Board of Supervisors from enforcing a one-year bar on his participation in its standing committees. As that one-year bar expired on February 7, 1997, Whitener no longer has a "live" dispute with the Board that satisfies the case or controversy requirement.

Alejandrino v. Quezon, 271 U.S. 528, 46 S.Ct. 600, 70 L.Ed. 1071 (1926), directly addresses Whitener's situation. A member of the Philippine Senate, Alejandrino sought mandamus and an injunction against that body after he had been expelled for one year. Ironically, like Whitener, he was accused of angrily confronting another legislator after legislative proceedings and outside the chambers. On appeal, the Supreme Court found the case moot, reasoning:

We do not think that we can consider this question, for the reason that the period of suspension fixed in the resolution has expired, and, so far as we are advised, Alejandrino is now exercising his functions as a member of the Senate. It is therefore in this Court a moot question whether lawfully he could be suspended in the way in which he was.

Alejandrino, 271 U.S. at 532, 46 S.Ct. at 601.

The same conclusion must be reached here. Whitener has already received the redress that he sought, namely, reinstatement to Board standing committees. His suggestion that his appeal is not moot because his new committee assignments differ from those he previously held is meritless in view of the fact that, as Whitener conceded at oral argument, the Board has the ability to reconstitute standing committees on a yearly basis as it chooses.

Similarly, Whitener's assertion that his appeal should not be found moot because "there exists a reasonable expectation and probability that the violations complained of in this appeal will recur" is no more persuasive. There is absolutely nothing in the record to indicate that the Board will impose another one-year punishment on Whitener; and just as the Supreme Court in Alejandrino chose not to speculate on future bases of jurisdiction, so should we. What Whitener really seems to want is to litigate other, recently

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occurring, allegedly wrongful conduct by the Board. That course is not open to him here--he cannot on appeal make claims never pled or even existing when this suit was filed and considered by the district court. Moreover, these asserted "new" violations can and will be addressed in ongoing litigation that has been initiated by the Board against Whitener through the Virginia state court system.

Finally, since we lack jurisdiction to consider a moot claim, the fact that the parties did not address mootness in their initial briefs, but only in making and responding to a motion to dismiss on mootness grounds, does not in any way prevent us from addressing mootness. See Powell, 395 U.S. at 497 n. 9, 89 S.Ct. at 1951 n. 9 (observing that in Alejandrino the parties did not brief mootness).

For all of these reasons, I believe Whitener's appeal is moot and should be dismissed on that ground.

---

* By separate order, we have denied the Board's motion to dismiss this appeal as moot. Neither party argued the point below or in their briefs on appeal, and the issue arose only during oral argument on an inquiry from the court. While the record therefore is not fully developed, we agree with Whitener that interim events have not completely and irrevocably eradicated the effects of the Board's discipline. See County of Los Angeles v. Davis, 440 U.S. 625, 630, 99 S.Ct. 1379, 1382-83, 59 L.Ed.2d 642 (1979). The Board voted that Whitener be formally censured and stripped of his ability to serve and vote on any of Loudoun County's standing committees and county commissions for a period of one year. While the year has now passed and Whitener has been made a member of some committees, he asserts that he "has still not been reinstated in his previous committee chairmanships, committee assignments and county commissions," having only been allowed to serve "in a minor capacity on several of Loudoun County's less influential standing committees." He claims also that he "has not been awarded compensation for the court costs and legal fees" he has incurred. And finally, the stigma of formal censure remains. For purposes of the Board's motion, therefore, we can only assume that effects of discipline have not yet been completely and irrevocably eradicated.

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W. G. McCARLEY et al., Plaintiffs,
v.
Roy W. SANDERS, as Comptroller of the State of Alabama, et al., Defendants.
Civ. A. No. 2926.
United States District Court, M. D. Alabama, N. D.
January 27, 1970.

Morris S. Dees, Jr., Montgomery, Ala., R. Clifford Fulford and Max Pope, Levine, Fulford & Pope, Birmingham, Ala., Joseph J. Levin, Jr., Montgomery, Ala., Douglas J. Kramer, New York City (of The James Madison Constitutional Law Institute), Norman Dorsen, New York City, for plaintiffs.

MacDonald Gallion, Atty. Gen., State of Alabama, Gordon Madison and Leslie Hall, Asst. Attys. Gen., State of Alabama, for State officials and Senators Adams, Albea, Branyon, Carr, Clark, Cooper, Engel, Folsom, Giles, Givhan, Goodwyn, Harris, Jackson, Leonard, Lindsey, Lolley, McDermott, Nabors, O'Bannon, Oden, Pelham, Pierce, Radney, Skidmore, Stone and Turner.

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Robert S. Vance (of Jenkins, Cole, Callaway & Vance), Birmingham, Ala., for Senators Bailes, Childs, Dominick, Gilmore, Hawkins, Morrow and Vacca.

C. C. Torbert, Jr., pro se.

Before RIVES, Circuit Judge, and JOHNSON and PITTMAN, District Judges.

RIVES, Circuit Judge:

W. G. McCarley, a State Senator, was expelled from the Senate of Alabama on August 20, 1969. This action is brought by McCarley and by certain citizens and voters of his senatorial district on behalf of all such citizens and voters[1] seeking to have McCarley's expulsion from the State Senate declared invalid and for relief consequent upon such declaration. Governor Brewer has been dismissed as a party defendant. We have denied the motion of the members[2] of the State Senate made parties defendant. The other defendants are Roy W. Sanders, State Comptroller, and McDowell Lee, Secretary of the State Senate. The issues to be decided are simply whether the Fourteenth Amendment was applicable to require that the expulsion proceedings accord with procedural due process, and if so, whether McCarley has been afforded procedural due process.[3]

On August 12, 1969, a newspaper in the State Capitol, The Montgomery Advertiser, published a front page story headlined, "McCarley Asks Cash for Bill," which charged McCarley with serious misconduct in the performance of his duties as a State Senator and inferred that other unnamed Senators might be implicated.[4] On the same day, the Alabama Senate passed a resolution resolving:

> "1. That request is hereby made that the Grand Jury of Montgomery County proceed immediately to inquire into the allegations against a member or members of this body appearing in a news article of the August 12, 1969, issue of The Montgomery Advertiser.
>
> "2. That the President of the Senate appoint and impanel a committee from the membership of this body and that such committee be charged to inquire into the allegations of such news

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> article and promptly report its findings to the Senate."[5]

The President of the Senate immediately appointed an investigating committee as

provided by that resolution, consisting of seven Senators. A separate resolution also adopted on the same day gave this "Select Committee" power "to subpoena witnesses, to take testimony under oath, and compel the production of documents or writings by subpoena."

The next day, August 13, the Committee began hearings which were closed to the public. McCarley was invited by the Committee to testify. McCarley and his attorney were told by the chairman of the Committee that the Committee had been charged to investigate the matters contained in the newspaper article and that McCarley was not then being charged or accused of any wrongdoing, that the Committee would observe certain ground rules as to witnesses appearing before it, viz.: that the hearing would be closed to the public; that neither McCarley nor his attorney could be present when other witnesses testified; and that neither of them would be permitted to cross-examine any witness appearing before the Committee. The purpose of the Committee hearing was simply to investigate the charges made in the newspaper article.

Based on what he had read in the newspaper, McCarley testified to his version of what had occurred and answered questions from members of the Committee. Eighteen other witnesses testified before the Committee, but neither McCarley nor his attorney were permitted to be present.

At 12:30 A.M. on August 20, 1969, shortly after midnight, the Committee made its report detailing in five typed pages its findings as to Senator McCarley and concluding as follows:

> "As respects Senator McCarley the finding is inescapable that his conduct is incompatible with and contrary to his clear duty as a member of the Senate of Alabama. Viewed in the light most favorable to him and discounting in their entirety certain inconsistencies in his own testimony, Senator McCarley, by his own acknowledgement, was a knowing participant in a program of whatever origin which had as its purpose and goal the extraction of money from a citizen as a pre-condition to the orderly and proper exercise of the legislative process. He was, in short, by his own admission, a knowing accomplice. Conceding that he did not expect direct financial reward does nothing to void this finding."

After receiving the report the Senate recessed to come back later in the day. About 5:00 P.M., McCarley read a prepared statement to the Senate. A meeting of the Senate Rules Committee was called, and the presiding officer of the Senate announced that the Rules Committee would have an important report about 9:00 P.M., and urged every member of the Senate to be present. About 9:30 P.M. the Rules Committee made its report, containing four resolutions. The first three were passed within ten minutes. The fourth and presently pertinent resolution reads as follows:

> "S.R. 97 — WHEREAS, pursuant to S. R. 80, a copy of which is attached hereto, the President of the Senate did appoint and impanel a Committee charged to inquire and promptly report its findings to the Senate relating to a news article appearing in the Montgomery Advertiser in its issue of August 12, 1969, which article charged serious misconduct by a member or members of this Senate in the performance of official duties; and
>
> WHEREAS, said Committee did on August 20, 1969, make and submit a written report to

> the Senate, a copy of which is attached hereto; and
>
> WHEREAS, after having considered said report and particularly the findings

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> as such relate to Senator W. G. McCarley:
>
> NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF ALABAMA That pursuant to the authority contained in Section 53 of the Constitution of Alabama of 1901, Senator W. G. McCarley be and he is hereby expelled as a member of the Senate of Alabama."

There was some discussion. Senators Bailes, Clark and McCarley made brief speeches. McCarley "pleaded with the Senate to accept his statement that he had done nothing wrong and asked them not to expel him."[6]

Approximately twenty minutes after the introduction of the resolution it was passed by a vote of 32 in favor of expulsion and one against.

The defendants insist that the due process clause is not applicable to this case, quoting in support of that insistence the following from Snowden v. Hughes, 1944, 321 U.S. 1, 7, 64 S.Ct. 397, 400, 88 L.Ed. 497:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Taylor & Marshall v. Beckham, 178 U.S. 548, 20 S.Ct. 1009, 44 L.Ed. 1187. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, Cave v. Newell, 246 U.S. 650, 38 S.Ct. 334, 62 L.Ed. 921, as we reaffirm it now."

However, it is now well established that the State's interest must be balanced with the interests of the individual, and that a person may not be discharged or expelled from a state public office upon a ground involving criminal guilt, infamy, disgrace, or other grave injury to the individual until after such notice and hearing as is requisite to due process of law. Wieman v. Updegraff, 1952, 344 U.S. 183, 191, 192, 73 S.Ct. 215, 97 L.Ed. 216; Slochower v. Board of Higher Education, etc., 1956, 350 U.S. 551, 555, 556, 76 S.Ct. 637, 100 L.Ed. 692; Cafeteria and Restaurant Workers, etc. v. McElroy, 1961, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L.Ed.2d 1230. In Dixon v. Alabama State Board of Education, 5th Cir. 1961, 294 F.2d 150, 155, the principle was stated thus: "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."

This fundamental principle, essential to any fair and just system of laws, was recognized by the Senate of Alabama previously when a Senator was expelled for bribery, Journal of the Alabama Senate, 1932, pp. 1250-1254, 1273-1275, and by the House of Representatives of Alabama when a member of the House was acquitted of a charge of bribery, Journal of House, 1939, pp. 560, 561, 563-565, 594, 595, 597, 598, 634, 635, 636, 637.

There can, of course, be no serious argument that McCarley has been accorded even the barest rudiments of due process. He received no adequate notice. No formal charge against him was made before the Senate. The only procedure approaching a hearing accorded McCarley was before an investigating committee when he and his attorney were permitted to be present while McCarley made his statement and answered the Committee's questions but were excluded from hearing the testimony of the other witnesses and were denied the right to cross-examine those

witnesses. The transcript of testimony before the investigating committee had not been transcribed and was not available to the Senate before a vote was taken on the expulsion resolution. No evidence was taken before the Senate. In brief, the Senators voted to expel McCarley for corruption (though not clearly or adequately charged), and rendered him thereafter ineligible to either house (Section 54 of the Alabama Constitution)

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without according him an opportunity to defend himself and without themselves hearing any evidence. We must and do vacate McCarley's expulsion from the Senate of Alabama.

JUDGMENT

It is therefore ordered and adjudged by the Court that the expulsion of W. G. McCarley from the Senate of Alabama is vacated, and that the adoption by the Senate of Alabama of Senate Resolution 97 on August 20, 1969, is declared to be unconstitutional, null, void and of no effect. Senator McCarley is entitled to receive any compensation and perquisites of the office of State Senator to which he was elected. The Court retains jurisdiction to conduct any further proceedings and to enter any further orders or judgments which may be necessary or appropriate to carry this judgment into effect.

Notes:

1 We think these parties have sufficient standing to sue, and that on this point the case is distinguishable from Bond v. Floyd, N.D.Ga.1966, 251 F.Supp. 333, 338, and from Barry v. United States, ex rel. Cunningham, 1929, 279 U.S. 597, 616, 49 S.Ct. 452, 73 L.Ed. 867 on which Bond relied, because the lack of representation by the Senator of their choice may not be temporary; particularly so in view of the provision of Section 54 of the Constitution of Alabama that, "A member of the legislature, expelled for corruption, shall not thereafter be eligible to either house." In any event no harm can result from the presence of these parties plaintiff.

2 The effect of the Speech or Debate Clause in Section 56 of the Alabama Constitution is different from that of the Speech or Debate Clause in the Constitution of the United States, Art. 1, § 6, because the State Senators are charged as agents of the State with having denied McCarley procedural due process in violation of the Fourteenth Amendment. The case is therefore distinguishable on this point from Powell v. McCormack, 1969, 395 U.S. 486, 501-506, 89 S.Ct. 1944, 23 L.Ed.2d 491. The relief sought in this case is purely preventative or remedial and does not involve damages, punishment, or other personal liability.

3 The plaintiffs ask also that we declare unconstitutional Section 53 of the State Constitution, which provides for the power to expel a member of either house of the State Legislature, but we do not find it necessary to reach that issue.

4 The first two paragraphs of the newspaper article read:

"Sen. W. G. McCarley of Autauga County offered the Fraternal Order of Police (FOP) a legislative package deal that would cost the organization at least $3,500 to get a statewide police pension bill out of a Senate committee, The Advertiser has learned.

"But, McCarley first told a policeman and another legislator that he was acting only as a messenger. The money, he said, would be for two other senators."

5 Complying with the request, the Grand Jury returned an indictment charging McCarley with bribery. Upon his trial, the petit jury found him not guilty.

6 Witness Rex Thomas of the Associated Press.

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

EUGENE DELGAUDIO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. _____**
	)	
LOUDOUN COUNTY BOARD OF SUPERVISORS,	)	
	)	
Defendant.	)	

ORDER FOR TEMPORARY INJUNCTION

This day came the Plaintiff, EUGENE DELGAUDIO, by counsel, to be heard upon complaint and sworn affidavit for a temporary injuction to prevent the Loudoun County Board of Supervisors from disciplining him until such time as the Court can determine to what procedural due process the Plaintiff is entitled; and

IT APPEARING TO THE COURT the Board of Supervisors is preparing to summarily take action based on the Special Grand Jury's Report filed with this Court on June 24, 2013, without according the Plaintiff the substantive due process to which he is entitled under the Constitution of the United States and the Plaintiff has no remedy at law and will suffer irreparable injury; is is hereby

ADJUDGED, ORDERED and DECREED that, pending further order of the Court, the Loudoun County Board of Supervisors shall cease and refrain from disciplining Supervisor Eugene Delgaudio until further order of this Court.

The Court further ORDERS that this restraining order be effective from this date and that a hearing is set for _____, 2013, on the issue of whether this injuction should be enlarged or dismissed.

And no bond shall be required to be posted herein.

The Court further ORDERS that a copy of this order be served forthwith by the Sheriff of Loudoun County upon the County Attorney, John R. Roberts, Esquire.

_____
Judge

ENTERED: _____

I ASK FOR THIS:

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