Committee Report

CONSENT CALENDAR

February 7, 2018

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Committee on Executive Departments and Administration to which was referred HB 1206,

AN ACT relative to bonds for civil officers. Having considered the same, report the same with the following resolution: RESOLVED, that it is INEXPEDIENT TO LEGISLATE.

Rep. Kristina Schultz

FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

Committee:	**Executive Departments and Administration**
Bill Number:	**HB 1206**
Title:	**relative to bonds for civil officers.**
Date:	**February 7, 2018**
Consent Calendar:	**CONSENT**
Recommendation:	**INEXPEDIENT TO LEGISLATE**

STATEMENT OF INTENT

This bill would replace the term "employee" with "civil officer" in the statutes on government employee bonding. The committee was not convinced the change was either necessary or desirable.

Vote 17-0.

Rep. Kristina Schultz
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

CONSENT CALENDAR

Executive Departments and Administration

HB 1206, relative to bonds for civil officers. **INEXPEDIENT TO LEGISLATE.**

Rep. Kristina Schultz for Executive Departments and Administration. This bill would replace the term "employee" with "civil officer" in the statutes on government employee bonding. The committee was not convinced the change was either necessary or desirable. **Vote 17-0.**

Original: House Clerk

Cc: Committee Bill File

1206 Blurb per McGuire

Simmons, Miriam

From: Carol McGuire <mcguire4house@gmail.com>
Sent: Sunday, February 04, 2018 1:47 PM
To: Simmons, Miriam; Kris Schultz
Subject: HB1206 blurb

HB 1206, bonds for civil officers.

ITL, 14-0 (please confirm), consent

This bill would change the term "employee" with "civil officer" in the statutes on government employee bonding. The committee was not convinced the change was either necessary or desirable.

Kris Schultz for the committee

Voting Sheets

HOUSE COMMITTEE ON EXECUTIVE DEPARTMENTS AND ADMINISTRATION

EXECUTIVE SESSION on HB 1206

BILL TITLE: relative to bonds for civil officers.

DATE: January 30, 2018

LOB ROOM: 306

MOTIONS: INEXPEDIENT TO LEGISLATE

Moved by Rep. Schultz Seconded by Rep. Schuett Vote: 17-0

CONSENT CALENDAR: YES

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep Jacalyn Cilley, Clerk

STATE OF NEW HAMPSHIRE
OFFICE OF THE HOUSE CLERK

1/5/2018 10:28:37 AM
Roll Call Committee Registers Report

2018 SESSION

ED&A

Bill #: 1206 Title: Relative to bonds for civil officers.

PH Date: 1/17/18 Exec Session Date: 1/30/18

Motion: ITL Amendment #:

MEMBER	YEAS	NAYS
McGuire, Carol M. Chariman	✓	
Sytek, John Vice Chairman	✓	
Hansen, Peter T.	✓	
~~Beaudoin~~, Steven P. Byron	✓	
Proulx, Mark L.		
Hoell, J.R.		
~~Kaczynski~~, Thomas L. Thomas	✓	
Woitkun, Steven J.	✓	
Brewster, Michael A.		
Marsh, Henry A.	✓	
~~Smith, Ry~~an D. S. Schmidt	✓	
Gagnon, Raymond G.	✓	
Schmidt, Peter B.	✓	
Jeudy, Jean L.	✓	
Sullivan, Daniel J.	✓	
Goley, Jeffrey P.	✓	
Cilley, Jacalyn L. Clerk	✓	
Roberts, Carol R.	✓	
Schuett, Dianne E.	✓	
Schultz, Kristina	✓	
TOTAL VOTE:		

17-0 Motion passes

HOUSE COMMITTEE ON EXECUTIVE DEPARTMENTS AND ADMINISTRATION

EXECUTIVE SESSION on HB 1206

BILL TITLE: relative to bonds for civil officers.

DATE: 1/30/18

LOB ROOM: 306

MOTION: (Please check one box)

☐ OTP ☑ ITL ☐ Retain (1st year) ☐ Interim Study (2nd year) ☐ Adoption of Amendment # ______ (if offered)

Moved by Rep. Schultz Seconded by Rep. Schuett Vote: 17-0

MOTION: (Please check one box)

☐ OTP ☐ OTP/A ☐ ITL ☐ Retain (1st year) ☐ Interim Study (2nd year) ☐ Adoption of Amendment # ______ (if offered)

Moved by Rep. ______ Seconded by Rep. ______ Vote: ______

MOTION: (Please check one box)

☐ OTP ☐ OTP/A ☐ ITL ☐ Retain (1st year) ☐ Interim Study (2nd year) ☐ Adoption of Amendment # ______ (if offered)

Moved by Rep. ______ Seconded by Rep. ______ Vote: ______

MOTION: (Please check one box)

☐ OTP ☐ OTP/A ☐ ITL ☐ Retain (1st year) ☐ Interim Study (2nd year) ☐ Adoption of Amendment # ______ (if offered)

Moved by Rep. ______ Seconded by Rep. ______ Vote: ______

CONSENT CALENDAR: ✓ YES ____ NO

Minority Report? ______ Yes ______ No If yes, author, Rep: ______ Motion______

Respectfully submitted: Jacalyn Cilley

Rep Jacalyn Cilley, Clerk

Hearing Minutes

HOUSE COMMITTEE ON EXECUTIVE DEPARTMENTS AND ADMINISTRATION

PUBLIC HEARING ON HB 1206

BILL TITLE: **relative to bonds for civil officers.**

DATE: **January 17, 2018**

LOB ROOM: **306** **Time Public Hearing Called to Order:** **11:00 a.m.**

Time Adjourned: **11:15 a.m.**

Committee Members: **Reps. McGuire, Sytek, Beaudoin, Brewster, Gagnon, Jeudy, Goley, Schuett and Schultz**

Bill Sponsors:
Rep. Brewster

TESTIMONY

***Rep. Brewster, prime sponsor,** introduced the bill – supports the bill.
He said he had seen public officers (not employees) harassing people. He said that it costs the state money to defend such public offers or to make payments "on the side." He said that other states have such bonding requirements.

Question from Rep. Gagnon - why the bill replaced "employee" with "officer." **ANS:** Joseph Haas answered, saying that the doctrine of "respondence superior" *viz.* an employee acting on order of his public officer superior is bonded.

Chris Nicolopoulos, NH Association of Insurance Agencies – opposes the bill. He said that the objectives of the sponsors would not be achieved by this bill. The bill would not address the situations the sponsors are concerned about. That is, a citizen would not have a cause of action to trigger such a bond.

Joseph S. Haas, Concord NH – supports the bill.

Respectfully submitted by,

Rep. John Sytek, Acting Clerk

Sytek's original minutes

Minutes of public hearings before the ED&A committee – January 17, 2018

HB-1206. Relative to bonds for public officers. The hearing opened at 11:00 AM and closed at 11:15 AM.

Rep. Brewster, prime sponsor, introduced the bill. He said he had seen public officers (not employees) harassing people. He said that it costs the state money to defend such public offers or to make payments "on the side." He said that other states have such bonding requirements.

Rep. Gagnon asked why the bill replaced "employee" with "officer." Joseph Haas answered, saying that the doctrine of "respondeat superior" *viz.* an employee acting on order of his public officer superior is bonded.

Chris Nicolopoulos representing the NH Association of Insurance Agencies said that the objectives of the sponsors would not be achieved by this bill. The bill would not address the situations the sponsors are concerned about. That is, a citizen would not have a cause of action to trigger such a bond.

Simmons, Miriam

From: Carol McGuire <mcguire4house@gmail.com>
Sent: Thursday, January 18, 2018 10:04 AM
To: Simmons, Miriam
Subject: Fwd: Minutes of Jan 17 attached for your review & forwarding to committee assistant.
Attachments: 2018MinJan17.docx

Follow Up Flag: Follow up
Flag Status: Completed

Good.

---------- Forwarded message ---------
From: Sytek, John <John.Sytek@leg.state.nh.us>
Date: Wed, Jan 17, 2018 at 10:49 PM
Subject: Minutes of Jan 17 attached for your review & forwarding to committee assistant.
To: McGuire, Carol <carol@mcguire4house.com>

--
Carol

HOUSE COMMITTEE ON EXECUTIVE DEPARTMENTS AND ADMINISTRATION

PUBLIC HEARING ON HB 1206

BILL TITLE: relative to bonds for civil officers.

DATE: 1/17/2018

ROOM: 306 Time Public Hearing Called to Order: 11:00 AM

Time Adjourned: 11:15AM

(please circle if present)

Committee Members: Reps. McGuire, Sytek, Hansen, Beaudoin, Proulx, Hoell, Kaczynski, Woitkun, Brewster, H. Marsh, R. Smith, Gagnon, P. Schmidt, Jeudy, D. Sullivan, Goley, Roberts, Schuett, Schultz and Cilley

Bill Sponsors:
Rep. Brewster

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # 1206 Date 1/17/18

Committee ED+A

**** Please Print All Information ****

Name	Address	Phone	Representing	(check one) Pro	Con

Testimony

INVESTIGATIONS OF THE LATE JOHN C. FAIRBANKS AND OTHERS STUDY COMMITTEE

(HB 688, Chapter 340:1, Laws of 1997)

FINAL REPORT

February 1998

Members

Representative Alf E. Jacobson, Chairman
Senator Allen Whipple, Vice Chairman
Representative Barbara Hull Richardson, Secretary
Senator John S. Barnes, Jr.
Senator Sheila Roberge
Representative David A. Bickford
Representative Susan J. Clay
Representative Benjamin J. DePecol
Representative Paul M. Mirski
Representative Wayne T. Moynihan

Alternates

Representatives Janet G. Wall and Terence R. Pfaff

Presented by

The Investigations of the Late John C. Fairbanks and Others Study Committee

to

Senate President Joseph L. Delahunty

and

House Speaker Donna P. Sytek

INVESTIGATIONS OF THE LATE JOHN C. FAIRBANKS AND OTHERS STUDY COMMITTEE

(HB 688, Chapter 340:1, Laws of 1997)

FINAL REPORT

February 1998

The special legislative committee to investigate the activities of former Judge John C. Fairbanks, former Attorney Charles C. Chretien and former Attorney William Hibbard was authorized by the passage of HB 688 by the 1997 legislative session and signed by Governor Jeanne Shaheen. This committee is a successor to a 1996 legislative committee to investigate Mr. Fairbanks. The authorization of the present committee extends to January 1, 1998.

The committee's membership is three Senators appointed by the President of the Senate and seven members from the House Judiciary and Family Law Committee appointed by the Speaker of the House. The three Senate members are: Senate Majority Leader John S. Barnes, Jr., and Senators Sheila Roberge and Allen Whipple. The House Members are: Representatives David A. Bickford, Susan J. Clay, Benjamin J. DePecol, Alf E. Jacobson, Paul M. Mirski, Wayne T. Moynihan and Barbara Hull Richardson. Representatives DePecol and Jacobson also served on the first Fairbanks Committee. House alternates, Representatives Janet G. Wall and Terence R. Pfaff, were appointed by Speaker Sytek.

As required by law, the Committee organized on July 22, 1997. The Committee elected the following members as officers: Rep. Jacobson, Chairman; Sen. Whipple, Vice Chairman; and Rep. Richardson, Secretary. The Committee has held 30 meetings or hearings; interviewed 49 witnesses of whom 19 witnesses were not heard by the 1996 committee. As authorized by the legislation, the Committee possessed subpoena power and issued three subpoenas. Despite former Attorney General Jeffrey Howard's misgivings about legislative subpoenas, calling it "overkill," the Committee used the subpoena sparingly but effectively. In some cases, it permitted witnesses such as Judge Barbadoro to testify where otherwise he could not have because of federal law.

This report is divided into separate categories of inquiries and relies on information obtained by the first committee as well as information generated by the second committee.

JUDICIAL CONDUCT OF JOHN FAIRBANKS:

Attorney Fred Upton of the Judicial Conduct Committee (JCC) testified that it handled four complaints of possible misconduct by Judge Fairbanks. In 1983 upon a complaint signed by Newport citizens, Governor John Sununu forwarded it to the JCC. The complaint involved the issue of disparate sentences. The JCC ruled that there was no "possibility of any ethical misconduct." (Testimony, 11/6/96, p. 7) The second complaint involved odometer tampering, and Fairbanks did make an award. However, the defendant complained that Fairbanks had exceeded the 60 day rule for making a decision in district court. Instead of rescheduling the case, Fairbanks paid the plaintiff $1,000 out of his own funds. For this, the JCC gave him a private reprimand. (Testimony, 11/6/96, pp. 9-11) The third complaint involved Vanessa Wilson, a lawyer, who complained that Fairbanks "in the presence of her opponent had made an ex-parte change in visitation rights." Wilson, however, declined to come before the JCC. As a result, the JCC treated the complaint as a withdrawal. (Testimony, 11/6/96 p. 11) The fourth complaint involved a breeding mare belonging to Ralph Kay who sued Jane Carpenter and got an award of $500. Carpenter objected to the award and filed a complaint with the JCC which dismissed the case because it "related to a judge's findings." (Testimony, 11/6/96, pp. 12-13) According to Upton, the JCC never handled any "complaint against Judge Fairbanks alleging conduct that might constitute a crime." (Testimony, 11/6/96, p. 27)

On the other hand, there was considerable testimony before this committee that concerned the sentences delivered by Fairbanks; specifically his conduct in court and preferential treatment for some defendants. Tom Cummings, former police prosecutor in Newport, testified that "there were periods of times" that he "felt the sentences were inconsistent." (Testimony, 11/13/97, p. 37; see also p. 50 for more on erratic sentencing) Defense attorneys "were not happy with some of the procedures and...with some of the sentences." (Testimony, 11/13/97, p. 38) According to Cummings, "people hesitated and wondered what the ramifications were going to be when you went back into court again after making" a complaint against Fairbanks. (Testimony, 11/13/97, p. 39) Newport Police Chiefs Arthur Bastian and David Hoyt also testified on the difficulties of reporting poor procedures and disparate sentences. Both were fearful of the prospect of losing their jobs. (See Testimony, 9/30/97 p. 38ff) On one occasion, Bastian did go to the FBI to complain about Fairbanks, but apparently nothing came of it. Cummings also testified that Fairbanks was "not a very authoritative figure." (Testimony, 11/13/97, p. 41)

Former Newport Police Chief, Floyd Potter, testified that when he was a state trooper back in 1969, the State Police had wanted to do a criminal intelligence report that involved using an informant to monitor Fairbanks' judicial activities. The idea went to the Attorney General' s office where "it was decided not to try it, because they felt that the concern of dealing with an informant versus dealing with someone in court could be a very difficult case to make." (Testimony, 12/9/97, p. 71) Potter stated that "a lot of things were done in

chambers rather than in open court." (Testimony, 12/9/97, p. 72) According to Potter, the problem was that one had to always "proceed with caution so as not to damage anyone's reputation or whatever, particularly in a small community." (Testimony, 12/9/97, p. 74) Still, Fairbanks was "always considered by law enforcement to be particularly lenient." (Testimony, 12/9/97, p. 78)

However, former District Court Clerk, Jan Corliss, who served under Fairbanks from April, 1986 until June of 1989, testified that she never saw any behavior on the part of Fairbanks that corresponded to the complaints made by Cummings, Bastian, Potter and Hoyt. Corliss did confirm that Fairbanks was very easy going compared to other district court judges. (Testimony, 11/18/97)

PROBLEM OF NO PROPER ACCOUNTING PROCEDURES AND REPORTING:

In all three cases there is a common thread that the investigations were clearly hampered by irregular accounting methods. According to Court Auditor Craig Calaman, William Hibbard's records were in "such a mess" that they were "inauditable." (Testimony, 8/5/97, p. 53) On Chretien's accounting, the testimony was that it was "a very confused, disorganized system, if indeed, it rose to the definition of a system." (Testimony, 8/19/97, p. 41) According to Judge Paul Barbadoro, Fairbanks' records were in "a horrendous" state; "they were loose, just thrown into files, very disorganized and very incomplete." (Testimony, 9/9/97 p. 6)

On the question of reporting, the Supreme Court requires that lawyers handling trust accounts submit the Annual Trust Accounting Compliance Certificate. A comparison between the certificate filed by Fairbanks in 1985 and that filed by Chretien in 1992 shows that they are essentially the same. Furthermore, their answers are the same to the questions asked, and both lied precisely in the same way with respect to the actual conditions of their accounts. The problem is that these certificates require no documentation or supporting evidence for statements made. Probate Court Administrative Judge, John Maher, agreed that the form "is absolutely useless because there's no documentation" to support the certificate. (Testimony, 11/20/97, p. 20) Judge David Brock also believes that these certificates are merely "placebos." Furthermore, there are no resources available to make any meaningful check on these submissions.

THE COURSE OF THE EXECUTIVE BRANCH'S INVESTIGATION OF JOHN FAIRBANKS:

The State Police and the Attorney General's Office had early and repeated reports of unethical and/or illegal activities taken by Fairbanks. In the period of 1967-69, the superintendent of Sullivan County jail reported to the State Police that an inmate at the jail had reported to the superintendent that Fairbanks had dismissed a charge against an inmate after having "sexual conduct with the judge." (Testimony, Sept. 2, 1997, p. 28) A criminal intelligence report was

submitted, and a meeting took place in the office of the Attorney General. The officer who had submitted the report testified: "I felt very strongly that we should proceed and try to go with it. But, as I say, at that time, you know, it was a decision by the superiors that we not go." (Testimony, December 9, 1997, p. 77)

In 1972 police arrested a man in Newport on a domestic violence charge. Two hours later the arresting officer received a call from the State Police telling him that he had arrested an informant for the State Police who were using the informant in a sting operation directed against Fairbanks. Testimony from the arresting officer to the Committee indicated that "this wasn't any snap decision," but rather, "something that the informant and the State Police detective had talked about previous to my arresting him." (Testimony, November 13, 1997, p. 56)

As aforementioned, Governor Sununu forwarded a complaint to the JCC in 1983 about disparate sentences given by Fairbanks. However, under the guidelines of the JCC, it could take no action. Similarly in 1985 the office of the Attorney General learned that Fairbanks continued to be heavily involved in local politics in direct violation of Rule #38, Canon #7 of the Code of Judicial Conduct. As far as is known, the Attorney General took no further, investigative action. One of the mysteries of the Fairbanks investigation by the Attorney General is that the office had the capability to use pen register/trap and trace devices but never did in the search for Fairbanks even though seven orders for these devices were made in other cases. (Document dated November 18, 1970) These failures would appear to be incompatible with responsible governmental conduct.

The first beginnings of an investigation into Fairbanks' behavior began in late December 1988 with a complaint by John Tweedy of Washington, N.H., in which he complained that John Fairbanks had not been cooperative in giving a clear accounting of his brother's trust funds. Except for a preliminary interview following the filing of the complaint, there was no further activity during the early months of 1989. Stephen Merrill, Attorney General at the time, testified that the Tweedy matter "'was not brought to my attention before I left the Attorney General's office." Merrill went on to say: "unless it was considered a significant matter at that point, it wouldn't have been unusual that I was not told about it." (Testimony, 11/12/96, p. 32) Not until March 28, 1989, was there a decision to review Tweedy's claims. (Testimony, 10/21/97 p. 91) Judge Kathleen MacGuire could not remember talking to the Attorney General about Fairbanks nor of the filing of the Tweedy complaint. (Testimony, 10/31/97, pp. 4-5) The investigator, Thomas Hannigan, as late as May 1989, had doubts that the case would amount to very much. According to the testimony of Jan Corliss, in her interview with Hannigan in May 1989, Hannigan told her that "he didn't think it would be that big a case," and he was "treading real lightly." In his view, Fairbanks "would just be investigated and that would be the end of it...just a minimum, routine investigation." (Testimony, 11/18/97, pp. 17-18) As late as June 2, 1989, "the Attorney General said that he didn't think it was 'going anywhere,' that there did not appear to be any 'foundation to it,' and no misappropriation was apparent." (Memorandum, June 2, 1989 from RHW) Judge Arnold testified that the Attorney

General's office began to "push this case very strongly in late spring, early summer" and at that time Hannigan "quickly. determined" that his earlier view "might have been a premature assessment." (Testimony, 10/14/97, p. 10) In this connection, one witness opined that "every investigator, every prosecutor gets a gut feeling ....whether or not this one's going to play out as a crime." (Testimony, 11/25/96, pp. 62-63)

By June 1989, Sullivan County Attorney, Marc Hathaway, was ready to bring a criminal case against Fairbanks because he believed there was sufficient evidence to pursue successfully a criminal conviction. However, for reasons still not known, the Attorney General decided to take over the case. Even so, it was not until around August 8, 1989, that the Attorney General's office concluded that Fairbanks was indeed engaged in criminal activity. (Testimony, 11/14/96, p. 21) The question was, should the Attorney General proceed with the evidence in hand or wait and gather more evidence? Decisions were made as to whether to run with a particular case or not. The problem is that there is no record of these decisions. For example, the Attorney General's office decided not to go with the Patricia Sawyer case even though it was admitted that the case was "fairly clean cut." Hannigan conceded that "we could have run with the Sawyer case," but in other cases, such as Tweedy and Lehtinen, the decision was not to run with them. According to Hannigan, John Davis made these decisions, but no records exist to show how and why these actions were taken. (Testimony, 11/14/96, pp. 8-9, 21 and 27-28; Testimony, 10/21/97, pp. 113, 125, 127, 129, and 133-134) In contrasting testimony, Attorney Charles Spanos said: "I submit that there was more than sufficient probable cause to charge John Fairbanks with crimes long before December 28, 1989." (Testimony, 9/18/96, pp. 4-5) On the other hand, Michael Ramsdell denied that in June of 1989 that the Attorney General's office "had evidence that would have been sufficient to prove a single, concrete charge." (Testimony, 11/25/96, p. 44)

The ultimate decision was to proceed with a full blown investigation because "you surely would want to have all your ducks in a row before you would prosecute." After all, Fairbanks was "a respected member of the community." (Testimony, 10/31/96, p. 12) In Andrew Serell's view, they were "suspicious from the beginning," but yet in June of 1989 there was still a question whether or not it was a case of "'poor management" or theft, and they were fearful of charging Fairbanks at the time because he might "assert his speedy trial rights." That would have created a problem if there were less "than full evidence." Thus in his view "it was not appropriate to try Mr. Fairbanks in a piece meal fashion." Moreover, it would have possibly resulted in "concurrent sentences as opposed to a single sentence" of longer term. (Testimony, 10/23/97, pp. 31, 33 and 46-47) According to Michael Ramsdell, the view was to "go through the trail of money that had been determined by investigators and try to make a determination as to which charges" that could be proven "beyond a reasonable doubt." As Judge Arnold put it: "to marshal all the information necessary to present a full and complete case." In Arnold's opinion, the Fairbanks case was handled "professionally and well;" "there was no coverup, nor was .... there a lackadaisical handling of the case." (Testimony, 10/14/97, pp. 25-27) Arnold insisted that

there was no "smoking gun" in this case even if the Committee was trying to find one. (Testimony, 10/14/97, p. 28)

Yet questions remain. Could an earlier and more vigorous pursuit of criminal activity have resulted in an earlier conviction? After all each of the earlier crimes were Class A Felonies subject to a long prison term. (See Arnold, Memorandum, 12/29/89) For example, in the Arnold Sherman matter, the whole case rested on two easily available checks that were paid by the banks. (Memorandum 8/9/89, Hannigan). Indeed all four of the early cases, Tweedy, Lehtinen, Sawyer and Kenerson could have been successfully prosecuted early on. After all, indictments in these cases would not have stopped other new indictments. (Testimony, 9/25/96, p. 52) Nonetheless, Andrew Serell argues that it was "not appropriate to try Mr. Fairbanks in a piecemeal fashion." (Testimony, 10/23/96, pp. 46-47)

Even so, an earlier conviction may have served the greater public interest in protecting the trust funds managed by Fairbanks. Several months before the indictment on December 29, 1989, William Cullimore had argued that he could not "emphasize too strongly the importance of deciding promptly how to proceed in this matter." He goes on to suggest the possibility of also proceeding concurrently along a civil track. The idea raises the prospect of what may have been a viable concurrent civil proceeding that would have allowed an easier and quicker attachment of property and money sources. There was testimony that in May of 1989 there were "substantial assets in the Dean Witter account that were available to creditors." (Testimony, 10/21/97, p. 18) As late as July 1989, Fairbanks was transferring money into Miriam Fairbanks' account in Boston. (Testimony, 11/14/96) Even on October 4, 1989, Barbadoro reported that his client may have had as much as $2-3 million in assets available for "restitutionary purposes." (Memorandum, October 4. 1989, John Davis)

THE ISSUE OF A PLEA BARGAIN:

The Attorney General' s office determined not to engage in any plea bargain before there was an actual indictment and Fairbanks had been arrested. The office determined that Fairbanks would "not get any cushy sentence." (Testimony, 10/14/97, p. 13) Indeed, it viewed the case as "one that required significant and heavy sanctions." (Testimony, 10/14/97, p. 16) Nonetheless, Barbadoro did test the waters in the hope of a plea bargain, and he now believes that one of the "very unusual" aspects of the Fairbanks case was that there was no plea bargaining possibility. (Testimony, 9/9/97, pp. 12-14) After Fairbanks fled, there was a meeting between Governor-elect Stephen Merrill and an FBI agent in late December, 1992 to explore the prospect of a reduced sentence because the family believed that if there was a reduction, Fairbanks might then surrender. (See FBI, Boston File) As far as it is known, nothing came from it even though Merrill was willing to consider it. (Telephone conversation with Jeffrey Howard, November, 1997)

THE ISSUE OF LAWYER/CLIENT PRIVILEGE:

This issue has been of some importance in that the privilege prevented lawyers for Fairbanks from telling the Attorney General about an earlier flight of Fairbanks to Canada in May, 1989. Judge Arnold lamented "that the Attorney General's office did not have all the information that was available that might have allowed apprehension" prior to Fairbanks' suicide. (Testimony, 10/14/97, p. 20) Though Barbadoro knew of the May 1989 flight, he never told authorities because of the privilege. (Testimony, 10/14/97, p. 15) Moreover, despite the fact that Fairbanks violated his self surrender agreement with his lawyer, Barbadoro's view still was: "Even though a lawyer is mistreated by a client, that does not give the lawyer an excuse to waive unilaterally the privilege." (Testimony, 10/14/97, p. 54) Attorneys Jack Middleton and Robert Wells also knew of Fairbanks' earlier flight to Canada, and they even went up to get him to come back. (Testimony, 10/21/97, p. 16) However, they did not inform the Attorney General of this event. The Committee felt that even if there was this privilege, the Office of the Attorney General should have taken more initiative in approaching his lawyers on what information they may have had concerning a possible flight location. The basic issue comes down to whether or not in such a case, the private interest nullifies the public good.

THE ISSUE OF THE MANNER OF THE SEARCH:

In the first moments of Fairbanks' flight from justice there was a delay of some time before issuing an all points bulletin. There is also considerable confusion on just what happened on the days of December 27, 28 and 29. (See Testimony of Judge Barbadoro on September 9, 1997, especially pp. 77ff) According to the Boston FBI file, on December 27, 1989, Fairbanks' attorney "advised that his client was out of control, ... and as a result did not believe client would surrender to authorities upon his impending indictment on 12/28/89." On the next afternoon, officers of the Ogunquit, Maine Police Department went to Fairbanks' home there and "were told by _____ [name redacted] that he had left three hours previous." According to Middleton, the delay happened because "it would be embarrassing to put an all points bulletin out; you know, for a client and then have him show up," and so Barbadoro waited a while longer before notifying authorities. (Testimony, 10/21/97, p. 5) Just why there was this delay remains a mystery as to who is responsible.

For some reason or other there were supposed leads that seem to indicate that Fairbanks had fled in a southerly direction. (Testimony, 12/2/97, pp. 23ff) According to Captain Kevin O'Brien of the State Police, "There was no solid information that Fairbanks was in Canada. To be exact, it was in the opposite direction." (Testimony, 10/30/96, p. 22) However, this information proved to be incorrect. Indeed, his diary gives no indication but that he spent the entire time of his flight in Canada, nor that he ever spent much time in the south or in the Caribbean.

In 1992 the FBI file listed 20 leads of which one was correct that pointed to Quebec. (Memorandum, Bahan, 9/23/92) The committee made an effort to get the Boston file through the New Hampshire congressional delegation and directly through U.S. Attorney General Janet Reno and FBI Director Louis Freeh on September 18, 1997, but the File did not come until late December, which was too late to use it in questioning witnesses about Fairbanks.

The File reports that the FBI made searches for Fairbanks based on scores of tips about his whereabouts largely as a result of two T.V. programs, "Unsolved Mysteries" and "America's Most Wanted." There were supposed leads from such exotic places as Hueytown, Alabama, to St. Kitts in the Caribbean. Curiously the file says little about Canada except for one document, dated 11/20/90, which reads: "No other inquiries will be made by Legat Ottawa unless advised to the contrary by Boston." Clearly there was no real effort to pursue Fairbanks in Canada. According to Captain O'Brien, one may go to the FBI, but the agency "usually won't disseminate something unless it's something that they've substantiated or are looking for a particular help in investigating." (Testimony, 12/2/97, p. 37)

There were, however, other indicators. Attorney Gerry Waldron reported that Fairbanks was living in Montreal. (Interview with Gordon Flint, Sr., October 16, 1992) Chief David Hoyt testified that the Attorney General's office had information that Fairbanks was in Canada in 1993. (Testimony, 9/30/97) Also, in September of 1992 the Attorney General's office had information that Fairbanks was in Quebec (Tls of Jeffrey Howard to Nick Hart, 11/19/96), but there is no evidence that any search was conducted there. Michael Bahan contends that "every time that we found a lead and it was checked out, it came back negative" as far as Canada is concerned. (Testimony, 11/13/96, p. 16) This conclusion apparently related to Moose Jaw, Saskatchewan and some place 800 miles northeast of Vancouver, B. C. One individual, Melissa Stanton, who may have had more correct information about the whereabouts of Fairbanks, was never interviewed for fear that Fairbanks "would go underground." (Testimony, 11/13/96, p. 26)

In this connection testimony from the Attorney General's office was that it made no use of the pen register/trap and trace devices in trying to find Fairbanks. Despite the denials that the office did not use these devices in other cases, the record shows that seven orders for these devices were applied for in other cases during the period that Fairbanks was under investigation. (Document dated November 18, 1997)

DEAN WITTER ACCOUNTS RELATED TO FAIRBANKS:

According to documents received from the Dean Witter brokerage firm as the result of a hearing before the Committee on October 7, 1997, Fairbanks was involved in 62 different accounts. Of these, Fairbanks acted as the fiduciary, either as trustee or executor in 23 accounts; in 16 accounts he acted as the

referral; 13 accounts were by members of the Fairbanks family; and 10 were handled by a different executor or trustee. Shortly after Fairbanks' criminal activity became public knowledge, Dean Witter did freeze the accounts of both John and Miriam Fairbanks in the respective amounts of $15,290.16 and $585,714.63. These monies were later paid over to the Trustee in Bankruptcy.

CASE OF CHARLES CHRETIEN:

The Committee took testimony in the case of Charles Chretien whom the Supreme Court disbarred on April 22, 1996, for misappropriating $131,838.44 from clients and the "unauthorized removal of $32,606.13 from his general client trust account" which he used "for the payment of his personal and business obligations." (Petition for Disbarment, 4/22/96) Actually, Chretien may have stolen more in that he charged "an outrageous amount of money" in fees for his services. (Testimony, 8/5/97, p. 28) For reasons still unknown, the Attorney General did not pursue a full blown case that would have included the entire amount of $131,000 or more, but instead chose to charge him with two specific cases that amounted to $24,000. (Testimony, 7/22/97, pp. 18-19) Unlike Fairbanks, Chretien pled guilty but has not served any jail time to date.

The Chretien case is the basic commonplace case like that of John Fairbanks. Typically he created "non-client accounts" and deposited them in what he called "loans or advances" in order to "differentiate them from earned fees." (Testimony, 8/5/97, pp. 23-24) As cited above, he charged excessive fees. The worst example was the sale of the real estate of a Ms. Cote where he sold the property for $28,500 and charged a fee of $18,000. (Testimony, 8/5/97, p. 26) Like Fairbanks, he filed false Annual Trust Account Compliance Certificates with the Supreme Court.

CASE OF WILLIAM HIBBARD:

Attorney Hibbard's violations of lawyer/client trust were quite different from those of Fairbanks and Chretien in that his principal business related to mortgages and real estate, in particular, closings. Moreover, there were no complaints filed against him. He engaged in the kiting of mortgages and the issuing of policies but then not remitting the premiums to the title insurance company. By juggling his accounts, he managed to cover the obligations of his company, and also covered "his tracks...by maintaining inappropriate accounting procedures." Furthermore, he kept his employees in the dark by intentionally withholding information. (Testimony, 7/22/97, pp. 6-12) At least some of his victims were luckier than those of Fairbanks and Chretien for two reasons: First, there was insurance; and second, creditors moved quickly to freeze all the bank accounts of Hibbard that they were able to locate. (Testimony, 8/19/97, pp. 21-23) One of the mysteries of the Hibbard case is that no one has been exactly able to determine how Hibbard spent the monies he took.

Two other aspects of the Hibbard case interested the Committee. One was that Hibbard's 43 employees have not been paid their last checks; and two, that the receivers received their money before any creditors, including the employees. Martin Honigberg of the Attorney General's office filed with the court what amounted to a complaint about these two items, but to date, the court has not acted on the requests. (Testimony, 9/23/97, p. 15)

THE CORBIN PARK MYSTERY:

Just what happened at the hunting lodge in Corbin Park in 1985 still is unresolved. According to Kevin Onnela, he told then Attorney General Merrill about some illicit activities; that Fairbanks was "stealing from his clients" and that he believed that Fairbanks was gay. (Sworn Affidavit, dated 2/1/90 and entered into Testimony, 10/21/97) Onnela also took a lie detector test in 1992 which he passed. Others, however, have denied Onnela's testimony. In his 1996 testimony, former Governor Stephen Merrill had said: "I can assure you that did not take place. If it had, I would have remembered." (Testimony, 11/12/96, p. 32) In his 1997 testimony, Merrill reaffirmed that there was no "discussion about, let's talk about John Fairbanks and the wrongdoing that he has committed." (Testimony, 11/4/97 p. 34) Merrill did recall that there was some discussion about Fairbanks being a homosexual, but it never extended to a review of the issue of his judicial conduct.

THE QUESTION OF CONFIDENTIALITY OF RECORDS IN THE PROFESSIONAL CONDUCT COMMITTEE AND THE JUDICIAL CONDUCT COMMITTEE:

The Committee had several discussions about the issue of judicial secrecy when it came to disciplinary measures involving judges and lawyers. In testimony, Supreme Court Chief Justice, David Brock, rejected the Oregon plan that "everything is public from the time a complaint is filed against a lawyer or judge" because in his view such an openness would be "unduly risking the reputations of judges and lawyers." (Testimony, 11/12/96, p. 4) Some complaints could be "potentially libelous and with no foundation." Brock believes that New Hampshire is "a very different state in so many ways from Oregon" in that New Hampshire is a small state geographically where people know each other in contrast to Oregon.

Brock believes that the changes in confidentiality initiated in 1996 have opened both JCC and PCC proceedings. Now the complaint is considered non-public until there has been a review and a determination made that there is a foundation to the complaint. At that time the procedure becomes public.

THE ISSUE OF THE TESTAMENTARY TRUSTS VERSUS INTERVIVOS TRUSTS:

Attorney Robert Wells testified that New Hampshire and Vermont "have the most heavily supervised probate system in the country." (Testimony, 10/21/97, pp. 21-22) Objections to the system are its costs, public knowledge of what is in a will or testamentary trust and long delays in concluding the will or trust. Judge Maher, on the other hand, believes that the current probate system does protect trusts and wills from most criminal activity and insists that "the big thefts in the future .... will be in intervivos trusts, not probate," and there is "no way in the State of New Hampshire that you're able to catch" these defalcations at this time. (Testimony, 11/20/97, pp. 5-18) These new forms of trusts are characterized as the "land mines of the future," and as such they ought to be a continuing concern for possible legislative action.

COMMITTEE RECOMMENDATIONS:

A. The Professional Conduct Committee and the Judicial Conduct Committee should hire professional investigators to look more carefully into complaints. Evidence generated by the Committee shows that the 1983 case against Fairbanks regarding disparate sentences may well have been a pattern rather than an isolated instance. Testimony presented to the Committee, especially by law enforcement, demonstrates a pattern of inconsistency in sentences. The Committees should take into consideration other related cases, use more careful docketing and undertake a review of all complaints.

B. There is a need to update and put on Sustain the back files that still have ongoing activity in the probate court.

C. Evidence generated by the Committee clearly shows the need for an ombudsman where there are complaints against judges. Fear of judicial or governmental reprisals forced people to remain silent because of the need for job protection.

D. All estates handled by fiduciaries, including individual citizens who may seek assistance from a practitioner, must have bonding in order to protect the beneficiaries. Large estates of $50,000 or more ought to have individual bonds. Small estates ought to be under a general bond that the fiduciary holds as part of the practice. "The only way to prevent or protect an estate from an intentional conduct, such as criminal conduct is to get a bond." This is true be it a testamentary or intervivos trust. (Testimony, 12/4/97. p. 13)

E. All complaints brought to the Office of the Attorney General be immediately docketed, and all decisions made regarding any complaint be recorded as to date, the person making the decision and the reasons for the decision. The

committee was unable to trace why and by whom decisions were made not to prosecute certain complaints even though the evidence was there.

F. All individual and corporate fiduciaries, except for already regulated institutions such as banks, must follow the same system of accounting. All three fiduciaries studied engaged in their own creative, often inappropriate, methods of accounting that made it far more difficult for auditors to follow.

G. That the legislature make a careful study of the attorney-client privilege when a client breaks his agreement with his attorney. The attorneys for Fairbanks did have information that may have been very helpful in targeting Fairbanks' whereabouts much earlier if law enforcement had had the information about Fairbanks' proclivities for going to Canada that was not given to it because of the attorney-client privilege.

H. In the Hibbard case, his employees were not paid their wages after his suicide. The legislature ought to review the priority list on who gets paid when the court orders the distribution of remaining funds. (Testimony, 12/4/97, p. 11)

I. There was considerable discussion about the judicial system as it presently exists. Among the recommendations are:

1. That there be no part-time judges as now exits in both the district and probate courts. One suggestion is that there be a blending of the district court with the probate court so that one full-time judge would handle both responsibilities.

2. That judges undergo a periodic, ten-year review and be reappointed on the basis of the review.

3. That the judicial system be more open to more public scrutiny and be subject to the right-to-know law as is the case with the legislative and executive branches of government. "The judicial system itself is too closed, much too closed a loop; it's too separate!" (Testimony, 12/4/97, pp. 9 and 20)

4. The Committee recommends that the practice of part-time judges be discontinued, or if not possible, then prohibit the practice law in the same county that they are judges in order to avoid potential conflicts.

THE ISSUE OF THE APPOINTMENT OR ELECTION OF REGISTRARS OF PROBATE:

There was considerable testimony on this issue because of a perceived conflict of authority between the appointed probate judge and the elected registrar of probate. In the Sullivan County Probate Court during the Fairbanks

era, there was a conflict over the authority of Judge Harry Spanos and the Registrar of Probate. However, Chief Justice Brock testified that the probate judge "has plenary power over the registrar of probate." (Testimony, 11/12/96, p. 23) On the other hand, Judge Maher testified that there is "equivocal testimony on the authority of probate judges over registrars of probate." (Testimony, 11/20/97, pp. 23-24) In his view the sticking point is that registrars of probate are elected, and somehow, therefore, derive independent authority from that election. As this is primarily a constitutional issue, the Committee does not make a recommendation.

ISSUES PRESENTED TO COMMITTEE THAT WERE OUTSIDE ITS STATUTORY SCOPE:

More than a score of complaints about judicial conduct were received by the Committee that related to persons other than those specified by the legislation or in some way directly related. There was no possibility that the committee could manage this plethora of outside complaints and still do its work as required by the statutes. The committee recommends that a study committee similar to the one proposed in HB 397 (1997 session) be considered so that these complaints can be heard by an established legislative committee authorized to examine such matters.

NOTE: All documents referred to in this report are on file at the Division of Records Management and Archives on 71 South Fruit Street, Concord, N.H.

Respectfully submitted,

Rep. Alf E. Jacobson, Chairman

Sen. Allen Whipple, Vice Chairman

Rep. Barbara Hull Richardson, Secretary

Sen. John S. Barnes, Jr.

Sen. Sheila Roberge

Rep. David A. Bickford

Rep. Susan J. Clay

Rep. Benjamin J. DePecol

Rep. Paul M. Mirski

Rep. Wayne T. Moynihan

ADDENDUM #1

January 19, 1998

Hon. Alf. Jacobson
P.O. Box 188
New London, NH 03257-0188

RE: Fairbanks II Report

Dear Representative Jacobson:

The following remarks constitute my primary conclusions concerning the findings of the Fairbanks II Committee.

John C. Fairbanks was able to violate public mores and judicial canons of decency throughout his thirty-five years on the bench due to a toxic concoction of official indifference, personal influence and intimidation. Official indifference derived from the foolish assumption that judges will always act in the public interest. Few of stature ascribed any but the best of motives to John Fairbanks' activities, on or off the court. His influence within the Sullivan County community and his political stature at local and state levels dissuaded those of authority from seriously considering complaints concerning his behavior, behavior which in any other theater would have been considered outrageous. His judicial status intimidated local and state law enforcement agencies and those in the Attorney General's office who were sworn to bring outlaws like Fairbanks to justice. His judicial status enabled him to act with impunity, to receive favored treatment once officially under investigation and finally, to be given sufficient freedom pending indictment to be able to flee prosecution.

His last eleven years of judicial service were conducted under the direct supervision of the justices of the New Hampshire Supreme Court.

Part One, Article 35 of the New Hampshire Constitution requires that citizens be tried by judges who are "...as impartial as the lot of humanity will admit." Every lawyer and virtually every citizen knows what that means – that it is impossible for individuals serving on judicial or quasi-judicial panels to impartially judge the acts of family members, friends, employees or business associates. The requirement of impartiality requires that those acting in a judicial or quasi-judicial capacity must distance themselves in every way possible from adjudicating matters where real, inferred or potential conflicts of interest might be ascribed. The Constitution prohibits the creation of a judicial paradigm which would permit judges to sit on cases involving friends, employees or business associates because such a paradigm would serve to undercut the public's expectation of the enforcement of the constitutional guarantee of judicial impartiality. Nevertheless, this is precisely the oversight arrangement within which Judge Fairbanks functioned and it is the same oversight arrangement which exists today.

Presently, all officers of the court, all judges, clerks and lawyers - including those who serve the public's interest in the Attorney General's Office – fall under the supervisory authority of the justices of the New Hampshire Supreme Court. Since that supervisory authority may not be challenged without the agreement of the justices of the Supreme Court no effective public oversight authority for the purpose of monitoring judicial conduct can presently exist. True accountability within the judicial system will not be achieved until impartial public oversight is made possible and until those charged with the impartial monitoring of the courts are given the power to forcefully and publicly remove those within the judicial system who misuse their offices by abusing the public trust.

Judicial miscreants will act unlawfully regardless. The responsibility of New Hampshire's General Court is to insure that those judges who serve in their own interest be removed from office as quickly and efficiently as possible. The creation of an independent administrative office of the courts – with public oversight and enforcement capability – would serve that end more efficiently than the present arrangement provided through Part Two, Article 73-A of New Hampshire's Constitution.

Finally, two areas of inquiry concerning Judge Fairbanks's activities were not addressed by the Fairbanks's Study Committee. The committee did not have the time to examine the political relationships or political contributions which may have enabled Fairbanks to be shielded from disciplinary action nor did the committee have the time to examine his behavior and business dealings as a banker. Abuses in both of these areas of his personal and business life may have led to acts which are presently being wrongly attributed to either his judicial performance or his performance as a lawyer. To fairly complete a full examination of the causes of the Fairbanks scandal, the investigative work of the Committee should be extended to investigate these subjects.

Sincerely,

Representative Paul Mirski, Grafton/12

ADDENDUM #2

"All power residing originally in, and being derived from, the people, ..." Part I, Article 8 of the New Hampshire Constitution provides, **"... all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore should be open, accessible, accountable and responsive. To that end, the public's right of access to government proceedings and records shall not be unreasonably restricted."** With this constitutional mandate in mind the majority committee asked to see the full record of complaints made concerning all judges in New Hampshire. The request was made of the Court in order to determine the full extent of complaints which may have been made against John Fairbanks, to determine the authenticity of complaints which a witness testifying before the committee in non-public session had made concerning two other judges, and to determine, based upon a review of all complaints, if there were important connections in all of this which were being missed.

Upon receiving a letter from Mr. Howard J. Zibel, Clerk of the N.H. Supreme Court, resisting the committee's request and requiring the committee to provide cause, the committee at first voted to subpoena the N.H. Supreme Court to obtain all the JCC's records then reconsidered its vote, finally submitting the Court a letter citing the power and authority of the legislature and the public's right to know as justification for the committee's right to review JCC complaints.

Within the time frame for the Court to respond, an invitation was proffered to the Fairbanks Committee by the Court to view the JCC's records concerning Fairbanks and the two other judges. The committee accepted the invitation and found that the Fairbanks material available at the offices of the Supreme Court had already been made public. It also found that the witnesses' remarks concerning the other two judges appeared to have some validity. Nevertheless, the committee was not able to examine the full record of complaints made to the JCC concerning all New Hampshire Judges and so was not able to determine the alacrity with which complaints were dealt with nor was it able to determine if procedures and punishments employed by the JCC were efficacious. In the end, the challenge to the Court made by the Committee concerning the public's right to know as provided by the N.H. Constitution was left unresolved.

Bill as Introduced

HB 1206 - AS INTRODUCED

2018 SESSION

18-2017
04/03

HOUSE BILL ***HB 1206***

AN ACT relative to bonds for civil officers.

SPONSORS: Rep. Brewster, Merr. 21

COMMITTEE: Executive Departments and Administration

ANALYSIS

This bill replaces references to "employee" with "civil officer" in the statute governing bonds for public officials.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1206 - AS INTRODUCED

18-2017
04/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eighteen

AN ACT relative to bonds for civil officers.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Officials and Employees Bonds; References Changed. Amend the following RSA provisions by replacing all references to "employee" or "employees" with "civil officer" or "civil officers": RSA 93-B (chapter heading); 93-B:1 (introductory paragraph); 93-B:1, I-II; 93-B:1-a; 93-B:4; and 93-B:5.

2 Effective Date. This act shall take effect 60 days after its passage.