

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**THE AMERICAN TRADITION
INSTITUTE, and
THE HONORABLE DELEGATE
ROBERT MARSHALL**

Petitioners,


v.

**RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA,**

Respondent.

Civil Docket No. CL 11-3236

Affidavit of David W. Schnare

BY  DEPUTY
CIRCUIT COURT CLERK'S OFFICE
PRINCE WILLIAM COUNTY, VA

2011 OCT 24 PM 12: 28

FILED

AFFIDAVIT OF DAVID W. SCHNARE

On this day, David W. Schnare personally appeared before me, a certified Notary Public in and for the Commonwealth of Virginia, and after first being duly sworn to tell the truth, testified as follows:

1. My name is David W. Schnare. I am licensed to practice law in the Commonwealth of Virginia (VA Bar. No. 44522) and am subject to the Virginia Rules of Professional Conduct established by the Supreme Court of the Commonwealth of Virginia. I am also a member of the U.S. Courts of Appeal for the Second and Fourth Circuits and the Supreme Court of the United States.

2. I am the Director of the Environmental Law Center at American Tradition Institute (ATI), Director of the Center for Environmental Stewardship at the Thomas Jefferson Institute for Public Policy and Director of the nascent George Mason Environmental Law Clinic. I am an appointee to the Chesapeake Bay Exceptions Review Commission of Fairfax County, the

largest urban county in the nation, and Chairman of the Environmental and Land Use Committee of the Occoquan Watershed Coalition, an organization of 143 homeowners associations in western Fairfax County, Virginia.

3. ATI has no in-house counsel and uses Hackstaff Law Group of Denver, Colorado, when it needs corporate legal advice.

4. In the recent past, I have been CEO of Schnare and Associates, Inc., a professional corporation providing legal representation, legal and policy analysis.

5. I retired from 37 years of federal service to this nation on September 30, 2011. I gave 33 years of service within the U.S. Environmental Protection Agency (EPA).

6. My professional affiliations are public knowledge and have been available on the internet for many years. *See, e.g.,*

http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23a539ea-802a-23ad-45fd-606dcd273a3a&Witness_ID=10fdc301-084b-4845-af15-c0cfdd2b4493, first published Sept. 2007, *see*

http://web.archive.org/web/20070926230854/http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23a539ea-802a-23ad-45fd-606dcd273a3a&Witness_ID=10fdc301-084b-4845-af15-c0cfdd2b4493;

<http://www.epa.gov/compliance/resources/cases/civil/caa/aleris.html>, published Aug. 2009.

<http://www.owccoalition.org/owcbios.htm>, first published Mar. 2001, *see*,

<http://web.archive.org/web/20010303030914/http://www.owccoalition.org/owcbios.htm>;

http://www.thomasjeffersoninst.org/staff_scholars.php, first published Nov. 2010) *see*,

http://web.archive.org/web/20101108001119/http://www.thomasjeffersoninst.org/staff_scholars.php (November 2010);

<http://thehardlook.typepad.com/about.html>, first published July 2008, *see*,

<http://web.archive.org/web/20080724005251/http://thehardlook.typepad.com/about.html>;

7. Throughout my federal career, I have actively contributed *pro bono* services to non-federal organizations (*see* Exhibit 3), routinely specifying an activity is not associated with EPA, as required under federal and EPA ethics regulations. *See, e.g.,* Exhibit 2, note 1, which states:

Dr. Schnare is the Institute's Senior Fellow for Energy and the Environment. His position with the Institute is pro bono. He has been employed by the U.S. Environmental Protection Agency for 30 years and currently serves as a Senior Counsel in the Office of Civil Enforcement prosecuting violations of the nation's Clean Air Act. This testimony reflects the views of the author and does not necessarily reflect the position of the U.S. EPA or the Thomas Jefferson Institute.

And see, the standard bio I provide conveners for speeches:

David W. Schnare, Esq. Ph.D. Dr. Schnare is a senior attorney with the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance and President of Schnare & Associates, an administrative and environmental law appellate practice. He has served on the staff of the Senate Appropriates Committee and as the nation's Senior Regulatory Economist with the U.S. Office of Advocacy for Small Business. He holds the position of Director of the Center for Environmental Stewardship at the Thomas Jefferson Institute. HIS REMARKS TODAY ARE HIS OWN AND DO NOT REPRESENT ANY ORGANIZATION WITH WHOM HE IS OTHERWISE AFFILIATED.

8. On May 24, 2011, outside a courtroom in Prince William County Circuit Court, during casual introductory conversation between me and Richard Kast, counsel representing the University of Virginia (UVA), Mr. Kast inquired as to my professional background. To the best of my memory I stated, "I have worked for the U.S. EPA for many years and I'm here today doing *pro bono* public interest law." This was accurate and not misleading. This statement follows a long-standing practice of federal employees to minimize their federal responsibilities when acting outside a federal capacity. We do this to ensure there is no confusion as to whom we represent. This was a very brief, informal inter-personal conversation and did not take the form of any formal exchange as to potential conflicts of interest or other formalist representation. At no time did I state or imply that I was "formerly" with EPA. Mr. Kast did not indicate he took this to mean I had departed EPA, such as by asking me when I left the Agency, if I left the Agency, or other follow-up. Had Mr. Kast asked whether or when I separated from EPA, I would have informed him of my employment status at EPA and my authority to engage in outside activity

under the ethics rules, something I have done countless times during my 33 years with EPA. Further, this is the first allegation in 33 years that my standard reply has been characterized as misleading.

9. In my interaction with Mr. Kast, I closely followed the federal rules with regard to stating my representations, to wit:

5 C.F.R. 2635.807(b) Reference to official position. An employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking

10. My *pro bono* litigation activities began in 2000 and have continued ever since. The first such representation is documented at *Jessup v. American Kennel Club, Inc.*, 210 F.3d 111 (2d Cir. N.Y. 2000).

11. To pursue *pro bono* and other outside activities, I have routinely filed outside employment notices as required under federal and EPA ethics rules. See, e.g., Exhibit 9, a 2008 filing to present a paper, and Exhibit 10, the 2010 filing to act as *pro bono* Director of the ATI Environmental Law Center.

12. The November 16, 2010, ethics filing was made contemporaneous with the transition of the Western Traditions Institute into the American Tradition Institute and was made the day following my statement of intent to the ATI Board to serve as the Director of the ATI Environmental Law Center, subject to filing of the ethics memoranda. Exhibit 5 is the metadata associated with that memorandum, showing the memo was created and last edited on November 16, 2010, the same day it was signed and hand-carried to the initial addressee, Greg Fried. This memorandum was not “purportedly” prepared on November 16th, the clear evidence shows it was in fact prepared on that date.

13. Recently, on November 18, 2011, I spoke with Phil Brooks, Director of EPA's Air Enforcement Division and Mr. Fried's immediate supervisor regarding his investigation on the handling of the memorandum. Mr. Brooks informed me that his investigation revealed that Mr. Fried had received the memorandum on the date it had been prepared, but failed to forward it to Mr. Kushner, the Deputy Ethics Officer.¹ Until Mr. Brooks contacted me as part of his investigative, I was not aware Mr. Fried had failed to carry out his duties in this regard. I was aware, however, that Mr. Fried had the memorandum as it was hand-delivered to him on the day it was created and we spent about half an hour discussing the nature of the outside activity. Neither at that time nor at any time thereafter did Mr. Fried voice concern to me about the contents of the memorandum

14. While Mr. Kushner, the Deputy Ethics Officer may not have received a copy of the memorandum, he had constructive knowledge of its existence and clear knowledge of the outside activity as it was listed on the 2011 OMP Form 450, and Ms. Jeanne Duross, who manages ethics matters for Mr. Kushner, discussed the filing with me in August or September 2011. See, Exhibit 4, documenting Ms. Duross' February 7, 2011 receipt of the form and the clear notice of my outside activities with ATI.

15. In his affidavit, Richard Kast misrepresented EPA's October 6, 2011, FOIA response to Peter Fontaine regarding documents associated with my outside employment. Mr. Fontaine, like me, is a former EPA enforcement attorney.² He is also a personal friend of Ms.

¹ Mr. Brooks related to me that when asked about why he had not forwarded the memorandum, Mr. Fried replied, "I fucked up." EPA's FOIA response to Mr. Fontaine now makes every effort to shield Mr. Fried from public criticism for his failure. I have long known Mr. Fried. He is a relatively inexperienced supervisor, but is intelligent, resourceful and highly motivated. He works long hours to do a job that is, by any measure, overwhelming to a new supervisor. I believe Mr. Fried simply did not understand the significance of the memorandum, had never received one before, and has learned a hard lesson that I personally hope does not limit his advancement at EPA.

² Mr. Fontaine and I share more than history as enforcement attorneys working in the Air Enforcement Division. Both Mr. Fontaine and I received the EPA's Award for Excellence, an award given annually to one lawyer in the

Justina Fugh, Senior Counsel for Ethics, the EPA official who signed the response letter. In the letter (Kast Aff. Exhibit 26), Ms. Fugh states that my responsibility as follows:

“In order to engage in outside activity that involves the practice of a profession or that deals in significant part with any ongoing Agency program, policy or operation, Mr. Schnare was required to seek prior approval from his Deputy Ethics Official. 5 C.P.R. § 2634.801 and 5 C.P.R. §640 1.1 03.

Ms. Fugh then indicates they have no record of Mr. Kushner receiving or approving the request. The letter is notably silent on the fact that I did what Ms. Fugh indicated I was required to do. It is also silent on Mr. Fried’s failure to forward my memorandum to Mr. Kushner or the fact that Mr. Kushner had constructive notice of the memorandum and actual notice of the activity.

16. On November 18, 2011, I contacted Ms. Fugh to inquire as to my duties as a former EPA employee to correct the FOIA response in order to deal with the omissions and her intimation that the letter was no more than “purportedly prepared”. At a point when she was aware that the metadata for the letter, all still in the custody of EPA, as well as the investigation by Mr. Brooks and the statements by Mr. Fried as to his failures, indicate her adverb was inaccurate, she offered the following response to my query as to my ethical duties to correct the letter. She said, “You have none, and neither do I.” She then abruptly ended the telephone call. I note that, in my experience and as reported by others, this abruptness is normal behavior for Ms. Fugh, and thus dismiss it. However, I also not for the record her admission during the telephone call of Agency management error, defensiveness over this inaccuracy and unwillingness to acknowledge an ethical duty to go on the record as to having not fully and honestly represented to her friend Mr. Fontaine the full facts of the matter.

120-lawyer Office of Enforcement and Compliance Assurance, he in 1994 and me in 1996. I do not know if he was ever given the Agency’s highest award (Gold Medal). I have been awarded five EPA Gold Medals and another five Bronze Medals.

17. Ms. Jeanne Duross indicated to me on September 29, 2011, that Mr. Fontaine and Ms. Fugh had discussed this matter prior to his submission of his FOIA request. During that meeting, Ms. Duross also stated that my approvals for my law firm activities (Schnare and Associates) and approvals for the Thomas Jefferson Institute for Public Policy were sufficient to cover any activities in the instant matter.

18. The EPA Fugh letter also fails to indicate that no federal employee is barred from representing himself at law, even against the agency for which they work. *See*, 5 C.F.R. § 3801.106(b)(i). "Outside Employment." In light of this rule, the approval for outside employment to represent myself in the instant matter cannot be denied, mooted whether it was ever approved.

19. I am a Petitioner in this matter and represent my own interests, interests identical to those of the other petitioners, and thus have no conflict of interest and have a legal right to an approval of my application for outside employment which would have been granted for the instant case had the memorandum been forwarded to Mr. Kushner.

20. I should also note that this case is not the only one being prosecuted by ATI. ATI is in federal district court in Colorado on a constitutional issue and in the District of Columbia district court on a matter involving a federal FOIA. Because I am not a plaintiff in either matter, I am not entered in either case, a practice exactly as stated in the outside employment memorandum.

21. I note that it is not possible for me to have a conflict of interest in this case as nothing now before this Court in the above titled matter has any relationship to any issue or matter before the U.S. EPA, much less any particular matter on which I worked while an EPA

attorney. This is even more particularly true in light of my recusal from working on the climate-related endangerment finding at EPA, a recusal made before creation of ATI. *See*, Exhibit 6.

22. I reiterate my statement in my outside employment memo that I have performed my duties outside of normal duty hours. Thus, they were either performed prior to commencement of my work day, after the work day, during lunch or break periods or while on leave. Every email sent to by me to Mr. Kast was sent through a non-governmental email system allowed by EPA to be used by its employees and not sent through the EPA email system.

23. I have made no misleading statement to Richard Kast about my employment status with EPA and made no false statements, demonstrable or otherwise, about conflicts of interest with EPA while being employed by EPA.

24. ATI is not a competitor of the University of Virginia (UVA), Pennsylvania State University (PSU) or any of their faculty associated with global warming and climate change. ATI does not offer products or services in competition with UVA or PSU. ATI is not a competitor for research grants, professional publications, scientific research or any other normal element of a UVA or PSU faculty member or the universities at large. ATI does not make company decisions that affect contracts, marketing, employment, pricing, product design, or any decisions that reflect similar or corresponding activities by UVA or PSU.

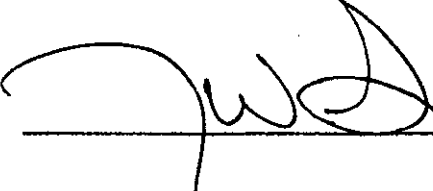
25. I do not participate in ATI decision-making with regard to contracts, marketing, employment, pricing, product design, or research grant proposals of the kind similar to those decisions made by UVA or PSU. Nor do I participate in ATI decision-making with regard to contracts, marketing, employment, pricing, or product design. My function with each organization involves legal and policy analysis, case selection and litigation.

26. I have agreed to comply with the Protective Order issued by the Court in this matter, have signed an agreement to that effect and have previously reiterated my commitment to honor this duty, both in line with the Court's Order and under the Virginia Rules of Professional Conduct. I reiterate this commitment again today in this sworn affidavit.



David W. Schnare

Seen to and subscribed before me on this 24th day of October, 2011.



My commission expires: 1/31/2013

**Lindsey William Smith
Notary Public
Commonwealth of Virginia
Registration #7300833
My Comm. Exp. 1-31-2013**