

BEFORE THE SENATE OF THE STATE OF ARIZONA
SITTING AS A COURT OF IMPEACHMENT

In the Matter of the)
Impeachment of:)
)
EVAN MECHAM, Governor)
of the State of Arizona.)

Phoenix, Arizona
March 15, 1988
9:04 a.m.

TRIAL VOLUME 12

BEFORE THE HONORABLE FRANK X. GORDON,
PRESIDING OFFICER

For the Board of Managers: Storey & Ross
By William P. French, Esq.
and
Brown & Bain
By Paul Eckstein, Esq.

For the Respondent: Jerris Leonard, Esq.
and
Craft & Loesch
By Winfred O. Craft, Jr., Esq.

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(Pages 2469 - 2478 sealed by order of Presiding Officer.)

I N D E X

<u>WITNESS</u>	<u>DIR</u>	<u>CR</u>	<u>REDIR</u>	<u>RECR</u>	<u>VOIR DIRE</u>
JOHNSTON, COY H.	2520	2551	2556		
JOHNSTON, CHRISTINA	2574, 2610, 2614	2614			2612
MacDONALD, ANDREW M.	2625	2645			

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>IN EVIDENCE</u>
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Phoenix, Arizona
March 15, 1988
9:04 a.m.

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3 THE PRESIDING OFFICER: Thank you, ladies and
4 gentlemen. The Court of Impeachment is reconvened. Have
5 the record show the presence of a majority of the Board of
6 Managers, their counsel, and counsel for the respondent.

7 We have this morning for the first item --
8 oh, I'm sorry. We'll ask the clerk to call the roll at
9 this time.

10 THE CLERK: Senator Alston?

11 SENATOR ALSTON: Present.

12 THE CLERK: Senator Brewer?

13 SENATOR BREWER: Present.

14 THE CLERK: Senator Corpstein?

15 SENATOR CORPSTEIN: Here.

16 THE CLERK: Senator De Long?

17 SENATOR DE LONG: Present.

18 THE CLERK: Senator Gabaldon?

19 SENATOR GABALDON: Here.

20 THE CLERK: Senator Gutierrez?

21 SENATOR GUTIERREZ: Present.

22 THE CLERK: Senator Hardt?

23 SENATOR HARDT: Here.

24 THE CLERK: Senator Hays?

25 SENATOR HAYS: Here.

1 THE CLERK: Senator Henderson?

2 SENATOR HENDERSON: Here.

3 THE CLERK: Senator Higuera?

4 SENATOR HIGUERA: Present.

5 THE CLERK: Senator Hill?

6 SENATOR HILL: Here.

7 THE CLERK: Senator Kay?

8 SENATOR KAY: Here.

9 THE CLERK: Senator Kunasek?

10 SENATOR KUNASEK: Here.

11 THE CLERK: Senator Lunn?

12 Senator MacDonald?

13 SENATOR MacDONALD: Present.

14 THE CLERK: Senator Mawhinney?

15 SENATOR MAWHINNEY: Present.

16 THE CLERK: Senator Osborn?

17 SENATOR OSBORN: Present.

18 THE CLERK: Senator Pena?

19 SENATOR PENA: Here.

20 THE CLERK: Senator Rios?

21 SENATOR RIOS: Present.

22 THE CLERK: Senator Runyan?

23 SENATOR RUNYAN: Here.

24 THE CLERK: Senator Sossaman?

25 SENATOR SOSSAMAN: Here.

1 THE CLERK: Senator Steiner?

2 SENATOR STEINER: Here.

3 THE CLERK: Senator Stephens?

4 SENATOR STEPHENS: Here.

5 THE CLERK: Senator Stump?

6 SENATOR STUMP: Present.

7 THE CLERK: Senator Taylor?

8 SENATOR TAYLOR: Here.

9 THE CLERK: Senator Todd?

10 SENATOR TODD: Here.

11 THE CLERK: Senator Usdane?

12 SENATOR USDANE: Here.

13 THE CLERK: Senator Walker?

14 SENATOR WALKER: Here.

15 THE CLERK: Senator West?

16 SENATOR WEST: Present.

17 THE CLERK: Senator Wright?

18 SENATOR WRIGHT: Here.

19 THE CLERK: Senator Lunn?

20 THE PRESIDING OFFICER: Senator Usdane?

21 SENATOR USDANE: Mr. Presiding Officer, I move
22 Senator Lunn be excused from attending today's
23 proceedings.

24 THE PRESIDING OFFICER: Under Rule 19, that
25 requires a two-third's majority of the members of the

1 Senate. All those in favor, signify by saying "aye." All
2 opposed say "no." The "ayes" appear to have it. They do
3 have it, and it's so ordered.

4 The roll call indicates 29 Senators present,
5 one absent and excused.

6 The first item of business this morning is to
7 rule on the motion, Item No. 80 in your book. There has
8 been a response filed to that motion by counsel for the
9 Board of Managers, which is document No. 81 in your book.
10 And when I'm -- I'm sure Mr. Craft -- is Mr. Craft or Mr.
11 Leonard going to argue?

12 All right, Mr. Craft, you're requesting, are
13 you, 15 minutes oral argument?

14 MR. CRAFT: I am, Your Honor.

15 THE PRESIDING OFFICER: Counsel has requested
16 permission to orally argue for 15 minutes. I need
17 concurrence of a majority of the Senate to approve that.

18 All in favor, say "aye." Opposed say "no."
19 The "ayes" appear to have it. They do have it, and it's
20 so ordered.

21 You may proceed, Mr. Craft.

22 MR. CRAFT: Mr. Presiding Officer, ladies and
23 gentlemen of the Court of Impeachment, we filed yesterday,
24 on Monday, a motion for a mistrial, or in the alternative,
25 a motion to dismiss.

1 I had, along with my co-counsel, watched what
2 I considered to be an unfortunante pattern of events which
3 had occurred, starting with the taking of a deposition of
4 Mr. and Mrs. Mark Johnston, which occurred the day before,
5 the Sunday before our trial began here. And there were a
6 number of other events, factual events, which led from
7 that public disclosure that there were witnesses who would
8 testify that would be contrary to what some of the
9 complaining witnesses in this case had testified to.

10 We didn't think much about this public
11 disclosure until a number of events began to occur. And,
12 basically, what, in a nutshell, we're asking this Court to
13 do is to grant us an opportunity to have an evidentiary
14 hearing in which we will bring in witnesses and you'll
15 have an opportunity to cross-examine and ask and ascertain
16 for yourselves whether or not the allegations that we're
17 making in this motion for a mistrial are accurate. And I
18 think that the evidence that I have seen and been involved
19 in are overwhelming.

20 I want to tell you that after Christina
21 Johnston was publicly identified, the Department of Public
22 Safety initiated an action to attempt to request the
23 Maricopa County Sheriff's Office to effect an arrest of
24 Christina Johnston on a ten-month old stale warrant for a
25 misdemeanor charge that lodged in Scottsdale City Court.

1 Mrs. Johnston had worked as an investigator,
2 and in that employment, she had repossessed an automobile.
3 In that repossession, the person she repossessed the
4 automobile from objected to that repossession and told her
5 at that time that he had friends on the Department of
6 Public Safety. They repossessed the car. Mrs. Johnston
7 never knew anything else about it, and continued to
8 practice her profession along with her husband in
9 Scottsdale and in the Phoenix area, did not know that
10 there was any kind of a complaint which had been lodged
11 against her at all.

12 Miraculously, after she appears, her name
13 appears in public, the Department of Public Safety asks
14 the Maricopa County Sheriff's Office to effect an arrest
15 of Mrs. Johnston on this stale warrant, which Mrs.
16 Johnston was not even aware of. And we can present
17 testimony as to which DPS officer called the Maricopa
18 County Sheriff's Office and asked them to do them a favor,
19 which was to arrest Tina Johnston, a material witness in
20 this trial, who has yet to testify. We let that incident
21 go by because we didn't know that at that time that the
22 Department of Public Safety had asked for her arrest.

23 Subsequently, the next event that occurs is
24 Mr. Corio. Mr. Corio comes to our office, makes certain
25 statements to us about what he's going the testify to, and

1 says that he's there voluntarily. We did not call him.
2 We didn't know of him. He called our office. He came in
3 and gave us evidence that he said that he had, or said
4 that he would testify that he was there when the
5 conversation took place with Officer Martinez and Peggy
6 Griffith, and that he had done sweeps of the office, and
7 other things that we thought were relative and material to
8 this particular count of the indictment.

9 I then get a call from Chief Limbs of the
10 Capitol Police, and he indicated that Mr. Corio had been
11 seen being dropped off in front of the Capitol complex in
12 Chief Milstead's car in the company of Ron Mays, a DPS
13 officer, and subsequently I talked with Mr. Corio just
14 before he went on the trial -- before he was going to
15 testify before this trial, and I asked him about this, and
16 he indicated to me that he did not want to testify, that
17 he was scared to death, and I reassured him that if he
18 told the truth, he didn't have anything to worry about.

19 When he got on the stand, he all of a sudden
20 didn't remember the elements and the important kinds of
21 things that he had told us that he had said he was going
22 to testify to.

23 The third instance that occurred was the
24 arrest of Mrs. Terri Fields. I have documentation as to
25 how that happened by the Mesa Police Department. We have

1 evidence to present to you that the Department of Public
2 Safety set her up. They used a ploy of calling Mrs.
3 Fields' mother's home and asked for her. They didn't
4 arrest her at her house. They arrested her at her
5 mother's house at about 8:30 or 9:00 at night on a Friday
6 night, and we have evidence that they called and said they
7 were a newspaper reporter. They tried to get her out of
8 the house and arrest her on a traffic violation. She had
9 had a suspended driver's license, and that they could get
10 her on two offenses, driving with a suspended driver's
11 license, and they had searched the computer files and
12 found an outstanding city traffic warrant from Mesa. This
13 is all done by the Department of Public Safety. This was
14 a witness that testified before you on Thursday, and they
15 effected this arrest on Friday.

16 And the last tampering that I was aware of
17 before last night dealt with Mr. Mark Johnston, who had
18 applied to the San Diego Police Department, had asked for
19 records. They seemed to be cooperative before the trial,
20 and yet, after the trial began, Mr. Johnston went back to
21 San Diego, and they informed him that the Department of
22 Public Safety had conversations with them. In fact, I
23 think you heard Chief Milstead admit that somebody in his
24 office might have contacted the department in San Diego,
25 and the next thing you know, there are documents that we

1 cannot retrieve or we can not get.

2 Last evening another witness to this trial,
3 which you will hear from today, will discuss his
4 intimidation and the fact that he felt that as an officer
5 and as a captain serving in the Department of Public
6 Safety, that his superior, Colonel Phelps, called him in
7 after he found out he was on the witness list, confronted
8 him and asked him what he was going to testify to. And
9 this officer says that this intimidated me, and I knew I
10 was about to commit the equivalent of occupational suicide
11 by testifying freely and openly to this court.

12 Ladies and gentlemen, what we're asking for
13 is for you to take cognizance of these events that
14 occurred. They aren't manufactured. They are true. And
15 we want to present evidence to you to demonstrate what we
16 think is a consistent pattern of an abuse by the police
17 power.

18 Now I want to talk about the law for just a
19 second, and I don't have very many more minutes. This is
20 a political trial, and we've all had problems and
21 confusion with regard to what the rules of the game are
22 because there really aren't a lot of rules. We try to
23 find some standard by which we are going to proceed and
24 rules that govern this procedure.

25 You are a single branch of the legislative

1 branch of state government. And under our separation of
2 powers doctrine, which is based upon our constitution, we
3 have three co-equal branches of government that we're all
4 aware of, the executive branch, the legislative branch,
5 and the judicial branch. And what we are saying to you is
6 that we believe it is an abuse of the state police power
7 to allow the House of Representatives, who in this case
8 are the complaining party who brought an impeachment
9 action in the House and are now having it prosecuted in
10 front of the Senate.

11 There has been a consistent pattern of use of
12 the DPS, who is not a party to this action at all, by the
13 Board of Managers and their attorneys. This morning the
14 news is disclosed that Mr. Hurwitz has provided legal
15 advice to Chief Milstead before he testified before this
16 body. There is an insidious pattern of misbehavior on the
17 part of the state police under the direction of Chief
18 Milstead, who is the complaining witness, and we think
19 that it is an abuse of that state police power to allow
20 the legislative branch to rely upon the executive branch's
21 power of the police state in this instance.

22 Let me give you an example. If this body
23 were to find someone in contempt of the legislature, in
24 order to get that contempt enforced, this body would have
25 to go before a court of law and ask them to rule and

1 enforce that order. You don't have police power as a
2 legislative body. And yet, on numerous occasions, there
3 has been a pattern of cooperation between the managers and
4 their attorneys and the Department of Public Safety.
5 That, ladies and gentlemen, we think is a violation of the
6 basic tenets and constitutional tenets, and what we're
7 asking for is an evidentiary hearing to demonstrate that
8 these events are taking place.

9 It's an anomaly that we sit here accusing
10 this Governor of the state of hindering and tampering and
11 obstruction of justice, and yet, with immunity, it seems,
12 the Department of Public Safety can engage in these kind
13 of activities which are designed specifically to discredit
14 our witnesses. They are designed specifically to tamper
15 with our witnesses, to intimidate our witnesses, and to
16 prevent you and the people of this state and the people of
17 this country from getting the truth. And I do not think
18 we can stand by and allow that to happen.

19 And so we've asked for you to dismiss those
20 counts, and if we were in a court of law, the misconduct
21 on the part of the prosecution would sustain our request,
22 I am sure, with the evidence that we have. And in this
23 instance, we're asking you to hear that evidence and for
24 you to judge yourself whether there's been misconduct.

25 Now, this morning I got a copy of the Board

1 of Managers' response to our motion. And for the first
2 time, I turned on the back page, and I found a sworn
3 affidavit from Mr. Antonio Corio. I find this scurrilous
4 in the extreme. It is not accurate. It is a lie. And it
5 is an attempt to continue to impugn the integrity of the
6 people who are participating in these proceedings.

7 Now, on Saturday Mr. Eckstein called me and
8 informed me that the press had inquired relative to my
9 participation in the Super Collider activities and that
10 the House of Representatives paid -- and there is a
11 document that's probably two inches thick about the Super
12 Collider project. And he said, "I'm sorry this got out,"
13 or words to that effect, "and I want you to know it in
14 advance, and you have a copy of it."

15 It's an attempt, ladies and gentlemen, to
16 deflect our attention away from it. It's an attempt to
17 impugn me, and this is the second instance of it. And I
18 resent it deeply, and I'm prepared to take the stand and
19 testify under oath in the evidentiary hearing to prove how
20 low people are going to try to prevent you from getting
21 the facts.

22 What are we afraid of? Why are we afraid?
23 We're afraid in this state today because we got a run away
24 police state, and I think that we owe it to ourselves, all
25 of us, to at least inquire and ascertain for yourself

1 whether there are sufficient facts that prove the points
2 we're trying to make. So we're asking for an evidentiary
3 hearing, and if the evidence proves as we think it does,
4 we're asking you to take notice of that and dismiss Count
5 I. I appreciate it.

6 THE PRESIDING OFFICER: Mr. French or Mr. Eckstein,
7 who will respond?

8 MR. FRENCH: Mr. Presiding Officer, ladies and
9 gentlemen of the Court. For Mr. Craft to stand up here
10 and to tell this body that there are three branches of
11 government is an insult.

12 For him, since we have been in this chamber,
13 to attempt to try the Department of Public Safety, Colonel
14 Milstead, Mr. Corbin, Mr. Murphy, and to talk about a
15 conspiracy that's going on, is not something that's going
16 to slip by you without your knowing what is really going
17 on here. After two-and-a-half weeks of waiting and
18 waiting and waiting to finally see what the Governor's
19 defense is to Article I, it has now become apparent that
20 there is no defense.

21 So Mr. Craft demands that you all dismiss
22 this case before the world finds out that there is no
23 defense to Article I. This motion is nothing but a
24 smokescreen. It's a diversion. Mr. Craft wants you to
25 deal with any and everything but the facts of this case.

1 From the very beginning of this case,
2 respondent and his counsel have tried to keep this court
3 from focusing on the operative facts. November 13th,
4 November 14th, November 15th, and November 16th, that's
5 what this case is about.

6 Now, two of the witnesses that have appeared,
7 one wants to talk about the personal life of Colonel
8 Milstead. The other would like you to believe that what
9 Mrs. Peggy Griffith stated both on the stand and in her
10 statement never occurred, that there was no threat,
11 probably never a second meeting. The simple fact is,
12 these two people appeared in a very visible situation, and
13 it just so happens, not because of DPS, not because of the
14 Board of Managers, not because of the Senate, that both of
15 these people have outstanding warrants for their arrest.

16 I believe Mr. Craft would have you believe
17 that exercising those warrants is some kind of an impeding
18 of an investigation, intimidation of witnesses. It's the
19 duty and responsibility of the law enforcement societies
20 in this state to enforce warrants for arrest.

21 This Senate, the Board of Managers, no one
22 caused those warrants to issue. They issued long before
23 we started this proceeding. But simply because two of
24 their witnesses have outstanding warrants somehow or
25 another, Department of Public Safety should not arrest

1 those people. There's no basis in law or in fact for that
2 position.

3 We now come to Mr. Antonio Corio. You saw
4 the man testify here. You've heard Mr. Craft talk about
5 how somebody has intimidated this man, and he changed his
6 story. And I'm sorry to tell you that somebody did
7 intimidate him. If you would look at his affidavit that
8 he prepared and gave to us, you're going to see who
9 intimidated him. Mr. Craft did. We didn't put the words
10 in this affidavit. There's some pretty rough language in
11 there, but we didn't manufacture the words. We didn't put
12 them there. Mr. Antonio Corio did.

13 I think if there's intimidation, this body
14 should follow through on the intimidator, and also, if you
15 have any question about the affidavit, I would strongly
16 suggest to you that somebody in this Senate ask that a
17 subpoena issue and that he come back and testify before
18 this body. This motion is a smokescreen. Let's get to
19 the November days. Let's get to that defense. Let's get
20 on with this thing, and let's not be diverted.

21 The Board of Managers respectfully requests
22 that you vote to deny and dismiss this motion. Thank you.

23 THE PRESIDING OFFICER: Mr. Craft, I think you had
24 one minute left on your time, if you wish to use that
25 minute.

1 MR. CRAFT: Thank you, Mr. Presiding Officer,
2 ladies and gentlemen of the Court of Impeachment.

3 In my opening statement, I told this body
4 that I wasn't interested in bringing out and have tried
5 not to bring out the dirty linen in this state. We've got
6 a problem here and don't know how to address it. I've
7 spent time in judge's chambers talking about it. I've
8 talked to the defense counsel. There's something wrong.
9 And I think you can never err, if you're going to err, on
10 finding out what the facts are.

11 I think that we all have a responsibility to
12 do that. Let the chips fall where they may. Let's dig
13 for the truth. Let's find the truth. You know, I kind of
14 resent the fact that anybody would sit here and say that
15 we haven't tried to answer the allegations that have been
16 made in the impeachment charge on Count I.

17 What is material here is what happened
18 leading up to that date and what happened after that date.

19 THE PRESIDING OFFICER: Counsel, your time has
20 expired. Would you bring your arguments to a close.

21 MR. CRAFT: I'd ask you to consider that if we're
22 going to err on one side or the other, err on the side of
23 finding out what the facts are. I thank you.

24 THE PRESIDING OFFICER: Are there questions by
25 Senators? I would --

1 Senator West.

2 SENATOR WEST: Mr. Presiding Officer, either to
3 yourself or to either one of the counsels, is there not --
4 the only information I have, unfortunately, is what I read
5 in the paper this morning, but is there not an
6 investigation on the part of the Pima County Attorneys
7 going on as a result of the Senate inquiry reference to
8 Department of Public Safety?

9 THE PRESIDING OFFICER: Senator Kunasek, I think,
10 could answer that question for you.

11 SENATOR KUNASEK: Mr. Presiding Officer, Senator
12 West, the allegations that were brought, not only in the
13 most recent weekend, but the prior allegations of a
14 statement, are being looked into by the federal
15 authorities.

16 The FBI was additionally asked over the
17 weekend to look into the current allegations. They are, I
18 have been informed verbally by Mr. McNamee, doing that.
19 The Senate leadership, Senator Stephens and myself,
20 yesterday sent a letter requesting Mr. Neilly of the Pima
21 County Attorney's Office to look into these allegations as
22 well. We have no reason to suspect one way or the other
23 as to these allegations. However, we, Senator Stephens
24 and myself, felt that they were of sufficient interest to
25 warrant looking into, and when that report is completed,

1 we will furnish it for all the members of the Court.

2 SENATOR WEST: Mr. Presiding Officer, I guess
3 that's my point. In fact, I assume Senator Kunasek had
4 put into the record then that both the Departments of
5 Justice, the Federal Bureau of Investigation, and the Pima
6 County Attorney's Office, the proper forum, certainly to
7 investigate allegations as serious as these that have been
8 made, apparently are currently doing that, and they are
9 proper and appropriate bodies to conduct that
10 investigation, and I think that is where it should rest.

11 THE PRESIDING OFFICER: Mr. Craft?

12 MR. CRAFT: Mr. Presiding Officer, in response to
13 Senator West, I'd just like to say that our problem is
14 that -- I fully agree that it ought to be handled by an
15 outside group and there ought to be an ongoing
16 investigation.

17 What we're concerned about is, even as of
18 last night, we found out that a new witness had been
19 tampered with, had been threatened, and as we present our
20 case, if our witnesses who are testifying here who have
21 their name publicly announced in our witness list are
22 intimidated by the Department of Public Safety, as Captain
23 Coy Johnston was last night, and he indicated to us that
24 he has been told by Colonel Phelps and questioned by
25 Colonel Phelps, that that is the pattern which is

1 occurring which makes it so that it is very difficult, if
2 not impossible, to have witnesses come before you and give
3 you their version of what they think the facts are. And
4 that is the problem for -- that I think needs to be
5 addressed, not that the other matters are not properly
6 being looked into. They are being properly looked into,
7 I'm sure, as of yesterday. But it is the ability to bring
8 witnesses on the stand who are not going to be tampered
9 with before or after they testify to you. And that's what
10 we'd like you to address.

11 THE PRESIDING OFFICER: Senator Osborn had the next
12 question.

13 SENATOR OSBORN: Mr. Presiding Officer, I wonder if
14 I might ask a question of you.

15 THE PRESIDING OFFICER: I'll try to answer it,
16 Senator.

17 SENATOR OSBORN: I'm referring to the Board of
18 Managers' opposition to respondent's motion for, one,
19 mistrial, or two, in the alternative, to dismiss. That's
20 Document No. 81. And on page 6 of that document, the
21 Board of Managers, in the last paragraph on that page,
22 "Pursuant to Arizona law, a new trial should not be
23 granted as a disciplinary measure." And they go on to
24 say, "but only where such misconduct affects the
25 substantive rights of the aggrieved party." Then there's

1 a couple of citations, and then again on page 7, the
2 second line, "Respondents must show a probability that the
3 misconduct will actually influence the verdict."

4 My question to you, Mr. Presiding Officer,
5 is: Do those statements comport with the Arizona Rules of
6 Evidence?

7 THE PRESIDING OFFICER: Senator, I would respond to
8 you by saying that the Rules of Evidence are not involved.
9 These are rulings on substantive matters of law.

10 SENATOR OSBORN: Perhaps I should reword my
11 question.

12 THE PRESIDING OFFICER: And I would say to you that
13 this is ultimately a decision you have to make, because if
14 you believe it -- I would say to you that I believe that
15 these are the proper standards to be applied.

16 Whether you believe in your judgment that the
17 facts are such that the activities which have occurred in
18 fact would affect the substantial rights of the parties in
19 this matter and influence the verdict, then a proper
20 remedy would be to either grant a mistrial and start this
21 procedure all over, because there would be no double
22 jeopardy involved to start it over again, or to dismiss
23 subject to being restarted, or dismiss with what we call
24 prejudice, which would mean without the right to restart
25 it.

1 All three of those remedies, I believe, are
2 available to this body if you believe under the facts that
3 such conduct would in fact have a prejudicial effect on
4 the parties' rights.

5 SENATOR OSBORN: Thank you.

6 THE PRESIDING OFFICER: Now, I believe before we
7 proceed further to Senators' questions, that the motion is
8 actually in the form of two motions in the alternative.

9 The first is a motion for mistrial, which
10 would be because of the alleged conduct of the parties to
11 scrap this trial so far and start over again. The second
12 subsection of the motion is a motion to dismiss, and as I
13 mentioned, you could dismiss and start the proceedings
14 anew or you could dismiss and preclude the matter from
15 being started again by dismissing it with prejudice.

16 Now, both of those motions have, I believe
17 from reading the motion, a sub-part that requires or
18 requests the body to grant an evidentiary hearing whereby
19 all the things that are alleged in the petition or the
20 motion could be proved by the evidence that is offered
21 by -- suggested by Mr. Craft.

22 So in ruling on both of these sub-parts of
23 the motion, the motion for directed verdict or mistrial --
24 let's say motion for mistrial -- and the motion to
25 dismiss, you should consider as a sub-part of each of

1 those two motions that Mr. Craft is asking permission to
2 have an evidentiary hearing to prove the things that he
3 has alleged exist in his motion.

4 However, you may choose, I feel, to decide
5 that -- to just assume that everything he says in his
6 motion is correct for the purpose of deciding your motion.
7 And if you do, you can choose, then, to vote on it yes or
8 no based upon what is alleged to have occurred. So that's
9 my information for you.

10 Do you have further questions?

11 Yes, Senator Higuera was next.

12 SENATOR HIGUERA: Mr. Presiding Officer, will Mr.
13 Craft yield to a couple of questions?

14 MR. CRAFT: Yes, Your Honor, yes, Senator Higuera.

15 SENATOR HIGUERA: Mr. Craft, were you aware that
16 there were outstanding warrants against these two
17 individuals that we're addressing at this time?

18 MR. CRAFT: Not only was I not aware, Senator, but
19 neither were Mrs. Fields or Mrs. Johnston.

20 SENATOR HIGUERA: Thank you, Mr. Craft. Mr. Craft,
21 do you believe that the Department of Public Safety or any
22 other police agencies should overlook and disregard
23 outstanding warrants on any future witnesses or these two
24 witnesses? Are you asking the police agencies to overlook
25 and disregard outstanding warrants?

1 MR. CRAFT: Not at all, Senator. What we are
2 saying is that it's totally proper for the Mesa Police
3 Department on a traffic warrant to execute their warrants.

4 I am told that every police department in
5 this jurisdiction, whether it's Glendale or whether it's
6 Phoenix or whether it's Mesa or whether it's Scottsdale,
7 has what they call a warrant officer and he goes around
8 and informs people that may not know that there is a
9 warrant commanding their appearance before a court, and
10 they go by generally and they ask them are they aware of
11 it, and if they're not aware of it, they tell them that
12 they need to go down to court and take care of it, and
13 they warn them if you do not go down and take care of this
14 problem, we will have to come back a day or sometime later
15 and arrest you.

16 What I'm suggesting, Senator, is that in this
17 situation, it isn't that we're objecting at all that
18 Scottsdale Police have the right to effect an arrest on
19 their warrant within their jurisdiction, and the same is
20 true with Mesa or anywhere else.

21 What we're objecting to is a state police who
22 does not have jurisdiction, Senator, to invade the
23 territory of the Mesa Police Department or the Scottsdale
24 Police Department and effect an arrest themselves. It is
25 unheard of, I am told, for the Department of Public Safety

1 to use their fugitive detail, which is who made the arrest
2 on Mrs. Fields. They're out looking for fugitives who are
3 fleeing from justice, and in this instance, they used six
4 police officers to arrest Mrs. Fields through a felony
5 kind of a process on a traffic ticket that was issued by
6 Mesa.

7 So, that's what I'm objecting to, sir, not
8 the fact that she could have been arrested in Mesa by the
9 Mesa Police Department, but the DPS went out and did this.
10 They invaded the jurisdiction both of Scottsdale, they
11 invaded the jurisdiction of Mesa, and my reading of the
12 state statute is that that is not what their purpose is,
13 sir.

14 SENATOR HIGUERA: Thank you, Mr. Craft. I guess
15 your overwhelming response is that these folks invaded
16 jurisdiction. That's what you're claim at this time?

17 MR. CRAFT: And I'm saying that they did it, sir,
18 in order to intimidate people who are witnesses before
19 this body and to frighten them or scare them or to make
20 them so that they're apprehensive about coming here and
21 tell you, Senator, the truth as they know it.

22 THE PRESIDING OFFICER: Counsel, perhaps by error,
23 you have caused some confusion in the Senators' minds, and
24 I don't wish you to unintentionally mislead them. But as
25 I understand it, and of course all I know is what's in the

1 newspapers and what you've said, that this really was not
2 just a misdemeanor traffic ticket. This was a court order
3 that was based upon the failure to have done something
4 that was required in the traffic procedure. Now, if
5 that's not correct, you tell us.

6 MR. CRAFT: Your Honor, it's my understanding as of
7 yesterday, when Mrs. Fields appeared before the Court in
8 Mesa, that the judge was not aware of what she was
9 appearing for himself.

10 THE PRESIDING OFFICER: But the outstanding warrant
11 was not for the traffic citation. It was for the
12 violation of something past the conviction in the traffic
13 violation.

14 MR. CRAFT: As of the moment, Your Honor, I have
15 not seen what the warrant is. That may very well be the
16 fact, Your Honor.

17 (Discussion off the record.)

18 MR. CRAFT: I am informed that it was a warrant
19 issued for failure to appear at an Alcoholics Anonymous
20 meeting or a number of those classes that were taken, but
21 the judge informed Mrs. Fields yesterday that that was
22 voluntary and not mandatory. So she's confused. I'm
23 confused. And that's the facts as I know them to date,
24 Your Honor.

25 THE PRESIDING OFFICER: Senator Mawhinney, you had

1 a question.

2 SENATOR MAWHINNEY: Yes, Mr. Presiding Officer.
3 The issue of the mistrial, if we were to declare a
4 mistrial, as I understand it historically is used, then
5 theoretically the purpose for that is to clear out the
6 jury so that they could no longer be, with whatever
7 tainted evidence they had received, be capable of coming
8 to some false conclusion.

9 Clearly that's not an option here. Clearly
10 this Senate, regardless of whatever bad information we
11 get, whatever good information we get, whatever argument
12 we get, have to make the decision here. How would we
13 propose an option that dealt with a mistrial if we're not
14 going to change any of the players, any of the parties,
15 any of the participants? How in the world could we do a
16 mistrial other than just going through the entire
17 operation again pretending that it never happened before?

18 THE PRESIDING OFFICER: That's a good question,
19 Senator Mawhinney, but I could only explain or distinguish
20 it to a situation where you not only are jurors, but
21 you're the judge in this case. And it is not infrequent
22 that in courts where you have a judge trial without a
23 jury, that possibly a mistrial could be declared, and even
24 a judge trial, and start over again with the same judge,
25 merely changing the order of proof or the witnesses and

1 the testimony in the case the second time.

2 So I think that the analogy is not quite true
3 to moving out all the jurors and getting fresh jurors. It
4 could be a judge-type trial that a mistrial would be
5 granted.

6 SENATOR MAWHINNEY: Thank you.

7 THE PRESIDING OFFICER: Senator Kunasek?

8 SENATOR KUNASEK: Mr. Presiding Officer, I would
9 respectfully request that we take this under advisement at
10 this time until we have a chance to find out some more of
11 the details, and perhaps take up a ruling on it 24 or 48
12 hours hence.

13 THE PRESIDING OFFICER: All right. Could we then
14 say that I will hear from the body tomorrow morning at 9
15 o'clock whether it's in a position to rule at that time,
16 and if not, to give me a definite date thereafter so that
17 I can keep it on the calendar?

18 SENATOR: KUNASEK: Yes, sir.

19 THE PRESIDING OFFICER: Senator West.

20 SENATOR WEST: Mr. Presiding Officer, I hoped it
21 wasn't going to be that easy for you. I was hoping you
22 could give us a ruling under Rule 22.

23 THE PRESIDING OFFICER: I think I indicated to
24 Senator Osborn that this is a mixed question of fact and
25 law, and really it's a decision you have to make as to

1 whether the facts are sufficient, that as a matter of law,
2 you feel this motion should be granted. So I'm not going
3 to help you on that. Thank you.

4 Senator Usdane.

5 SENATOR USDANE: Mr. Presiding Officer, I'd like to
6 speak in favor of Senator Kunasek's motion to take it
7 under advisement until tomorrow, with the idea that it
8 would allow the Senate the opportunity at 5:00 p.m., or
9 sometime around that time this afternoon, to go into a
10 public proceeding at the completion of today's hearings
11 and listen to counsel and discuss it. Because we haven't
12 read the motion by the Board of Managers yet, really, or
13 had any time to evaluate it.

14 THE PRESIDING OFFICER: Senator Wright?

15 SENATOR WRIGHT: Mr. Presiding Officer, question of
16 the Presiding Officer. Can you recall at any time in your
17 experience on the bench of running into a request for a
18 mistrial declared on the basis of a police state,
19 misbehavior of the police, intimidation of witnesses, et
20 cetera, or have you read of anything in the literature?
21 And in that event, would you have any advice to offer or
22 any guidance to offer to this body?

23 THE PRESIDING OFFICER: In my experience, I have
24 been involved in one previous case. It was a criminal
25 case, where defense counsel did request a mistrial based

1 upon police misconduct in the case, overreaching and
2 intimidation of witnesses. I don't want to name names or
3 the people that were involved, but it was not granted
4 based on facts peculiar to that case.

5 It is not unheard of that such an action
6 could occur. I don't know how many other judges ever had
7 that same experience, but it's possible to occur. I do
8 not wish to give you the feeling of my own evaluation of
9 the conduct in this case as to whether or not it rises to
10 that level. I have to leave that to you.

11 SENATOR WRIGHT: Mr. Presiding Officer, one further
12 question. Is it appropriate for this Court to enjoin or
13 in some manner restrict contemplated activities, or at
14 least alleged contemplated activities, of the Department
15 of Public Safety in an attempt to influence witnesses?

16 THE PRESIDING OFFICER: I personally don't believe
17 this Court has the power to tell the Department of Public
18 Safety what it should or should not do. It's just like
19 you cannot tell the press whether they should or should
20 not publish something. But if you later then find that
21 the situation has caused substantial prejudice in a case,
22 you take whatever remedy that you feel is necessary to
23 correct that prejudice.

24 If, in the facts in this case, you believe
25 that substantial prejudice has occurred as a result of the

1 respondent's case because of the conduct, if proven, or if
2 assumed to be correct based upon the motion, then your
3 remedy is not to tell the Department of Public Safety to
4 do or not to do anything, but to correct the prejudice,
5 and that would be in the form of dismissing the case or
6 granting a mistrial.

7 SENATOR WRIGHT: Sorry, Mr. Presiding Officer. You
8 just raised more questions.

9 THE PRESIDING OFFICER: Maybe I shouldn't answer so
10 many.

11 SENATOR WRIGHT: If I, as a juror, do not believe
12 that I have been substantially influenced by testimony
13 that may or may not have been tainted, would that relieve
14 perceived prejudice?

15 I mean, if each one of us, for instance,
16 being fully aware, being made fully aware of the
17 allegations of the defense counsel, and the response of
18 the Board of Managers feel that the witnesses were not, or
19 at least their testimony was not negatively or positively
20 perceived by us because of some influences external to
21 their testimony, isn't that, in a sense, responding to a
22 declaration for a mistrial, because we are saying, hey, we
23 weren't influenced by that?

24 THE PRESIDING OFFICER: That's exactly the
25 quantitative decision you must make as not only jurors,

1 but judges in this case. If you did feel that you as a
2 trier of fact had been influenced or would be influenced
3 by these to some extent to the point that you feel that
4 prejudice had occurred to the parties, or would occur to
5 the parties that would affect your verdict, then you
6 should grant the motion to dismiss or for a mistrial.

7 If you feel at this point that that conduct
8 has not or would not create substantial prejudice in your
9 mind against the parties or cause a problem to prejudice
10 the rights of the respondent, then you don't need to grant
11 either of the motions.

12 SENATOR WRIGHT: Thank you, Mr. Presiding Officer.

13 THE PRESIDING OFFICER: Other questions by
14 Senators?

15 Yes, Senator Pena.

16 SENATOR PENA: Mr. Presiding Officer, would an
17 evidentiary hearing be limited only to those who are
18 mentioned in these two documents, or would it open up
19 again to bring all of the witnesses back again?

20 THE PRESIDING OFFICER: Senator, I can't really say
21 that it is limited to only the people who are mentioned
22 there, because it would, of course, necessitate bringing
23 people in to corroborate the statements made there. It's
24 possible that other witnesses would also be required
25 besides the names of the people that are listed.

1 Senator Kay?

2 SENATOR KAY: Mr. Presiding Officer, can the Chair,
3 can the Presiding Officer tell us whether Colonel Phelps
4 will be called as a witness to be interrogated upon the
5 allegations made by Mr. Craft?

6 THE PRESIDING OFFICER: Mr. Craft, would you
7 respond to that?

8 MR. CRAFT: Senator Kay, it's my desire as of last
9 night to call Colonel Phelps. He was on our witness list,
10 and after last evening, the answer is yes, sir.

11 SENATOR KAY: Thank you.

12 THE PRESIDING OFFICER: I think we have a motion
13 before us, which is Senator Kunasek's motion, to take this
14 matter under advisement and report tomorrow at 9:00 a.m.
15 on whether you're ready to vote. Is there any other
16 discussion or debate on Senator Kunasek's motion?

17 Question is called. It would require a
18 majority of the members of this body to sustain Senator
19 Kunasek's motion to take this matter under advisement.

20 All those in favor signify by saying "aye."
21 All those opposed say "no." The "ayes" appear to have it.
22 They do have it, and it's so ordered.

23 All right. The next matter that I had listed
24 was Senator Stephens' subpoena of Mr. Craft. I believe at
25 that point we were going to discuss it sometime today as

1 to whether you wished to proceed with requesting the body
2 to vote on the issuance of the subpoena.

3 Would you state your position on that,
4 Senator Stephens?

5 SENATOR STEPHENS: Mr. Presiding Officer, thank
6 you.

7 I would still like to ask the body to
8 consider granting the subpoena for Mr. Craft, as Mr. Craft
9 appears to be at the center of a lot of the testimony
10 given by witnesses time and time again, particularly in
11 the issue of the meeting between Lieutenant Beau Johnson,
12 Mr. Craft, Mr. Burke and the Governor, where Lieutenant
13 Beau Johnson alleged that he informed the Governor that
14 the alleged death threat incident was a possible felony.
15 And that seems to be a matter of controversy, and I think
16 it would provide testimony of value to the Senate in our
17 decision-making capacity on this particular Article.

18 THE PRESIDING OFFICER: I think Mr. Leonard had
19 indicated he wanted to state his position on it when we
20 last adjourned on this point.

21 Mr. Leonard?

22 MR. LEONARD: Mr. Presiding Officer, I wonder if I
23 could ask Senator Stephens to yield to a question.

24 SENATOR STEPHENS: Yes, that would be fine.

25 MR. LEONARD: What would would be your intention as

1 to the timing of the testimony?

2 SENATOR STEPHENS: Well, Mr. Leonard, the Presiding
3 Officer mentioned that the appropriate time to hear from
4 witnesses that Senators would subpoena would be after the
5 defense had a chance to call all of its witnesses, and I
6 would think that would be particularly appropriate in this
7 case, since perhaps some more witnesses would relate
8 situations where Mr. Craft was a material participant in
9 those meetings or proceedings.

10 MR. LEONARD: Thank you, Senator.

11 Mr. Presiding Officer, I would assume that if
12 Mr. Craft were subpoenaed, and were to testify, that he
13 would not in any way be disqualified with respect to
14 continuing to act as counsel, in light of the fact that I,
15 obviously, would be here, or other co-counsel would be
16 here during his testimony. Would that be the Presiding
17 Officer's position?

18 THE PRESIDING OFFICER: Yes. I so stated the other
19 day.

20 Under the ethical rules, normally a lawyer
21 cannot participate as a lawyer, then step out of that role
22 and testify as a witness, and step back into the role of
23 lawyer later, but that's only when that choice is left to
24 the lawyer.

25 In this case, which is different than most,

1 the request to become a witness is being made by a Senator
2 and not by the lawyer, and so I would allow him to step
3 back into the role as lawyer after he testifies.

4 However, in order to avoid any confusion, I
5 wish to correct what Senator Stephens mentioned, that the
6 witness would be called after all of the testimony is in
7 as placed by parties. That would be after rebuttal, also,
8 by the Board of Managers.

9 MR. LEONARD: As I understand the Presiding
10 Officer's position, he could not be called as a witness by
11 the Board of Managers. Their case is over on rebuttal.
12 But he could be called, or the intention would be to call
13 him during that period of time in which the members of the
14 Senate are calling witnesses?

15 THE PRESIDING OFFICER: That's correct. Under our
16 rules, neither party can call an attorney or other officer
17 of this Court as a witness.

18 However, we did decide that Senators could do
19 so, and it would only be done if all the evidence is in by
20 both parties.

21 (Discussion off the record.)

22 MR. LEONARD: Mr. Presiding Officer, it's my
23 understanding that the Senate issues the subpoena in the
24 name of the body as opposed to an individual member.

25 THE PRESIDING OFFICER: That's correct.

1 MR. LEONARD: And that that's done by a majority
2 vote?

3 THE PRESIDING OFFICER: That's correct.

4 MR. LEONARD: Mr. Presiding Officer, my position
5 would be that the respondent would not resist the subpoena
6 on any legal technical grounds, but I would request that
7 if that subpoena is to be issued, it be done under the
8 rules, and that it be done by a majority and by a roll
9 call vote. That would be my only request.

10 THE PRESIDING OFFICER: Well, Senator Usdane?

11 SENATOR USDANE: Mr. Presiding Officer, I'd like to
12 ask a question, if I may. I'm not sure I understand, so I
13 guess I'll ask two.

14 One is, could Mr. Craft appear on a voluntary
15 basis at the conclusion rather than be subpoenaed, if he
16 chose to, rather than be subpoenaed?

17 And two, if there was contradictory
18 information given, would we then be allowed to recall a
19 witness, since it's at the conclusion of the testimony?

20 THE PRESIDING OFFICER: In order there not be any
21 confusion on that, Senator, I don't think it would make
22 any difference whether Mr. Craft wanted to or not. He
23 could be called.

24 And number two, yes, the body could call
25 additional witnesses, or even the same witnesses who had

1 testified before on the subpoena of Senators.

2 All right. You've heard the positions of the
3 parties, and I don't believe that we can give Mr. Leonard
4 the privilege of requesting a roll call vote. However, if
5 anyone else requests one, it could be done.

6 Senator Kay, did you have a comment?

7 SENATOR KAY: Yes, Mr. Presiding Officer, that is
8 the point that I was going to make. That under Rule 16,
9 Item D, only Senators could, not counsel, request roll
10 call votes.

11 THE PRESIDING OFFICER: All right. That requires a
12 concurrence of five members in order to request a roll
13 call vote. Is that correct?

14 I'm sorry. I misunderstood. Senator Kay,
15 are you asking for a roll call vote?

16 SENATOR KAY: No, I'm not asking for one, sir. I'm
17 just pointing out that, in fact, I rose before the Chair
18 pointed out to the body that Mr. Leonard has no standing
19 to ask for a roll call vote. Only a Senator can do that.

20 THE PRESIDING OFFICER: I'm sorry. I was hearing
21 too many conversations from different directions. I
22 misunderstood you, Senator. There is not a request at
23 this point.

24 MR. LEONARD: Mr. Presiding Officer?

25 THE PRESIDING OFFICER: Yes.

1 MR. LEONARD: I do believe I have the request -- or
2 do have the right to request that a member with sufficient
3 seconds of this body do this by a recorded roll call vote,
4 and I would trust that one member together with the
5 sufficient seconds would do so.

6 THE PRESIDING OFFICER: All right. I understand
7 the way you are requesting it, then.

8 MR. FRENCH: Mr. Presiding Officer?

9 THE PRESIDING OFFICER: Yes, Mr. French.

10 MR. FRENCH: I feel compelled to make a statement
11 in regard to Mr. Craft's testimony. Because of his
12 relationship with the respondent, that is, Governor
13 Mecham, I know of no rule, regulation, or anything else
14 that would allow him under any circumstances to testify
15 adversely to his client. And I think this body should
16 know that.

17 THE PRESIDING OFFICER: All right. I understand
18 your statement.

19 All right. All those in -- Senator Sossaman?

20 SENATOR SOSSAMAN: Mr. Presiding Officer, if no one
21 else would like to stand, I will, in the spirit of
22 openness, and if I could get four other people to stand
23 with me, I would ask for a roll call vote.

24 THE PRESIDING OFFICER: All right. That does
25 require a concurrence of five. We have one, two, three,

1 four -- there is just four. Does it require five in
2 addition to the movant? I believe it does. It fails,
3 then, for the lack of the fifth concurrence.

4 All right. The motion then will be by an
5 oral motion. All those in favor of the granting -- or the
6 issuance of the subpoena to Mr. Craft to require him to be
7 a witness after the rest of the evidence on this Article
8 signify by saying "aye." Opposed say "no."

9 The "ayes" appear to have it. They do have
10 it, and it's so ordered.

11 I believe we're at a point now where we
12 resume the taking of testimony. Mr. Craft, who is your
13 next witness?

14 MR. LEONARD: Mr. Presiding Officer, our next
15 witness is Captain Coy Johnston, and I think we're looking
16 for him right now.

17 THE PRESIDING OFFICER: Would somebody call Captain
18 Johnston, please?

19
20 COY H. JOHNSTON,
21 a witness herein, after having been first duly sworn, was
22 examined and testified as follows:

23

24

25

(Next page, please.)

1 DIRECT EXAMINATION

2 BY MR. LEONARD:

3 Q. Good morning, Captain Johnston.

4 A. Good morning.

5 Q. Would you state for the Court your full name,
6 please.

7 A. Coy Hugh Johnston.

8 Q. And you're a captain in the Department of
9 Public Safety for the State of Arizona?

10 A. Yes, sir.

11 Q. And you're appearing here by subpoena; is
12 that correct?

13 A. Yes, sir.

14 Q. That is, you've been subpoenaed by the
15 respondent in this case?

16 A. Yes, sir.

17 Q. When did you begin your employment as a
18 Public Safety officer?19 A. I began my employment with the Arizona
20 Highway Patrol in July of 1956.21 Q. And it's my understanding from your
22 background that with the exception of a few months, that
23 you've been continuously employed since 1956 up to date as
24 a police officer; is that right?

25 A. Yes, sir.

1 Q. And when were you promoted to captain?

2 A. On June 7th, 1981.

3 Q. What were the circumstances of your promotion
4 to a captaincy?

5 A. Well, of course, I had competed through a
6 process and had placed on the list for promotion, and a
7 vacancy had occurred on the Law Enforcement Merit System
8 Council, and I was promoted and assigned to be the
9 business manager of the Law Enforcement Merit System
10 Council at that time.

11 Q. Captain, keep that microphone up close and
12 speak in there so that all the Members of the Senate can
13 hear you.

14 So that on June 7th of 1981, you became the
15 business manager for the Law Enforcement Merit System
16 Council. Is that the correct name?

17 A. Yes, sir.

18 Q. And how long did you hold that job?

19 A. I was in that position until August of 1985.

20 Q. Captain, tell us a little bit about the Law
21 Enforcement Merit System Council. What does it do?

22 A. The Law Enforcement Merit System Council
23 consists of a three-member board that is appointed to
24 oversee the personnel practices, establish rules for
25 hiring, discipline, termination, and so forth, of

1 employees of the Department of Public Safety.

2 Q. And is it limited to issues involving
3 employees of the Department of Public Safety?

4 A. At the present time it is. There was a
5 period of time when they also had considered issues
6 involving the Arizona Criminal Intelligence Systems
7 Agency.

8 Q. What was the relationship between the Merit
9 System Council and the leadership, the management of the
10 Department of Public Safety in June of 1981, when you
11 became the business manager?

12 A. Well, they were literally at war with each
13 other at that time. There was very little relationship
14 between the two agencies.

15 Q. Was there a failure of communication between
16 the Council members on the one hand and it's staff and the
17 leadership of DPS on the other?

18 A. Yes. From both directions there was little
19 communications.

20 Q. And what was the cause of that strained
21 relationship?

22 MR. ECKSTEIN: Your Honor, I object. This
23 testimony is not relevant nor material to this proceeding.
24 This proceeding involves allegations of obstruction of
25 justice that relate to the Governor's conduct. At best,

1 this is extrinsic evidence that relates to how DPS
2 operates or how it operated in 1981. It is irrelevant.
3 It is immaterial. And it will only prolong this
4 proceeding unnecessarily if it is gone into.

5 THE PRESIDING OFFICER: Counsel, could you just, in
6 just a few words, tell me how you feel this is material?

7 MR. LEONARD: Mr. Presiding Officer, it's
8 foundational to both a conversation which this witness had
9 with Director Milstead, and it is also foundational with
10 respect to Director Milstead's testimony that he never
11 interfered in the Merit Selection System process.

12 MR. ECKSTEIN: Your Honor, could I be heard on
13 that?

14 THE PRESIDING OFFICER: Yes, you may.

15 MR. ECKSTEIN: Under Rule 608(b), counsel well
16 knows that extrinsic evidence of acts of misconduct or
17 statements is not admissible. While it is permissible to
18 cross-examine a witness with respect to acts or statements
19 that that witness may have made, it is not permissible to
20 put on the stand a witness such as this witness to
21 contradict what a witness may have said on the stand.

22 608(b) is very clear on that. State v Corty,
23 566 P2d, 318, is very clear on that. That kind of
24 evidence is absolutely impermissible on direct
25 examination.

1 THE PRESIDING OFFICER: The objection is sustained.

2 BY MR. LEONARD:

3 Q. Did you, Captain Johnston, during the period
4 of time that you were employed as the business manager for
5 the Merit System Council, have a direct conversation with
6 Director Milstead at which another member of DPS was
7 present?

8 MR. ECKSTEIN: Same objection.

9 MR. LEONARD: This is a direct conversation, if the
10 Court please, conversation between this witness and
11 Director Milstead.

12 THE PRESIDING OFFICER: I thought we discussed
13 earlier that my ruling left open attacks on the
14 credibility of Director Milstead's testimony that related
15 to opinion evidence based upon knowledge of witnesses, the
16 witness's knowledge of Director Milstead, or character
17 testimony, opinion testimony, based upon reputation in the
18 community. But specific bad acts not amounting to the
19 commission of a felony, or extraneous matters that were
20 not included in the acts that are material in this case,
21 are just not admissible.

22 And I think the question falls within those
23 parameters. I think that it is excluded. It does not
24 amount to matters that are directly related to this
25 matter, and would amount to specific conduct of some time

1 ago that deals with extraneous matter.

2 So, we're dealing with the issues -- and I'm
3 looking at your second supplemental witness list, which
4 relates to Captain Coy Johnston, and it does not include
5 anything concerning what you're about to question the
6 witness on. You say that he is to be here to testify
7 regarding admissions by Ralph Milstead regarding his
8 willingness to compromise his testimony with respect to
9 allegations involving respondent.

10 Now, is that relevant to this issue?

11 MR. LEONARD: If the Court please, there is a
12 statement which this witness was privy to which he heard
13 Milstead make that goes directly to Milstead's
14 credibility. The statement has to do with whether or not
15 what the Director is willing to do in order to win. That
16 goes directly to the credibility of the complaining
17 witness against the respondent.

18 It is clearly admissible as a statement made
19 by the complaining witness that shows the witness's
20 propensity or willingness to, in this case, lie. And I
21 think that that is clearly admissible under the rules.
22 This witness was a witness right there when the statement
23 was made. And the questions I'm asking merely lay the
24 foundation to get to the meeting at which Director
25 Milstead made that statement.

1 And the statement is simply this --

2 MR. ECKSTEIN: Excuse me, Your Honor --

3 MR. LEONARD: -- "I would lie to win."

4 THE PRESIDING OFFICER: Mr. Eckstein, now that
5 we've heard what it is that the witness is going to say,
6 go ahead.

7 MR. ECKSTEIN: I am shocked, but perhaps I
8 shouldn't be, at counsel's conduct.

9 MR. LEONARD: Counsel, stop attacking the lawyers
10 in this case and address the issues.

11 MR. ECKSTEIN: Mr. Presiding Officer, I have heard
12 counsel say clearly, clearly it's admissible. I have not
13 heard one citation, one rule, that suggests that it is
14 permissible that this evidence be admitted.

15 Indeed, under 608(b) and under State v Corty,
16 it is not. Extrinsic evidence of specific acts is not
17 admissible on direct examination. While it is fair to
18 cross-examine a witness about that, it is not permissible
19 to go into that on direct examination of another witness.

20 Your Honor did state properly the rule that
21 opinion evidence as to reputation is permissible, but not
22 specific acts.

23 THE PRESIDING OFFICER: I'm going to change my
24 ruling. I'm going to overrule the objection as to this
25 particular question.

1 You may answer, sir. Do you remember now
2 what the question is?

3 BY MR. LEONARD:

4 Q. The question was: Did there come a time,
5 Captain Johnston, when you had a meeting which included
6 Director Milstead and another officer of the Department, I
7 believe Major Gary Ross?

8 A. Yes, sir.

9 Q. Now, as a foundation to that conversation,
10 Captain Johnston, do you have an opinion as to whether or
11 not Director Milstead is a competitive type person?

12 A. Yes, sir.

13 Q. And what is that opinion?

14 A. I believe he's a very fierce competitor.

15 Q. And were you and Major Ross and Director
16 Milstead discussing a matter that had to do with a dispute
17 between the Merit System Council and the management of DPS
18 at the time of this conversation?

19 MR. ECKSTEIN: Object to the question as leading.

20 MR. LEONARD: It's foundational.

21 MR. ECKSTEIN: Foundation questions cannot be
22 established by leading questions.

23 THE PRESIDING OFFICER: Overruled. You may answer.

24 THE WITNESS: You're going to have to repeat that
25 one.

1 BY MR. LEONARD:

2 Q. Were the three of you discussing business
3 that had to do with the Department and the Merit System
4 Council?

5 A. Yes, sir.

6 Q. And was there a disagreement about what the
7 Council was doing on the one hand and the Department and
8 the Department's position on the other?

9 A. Yes, sir.

10 Q. And during the course of that conversation,
11 do you recall Director Milstead making a statement that
12 surprised you?

13 A. Yes, I did.

14 Q. What was the statement?

15 A. He stated to me that -- or to us that, "I
16 would lie to win."

17 Q. And what was your reaction to that statement?

18 A. Well, it surprised me that he would make that
19 statement.

20 MR. LEONARD: Now, if the Court please, the next
21 area that I'm going to go into is direct testimony by this
22 witness that will contradict testimony by Director
23 Milstead under cross-examination by Mr. Craft, to be found
24 at page 1445, and the Director made this statement, and I
25 quote from the record, Volume 7: "It's impossible for me

1 to interject myself into that Merit System Council
2 process."

3 And the second quote is found on page 1448 of
4 Volume 7, and Director Milstead said this: "Again, the
5 Merit System Council governs all the hiring practices that
6 he'd have to go to --" and "he'd" here is, he's talking
7 about former Lieutenant Mark Johnston "-- that Lieutenant
8 Johnston would have to go ask for a waiver of the time
9 extension that had expired so he could be reinstated as a
10 sergeant."

11 I'm prepared to show that this witness will
12 directly contradict that testimony. And I'd like to go to
13 that briefly, if I can.

14 THE PRESIDING OFFICER: Just a minute. As I
15 understand, these matters under Rule 613 and 608(a) are
16 extrinsic statements which are in contravention of the
17 answers that you got on cross-examination of the witness.

18 MR. LEONARD: Exactly.

19 THE PRESIDING OFFICER: And they're not admissible
20 under those. If you ask the questions, and you got
21 negative answers, you cannot now by the use of extrinsic
22 evidence attempt to impeach those answers.

23 Under 613(b): "Extrinsic evidence of a prior
24 inconsistent statement by a witness is not
25 admissible unless the witness is afforded an

1 opportunity to explain or deny the same and the
2 opposing party is afforded an opportunity to
3 interrogate him thereon."

4 MR. LEONARD: Well, Your Honor, if the Court
5 please, this testimony was elicited from Colonel Milstead
6 on cross-examination in this trial, and I am prepared to
7 show through this witness that that testimony was false.

8 And I believe under 613, that I have a right
9 to do that, because opposing counsel knows this witness
10 has been available to them. He was asked a week ago, I
11 believe last Wednesday, he was interrogated, or at least
12 had his testimony discussed with Colonel Gary Phelps.
13 There's no surprise here.

14 THE PRESIDING OFFICER: Counsel, 608(b), if you
15 have that before you, "Specific Instances of Conduct."

16 "Specific instances of the conduct of a
17 witness for the purpose of attacking or supporting
18 his credibility, other than conviction of crime as
19 provided in Rule 609, may not be proved by
20 extrinsic evidence. They may, however, in the
21 discretion of the court, if probative of
22 truthfulness or untruthfulness, be inquired into on
23 cross-examination of the witness:

24 "1. Concerning his character or
25 truthfulness or untruthfulness; or

1 "2. Concerning the character for
2 truthfulness or untruthfulness of another witness
3 as to which character the witness being
4 cross-examination has testified.

5 "The giving of testimony, whether by accused
6 or by any other witness, does not operate as a
7 waiver of his privilege," et cetera.

8 Now, isn't this extrinsic evidence of
9 contradictory statements or acts which cannot be proved by
10 extrinsic evidence under 608(b)?

11 MR. LEONARD: Except, Your Honor, it concerns the
12 character for truthfulness or untruthfulness of another
13 witness, which is Milstead.

14 THE PRESIDING OFFICER: As I read your position,
15 then anything that Director Milstead did that is
16 contradictory to his testimony bears upon his credibility?

17 MR. LEONARD: Your Honor, that is absolutely right,
18 and I think that's a commonly accepted principle of
19 evidence. If a witness takes the stand and testifies that
20 certain facts took place, or he did or did not do certain
21 things, the opponent has a right to put a witness on the
22 stand to show that that testimony was not truthful, and
23 that what was alleged either did or did not occur.

24 There's a direct confrontation between this
25 witness's testimony and the complaining witness's

1 testimony with respect to whether or not the complaining
2 witness in this case testified truthfully.

3 THE PRESIDING OFFICER: Mr. Eckstein?

4 MR. ECKSTEIN: Mr. Presiding Officer, that is
5 common in other jurisdictions, and whether that is common
6 under other rules, that is not the law. That is not the
7 rule in this state after 608(b), and after State v Corty.
8 It is clear that kind of evidence is not permissible.

9 THE PRESIDING OFFICER: I'll sustain the objection.

10 Senator Stump?

11 SENATOR STUMP: Mr. Presiding Officer, I realize
12 that the Rules of Evidence are a guide in these
13 proceedings. To my mind, the voracity, the truthfulness
14 of the witnesses, particularly main witnesses, is very
15 important. I think a person's general background and
16 their general way of being says something about them, and
17 I would like to hear what this witness has to say, and I
18 appeal.

19 THE PRESIDING OFFICER: All right. Senator Kay?

20 SENATOR KAY: Mr. Presiding Officer, your ruling
21 undoubtedly is correct in a court of law, and I think
22 Senator Stump is absolutely right. I think if we have
23 displays like this for the last ten minutes, we're going
24 to be basket cases here; one lawyer accusing the other of
25 unethical conduct, the other one shouting at the other.

1 Let's get to the facts. Let him answer the darn thing.

2 THE PRESIDING OFFICER: As I mentioned to you
3 before, I merely make preliminary rulings on evidentiary
4 matters. And if you in your wisdom feel that it's more
5 important to hear the evidence that I had ruled
6 inadmissible, you, of course, may do so by overriding my
7 ruling by a majority vote.

8 Is there any other discussion or debate on
9 the appeal? It has been requested, the appeal. It would
10 require a majority of the Senators to appeal and overrule
11 my decision.

12 And therefore, I would ask by voice vote at
13 this point, all those in favor of overruling my decision
14 signify by saying "aye." All those opposed say "no."

15 I'm afraid my ears are not as keenly attuned,
16 and I would request a roll call -- I'm sorry, a standing
17 vote, then. All those in favor of overruling my ruling,
18 please stand. There are 16 Members of the Senate who have
19 indicated.

20 We will ask for those who oppose my -- excuse
21 me -- in voting against the overruling of my decision to
22 stand. All right. 16 to 11.

23 Therefore, my ruling is overruled, and we
24 will now allow the witness to answer.

25 Could we at this point take our morning

1 recess. It's now five minutes past the -- we will then be
2 able to refresh the witness's recollection of the
3 question, and we can start at that point.

4 We'll stand at recess for 15 minutes.

5 (Recessed at 10:21 a.m.)

6 (Reconvened at 10:40 a.m.)

7 THE PRESIDING OFFICER: Thank you, ladies and
8 gentlemen.

9 The record will show the presence of a
10 majority of the members of the Board of Managers, their
11 counsel, and counsel for the respondent.

12 We'll resume with Captain Johnston on the
13 stand. Please call him.

14 Captain Johnston, I'll remind you, you're
15 still under oath, sir.

16 THE WITNESS: Yes, sir.

17
18 CONTINUED DIRECT EXAMINATION

19 BY MR. LEONARD:

20 Q. Captain Johnston, immediately before the
21 recess, we were about to discuss some specific cases which
22 you have of relating to statements concerning Colonel
23 Milstead that he did not interfere with or involve himself
24 with the Merit System process.

25 Do you recall the case of Casey Sinclair?

1 A. I believe you have that name wrong.

2 Q. All right. Casey Lincoln?

3 A. Casey Lincoln, yes, sir.

4 Q. And tell us just very briefly what that case
5 had to do with, and how Colonel Milstead involved himself
6 in the process.

7 A. Casey Lincoln had gone to the Director and
8 asked to be re-employed. He had been away from the
9 Department for just a little under two years. The
10 re-employment rule gives the Director the authority to
11 re-employ people if they have been gone less than a year.

12 The Director, in turn, sent him to the
13 Council, and he made a request to the Council to waive the
14 one-year period. The Council rejected that request in
15 their meeting on June 8th of 1983.

16 Subsequent to that, I was in the personnel
17 division office, either the next day or the following day,
18 and I saw Mr. Tom Cochran, who is one of the personnel
19 managers, and he was working on some type of a process.
20 So I asked him what it was he was doing. And he told me,
21 he says, "The Director wants me to --"

22 MR. ECKSTEIN: Objection, objection. It calls for
23 hearsay.

24 MR. LEONARD: Part of the process, Your Honor, of
25 this man's job. He's testifying to what -- an

1 investigation that he was making as the manager of the
2 Merit System Council that had to do with the business of
3 the Council.

4 THE PRESIDING OFFICER: I just don't know whether
5 my role now is to consistently uphold the reversal of my
6 ruling.

7 MR. ECKSTEIN: Mr. Presiding Officer, I don't think
8 the reversal went to hearsay evidence.

9 THE PRESIDING OFFICER: I'll overrule the
10 objection. I think the way it was framed and the way that
11 the Senators considered it, that he was going to be able
12 to give his testimony concerning what Director Milstead
13 did and said concerning this incident.

14 BY MR. LEONARD:

15 Q. What did you find out about the Casey Lincoln
16 case?

17 A. Mr. Cochran informed me that the Director
18 wanted him to put Casey Lincoln to work as an officer, and
19 he was in the process of setting up a hiring process to do
20 that.

21 At the time we were in the midst of a hiring
22 freeze, and we were not conducting processes to hire
23 anybody. And that did not seem proper to me, to do a
24 process for one individual when we had probably between
25 500 and a thousand names that were already in the process

1 somewhere when the freeze took effect.

2 Q. Would those 500 or a thousand people who had
3 already applied under ordinary circumstances be ahead of
4 Mr. Lincoln?

5 A. Some of those were at the very last stages of
6 just going through the final psychological exam and the
7 medical exam before being hired, and others were in the
8 early stages of just starting the hiring process. So, all
9 of those would have been ahead of where Casey Lincoln was
10 at that moment.

11 Q. And, Captain Johnston, did you consider that
12 to be a perversion of the hiring process?

13 MR. ECKSTEIN: Objection; leading.

14 THE PRESIDING OFFICER: Sustained.

15 BY MR. LEONARD:

16 Q. Do you have an opinion as to how that
17 impacted on the hiring process, the Merit System process?

18 A. I did not believe that it would be proper at
19 that point to do a normal hiring process to bring anybody
20 on board as an officer and bypass all of the other names
21 that were currently on the list.

22 Q. And what was the significance, if any, of
23 Director Milstead's involvement in that particular case?

24 A. The information that I received from Mr.
25 Cochran was that the Director wanted Casey Lincoln to be

1 brought back to work, and wanted him to find the way to do
2 it.

3 Q. Could that have happened without the
4 Director's direct involvement?

5 MR. ECKSTEIN: Objection; lack of foundation.

6 THE PRESIDING OFFICER: Sustained.

7 BY MR. LEONARD:

8 Q. What was the significance of the Director's
9 interest in the matter?

10 MR. ECKSTEIN: Same objection, lack of foundation.
11 I don't know that this witness is in a position to testify
12 as to that. All of this testimony is hearsay, and I've
13 objected to it on those grounds.

14 Apparently the hearsay was allowed to come
15 in, but the witness still must establish and counsel must
16 establish some foundation for the witness to testify as
17 to --

18 THE PRESIDING OFFICER: I think it lacks foundation
19 as well as calling for a conclusion of this witness that
20 has not been established by proper basis. So the
21 objection is sustained.

22 BY MR. LEONARD:

23 Q. Captain Johnston, tell us, during the period
24 of time that you were the manager of the Merit System
25 Council, did you become familiar with the processes of

1 hiring and promoting police officers in the Department of
2 Public Safety?

3 A. Yes, sir.

4 Q. And that was over the period of what? Some
5 five years?

6 A. Four years.

7 Q. Four years that you held the position as
8 manager?

9 A. Yes, sir.

10 Q. And were you familiar with the procedure by
11 which people were brought on initially in the employment
12 process of the Department of Public Safety?

13 A. Yes, sir.

14 Q. And were you as part of your job cognizant of
15 hiring freezes?

16 A. Yes, sir.

17 Q. Were you also cognizant of the matter by
18 which the Department of Public Safety promoted people
19 within the department?

20 A. Yes, sir.

21 Q. Were you required as a part of your job to be
22 an expert and know all of the rules and regulations having
23 to do with hiring and promotion?

24 A. Yes, sir.

25 Q. Do you have an opinion as to whether or not

1 Mr. Lincoln's hiring by the Department of Public Safety
2 was in accord with the accepted standards that were in
3 force by the Merit System Council at that time?

4 A. The method that Mr. Cochran was approaching
5 to do that was not in accordance with the -- that is not
6 the way Casey Lincoln was ultimately hired, but the way
7 that Tom Cochran was doing it would not be following the
8 normal procedures.

9 Q. And do you have an opinion as to who was
10 responsible for the Lincoln case receiving treatment that
11 was outside of the normal process?

12 A. Yes, sir.

13 MR. ECKSTEIN: Objection; objection. The question
14 asks still for his opinion as to who might have been
15 responsible. While this witness might have knowledge
16 about normal procedures, to ask him who might have been
17 responsible for using procedures other than normal
18 procedures has not been established by proper foundation.

19 THE PRESIDING OFFICER: Sustained.

20 BY MR. LEONARD:

21 Q. Was the Casey Lincoln waiver and his
22 employment handled in the normal or ordinary course of the
23 Merit System Council rules?

24 MR. ECKSTEIN: Objection; asked and answered.

25 MR. LEONARD: That's the foundation, Your Honor.

1 THE PRESIDING OFFICER: Overruled.

2 You may answer.

3 THE WITNESS: I'm not real sure I understand what
4 you're asking me, whether the hiring of Casey Lincoln or
5 the process that they were going through at the time.

6 BY MR. LEONARD:

7 Q. The process that they were going through, was
8 that being conducted according to the normal or acceptable
9 Rules of Procedure for the Merit System Council?

10 A. No, sir, it wasn't.

11 Q. Now, do you have an opinion as to who was
12 responsible for bringing that process through DPS?

13 MR. ECKSTEIN: Objection; same objection as I
14 stated before. The witness may be asked whether he knows
15 who was responsible.

16 MR. LEONARD: First, I'd ask him if he has an
17 opinion, if the Court please.

18 MR. ECKSTEIN: But to ask him whether he has an
19 opinion is not proper. I object.

20 THE PRESIDING OFFICER: Foundation has not been
21 laid at this point. The objection is sustained.

22 BY MR. LEONARD:

23 Q. Do you know who was responsible for bringing
24 Casey Lincoln's papers through the process outside of the
25 normal process established by the Merit System Council?

1 A. Yes, sir.

2 Q. Who?

3 A. Tom Cochran told me that it was the Director
4 that instructed him to do that.

5 Q. Are you familiar with an individual by the
6 name of Rick Twitchell?

7 A. Yes, sir.

8 Q. Does that instance involve something that was
9 out of the normal process of the Merit System Council?

10 A. There was -- the Rick Twitchell situation was
11 a little different than the previous one.

12 Q. Does it bear on the issue of whether or not
13 the case was handled other than by the normal established
14 procedures of the Merit System Council?

15 A. Yes, sir.

16 Q. Would you tell us how.

17 A. It came to my attention that we were going to
18 be bringing Rick Twitchell on board as a provisional
19 employee and assigned to work with the ALEAC as --

20 Q. Help the reporter out. What was that?

21 A. ALEAC, Arizona Law Enforcement Advisory
22 Council, in the development of an executive management
23 training program.

24 Q. Mr. Twitchell had retired from the Phoenix
25 Police Department, had -- did have very good

1 qualifications for the position that was involved. I
2 became aware that we were going to be bringing him on as a
3 provisional rather than go through the normal testing
4 process to bring him into the department.

5 I went to -- in this case, I went to Major
6 Ross, who was the personnel division commander at that
7 time, and I told him that rather than go the provisional
8 route, which would ultimately have required us to do a
9 retesting process, would have required us to advertise,
10 test at that pay grade level, probably do screening and
11 testing on anywhere from 50 to 100 different people, go
12 through the expenses of that when it was already
13 established that Rick Twitchell was the person that was
14 wanted and the person that would be selected, and Major
15 Ross and I agreed at that point to go ahead and bring him
16 on without going through this process of the provision,
17 the provisional appointment.

18 Q. And what was the significance of that?

19 MR. ECKSTEIN: Objection, objection; overbroad and
20 vague.

21 THE PRESIDING OFFICER: Overruled.

22 You may answer, if you can, sir.

23 THE WITNESS: It was my understanding that Rick
24 Twitchell and the director were very good friends, and
25 that it was the Director's wishes that Rick be brought

1 into that job.

2 BY MR. LEONARD:

3 Q. Who told you that?

4 A. That came out in my discussion with Major
5 Ross.

6 Q. Do you recall an individual by the name of
7 Dave Pilcher?

8 A. Yes, sir.

9 Q. And tell us about that situation.

10 A. The Dave Pilcher hiring occurred in, I
11 believe, 1985, and it was very similar to the one with
12 Rick Twitchell. We had a vacancy in the Department of
13 Public Safety at the controller's level. Dave Pilcher had
14 been -- had worked for the jail BC as an analyst. I knew
15 Dave quite well and I think that Dave was a very competent
16 individual. It came to my attention again that they
17 wanted Dave in that position and they were going to bring
18 him in as a provisional.

19 Again, I had problems with doing that in an
20 area where we already had made up our mind who the person
21 was going to be, because at some point in time we would
22 have to go through an advertising and a testing process to
23 test people for a job they had no opportunity to get. And
24 so, again, we made a determination to bring Dave in as a
25 regular employee without going through the testing

1 process.

2 Q. What is the impact, Captain, on using this
3 kind of a provisional process on the people who respond to
4 the advertising believing that the job is available?

5 MR. ECKSTEIN: Objection; irrelevant and
6 immaterial.

7 THE PRESIDING OFFICER: Sustained -- I mean
8 overruled.

9 You may answer, sir.

10 THE WITNESS: I don't believe it's fair for any
11 agency, whether it's state or otherwise, to advertise to
12 people and give them an impression they have an
13 opportunity to compete for a job in which they really have
14 no opportunity, because there's a great deal of time and
15 money from the State standpoint and there's a great deal
16 of time and trauma from the standpoint of the person going
17 through the process. And I had problems doing that when
18 it appeared that there really wasn't going to be a
19 vacancy.

20 BY MR. LEONARD:

21 Q. Is it a distortion of sound personnel
22 practices to do this?

23 MR. ECKSTEIN: Objection; leading.

24 THE PRESIDING OFFICER: Sustained.

25 BY MR. FRENCH:

1 Q. Do you have an opinion, Captain Johnston, as
2 to the effect of that type of activity on the personnel
3 process?

4 MR. ECKSTEIN: Objection; irrelevant and
5 immaterial.

6 THE PRESIDING OFFICER: Overruled.

7 You may answer.

8 THE WITNESS: I believe that personnel practices
9 are always subject to scrutiny and question, because
10 there's always reasons why people feel they should have
11 been selected when they weren't. And there's not much you
12 can do about that, but I think when you start to do a
13 process where you know that somebody can't honestly
14 compete, that it's unfair to that person and it is not
15 being done in the right interest of anybody involved.

16 BY MR. LEONARD:

17 Q. Captain Johnston, your name appeared on our
18 supplemental witness list on Tuesday, March 8th, which was
19 filed with this Court at 2 o'clock on that day.

20 Did you have a conversation the next day, on
21 Wednesday, March 9th, with Colonel Gary Phelps?

22 A. Yes, sir.

23 Q. Would you tell us what that conversation was
24 about?

25 MR. ECKSTEIN: Objection, Your Honor, irrelevant

1 and immaterial.

2 THE PRESIDING OFFICER: How would this be material,
3 Counsel, without telling us what the witness is going to
4 testify to?

5 MR. LEONARD: It would relate, if the Court please,
6 to an issue that I think is pending before this Court that
7 Mr. Craft alluded to this morning, whether or not -- well,
8 whether or not there was any hesitancy on the part of this
9 witness to testify.

10 MR. ECKSTEIN: Mr. Presiding Officer, the issue
11 before the Court is Article I of the Articles of
12 Impeachment, whether there was obstruction of justice
13 conducted by the Governor of this state.

14 The issue before this Court is not the
15 conduct of DPS, not how DPS hires people, not Colonel
16 Milstead. If we are going to endlessly go into this, this
17 proceeding, even on this Article, will spiral and spiral
18 and go on for weeks. It is immaterial.

19 THE PRESIDING OFFICER: As I understand it, the
20 question leads toward an allegation that this witness was
21 being required to compromise his testimony, and I will
22 allow him to answer that question.

23 The objection is overruled.

24 BY MR. FRENCH:

25 Q. Did you have a conversation with Colonel

1 Phelps last Wednesday morning?

2 A. Yes, sir.

3 Q. Tell us how that conversation came about.

4 A. Colonel Thompson, who is my immediate
5 supervisor, received a telephone call from Colonel Phelps
6 after he had talked to the Colonel. He came and told me
7 that Colonel Phelps wanted to see me in his office. I
8 inquired as to what it might be about, and we didn't
9 either one of us know. So, you know, I headed on down to
10 the office.

11 I arrived at Colonel Phelps' office and stood
12 in the doorway until he finished a telephone conversation
13 he had, and then he invited me in. That was the first
14 time that I was aware that I had been placed on the
15 subpoena list. Colonel Phelps showed me the subpoena
16 list, pointed to my name at the bottom of that list, and
17 asked me what that was all about. I proceeded to tell him
18 about the -- what I assumed it was about was the
19 conversation that the Director and -- had had when he made
20 the statement about lying.

21 The conversation lasted probably about, oh,
22 five, maybe ten minutes, and we talked about the fact
23 that -- I stated to him that I did not want to testify,
24 that I had no desire to be here in this position right
25 now, and that I felt that I was going to be put in a very

1 difficult position, and he agreed that he hoped that I
2 didn't have to testify.

3 Q. Did you feel in any way intimidated by having
4 been called into Colonel Phelps' office?

5 A. Without a doubt.

6 Q. Captain Johnston, yesterday Mr. Hawkins
7 testified that he was dismissed by Colonel Milstead as the
8 administrative officer of DPS, and that, in part, that
9 dismissal had to do with a -- what I believe he testified
10 to was a violation of the rules having to do with the
11 re-rating of a personnel action, a rating of an employee
12 from satisfactory to another rating.

13 Are you familiar with that incident at all?

14 A. Yes, I am.

15 Q. Could you tell us about that?

16 MR. ECKSTEIN: Objection, Mr. Presiding Officer.
17 This witness was not listed to give testimony on this
18 subject. It is irrelevant and immaterial.

19 THE PRESIDING OFFICER: Sustained.

20 MR. FRENCH: If the Court please, it goes directly
21 to an action taken by Colonel Milstead that had to do with
22 personnel.

23 THE PRESIDING OFFICER: Well, yes, as all of these
24 questions have related to, as I previously ruled, we are
25 going to be getting into collateral matters that do not

1 involve the actual issues before the Court, matters in
2 which the cross-examination of Director Milstead did not
3 give any indication that you were entitled to that
4 testimony. No warning question was given to Director
5 Milstead which would authorize questions concerning this.

6 And I have ruled, and I will continue to rule
7 that way as long as those proper objections are made.

8 (Discussion off the record.)

9 MR. LEONARD: Well, I -- is the Presiding Officer
10 sustaining or overruling the objection?

11 THE PRESIDING OFFICER: I sustained the objection.

12 MR. LEONARD: This has to do directly, if the Court
13 please -- I didn't want to continue the argument -- but
14 with respect to the testimony that he did not interfere in
15 personnel actions, there is a direct -- the testimony we
16 hope to elicit will indicate that there was a direct
17 interference in a personnel action, and certainly counsel
18 had knowledge of it. They heard Max Hawkins' testimony
19 about the incident.

20 MR. ECKSTEIN: Mr. Presiding Officer, I think
21 that's a mischaracterization of Colonel Milstead's
22 testimony. It was not that he did not interfere with
23 personnel actions of any kind. So the purported testimony
24 here that would contradict Colonel Milstead just does not
25 exist.

1 THE PRESIDING OFFICER: I'll still sustain the
2 objection. However, Counsel, I would say to you that
3 whatever position you've taken, you have established it,
4 or at least to my estimation you have established it by
5 prior testimony of this witness, and I would feel
6 additional matters would merely be cumulative, also.

7 MR. LEONARD: Thank you, Mr. Presiding Officer.
8 That's all I have.

9 THE PRESIDING OFFICER: You may cross-examine.
10

11 CROSS-EXAMINATION

12 BY MR. FRENCH:

13 Q. Mr. Presiding Officer, Members of the Court.
14 Captain Johnston, this conversation you had
15 with Lieutenant Colonel Phelps was last Wednesday, did you
16 testify?

17 A. Yes, sir.

18 Q. And I believe you testified that he hoped you
19 would not have to testify; is that correct?

20 A. That's correct.

21 Q. And you certainly hoped that you would not
22 have to testify?

23 A. That's correct.

24 Q. Did Colonel Phelps go into the reasons why he
25 hoped you didn't have to testify, and did you also go into

1 those reasons?

2 A. Yes, sir.

3 Q. Those have to do with mental health problems,
4 do they?

5 A. Yes, sir.

6 Q. I'll come back to that, since counsel has not
7 addressed this area.

8 Did Colonel Phelps say, though, that if you
9 were subpoenaed, that you would have to testify and that
10 you should tell the truth?

11 A. I don't recall making that statement, no,
12 sir.

13 Q. You were transferred to the Merit System
14 Council in June of 1985?

15 A. June of 1981.

16 Q. '81? All right.

17 You were selected for that position by
18 Director Milstead?

19 A. The process of filling the business manager's
20 job is a selection by the Director and appointment by the
21 Council.

22 Q. And you were promoted to captain while
23 Colonel Milstead was Director?

24 A. Yes, sir.

25 Q. In order to allow the Senate to fully

1 evaluate your testimony, I'm going to ask you some
2 questions which will seem to be personal in nature but I
3 think the Senate should be aware of.

4 You have had recent psychological problems;
5 is that correct?

6 A. Yes, sir.

7 Q. In fact, you were hospitalized twice at
8 Camelback Hospital for depression as recently as August of
9 1987?

10 A. That's correct.

11 Q. Over the past few years, you have been under
12 both psychiatric care and also psychology, a
13 psychologist's care?

14 A. What time period?

15 Q. That was a terrible question. Let me reask
16 it.

17 You've been under the care of certified
18 psychologists?

19 A. During the past year, yes, sir.

20 Q. And also a psychiatrist?

21 A. Yes, sir.

22 Q. You're currently undergoing group therapy,
23 are you not?

24 A. Yes, I am.

25 Q. You're taking several types of medication?

1 A. Yes, sir.

2 Q. It is true, is it not, Captain, that you also
3 have been subject to severe memory loss?

4 A. At times, yes.

5 Q. When you remember this statement that you
6 attribute to Colonel Milstead, "I'd lie to win" -- is that
7 what you said?

8 A. Yes.

9 Q. You don't remember the month the statement
10 was made, do you?

11 A. No, sir.

12 Q. You don't even remember the exact year it was
13 made, do you?

14 A. It would have been 1982.

15 Q. Do you remember what month it was made?

16 A. No, sir.

17 Q. Do you know under what circumstances this
18 statement was made?

19 A. I don't recall the exact issues we were
20 discussing at that time.

21 Q. Do you recall exactly who was present?

22 A. To my recollection, Gary Ross and I were the
23 only two present.

24 Q. Mr. Milstead has never told you that he would
25 lie under oath, has he?

1 A. I don't recall him ever using the phrase
2 "under oath," no, sir.

3 Q. You've seen him testify and heard him testify
4 before the Merit System Council on several occasions, I
5 suppose?

6 A. Yes.

7 Q. And isn't it a fact that you've never heard
8 Colonel Milstead lie under oath in those hearings?

9 A. I don't know of anything that the Colonel
10 ever testified to that I knew to be dishonest.

11 Q. Okay. In regard to the processing of
12 employment for Messrs. Twitchell, Pilcher and Lincoln,
13 you've never had direct discussion with Colonel Milstead
14 on any of these three individuals, have you?

15 A. That's correct.

16 Q. Isn't it also true that you've never received
17 a direct order from Colonel Milstead to hire anyone?

18 A. That's true.

19 Q. Isn't it also true that Colonel Milstead
20 never placed you under any kind of undue influence in your
21 position with the Merit System Council? Is that correct?

22 A. No, sir, that's not correct.

23 Q. You're saying that he has?

24 A. Yes, sir.

25 Q. And that was in connection with the hiring of

1 one of these three individuals?

2 A. No, sir.

3 Q. In fact, Colonel Milstead has never asked you
4 to do anything illegal, has he?

5 A. No, sir.

6 Q. Isn't it a fact, Captain, that Director
7 Milstead could not legally order you to hire anyone?

8 A. That's correct.

9 Q. One of the reasons you didn't want to
10 testify, as I understand it, was because of the
11 psychological problems that you're experiencing?

12 A. Not necessarily because of the problems, but
13 because of the fact that those psychological problems may
14 be brought out here, and I didn't particularly want to go
15 through that.

16 Q. I can understand that, and I appreciate it.
17 But can you not see the reasons why they should be brought
18 out?

19 A. Yes, sir.

20 MR. FRENCH: Thank you.

21 THE PRESIDING OFFICER: Redirect.

22

23 REDIRECT EXAMINATION

24 BY MR. LEONARD:

25 Q. Captain Johnston, Mr. French didn't ask you

1 the follow-up question. I think the question was: Have
2 you ever been pressured by Colonel Milstead. And I think
3 you said -- the question was, you had never been
4 pressured --

5 A. I believe he asked me if he had ever
6 exercised any undue influence over me in that position.

7 Q. Any undue influence. And you said, in answer
8 to the question, that he hadn't exercised undue influence,
9 and I believe you said no?

10 A. That's correct.

11 Q. When did you feel that you had been subject
12 to undue influence by Colonel Milstead?

13 A. This was during the last, oh, eight months
14 that I was in the Merit System Council, and it had to do
15 with the issue of the development of the employee
16 appraisal system for the Law Enforcement Merit System
17 Council that is currently in use in the Department of
18 Public Safety.

19 Q. And how did he attempt to exercise undue
20 influence on you?

21 A. We had had a meeting in the beginning of the
22 development of this process in which we had agreed -- the
23 meeting did not involve the Director himself. It involved
24 Deputy Director Gary Phelps, Lieutenant Colonel Randy
25 Sterna, and other people who worked for Colonel Sterna, in

1 which we came to several agreements on the processes for
2 developing this program and for preparing it to go in
3 front of the Council.

4 A few months later, the program was given to
5 me, and I was told that the Director had already approved
6 it. I had never had an opportunity to see it at that
7 time. We got into a real battle over that issue, and
8 finally I had to have the Chairman of the Council go to
9 the Director and tell him, you know, that the Council is
10 not going to approach this unless you follow the
11 guidelines laid down by Captain Johnston.

12 Q. And you felt you were being unduly pressured
13 by the Director on that issue?

14 A. Yes, sir.

15 Q. Mr. French asked you whether or not it was
16 the fact that you've had some psychological treatment,
17 treatment for emotional problems that caused you to be
18 reticent to testify.

19 Is there any other reason why you were
20 hesitant to testify?

21 A. Yes, sir.

22 Q. What's that reason?

23 A. Well, I think it's apparent that my testimony
24 here is in direct opposition to that of my employer, and
25 that puts me in a very uncomfortable position.

1 Q. As a matter of fact, when you and I discussed
2 your testimony, we had quite a lengthy discussion about
3 your emotional problems, didn't we?

4 A. Yes, sir.

5 Q. Was the significant result of those problems
6 a problem with memory loss?

7 A. That was one of the symptoms that resulted
8 from the stress, pressure that I was under at the time.

9 Q. Was that memory loss a loss of the ability to
10 recollect current things, like what happened to you the
11 day before?

12 A. There were periods of time that I couldn't
13 remember what I had done the hour before, and other times
14 I couldn't remember things over several days.

15 Q. Was your memory loss ever impaired with
16 respect to activities and remembering things from years
17 past?

18 MR. ECKSTEIN: Objection. If the witness had a
19 memory loss from things past, I don't know how he could
20 conceivably answer that question. Lack of foundation.

21 THE PRESIDING OFFICER: Overruled. You can answer
22 if you can, sir.

23 THE WITNESS: It would be difficult for me to
24 answer that question, Mr. Leonard, because I don't know of
25 anything that I wasn't remembering from years past at that

1 time.

2 BY MR. LEONARD:

3 Q. So you had no occasion to be tested on
4 whether or not you could remember something two or three
5 years ago?

6 A. That's correct.

7 Q. Are you suffering any memory loss problems
8 today, Captain?

9 MR. ECKSTEIN: Objection; same objection.

10 THE PRESIDING OFFICER: Sustained.

11 MR. LEONARD: If the Court please, isn't memory
12 loss an issue here?

13 THE PRESIDING OFFICER: We just resolved the issue,
14 at least I think. How can he tell whether he can remember
15 without being tested?

16 BY MR. LEONARD:

17 Q. All right. Captain Johnston, do you know
18 your Social Security number?

19 A. Yes, sir.

20 Q. What is it?

21 A. 527-32-4621.

22 Q. Do you know your birth date?

23 A. Yes, sir.

24 Q. What's that?

25 A. May 29th, 1933.

1 Q. Do you know your ex-wife's birth date?
2 A. Yes, sir.
3 Q. And what's that?
4 A. July 19th, 1934.
5 Q. Do you remember the day on which you and your
6 ex-wife were married?
7 A. Yes, sir.
8 Q. What's that?
9 A. May 28th, 1952.
10 Q. How many children do you have, Captain?
11 A. Seven.
12 Q. What's the name of the oldest?
13 A. Diana.
14 Q. What's her birth date?
15 A. July 8th, 1953.
16 Q. What's the second oldest?
17 A. Rodney.
18 Q. What's her birthday?
19 A. It's a he.
20 Q. He, I'm sorry.
21 What's his birth date?
22 A. November 13th, 1954.
23 Q. What's the name of your third child?
24 A. Coy, Jr.
25 Q. What's Coy, Jr.'s birthday?

1 A. August 11, 1956.

2 Q. And what's the the name of your fourth child?

3 A. Ricky.

4 Q. What's Ricky's birthday?

5 A. January 9th, 1958.

6 Q. What's the name of your fifth child?

7 A. Velma.

8 Q. And what's her birthday?

9 A. April 29th, 1959.

10 Q. What's the name of your sixth child?

11 A. Colleen.

12 Q. Colleen?

13 THE PRESIDING OFFICER: Yes, Senator Steiner?

14 SENATOR STEINER: Mr. Presiding Officer, I think

15 Mr. Leonard is making a point, has made a point. I think
16 an example or two of memory would be enough. It makes me
17 uncomfortable, that particular line, not because of the
18 point he's making, but the manner in which he is doing it.

19 May I express that objection, and urge Mr.
20 Leonard to not pursue that particular line.

21 MR. LEONARD: Thank you, Senator. Thank you,
22 Captain Johnston.

23 THE PRESIDING OFFICER: All right. Questions by
24 the Senators?

25 Senator Osborn?

1 SENATOR OSBORN: Mr. Presiding Officer, I have a
2 question that is not, I think, probably not relevant, but
3 I would like to ask if counsel for the respondent would
4 yield to a question.

5 THE PRESIDING OFFICER: Mr. Leonard?

6 MR. LEONARD: I yield, Mr. Presiding Officer.

7 SENATOR OSBORN: Mr. Presiding Officer, Mr.
8 Leonard, my records indicate that on March 8th, and I'm
9 referring now to Document 67, it is respondent's second
10 supplemental witness list, Article I, Obstruction of
11 Justice, and Captain Coy Johnston is the fourth person
12 listed on your list of witnesses filed May 8th. Now, my
13 notes indicate that Colonel Milstead was under
14 cross-examination by counsel for the respondent on March
15 8th.

16 And my question to you, sir, is: Why, at
17 that time, did you not raise the points raised today,
18 after much argument, with respect to Captain Coy
19 Johnston's testimony, instead of bringing it in at this
20 late date? I surely need not point out that had you
21 raised it at that time, on March 8th, we then could have
22 heard rebuttal testimony. Can you answer, sir?

23 MR. LEONARD: Well, Senator, there were two,
24 basically two issues which I attempted to prove through
25 Captain Coy Johnston. One was that Colonel Milstead made

1 a statement that he'd lie to win. You have to determine
2 the significance of that. That would not have been an
3 appropriate question, in my view, for respondent's counsel
4 to ask Mr. Milstead on cross-examination. I think it's
5 not required to be asked. It would have been
6 inappropriate to ask it because it goes directly to the
7 question of whether or not you should believe Colonel
8 Milstead's testimony, all of it, part of it, some of it, a
9 lot of it, or a little bit of it. That's something for
10 you to decide. I think that it was not inappropriate for
11 us not to ask him that question.

12 Now, with respect to the balance of Captain
13 Johnston's testimony, it all goes to the statements -- and
14 if you would read the transcript beginning at page 1443,
15 Volume 7, Colonel Milstead is under cross-examination by
16 Mr. Craft, and he's asking him a substantial number of
17 questions with respect to some specific examples as to
18 whether or not Colonel Milstead ever interfered in the
19 Merit System Council process. Now, that is the process by
20 which people are hired and promoted.

21 In two instances, Colonel Milstead said the
22 first time, on page 1445: "It's impossible, it's
23 impossible for me to interject myself into that Merit
24 System Council process."

25 Again, on page 1448, there is a colloquy

1 between counsel and Colonel Milstead about the former
2 employee, Mark Johnston, and he's talking about whether or
3 not he could accede to Tina Johnston's request to bring
4 Mark Johnston back on the force as a sergeant, because he
5 had already been gone one year, and he said, there's no
6 way I can do that.

7 Yet, you heard testimony from this witness
8 that he did it for at least -- in at least one other
9 instance.

10 THE PRESIDING OFFICER: Senator Osborn?

11 SENATOR OSBORN: Mr. Presiding Officer, it seems to
12 me, Mr. Leonard, if I may say so, that at the time that
13 Colonel Milstead was being cross-examined by you, or by
14 your staff, specific instances of so-called interference
15 in the process as brought out by Captain Coy Johnston here
16 today could have been raised by you, and then we would
17 have had an opportunity to hear the rebuttal from Colonel
18 Milstead.

19 MR. LEONARD: Senator, I appreciate that, but
20 that's -- excuse me, Counsel -- that simply is not
21 correct. I did not interview Captain Johnston in any
22 detail, I believe, until -- Captain, I think it was
23 Thursday night and Friday noon.

24 THE WITNESS: Friday morning and Friday noon.

25 MR. LEONARD: Friday morning and Friday noon. I

1 did not know about these specific instances, or we did not
2 know at the time that Colonel Milstead was on the stand.

3 THE PRESIDING OFFICER: Mr. Eckstein?

4 MR. ECKSTEIN: Mr. Presiding Officer, Senator
5 Osborn, if I might respond to that, I think now it's
6 evident why we have Rule 608(b) and why we have Rule 608
7 (a). These questions are proper on cross-examination of
8 the witness, to ask the witness specific acts of bad
9 conduct, so that the witness can be tested and so that the
10 witness can respond to them.

11 But, to allow a witness to come on on direct
12 examination, and to give hearsay testimony at that, as to
13 these is absolutely improper under the rules, and I think
14 now you can see why it is improper and why we have a rule
15 like 608(b).

16 THE PRESIDING OFFICER: Senator Rios was next.

17 SENATOR RIOS: Thank you, Mr. Presiding Officer.
18 Just a couple of brief questions of Captain Johnston.

19 Captain Johnston, you indicated in your
20 testimony that when Lieutenant Colonel Gary Phelps called
21 you into his office, that was last Wednesday; is that
22 correct?

23 THE WITNESS: Yes, sir.

24 SENATOR RIOS: Were there any other additional
25 meetings or contacts between you and Lieutenant Colonel

1 Gary Phelps since last Wednesday?

2 THE WITNESS: No, sir.

3 SENATOR RIOS: At that particular meeting, did
4 Lieutenant Colonel Gary Phelps attempt to discourage you
5 in any way, or did he in any way indicate to you that you
6 ought to change your testimony so that it would not be in
7 conflict with Director Milstead's testimony?

8 THE WITNESS: I think you've asked me more than one
9 question, Senator. And if I can --

10 SENATOR RIOS: I apologize. I'm not a trained
11 attorney. I have a problem of doing compound questions.
12 Let me try to break it down, if I may, then.

13 In your opinion, did Lieutenant Colonel Gary
14 Phelps try to discourage you from testifying here today?

15 THE WITNESS: He said nothing as far as speaking
16 that would have attempted to do that, no, sir.

17 SENATOR RIOS: And the second part of the question
18 was: Did Lieutenant Colonel Gary Phelps ever indicate to
19 you or state to you that you ought to change your
20 testimony so that it would not be in conflict with the
21 testimony given here by Director Milstead?

22 THE WITNESS: No, sir, he didn't.

23 SENATOR RIOS: Okay. Thank you.

24 THE PRESIDING OFFICER: Senator West is next.

25 SENATOR WEST: Mr. Presiding Officer, Captain

1 Johnston, you've obviously had a pretty long career with
2 the Department of Public Safety, I believe 1956 to
3 present, with an interim time out; is that correct?

4 THE WITNESS: I had a break in service, Senator, in
5 1966, of about four-and-a-half months. I've been with the
6 Department a total of 31 years, plus a few months. I have
7 21-plus years in the retirement system.

8 SENATOR WEST: Captain Johnston, since that time,
9 what, if any, have you had any minor or major disciplinary
10 infractions?

11 THE WITNESS: There was one disciplinary infraction
12 in conjunction with the problems that I was having that
13 resulted in my being in the hospital. That occurred in
14 the time period of from April through July that this was
15 pending, or the action was taking place.

16 SENATOR WEST: Is this within the last year?

17 THE WITNESS: In 1987, yes, sir.

18 SENATOR WEST: And what was the nature of that
19 disciplinary problem?

20 THE WITNESS: It had to do with some irrational
21 behavior on my part, which was in conjunction with the
22 stress that I was experiencing. And I received two -- a
23 loss of two vacation days as a result of that.

24 SENATOR WEST: Is that the only disciplinary
25 problem that you've had in your 30-plus years with the

1 Department?

2 THE WITNESS: Yes, sir.

3 SENATOR WEST: Thank you.

4 THE PRESIDING OFFICER: Senator Higuera?

5 SENATOR HIGUERA: Thank you, Mr. Presiding Officer.

6 Captain Johnston, do you have relatives who work in the
7 field of law enforcement?

8 THE WITNESS: Yes, sir. I have two sons that work
9 for the Mesa Police Department.

10 SENATOR HIGUERA: Captain Johnston, did the Mesa
11 Police Department have jurisdiction over the --
12 outstanding jurisdiction, as far as having jurisdiction,
13 execution of the outstanding warrant on Terri Fields?

14 THE WITNESS: Senator Higuera, I'd prefer not to
15 get into that, because I have no knowledge of what
16 happened in that instance.

17 SENATOR HIGUERA: I appreciate that.

18 Captain Johnston, at any time prior to your
19 testimony today before this Court, have you discussed with
20 your sons Terri Fields' outstanding warrant?

21 THE WITNESS: No, sir. I had no knowledge of Terri
22 Fields' -- wait. Your question was prior to today had I
23 discussed that with any of them?

24 Yes, sir, I did have a discussion last night
25 with one of my sons.

1 SENATOR HIGUERA: Captain Johnston, last night
2 would have been Monday night. Prior to Monday night, you
3 had not discussed with any of your sons the Terri Fields
4 warrant?

5 THE WITNESS: That's correct, sir, I had not.

6 SENATOR HIGUERA: Thank you.

7 THE PRESIDING OFFICER: Senator Hill.

8 SENATOR HILL: Mr. Presiding Officer, an
9 observation, Captain Johnston. Perhaps you better
10 understand now why politicians are securely in second from
11 the bottom in public esteem.

12 THE PRESIDING OFFICER: Is that a question,
13 Senator?

14 SENATOR HILL: An observation.

15 THE PRESIDING OFFICER: Senator Stump?

16 SENATOR STUMP: Captain Johnston, would you say
17 that the fact that Colonel Phelps was discussing your
18 testifying here, in and of itself, was that intimidating?

19 THE WITNESS: I didn't feel that Colonel Phelps had
20 a need to know nor did I feel he had a right to know what
21 I might be testifying about in this case, since DPS is not
22 an integral part of this process.

23 SENATOR STUMP: Then your answer is yes?

24 THE WITNESS: My answer is yes.

25 THE PRESIDING OFFICER: Other questions?

1 Senator De Long.

2 SENATOR DE LONG: Thank you, Mr. Presiding Officer.

3 Captain Johnston, we've heard you testify
4 that you really didn't want to be a witness here, and I
5 don't blame you, sir. But how did you come to be a
6 witness here? Could you explain that to the Court?

7 THE WITNESS: A comment I made in the DPS office
8 during the House hearing in response to a statement made
9 by one of the other members of the Highway Patrol got back
10 to the investigators in some manner, and they contacted me
11 reference the statement that Colonel Milstead made in the
12 meeting we referred to.

13 SENATOR DE LONG: Thank you, sir.

14 THE PRESIDING OFFICER: Other questions?

15 All right. This witness will be excused
16 subject to being called later if needed. Thank you, sir.

17 Your next witness?

18 MR. CRAFT: Christina Johnston.

19 MR. ECKSTEIN: Mr. Presiding Officer, while we are
20 waiting for the next witness, I would note that this
21 witness was listed to testify as to her background and
22 experience, and would testify generally along the lines
23 contained in the sworn statement that was taken on the
24 evening of February 28, 1988, which has been produced.

25 You have ruled, Mr. Presiding Officer, in

1 connection with your ruling on March 9, 1988, set out at
2 Volume 7, pages 1518 through 1520, that evidence with
3 respect to any sexual activity and any threats was not to
4 be gone into, was prohibited, and that was a ruling you
5 made previously.

6 In addition to that, you ruled on March 9th,
7 1988, that the respondent had put in evidence from which
8 one could conclude that Director Milstead had a motive to
9 testify as he did. I see no other basis for any testimony
10 from this witness, and I lodge my objection at this time.

11 If there is testimony that is not covered by
12 your order, I would like to know about it. If there
13 isn't, I will continue to object. But I believe that your
14 order of March 9 and your previous order would preclude
15 this witness from testifying if the only thing this
16 witness is to testify about are those items that are set
17 out in the witness statement of February 28.

18 THE PRESIDING OFFICER: I understand your position,
19 and I will not make a ruling on it at this point until I
20 see what questions are asked of the witness.

21 MR. CRAFT: Your Honor, I would like to respond for
22 a moment, and only for a moment.

23 THE PRESIDING OFFICER: Could we have the witness
24 sworn so that --

25 MR. CRAFT: I was hoping we could before this

1 dialogue took place, Your Honor.

2 THE PRESIDING OFFICER: All right, she'll be sworn
3 at this time.

4

5 CHRISTINA JOHNSTON,

6 a witness herein, after having been first duly sworn, was
7 examined and testified as follows:

8

9 THE PRESIDING OFFICER: Take the stand right here,
10 please.

11 All right, you may respond, Mr. Craft.

12 MR. CRAFT: Your Honor, these are very difficult
13 times for us all, and very difficult kind of procedural
14 problems, and I must admit to this Court and to this body
15 I find it very difficult, indeed, to believe that we can
16 have a process where legal counsel is constrained and
17 restrained and prohibited from seeking answers to
18 questions which have come up in the course of this trial,
19 Your Honor, and be bound by those rules, and yet the Judge
20 and the jury is not bound by anything that they may ask.

21 And, Your Honor, it's very difficult for me,
22 where, in a courtroom I could understand it. The jury
23 could not hear, the judge would not hear anything that did
24 not come out in the proceedings, and all would be bound by
25 the same rules. But in this proceeding, the rules that

1 apply to the Governor's lawyers and to the House of
2 Representatives' lawyers do not apply to this body. And
3 they may seek the truth through any means that they
4 desire, and yet we may not.

5 Now, if it was a court of law, I would
6 understand it --

7 THE PRESIDING OFFICER: That's the only part of
8 this proceeding I have some control over, are you lawyers.
9 And so let's proceed.

10 MR. CRAFT: I guess that was a monologue of mine.
11 I apologize to the Court.

12

13 DIRECT EXAMINATION

14 BY MR. CRAFT:

15 Q. Would you please state your full name.

16 A. Christina Johnston.

17 Q. And, Ms. Johnston --

18 THE PRESIDING OFFICER: You're going to have to
19 keep that close to your mouth, please, so we can hear you.

20 BY MR. CRAFT:

21 Q. That's better.

22 Would you please state your full name again?

23 A. Christina Johnston.

24 Q. And where do you reside?

25 A. San Diego, California.

1 Q. And are you employed?

2 A. Yes, sir.

3 Q. And how are you employed?

4 A. Private investigator.

5 Q. And are you in business with anyone else?

6 A. My husband.

7 Q. And he is whom?

8 A. Mark Johnston.

9 Q. And what's the name of your company?

10 A. Detectives.

11 Q. And are you familiar with Ralph T. Milstead?

12 A. Yes, I am.

13 Q. And when did you first meet Mr. Milstead?

14 A. Approximately November or December of 1979.

15 Q. And how long have you known him? Since that
16 time?

17 A. And since that time.

18 Q. Continuously?

19 A. As of June 18th, my birthday, 1980, that's
20 when it became continuously.

21 Q. And have you had a professional relationship
22 with him based upon your employment?

23 A. None at all.

24 Q. Have you had a personal relationship with
25 him?

1 A. Intimate and personal.

2 Q. Let me ask you to address a time frame now of
3 July, 1987, and ask you if you had a conversation and met
4 with Mr. Milstead.

5 A. Yes, I did.

6 Q. And would you tell us what transpired, what
7 took place which led up to that conversation?

8 A. Yes, I will. It was approximately July of
9 1987. I -- my husband and I were residing in Phoenix,
10 Arizona at that time, and on a day-to-day basis we'd be
11 reading the paper, and we saw that Governor Mecham may
12 dismiss Ralph.

13 Well, at that time I said to myself, well,
14 good, now he's going to get a dose of his own medicine.
15 And at that time I said, well, I'm going to give him a
16 call and I'm going to talk to him, because I had been
17 thinking about going to Governor Mecham with some things
18 that I had. But when I would talk to people, they would
19 say, I'm not going to get involved. I'm afraid of my job.
20 I'm afraid to get involved. I'll lie. I'll say that I
21 don't know what you're talking about.

22 So I said, well, I'm going to meet with Ralph
23 Milstead, and I'm going to sit in front of him, and since
24 I know him very personal, I'm going to see if maybe, if
25 maybe he's seen that he's getting what he's been dosing

1 out.

2 I called him. We met at the Holiday Inn at
3 Peoria and the freeway --

4 MR. ECKSTEIN: Mr. Presiding Officer, I'm going to
5 object to any recitation of the conversation between this
6 witness and Colonel Milstead. Your Honor has ruled on
7 March 9th that any evidence with respect to bias or motive
8 on the part of Colonel Milstead with respect to Governor
9 Mecham would be cumulative.

10 I believe that this testimony would go into
11 that, and I object on the basis of your order of March
12 9th. I think it is clear and the evidence is cumulative.

13 THE PRESIDING OFFICER: How would this lead to
14 something that was outside the parameters of my order?

15 MR. CRAFT: Your Honor, it's laying the foundation
16 for the discussions that she had with Director Milstead
17 relative to this trial, relative to the issue of
18 impeachment, relative to the issue of Governor Mecham,
19 relative to the issue of the Department of Public Safety,
20 relative to the credibility of the testimony and the
21 statements that have been made by Colonel Milstead,
22 relative to the voracity of those statements, Your Honor.

23 THE PRESIDING OFFICER: Now, as I recall, my ruling
24 allowed you to go into the truthfulness of Colonel
25 Milstead, and certainly if you have questions that would

1 deal with this witness's opinion of Colonel Milstead's
2 truthfulness, or her understanding and knowledge of
3 Colonel Milstead's reputation as to truthfulness, those
4 questions would be allowable under my order.

5 If we're going to talk about specific acts of
6 misconduct, such as the things that we've gone into with
7 relation to other witnesses here as to other matters that
8 are not central to the issue of Articles of Impeachment, I
9 will sustain the objection. But at this point, I don't
10 know specifically.

11 Now, you're asking her a question that leads
12 to a conversation, and I don't know why you're allowing
13 her to have quite free rein just in answering these
14 questions. I'd appreciate it if you'd be specific in your
15 questioning as to time, date, person, place.

16 And at this point I'll overrule the
17 objection.

18 BY MR. CRAFT:

19 Q. Did you call Colonel Milstead in July of
20 1987?

21 A. Yes, sir.

22 Q. And did you ask to see him?

23 A. Yes, sir.

24 Q. And where did you ask to see him?

25 A. Holiday Inn, Peoria and the freeway.

1 Q. And did the Colonel respond to your request?

2 A. Oh, yes.

3 Q. And did you meet with him?

4 A. Yes, I did. I don't remember. I think it
5 was a couple days or a week later, something like a that.

6 Q. What time of day was this, approximately?

7 A. I don't recall. It was after lunchtime. It
8 could have been 2:00, 3 o'clock, something like this.

9 Q. But it was before 5 o'clock in the evening?

10 A. Yes, m'hum.

11 Q. Had you had a habit of meeting with him
12 during these types of periods?

13 MR. ECKSTEIN: Objection; immaterial, irrelevant.

14 THE PRESIDING OFFICER: Sustained.

15 BY MR. CRAFT:

16 Q. Did he come to the meeting?

17 A. Yes, he did.

18 Q. And what did you say to him?

19 A. Well, we made our greetings, and, "It's been
20 a while," and I just said, "I've been reading the papers,
21 and it looks like you're going to be fired. What are you
22 going to do now?"

23 Q. And what did he say?

24 A. He said --

25 MR. ECKSTEIN: Objection. Objection, Your Honor.

1 I believe this is covered by your order of March 9, and I
2 know you're familiar with it. But this is cumulative
3 evidence that goes to possible bias or motive for
4 testifying against the Governor. You have ordered
5 previously that no further testimony would be taken on
6 this point.

7 MR. CRAFT: Your Honor, I am attempting to try to
8 get at the truth. I'm attempting to try to lay the
9 foundation for conversations which Mrs. Johnston
10 personally engaged in with Director Milstead. And if --

11 THE PRESIDING OFFICER: Were they the subject of
12 cross-examination of Director Milstead?

13 MR. CRAFT: Yes, Your Honor.

14 THE PRESIDING OFFICER: Did you ask him about these
15 specific conversations?

16 MR. CRAFT: I did indeed. I have the transcript,
17 which is here, and I'm going to walk back through them, if
18 I can get to it. But I have to lay the foundation as to
19 the questions that were asked of Director Milstead
20 directly, and which impeach him or are contrary testimony.

21 MR. ECKSTEIN: Would you point out to us where in
22 the transcript Colonel Milstead was asked specific
23 questions about those conversations and those specific
24 points that you wish to impeach him on?

25 MR. CRAFT: I'll tell you, Counselor, what I'd

1 really like to do is sit down and let this body ask the
2 questions, because I'm constrained to ask the questions,
3 and I know the Senators can get to the truth, and I
4 obviously have not been able to do that right now.

5 THE PRESIDING OFFICER: Counsel, that is not an
6 answer to my question. I would like to know specifically
7 where in the record you did warn Director Milstead in such
8 a way as to ask if certain conversations did in fact take
9 place if you intend to impeach him on prior inconsistent
10 statements.

11 MR. CRAFT: Your Honor, I believe he testified that
12 he did meet with Christina Johnston at Peoria and the
13 freeway sometime in July 1987. I asked him some specific
14 questions relative to conversations that he had with her,
15 and asked him whether or not he recalled having a
16 conversation with regard to whether or not the Governor
17 was after him, whether or not Max Hawkins was after him,
18 whether or not -- numerous other questions that were asked
19 of Director Milstead relative to that conversation, and
20 relative to the use of his automobile at that time, and
21 other questions which are totally relevant to the
22 questions that I asked him on cross-examination, and for
23 which this witness is here to give a different version
24 than what he gave us when he testified.

25 MR. ECKSTEIN: Mr. Presiding Officer, my

1 recollection may be wrong. I do recall counsel asking
2 Director Milstead whether there was such a meeting. My
3 recollection is, however, that he stopped short of asking
4 specifics about that conversation. I would be happy to
5 have particular transcript references pointed out.

6 MR. CRAFT: Your Honor, if it please the Court, I
7 will set aside this conversation at this time and go
8 directly to a number of specifics that I have in front of
9 me. And I will search that record out, Counsel, over the
10 noon hour, which is coming up in about 17 minutes, and I'd
11 be happy to revisit it, if that's your pleasure, Your
12 Honor.

13 THE PRESIDING OFFICER: I'd appreciate that.

14 Could I have that by 1:30 so I could read it
15 before we resume at 2 o'clock? Thank you.

16 You may proceed to another item, then.

17 BY MR. CRAFT:

18 Q. Mrs. Johnston, have you been married before?

19 A. Yes, I have.

20 Q. And how many times have you been married?

21 A. Only six.

22 Q. And is there a reason for that that you would
23 like to tell this Court?

24 A. Well, I had a --

25 MR. ECKSTEIN: Mr. Presiding Officer, all of this

1 testimony is irrelevant --

2 MR. CRAFT: I'm laying a foundation, Your Honor.

3 MR. ECKSTEIN: Excuse me.

4 MR. CRAFT: I don't know how you can get to the
5 truth if I'm interrupted every time, even with regard to a
6 question as to how many times she's been married.

7 THE PRESIDING OFFICER: I fail to see any relevance
8 here. I'll sustain the objection.

9 BY MR. CRAFT:

10 Q. Have you always supported yourself?

11 A. Yes, sir.

12 Q. Have you always supported yourself by working
13 hard?

14 A. Yes, sir.

15 Q. And how many children do you have?

16 A. I have three. My youngest is 27 months.

17 Q. How old is your oldest?

18 A. He just turned 26.

19 Q. And in all of those marriages, how much child
20 support have you ever received?

21 MR. ECKSTEIN: Objection, irrelevant and
22 immaterial.

23 THE PRESIDING OFFICER: Sustained.

24 BY MR. CRAFT:

25 Q. Were you married when you met Ralph Milstead?

1 A. No.

2 Q. Do you know whether he was married?

3 A. He told me he wasn't.

4 MR. ECKSTEIN: Objection; irrelevant and
5 immaterial.

6 THE PRESIDING OFFICER: Sustained, and within the
7 parameters of my order, Counsel.

8 BY MR. CRAFT:

9 Q. Did you ever have a conversation with
10 Director Milstead where he explained his ambition to be
11 Governor of this State?

12 A. Yes, I did.

13 MR. ECKSTEIN: Objection --

14 BY MR. CRAFT:

15 Q. Can you telling us when that took place?

16 THE PRESIDING OFFICER: Just a minute. Don't
17 answer.

18 MR. ECKSTEIN: Objection; irrelevant and
19 immaterial.

20 THE PRESIDING OFFICER: Sustained.

21 BY MR. CRAFT:

22 Q. Did you ever have a conversation with regard
23 to Director Milstead about how he could beat a lie
24 detector test?

25 A. Yes.

1 MR. ECKSTEIN: Objection; irrelevant and
2 immaterial.

3 THE PRESIDING OFFICER: Sustained, and within the
4 parameters of my order.

5 BY MR. CRAFT:

6 Q. Do you know Sam Lewis?

7 A. Yes, I do.

8 Q. Did you have a professional relationship with
9 Mr. Lewis?

10 A. Never.

11 Q. Did you have a social relationship with him?

12 A. Yes.

13 MR. ECKSTEIN: Objection; irrelevant and
14 immaterial.

15 MR. CRAFT: Mr. Lewis testified, Your Honor --

16 THE PRESIDING OFFICER: Overruled. You may answer.

17 THE WITNESS: Excuse me.

18 BY MR. CRAFT:

19 Q. The question was whether or not you had a
20 social relationship with Colonel Lewis.

21 A. Strictly.

22 Q. Let me draw your attention to some testimony
23 that was given by Colonel Milstead during this trial.

24 I'll refer specifically for the Senators and counsel to
25 Volume 7, page 1417. The question of Colonel Milstead

1 was:

2 "Colonel Milstead, did you have a
3 conversation with Governor Babbitt prior to your
4 appointment as Director of the Department of Public
5 Safety with respect to your marital status?

6 "ANSWER: No, sir."

7 Did you, Mrs. Johnston, have a conversation
8 with Director Milstead relative to conditions of his
9 employment that were imposed by Governor Babbitt?

10 A. Yes, I did.

11 MR. ECKSTEIN: Objection, Mr. Presiding Officer.
12 This type of testimony is prohibited under Rule 608(b).
13 It is absolutely prohibited.

14 THE PRESIDING OFFICER: Sustained.

15 MR. CRAFT: I'm at a loss, Your Honor, as to
16 what's -- maybe I just don't understand the rules. And
17 that's obvious --

18 THE PRESIDING OFFICER: That may be a good
19 statement.

20 MR. CRAFT: It sure might, Your Honor. And what
21 I'm trying to do is to find out what the parameters are
22 for impeaching a witness where he takes the witness stand
23 and I ask him a specific question, Your Honor, and a
24 specific question is under oath, and he gives an answer.
25 And I have a witness that takes the stand where he has

1 denied making a statement.

2 We already have one witness who has taken the
3 stand and under oath has testified that, indeed, Colonel
4 Milstead told him, and it was Mr. Steiger, who testified
5 last week, that Colonel Milstead related to him a story
6 which was that Colonel -- that Governor Babbitt required
7 him to get married as a condition of being appointed as
8 the Director of Public Safety.

9 Now, I don't understand the relevance of
10 being able to ask Mr. Steiger that question and get a
11 response and not be able to ask that same question of
12 another witness who is under oath who would testify to the
13 fact that Colonel Milstead made the same statement to her.

14 MR. ECKSTEIN: Mr. Presiding Officer, I will only
15 comment with respect to counsel's misstatement regarding
16 Mr. Steiger's testimony. The statement was vague. It was
17 not as Mr. Craft has stated, and that still does not
18 excuse counsel's refusal to read your order and to read
19 Rule 608(b). The order and the rule are controlling, and
20 counsel knows that.

21 THE PRESIDING OFFICER: It's also inadmissible
22 under Rule 613(b), unless you read the statement to the
23 witness on cross and asked him if he made it, and so
24 that's one of the additional reasons.

25 I think it's time for us to take our noon

1 recess. Perhaps counsel can review my order.

2 (Recessed at 11:48 a.m.)

3 (Reconvened at 2:05 p.m.)

4 THE PRESIDING OFFICER: Thank you, ladies and
5 gentlemen. The Court of Impeachment is reconvened. The
6 record will show the presence of a majority of the Board
7 of Managers, their counsel, and counsel for the
8 respondent.

9 Mr. Craft, are you ready to proceed?

10 MR. CRAFT: I am, Your Honor.

11 THE PRESIDING OFFICER: Do you wish to recall Ms.
12 Johnston?

13 MR. CRAFT: It might be profitable, before you call
14 Ms. Johnston, to allow me to address the Court with regard
15 to the rules relative to the admissibility of evidence,
16 and I would like to ask the Court's indulgence for just a
17 moment. I went back at the lunch break; I did look back
18 at your ruling, Your Honor.

19 THE PRESIDING OFFICER: That is Document 70?

20 MR. CRAFT: The document that I am looking at I
21 don't have a number on, Your Honor. I believe that that
22 is the number.

23 THE PRESIDING OFFICER: The Document 70 was a
24 synopsis of my ruling that I placed in the record, which
25 had attached to it two and a half pages of the reporter's

1 transcript, when I actually made the ruling on a previous
2 day.

3 MR. CRAFT: I was looking at the March 3rd ruling,
4 and then as it was further elaborated in Volume 7 starting
5 at page 1518.

6 Your Honor, looking at the Rules of Evidence
7 over the lunch break, the difference between impeachment
8 and rehabilitation evidence, admissible under Rule 608 and
9 that admissible under Rules 401, 402 and 403, is that
10 evidence under Rule 608 shows the witness' character for
11 untruthfulness, and is based on events related to the
12 matters being litigated, while evidence under Rules 401,
13 402 and 403 show either motive to be untruthful, or
14 specific instances of conduct inconsistent with trial
15 testimony, which in either case must be related to the
16 matter being litigated.

17 I'll call to the Presiding Officer's
18 attention that impeachment and rehabilitation evidence is
19 admissible under Rule 401, evidence that tests, sustains
20 or impeaches the credibility of character of a witness is
21 generally admissible, State vs. Jeffers, 135 Arizona 404,
22 661 P2d. 1005. This is a 1983 case. A party against whom
23 a witness is produced has a right to present evidence that
24 may in the slightest degree affect the witness'
25 credibility.

1 Your Honor, the evidence I am attempting to
2 elicit from this witness goes directly to what I think is
3 the heart of the case, and the heart of the case is the
4 credibility of the single complaining witness, Colonel
5 Milstead, with no other witnesses. It is a test of his
6 credibility, Your Honor, against that of Governor Evan
7 Mecham. And I think that is what is at the crux of the
8 test that this body will have to rule on, and their
9 judgment will have to be based upon the evidence that's
10 being elicited by the witnesses.

11 That is why, Your Honor, the questions which
12 I was beginning to pursue, went back to specific instances
13 of testimony that was given here by Colonel Milstead on
14 cross-examination, where I asked him specific questions
15 and he gave me specific answers, Your Honor.

16 THE PRESIDING OFFICER: What areas in
17 Mr. Milstead's testimony are you referring to? Questions
18 at the Big Apple concerning --

19 MR. CRAFT: To begin with, the cite that I gave you
20 over the break was the one that dealt originally with the
21 question that I led with, which was in July of 1987 at the
22 Holiday Inn, it had to do with a specific question that
23 had to do with conversations about Governor Mecham that I
24 asked and questions that I asked of Colonel Milstead with
25 regard to whether or not Max -- he felt Max Hawkins was

1 watching him. All of these are relevant to that
2 conversation which took place between Colonel Milstead and
3 the witness. They are, I think, very relevant to the
4 impeachment process and to the evidence which we believe
5 casts doubt on Colonel Milstead's testimony.

6 THE PRESIDING OFFICER: Mr. Eckstein.

7 MR. ECKSTEIN: Mr. Presiding Officer, three things:
8 First, Rule 401, 402, and 403, set the outer limits of
9 what the testimony may be. Those rules apply to testimony
10 and a definition of what is relevant.

11 Rule 608 is a limitation on Rule 401, 402 and
12 403, and sets out the way in which testimony of specific
13 instances of conduct of a weight may be introduced through
14 cross-examination of the witness himself.

15 Secondly, I think the evidence will show, and
16 it certainly hasn't been demonstrated, that there are any
17 major conflicts between Colonel Milstead's version of his
18 conversation with Governor Mecham and Governor Mecham's
19 version. When you look at, as we will do on
20 cross-examination, at least, Governor Mecham's
21 recollection of that conversation as testified to in the
22 House of Representatives, virtually all of what Colonel
23 Milstead wrote in his DR and what he testified to is
24 remembered and recollected or can't be contradicted by
25 Governor Mecham.

1 Third, with respect to the specific line of
2 questions, the question that Mr. Craft asked had nothing
3 to do with Mr. Hawkins. It had to do with a conversation
4 about Governor Mecham. The one question that was asked at
5 page 1434 was: In that conversation did you tell
6 Mrs. Johnston that you were being watched by Max Hawkins?

7 Answer: No, sir. I don't believe so. I
8 never thought Max Hawkins ever watched me.

9 That's it. That was the extent of the
10 questioning about Governor Mecham or Max Hawkins or anyone
11 else.

12 MR. CRAFT: First of all, in response to
13 Mr. Eckstein, the Governor has not testified in this body,
14 in this Court of law. I reject categorically that this
15 body can take into account any evidence that was produced
16 anywhere else in a formal proceeding.

17 The Governor is going to testify here, Your
18 Honor, just as Colonel Milstead has testified under oath
19 here. The proceedings in the House were completely
20 different. The evidence which will be elicited here will
21 be elicited so that this body, these judges, and this jury
22 can decide the truthfulness of the evidence as they hear
23 it.

24 In addition, Your Honor, I would point out
25 under Rule 613, 613(b), the extrinsic evidence of prior

1 inconsistent statements of a witness where a witness is
2 not admissible unless the witness is afforded an
3 opportunity to explain or deny the same and the opposite
4 party is afforded an opportunity to interrogate them there
5 or, Your Honor, there is an exception in the interest of
6 justice otherwise requires.

7 I would suggest, Your Honor, I know of no
8 other case that would present, to me at least, a
9 demonstration of the interest of justice being served by
10 allowing a witness to testify with regard to a
11 conversation that appeared just a year ago, less than a
12 year ago, that's totally relevant, Your Honor, to Colonel
13 Milstead's motives and what he was attempting to do
14 vis-a-vis the Governor and what he felt about the Governor
15 at that time, and other kinds of relevant testimony that
16 go to the heart of the matter that's here.

17 THE PRESIDING OFFICER: One last comment.

18 MR. ECKSTEIN: I'll limit my comments to Rule
19 613(b). That rule relates to extrinsic evidence of a
20 prior inconsistent statement by the witness who is
21 testifying, not by some other witness.

22 And what that rule says is that extrinsic
23 evidence of a prior inconsistent statement made by
24 Christina Johnston may be examined into when that witness
25 is on the stand. That's all that it relates to. It

1 doesn't relate to extrinsic evidence of a statement made
2 by a witness who is no longer on the stand.

3 THE PRESIDING OFFICER: Maybe I should clarify what
4 I think I already clarified in the past. I agree with
5 Mr. Eckstein that Rule 401, 402 and 403 in fact are the
6 broad aspects of impeachment. However, Rule 608 and 613
7 narrow that area; in fact, we have all read and discussed
8 Rule 613(b). If I might explain, that rule excludes
9 evidence of a prior inconsistent statement unless the
10 witness is given a chance to deny or explain making that
11 particular statement.

12 In addition, the opposing party must be given
13 the opportunity to ask questions of the witness who made
14 the prior inconsistent statement regarding that particular
15 statement.

16 This rule basically provides for a "warning
17 question" for the sake of fairness, unless the interest of
18 justice otherwise requires.

19 This requirement gives the witness a chance
20 to explain or deny making the statement that is being used
21 to impeach him. In addition, 613(b) must be read in
22 conjunction with Rule 608(b) which provides, which
23 includes evidence of specific acts, if the acts are
24 collateral to the proceedings.

25 Courts use the following test to determine

1 whether to admit evidence. Whether the parties seeking to
2 introduce a matter for purposes of contradicting a witness
3 be allowed to prove the matter as a part of his case for
4 any purpose independent of that contradiction. If it is
5 only relevant to contradict the witness, it cannot be
6 proven under the rules.

7 The purpose of the rule is simple, or both of
8 those rules are simple: Keep the trial focused on the
9 issues being tried. If a party wishes to show that an
10 opposing witness is an untruthful person, he may do so by
11 bringing the witnesses to testify concerning their opinion
12 of the witness' character for truthfulness or
13 untruthfulness or a witness to testify regarding the
14 reputation of the witness regarding truthfulness.

15 That goes back to the point we just don't use
16 prior bad acts to prove truthfulness or untruthfulness
17 unless they rise to the level of a conviction of a felony,
18 and unless they come in relationship to a prior
19 inconsistent statement where a specific warning question
20 has been given.

21 I think I allowed one of the areas to be
22 explored this morning concerning the invasion of the merit
23 system for that very reason, because I thought it went to
24 a specific warning question.

25 I hope we have clarified it at this point.

1 We will not be allowing questions beyond what I have
2 stated, and you keep saying it goes to the heart of the
3 case, but I don't know what you are reaching for. What
4 statement is it you want the witness to testify about?

5 MR. CRAFT: I want them to testify to a
6 conversation that Colonel Milstead had relative to his
7 motive and his motives for attempting to get the Governor.
8 His motives for answering questions from the witness when
9 she asks him, "Isn't the Governor going to fire you," and
10 his responses back and forth, which I think directly --

11 THE PRESIDING OFFICER: I already gave you that
12 point. I said you had done that, and I said back when I
13 made my ruling you have established the motive on that.
14 You can argue that in closing argument. There is no
15 reason to put on more evidence concerning that.

16 MR. CRAFT: The other point in that conversation
17 dealt with whether or not Mr. Milstead was truthful when
18 he stated under oath that he never said that Mr. Hawkins
19 was ever watching him or looking for him or matters to
20 that extent. That is a direct --

21 THE PRESIDING OFFICER: That may in fact contradict
22 what he said, but it goes to the very question of his
23 motive. We all said that you have established that
24 Mr. Milstead has a good job, that he is an influential
25 person. It is a high paying job. He knew that Governor

1 Mecham wanted to replace him. He wanted to keep that job
2 so he would do what normal people would do to keep his
3 job.

4 Now, you keep bringing up instances here that
5 go ahead and reprove those very things that I said you had
6 accomplished. That is just exactly what these rules are,
7 for to keep from extending these issues beyond what is
8 necessary. I have ruled that those are cumulative
9 matters.

10 MR. CRAFT: Your Honor, the point that I think is a
11 distinction that I am attempting to try to make are that
12 there are some 24 statements that were made under direct
13 examination and cross-examination, which I think this
14 witness can prove were, and I asked specifically of
15 Colonel Milstead that this witness can testify that that
16 is not true, that his statement was not true. It only
17 goes to the truth of the issue; it goes to the truth and
18 the veracity of what Colonel Milstead testified to under
19 oath, not to the issue itself.

20 THE PRESIDING OFFICER: Well --

21 MR. CRAFT: Let me ask you: We have talked about
22 the issue of, for example, the question of whether or not
23 Governor Babbitt had said anything at all to Director
24 Milstead and made any conditions relative to his
25 appointment as DPS Director, either appointment or

1 re-appointment.

2 The question, I don't think, is whether or
3 not Governor Babbitt did it or did not do it. The
4 question really is whether or not Colonel Milstead told
5 that to both Mr. Steiger, as well as to Mrs. Johnston.
6 That goes to the question not of the truth of the
7 statement, but whether or not it was true that he told
8 other people that.

9 He has denied telling other people that, Your
10 Honor. I have a witness that can testify directly that
11 that is not true. I am wondering, Your Honor, if that
12 means that all of the inconsistent statements, the 24 that
13 I have here, that I would ask this witness on direct
14 examination whether or not Colonel Milstead said X, and
15 she said, "He did not say that to me," or "He did say that
16 to me," and he denied it on the stand.

17 Are all of those things excluded, Your Honor?

18 THE PRESIDING OFFICER: I believe so, because that
19 is exactly what 608(b) is for. It intends only to
20 contradict what was said, and doesn't rise to the level of
21 a prior bad act amounting to a felony.

22 MR. CRAFT: Then is it the Court's belief, then,
23 that I would have to recall Colonel Milstead to ask him
24 specifically each one of these instances and give him a
25 warning and tell him again that he is under oath and then

1 ask him whether or not he said this? If at that time
2 after being warned he says the same thing, am I not then
3 allowed to bring in another witness to impeach that
4 testimony?

5 THE PRESIDING OFFICER: It is my understanding, if
6 you ask the witness a question on cross-examination
7 concerning these prior inconsistent statements and he
8 denies making that inconsistent statement, you are stuck
9 with it. You cannot bring in extrinsic evidence under
10 608(b) to disprove that prior inconsistent statement.

11 I don't know how to make it any clearer than
12 that, Mr. Craft.

13 MR. CRAFT: I would say this to the Court, Your
14 Honor: If I had understood that that was what the full
15 extent of that ruling, I certainly would not have taken up
16 the time of this body to go through an extensive process
17 of cross-examination, Your Honor, with Colonel Milstead.
18 And the reason for that is very simple. I invited
19 Mr. Eckstein and Mr. French to attend the deposition that
20 I took on Sunday two weeks ago with the Johnstons. They
21 saw fit not to attend, even after I implored them to
22 attend.

23 I then provided them, simultaneous with
24 receiving a copy of that document, Your Honor, which was
25 Monday morning, for which I provided to the Court and

1 provided to them, they knew what the Johnstons were going
2 to say. I also, Your Honor, made available the Johnstons;
3 they volunteered to be available to answer questions by
4 Mr. French and Mr. Eckstein. They did not avail
5 themselves of that opportunity.

6 In this instance, Your Honor, the extent of
7 asking the questions of Colonel Milstead was specifically
8 to go to things that we had elicited from the Johnstons.
9 I asked, and Colonel Milstead obviously has been stated,
10 even as late as today, that Colonel Milstead sought legal
11 advice from Mr. Hurwitz and got -- was prepared to testify
12 here, did testify here, got legal advice here. He knew
13 what the substance of the Johnstons' testimony was, and
14 because of that, Your Honor, I was asking him these
15 specific questions so that at a subsequent date he might
16 be able to be impeached if he gave the wrong answers.

17 THE PRESIDING OFFICER: I am sorry, there was a
18 misunderstanding. I thought in order to avoid that
19 misunderstanding when we brought up the question of this
20 ruling last week, I think it was Thursday or Friday just
21 before our recess, I think Mr. Leonard was saying
22 something about the ruling, I said well, let's talk about
23 this now, let's see just how much is left to go ahead
24 with. And I started talking about, all you have left is
25 the right to bring in witnesses on opinion of truth and

1 veracity and reputation for truth and veracity.

2 I think I went through, I don't know
3 specifically if it was that time, but I went through Rule
4 613(b) which provides that you can't ask anything that
5 doesn't have a specific warning question. If there was
6 one, you go to 608(b), which you can't prove prior bad
7 action with intrinsic evidence unless it goes to motive or
8 bias. If he gets to motive or bias, as we get back to my
9 ruling already establishing the motive or bias and not
10 allowing cumulative evidence on that point, so I don't
11 know how to make it any clearer.

12 MR. LEONARD: Mr. Presiding Officer, in light of
13 that ruling, I think Mr. Craft and I need a few minutes to
14 try to decide where we go with our next witness;
15 therefore, I would ask for a 15-minute recess.

16 But I would ask, implore the Presiding
17 Officer, we did not have an opportunity on Friday to look
18 specifically at Arizona law on this subject, but in my
19 opinion, there is a specific case which relates to this
20 exact situation, counsel Mr. Craft cited it, and it stands
21 for the proposition that impeachment evidence is
22 admissible in Arizona under 401, and if that evidence goes
23 to test or sustain or impeach the credibility or character
24 of a witness and it is generally admissible and that is
25 State vs. Jeffers, a 1983 case.

1 I think Mr. Craft and I need a few minutes to
2 decide, and I would ask the Presiding Officer if we could
3 get a copy of that case and the Presiding Officer take a
4 look at it.

5 THE PRESIDING OFFICER: I'll do that.

6 MR. LEONARD: It goes directly to the issue. In
7 the meantime we need a few minutes to try to decide what
8 we are going to do for witnesses for the rest of the day.

9 THE PRESIDING OFFICER: I'll be glad to give you
10 that 15-minute recess. I'll obtain a copy of it. The
11 cite of the case again, State vs. Jeffers?

12 MR. LEONARD: 135 Arizona 404.

13 THE PRESIDING OFFICER: That's enough. Thank you,
14 counsel. We will take a 15-minute recess. It will be
15 2:45 when we resume.

16 (Recess at 2:30 p.m.)

17 (Reconvened at 2:50 p.m.)

18 THE PRESIDING OFFICER: Thank you, ladies and
19 gentlemen. The Court of Impeachment is reconvened. Show
20 the presence of a majority of the Board of Managers, their
21 counsel and counsel for the respondent.

22 During the recess I have read the State vs.
23 Jeffers case and discussed it with my clerks, and I do not
24 feel it is at all applicable to the situation. It does
25 not say that Rules 401, 402, 403 or 404 are not qualified

1 by Rule 608 or 613; in fact, it doesn't deal with that
2 situation at all. So it is not applicable.

3 Ladies and gentlemen of the Senate, I hope
4 you understand that in our making such a big issue of this
5 and taking well over an hour of your time arguing the
6 legal issues, it is not that I wish to be obstructionist
7 to you in hearing this evidence, which probably, if I had
8 overruled the objection, we would have heard in 10
9 minutes. It is just that you asked me to be here to rule
10 on matters of evidence, and I am doing that. That is the
11 way I believe it should be ruled on.

12 I'll say this: That I made this ruling
13 concerning the admissibility of certain evidence and the
14 inadmissibility of others, and you did not appeal or
15 overrule my ruling on it, and I tried my best to explain
16 it to counsel. I think by now they do understand what my
17 ruling was, and now that that is clear we will proceed.

18 MR. CRAFT: Mr. Presiding Officer, ladies and
19 gentlemen of the Court of Impeachment, I would ask that
20 the Court of Impeachment overrule the Presiding Officer's
21 ruling in this matter. I have about 10 statements that
22 Colonel Milstead made on the stand which I believe are not
23 truthful. There are not very many of those, and I believe
24 that in the interest of justice it will not take that
25 long, that this body has a right to know, because the

1 testimony was given by Colonel Milstead directly to this
2 body which statements may or may not be truthful. And
3 while I do not have obviously a vote and I do not have the
4 prerogative to move for overriding the Presiding Officer,
5 I would ask that some member of the body in the interest
6 of justice would allow those few exceptions to this rule
7 to be brought in. If this body were to see fit to do
8 that, I would not attempt to bring in and obviously I
9 couldn't if you did not move, I would not -- we would move
10 along to other matters.

11 I must say that we are attempting to seek the
12 truth in these matters. This is a Court of Impeachment,
13 not a court of law; that is why some of this has been very
14 difficult. I'll obviously abide by whatever the ruling
15 is, but I ask you to take that under consideration.

16 THE PRESIDING OFFICER: Senator Stump.

17 SENATOR STUMP: Mr. Presiding Officer, might be
18 helpful for us to decide that if we knew what the 10
19 points were that he would like to have, the Court -- the
20 Presiding Officer overruled on for.

21 THE PRESIDING OFFICER: I am sorry, I didn't
22 understand.

23 SENATOR STUMP: Before trying to overturn your
24 ruling, we might better be able to determine whether we
25 want to do that if we understood what the 10 statements

1 were that he wants this ruling overturned for.

2 MR. ECKSTEIN: Mr. Presiding Officer, members of
3 the Court, I think that would defeat the whole purpose of
4 the rule. What we are talking about here are collateral
5 matters from a witness who's own credibility, given her
6 opening statements, is subject to dispute. We are talking
7 about collateral matters that will spin out and out and
8 out. To allow a recitation of those statements would
9 defeat the very purpose of the rule. We oppose it.

10 THE PRESIDING OFFICER: Senator Wright.

11 SENATOR WRIGHT: Mr. Presiding Officer, could I
12 just ask one question that would possibly foreshorten
13 Senator Stump's question, and that is: As I recall the
14 line of testimony or the line of questioning or
15 examination of Colonel Milstead, and the long, long time
16 it took, but the various issues that the defense counsel
17 introduced addressed, as I recall, statements that
18 appeared in the exhibit which was not permitted to be used
19 in this trial, but which all of us were privy to and all
20 of us read. If I could just have Mr. Craft remind me if
21 there is anything he will bring out in testimony today
22 that would either contradict or only echo what we read in
23 that statement.

24 MR. CRAFT: Well, Senator Wright, you are right.
25 The portions -- and I have looked through this again and I

1 think maybe there's only five of those issues. I used the
2 Johnston sworn deposition to cross-examine Colonel
3 Milstead with. I went to some specific questions that had
4 to do with times, dates, places that the Johnstons had
5 mentioned and given under oath that they believed
6 occurred. I would take some of those that I asked on
7 cross-examination of Colonel Milstead and I would ask
8 whether or not Mrs. Johnston was aware of the truth of
9 that statement, and they specifically go to a few number
10 of areas.

11 I think the only thing that is left to me to
12 ask that I have scrutinized this carefully, which the
13 Judge did not exclude, which I'll go into and which are
14 not very long and we could be through with this witness
15 very shortly, has to do with the use of state vehicles.

16 Is that still within the bounds, or is that
17 excluded because it is not within the felony rule, Your
18 Honor?

19 THE PRESIDING OFFICER: I think that's excluded
20 also.

21 MR. CRAFT: Okay. I would say that there are about
22 five areas which were specific to Colonel Milstead in
23 questions that I asked him that he responded "no," which I
24 think impeach him on five issues. Those issues were
25 derived indeed from the sworn deposition of the Johnstons.

1 THE PRESIDING OFFICER: Any other discussion by
2 Senators?

3 Senator Sossaman.

4 SENATOR SOSSAMAN: Mr. Presiding Officer, I don't
5 wish to make a motion at this time. I think probably
6 since we began here at noon most of us are somewhat
7 confused with the technical arguments that you and the
8 lawyers have used.

9 I am not familiar with the rules that you are
10 speaking of, and I think, again, we have to trust our
11 judgment in your guiding of this procedure.

12 You have spent the last 30 minutes, I assume,
13 talking to counsel, and reading the reference that they
14 suggested, and you have given us your best ideas on that
15 process.

16 Although I know there is probably a lot of
17 people that would like, maybe not in this room, but in
18 television land, that would like to hear all about the
19 exploits of the witness that was on this morning, I am not
20 sure it is proper from what I have heard here, and I feel
21 comfortable with your ruling.

22 MR. CRAFT: If I could just respond to Senator
23 Sossaman. I would make clear that what is excluded by the
24 Judge with regard to anything that had to do with sexual
25 activities, I am not going to address those and would not

1 even ask to address those. I am only asking for questions
2 which were raised in cross-examination for which Colonel
3 Milstead gave an answer. I think there is about four of
4 them that I would use, and that's all I would do. I would
5 not go into any area that the Court determined invaded the
6 first ruling that the Judge made, and if I could just tell
7 you that when I first read the Judge's order, I read it,
8 which was March the 3rd, 1988 which was no evidence
9 regarding any sexual relationships will be permitted. I
10 understood that. I am not trying to address that.
11 Moreover, evidence of any alleged threats to the safety of
12 the Johnstons is prohibited. I understand that.

13 The Judge went on to say that he would,
14 however, allow evidence regarding motives which may have,
15 that the Milsteads may have for testifying against
16 Governor Mecham. I subsequently understand that the Judge
17 limited that, because he said I made my point and I
18 understand that.

19 Then he said he would reserve his rulings
20 with respect to allegations that Director Milstead had
21 padded his expense account or improperly used state
22 vehicles or otherwise misused his power. I am now
23 understanding that all of this information now that would
24 be relevant, or that this witness would have, except for
25 one which is the opinion as to the truth and veracity

1 which I think is the only issue, if I understand the
2 Judge's ruling, which I may now address to this witness or
3 any future witnesses which appear here.

4 What I am asking for the Court to do is to
5 overrule the Presiding Officer's ruling that would allow
6 me to go into four or five exact examples of statements
7 that were made by Colonel Milstead in response to answers
8 I asked him which this witness could testify to with
9 regard to whether it's true in her opinion or not.

10 MR. ECKSTEIN: Mr. Presiding Officer, if I could
11 respond. This issue doesn't come as a surprise to
12 counsel. I am surprised that counsel would read from a
13 March 3 order, when in fact there is a March 9 order that
14 counsel knows is available, and Mr. Leonard
15 responded to at page 1702, 1703 in Volume 8 as follows:
16 "We fully understand that there are certain exclusions
17 even relating to credibility. I think that the Presiding
18 Officer can feel assured that we will do our very best to
19 keep any evidence relating to the credibility of Director
20 Milstead within the bounds of the Presiding Officer's
21 ruling."

22 The respondent and respondent's counsel were
23 well aware of this ruling when it was made. They
24 understand it; they understood it then.

25 MR. CRAFT: The word is credibility, Mr. Eckstein,

1 and I thought that is what we were addressing today with
2 this witness, and when I had these instances of asking
3 questions which were given on direct, I mean on
4 cross-examination, and which were answered which go to
5 whether or not he told the truth or did not tell the
6 truth. To me that's what I thought that the Judge and the
7 Presiding Officer was talking about with regard to
8 credibility.

9 THE PRESIDING OFFICER: Is there any further
10 discussion by Senators? I take it then there is no motion
11 to overrule my ruling.

12 All right. There is not. We will proceed.

13 MR. CRAFT: Call Christina Johnston.

14 THE PRESIDING OFFICER: Christina Johnston will be
15 called.

16 I will remind you, you are still under oath.
17

18 CONTINUED DIRECT EXAMINATION

19 BY MR. CRAFT:

20 Q. Mrs. Johnston, earlier today I asked you a
21 question relative to your familiarity with and knowledge
22 of Mr. Ralph T. Milstead and the length of time that you
23 had known him.

24 How long have you known him?

25 A. Since November or December of 1979.

1 Personally since my birthday June 18th, 1980.

2 Q. During the course of that relationship have
3 you had an opportunity to form an opinion with regard to
4 Colonel Milstead's propensity for truth and veracity?

5 A. Yes, I have.

6 MR. ECKSTEIN: Mr. Presiding Officer, this witness
7 was not listed as a witness who would testify as to
8 opinion for truthfulness or veracity.

9 THE PRESIDING OFFICER: Counsel, we just took away
10 all the rest of her testimony. I think I'll let her
11 answer that. Objection is overruled.

12 MR. CRAFT: In addition, Your Honor, I thought
13 before we left that was the only thing you did tell me. I
14 wrote it down.

15 THE PRESIDING OFFICER: I did, sir. You may
16 proceed.

17 MR. CRAFT: Thank you.

18 Would the court reporter please read back to
19 Mrs. Johnston the question.

20 (Pending question read.)

21 BY MR. CRAFT:

22 Q. Would you tell us what you believe his
23 propensity is for telling the truth?

24 MR. ECKSTEIN: Mr. Presiding Officer, may I take
25 the witness on voir dire?

1 THE PRESIDING OFFICER: Yes, you may.

2
3 VOIR DIRE EXAMINATION

4 BY MR. ECKSTEIN:

5 Q. Mrs. Johnston, how many people have you
6 talked to to determine Colonel Milstead's reputation for
7 truth and veracity in the community?

8 A. Why don't you restate that.

9 Q. How many people have you talked to to
10 determine Colonel Milstead's reputation for truth and
11 veracity in the community?

12 A. I know a lot of people in the community that
13 know Ralph Milstead and his truthfulness.

14 Q. Would you please respond to my question. How
15 many people have you talked to about Colonel Milstead's
16 reputation for truth and veracity in the community?

17 A. I couldn't state a number, not over the
18 period of years.

19 Q. Can you give us a name?

20 A. Want me to say nine or ten or 20 or 30?

21 Q. I would like you to tell the truth.

22 A. Yeah.

23 Q. Yes, what?

24 A. Repeat your question.

25 Q. How many people in the community of Phoenix,

1 Arizona, have you talked to to determine Colonel Ralph
2 Milstead's reputation for truth and veracity in the
3 community?

4 THE PRESIDING OFFICER: Counsel, I must have
5 misunderstood the question. I thought the question was
6 does she have an opinion as to his truth and veracity, not
7 as to his reputation for truth and veracity. Because with
8 regard to how many people she knows would not be relevant
9 to her personal opinion, it would only be relevant if she
10 is talking about his reputation for truth and veracity.

11 I hate to ask the court reporter to go back
12 and read that question again, because that is the way I
13 understood it.

14 Please do.

15 MR. ECKSTEIN: Mr. Presiding Officer, I think you
16 heard it right. But I think in order to be able to give
17 an opinion, the witness has got to show some foundation,
18 and counsel has got to show some foundation for that
19 opinion.

20 THE PRESIDING OFFICER: Yes, that's true. He would
21 have to show that this witness, this witness can give an
22 opinion as to truth and veracity without having spoke to
23 anyone else, if he or she has known Colonel Milstead or
24 over a sufficient length of time and had sufficient
25 contacts with him to where she has an opinion concerning

1 his truthfulness. It doesn't depend at all upon how many
2 other people she has spoken to about it.

3 THE PRESIDING OFFICER: Read it back.

4 (Pending question read.)

5 MR. ECKSTEIN: Withdraw the objection.

6
7 CONTINUED DIRECT EXAMINATION

8 BY MR. CRAFT:

9 Q. Would you tell us what that opinion is?

10 A. My opinion is, his attitude towards people
11 that he supposedly likes and works with and the way he
12 talks about them, he is a liar. He is corrupt. He is an
13 egomaniac and he is power hungry. I am sorry, but that's
14 the truth.

15 MR. CRAFT: I have obviously no more questions.

16 THE PRESIDING OFFICER: You may cross-examine.

17
18 CROSS-EXAMINATION

19 BY MR. FRENCH:

20 Q. Mr. Presiding Officer, ladies and gentlemen
21 of the Court.

22 Mrs. Johnston, I get the impression you don't
23 like Colonel Milstead; is that correct?

24 A. Well, you know --

25 Q. Do you or do you not?

1 A. At this time I am very disgusted with him.

2 MR. FRENCH: No more questions.

3 THE PRESIDING OFFICER: Questions by Senators.

4 Senator Sossaman.

5 SENATOR SOSSAMAN: Mr. Presiding Officer, Mrs.
6 Johnston, during Colonel Milstead's testimony he indicated
7 that he had met you several times for dinner other places,
8 and the reason that he gave for that was that you were a
9 police informer for the Department of Public Safety.

10 Were you?

11 THE WITNESS: Yes, sir, from about '82 to '83. But
12 he didn't know about that until November of '83 when I was
13 through doing undercover work and I informed him, because
14 I had two officers ask me: Don't tell the Director; he'll
15 get mad at us.

16 SENATOR SOSSAMAN: Mrs. Johnston, as I recall the
17 testimony of Colonel Milstead, he admitted that you were a
18 police informer for other officers in the department, but
19 you were also his police informer also, and this was the
20 reasons for the meetings.

21 THE WITNESS: No, sir, there's nothing I would have
22 to work with him on. There's absolutely nothing. That is
23 a lie.

24 SENATOR SOSSAMAN: Mrs. Johnston, he indicated that
25 because you were working in a bar -- I believe as a

1 bartender or barmaid, I am not sure which -- that you ran
2 across quite a bit of information from, I think he said it
3 was sort of medium crime, not high crime, but medium
4 crime-type things that you relayed onto him, and people
5 who were involved in this.

6 THE WITNESS: No. As a matter of fact, from '80 to
7 '83 I did work in bars part-time in between other jobs. I
8 was going to school full-time at night. My jobs at the
9 bar didn't have anything to do with my investigative work.

10 SENATOR SOSSAMAN: Mrs. Johnston, you are stating
11 as far as you recall you had no personal relationships
12 with Colonel Milstead as far as a police informer for him?

13 THE WITNESS: You mean professional, sir?

14 SENATOR SOSSAMAN: Yes.

15 THE WITNESS: No. Professional, no, sir.

16 SENATOR SOSSAMAN: When you were working as a
17 police informer for other officers in the department, were
18 you paid?

19 THE WITNESS: Yes.

20 SENATOR SOSSAMAN: The final question, if I am
21 permitted to ask this: Did you ever hear Colonel Milstead
22 say that he would like to be Governor of Arizona?

23 THE WITNESS: Yes.

24 SENATOR SOSSAMAN: And that leads to another
25 question now: When?

1 THE WITNESS: Well, sir, it was in 1982, and
2 Babbitt was running for Governor at that time. And he
3 said, "You know, Tina," he said, "I would like to be
4 Governor some day. It is really an easy job. You don't
5 really have to do anything. Everybody does it for you."
6 He said, "As a matter of fact, you know Babbitt is
7 thinking about running for President," and I thought he
8 was kidding me. Strange sense of humor and he said,
9 "Attorney General Corbin, he could be Governor," he said,
10 "and everything would run smooth."

11 SENATOR SOSSAMAN: Thank you.

12 THE PRESIDING OFFICER: Other questions by
13 Senators?

14 Senator West.

15 SENATOR WEST: Mr. Presiding Officer,
16 Mrs. Johnston, I believe you came here and you had -- was
17 there a warrant outstanding for you?

18 THE WITNESS: Yes, sir. I was repossessing cars
19 and made some people angry.

20 SENATOR WEST: Did anybody try to serve that
21 warrant from the time you were called and put on the
22 witness list?

23 THE WITNESS: That warrant apparently -- I didn't
24 even know anything about it until I got a call from Mike
25 Scott and some reporter in Prescott had called. That is

1 how I knew about it.

2 SENATOR WEST: I would appreciate it if you would
3 listen to my question and reply to my question.

4 THE WITNESS: Repeat your question, sir.

5 SENATOR WEST: Yes. One more time. Did anybody
6 serve that warrant on you?

7 THE WITNESS: No, sir.

8 SENATOR WEST: Did you voluntarily go down and post
9 bond?

10 THE WITNESS: When I heard about it, yes, sir.

11 SENATOR WEST: Where did you get the money?

12 THE WITNESS: From my husband.

13 SENATOR WEST: That came out of your checking
14 account?

15 THE WITNESS: Yes, sir, Mr. West.

16 Can I say something to you?

17 SENATOR WEST: As I ask a question --

18 THE WITNESS: I would like to ask you a question,
19 though.

20 SENATOR WEST: You can't. I'll ask the questions,
21 thank you.

22 THE WITNESS: Okay.

23 SENATOR WEST: Mrs. Johnston, I had, I guess, the
24 privilege or the pleasure of reading a deposition
25 allegedly that you signed. I heard you speak here this

1 morning. I believe in both the deposition and your speech
2 here I got the impression that you were very familiar with
3 Colonel Milstead; in fact, I believe you called him by his
4 first name, Ralph.

5 THE WITNESS: He told me to call him Tom, but I
6 always called him Ralph.

7 SENATOR WEST: I noticed hear you called him Ralph
8 on two occasions and in the deposition you called him
9 Ralph; is that correct?

10 THE WITNESS: Yes.

11 SENATOR WEST: It was my understanding that those
12 who have a personal knowledge of him did call him Tom?

13 THE WITNESS: Yes. When I met him he said, "My
14 friends call me Tom. You can call me Tom." I said, "I'll
15 call you Ralph." He says, "You and Bruce Babbitt are the
16 ones that call me Ralph."

17 SENATOR WEST: Thank you.

18 THE PRESIDING OFFICER: Senator Kay.

19 SENATOR KAY: Mr. Presiding Officer, Mrs. Johnston,
20 what did you mean when you called Director Milstead
21 corrupt?

22 THE WITNESS: Well, some things I guess I am not
23 supposed to bring up due to objections, but he always used
24 his state car constantly; in fact, when the first time he
25 picked me up at my house in 1980, the end of June, we went

1 and got in his state car and he said, "I apologize, Tina,
2 that I am using my state car, but I don't have another
3 vehicle so if you will just bear with me." As time went
4 on he quit apologizing and he always used his state car.

5 Later on, maybe into late '81, '82, he
6 mentioned how he enjoyed using the state car. He didn't
7 have to buy gas and he didn't have to have a personal
8 vehicle, yet he mentioned he had a Jeep that his son Frank
9 used, Frank Milstead.

10 SENATOR KAY: So then what you are saying is that
11 anyone that uses a state car without explicit permission
12 would be corrupt?

13 THE WITNESS: Well, sir, he told me of things that
14 he did to other people for using the car just as he did.

15 I recall on President's day we went hiking.
16 I recall on another holiday we went hiking into the
17 Superstitions. He would come over to my house anywhere
18 from 10:00 and stay until 4:30, no pager, no way for
19 anybody to get in touch with him. He was supposed to be
20 at work and he tried to rush and get in to work at 5:00,
21 and this, I still see, is a habit of his.

22 SENATOR KAY: That is the only evidence of
23 corruption that you are talking about?

24 THE WITNESS: No, sir. When we were out eating, I
25 don't know what the reason was, I can't recall, but I

1 brought up something about him buying prime rib and eating
2 out all the time. He said it was no problem because he
3 could write it off with his friends on the -- also his
4 other girlfriends.

5 SENATOR KAY: What did you mean when you said that
6 Director Milstead was an egomaniac?

7 THE WITNESS: Well, I'll tell you, it seems like
8 everything that he does is for his own pleasure. And he
9 wants people to see he is Tarzan; that he told me one
10 time, "I don't impress that you I am the director?" n.

11 I said, "No, you don't. I am not impressed
12 by titles."

13 He said, "Well, Tina," he said, "if you don't
14 have a title or money in this world you are a loser." He
15 said, "People without money and a title are nobody." He
16 said, "Just like religion, like a Good Samaritan, it is a
17 crutch, it is a --" He said, "You don't need a crutch if
18 you have money and title. You are a loser if you don't."

19 And I said, "Well, thanks."

20 He said, "I don't mean anything to you. You
21 are beautiful."

22 SENATOR KAY: We are getting tangential here.

23 THE WITNESS: Back to the question.

24 SENATOR KAY: When you refer to someone as a
25 maniac, that questions their sanity and so forth. And

1 what you have just described is someone that is proud of
2 his own achievements in life. Isn't that what you are
3 saying?

4 THE WITNESS: Sir, that's all he talked about, him,
5 himself and him. How great he was, how wonderful he was.
6 If he would bring up somebody else, I was trying to tell
7 Senator West, he even made fun of him.

8 He told me he had powerful friends that he
9 didn't like, but he made friends with, and he jogged with
10 the Senator and he looked funny when we ran because he was
11 fat. He made fun of my instructor, instructor Bullard
12 Bullion, for Criminal Investigation I and II, because he
13 told me that he was a big fat slob and he didn't think he
14 was a good officer. I said he was --

15 SENATOR KAY: Mr. Presiding Officer --

16 MR. ECKSTEIN: I'm reluctant to interrupt the
17 Senator's questioning, but it is obvious the witness is a
18 runaway train here, and is responding not to questions but
19 to what she has been programed to testify to. I would
20 object to any further testimony by this witness.

21 MR. LEONARD: I think that comment, that objection
22 is totally out of order. Members of this jury have a
23 right to ask whatever question they want. I think counsel
24 is concerned that the truth is coming out. I think that
25 the Court ought to admonish him not to interrupt members

1 of the Senate when they are asking questions.

2 MR. ECKSTEIN: Mr. Presiding Officer, I don't
3 question the right of Senators to ask questions. I do
4 question the right of the witness to give answers to
5 questions that are not asked and to give speeches.

6 THE PRESIDING OFFICER: Yes, I think the witness
7 obviously strayed from the question, to my understanding.

8 If you wish to proceed you may, Senator Kay.

9 SENATOR KAY: No. I guess we've got the picture.
10 Thank you, sir.

11 THE PRESIDING OFFICER: Any other questions by
12 Senators?

13 Senator Stump.

14 SENATOR STUMP: Mrs. Johnston, along about 1983 I
15 was in the Attorney General's office along with Attorney
16 General and --

17 THE WITNESS: I can't hear you.

18 SENATOR STUMP: About 1983 I was in the Attorney
19 General's office along with the Attorney General and
20 Colonel Milstead, and we were discussing a bill that I was
21 going to introduce for concealed weapons. And Colonel
22 Milstead told me that he really didn't want to see such a
23 thing, because he liked to have that on the books because
24 it gave him and his men the ability to arrest people when
25 they didn't have anything else at the time; that he didn't

1 think that it was a bad thing to have a misdemeanor on the
2 books because it wasn't a felony, and, in fact, that he
3 told his wife that she shouldn't open her purse in front
4 of a police officer.

5 Now, in your relationships with him, do you
6 feel that this kind of disregard for the law and this
7 attitude of position, which is obviously -- would have
8 been obvious she was married to the Director, I don't know
9 if he was, but I assume he was since he was talking about
10 his wife -- does this kind of attitude get borne out in
11 your opinion? Does he have a rather nonchalant attitude
12 regarding, shall we say, rank has its privileges so far as
13 the law is concerned? Do you understand what I am driving
14 at?

15 THE WITNESS: Yes. Like for instance when I
16 questioned him about using the car and others couldn't, he
17 said it was different for himself. Is that what you are
18 referring to?

19 SENATOR STUMP: Yes.

20 THE WITNESS: Yes.

21 SENATOR STUMP: Thank you.

22 THE PRESIDING OFFICER: Any other questions?

23 All right. Mrs. Johnston, you are excused,
24 subject to being recalled in the event we wish to call you
25 back.

1 Thank you.

2 MR. CRAFT: Mark T. Johnston.

3 If I could change the order. Mr. MacDonald,
4 an attorney, has an appointment. It won't take long.

5 THE PRESIDING OFFICER: Right. We will change that
6 then. Mr. MacDonald who is an attorney will be called
7 next.

8 MR. CRAFT: Melvin MacDonald.

9 THE PRESIDING OFFICER: Take a seat right there.

10

11 ANDREW M. MacDONALD, JR.,

12 a witness herein, after having been first duly sworn, was
13 examined and testified as follows:

14

15 DIRECT EXAMINATION

16 BY MR. CRAFT:

17 Q. Would you please state your full name, sir.

18 A. Andrew Melvin MacDonald, Jr.

19 Q. Mr. MacDonald, where do you reside?

20 A. Here in Phoenix, Arizona, in the Moon Valley
21 area.

22 Q. How are you employed?

23 A. I'm an attorney.

24 Q. Is Mr. Ray Russell a client of yours?

25 A. Yes.

1 Q. Let me draw your attention to the evening of,
2 I believe, Saturday, November the 14th, 1987.

3 Were you representing Mr. Russell at that
4 time?

5 A. Yes, I was.

6 Q. Did you have a conversation on the evening of
7 Saturday the 14th of November with Mr. Russell?

8 A. Yes.

9 Q. Did you have a conversation before talking to
10 Mr. Russell with Ralph Milstead, the Director of Public
11 Safety?

12 A. No. I did with Steve Twist, but not
13 Mr. Milstead.

14 Q. Would you tell us the conversation that you
15 had, relate to us that conversation with regard to the
16 conversation you had with Mr. Twist that evening.

17 A. Yes. It was about 10:30 at night. I had
18 received a call at my home. Steve Twist had called and
19 was calling me from the Attorney General's Office. I had
20 indicated to Steve on earlier occasions that I had
21 represented a number of people arising out of the Evan
22 Mecham investigation, and Ray Russell was one of those
23 clients.

24 Steve called from the Attorney General's
25 Office and had indicated that Colonel Milstead had been

1 trying to get hold of him, and that Ray was not at home.
2 And Steve then indicated that the thought occurred to him
3 that I was Ray's lawyer and that they would call me and
4 ask me for permission to talk to Ray.

5 At that time I asked Steve what it was about.
6 He relayed to me at that time that there had been a
7 threat. I understood from Steve that the threat had
8 occurred the day before, and that it had been reported to
9 him that Peggy Griffith had walked out of Ray's office in
10 tears, and it was his belief that, in fact, what had
11 happened is that Peggy had told him about the threat and
12 that she was upset.

13 He relayed to me other information that he
14 believed had occurred in the Governor's office. That was
15 one of the pieces of information.

16 Q. At that time was Dr. Russell a target of the
17 grand jury?

18 A. No.

19 Q. The subject matter of the grand jury, to the
20 best of your knowledge at that time, was what?

21 A. Well, at that particular time the subject
22 matter related to the Wolfson loan, and it was my
23 understanding that that was the focus.

24 Q. Was your client aware of any of the details
25 regarding that loan?

1 A. No, he was not.

2 Q. But --

3 A. Let me correct that. There had been some
4 peripheral information that had been brought to his
5 attention, but overall I would not consider Ray Russell a
6 major figure at all in the Wolfson loan.

7 Q. Did he have any direct knowledge about the
8 transactions at all?

9 A. No. He had learned about it later on.

10 Q. Dr. Russell had to retain you to represent
11 him before the grand jury proceedings because he had been
12 called as a witness?

13 A. I might explain. There had been a number of
14 people that asked me to represent them. What I had been
15 doing at that time was informally meeting with Steve
16 Twist, Barnett Lotstein, and Mike Cudahy in the Attorney
17 General's Office the preceding weeks. So rather than have
18 various clients that I was representing go to the grand
19 jury, we had kind of had an informal agreement that I
20 would meet with them in the Attorney General's Office. We
21 would give them statements, and hopefully this would spare
22 them having to go to the grand jury.

23 Q. Are you a former federal prosecutor?

24 A. Yes. I was the United States Attorney from
25 1981 through 1985.

1 Q. You are familiar with the grand jury
2 proceedings?

3 A. Yes.

4 Q. Let me draw you back to the conversation that
5 you had with Mr. Twist.

6 When Mr. Twist gave you this information,
7 what did you perceive he was trying to communicate to you?

8 A. Well --

9 MR. ECKSTEIN: Objection; calls for speculation.

10 MR. CRAFT: No --

11 THE PRESIDING OFFICER: What he believed is
12 speculation. Sustained.

13 BY MR. CRAFT:

14 Q. What did he communicate, what was he
15 communicating to you?

16 A. Well, I think what Steve was asking was for
17 me to call Ray Russell and to find out from Ray if in fact
18 a discussion reference Peggy Griffith had occurred,
19 reference the threat had taken place in his office the
20 preceding day.

21 I had in the past, in working with Steve, had
22 indicated that I had wanted the truth to come out in the
23 investigation and pro or con I would provide that
24 information. I think he was asking me to basically
25 conduct the interview.

1 With reference to Colonel Milstead, at one
2 point during the evening I remember Steve patching in, I
3 think he patched into Colonel Milstead on the phone; I
4 didn't get the impression that he was in Steve's office at
5 the time.

6 Q. But you think that you overheard Colonel
7 Milstead involved in that process?

8 A. I know I heard him involved in the process,
9 but I think it was primarily reference the call to Ray
10 Russell which he had wanted to make.

11 Q. This was Saturday night. What time would
12 that have been, Saturday, November the 14th?

13 A. 10:30.

14 Q. 10:30 p.m.?

15 A. Yes.

16 Q. Mr. Twist was calling you, and Colonel
17 Milstead was involved?

18 A. Yes. I was told that Colonel Milstead had
19 been trying to get hold of Ray and that Ray was not home,
20 but was expected home shortly.

21 Q. Did you have concern for your client?

22 A. Yes.

23 Q. Dr. Russell --

24 A. Concern in that since I represented him, and
25 not knowing where they were going, I wanted to make sure

1 and satisfy myself in talking to Ray Russell to find out
2 what he was talking about before I permitted Colonel
3 Milstead or Steve Twist to talk to Ray Russell.

4 Q. As you know, this isn't a court of law, this
5 is a political court. And can you tell us what it was
6 that you were concerned about for your client at that
7 time?

8 A. Well, at the time I didn't know precisely the
9 direction that the Attorney General's Office was going; in
10 other words, I knew that I had some idea who some of the
11 targets were of their investigation. Obviously as
12 attorney the best service I can perform for a client is to
13 make sure that they don't become a target. So I wanted to
14 do everything within my power to make sure that none of
15 the clients that I was representing at the time became a
16 target.

17 And so, obviously, when I realized that they
18 were now focusing, when you are being called at 10:30 at
19 night, and I could tell that Steve was very concerned and,
20 you know, felt like he was onto something really big, and
21 it involved my client, I wanted to make sure that I knew
22 everything that was happening before they talked to my
23 client.

24 Q. The thing that was something big, did you
25 interpret that to mean another tampering with -- another

1 tampering episode potentially with Peggy Griffith?

2 MR. ECKSTEIN: Objection; leading.

3 THE PRESIDING OFFICER: Overruled.

4 You may answer.

5 THE WITNESS: That was the understanding for the
6 purpose of the call, the threat that Lee Watkins had made
7 to Peggy Griffith. It was told to me the preceding day.

8 BY MR. CRAFT:

9 Q. Did Deputy Attorney General Twist tell you
10 how he found this information out?

11 A. I don't recall him telling me how he found it
12 out. He did relay to me some of the problems they had had
13 in trying to find out more.

14 Q. What was that?

15 A. I remember him saying that Peggy had
16 apparently gone to Murray Miller, and after she had met
17 with Murray Miller they couldn't get any more information
18 out of her, so they were now trying to find other sources
19 who may have had the information. And since she had been
20 observed coming out of Ray Russell's -- Peggy had been
21 observed coming out of his office that preceding day,
22 allegedly crying, he thought that that may be a source of
23 information.

24 Q. Did he say where he got that information?

25 A. Yes.

1 Q. Where?

2 A. It was --

3 Q. Does the name Royanne Jordan sound familiar
4 to you?

5 A. Yes. I spoke to her that night, too.

6 Q. What did you ask her?

7 A. Well, the format after I talked to Steve,
8 Steve asked if I would speak with Ray Russell. I called
9 Ray. He wasn't home, and I left an urgent message: Call
10 me no matter what time. Within five or ten minutes Ray
11 called me at my home. I discussed with him what had
12 transpired, and I was convinced that Ray had never, to
13 that point in time, heard this allegation.

14 Q. Did he in fact deny the allegation?

15 A. Oh, yes, yes. He said that that hadn't
16 happened.

17 Q. Did he tell you that he had had a
18 conversation that day with Peggy Griffith?

19 A. When I talked to Ray the Saturday night he
20 knew that he had spoken with Peggy earlier that week, but
21 he couldn't remember whether it was Thursday or Friday, as
22 I recall.

23 Q. Did he remember the content at that time?

24 A. It dealt with women's issues. She was
25 apparently the chairwoman for some women's issue group.

1 Q. Domestic violence?

2 A. Something like that.

3 Q. Did he tell you that whether or not he had
4 spoken to Peggy Griffith relative to the allegation of a
5 death threat by Lee Watkins?

6 A. It had been my understanding that Steve had
7 not spoken with Peggy Griffith; they had been unable to
8 talk to her.

9 Q. I am talking about that Ray Russell, on the
10 meeting on Friday morning, that is the subject matter of
11 the inquiry by Steve Twist?

12 A. Ray said it didn't happen.

13 Q. That didn't happen at all?

14 A. That's right.

15 Q. Did you relate that back to Mr. Twist?

16 A. Yes. I then called Mr. Twist back on the
17 telephone and explained to him that I had interviewed Ray
18 Russell; that I had no problem with he or Colonel Milstead
19 calling him, and indicated that he was basically barking
20 up the wrong tree; that Ray knew nothing about the charge,
21 and that in fact Peggy Griffith hadn't been in there
22 talking about that issue on that day.

23 Q. You said that you represented others that
24 were targeted for appearance before the grand jury; is
25 that right?

1 A. Well, not targeted, but subpoenaed as
2 witnesses.

3 Q. I am sorry, subpoenaed as witnesses.
4 How many did you represent?

5 A. Nine, nine individuals.

6 Q. All of them had been asked to testify before
7 the grand jury on the Wolfson loan issue, to your
8 knowledge?

9 A. Yes.

10 Q. Have you ever seen, in your experience as an
11 attorney and former prosecutor, this number of parties
12 subpoenaed on an issue like this?

13 MR. ECKSTEIN: Objection; irrelevant, immaterial.

14 THE PRESIDING OFFICER: Sustained.

15 BY MR. CRAFT:

16 Q. Was the fact that the number of parties that
17 had been subpoenaed of concern to you?

18 MR. ECKSTEIN: Same objection.

19 THE PRESIDING OFFICER: Overruled.

20 You may answer.

21 THE WITNESS: I wasn't particularly concerned about
22 the number. I felt that some of the people were minor
23 players, some of the people I represented were minor
24 players, others perhaps may have more relevant evidence.
25 I wasn't particularly surprised that there was 35 or 36

1 witnesses that were subpoenaed.

2 BY MR. CRAFT:

3 Q. These people that were subpoenaed, were they
4 all political people who had been involved in the
5 political process with the Governor?

6 A. Well, the individuals that I represented were
7 friends and associates, and others who just ideologically
8 supported his views.

9 Q. Whose views?

10 A. The Governor's.

11 Q. But they were involved in the political
12 process, weren't they?

13 A. Some to a lesser extent than others. Some of
14 them hadn't made any contributions other than signing on
15 the notes. Others had contributed money. When you have
16 that many people, you can pretty well cover the spectrum.

17 Q. Their connection to the whole situation was a
18 political connection, was it not?

19 MR. ECKSTEIN: Objection; leading.

20 THE PRESIDING OFFICER: Overruled.

21 You may answer.

22 THE WITNESS: I am trying -- I would think that
23 each of them would be involved in the political process,
24 and that is why they were subpoenaed.

25 BY MR. CRAFT:

1 Q. In your experience as a former prosecutor,
2 and with your experience between 1981 and '85 as the U.S.
3 Attorney for Arizona, had you ever seen a similar
4 political issue being brought before a grand jury?

5 MR. ECKSTEIN: Objection; irrelevant and
6 immaterial.

7 THE PRESIDING OFFICER: Sustained.

8 BY MR. CRAFT:

9 Q. You said Director Milstead was also involved
10 in the conversations that took place about 10:00 at night
11 on Saturday night. Is that accurate?

12 A. It was later than 10:00. I would say his
13 involvement was minor. I just remember Mr. Twist, and it
14 seemed to me he patched in to him, because I remember
15 Colonel Milstead talking on the phone and it related to
16 the conversation with Ray Russell. And there were
17 multiple conversations that went back and forth for the
18 better part of an hour that night.

19 Q. Did you construe that as Milstead being
20 involved in an investigation?

21 A. I think he was involved in the investigation.
22 As far as wanting to interview Ray Russell, certainly.

23 Q. Can you recall anything that Colonel Milstead
24 suggested, or can you remember anything that he suggested?

25 A. I really would have to say that Steve Twist

1 was, in my view, the person that was in charge of what was
2 happening. Colonel Milstead was the party that was going
3 to conduct the interview as I understood it, but Steve was
4 running the command post.

5 Q. If I understand this correctly from what you
6 construed this conversation to be, Colonel Milstead was
7 going to be the investigator to take a statement from Ray
8 Russell if you would have allowed it to occur?

9 MR. ECKSTEIN: Objection; leading.

10 THE PRESIDING OFFICER: Sustained.

11 BY MR. CRAFT:

12 Q. What did you think Colonel Milstead was going
13 to do, or what did he say that he was going to do relative
14 to this issue?

15 A. Well, it was my understanding that Colonel
16 Milstead had hoped to interview Ray Russell that night.
17 And he, in fact, had tried, but had been unsuccessful in
18 getting anybody home.

19 Q. This was going to be Colonel Milstead
20 himself?

21 A. Yes.

22 Q. At some time past 10:00 or 11:00 at night?

23 A. Correct.

24 Q. Is that one of the reasons that gave you
25 great concern?

1 A. No. I was more concerned with Steve Twist
2 than Colonel Milstead.

3 Q. That was because Twist was giving
4 instructions?

5 A. Well, the Attorney General, in my view, has
6 the real power when it comes to the grand jury. Colonel
7 Milstead is an officer who investigates, but decisions are
8 made by the Attorney General.

9 So when Steve Twist, who did probably 99
10 percent of the conversing with me was involved in it, and
11 I could tell Steve was very concerned about things, and he
12 was -- I mean, the fact that he's working 10:30 at night
13 on a Saturday night led me to conclude that he was serious
14 about what was happening.

15 Q. Mr. MacDonald, when you were the
16 U.S. Attorney, was Ralph Milstead the Director of Public
17 Safety during that time?

18 A. Yes.

19 Q. Did you know him professionally?

20 A. I think I know everybody in this case
21 professionally: Attorney General, Colonel Milstead, and
22 others.

23 Q. I am just addressing right now Colonel
24 Milstead. Did you know him professionally?

25 A. Yes.

1 Q. Did you work with him professionally?

2 A. Yes.

3 Q. During all that time that you have worked
4 with him, do you ever recall Colonel Milstead personally
5 undertaking an investigation himself?

6 A. I recall on one occasion we were -- it
7 involved some personnel in his office. This is going back
8 a lot of years. And I remember that we had done something
9 and had not told Colonel Milstead that we were doing it,
10 and he was very upset, and I think properly so. I should
11 have contacted him at the time. But in that I know that
12 he had an interest in what was happening.

13 It was, as I recall, you are looking back
14 five or six years, we were looking at something that had
15 happened involving some of the officers in his department.
16 But other than that, mainly our major investigative
17 agencies were federal rather than state, so I would become
18 involved with Colonel Milstead at law enforcement
19 coordination meetings, and I had known him for a number of
20 years, too.

21 Q. Other than this one occasion, can you ever
22 remember another occasion where Colonel Milstead himself
23 undertook an investigation where he was going to take an
24 interview?

25 A. No.

1 Q. You were the U.S. Attorney. Is that the
2 highest ranking federal government prosecutor in the State
3 of Arizona?

4 A. Yes.

5 Q. You are appointed by the President of the
6 United States?

7 A. Yes.

8 Q. Confirmed by the Senate of the United States?

9 A. Yes.

10 Q. Your peer level, if there is a peer level of
11 a comparable state prosecutor, is there one?

12 A. Yes, the Attorney General.

13 Q. In terms of another level which is the
14 highest ranking state police official, who would that be?

15 A. I'm not sure I understand your question.

16 Q. In the State of Arizona relative to statewide
17 jurisdiction, who would be the number one parallel at your
18 level and the Attorney General's level with regard to law
19 enforcement?

20 MR. ECKSTEIN: Objection, Your Honor; this is
21 irrelevant and immaterial. We are going quite far afield
22 here.

23 THE PRESIDING OFFICER: Overruled.

24 You may answer, if you can.

25 THE WITNESS: Department of Public Safety.

1 BY MR. CRAFT:

2 Q. That would be Director Milstead?

3 A. Yes.

4 Q. Mr. MacDonald, did you ever personally, as a
5 prosecutor, undertake an investigation yourself where you
6 became an investigator in your entire tenure as
7 U.S. Attorney?

8 A. Well, on cases that I was involved in, yes, I
9 interviewed. When you talk about investigation, I would
10 personally interview the witnesses, I would, I always felt
11 more comfortable --

12 Q. Was this not after the case had been brought
13 to you by a police agency?

14 MR. ECKSTEIN: Excuse me. The witness was not
15 allowed to complete his answer, and I would request the
16 witness be given an opportunity to complete his answer.

17 MR. CRAFT: Please complete your answer.

18 THE PRESIDING OFFICER: Let him finish the answer.

19 THE WITNESS: I was going to say, I have, on cases
20 that I tried as United States Attorney, I will take a very
21 active role in interviewing witnesses.

22 In answer to pre-indictment, there was one
23 case that I specifically recall involving a murder of a
24 young child where her body was found on an Indian
25 Reservation, where I went with the County Attorney shortly

1 after her body was found because we didn't know which
2 jurisdiction would have it, and went out, was not the
3 first at the scene, obviously; there were investigators
4 there. But I would say those would be the only examples.

5 BY MR. CRAFT:

6 Q. When Colonel Milstead was discussing this
7 with Twist and you this evening, did they talk about any
8 other investigators being involved?

9 A. Well, I don't think Colonel Milstead
10 discussed it with me that evening. Colonel Milstead's
11 involvement in the conversation was very brief and very
12 short, and I think dealt with the interview. Mr. Twist
13 and myself were the main parties in the conversation.

14 Q. Could you tell me why the Director of Public
15 Safety would be the one to take an interview from
16 Dr. Russell as opposed to his investigators?

17 MR. ECKSTEIN: Objection; calls for speculation.

18 THE PRESIDING OFFICER: Sustained.

19 MR. CRAFT: One moment, Your Honor.

20 (Pause in the proceedings.)

21 BY MR. CRAFT:

22 Q. We have heard testimony presented in this
23 trial, Mr. MacDonald, that Colonel Milstead said that he
24 was not involved in conducting an investigation.

25 Is the testimony that you have given today

1 where you say he was going to be the one to actually do
2 the interviewing of Dr. Russell, is that consistent with
3 that statement?

4 MR. ECKSTEIN: Objection; compound and leading.

5 THE PRESIDING OFFICER: I think it calls for a
6 conclusion, too. The objection is sustained.

7 MR. CRAFT: I have no further questions.

8 THE WITNESS: Before you sit down, it was my
9 interpretation that Colonel Milstead was going to do the
10 questioning. It may well have been Steve Twist's
11 intention to do the questioning. I don't want to -- the
12 conversation with Colonel Milstead was like patched in and
13 out. It was just my understanding that it was Colonel
14 Milstead that had been contacting Ray Russell that night,
15 but, again, I wasn't there, and I don't know what his role
16 was. But it was my interpretation that it was Colonel
17 Milstead rather than Steve Twist that wanted to conduct
18 the interview.

19 Again, I remember during parts of the
20 conversation that it was my impression that Steve may also
21 want to be involved in the interview process, so --

22 BY MR. CRAFT:

23 Q. Let me ask you this. That raised another
24 question, and that is -- this is the last question: Did
25 Colonel Milstead have any direct involvement with regard

1 to any of the other nine or the eight other parties that
2 you represented?

3 A. Not to my knowledge.

4 Q. Did he ask to interview any of those?

5 A. No.

6 Q. To your knowledge, did Colonel Milstead have
7 any role whatsoever in interviewing witnesses or
8 participating in an investigation of activities
9 surrounding the Wolfson loan?

10 A. Not to my knowledge.

11 MR. CRAFT: Thank you. No further questions.

12 THE PRESIDING OFFICER: You may cross-examine.

13

14

CROSS-EXAMINATION

15 BY MR. FRENCH:

16 Q. Mr. Presiding Officer, members of the Court,
17 Mr. MacDonald, how are you?

18 A. How you doing?

19 Q. Okay.

20 This telephone call, that you have been asked
21 about on direct examination, from Mr. Twist, you were
22 representing Mr. Russell, correct?

23 A. Yes.

24 Q. You are not insinuating or saying in any way
25 that there was anything wrong with Mr. Twist calling you

1 in regard to your client, are you?

2 A. No. I thought it was the proper thing to do.

3 Q. That is the proper and ethical thing to do,
4 correct?

5 A. Correct.

6 Q. During the course of this conversation,
7 Mr. Twist did not tell you that Colonel Milstead wanted to
8 take a statement from Ray Russell, did he?

9 A. I don't remember him telling me. It was my
10 impression that that's what was going to happen, but --

11 Q. I believe you said you represented nine
12 people in regard to the grand jury investigation of the
13 Wolfson loan.

14 A. Correct.

15 Q. You and I have talked about that from time to
16 time, haven't we?

17 A. Sure, we have.

18 Q. In fact, I made some requests from time to
19 time that I be allowed to interview some of your clients,
20 and you complied with that, and we sat down with you
21 present, or people in my office did, and interviewed some
22 of your clients.

23 A. That's correct.

24 Q. There is nothing wrong with that?

25 A. Absolutely not.

1 Q. But it was perfectly proper for us to go
2 through you first?

3 A. That's correct.

4 Q. Are you aware, Mr. MacDonald, of the
5 allegations of the threat by Mrs. Peggy Griffith?

6 A. I am aware of them.

7 Q. And the allegations of the threat that you
8 are aware of, the allegations that she says where Watkins
9 says to her thus and so, do you consider those to be
10 serious?

11 A. I'll tell you my feeling -- the night Steve
12 Twist called me, and I knew that Steve took them very,
13 very serious, my personal feeling that night is I took
14 them far less serious, because I considered the source,
15 Lee Watkins; I personally thought he was a buffoon, and
16 didn't surprise me. I mean, I just thought: There he
17 goes again.

18 Q. At that time did you know of his criminal
19 background?

20 A. I can't remember, Mr. French, whether I had
21 read about that in the paper or not before.

22 Q. As I take it, your general feelings about it
23 that night was that he might well have said something like
24 that?

25 A. Oh, I wasn't at all surprised, if in fact he

1 made the statement, that he would have made the statement.
2 I was aware of other statements that he had made which I
3 considered irresponsible, that I had heard from others,
4 and to me it was just Lee Watkins shooting his mouth off
5 again.

6 Q. I believe counsel left out one of your
7 credentials. You are a former Superior Court Judge?

8 A. We used to sit on the Bench together.

9 Q. In connection with your job as the
10 U.S. Attorney for the District of Arizona, and recognizing
11 the Attorney General's Office and your office, you don't
12 see anything strange about the Attorney General's Office
13 investigating an alleged death threat?

14 A. No, I don't.

15 MR. FRENCH: That is all I have. Thank you.

16 THE PRESIDING OFFICER: Any redirect?

17 MR. CRAFT: No.

18 THE PRESIDING OFFICER: Questions by Senators?

19 Yes, Senator Todd.

20 SENATOR TODD: Mr. Presiding Officer, I have a
21 couple of questions for Mr. MacDonald.

22 In the realm of clarifying investigation and
23 interview, is there a difference between conducting an
24 investigation and conducting an interview?

25 THE WITNESS: Senator, in my view an interview is a

1 part of an investigation.

2 SENATOR TODD: And so if Mr. Milstead were to
3 conduct an interview, it could be a part of an
4 investigation?

5 THE WITNESS: I would think that would be a part of
6 the investigation.

7 SENATOR TODD: As far as, Mr. MacDonald, you are
8 looking at the circumstances that evening and usual versus
9 unusual, did they fit a regular pattern, or was it
10 unusual?

11 THE WITNESS: Well, I thought it was extremely
12 unusual. I had never -- depends on what you are talking
13 about. I have never been called at 10:30 at night by the
14 Chief Assistant Attorney General on an investigation. I
15 mean, it was that part of it was highly unusual.

16 But, again, I knew that Mr. Twist was heading
17 the grand jury investigation into Governor Mecham, and
18 clearly the investigation, from what had been reported to
19 him, related information touching on that investigation,
20 and so I think it was totally legitimate by Steve Twist to
21 call.

22 And again, Senator and members of the Senate,
23 I want to make clear, when I am talking about Colonel
24 Milstead's role, I'm saying that it was my impression that
25 night that Colonel Milstead was going to be conducting the

1 interview, but again, that was just my impression. I
2 don't specifically remember somebody telling me Colonel
3 Milstead will be conducting the interview. My memory was
4 that he had been trying to get Ray Russell and that he was
5 going to conduct the interview.

6 SENATOR TODD: Mr. MacDonald, I agree with you. I
7 am not sure that is all that important to the discussion
8 we are having. But do you ever remember, sir, a Governor
9 of the State of Arizona being accused of obstructing
10 justice before?

11 THE WITNESS: Not in my lifetime.

12 SENATOR TODD: The circumstances are unusual?

13 THE WITNESS: Well, I think the entire situation
14 has been unusual.

15 SENATOR TODD: Thank you, Mr. MacDonald.

16 THE PRESIDING OFFICER: Any other questions by
17 Senators?

18 Senator Steiner.

19 SENATOR STEINER: Mr. MacDonald, did I understand
20 you correctly to say that you learned on Saturday night
21 that Peggy Griffith had talked with Murray Miller? Did I
22 understand that correctly?

23 THE WITNESS: I had been told by Mr. Twist in that
24 conversation that they had tried to speak with Peggy
25 Griffith, but that she had somehow met with Murray Miller

1 and that she wasn't providing information.

2 SENATOR STEINER: Apparently that meeting took
3 place on Saturday?

4 THE WITNESS: That was my understanding, that it
5 had taken place Saturday morning.

6 SENATOR STEINER: Thank you.

7 THE PRESIDING OFFICER: Senator Usdane.

8 All right, Senator Mawhinney.

9 SENATOR MAWHINNEY: Mr. Presiding Officer, sir, you
10 have had, I guess, a professional relationship dealing
11 with Director Milstead for quite a period of time.

12 THE WITNESS: I have.

13 SENATOR MAWHINNEY: How many years?

14 THE WITNESS: I became United States Attorney in
15 '81. And I can't remember whether Colonel Milstead was
16 appointed at that time or shortly thereafter, but it is
17 within that time frame.

18 SENATOR MAWHINNEY: Would you say that you had a
19 close working relationship with him?

20 THE WITNESS: I would consider it close.

21 SENATOR MAWHINNEY: Would you be able to express an
22 opinion regarding any conduct of the director, other than,
23 I guess, what you would expect to be appropriate to the
24 senior law enforcement officer in the state?

25 THE WITNESS: Well, I think generally -- Are you

1 asking for my general opinion as his reputation?

2 SENATOR MAWHINNEY: That's right.

3 THE WITNESS: My personal opinion is he was a
4 highly respected person. I had great confidence in his
5 integrity.

6 THE PRESIDING OFFICER: Any other questions by
7 Senators?

8 If not, you are excused Judge MacDonald. It
9 is interesting to see one former Superior Court Judge
10 cross-examine another. Thank you, sir.

11 MR. LEONARD: Mr. Presiding Officer, we had
12 intended to call Mr. Sam Udall next. I talked with him, I
13 think, during the earlier intermission today, and he is
14 home and not feeling well; he says he has the 24-hour flu.
15 But he is quite sure that he will be available tomorrow
16 morning first thing. That testimony should be rather
17 brief.

18 We have no further witnesses for today.

19 THE PRESIDING OFFICER: All right. Understandably,
20 after the rulings that have been made, you might have been
21 caught short on your list of witnesses, so we will
22 stand -- I'll entertain a motion to recess at this point.

23 SENATOR USDANE: Mr. Presiding Officer, I move that
24 the Court of Impeachment stand at recess until Wednesday,
25 March the 16th, 1988 at 9:00 a.m.

1 THE PRESIDING OFFICER: Is there some addition that
2 you had with regard to our working hours, or has something
3 been tabled at least at this point?

4 SENATOR USDANE: Mr. Presiding Officer, if I may, I
5 have an understanding -- and I am sure if it is incorrect
6 we will get it corrected after I state it -- that is, that
7 we would go from 9:00 to 12:00 and from 1:00 until 6:00
8 p.m. tomorrow and each day thereafter, if counsel is able
9 to work that kind of schedule along with yourself.

10 THE PRESIDING OFFICER: Mr. Craft.

11 MR. CRAFT: Your Honor, I became aware of this when
12 President Kunasek mentioned this to me today.

13 Your Honor and Court of Impeachment, it is
14 very difficult to be adequately prepared and to provide
15 the testimony that you need. And I recognize fully that
16 this body has a duty, a Constitutional duty to move as
17 expeditiously as you possibly can to terminate and
18 conclude these proceedings.

19 We came into this case, we were prepared to
20 try this case, and we believed we knew what the rules of
21 the game were in terms of the hours that we were going to
22 keep, the days that we were going to work, and we have
23 predicated a great deal of the strategy, as well as the
24 people when they were going to testify, based upon our
25 understanding of what those rules were.

1 It works an extreme hardship, ladies and
2 gentlemen of the Court of Impeachment, to force us at a
3 time such as this to add two more hours to the testimony
4 that's given here.

5 And let me give you an example why; the
6 reason why is simple. Some of the things that we are
7 having to address on a daily basis are very important to
8 this proceeding, but which we have no control over.
9 Events which occurred on Friday night relative to an
10 arrest of one of our witnesses required us to stop what we
11 were doing in terms of pre-trying witnesses that would be
12 presented during this week and force us to concentrate and
13 use our time and our energy and our effort to look into
14 these matters.

15 As of last evening I spent two and a half
16 hours with the FBI. That took two and a half hours out of
17 the time that I needed. What I don't have is time; I have
18 everything else except time, and adding two more hours a
19 day works an extreme hardship when we are attempting to
20 try to address other issues that have to do with tampering
21 with witnesses and witnesses changing their stories, and
22 with other things that have to do with this body.

23 And I fully appreciate what you are trying to
24 do; I understand it. But there are just so many hours in
25 the day, ladies and gentlemen of the Court of Impeachment.

1 It is not just for me, it is for the whole Court, and to
2 be inadequately prepared makes it so that it is very
3 difficult for this Governor to get a fair opportunity to
4 address all of the issues in each of the indictments.

5 I rise to say this with great reluctance. I
6 have been associating with legislative bodies. I know how
7 hard you work. I know how difficult these proceedings
8 are, not just for you but for the whole state. But I do
9 not believe that under these circumstances where we came
10 into the case when we did, with no excuses, I am not
11 making excuses, we are prepared, but we are prepared to do
12 it within the time schedule that was given to us.

13 I recognize you have prerogatives, like my
14 wife; she can change her mind, and it's her prerogative,
15 and I grant that. But I would ask you to consider what
16 the effect might be on the ability of counsel to just keep
17 up with it.

18 As you know, we have to answer the motions
19 that are made; there are numerous motions that are made.
20 That takes paperwork, that takes research; it isn't just
21 that we walk out of here at 5:00 in the evening and we are
22 through. Lots of times we spend time in chambers with the
23 Presiding Officer and with the other counsel going through
24 matters to try to speed up and for efficient operations of
25 this Court. That takes us time. We are pre-trying

1 witnesses. We are literally, from the defense point of
2 view, at a great disadvantage because we have not been
3 working on this case for three months. There is a great
4 advantage on the part of the lawyers for the Board of
5 Managers.

6 Now, that just happens to be the
7 circumstances we find ourselves in. It is not anybody's
8 fault, it is no one's fault. And I know you want to be
9 fair and I know you want to be fair to everyone, but if
10 we're forced to overextend ourselves, I don't know where
11 the breaking point is. I am worried that one of the
12 lawyers will get sick, I am worried that we just -- there
13 is just so much you can do in a 24-hour day, and these are
14 difficult and trying cases, difficult for everyone. They
15 require research, they require study, they require
16 contemplation, and they require some kind of a degree of
17 attention to detail.

18 One of the reasons that we had to
19 cross-examine, for example, Director Milstead to such an
20 extent was, we didn't have the chance to pre-try him, to
21 get him before, so we could interview these witnesses.
22 The last witness, Mr. MacDonald, I have never met before
23 and never talked to before. I had an understanding
24 through some other party as to what his testimony would
25 be, so I had some knowledge of it.

1 As a matter of fact, when Mr. Miller left the
2 case, against the Governor's best wishes, we had hoped
3 that he would be part of a transition that would allow us
4 to come in and others to come in so that we wouldn't have
5 any loss of what you would call institutional memory. I
6 happened to get thrown in this case to argue this case. I
7 didn't know until Saturday morning before the Monday
8 morning of this trial starting that I was going to act as
9 the lead counsel for Article I.

10 I am not telling you this to get you to feel
11 sorry for me. I am telling you because it is a fact. And
12 these are things that you need to consider with regard to
13 how much we can do and how fast we can do it.

14 I would like the Governor to be exonerated
15 tomorrow, and I know there is a lot of evidence that still
16 has to be presented. I would ask you to consider that
17 that extra two hours a day, for every hour that we act
18 here, there is at least three hours of preparation that at
19 least has to go on, and that is a fact of life.

20 I would ask you to take that into
21 consideration when you make the decision to extend the
22 hours. I think it works to a major and fundamental
23 disadvantage of the Governor and his lawyers who are
24 attempting to defend him in this proceeding.

25 I thank you.

1 THE PRESIDING OFFICER: Senator Usdane.

2 SENATOR USDANE: Mr. Presiding Officer, Mr. Craft's
3 plea is appreciated, and I think understood. I would only
4 say for the benefit of this Court that to my knowledge
5 there was a meeting last evening, and I understand
6 counsel, neither counsel at the Bench was there, but there
7 was a representative, and we had an understanding that it
8 was not -- we knew it was a hardship, but that it was not
9 that difficult understanding Mr. Craft's plea. My motion
10 is only to come in at 9:00 a.m. and so, therefore, I make
11 that motion with the understanding that we will have to
12 resolve the extension otherwise.

13 THE PRESIDING OFFICER: I don't understand. We are
14 just -- your motion is to recess until 9:00?

15 SENATOR USDANE: 9:00 tomorrow morning. That's all
16 that is required, I believe.

17 THE PRESIDING OFFICER: All right. I might mention
18 for my own purposes, that when we did discuss in chambers
19 last night extending the hours of the attorneys' work, I
20 did indicate some concern about increasing the hours. I
21 mentioned to leadership that a normal work week for
22 lawyers, work week from the standpoint of hours in Court
23 is normally 20 hours a week, five days, I mean four days
24 of five hours each, because the Judge normally on the
25 fifth day hears motions in all cases, so it is a four-day

1 trial week and each counsel normally is involved in five
2 hours on that day. The rest of the day they put in on
3 interviewing witnesses, preparing statements, talking with
4 investigators and returning phone calls.

5 The present schedule that you are operating
6 under at this time is five days a week, six hours a day,
7 which is 30 hours a week, which is considerably more than
8 normally attorneys work under. If you add two more hours
9 a day you are making it a 40-hour week, which would be
10 twice the normal trial demands of an attorney, and I think
11 it is quite a bit.

12 And as I mentioned to leadership last night,
13 I would be willing to try it for awhile, if you wish to
14 impose that, but I would with the caveat that if I see it
15 causing undue prejudice to either party, I would request
16 you to reduce those hours again, because to my
17 understanding you are asking considerably more than what a
18 normal trial lawyer's work week is.

19 I would be willing on my part to do it, and
20 certainly I think the one-hour gain in the lunch period is
21 certainly a reasonable request, and I don't think counsel
22 could legitimately argue about that. But the evenings
23 where they are required to prepare is another matter, so
24 we could discuss that later.

25 All right. Senator Kunasek.

1 SENATOR KUNASEK: Mr. Presiding Officer, I
2 certainly appreciate your explanation of what is involved
3 in a trial proceeding such as this. I daresay that I had
4 no idea the amount of work that went into it before we
5 started. I certainly have a much deeper appreciation for
6 that work that takes place outside of the testimony or
7 hearing times.

8 I think that your explanation should go a
9 long way toward informing the public who are following
10 these proceedings that there is much more work involved
11 than just what takes place here in the chambers. I
12 appreciate your explanation, and with that I would call
13 for the question.

14 THE PRESIDING OFFICER: All right. There is a
15 motion before the body that we recess until 9:00 tomorrow
16 morning. Under Rule 16 it would require a majority of
17 your body to concur in that motion.

18 All in favor say "aye", all opposed say "no."

19 The "ayes" appear to have it, do have it, and
20 it is so ordered.

21 (Recessed at 4:15 p.m.)

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STATE OF ARIZONA)
)
 DISTRICT OF ARIZONA) ss.

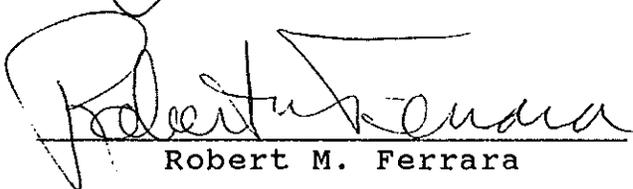
I HEREBY CERTIFY that I am a duly appointed, qualified and acting Official Court Reporter before the Senate of the State of Arizona sitting as a Court of Impeachment.

I FURTHER CERTIFY that the foregoing printed pages, numbered 2479 through 2661, inclusive, constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction.

DATED at Phoenix, Arizona, this 15th day of March, 1988.



 David R. Minder



 Robert M. Ferrara

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