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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Report	John D. Bates [9 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 09/15/2025 JLS]	9	N.D.	b6;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Judges - [Bates, John D.]

FRC ID:

9631

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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SUPERSEDED

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**ATTORNEY-CLIENT, ATTORNEY WORK PRODUCT,
AND DELIBERATIVE PROCESS PRIVILEGED**

CANDIDATE REPORT: JOHN D. BATES

**Prepared For The White House Pursuant To
The White House's Request For Views On The Candidate**

Summary: John Deacon Bates is a seasoned civil trial lawyer. He has had extensive experience as a government attorney and is now a member of a private law firm, Miller & Chevalier, in Washington, D.C. Mr. Bates served as an Assistant United States Attorney ("AUSA") for the District of Columbia from 1980 to 1995, and was Chief of the Civil Division in that office from 1987 to 1995. In his capacity as an AUSA, Mr. Bates represented the United States and various of its agencies in hundreds of cases involving a wide range of subject matters. His most noteworthy litigation during his tenure as an AUSA pertained to defense of regulations that limited rights of protestors to assemble and demonstrate in certain places, including near the White House and on Supreme Court grounds. Before he joined Miller & Chevalier in 1998, Mr. Bates spent two years (1995 to 1997) as Deputy Independent Counsel for the Whitewater Investigation (during the so-called "pre-Lewinsky" phase), in which capacity he had responsibility, among other things, for examining then-First Lady Hilary Rodham Clinton before a federal grand jury and for litigating issues surrounding claims of governmental attorney-client and work product privileges asserted with respect to notes taken by White House attorneys of conversations with the First Lady. In private practice, Mr. Bates has focused primarily on representation of entities in the health care industry.

Mr. Bates has a few public writings and has made a number of speeches and presentations, all of which appear to be noncontroversial, apolitical, and non-ideological. He has refrained from publishing any material concerning the Whitewater investigation, although he was interviewed about it on "Nightline", on a morning television show, and on National Public Radio. There is little in the public record to indicate either a commitment or opposition to any particular legal or judicial philosophy, but Mr. Bates has indicated his view that federal district court judges should read, interpret, and apply the law as it has been determined by others (e.g., legislatures). John Bates is highly-regarded by colleagues and by opposing counsel alike. People praise him for his intellect, his integrity, and his even-handedness. If an individual or group were to oppose Mr. Bates' appointment -- and there is no reason to believe that any particular individual or group would do so -- they might point to his relative inexperience in criminal litigation matters in an effort to portray him as unqualified. That is unlikely, however, given his many years of litigation experience generally. Moreover, in his role as Deputy Independent Counsel for the Whitewater investigation, he assumed the role of a prosecutor in many instances and handled criminal investigations. Although he could be opposed as a consequence of his role in the Whitewater investigation, he has largely escaped criticism for his efforts in that regard and even there reportedly has earned and maintained the respect of opposing counsel.

I. General Background/Legal Career

John Bates was born in Elizabeth, New Jersey on (b)(6). He graduated from Pingry High School (a private school) there in 1964. He attended Wesleyan University from 1964 to 1968, graduating with a Bachelor's degree in 1968. (In 1966, he left Wesleyan for a short time to work and earn money, attending some classes at Drew University near his home.) From 1968 to 1971, Mr. Bates was in the United States Army. During some of that time he served in Vietnam and earned a Bronze Star, among other awards. He reached the rank of First Lieutenant before he received an honorable discharge in June 1971. From 1971 to 1973, Mr. Bates did some work at Elizabeth Sheet Metal in Elizabeth, New Jersey and took various trips abroad and in the United States. He attended the University of Maryland School of Law from 1973 to 1976, earning a J.D. degree there in 1976. He held several different summer law jobs during the time he was in law school, including as a summer clerk at the United State's Attorney's Office in Baltimore, Maryland.

After graduation from law school, Mr. Bates clerked for United States District Court Judge Roszel C. Thomsen (D. Md.) from 1976 to 1977. After completing his clerkship, Mr. Bates joined the law firm of Steptoe & Johnson in Washington, D.C. and remained there until 1980. His practice at Steptoe & Johnson was focused primarily on matters on behalf of insurance companies. He also handled a significant age discrimination case while at Steptoe & Johnson.

Mr. Bates left Steptoe & Johnson in 1980 to join the Office of the United States Attorney for the District of Columbia. He worked there from 1980 to 1995 as an AUSA representing the interest of the United States in a wide variety of civil matters. Mr. Bates was promoted to Chief of the Civil Division at the United States Attorney's Office in 1987, a position he held until he left to join the Whitewater Investigation.

Toward the end of his tenure as Chief of the Civil Division at the United States Attorney's Office, Mr. Bates was "detailed" to the office of the Independent Counsel for the Whitewater Investigation, where he soon was appointed to the position of Deputy Independent Counsel. In that position for a period of approximately two years (1995 to 1997) during the so-called "pre-Lewinsky" phase of the investigation, Mr. Bates coordinated and conducted a broad range of criminal investigations involving allegations of obstruction of justice, perjury, mail and wire fraud, and bribery, among others. He had lead responsibility with respect to a number of matters -- including the handling of files from Vince Foster's office and incidents surrounding his death, contacts between the White House and the Treasury Department concerning possible efforts to obstruct justice, the handling of certain FBI files by White House personnel, and issues relating to firings at the White House travel office. In January 1996, Mr. Bates questioned then-First Lady Hilary Rodham Clinton before a federal grand jury.

Since leaving the Independent Counsel's office and joining Miller & Chevalier, Mr. Bates has focused on the representation of health care and defense industry clients in civil and criminal fraud investigations and in *qui tam* actions brought under the False Claims Act. He chairs the Government Contracts Department at the firm and is a member of its Executive Committee.

II. Noteworthy Litigation

John Bates has appeared as counsel on pleadings in literally hundreds of reported cases. As an AUSA in the United States Attorney's Office for more than fifteen years, Mr. Bates had responsibility for defending government actions and government agencies against a wide range of challenges. The most noteworthy of his efforts there appear to have been in connection with defending federal statutes and regulations that curtailed the rights of individuals to assemble and demonstrate on federal property, including near the White House and at the Supreme Court. Some of the more significant of those cases include: Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir.) (*en banc*), rev'd 468 U.S. 288 (1984) (finding constitutional a regulation that prohibited camping as part of a First Amendment demonstration in Lafayette Park across from the White House and on the Mall); White House Vigil for the ERA Committee v. Clark, 746 F.2d 1518 (D.C. Cir. 1984) (upholding a regulatory package that limited the rights of demonstrators on the White House sidewalk); and Pearson v. United States, 581 A.2d 347 (D.C. Cir. 1990) (upholding a statute that prohibited processions and assemblages in the plaza area and main entrance steps of the Supreme Court in face of a challenge brought by anti-abortion demonstrators). He was also lead counsel in several cases relating to prison overcrowding in the District of Columbia. See, e.g., United States v. District of Columbia, 897 F.2d 1152 (D.C. 1990), and Twelve John Does v. District of Columbia, 841 F.2d 1133 (D.C. Cir. 1988). In addition, Mr. Bates represented an instrumentality of the United States in a case in which the D.C. Court of Appeals held that the United States and its instrumentalities are not liable in antitrust actions under the Sherman Act. Sea-Land Services, Inc. v. The Alaska Railroad, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982). Early in his tenure at the United States Attorney's Office, Mr. Bates worked on a high-profile case involving classified information. Westmoreland v. CBS, Inc., 584 F.Supp 1206 (D.D.C. 1984). Given that the role of the United States Attorney's Office in that case concerned protection of classified information of the Central Intelligence Agency and the National Security Agency, however, the efforts were not particularly noticeable in an otherwise highly-publicized matter.

Mr. Bates' most noteworthy litigation effort came as a result of his work as Deputy Independent Counsel for the Whitewater Investigation. In addition to the numerous investigations he managed, he argued the case resulting in the seminal decision rejecting the application of a governmental attorney-client or work product privilege to shield from a federal grand jury the notes of White House lawyers taken during the course of conversations with the then-First Lady, Hilary Rodham Clinton. In re Grand Jury Subpoena, 112 F.3d 910 (8th Cir. 1997), cert. denied, 521 U.S. 1105 (1997).

During his short time at Miller & Chevalier, it does not appear that Mr. Bates has handled any matter that is particularly noteworthy for these purposes. But he recently obtained a \$2.4 million jury verdict in a race-related hostile work environment trial he handled *pro bono* for the Washington Lawyers' Committee for Civil Rights. While at Steptoe & Johnson early in his legal career, Mr. Bates handled another case *pro bono* in which he represented a woman who was seeking political asylum from the Republic of South Africa.

III. Publicity/Public Record

Mr. Bates has two published writings: (1) "Federal Equitable Restraint: A *Younger* Analysis in New Settings," 35 Maryland L. Rev. 483 (1976); and (2) "The Perils of Parallel Criminal and Civil Proceedings: A Primer," The Health Lawyer, Vol. 10, No. 4 (March 1998) (ABA Health Law Section). These writings appear to be apolitical and non-ideological. While one could always endeavor to take something out of context or unfairly portray a particular passage, neither of Mr. Bates' publications appears to contain any discussion that should be considered controversial for these purposes.

Mr. Bates has on occasion given a speech that has been provided in writing to those who have attended the program or seminar at which he was making a presentation. While he periodically taught or lectured for the Department of Justice's continuing legal education programs during his tenure as an AUSA, the available manuscripts of his presentations are from some of approximately half-a-dozen appearances he has made to various health-related programs since he has been at Miller & Chevalier. Most of the presentations there concern health care fraud and management of government investigations; none appear to be political or ideological. While one could always endeavor to take something out of context or unfairly portray a particular passage, none of the available manuscripts of Mr. Bates' presentations appear to contain any discussion that should be considered controversial for these purposes.

Mr. Bates has refrained from publishing any material -- whether in the form of a book, news article, editorial, letter to an editor, or otherwise -- related to his experiences as Deputy Independent Counsel for the Whitewater investigation. From time-to-time Mr. Bates gave statements to the media about the Whitewater investigation, but nothing he said appears to have generated any significant controversy. Noteworthy among the media statements were those given on ABC's Nightline, on one of the national network's morning news programs, and on National Public Radio. The context of his interview on ABC's Nightline, which occurred during the so-called "Lewinsky phase" of the investigation (after Mr. Bates had left his role as Deputy Independent Counsel), was with respect to the effort of Independent Counsel Ken Starr to question members of the Secret Service. In that interview Mr. Bates stated, among other things:

John Bates: It would surprise me if that [finding a way to get around the attorney-client privilege] is Ken Starr's intent or the intent of the other people in the independent counsel's office.

Ted Koppel: Why?

John Bates: For all the time I was there, which was a little over two years, Mr. Starr always showed an immense respect for the personal attorney-client privilege between the President and his personal lawyers or

anyone else involved in the investigation and their personal lawyers. I would be very surprised if he is using this opportunity to try to breach that privilege and indeed to get involved in another round of litigation. That seems unlikely to me, just as it's very unlikely to me that he would ever, or his investigators would ever, ask questions relating to national security.

Ted Koppel: . . . [A]nd yet the relationship between the independent counsel's office and the White House has reached such a level of animus and cordial dislike on both sides that one gets the impression that at this point he might do almost anything. I'm speaking now of the independent counsel.

John Bates: Well, I don't think that's true. I think that the office and Ken Starr, at least as far as I can tell from the outside, I'm not there any longer, continues to operate in a professional manner and would continue to do so. But my experience is just dramatically against any idea that there would be an attempt to breach the personal attorney-client privilege. I don't know the facts. I don't know precisely what has led to the various subpoenas of particular Secret Service agents but it would surprise me if, with respect to Mr. Cockell [the head of the President's personal Secret Service detail], there is a direction pointed toward attempting to breach the personal attorney-client relationship.

...

Ted Koppel: I mean is it even within the competence of the independent counsel's office to bring an indictment against the President? Wouldn't he have to hand that over to the House of Representatives?

John Bates: Well, the legal scholars have, and are continuing to debate that. I might have my own personal assessment of that, which incidentally leans towards the position that a sitting President should not be indicted, but that's not a decision for me to make, obviously. It's something that the people, including

Ken Starr, involved in the investigation have to look at and I'm sure that they have looked at it very thoroughly.

While Mr. Bates appears to have largely escaped criticism for his role as Deputy Independent Counsel and for any statements given to the media concerning the Whitewater investigation, there was one published criticism of him in an oped piece by syndicated columnist Anthony Lewis. In the piece entitled "Back to a Republican System" (July 6, 1999), published in *The New York Times* and elsewhere, Anthony Lewis criticized various aspects of Kenneth Starr's Whitewater investigation, including the decision to ask Arkansas state troopers what they knew about any extramarital sex by Mr. Clinton while he was Governor of Arkansas. About that, Anthony Lewis wrote:

When the story [about the decision to question state troopers, reported in the *Washington Post*] appeared, I asked Mr. Starr's Washington deputy, John Bates, about it. He said it was distorted. The agents were just trolling, he said, to find any acquaintances of Governor Clinton who might know about Whitewater. I believed that representation by an official I thought could be trusted -- and wrote a column criticizing the story. I was wrong.

In fact, as the book ["Shadow," by Bob Woodward] convincingly shows, the *Post* account was an understatement of what Mr. Starr had done. He had authorized his agents to ask about sexual affairs -- even to ask whether one woman had had a child who looked like Mr. Clinton. He was ready to use his extraordinary prosecutorial power in that sleazy way in order to destroy the President.

Mr. Bates contemplated writing a response to the oped piece, but ultimately refrained and never submitted anything for publication.

In April 1986, Mr. Bates gave testimony before a congressional subcommittee (the Subcommittee Of The Committee On Government Operations, House of Representatives) pursuant to a subpoena. The specific issue before the Subcommittee at that time was the "Efforts By Federal Agencies To Circumvent The Competition In Contracting Act," and Mr. Bates was asked to testify with respect to "actions taken by the OMB and the Justice Department to block a bid protest case from being heard by the GSA Board of Contract Appeals." The inquiry of Mr. Bates concerned, in part, whether, in a particular case, he had properly represented to a court that he was presenting a unified position on behalf of all federal agencies involved in the matter when there was some

indication in the record that the General Services Administration did not concur with the position pronounced by Mr. Bates in court. The inquiry also focused on what court had proper jurisdiction over the matter. A copy of the relevant portion of the transcript is attached to this report.

IV. Miscellaneous Other

There are various other items that are worthy of mention and consideration:

- Among the judges/justices Mr. Bates identified as examples of what a good judge/justice should be and who he admires are: Judge Hogan (for his dignity, patience, and efficiency), Judge Lamberth (for his tenacity and courage), Justice Scalia (for his intellectual honesty and impressive nature), Justice Ginsburg (for her attention to detail and her ability to focus), Justice Kennedy (for his insightfulness and his thoughtfulness), and Justice Thomas (for his wonderful human nature and kindness);
- Outside his specific work-related responsibilities, Mr. Bates has been involved in church activities, community youth sports leagues, and bar association activities (including service as Treasurer of the DC Bar and chairman of various committees);
- Mr. Bates stated in his interview that his law firm, Miller and Chevalier, does not have an exemplary record with respect to diversity issues, although he has made efforts to reach out to minorities in recruiting;
- While at the United States Attorney's Office, Mr. Bates had a strong record in terms of hiring and promoting women and minorities. He promoted Wilma Lewis to a Deputy position, for example, and she later became the United States Attorney;
- He and his wife (a former tax lawyer) have filed for extensions to file their income taxes, but Mr. Bates states that they have always followed the law and regulations in doing so;
- Over the course of about a ten year period, Mr. Bates and his wife hired 3 or 4 nannies for their children; he claims that in each instance the nanny was a United States citizen and that appropriate social security and unemployment taxes were withheld;
- Mr. Bates and his wife have had, and continue to have, individuals provide cleaning service at their home; he claims that in each instance the individual has been a United States citizen and that appropriate social security and unemployment taxes were withheld;

(b)(6)

(b)(6)

- Although Mr. Bates' Senate Questionnaire states that he has never been a party to any litigation, he has been named as a defendant in some *pro se* cases by virtue of his former role as Chief of the Civil Division at the United States Attorney's Office. See, e.g., Anderson v. Bates, 1994 WL 10863 (D.C. Cir. 1994), and Jones v. Rehnquist, et al., 72 F.3d 133 (8th Cir. 1995);
- In two published decisions, Trout v. Garrett, III, et al., 780 F.Supp 1396 (D.D.C. 1991) and Trout v. O'Keefe, et al., 144 F.R.D. 587 (D.D.C. 1992), Judge Harold Greene wrote blistering opinions about the tactics taken by the United States Attorney's Office and by counsel for the Navy in a class action discrimination case brought against the Navy. Judge Greene believed that the defense lawyers, of whom Mr. Bates was one, violated Rule 11 in their handling of the case because they had taken irreconcilable positions with respect to liability. Mr. Bates' name (and the name of then-U.S. Attorney Jay Stephens) appeared as counsel on the pleading that was the subject of Judge Greene's wrath, but Mr. Bates did not personally sign the pleading. Judge Greene issued a show cause order as to why the attorney who had signed the pleading (an AUSA who Mr. Bates supervised) should not be sanctioned. In the course of the first of his two scathing opinions, Judge Greene wrote:

"Although the Court could under the law proceed against the other two counsel as well [citation omitted], it will not do so. There is no evidence that Mr. [Jay] Stevens (sic) [United States Attorney] and Mr. Bates had enough knowledge of the history of this litigation to appreciate the frivolousness of the representations made in the September 20, 1990 filing."

- Although not available at the time this memorandum is being prepared, there reportedly are two Office of Professional Responsibility reports concerning investigations into Mr. Bates' professional conduct. It is not clear what those investigations and reports relate to, but one might speculate that they concern

activities occurring during the Whitewater investigation, the matter about which he gave congressional testimony, and/or activities surrounding the "Navy" case (all of which are referenced above).

- During telephone interviews, his current and former co-workers, co-counsel, opposing counsel, neighbors, and friends gave very high praise to Mr. Bates. He was repeatedly recognized by those interviewed for his intellect and for his calm demeanor. Mr. Bates was frequently noted for his fair and even-handed approach to problem-solving. Several of those interviewed noted that Mr. Bates kept his political views and philosophies to himself. One or two who were interviewed volunteered that Mr. Bates is a registered independent. Most every person interviewed failed to identify any weakness and gave Mr. Bates the highest recommendation.

V. Confirmation Issues

Whitewater -- One might imagine that Mr. Bates' role as Deputy Independent Counsel could serve as a source of contention with respect to the confirmation process. The fact that he has largely avoided public commentary about the investigation, the fact that his tenure was during the "pre-Lewinsky" phase of the investigation, and the fact that he has largely escaped criticism concerning his role there, however, should help to keep this factor relatively insignificant.

Lack of Criminal Litigation Experience -- It is possible that Mr. Bates could meet with some resistance as a consequence of his relative lack of criminal litigation experience. Given his many years of government service, his current representation of clients in criminal investigations, and his significant role as Deputy Independent Counsel (in which role he questioned the then-First Lady and others before a federal grand jury and handled numerous investigations), it is likely that such a criticism would not develop much momentum.

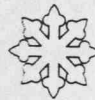
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**EFFORTS BY FEDERAL AGENCIES TO CIRCUMVENT
THE COMPETITION IN CONTRACTING ACT
(Part 2)**

HEARINGS
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES
NINETY-NINTH CONGRESS
SECOND SESSION

APRIL 10 AND 17, 1986

Printed for the use of the Committee on Government Operations



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1986

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EFFORTS BY FEDERAL AGENCIES TO CIRCUM- VENT THE COMPETITION IN CONTRACTING ACT

(Part 2)

THURSDAY, APRIL 17, 1986

HOUSE OF REPRESENTATIVES,
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:25 a.m., in room 2154, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Stephen L. Neal, Frank Horton, and Jim Saxton.

Subcommittee staff present: Richard C. Barnes, staff director; Linda Shelton, clerk; and Mary Alice Oliver, secretary; full committee staff present: William M. Jones, general counsel; James E. Lewin, chief investigator; James E. Rife, Charles C. Wheeler III, and R. Michael Long, professional staff members; Stephen M. Daniels, minority staff director and counsel; Thomas F. Houston and Gregg Kilgore, minority professional staff, Committee on Government Operations.

Mr. BROOKS. Our next item of business is continuation of efforts by Federal agencies to circumvent the Competition in Contracting Act. This morning's witness is Mr. John Bates, assistant U.S. attorney, U.S. District Court for the District of Columbia.

Mr. Bates, if you would come forward, sir.

[Witness sworn.]

Mr. BROOKS. We are delighted to have you here. You had been asked to appear on April 10 regarding actions taken by the OMB and the Justice Department to block a bid protest case from being heard by the GSA Board of Contract Appeals.

The case involves a \$300 to \$500 million procurement conducted by the Government Printing Office on behalf of the U.S. Army. The Justice Department, however, refused to allow Mr. Bates to appear at that time and subsequently the committee voted a subpoena to force his appearance today. We are delighted to have you here and we would be pleased to accept your statement and hear what you have to say. Then we will have a few questions for you.

STATEMENT OF JOHN BATES, ASSISTANT U.S. ATTORNEY, OFFICE
OF THE U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

Mr. BATES. Thank you very much, Mr. Chairman and members of the subcommittee. Perhaps I should first address that aspect of the subpoena which is a request that I bring with me today all the documents relating to the litigation involving Electronic Data Systems Federal Corp. in several forums, all documents not only in my possession but that have ever been in my possession.

All such documents are, of course, part of the official files of the office of the U.S. attorney or the Department of Justice to the extent that I transferred files to them when this litigation went from one court to another.

They may only be produced or disclosed upon the authorization of the U.S. attorney or another appropriate Department of Justice official. I am, however, authorized to state that the production of the subpoenaed files has been approved in the circumstances of this matter but that this production is not intended as, and it should not be considered as a waiver of any privileges that the U.S. attorney for the District of Columbia or the Department of Justice may have and may choose to assert under other circumstances.

I have a large box of documents which includes the entirety of the files which were in my possession when the subpoena was served on me and includes all files that I transferred to the Commercial Litigation Branch of the Department of Justice when the handling of this litigation was transferred there.

They are in this box and I will be glad to turn them over to whomever, Mr. Chairman.

[Documents proffered to the committee.]

Mr. BROOKS. Thank you, Mr. Bates.

Mr. BATES. Mr. Chairman, with respect to those documents, they are copies of our files. I talked to Mr. Lewin last night and he agreed that that would be sufficient. There is one document that I brought the original of and that is simply the report of this subcommittee's March 5 hearing in this matter. I brought the only copy that I had of that 400-page document without xeroxing it.

Mr. BROOKS. The subcommittee will accept your statement and it will be made part of the record. I would note, however, that the subcommittee in doing so does not indicate its approval of or agreement with the contents of or assertions made in your statement which is, I trust, on behalf of the Justice Department.

We have some questions for you and we are delighted to see you here today.

Mr. BATES. I am pleased to be here, Mr. Chairman, and I am glad to respond to your questions.

Mr. BROOKS. Sorry it is a gray day but it is pleasant inside.

Mr. NEAL. Mr. Chairman.

Mr. BROOKS. Mr. Neal, Congressman from North Carolina.

Mr. NEAL. I just wondered, do these documents represent all that you have asked for and all that is necessary for our better understanding of this case?

Mr. BROOKS. We have not examined the documents but they have represented that it is a complete set of the documents on that subject matter. We will look at them and see if it is.

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Mr. NEAL. That is the witness' assertion that these are all the pertinent documents?

Mr. BATES. Congressman Neal and Mr. Chairman, perhaps I should explain what is in that box.

I had a file that I accumulated while I was handling the litigation that began in the U.S. District Court for the District of Columbia.

Upon Judge Hogan's ruling transferring the case to the U.S. Court of Appeals for the Federal Circuit, responsibility for the case went to the Commercial Litigation Branch of the Department of Justice.

I then transferred my entire litigation file over there with the exception of a skeleton file which I retained. This box contains the skeleton file and all documents I received subsequent to that transfer, plus all the documents I transferred over to the Commercial Litigation Branch.

I asked them, upon receipt of this subpoena, to send back to me everything I had sent to them so that I could comply with the subpoena which asked for everything currently in my possession or which ever had been in my possession.

I should say, however, that it would not be fair to represent that this is every document that exists relevant to the *Electronic Data Systems* litigation because I never had every document. Some things were created that never came to me in the course of the subsequent Federal circuit litigation. I have not been actively involved in that.

Mr. BROOKS. All right. Mr. Bates, have you read the documents submitted to this committee describing a conversation between you and Joe Vergilio, a staff counsel for the Board of Contract Appeals?

Mr. BATES. I have read many of them, if not all of them, Mr. Chairman.

Mr. BROOKS. Have you looked that over?

Mr. BATES. The documents I believe you are referring to, Mr. Chairman, I have read. I think you are referring to the documents Mr. Vergilio sent to me.

Mr. BROOKS. Did you tell Mr. Vergilio that the three positions outlined in the memo were reviewed and approved?

Mr. BATES. I am confident, Mr. Chairman, that I said something along those lines. I am almost positive that I would have said to him that they had been reviewed at the high levels of the Department of Justice. I am also confident that I would have said to him that OMB had been informed of this.

Now, whether I said they had been reviewed at high levels of OMB, I am simply not sure, if that makes a difference. I am not sure it makes any difference, but something close to that language, I certainly did say to Mr. Vergilio in discussing this matter with him.

Mr. BROOKS. Who specifically at OMB and Justice would you think participated in making these decisions upon which you base that previous statement?

Mr. BATES. As you know, Mr. Chairman, Mr. Schiffer, the Deputy Assistant Attorney General from the Civil Division in charge of the Commercial Litigation Branch, who testified here 1 week ago today, I believe, participated in this decisionmaking.

He is probably the highest level Department of Justice official with whom I had any personal conversations about this matter. I cannot speak for him as to whom he might have spoken with, but certainly it went to that level, as well as, of course, to my supervisor, the Chief of the Civil Division of the U.S. Attorney's Office for the District of Columbia, who concurred in this decision. I had discussed it briefly with him.

With respect to OMB, my personal contacts were with the Office of General Counsel at OMB. I spoke early on, when this case was filed, I believe on February 7, with both the deputy general counsel and the assistant general counsel, basically for informational purposes.

I was not involved in any further discussions with OMB officials.

Mr. BROOKS. Did you talk to anyone in the OMB?

Mr. BATES. The only people that I had actual conversations with were the two people I just identified, the deputy general counsel and the assistant general counsel. I had contact with them.

Mr. BROOKS. What are their names?

Mr. BATES. John Cooney is the deputy general counsel, Mr. Chairman, and Robert Damus is the assistant general counsel. Perhaps I should tell you why I talked with them and what I talked with them about.

When the case was filed it was apparent that OMB was involved. There had been a referral to OMB, or an attempt to refer the matter to OMB by GPO.

I felt that I should inform OMB of this litigation and that I should find out what they intended to do, not in terms of any decision they would reach, but rather whether they intended to deal with the matter that had been referred to them. This was important because I would have to represent something in court, so I informed OMB of the litigation and discussed the issues that were raised, but did not have any real substantive discussions with them about the positions we should take, although ultimately I certainly informed them of the positions we were taking.

Mr. BROOKS. They did not disagree with the position that Justice was beginning to implement?

Mr. BATES. That is certainly accurate, Mr. Chairman.

Mr. BROOKS. Did you talk to Bob Bedell?

Mr. BATES. I did not personally, although I do know that Mr. Bedell was involved in consideration of this matter at OMB. I did not have any conversations with him.

Mr. BROOKS. Do you know anybody else who was involved?

Mr. BATES. At OMB?

Mr. BROOKS. Yes.

Mr. BATES. I am confident that Ms. Gramm was involved in the decision that, as you well know, has now been rendered on the matter referred to OMB, and I believe that some staffers must have been involved as well.

Mr. BROOKS. Mr. Bedell and Ms. Gramm.

Mr. BATES. One staffer whose name I know is Diane Weinstein, I think she was involved. I did not have any conversations with her either.

Mr. BROOKS. Was anybody else involved other than the people at OMB and Justice that you know of?

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Mr. BATES. Yes, very definitely, Mr. Chairman.

Mr. BROOKS. Who?

Mr. BATES. When this case came in, it was obvious to me that there was, as I am faced with in many other situations and as my office and the Department of Justice are frequently faced with, a situation where there did not seem to be a uniformity of position among the various agencies of the executive branch involved.

Mr. BROOKS. That is putting it very nicely—there seemed to be no uniformity of position between the various agencies within the Government.

Mr. BATES. It is my responsibility, delegated from the Attorney General—

Mr. BROOKS. I like that one, Mr. Bates. Go ahead.

Mr. BATES. Thank you, Mr. Chairman. It is my responsibility, statutory responsibility, on delegation, of course, from the Attorney General and the U.S. attorney to represent the United States in civil litigation that is filed against it. One of my early tasks obviously was to determine the position that would be taken on behalf of the United States in this litigation.

I consulted quite extensively with GSA, with the attorneys for GSA. I also consulted with the Department of the Army, which was involved here.

Based on all those discussions and consultations, eventually the litigation position of the United States was reached. This is a process that takes place frequently in cases of this sort, and it is a process which the Department of Justice ultimately has the responsibility for carrying out to reach a litigation position.

Mr. BROOKS. Now, Mr. Bates, there was obviously some lack of uniformity there in the various agencies, as you say, but on February 14, the GSA abruptly withdrew from the Board proceedings and this was just a few days before you, as U.S. attorney, appeared in Federal court on GSA's behalf.

The arguments you made then were almost opposite to those that you just stated and those that have been made by the GSA itself prior to the Justice Department's intervention. You told the district judge on that day: "You have a uniformity of Federal agencies before you on this position, and we would submit that some deference to the agency interpretation of this Brooks Act provision, the OMB role, is appropriate. GSA, OMB, and GPO all believe that the proper course is for OMB to address this question."

I would point out that there seems to be some direct conflict there, some real difference in your viewpoint. I think that your first and original interpretation of the situation was perhaps accurate and that after the GSA is out of it, there aren't any agencies speaking up.

OMB and the Justice Department and the GPO and the Army were as one in collusion against the GSA's effort to resolve the matter under the law.

Mr. BATES. Mr. Chairman, both things that I said are perfectly accurate, both the statement that there was a lack of uniformity when the case was filed and the statement I made in court that I was standing in front of a Federal judge presenting the uniform position of the United States.

Let me explain why they are both accurate. First of all, GSA was still involved in the Federal court litigation. They did not withdraw from the Federal court litigation. I was representing them in the Federal court litigation. They withdrew from the proceeding before the Board, where I did not represent them.

Mr. BROOKS. I understand.

Mr. BATES. I think I have to address two separate things. Let me explain first any role that I had, and it was virtually none, in that withdrawal by GSA from the Board proceeding.

After discussing the litigation proceeding with attorneys from GSA and we did discuss it at length, I pointed out what I felt were some problems or vulnerabilities in the position that they wanted to take. Ultimately we had a second conversation. This second conversation was a telephone conversation with the responsible attorneys from GSA in which I explained the litigation position that the Department of Justice had decided was the appropriate position.

Mr. BROOKS. Who was it that you talked to?

Mr. BATES. I think Mr. Borwick was the principal person that I spoke to. He had others in his office if I remember correctly, but he was the responsible attorney from GSA.

I explained the litigation position that we thought should be taken and specifically gave GSA the opportunity, if they desired, to discuss that further in a face-to-face meeting with Mr. Schiffer. I specifically said: "If you don't agree with us and you want to discuss this further, let's meet with Stu Schiffer and air it further." They declined.

They said: "We will accept that position to be made in court on our behalf," and that is what I then did. So when I stood up in front of the Federal court, I was representing GSA and they had agreed to the position that I was taking in court.

With respect to GSA's withdrawal before the Board, during that same telephone conversation I said, I believe to Mr. Borwick, "GSA is in somewhat of a problem here because of the position they have taken before the Board." I asked him to consider what would be an appropriate thing for GSA to do.

I did not suggest anything for them to do. But I did suggest that they probably had to inform the Board in that proceeding of the position that they were now taking through the Department of Justice in Federal court.

Mr. Borwick said that they would think about it and I was later informed of their action. The next conversation that I had on that subject was when I was informed by Mr. Borwick, No. 1, they had withdrawn from the Board proceeding, and No. 2, the Board had granted that withdrawal.

I never suggested that they withdraw. That was not my idea and the only conversation I had on it was the one I just described to you.

Mr. BROOKS. Is it true that the Justice Department was going to file on behalf of GSA and the Board in the Federal court?

Mr. BATES. No, sir. I had discussed this with Mr. Vergilio and we were very sensitive to this problem from the first day, February 7, when the case was filed. We felt that the Board was really, in effect, a nominal party.

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Often you have a court case filed which is either an appellate case or a trial case that involves review of some other tribunal's decisions. That tribunal is normally not really an active party in the litigation. The parties to the lower proceeding represent the competing positions.

We felt that the Board was a nominal party here. We were not going to speak for the Board and force the Board to take any position. In fact, as Mr. Vergilio asked and indicated in his letters, we indicated at the outset to Judge Hogan that the Board's position was best reflected in its various opinions that had been issued, and that we felt that the Board was a nominal party and we were not presenting a different position for the Board. The opinions spoke for its position.

Mr. BROOKS. And that you would not even file an amicus curiae brief in their behalf?

Mr. BATES. We were not asked to and never considered that, Mr. Chairman. I don't think that would have been appropriate. They might have been able to ask us if we felt that it was appropriate for them to do so, and perhaps something along those lines might have been possible. I don't know. But that subject was never raised by the Board.

Mr. BROOKS. Was the specific fear of harm raised?

Mr. BATES. I am not sure that any specific fear of harm was raised, but I certainly think that that would have been consistent with Mr. Vergilio's concerns, so it may well have been raised.

Mr. BROOKS. He sent you a three-page memo arguing that the Justice Department should not join EDS in seeking an injunction because it would harm the Board. You do recall getting that?

Mr. BATES. I certainly recall getting that memo and I certainly recall that Mr. Vergilio did not fully agree with our position. He agreed with one aspect of our position, but he did not agree with all aspects of our position.

Mr. BROOKS. Did that report come to you?

Mr. BATES. That memo from Mr. Vergilio?

Mr. BROOKS. Yes.

Mr. BATES. Yes, sir, it did.

Mr. BROOKS. Did it go to anyone else in Justice?

Mr. BATES. I don't think so. I think he sent it only to me. It obviously came to the attention of others in Justice from me. I did send it forward. I gave it to Mr. Schechter, who is an attorney from the Commercial Litigation Branch, I had basically brought into this matter at the outset because it appeared clear to me that the eventual course of this litigation would be over to the Federal circuit where the litigation responsibility would be in that branch of Justice.

Mr. BROOKS. When you appeared in the Federal court on this matter, was the position that you argued dictated to you by those at the highest levels of OMB and the Justice Department?

Mr. BATES. I fully concurred in the position. Indeed, Mr. Chairman, a curious thing happened here. I reached, independent of any view of the officials of the Department of Justice, the same position on my examination of the statutes, the legislative history, and the factual and legal materials that had been provided to me by the various parties.

I independently reached the view that the appropriate interpretation here was that the matter that had been referred to OMB should first be decided by OMB, and as well, I independently reached the determination that this entire case should go to the Federal circuit and not remain in district court.

Mr. BROOKS. Did you advise the court that the GSA had taken a contrary position to the Department's in this very case on their first presentation to you?

Mr. BATES. Mr. Chairman, that was absolutely evident throughout this matter. All the papers that GSA had filed before the Board were in front of the Federal judge, and there was no question that GSA had taken another position. I am confident that our factual and procedural statement in our brief clearly indicated that GSA had taken a different position before the Board.

Mr. BROOKS. Did you feel that the GSA had changed their position?

Mr. BATES. They had fully concurred in the position that I was representing in court, Mr. Chairman.

Mr. BROOKS. Did they concur in that position or did they just say that you could go on and represent them, and they had no alternative to representation?

Mr. BATES. The route that they had was to disagree with me and discuss it further, and I specifically offered them that opportunity to meet with me and people from the Department of Justice, including Mr. Schiffer, to talk it out further if they did not want us to take that position in court. They said, "No. We don't need to meet. Take that position in court."

Now, what their thinking was I am afraid I am not fully privy to, but without a doubt, they concurred in our presenting that position on their behalf in Federal court.

Mr. BROOKS. When you appeared in Federal court in this matter, who was your client?

Mr. BATES. GSA was one aspect of the client. We represent, of course, the United States in these situations. But to break that down in this particular case, there were various parts of the Government involved in the case obviously. GSA was our client. The U.S. Army was at least in part our client. We filed a motion before the Federal court asking that they be allowed to intervene.

GPO was most definitely not our client. In fact, although we took the same position as they did on one of the issues, we were at loggerheads and strictly against them on another issue, and much of the argument on February 18 was spent on the jurisdictional issue of which court this case belonged in, and we very vehemently disagreed with GPO on that.

Mr. BROOKS. What argument did you have with GPO?

Mr. BATES. GPO, which, along with EDS, had filed the case in Federal court, felt that the case, belonged before the U.S. district court. We felt that it did not, and we asked the U.S. district court to transfer the case to the Federal circuit. That took up fully one-half of the argument before Judge Hogan and it was the subject of one of his two opinions. We spent at least as much time and attention on that.

Mr. BROOKS. Now, counselor, you told the court, "I speak for the Federal executive branch agencies involved here, the Army, if it is

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permitted to intervene, * * * and GSA, which is a defendant in the action."

Mr. BATES. That is correct, Mr. Chairman.

Mr. BROOKS. It does strike me as unusual that you were representing the plaintiffs and the defendant. I am just wondering who was representing the judgmental view of the GSA that was directly opposed to this. Apparently nobody did and they signed off with you as their lawyer, and they were dead.

Mr. BATES. They were not dead. They made that decision with their eyes open, Mr. Chairman.

Mr. BROOKS. With their eyes open but how about their arms?

Mr. BATES. I believe Ms. Latimer has provided deposition testimony that no pressure was put on them.

Mr. BROOKS. I bet they don't play the piano any more.

Well, Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman. I don't have any questions. You have covered this subject pretty well. Thank you, Mr. Bates. I appreciate your attending.

Mr. BROOKS. Mr. Neal, you are a musician, the distinguished gentleman from North Carolina.

Mr. NEAL. Thank you, Mr. Chairman. I am really more interested or most interested in the apparent irregularities and let me ask you a few questions about that.

It is my understanding that there are several major irregularities claimed in this matter. One, there was an employee on the evaluation team for this contract who went to work for EDS who offered the winning bid. The employee then went back to work for the evaluation team, indicating to me some clear conflict of interest. Two, the winning contractor, EDS, was apparently allowed to team up with another contractor after the time for best and final offers had passed and this joint offer never went through a proper evaluation process. Three, the losing contractors believe that the winning contractor was allowed to lower its bid after the time had passed for the best and final offers.

I think there are some other allegations, also, but those are three that strike me as being fairly serious. How would you comment on this?

Mr. BATES. I agree those allegations do seem fairly serious. The Department of Justice, Congressman Neal, has never taken a position on the underlying aspects of the bid protest that you just identified, either those or any others.

Our position, at least certainly my position with respect to the litigation that I was responsible for, was merely to determine where those issues should be aired, in what forum and through what process.

We have taken no position whatsoever on the underlying facts or allegations with respect to the bid protest brought by AT&T, Xerox, and Volt. To this date, I believe, the Department of Justice has taken no position on that. I certainly never closely examined those or took any position on them.

Mr. NEAL. What is your position as to where these complaints should be aired?

Mr. BATES. There are a number of forums available. With respect to this case, the Federal circuit now has before it the question of

what should happen before the General Services Board of Contract Appeals. OMB has made a determination as to whether this particular procurement involves automatic data processing equipment as defined under the language of the Brooks Act and, therefore, whether this bid protest properly belongs before the Board.

The Department of Justice is taking the position that it was OMB's role to make that determination. If that determination is the end of that process, then the bid protest, I believe, would go forward before either GAO, the Claims Court or the U.S. district court, but not before the Board.

That is yet to run its course in the Federal circuit, of course, which has the review authority over the Board.

Mr. NEAL. It was OMB that decided that this was not an electronic data processing contract and you concurred in that?

Mr. BATES. I have no view on that. That is not our role, Congressman Neal, and certainly not my role since I have been out of this litigation as of approximately February 22 or 23.

Mr. NEAL. But OMB concurred in that judgment, that this was not an ADP contract.

Mr. BATES. OMB has entered a decision on that question. The Department of Justice in this litigation has never taken a position on that underlying question of whether this procurement is automatic data processing equipment under the terms of the Brooks Act. We carefully avoided taking a position on that question.

Mr. NEAL. May I ask you why did the Justice Department not want you to appear here as a witness?

Mr. BATES. Congressman Neal, I don't think it is fair to say that the Justice Department did not want me to appear here. Mr. Schiffer, the Deputy Assistant Attorney General, did appear a week ago today.

Mr. NEAL. No, why they didn't want you to appear.

Mr. BATES. It wasn't a question of wanting or not wanting me to appear. When this came up, I believe the day before the hearing last week, Mr. Schiffer was already scheduled to appear and I just simply did not have the authorization under our internal policies to appear before the subcommittee last Thursday, although I am very happy to be here today.

Mr. NEAL. I am wondering also why the Department of Justice would not be interested if there was a claim that there had been some illegal or improper activity on the part of Government employees?

Mr. BATES. Oh, most definitely the Department of Justice might be interested in that. The only question I was addressing was what position the Department of Justice has taken in the litigation that I was involved in and that is now in the Federal circuit.

The issues in that litigation as we see them at this time are to determine where that bid protest, where those underlying questions should be addressed. Once that gets worked out, obviously the Department of Justice, or the particular agency if it is before certain of those forums, would be taking positions on the underlying bid-protest issues that you identified.

Mr. NEAL. Mr. Chairman, I can't see that this witness is able to answer, not through any lack of cooperation on his part, some of these very basic questions about the irregularities in the bidding. I

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am sort of at a loss as to how to proceed in questioning this witness. I certainly want to be as helpful as I can.

Mr. BROOKS. I would say that the witness is not involved in the substance of the controversy at all, and probably doesn't know much about it, and is not responsible for it. The controversy is between AT&T and EDS and Volt and Xerox, and their controversy is about the way the contract was let—whether EDS got a last look at it or whether they made a \$24 million mistake. Probably some secretary—just a little matter, not much, just a minor change in the bid, \$24 million. I mean, nothing special.

That is the controversy that they wanted to take up in the Board. The counsel's problem is whether or not they should give the Board that opportunity or whether OMB should run everything. He came out on the side of OMB, along with the administration, Justice, OMB, Army, and GPO. The GSA was dragged along kicking and screaming. They finally hit GSA in the head and dragged them along and they didn't say anything because they were knocked out or their arms were hurt.

You don't know what GSA's problem was but you can see that they probably had what they call the indoctrination period—a little motivation session with GSA.

Mr. NEAL. Time in the woodshed, as Mr. Stockman put it.

Mr. BROOKS. They don't even bring them up to the Oval Room either, none of that. This is lower level treatment they are giving them.

Mr. NEAL. It seems that they are making a mockery of the Brooks Act.

Mr. BROOKS. Yes, sir; that is not above them.

Mr. HORTON. We had the Justice Department here before and Mr. Bates is in the Justice Department, but as the chairman said, his knowledge of this overall subject is very limited. The problem that we are concerned about, aside from the merits of this thing, is the intervention of OMB into the GSA Board of Contract Appeals' proceedings and literally creating a situation in which the expedited method to resolve procurement matters cannot be used. We are concerned about the Justice Department's position in this thing and what part they are playing in it.

I don't think Mr. Bates is the proper witness to address those kinds of questions to.

Mr. NEAL. That is what I was just thinking.

Mr. HORTON. He has very limited knowledge.

Mr. NEAL. I am assuming that we will have some more witnesses who can speak more on this.

Mr. HORTON. We had some before.

Mr. BROOKS. I would assure the gentleman from North Carolina that we have already asked the appropriate Government agencies to look very carefully into the facts and the procedures surrounding this very fascinating bidletting.

We are not waiting for the Justice Department to decide whether or not anyone was stealing or taking a last look. We are not going to wait for that. We are going to try to get that information ourselves. This is what the Justice Department ought to be aware of, too. Mr. Bates, you are not running it but maybe you can tell them. They don't listen very well.

The object of the game is to resolve bid differences quickly and not delay them. We know they can go to court, if they catch them at fraud, last-look, bid collusion with somebody in the agency who gave them a last look at it—well, that is fraud. We may be able to prove that. You may prove it in court but that might take 6 months or a year.

In the meantime, the agency goes right ahead merrily doing business with the contractor that they were in cahoots with. They just are building away, building, building, building and doing, doing, doing, spending money, et cetera.

Then in a year's time it is hard to turn it around and the people who did it say: "We have a cost. We spent this money and we ought to at least get our money back and 20-percent profit because we are such nice people." I would like to hang them in the street myself if we catch them.

That is what the Board was designed to do. That is what Mr. Horton and I and on a bipartisan basis Congress voted to do so that the GSA Board would take a look at those disputes. These four, big, major producers don't mean a thing to me at all—none in my district, couldn't care less, they don't contribute to me. They don't vote for me. I don't care what happens to them.

But they are American companies that you want to see treated fairly. The Government has to treat contractors and bidders, fairly or people—

Mr. HORTON. And quickly.

Mr. BROOKS. And quickly. The Board would have decided this whole thing on the merits by March 25. The plaintiffs, the people other than EDS, none of them asked me to go into the merits of the case. They didn't want Congress examining it and arguing about it. They didn't ask the Justice Department or the OMB to get in it. All they wanted was the GSA Board to give them an opportunity for their lawyers to get in there on an expedited basis, have a hearing, and see if they could resolve the matter.

That sounded intelligent to me and the Justice Department got right in bed with the GPO and the Army and the OMB to kill that Board—not to let the Board decide it. I think it is a bad policy judgment on the part of Justice. I think they strained to do it and I think that it was very poorly thought out and I think it cost the Government a lot of money and will create a lot of additional controversy because that contract is not going to go away.

Somebody is going to look at it. Somebody is going to look at it and examine all the facets of that little operation where somebody changed a bid by \$24 million—made a little technical error. Did you ever make \$24 million technical error in your bookkeeping arrangement?

Mr. BATES. Unfortunately not. I wish I had had the opportunity in my personal finances, Mr. Chairman.

Mr. BROOKS. I wish that we could. If you can make that kind of an error, if you can lose that much, you have to have an awful lot to start with as they say.

We appreciate your being here. Mr. Saxton, do you have any comment?

Mr. SAXTON. No, Mr. Chairman.

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Mr. BROOKS. We have a vote that started at 11:02 so we want to thank you very much for coming down and we enjoyed it. You are a very pleasant, articulate, and candid witness and I am just sorry that you didn't agree with us. We are delighted to have you here.

Mr. BATES. Thank you, Mr. Chairman, I am glad to have been here.

Mr. BROOKS. We stand adjourned.

[Whereupon, at 11:07 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]