Petition for Writ of Mandamus

Nature of the Case In a case originally involving Due Process and discrimination in the academic economics profession, Defendants committed the extrinsic fraud of corrupting officers of the court, and relatedly the intrinsic fraud of suborning perjury at a Title VII bench-trial. The University of Hawaii's principal attorney influenced Petitioner Roy's attorney with promise of and then actual employment; the latter, among other misdeeds leading to his discharge mid-trial by Petitioner, waived disclosures shortly before trial of the District Court's personal associations with Defendants. The overall effect has been a prevention of impartial adjudication of issues fairly presented to the federal courts, causing judicial findings to have become disengaged from admissions in evidence of the prevailing party, and lengthy conclusions of law to be ordered not published or freely and transparently cited in other courts. Mandamus regrettably is made unavoidable if effect is to be given to clear law governing (i) relief under Fed. R. Civ. Proc. 60(b) for reason of fraud; (ii) contest on merits of briefs and the record rather than summary disposition in cases reaching the Court of Appeals; (iii) right of a party to suggest En Banc consideration.

Facts, Legal Definitions & Course of Proceedings Demand for jury-trial filed February 15 1990 in United States District Court led eventually to a bench-trial in March 1992 [B 22:28]. During this time and likely in mid-1991, Defendants' principal attorney

Warren Price III, as Attorney General to then Governor the Hon. John D. Waihee, backed Plaintiff-Petitioner's attorney John A. Chanin for a vacancy in the State of Hawaii judiciary. The Governor is the appointing authority to the State Supreme Court and its lower Courts, and also appoints members of a Judicial Selection Commission which recommends candidates for vacancies. Defendant University hired Chanin to teach at the same time.

Chanin did not disclose transactions with Price at any time, casually mentioning a few days before trial that he was up for a State judicial vacancy on which Petitioner had congratulated him.

A bench-trial restricted to Title VII 42 U. S. Code § 2000 began March 31-April 3 1992, was interrupted by another proceeding, then resumed April 14-17, 21-24 [B 28:30]. At onset of alleged perjury in Defendants' case-in-chief, Petitioner discharged Chanin mid-trial and began to represent himself from April 17 1992 [B 29.NR 134]. Petitioner has no legal training beyond this experience. Unknown to Petitioner, Chanin's judicial appointment did not materialize after trial and he was hired by Price in Price's private firm "Price Okamoto Himeno & Lum" and moved his offices from rented premises at 4 S. King St., Honolulu to Price's firm at 707 Richards Street.

The docket of the United States Court of Appeals for the Ninth Circuit in a first appeal taken by Petitioner records Warren Price III to be Defendant-Appellees' principal attorney on Date of Mandate Issued August 22 1994 [B 14]. The docket of the District Court records Price to be Defendants' principal attorney

and Chanin to be Roy's principal attorney since February 15 1990 [B 21]. Martindale-Hubbell's Law Directory listed Chanin under Price's firm "Price Okamoto Himeno & Lum" and as "Of Counsel" to it while this case was sub judice [B 19:20].[1]

Chanin demanded and received from Roy in 1989-1991 some $44,700 to prosecute the original case. Knowing Roy was in Chanin's words "tapped out", Chanin on November 21 1991 demanded payment of $5000, paid for by check no. 364 drawn on First Hawaiian Bank, at a time under influence of Price's backing for the judicial appointment. While Roy was preparing appeal in May-June 1993, Chanin started to send "bills" demanding $97,144.95 addressed from Price's firm [B 15:18]:

"Price Okamoto Himeno & Lum
Ocean View Center, Suite 728
707 Richards Street,
Honolulu, HI 96813"

accompanied by phonecalls originating from Price's firm about payment. B 15:17 is billing postmarked Honolulu June 8 1993. "Price" refers to Warren Price III. Below Price's name the handwritten initials "JAC" may be seen referring to John A. Chanin. B 18 postmarked Honolulu May 11 1993 contained similar billing which Roy destroyed, not realizing "Price" referred to Defendant-Appellees' attorney Warren Price III.

The Hon. Alan C. KAY, United States District Judge presiding in the case, disclosed shortly before trial he was acquainted on

[1] "Of Counsel refers to an attorney who aids in the preparation of a case, but who is not the principal attorney of record for the case. He or she usually assists the attorney who has been hired for the case." (Barron's Law Dictionary)

the racquetball court with Defendant Dubanoski, whose July 1989 employment decision based on Warren Price III's advice was the subject of Roy's case, and the Court and Defendant University's Senior Vice President Yaoune knew one another as members of the Church of Jesus Christ of Latter Day Saints; this official had been Defendant Simone's designee when Petitioner Roy had sought an administrative remedy within the University in November-December 1989 before filing in federal court. Roy's attorney Chanin did not move for Judge KAY to recuse himself, but issued informal waivers that were accepted by the judge.

None of the above-stated facts is denied or contradicted by Defendant-Appellees or by any finding of the U. S. Court of Appeals or U. S. Court for the District of Hawaii in the record of this case. In determining abuse of discretion in a Fed. R. Civ. Proc. 60(b) motion, a higher court

> "is entitled to assume that plaintiff's allegations are true, as it would on a motion to dismiss, where no evidence or response is offered in opposition", Ervin v. Wilkinson 701 F.2d 59, 61 (7th Cir. 1983), citing McKinney v. Boyle 404 F.2d 631 (9th Cir. 1968) citing this Court Klapprott v. U. S. 335 U. S. 613-615 1949.

On October 8 1991, issues of 14th Amendment Due Process and 42 U. S. Code §1981, §1985(3), §1986 were dismissed as barred by 11th Amendment sovereign immunity for Defendants [B 36 (A 21:23)]. Chanin did not provide normal defenses or take interlocutory appeal or file federal claims promptly in State court to overcome any 11th Amendment barrier altogether. In the first appeal taken by Petitioner, the Court of Appeals seemed to

reverse the dismissal of Due Process issues but did not remand for trial of facts to take place [B 36 (A 4)]:

> "Roy's original complaint included a Due Process claim. This claim was dismissed on summary judgment in October 1991, and that order merged into the June 1992 district court judgment from which Roy appealed. Thus, the issue was not waived by Roy and is properly before us."

The last sentence seemed to restore issues of deprivation without notice and hearing of Roy's property and liberty that have never been allowed to be tried in this case to date. B 39:40 shows Defendants admit Roy to be an "inventor" in their "Intellectual Property Program" owed property in their possession to this day, seven years after events of the case began; a small example of evidence not allowed to be tried because of the barrier placed on issues of 14th Amendment Due Process.

This Court, the Hon. JUSTICE KENNEDY, has long established right to prior notice and hearing as central to the Constitution's command of Due Process. The general rule is

> "individuals must receive notice and an opportunity to be heard before government deprives them of property." U. S. v. James Good Real Property 114 S. Ct. 492 1993.

This Court has also always held:

> "The 14th Amendment... ordains 'nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its legislative, executive or its judicial authorities." Virginia v. Rives 100 U. S. 313, Scott v. McNeal 154 U. S. 34 (1893), Cooper v. Aaron 358 U. S. 16-17 (1958).

After certiorari and rehearing were not granted by this Court in December 1994 and February 1995 [B 34] and following a suggestion

of the Clerk's office that a lower court might be approached if there was evidence of fraud in the case, Roy on May 23 1995 formally filed the after-discovered evidence of transactions between Price and Chanin under Fed. R. Civ. Proc. 60(b) and moved the District Court for equitable relief from its 1992 judgment for reason of fraud upon the court.

In a July 28 1995 order denying relief, the District Court admitted fraud upon the court is defined by judicial officers being corrupted or for "counsel to influence the court" [B 3:4] but held transactions between Defendant-Appellees' attorney and Plaintiff-Petitioner's attorney was not such fraud:

> "Because Plaintiff's allegations in the motion at issue solely concern the relationship between his attorney and the opposing party's attorney, such allegations, even if true, would not constitute fraud upon the court.... Plaintiff's allegations of fraud on the part of his attorney do not involve the court but rather the opposing counsel; therefore, such allegations, even if true, would not represent fraud upon the court." [B 3:4].

An attorney of record in a federal case is an officer of the federal courts, a "public official" or "person selected to be a public official" under 18 U. S. Code § 201 (b)-(c) which prohibits directly or indirectly promising, giving, asking for or soliciting "anything of value" to influence any official act or commit fraud on the United States or do or omit any act in violation of official duty. For an attorney to covertly induce opposing counsel, also a court officer, to "throw" a case is precisely fraud upon the court, defined in legal practice as unconscionable fraud damaging the integrity of the process of

administration of justice itself:

> "fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication" Moore's Federal Practice ¶ 60-360.

> "An attorney who attempts by personal influence to control a judge or jury in their decision in pending case or who merely holds himself out as able to do so, whether or not he actually makes the attempt and whether or not he succeeds or fails in the attempt, is ejected from the courts and ceases to exist as a lawyer." Root Refining v. Universal Oil Products 169 F.2d 534 (3rd Cir. 1948).

The District Court's July 28 1995 order did not mention Chanin's waiver of the Court's own associations with Defendants. Petitioner's motion to vacate was held to be untimely and to suffer from "procedural failure":

> "in order to permit this motion to go forward, [the Court] would have to nearly triple the time allowable for filing a Rule 60(b)(3) motion". [B 5]

Against Petitioner's pro se situation the District Court weighed

> "the interests served by the time limitations provided in Rule 60(b): namely, the Defendants' and the Court's interest in finality." [B 5]

What the record in fact discloses is that on May 20 1992, more than one month before entry of the June 23 1992 final judgment and three years before the formal 60(b) motion, Petitioner (on pro bono advice of Honolulu attorney Susan Ichinose) filed objections pro se to the fraud of suborned perjury contained in Defendants' testimony at the bench-trial, as discovered by cross-examination after Chanin's mid-trial discharge [B 31.NR 157:159]. "The classical example of intrinsic as contrasted with extrinsic fraud is the commission of perjury by a witness" Hazel-Atlas 322

U. S. 238, 261 (1943). In cognizance of conflict in earlier traditions as to whether intrinsic fraud sufficed for reversal (Publicker v. Shallcross 106 F.2d 949 3rd Cir. 1939), Revised Fed. R. Civ. Proc. 60(b)(3) explicitly codified

> "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party".

Relief from judgment for reason of intrinsic fraud must be moved within one year of judgment under 60(b)(3). Petitioner's 1992 objections were not labelled under Rule 59(e) or 60(b); however

> "nomenclature is unimportant" Federal Practice 1995 ¶ 60.31, 60-348.

> "the main thing to be borne in mind is that a litigant, who, in good faith initiates a timely procedure for relief, should not be penalized for choice of the 'wrong' procedure." ibid. ¶ 60.30[2], 60-331-338.

The District Court did not address Roy's May 20 1992 objections to Defendants' perjury at the Title VII bench-trial, and demonstrable perjury came to be credited in judgment entered one month later. The June 23 1992 judgment was essentially the same as an April 24 1992 ruling at the end of the bench-trial.[2] Judgment did not refer to witnesses on Roy's behalf, who included as experts the eminent economists Milton Friedman and T. W.

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[2] Closing arguments occurred before lunch on April 24; after lunch a written decision in Defendants' favor was read and Defendants instructed to prepare fact-findings [B 29. NR 145]. That this had been written before closing arguments were delivered, or without patience and caution during the lunch-break, is indicated by the volume of evidence (12 volumes of transcripts produced in 1993, more than 100 documents) entered in a bench-trial interrupted by another proceeding for a week, all of which could not have been weighed or reflected upon and written about in a lunch-break.

Schultz, each a former President of the American Economic Association and a recipient of the economics Nobel prize. Mention was not made of the Court's own finding at the trial that Roy was a tenure-track professor facing an imminent mutually-expected tenure and promotion evaluation at the Defendant University [<u>infra</u> 19:26]. The judgment did not mention that the chair of the economics department personnel committee, which in May 1989 voted in favor of renewing Petitioner's employment, had written to committee-members that to not renew

> "would contradict too openly our evaluations of last year and would apply standards to Suby we have not applied to anyone else.... He has completed an impressive book and could well give us more recognition in scholarly circles than anyone else on board." [B 36 (A 105:106)].

Petitioner's book referred to is <u>Philosophy of Economics: On the Scope of Reason in Economic Inquiry</u> (Routledge: London & New York 1989, 1991), which had just been accepted for publication at the time of events of the original case.

The day after the bench-trial, Chanin (still supposed to be representing Petitioner in State court) asked to meet Roy at a Burger-King where he tried to discourage any appeal from being taken to the Ninth Circuit. Defendants filed on May 12 and obtained on July 20 1992 ex parte judgment of costs of $5882.28 in effort to deter appeal [B 31. NR 150, 168].

Notice of Appeal was timely filed on July 2 1992. The District Court having indicated it would not grant relief for reason of fraud, jurisdiction passed to the Court of Appeals.

"The traditional rule is that when an appeal is taken from the district court, the latter court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court.... The Ninth Circuit, which adheres to the view that the filing of a notice of appeal divests the district court of jurisdiction to dispose of [a Rule 60(b)] motion without a remand from the court of appeals [Long v. Bureau of Economic Analysis 646 F.2d 1310 (1981), 454 U. S. 934; Poloma v. Baba 497 F.2d 959 (1974)], has in the past followed different procedures. Federal Practice 1995 ¶ 60.30[2] 331-338.

On November 8 1992, the Hon. Mary M. SCHROEDER, J., the Hon. Betty B. FLETCHER, J., granted opposed motion for enlargement of time for Petitioner to try to earn the $7500+ cost of transcripts recording the perjury, Appellees' attorneys Price and Michaels demanding more than the trial transcript, Roy protesting increase in cost of litigation [B 32. NR 173,175].

The appeal was dismissed sua sponte for reasons unknown on April 28 1993, despite transcripts being printed and Certificate of Record filed in the Ninth Circuit on May 3 1993 [B 32 NR 176].

Respondent Motions Attorney named in this Petition for Mandamus defended that dismissal on the phone with Roy. A Motions Panel, the Hon. Joseph T. SNEED, J., the Hon. John T. NOONAN Jr.,J., denied reinstatement on July 6 1993. On August 13 the same Motions Panel granted opposed motion for reconsideration, recalling the mandate and reinstating the appeal [B 32.NR 178].

Perjury was a key issue in the appeal taken. Roy had not realized when briefs were filed in the Court of Appeals in late 1993 there may have been extrinsic fraud as well in transactions between Chanin and Price leading up to the bench-trial.

"Fraud is 'extrinsic' or 'collateral' within rule authorizing relief from judgment obtained by such fraud when its effect is to prevent an unsuccessful party from having a trial or from fully presenting his case.... as, for instance, when his attorney fraudulently connives at his defeat or sells out his client's interest.... It is always extrinsic fraud for an attorney to fail fully to disclose to his client all material facts in any transaction in which their interests are adversary and when such fraud results in a failure of the client to defend against the claim of his attorney.... The relation of attorney and client inspires confidence in the client, and a mere breach of fidelity to client's interest is 'constructive fraud' and gives client a right to redress." Fiske v. Buder 125 F.2d 841 (8th Cir. 1942), cited by Fed. R. 60(b) Advisory Committee.

Roy left Hawaii after judgment and did not realize "Price" in

"The Law Offices of John A. Chanin,
Price Okamoto Himeno & Lum"

sending bills for $97,144.95 in May-June 1993 (presumably to deter the appeal) was none other than Defendant-Appellees' principal attorney of record Warren Price III, for whom Chanin was now apparently working in private capacity after not having been appointed to the State of Hawaii judiciary. Had the judicial appointment materialized it may have seemed routine an attorney was backed for a judicial vacancy even though it coincided with trial in this case. As it turned out, a law firm owned by Defendants' lead counsel has represented having done legal work for Plaintiff-Petitioner to a sum of $97,144.95 in an employment discrimination/Due Process case against the self-same Defendants. Equitable relief has been always granted

"where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him

> by his opponent, as ... where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side -- these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.... In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud directly practiced upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." U. S. v. Throckmorton et. al. 98 U. S. 61, 65-66 (1878).

This Court has held scope of this equitable power of chancery to be wide, the locus classicus being the opinion of JUSTICE BLACK in Hazel-Atlas 322 U. S. 238, 244 (1943) referring to rules "firmly established in English practice long before the foundation of our Republic". Relief will be granted for after-discovered fraud regardless of date of judgment. JUSTICE ROBERTS' dissent was unanimous "[n]o fraud is more odious than an attempt to subvert the administration of justice", id. 251. The District Court's order may have misread Hazel-Atlas to say fraud on the court is a nebulous concept "referring to very unusual cases involving 'far more than injury to a single litigant'" [B 3], as seen when the phrase is read in context.[3]

[3] "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception

Relief for reason of extrinsic fraud is to be sought within one year of judgment by motion under 60(b)(3), or if egregious enough amounting to fraud upon the court by motion or independent bill of review under 60(b)(6) without fixed time limit. Hazel-Atlas was relied upon by drafters of Revised 60(b) and JUSTICE BLACK in Klapprott once more clarified the Court's meaning:

> "[Rule 60(b)(6)] strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of ... common law remedial tools. In simple English, the language of the 'other reasons' clause... vests power in courts adequate to enable them to vacate judgment wherever such action is appropriate to accomplish justice." 614-615 (1949).

Following Klapprott, the Ninth Circuit in McKinney held fraud by a party's counsel to fall under 60(b)(6).[4] As noted by the Fiske court, Revised Rule 60(b) was adopted from §473 of the California Code and §473 had not impaired California courts in

> "the original jurisdiction of chancery to relieve a party from a judgment or order, the fruit of certain types of fraud", James Moore & Elizabeth B. A. Rogers "Federal Relief from Civil Judgments", Yale L. J. 1946.

Revised Rule 60(b) similarly does not impair a federal court's original jurisdiction as chancery to relieve a party from judgment for reason of extrinsic or intrinsic fraud.

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and fraud." id.246.

[4] "the main charge made by Plaintiff is fraud on the part of his own counsel... This, we think, brings him within ground (6) [of Rule 60(b)], as to which there is no fixed time limit. See Klapprott.... We need not perform a semantic tour-de-force to achieve the result that we reach, as Judge Learned Hand did..... That case did not involve a charge of fraud directed at a party's own counsel... this one does.... We think that we should follow the procedure used by the Supreme Court in Klapprott."

In the case before the Court, when the extrinsic fact Chanin had been working for Price came to be known in late 1993 (from a long-distance phone answer by attorney Ichinose), Petitioner Roy, not knowing what if anything could be done, wrote a letter dated January 24 1994 stating so to the Court of Appeals where appeal was pending. The Ninth Circuit did not then or at any time exercise its inherent common law power to inquire into possible collateral fraud in this case. In a 13-page July 29 1994 opinion ordered by the Court not to be published or cited by other courts of law, the Hon. Cecil F. POOLE, J., the Hon. William C. CANBY Jr., J., the Hon. Pamela Ann RYMER, J., agreed Petitioner's objections to perjury at the Title VII bench-trial had been timely [B 36 (A 6)] and that Roy had argued

> "the judgment should be reversed because key University witnesses Richard Dubanoski, Chung Lee, and Darrell Krulce materially perjured themselves." [B 36 (A 6)]

The Court of Appeals agreed inconsistent testimony had been shown in testimony of these key Defense witnesses:

> "Roy points out inconsistencies in several witnesses' testimony" [B 36 (A 6)].

The Court of Appeals mentioned but chose not to apply the controlling precedent Harre v. A. H. Robins 750 F.2d 1501 (11th Cir. 1985). There the burden for a new trial was met by showing testimony in deposition in a previous case was "sufficiently conflicting to support an allegation of perjury" in the case at bar. Even failure to discover perjury in cross-examination was held not to bar a 60(b)(3) motion. The Court of Appeals held conflicting testimony made a difference in movants' approach to

the case, and their cross-examination of the allegedly perjuring witness. Ability to fully and fairly litigate the claim had been prejudiced by the conflicting testimony. Here the Court of Appeals stated but did not apply the same standard, saying

> "Roy's claim is not based on evidence of perjury external to the trial and discovered after its close. Such evidence may suffice to obtain a new trial." [B 36 (A 6)]

The Ninth Circuit required Petitioner to have offered evidence

"to negate the real possibility"

that inconsistent testimony of Defendants' key witnesses discovered under cross-examination at the bench-trial

> "might arise from a faulty memory or confusion over events four years in the past" [B 36 (A 6)]

-- a burden in excess of that on a U. S. Attorney under 18 U. S. Code § 1621 who needs only prove a witness

> "knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false".

In petition for certiorari (94-6512, 115 S. Ct. 94, 95), it was pleaded the Court of Appeals had defined an unreasonable burden in an appeal taken by a party without legal training, who had to discharge counsel mid-trial at onset of demonstrable perjury. Burden under 60(b)(3) that intrinsic fraud prejudiced a movant's ability to litigate a claim fully and fairly, is conceptually different from and necessarily lighter than a prosecutor's burden of proving perjury under §1621. The difference is made clear by Harre being modified after a perjury acquittal of the same witness 866 F.2d 1303 (1989). Similarly, the burden under

60(b)(3) or 60(b)(6) of showing an officer of a federal court induced opposing counsel to "throw" a case, is lighter than a burden of proving bribery under § 201. Under Harre

> "movant must establish that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case" Harre citing Stridiron v. Stridiron 698 F.2d 204, 207 (3rd Cir. 1983), Rozier v. Ford Motor Co 573 F.2d 1339 (5th Cir. 1978).[5]

This Court, the Hon. JUSTICE SCALIA, though divided in St. Mary's Honor Center v. Hicks 113 S. Ct. 2742, 2753 (1993), was unanimous in reading McDonnell Douglas 411 U. S. 792, and Burdine 450 U. S. 248, to have said that Title VII requires a claimant

> "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision. We... insist that [claimant] must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised." emph. added

The grave concern expressed by the dissent, the Hon. JUSTICE SOUTER, was that flood-gates were being opened to perjury and mendacity (citing Lanctot, "Defendant Lies and Plaintiff Loses", 43 Hastings L. J. 57 (1991) id. 2762). The majority agreed "Undoubtedly some employers... will be lying" id. 2754 but held

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[5] In the Ninth Circuit, Toscano v. C. I. R. 441 F. 2d 930 1971; Keys v. Dunbar 405 F.2d 955, 1969, England v. Doyle 281 F.2d.304 1960, Atchison, Topeka and Santa Fe Railway v. Barrett 246 F.2d 846, 1957.

"Title VII is not a cause of action for perjury, we have other civil and criminal remedies for that."[6]

The majority suggested the "central fact" in such cases may be "not a physical occurrence" but an employer's "state of mind" (id. 2754). In the present case, however, Price's concrete transactions with Chanin dovetailed into demonstrable perjury suborned by Price's deputies Tsujimara, Loo and Suzuki about central facts to do with meetings between key witnesses:

COUNSEL LOO: Do you know Dean Richard Dubanoski?
KRULCE : I don't think I would recognize him if I saw him.
COUNSEL: What about Dr. Paul Yuen?
KRULCE : No, I don't know Dr. Paul Yuen.

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[6] From Hicks, the law of workplace discrimination appears to be as follows. An employer may discharge or not promote or rehire an employee and the latter could mistakenly believe the act was discriminatorily motivated. Equally, an employer could discharge or not promote or rehire an employee and the latter may then correctly expose an illegal rationale or motivation to do with the employee's race, sex, religion or national origin. The key issue in a particular case would have to do with whether evidence fairly obtained and presented showed an innocent employer defending against an erroneous or wrongful charge of discrimination, or a culpable employer revealed to have acted against a productive employee for unlawful reasons to do with the employee's race, sex, religion or national origin. An additional question is whether a party engaged in fraud under 60(b). "Since courts exist to do justice, any fraud in the presentation of a case to the court could plausibly be said to be fraud upon the court, whether it be accomplished through the bribery of a member of the court or jury, by the use of false or perjured testimony, by concealing or suppressing testimony, by reference in a brief to supposedly impartial authorities when these are known to be otherwise, or by resorting to any sharp practice that hinders the presentation of a claim or defense." Moore & Rogers, "Federal Relief from Civil Judgments", 692. Fraud vitiates everything, covertly altering terms of the contest from what the defrauded party reasonably assumes these to be, when fair contest on the merits is a desirable legal objective. Additional questions would be for a prosecutor and jury whether a party culpable under 60(b) may or may not be prosecuted and convicted e.g. of perjury or bribery under §1621 or § 201.

COUNSEL: Do you know President Simone?
KRULCE : Not personally.
COUNSEL: Did you have any discussions with Dr. Dubanoski, Dr. Yuen or President Simone regarding Dr. Roy?
KRULCE: Never.
[Trans. Vol. IX-9.2:10; 9th Cir. 92-16385; ER IV 1.2:10]

COUNSEL LOO: Did you discuss the matter of the February 6 1989 student petition with any of the students?
DUBANOSKI: I did not know the students, no, so I did not.
[Transcript Vol. VIII-33.24:34.1; 9th Circ. 92-16385 ER IV-138.24:139.1]

PRO SE: Do you know a student called Darrell Krulce?
DUBANOSKI: I only know it because of the reading I have.
PRO SE: Did you know it in the months February to June of '89 a student called Darrell Krulce?
DUBANOSKI: No.
PRO SE: Did you ever meet a student called Darrell Krulce?
DUBANOSKI: Not to my knowledge.
[Transcript Vol. VIII-174.8:14; 9th Circ. 92-16385 ERIV.198.8:14].

Proof that interim dean Dubanoski and graduate-student Krulce were lying comes from Defendants' own document in evidence obtained during discovery Px94 [B 37 (A 125)]. This was result of an internal inquiry dated October 18 1989 done by Defendant Simone's designee Takushi's subordinate Subiaga during Petitioner's search for an administrative remedy before filing in federal court. It read:

"March 1, 1989 Darryl (student) and Dean Dubanoski discuss Subroto." [B 37 (A 125); 9th Circ. 92-16385 ER II-79]

Chanin waived calling Dubanoski, Lee and Krulce in Roy's case-in-chief, leaving the only chance for perjury to be established to be by cross-examination in Defendants' case-in-chief after Chanin's mid-trial discharge by Petitioner. Chanin seemed willing to let Price's deputies prevent vital evidence from

entering, and Px94 [B 37 (A 125)] could not enter evidence on April 2 [B 29. NR 125] and could not enter until Chanin's mid-trial discharge on April 17 after a one-week break for other proceedings before the District Court.[7] Px94 entered the record on April 23 1992 [B 30. NR 144], just before closing arguments and despite Price's deputies' attempts to suppress it. Chanin had not deposed or subpoenaed Subiaga, and Price's deputies did not produce Subiaga, an employee of Defendant University, when Roy tried to subpoena him [B 30. NR 143] for rebuttal at the last minute on April 23. Subiaga's findings could enter the record only as an exhibit via Px94. The document unequivocally recorded ("Darryl") Krulce discussed Petitioner with Dubanoski on March 1 1989, proving the lying.[8]

The significance of the above example is as follows. With acceptance of Philosophy of Economics for publication, Petitioner faced a mutually-expected tenure/promotion evaluation at Defendant University. Just as the evaluation became imminent,

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[7] Had associate counsel James Y. Agena been at trial this may not have occurred. Agena had written the federal complaint and worked closely on the case since 1989 yet did not take part in the 1992 trial [B 21:29]. Chanin, over Petitioner's protest, discharged Agena from his firm before trial. When Petitioner tried to hire Agena instead, Chanin talked to Agena who said he would not take it to trial unless Chanin led it.

[8] Chanin's discharge which then allowed perjury to be pinned down by cross-examination, is itself evidence of Petitioner's resistance to fraud, even while being unaware of the transactions between Price and Chanin. An attorney's misdeeds bind a client where the client voluntarily acts through that attorney but client may not be penalized for actions not negligent but reasonable like trying to proceed pro se, Carter v. Albert Einstein Medical Center 804 F.2d 805 (3d Cir.1986).

the good name and reputation as teacher and scholar he had made at the University [B 38 (A 195:197)] was egregiously attacked by Defendant Lee working covertly with Krulce. Although these facts do not appear in judicial findings, the District Court determined and Defendants admitted under cross-examination as follows:

> JUDGE KAY: Now, Dr. Roy was finishing in the spring of '89, he was finishing his third year probation?
> DEFENSE WITNESS CAMPBELL: Yup. Yes.
> JUDGE KAY: And he would be considered for tenure in his fourth year?
> DR. CAMPBELL: Right.
> JUDGE KAY: And if he was not tenured in his fourth year, then he would have a terminal fifth year?
> DR. CAMPBELL: That's right.
> JUDGE KAY: Thank you. [B 36 (A 102.14:23; A 100)].

As of Spring 1989, Petitioner held a reasonable expectation of a tenure/promotion evaluation to occur in Fall 1989 of his work as a researcher and teacher. If successful, he would have academic tenure at the University; if not, he would have employment through 31 July 1991.[9] Tenure in State universities is supposed

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[9] COUNSEL LOO: Was [Petitioner's] position a permanent one?
DEFENSE WITNESS HUNG: It was a tenure-track position subject to review every year for five years I think.
COUNSEL: What does 'tenure-track' mean?
DR. HUNG: Tenure-track is -- means that when a person performs satisfactorily, he will be renew -- his appointment will be renewed every year for -- until the fifth year, and then in the fourth -- end of fourth year he become consider for tenure and if it's approved, then he will be tenure which means that he will be hired for the rest of his life as long as his performance is satisfactory.
COUNSEL:When you say as long as his performance is satisfactory, what do you mean?
DR. HUNG: Well it means that there are not -- not any really, really serious mistakes he make like raping a student (sic) or something like that." [Defense Exhibit 83, 11:12]

PRO SE: Well, this memo [Defense' Exhibit 72] is something which you received in your capacity as a member of that committee, and

to preserve freedom of inquiry and critical research as well as measure academic achievement. Evaluation is supposed to involve external review of the quality of a researcher's contribution to his or her scholarly discipline [B 36 (A 101.10:17)]. Regardless of the outcome of the process, it is the crucial pivotal event of every academic's professional career. Misled by fraud, the Ninth Circuit opened its 1994 opinion with the words [B 36 (A 1)]:

> "Subroto Roy was an untenured professor of economics at the University of Hawaii-Manoa. The University received student complaints about his performance and elected not to renew his contract, allegedly because of performance-related deficiencies."

In reality, i.e., as the record discloses Defendants to have admitted, no "performance-related deficiencies" or "student complaints" were ever identified against Petitioner at any time in any proper forum at the University of Hawaii -- Zero. What the record discloses is that evaluations of Roy's performance as teacher, scholar and colleague in 1986, 1987, 1988 were positive, even highly laudatory [B 38 (A 195:197)]. If there was any election at all in 1989, it was an economics department personnel committee vote in favor of renewal [B 36 (A 103.24: 104.2)].

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on page two, as you know, its says clearly that: "If Suby is reappointed for a fourth year, then he will either come up for tenure in that year and be approved or be given a terminal year ending 31 July 91". Did you recall receiving that as the Rose mentioned on the first page?
DEFENSE WITNESS ROSE: At this time, I do not recall receiving it, but it undoubtedly came before my eyes at that point in time.
PRO SE: Would it be fair to say your committee knew that Professor Roy, if he was renewed, would be up for promotion and tenure in the fall of '89?
DR. ROSE: Yes.
PRO SE: Thank you. [Transcript Vol. X-212.11:213.1

The chair of the personnel committee admitted it was Defendant Lee's actions that had limited Roy's ability to compete for and achieve tenure at the University [B 38 (A 147.11:23)]. The District Court ignored but the Ninth Circuit admitted Roy's "general ability and the quality of his publications" [B 36 (A 13)] as testified to by Milton Friedman and T. W. Schultz [B 38 (A 158:194)]. Defendant Simone knew from Schultz that Philosophy of Economics was considered

> "an in-depth analysis of the philosophical foundations of economics. It is scholarship of a high order. It is an original contribution of major importance to economic thought." [B 38 (A 159)]

Defendant Dubanoski knew Roy was managing University-sponsored research, involving contracts the University had entered into relating to research volumes edited by Roy to which the Defendant University President owns copyrights today[10] on which Roy had to continue to work even after being terminated without notice. A July 17 1989 letter terminating Roy without notice or hearing [B 38 (A 148:149)] made no mention of "student complaints" because Defendants admitted knowing they would be sued if any such fabrication came to be stated [B 38 (A 149.4:157.11)]. The stated reason was Roy had not done adequate research in the field of macroeconomics [B 38 (A 148)]. That this was pretextual was known to Defendant Yuen who was told by Friedman, a world pioneer in the field of macroeconomics:

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[10] Transcript Vol. VIII-120.19:121.3; 123.22:126.12; 128.21:129.18; 181:11:14; 125.19:20.

> "There is no doubt whatsoever [Professor Roy] has a thorough and deep understanding of the major issues that have occupied macroeconomics over the past fifty years." [B 38 (A 158)].

Friedman testified he had "every reason to believe that what I wrote was correct and remains correct" [B 38 (A 164.19:21)], that Roy's book showed him "a thoroughly competent economist" [B 38 (A 172.14:15)], "thoroughly conversant with macroeconomics" [B 38 (A 173.23:24)], that Friedman had some personal familiarity with Defendants' department [B 38 (A 168.21:169.10)], that Roy

> "has published more and better material on macroeconomics than any other member of the department that I can think of" [B 38 (A 169-112.19:22)].

Just as Petitioner's tenure/promotion evaluation became imminent, a written document -- false or misleading in almost its entirety -- was fabricated against him by Krulce working with Defendant Lee, a document which could not have withstood open scrutiny in the proper forum on the campus of the Defendant University. This Court has traditionally held

> "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard is essential." Board of Regents v. Roth 408 U. S. 573 1972.

Yet on legal advice of Warren Price III, Defendants denied Petitioner notice and opportunity for hearing or rebuttal of this fabricated document in any proper forum within the University -- effectively crippling Petitioner's ability to work in the academic economics profession again. That has been the root of this case since February 14 1989, though almost lost by extrinsic and intrinsic frauds shown herein, causing judicial findings to

have become entirely disengaged from Defendants' own admissions in evidence under cross-examination and discovery:

<u>Defense' Admissions under Discovery & Cross-Examination I.e., Presumptively True Facts</u>

No later than February 14 1989 Lee obtained a complaint against Roy in form of a letter dated February 6. Its main author was Krulce [B 36 (A 107.5:9)]. Lee admitted writing on the signature part of this letter addressed to himself: "seem to be in my signature" [B 37 (A 109.7:18)]. An internal inquiry found Lee kept this from Roy for five months i.e. since August 1988 [B 37 (A 127:128)]. Lee on February 16 informed Dubanoski and on March 1 the latter discussed Roy with Krulce [B 37 (A 125)].

A University mediator Ekroth found Lee "singularly unenthusiastic" about solving

<u>Court of Appeals' Findings Based on Extrinsic and Intrinsic Frauds Proven Herein</u>

"[Roy] argues that Lee, Krulce and Dubanoski lied about when and whether they met in the fall of 1988 and the spring of 1989 and what they discussed... [which] relates to a completely immaterial set of facts. Indeed the district court did not bother to make any findings of fact regarding when Dubanoski, Krulce and Lee ever met or what they discussed. The district court was not required to discredit Dubanoski's and Krulce's material testimony because an immaterial part of their testimony was in dispute." [B 36 (A 7)]

any problem [B 37 (A 135.7:136.13)] with any students. Policy gave reasonable access to files, said no anonymous material may be placed therein, and provided for copy of any material used in a grievance [B 37 (A 132:133)]. Lee admitted the letter should have been treated by due procedures of notice and hearing under University policy M-4527 [B 37 (A 112:119)], that M-4527 was not afforded to Roy and no other procedure was available [B 37 (A 120.15:122.15)]; that Lee sent M-4527 to all professors [B 37 (A 111, A 131.2:9)]; that procedure was afforded to other professors in a separate grievance in the same department as Roy at the same time [B 37 (A 129.25:130.8; A 201.21:23)].

"the district court concluded that M-4527 was a non-mandatory procedure which could be used at the option of the student grievant" [B 36 (A 2)]; "a finding of fact reviewable only for clear error" [B 36 (A 2)].

"We conclude that the district court did not clearly err in finding M-4527 to be nonmandatory. Because the district court also found that no student had requested the use of M-4527, a determination Roy does not contest (sic) Roy cannot show that the University discriminated against him by failing to apply M-4527's procedures to his case." [B 36 (A 4)].

"a letter signed by twenty graduate students detailing

The letter as a whole document with alleged signatures [B 37 (A 142:143)] was produced for the first time under Fed. R. Civ. Proc. § 26 in discovery. It was admitted a written offer from Roy to address any concerns [B 38 (A 145. 6:15, 146.1:11)] was not replied to.

serious flaws in Roy's teaching" [B 36 (A 10)]

"a legitimate business reason for the decision not to retain Roy" [B 36 (A 10)]

From the time Petitioner's tenure/promotion evaluation became imminent, his work at Defendant University was overtly filtered through written and spoken allegations about his national origin or religion. Personnel committee documents referred to him as a "Brahmin" whose alleged "cultural background" was such he had alleged attitudes with "superiors" which differed from alleged "elitist" attitudes with "inferiors".[11] In reality, the authors of these remarks admitted under cross-examination that what they wrote and testified to was hearsay entirely and there was no action known to them corresponding to any mental stereotype they may have had.

> PRO SE: You referred to Professor Roy's alleged elitism in your testimony today. Do you have any personal experience in your relations with him as an individual, which give you any reason to believe that statement to be true?

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[11] Transcript Vol. X-143.10:14; IV-84.14:96.4; IV-97.6:98.10; Px211, Px212, Px201.

DEFENSE WITNESS CAMPBELL: No, it's why I say it's alleged.
PRO SE: What is alleged, I'm sorry, you allege that he's elitist?
DR. CAMPBELL: I said that's why I infer that my answers were based on the fact that it had been alleged that you were elitist, you were not elitist with me.
PRO SE: So it is your belief that as far as in your experience, Professor Roy was not elitist with respect to you?
DR. CAMPBELL: In respect to me, no.
[Transcript Vol. X-131.10-22]

PRO SE: Did you have any personal experience of Professor Roy's arrogance with respect to you or your family?
DEFENSE WITNESS ROSE: No, not at all.
PRO SE: Did you have any personal experience of Professor Roy's arrogance with respect to a student in your presence?
DR. ROSE: No. [Transcript Vol. X-196.19-24]

Based on a waiver by Chanin before his discharge, the District Court refused to give effect to the holding of this Court, the Hon. JUSTICE O'CONNOR, in Price Waterhouse v. Hopkins 490 U. S. 228 (1989), despite a pre-trial undertaking that this Court's holding would be given effect to [B 36 (A 40; A 62; A 33)]. The Ninth Circuit's opinion admitted this was error [B 36 (A 9)].

Before perjury at the bench-trial, a pretrial ruling said:

"it is not at all clear whether the Defendants' arguments could sustain their burden of proof. The personnel committee's evaluation, although a mixed bag, gave a final recommendation of renewal. Chairman Lee's recommendation of nonrenewal appears to have played a pivotal role in the decision." [B 36 (A 33)]

I.e., the only vote was in favor of renewal. Had Defendant Lee the main source of animus not been involved, interim dean Dubanoski had no alternative but to follow the vote. Therefore, discrimination would be found under the Price Waterhouse holding of this Court. Misled by the perjury, the Court of Appeals then

contradicted the pre-trial judicial finding in Petitioner's favor, and concluded against Petitioner:

> "There is no reason to believe that but for any private animus Chung Lee might have harbored, Roy would still have been renewed." [B 36 (A 12)]

> "does not lead us to reverse the district court's finding of no discrimination. Even under Price Waterhouse, Roy has failed to prove that the district court's finding of no discrimination was clearly erroneous." [B 36 (A 10)]

Inconsistent judgments in the same case create situations "so extreme... it would be an abuse of discretion" to deny relief under Rule 60(b), Federal Practice & Procedure § 2857.[12] Granting relief under 60(b) would have rectified all matters above with order of a new and fair trial of the original evidence in the case where fair contest on the merits is a desirable legal objective. Based on the remedial nature of 60(b), the discretion of a district court to deny relief is limited, Federal Practice & Procedure § 2857, citing Patapoff v. Vollstedt's 267 F.2d 863, (9th Circ. 1959); In re. Cremidas' Estate Alaska 1953, 14 F. R. D. 15; National Credit v. Gray 1 F.3d 262 (4th Cir. 1993). Rule 60(b)'s Advisory Committee had cited the Ninth Circuit:

> "Rule 60 does not affect, interfere with, or curtail the common law power of the federal courts to... deal with situations where, in justice and good conscience, relief should be granted from manifest error.... The power to vacate judgments was conceded by the common law to all its courts. Within its proper limitations

[12] Citing "When verdicts in the same case are inconsistent on their faces, indicating [the trier of fact] was either in a state of confusion or abused its power, granting of a motion to alter or amend the judgment, for new trial, or for relief from the judgment, if timely made, is not discretionary." Hopkins v. Coen 431 F. 2d 1055 (6th Cir.) 1970.

> it is a power inherent in all courts of record and independent of statute. It may be exercised by the court either on its own motion or on motion or suggestion of a party or by an interested person", citing 1 Freeman on Judgments § 194, 375-376." Bucy v. Nevada Construction Co. 125 F.2d 213 1942.

The District Court denied relief ruling "substantive failure" [B 5]. The Ninth Circuit admitted "Roy points out inconsistencies in several witnesses' testimony" but Roy "failed to recognize"

> "the Ninth Circuit also states that [Roy] offers no evidence to negate the real possibility that the inconsistencies might arise from a faulty memory or confusion" [B 5:6].

Roy's Due Process claim "like his other substantive arguments is without merit" [B 6:7]; as for applying Price Waterhouse, the Ninth Circuit "still found no reason to reverse" [B 6].

Notice of appeal taken from the July 28 1995 order was timely filed. On September 19 1995, time-schedule was ordered requiring Opening Brief by December 14 1995, Answering Brief by January 16 1996, and any Reply Brief within 14 days of the latter [B 8:9]. On October 13, while Petitioner was preparing appeal, Respondent Motions Attorney on sua sponte motion over signature of a deputy clerk ordered Petitioner to show cause within 21 days under Circuit Rule 3-6 why the order below should not be summarily affirmed [B 10]. Petitioner complied in a timely manner (October 31 & November 13 1995) combining show cause with filing Opening Brief and Record and an independent bill of review authorized by 60(b) for exercise of original jurisdiction of the Ninth Circuit to unearth fraud Federal Practice ¶ 60-348 seq. On November 14, Appellees mailed their response and on November 24

Petitioner's response to this reached the Ninth Circuit's mailbox. Appellees did not attempt to deny any of the facts from which extrinsic fraud may be inferred in this case. Fraud may be assumed proven (supra 4, under Ervin citing McKinney citing Klapprott). If any summary judgment by the Court of Appeals was called for, therefore, it would be order of a new and fair trial of evidence in the original case of employment discrimination and deprivation of property and liberty without due notice and hearing prohibited by the 14th Amendment.

Before Petitioner's pleading reached Respondent Motions Panel, Respondent Attorney's self-motion was summarily affirmed, denying without mention Petitioner's independent action under 60(b) in the original jurisdiction of chancery. Grounds suggested were untimeliness, and district court may not act inconsistently with circuit court mandate on post-judgment motions [B 11]. Petitioner pleaded reconsideration as such grounds were invalid for clear reasons of law set out by this Court and drafters of 60(b). It was pleaded a fairly presented action under 60(b) -- which commenced with objections to the intrinsic fraud of suborned perjury filed before entry of the June 23 1992 judgment (supra 7-8) to which new and undisputed after-discovered evidence of collateral fraud had been added in 1994 and 1995 -- must be allowed to reach adversary contest and hearing on the merits in the Court of Appeals. By not allowing the Ninth Circuit's own September 19 1995 briefing schedule order to be kept, clear substantive law governing fraud and governing

summary judgment was being misapprehended or overlooked. On December 15 and 18 1995, Respondents issued the Mandate, denying reconsideration, rehearing or any other submissions, and closing the docket [B 11:13]. Respondent Attorney told Petitioner any petition for rehearing would be returned in the mail if sent, Respondent Attorney acknowledged not finding authority for this under Federal or Circuit Rules, citing "Ninth Circuit General Orders 6.11" as authority. Respondent Attorney said Respondent Motions Panel had acted as a Merits Panel. Petitioner said the appeal had not been briefed according to the September 19 1995 time-schedule order, i.e. there had been no adversary contest in a fairly presented timely appeal as of right. Respondent Motions Attorney said full briefing or oral argument in an adversary contest would not make a difference as the outcome would be the same, and Petitioner's only recourse was to petition for certiorari. Petitioner informed Respondent of intent to petition the Circuit Justice for extraordinary remedy of Writ of Mandamus to compel hearing on the merits or En Banc suggestion to be made. Respondent Motions Attorney repeated suggestion of certiorari, saying the Ninth Circuit would do what this Court ordered but suggested a low estimate of odds. Petitioner sought to indicate fraud vitiates everything; the undenied fraud here can be remedied only by a new and fair trial of the original evidence. <u>Argument Why Mandamus is Made Necessary</u> Writ of Mandamus is regrettably made unavoidable because Respondents have declined to give effect to clear law governing right of a party to suggest En

Banc hearing, governing summary disposition, and governing relief from judgment for reason of fraud as intended by drafters of 60(b) and held by this Court and the Ninth Circuit itself. Traditional use of mandamus has been

> "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Mallard v. U. S. Dist. Court for S. Dist. Iowa et. al. 490 U. S. 296, (1989) citing Roche v. Evaporated Milk Assn. 319 U. S. 21, 26 (1943), Will v. Calvert Fire Ins. Co 437 U. S. 655, 661 (1978); Kerr v. U. S. Dist. Court for N. Dist. California 426 U. S. 394, 402 (1976); Will v. U. S. 389 U. S. 90, 95 (1967).

Mandamus is granted in exercise of supervisory or appellate jurisdiction of the Court, or "when a lower federal court refuses to give effect to or misconstrues" the mandate of this Court, U. S. v. Haley 371 U. S. 18 (1962). To ensure mandamus remains extraordinary, Roy must show he lacks adequate alternative means to obtain the relief he seeks, Mallard citing Kerr at 403, Allied Chemical Co. v. Daiflon Inc., 449 U. S. 33, 35 (1980), and must

> "carry the burden of showing [his] right to issuance of the writ is clear and indisputable", Mallard citing Bankers Life & Casualty Co. v. Holland 346 U. S. 379, 384 (1953) quoting U. S. v. Duell 172 U. S. 576, 582 (1899).

Though the Court has "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of jurisdiction", the Court requires Roy to demonstrate a "clear abuse of discretion" or conduct amounting to "usurpation of the judicial power", Mallard citing Kerr 426 U. S. at 402, Will v. U. S. 389 U. S. at 95, Bankers Life 383, De Beers Consolidated Mines v. U. S. 325 U. S. 217 (1945).

The Ninth Circuit's unpublished 1994 opinion mentioned but refused to apply the Harre standard for a new trial for reason of intrinsic fraud; the 1995 action of closing the docket in face of undenied evidence of extrinsic fraud might just as well have said: "We don't want to know about corruption or perjury". On sua sponte motion of Respondent Attorney, Honorable Respondents ordered a fairly presented appeal not to proceed to maturity for adversary contest before a Merits Panel of the Court of Appeals, then disallowed Petitioner from reaching the full Court En Banc and the Chief Judge. Authority cited by Respondent Attorney "Ninth Circuit General Orders 6.11" stands in flat contradiction of this Court's holding since West. Pac. Ry. Corp. 345 U. S. 247 (1953) and the September 1995 proposed changes to Fed. R. App. Proc. 35, that a party should be free to suggest En Banc consideration, allowing such a petition to reach every active Judge including the Chief Judge.

Authority to hear causes En Banc is statutory under 28 U. S. Code § 46(c). Rule 35 was designed precisely to provide a procedure for a party to make such a suggestion without disturbing the authority of the Court to order En Banc hearing sua sponte Federal Practice 1995 ¶ 235.02. While En Banc hearing under Rule 35 is not favored and ordinarily will not be ordered, the present case is precisely a candidate for such hearing in view of panel decisions conflicting with decisions of this Court, with authoritative decisions of other Circuits and with the Ninth Circuit's own precedents hitherto.

Secondly, Respondents were constituted as the Circuit's Motions Panel for one month under local rule. Circuit Rule 3-6 authorizes summary judgment on questions "so insubstantial as not to justify further proceedings". All Circuits are agreed summary judgment under Fed. R. Civil Proc. 56 may be made only as a matter of law when it is clear what the truth is and no genuine issue remains for a fact-finder. Summary judgment seldom will be proper in cases involving large public issues or conspiracy claims. If there is to be error it should be in favor of full contest on the merits, itself a desirable legal objective Federal Practice ¶ 56-211 et. seq. All Circuits allow for disposal of frivolous appeals with ample disincentive available under Fed. R. App. Proc. 38.

Wide differences appear in local rules, however, as to treatment of serious or "non-frivolous" cases reaching the Court of Appeals, adding up to a recipe for arbitrariness and defeat of the Rule of Law not countenanced by Congress. Applying Rule 56 principles under this Court's holding in Anderson v. Liberty Lobby 477 U. S. 257 1986, the result would be that to survive summary disposition in the Court of Appeals, the non-moving party needs only to have presented issues on which a Merits Panel or En Banc Court of the Circuit might return a judgment in its favor in an adversary proceeding. Defending against summary affirmance, Appellant need only present issues on which a Merits Panel or En Banc Court might reverse, vacate, set aside or remand for further proceedings. If so, a fairly presented appeal must be heard on

the merits. The function of summary judgment is to avoid "useless" assignment to a Merits Panel but such assignment is absolutely necessary if there are issues resoluble only by adversary hearing on the merits. A Motions Panel must determine whether there are issues resoluble only by contest on the merits yet not resolve such issues; deny summary judgment where there is any such issue; grant summary judgment if at all only where it is clear what the truth is and applying substantive law governing the issue leads inexorably to summary reversal or affirmance Federal Practice ¶ 56. 200:204. If there is to be error it should be in denying summary judgment in favor of full contest on the merits of briefs and oral argument. The problem of overcrowded calendars is not to be solved by summary disposition of issues lawfully presented for adjudication, ibid ¶ 56-246.

Such a result is closest to rules of the Fourth, Sixth and Tenth Circuits that summary disposition motions should not be filed routinely, and in any case must be made only after briefs are filed, and the Court of Appeals will defer action "until the case is mature for full consideration". Serious appeals may rarely qualify for summary disposition, which may explain the reluctance of the Second, Fifth, Seventh, Eleventh, D. C. and Federal Circuits to arm themselves with local rules much beyond what Fed. R. App. Proc. 38 already allows. Relatively heavy use of summary disposition in the remaining Circuits would lead to inconsistency of practice, a potential recipe for arbitrariness

and defeat of the Rule of Law, with possible usurpation (and abdication) of judicial power not countenanced by Congress.

Respondents in this case have not found frivolous the Opening Brief and Record filed by Petitioner six weeks ahead of the December 14 1995 date ordered by the briefing schedule. To the contrary, the egregious matter in the original case of Defendant-Appellees' extrinsic fraud upon the court as defined in the law is undenied. Appellees would have either admitted or not denied their earlier frauds upon the court when they filed their Answering Brief that was due on January 16 1996 according to the briefing schedule ordered by the Ninth Circuit. If any new prevarication was made to a Merits Panel, Petitioner would have been able to expose such in the Reply he had a right to file within 14 days of the Answer. Appellees' admissions would have been sufficient to make a new and fair trial of the original evidence obligatory under this Court's clear tradition since Throckmorton. This Court reiterated in Hicks the Burdine principles

> "We... insist that [claimant] must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised."

Respondents' closing the docket on December 15 1995 has the effect of saving Appellees from admitting in the Answering Brief due to be filed on January 16 1996 their frauds on the court now established, i.e., after-discovered hiring of Chanin by Defendant-Appellees' counsel of record Price, following Chanin's judicial appointment not taking place; Chanin's waiver before

trial of the District Court's personal associations with Defendants; and the suborned perjury at the Title VII bench-trial pinned down after Chanin's discharge. Such arbitrariness, starting with sua sponte motion of Respondent Attorney [B 10], who also defended the 1993 sua sponte dismissal that had to be reinstated with great difficulty by this i.f.p. Petitioner [B 32. NR 177:178] would not have been seen in the majority of Circuits of the Court of Appeals which disallow summary disposition or allow it only on merits of briefs in an appeal that is mature for consideration.

Clear traditions of this Court and the Ninth Circuit itself make a new and fair trial of the original evidence obligatory in this case. If undenied extrinsic fraud is considered "so insubstantial as not to justify further proceedings", discretion is abused. For appeal as of right to be disallowed from reaching maturity, and for lawful En Banc suggestion to be prevented from being made exceeds the Circuit Motions Panel's authority. For an order to be affirmed which refuses to consider corruption of opposing counsel to fall under standard legal definitions of fraud upon the court, and ignores undenied personal associations between the District Judge and Defendants, is to abuse discretion or fashion law flatly at odds with this Court's tradition and what was countenanced by 60(b) and Congress.

If Honorable Respondents have acted as a Merits Panel pro tanto, they failed to exercise authority to unearth undenied extrinsic fraud, when it was their duty to do so. Petitioner's

resistance to Defendants' frauds began, if not with mid-trial discharge of the after-discovered corrupted attorney, then with formal objections to perjury filed on May 20 1992, a month before entry of judgment. While under appeal, Petitioner discovered his attorney, having apparently not become a State judge, working for Defendant-Appellees' lead attorney in a private capacity, sending "bills" to Petitioner in evident attempt to deter appeal from proceeding. Petitioner brought it to the Court's attention by letter dated January 24 1994. The Ninth Circuit did nothing. Admitting "Roy points out inconsistencies in several witnesses' testimony" [B 36 (A 6)], the Court stated but refused to apply the law under Harre, placing on Roy a burden exceeding that placed on a prosecutor. Having neglected to inquire into extrinsic fraud, the panel misread Harre as saying evidence of perjury must be "external to the trial and discovered after its close" if it is to "suffice to obtain a new trial" [B 36 (A 6)]. The correct 60(b)(3) burden under precedents from Throckmorton (1878) and Publicker (1939) to Harre (1989) and Hicks (1993), has been in fact more than met by Petitioner. Fidelity to the same standards and spirit of the law points to fraud having prevented Roy from fully and fairly presenting his original case when a fair contest on the merits is a desirable legal objective. A 60(b)(3) motion to vacate has been extant since the 1992 objections but has been either ignored or addressed erroneously by the Court of Appeals. Respondents have in effect turned a blind eye and deaf ear to undenied proof of fraud in this case.

The same conclusion is reached a fortiori under 60(b)(6) by which there is no fixed time limit to vacate judgment rooted in extrinsic fraud on the court. Laches could have been a defense if Petitioner was asserting fraud after "unexplained delay of 25 years" Bulloch v. U. S. 721 F.2d 713 (10th Circ. 1983). Neither Defendants nor the District Court nor Respondents assert laches. To the contrary, it has been Petitioner's perseverance and faith in the Rule of Law in the country that has allowed him to resist the egregious actions of State Government officials since 1988-1989 against a loyal and productive member of the State's University. For these reasons it is invalid to say Roy has been untimely in bringing fraud to the attention of the court.

Nor can 60(b) relief be denied on the basis of the 1994 affirmance. Proven or undenied frauds at the District Court level vitiate the Ninth Circuit's unpublished 13-page opinion. Perjury in the trial record caused inconsistent judgments in the same case when this Court's Price Waterhouse holding was applied (supra 26:28), while corruption of counsel led to evidence of property and liberty deprivation without notice and hearing to not be allowed to reach trial. If the Ninth Circuit was itself misled by fraud or by fraud occurring below, or failed to unearth fraud or did not give effect to or misconstrued this Court's mandate or the clear intent of Rule 60(b), it is invalid to conclude the District Court must uphold and not correct errors made above, corrections which the Court of Appeals may then still have opportunity to review for error.

Conclusion Petitioner comes with clean hands throughout, with proof demonstrated of Defendants' collateral and intrinsic frauds in the case. Fed. R. Civ. Proc. 60(b) was intended to prevent advantage unfairly or unconscionably gained to be retained, as Defendants gained by corrupting Roy's attorney with employment in 1991-1993, then brazenly committing demonstrable perjury in the Title VII bench-trial in 1992. The Ninth Circuit was approached in fairly presented appeal as of right to set aside judgment in the face of undenied extrinsic fraud. Honorable Respondent Motions Panel sua sponte have refused to exercise authority when it was their duty to do so, disallowing appeal to mature by the briefing schedule, saving Appellees from admitting their fraud to a Merits Panel, and closing the docket preventing a lawful En Banc suggestion from being made.

Petitioner has discharged the burden of showing his right to issuance of Mandamus is "clear and indisputable" Mallard (1989) citing Duell (1899) in aid of the Court's original jurisdiction and supervision of the federal courts. Only Mandamus of the Circuit Justice may now cause Respondents to permit lawful suggestion for En Banc hearing to be made, for adversarial hearing on merits of briefs and the record to occur in a fairly presented appeal as of right, or for direct effect to be given to Fed. R. Civ. Proc. 60(b) by order of a new and fair trial of the original evidence in this case. Respectfully submitted by

Subroto Roy, Petitioner, January 26 1996.

CERTIFICATE OF SERVICE

Petitioner Subroto Roy does affirm that a copy of this Petition for Extraordinary Writ of Mandamus and Appendix of Record B1:40 was duly served by first-class mail posted on February 5 1996 with postage pre-paid and delivery recorded on

Respondent Motions Attorney Susan Gelmis Esq.,

Respondent Motions Panel

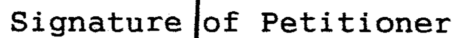
the Hon. Harry PREGERSON, J.,

the Hon. William A. NORRIS, J.,

the Hon. Stephen REINHARDT, J.,

each at United States Court of Appeals for the Ninth Circuit, 121 Spear Street, P. O. Box 193939, San Francisco, CA. 94119-3939.

Defendant-Appellees jointly represented by Margery S. Bronster Esq., 425 Queen Street, Honolulu, HI 96813 have also been served.



Signature of Petitioner

February 5 1996