

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

**In the Matter of the Request for the
Removal of Kwame M. Kilpatrick from
the Office of Mayor of the City of Detroit**

**No. EO-2008-004-LO
Hon. Jennifer M. Granholm**

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**PETITIONER DETROIT CITY COUNCIL'S RESPONSE TO RESPONDENT MAYOR
KILPATRICK'S MOTION TO DISMISS THE PETITION OF THE DETROIT CITY
COUNCIL, OR, IN THE ALTERNATIVE, TO STAY THE PROCEEDINGS**

The Mayor of the City of Detroit has asked the Governor to dismiss the Detroit City Council's Petition requesting that he be removed from office based on official misconduct. He sets forth numerous arguments and defenses, most of which can be described as baseless and irrelevant "conspiracy theories." He also makes unsupported factual assertions that are, in turn, irrelevant, incorrect or false. Therefore, to set straight the factual basis for the Petitioner's claim, we must restate the facts, most of which are already clearly established or undisputed, but all of which will be proven at the forthcoming hearing.

I. Statement of Facts

The factual basis for Petitioner's claim is the Mayor's self serving, private, expedient and unlawful actions -- a series of tricks and deceptive practices, all designed to keep the eyes of Council and the eyes of the public off the ball. The Petition charges that the Mayor engaged in "official misconduct," which has been defined, under Michigan law, as

any willful malfeasance, misfeasance, or nonfeasance in office. The term may, indeed in its common acceptance does, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged.

People v Coutu, 235 Mich App 695 (1999).

Does that definition fit the Mayor's conduct in this case? The factual recitation set forth below provides a clear answer to that question.

Brown and Nelthrope, plaintiffs in the underlying civil lawsuit against the Mayor, were Detroit police officers. Indeed, Brown was a Deputy Chief. Nelthrope brought allegations of misconduct by the Mayor's Executive Protection Unit (EPU), including the notorious "rumored party at the Manoogian Mansion,"¹ to the attention Internal Affairs, headed by Brown. Brown proceeded to investigate. As a result, Brown was fired and Nelthrope was forced out of his job. Harris, a third plaintiff in a separate lawsuit and also a Detroit police officer, claimed that he was used by the Mayor to "facilitate" the Mayor in his "philandering activities." He then testified about those activities to the Michigan State Police and was "targeted" by the Mayor because of it.

The *Brown/Nelthrope* matter went to trial in Wayne County Circuit Court on August 21, 2007. On September 11, 2007 the jury returned a verdict in favor of the Plaintiffs in the amount

¹ Quotation marks in this paragraph denote material from the Lawsuit Settlement Memorandum, prepared by the Law Department, which will be offered as an exhibit in the course of this proceeding.

of \$6.5 million. During the course of the litigation, including the trial, both the Mayor and his Chief of Staff, Christine Beatty, testified under oath, that:

1. *they did not “fire” Brown or Nelthrope;*
2. *they first took an interest in the Brown internal affairs investigation when Beatty received an “anonymous letter,” and not before then; and*
3. *the Mayor and Beatty did not have a “romantic” or “sexual” relationship.*

One week after the verdict, both the Mayor’s and the City’s lawyers appeared before the Detroit City Council in closed session. At that time, they made it very clear that the case would almost certainly be appealed because the failure to do so would set a bad precedent. The one thing they insisted on was that there would be no final decision about the appeal until the transcript of the trial was ordered and reviewed by an appellate attorney. They also made clear that a settlement was very unlikely (there would be no settlement unless there were an “awfully, awfully, awfully, awfully” attractive offer). [*Index of Exhibits of Petitioner*, Exh. 07, attached thereto, (August 15, 2008) (Governor’s Website, Document #45)].

Thereafter, the Wayne County Circuit Court ordered the parties into a facilitation to resolve the question of attorney’s fees. At that session, hours were devoted to arguing about the Plaintiffs’ attorneys’ fee petition. The lawyers for the City and the Mayor rejected the idea of a global settlement because they did not have authority to negotiate a resolution of the entire case. After hours of back and forth, it became clear that the negotiations were going nowhere. At that point the Plaintiffs’ attorney, Michael Stefani, gave the facilitator, (former) Judge Val Washington, a copy of a supplemental brief on the attorney’s fee issue that he intended to file the next day. [*Index of Exhibits of Petitioner*, Exh. 02, attached thereto, (August 15, 2008) (Governor’s Website, Document #45)]. He requested that it be shown to Sam McCargo, the

Mayor's attorney. Stefani told Washington that the brief established that the Mayor had committed perjury. In fact, the brief did, indeed, purport to show that the Mayor had committed perjury with respect to all three areas of his testimony delineated above.

Stefani's brief was shown to McCargo. After reading it, McCargo spoke with Stefani and made two inquiries:

1. To see the original text messages from which the brief was derived. He was told that Stefani had the original texts and would provide them when the case was settled and the amount of the settlement was paid; and
2. Whether the "brief" would be filed the next day. He was told that it would not be, if the case was settled. He also asked whether the brief could be subject to a confidentiality agreement and was told that it could, as long as the case was settled.

[*Index of Exhibits of Petitioner*, Exh. 21, attached thereto, (August 15, 2008) (Governor's Website, Document #45)].

McCargo then said that he would call the Mayor. Corporation Counsel was also summoned to the facilitation. After the Mayor was called and spoken with, these cases, the Brown and Nelthrope cases – cases for which there had never been one dime offered in settlement and where any discussion of a global settlement was dead in the water – were settled in less than two hours (perhaps in one) for \$8 million. The Harris case was settled for \$400,000.

As the discussions went forward, Mr. Stefani made hand written notes of the agreement. The Mayor's lawyers insisted that there be a strong confidentiality provision -- one very different from the standard confidentiality provision in most employment cases, where it is only the amount of the settlement that is to be kept confidential. This confidentiality agreement was that the text messages, the "brief" and other material would be kept secret and, once the settlement amount was paid, would be turned over to the Mayor² and to no one else. [*Index of Exhibits of Petitioner*, Exh. 15, attached thereto, (August 15, 2008) (Governor's Website, Document #45)].

² Notably, while the text messages contain material written by the Mayor, they were derived from Ms. Beatty's texting device.

The Mayor's lawyers also insisted that there be liquidated damages in the amount of millions of dollars to be paid by the plaintiffs and Mr. Stefani's law firm were there any breach of the confidentiality provisions. Notably, the confidentiality provisions occupied much more of the settlement agreement than did the monetary provisions.

The hand written settlement agreement originally contained the following language: "As a condition precedent to this agreement becoming operative *it* must be approved by Mayor Kwame Kilpatrick and the City Counsel (sic) of the city of Detroit." [*Index of Exhibits of Petitioner*, Exh. 03, attached thereto, (August 15, 2008) (Governor's Website, Document #45)]. At the insistence of the Mayor's attorneys, the word "*it*" was crossed out and the phrase "the monetary terms of this settlement" was inserted. Thus, it is evident that, from the very beginning, there was an intent to conceal the confidentiality and secrecy provisions from the City Council.

The handwritten notes were taken back to Mr. Stefani's office that evening and typed up into a document entitled "Settlement Agreement." This agreement was signed on behalf of the Mayor by Mr. McCargo and Assistant Corporation Counsel, Ms. Colbert-Osamuede; on behalf of the City, by Ms. Colbert-Osamuede and Mr. Copeland; and on behalf of the Plaintiffs by Mr. Stefani and Mr. Rivers, his associate. It was signed that night and was a valid contractual agreement. [*Index of Exhibits of Petitioner*, Exh. 04, attached thereto, (August 15, 2008) (Governor's Website, Document #45)].³

That night, the Corporation Counsel called Council Member Kenyatta, the chair of Internal Operations Committee of the City Council, and asked if the settlement could be brought before his committee on the next day, October 18, 2007, so that it could be approved by the body

³ As finally drafted and signed, the slightly expanded language containing the condition precedent reads as follows: "As a condition precedent of this Agreement becoming operative, the monetary terms of this settlement must be approved by Gary Brown, Harlod Nelthrope and Walter Harris, Mayor Kwame Kilpartick and the City Council."

at its next scheduled session on October 23, 2008. [*Index of Exhibits of Petitioner*, Exh. 06, attached thereto, (August 15, 2008) (Governor's Website, Document #45)]. With Member Kenyatta's agreement, the Law department prepared a Lawsuit Settlement Memorandum, which was presented to the committee the next day. Since the Mayor had insisted that only the "monetary terms" were to be approved by Council, the confidentiality agreement, *a material and major part of the settlement*, was not disclosed to the committee or to the Council on October 23rd when the settlement was voted on and approved by the entire body.

On October 29th, the day after the settlement became public, the Detroit Free Press submitted a FOIA request to the City asking for "(t)he entire settlement agreements" in the *Brown/Nelthrope/Harris* cases. [*Index of Exhibits of Petitioner*, Exh. 10, attached thereto, (August 15, 2008) (Governor's Website, Document #45)]. On October 27th, after the City Council had authorized the October 17th Settlement Agreement and after the Free Press FOIA request, the Mayor *signed* a case-captioned document entitled "*Notice of Rejection of Proposed Settlement Terms Arising out of October 17, 2007 Facilitation.*" [*Index of Exhibits of Petitioner*, Exh. 09, attached thereto, (August 15, 2008) (Governor's Website, Document #45)]. The Mayor's signature and name are the only signature and name found on this document. This document was served on the Plaintiffs' attorney and had the effect of terminating all obligations under the October 17th Settlement Agreement.

Before the rejection was served on Mr. Stefani, he was asked by Mr. McCargo whether he had heard of the Free Press FOIA request. When Stefani said that he had not, he was told (a) that because of the FOIA, the Mayor was going to have to reject the current settlement agreement, (b) that the monetary and confidentiality terms needed to be broken out separately, but (c) that the settlement they had originally agreed upon was still intact.

On October 29th the City denied the Free Press FOIA request, stating that “there is no settlement agreement as parties are working out the details of the agreement.” [*Index of Exhibits of Petitioner*, Exh. 10, attached thereto, (August 15, 2008) (Governor’s Website, Document #45)].

On November 1, 2007 a new “Settlement Agreement and General Release”⁴ was signed by the Plaintiffs, and on November 5, 2007, by the Defendants (with McCargo signing on behalf of the Mayor). [*Index of Exhibits of Petitioner*, Exhs. 13 & 14, attached thereto, (August 15, 2008) (Governor’s Website, Document #45)]. This agreement recites only the monetary terms of the settlement and, in essence, is the same as the monetary terms of the October 17th Agreement. Also on November 1, 2007 a “Confidentiality Agreement” was signed by the parties, including “Kwame Kilpatrick” (*sic*) [*Index of Exhibits of Petitioner*, Exh. 15, attached thereto, (August 15, 2008) (Governor’s Website, Document #45)]. The terms of this agreement again were, in effect, the same as the confidentiality terms of the October 17th Agreement, save for additional language that noted that Kilpatrick and Beatty were signing personally and individually; and that the records covered by this agreement were “personal, private and confidential.”

Since, as noted above, the October 27th Rejection by the Mayor rendered the City without any obligation to pay anything under the first settlement agreement, the only agreement under which the City was obligated to pay was the November 1/November 5 “Settlement Agreement and Release.” This new settlement was never brought to the Council for approval and consent.

Painfully aware of this problem, on November 1, 2007 the Mayor recited the Council’s approval of the earlier and rejected Settlement Agreement and signed a “*Notice of Mayor Kwame Kilpatrick’s Approval of the Terms and Conditions of Settlement as Approved by City Council on October 23, 2007.*” [*Index of Exhibits of Petitioner*, Exh. 11, attached thereto, (August 15, 2008)

⁴ There were two such agreements: one for Brown and Nelthrope, the other for Walter Harris.

(Governor's Website, Document #45)]. Again the only name and signature on this document are the Mayor's.

On November 13, 2007, the Free Press resubmitted a second FOIA request, to wit:

“The entire **settlement agreements** in the two Wayne County Circuit Court lawsuits. . . . This request includes but is not limited to all documents, attachments, exhibits, notes, records or other information related to the conclusion of the cases. . . .”

[*Index of Exhibits of Petitioner*, Exh. 16, attached thereto, (August 15, 2008) (Governor's Website, Document #45)].

On December 7, 2007 the City responded by providing only the two documents labeled “Settlement Agreement and General Release” (dated November 1), one for the *Brown Nelthrope* case and the other for the *Harris* case. Having not been provided with the two November 1 “Confidentiality Agreements,” the City did not provide them.” [*Index of Exhibits of Petitioner*, Exh. 15, attached thereto, (August 15, 2008) (Governor's Website, Document #45)].

Without any doubt, the above activities meet the definition of official misconduct, as defined and understood under Michigan law. And there can be little doubt, the Mayor's protests notwithstanding, that there is and will be strong evidence of his *direct* involvement in these activities. The following is a partial itemization of those actions:

1. A settlement that was dead in the water *before* the revelation of the text messages was wrapped up for \$8.4 million, within one to two hours after the revelation, but *only* after the Mayor was informed and consulted on the telephone.
2. The very first document that the Mayor signed himself⁵ is the “*Rejection of Proposed Settlement*,” executed on October 27, 2007. That document recites “any and all terms” of the October 17, 2007 settlement. Since he signed the Rejection it as very reasonable to infer that the Mayor (an attorney) fully understood the terms of the October 17th settlement. Clearly, he understood that in order to settle the case a “new”

⁵ It should be noted that other options were available to the Mayor in addition to his direct and personal signature. He could have had a representative sign for him. (see the October 17th “Settlement Agreement”; see also the “new” settlement documents, i.e., “Settlement Agreement and General Release” again signed for the Mayor, by his lawyer on his behalf) To paraphrase Colin Powell, if he signs it, he owns it.

settlement now had to be forged which that the Charter mandated had to be taken to Council.

3. Indeed, on November 1, 2007 the Mayor again, himself, signed and approved the terms and conditions of the “new” settlement, described as “the Settlement Agreement and Release Agreement executed by the parties and dated November 1, 2007.” It is thus clear that the Mayor read the terms and conditions of the new agreement and knew that the confidentiality terms had been left out of that public document. It is also clear that the “new” settlement was never taken to Council and the Mayor knew it, since under the Charter, *Section 4-119*, any resolution authorizing a new settlement would have been given to the Mayor for veto, should he have chosen to do so. Since the “new” settlement was never brought to Council, there was never a resolution consenting and approving the settlement and it was never shown to the Mayor because it never happened.
4. Again on November 1, 2007, “Kwame Kilpatrick” himself signed a “Confidentiality Agreement” that reflects a clear understanding of all of the ‘secret’ matters in this case. It states that all the secret documents will be given to the Mayor’s designated representative. In all ways this document purports to be private, secret and intended to be kept from the public – an “agreement not to disclose the terms of this Agreement to any person or *entity*...” Clearly this was the critical provision of the settlement, so important that by its breach the Plaintiffs and their attorney would be liable for millions of dollars to be defaulted to the benefit of the City of Detroit (inexplicably, since this was supposed to be a “private” agreement. The same provisions with regard to the need to advise Council and obtain its consent and agreement to all settlement, cited above, apply to this activity, both direct an by way of highly reasonable inference, by the Mayor.
5. Finally, on November 1, 2007, “Kwame Kilpatrick” signed a “Notice” designating his representative to receive confidential material as Attorney William Mitchell, his personal attorney. Mr. Mitchell has testified in deposition that he delivered this material to the Mayor personally and later, when there was a suggestion of a criminal prosecution, on the Mayor’s behalf, took the same material to a lawyer in Virginia, outside this jurisdiction. That testimony will be presented at the removal hearing.

II. Argument

A. The Petition sufficiently alleges that the Mayor committed official misconduct.

Mayor Kilpatrick engaged in unlawful conduct in his official capacity. In the Statement of Facts, Petitioner has set forth a pattern of deception and trickery that resulted in the settlement of the *Brown/Nelthrope/Harris* cases. The settlement was effectuated under a scheme whereby

critical portions of it were unlawfully concealed from the Council and the public.

Among other sources of legal duty, the malfeasance and misfeasance that form the basis for the claim of unlawfulness can be found in a variety of Charter provisions, *Sections 2-106, 6-403 and 8-303*. It can also be found in the Freedom of Information Act, MCL 15.231 *et seq.* and the Charter provision that affirmatively imposes that standard of conduct on the Mayor, *Section 2-112*.

“Official misconduct” includes any “unlawful behavior by a public officer in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law” *Krajewski v City of Royal Oak*, 126 Mich App 695, 697 (1983). It is “something which in a material way affects the rights and interests of the public.” *Id.*, citing *State ex rel Hart v Common Council of Duluth*, 55 NW 118 (Minn. 1893). Official misconduct, therefore, is

broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. The term may, indeed in its common acceptance does, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged.

People v Coutu, 235 Mich App 695 (1999).

There appear to be two types of official misconduct – affirmative conduct and “failure, refusal, or neglect” to perform a public duty. *Krajewski, supra*. In this case, the facts show and will establish at the removal hearing that the Mayor did both.

First, he ***affirmatively*** authorized and incurred the obligation to pay \$8.4 million to the Brown/Nelthrope/Harris plaintiffs in order to cover up and make secret his personal embarrassment and potential criminal liability. Under *Section 2-106* of the Detroit City Charter, “[t]he use of public office for private gain is prohibited.” (Emphasis added.) The Mayor

authorized and directed the City of Detroit Law Department to settle a civil matter in the amount of \$8.4 million dollars. In consideration of this payment – crucial and material consideration – the Mayor negotiated (1) Confidentiality Agreements to not disclose “personal and private” indiscretions that were embarrassing and potentially incriminating to him, and (2) Escrow Agreements to designate a physical “hiding place” for documents (i.e. “text messages”) that provided proof of perjurious statements. Mayor Kilpatrick designated these secret agreements as “personal and private matters,” but used *public monies* to broker them. Thus, Mayor Kilpatrick violated §2-106, which incorporates the Detroit Ethics Ordinance § 2-6-1 and commentary.

The Mayor argues that the Confidentiality and Escrow Agreements he executed were “separate” from the Settlement Agreement and thus not part of the “public” settlement. That is ridiculous. Whether incorporated into the Settlement Agreement itself (as they were in the original, October 17 document) or extracted and placed in separate documents (as they were on November 1), these Confidentiality and Escrow Agreements were critical, negotiated, *deal-breaker* elements of the settlement. They were negotiated for one reason: to serve the Mayor’s private interest. This is “official misconduct.”

Second, the Mayor *deliberately failed* to notify Council of the Confidentiality and Escrow Agreements, which were clearly material to the settlement. Under Charter *Section 6-403*, “*no civil litigation of the city may be settled without the consent of the city council.*” The failure to notify Council of these material terms prevented Council from considering information that would have been crucial to any meaningful consent to the settlement.

Perhaps an even more egregious violation of *Section 6-403* is the Mayor’s *affirmative rejection* of the first (October 17th) Settlement Agreement and his subsequent execution and approval of different and separate agreements without any consent by the City Council, informed

or otherwise. The City Council approved the October 17 Settlement Agreement, albeit without being informed of its material terms. When the Mayor, under *his signature*, executed the “*Notice of Rejection of Proposed Settlement Terms Arising out of October 17, 2007 Facilitation*,” on October 27, he affirmatively nullified the first Settlement Agreement and thereby necessarily affirmatively nullified even the *uninformed* consent that the City Council had given. In short, the November 1, 2007 Settlement Agreement under which the City paid \$8.4 million was never presented to or approved by Council, in blatant violation of Section 6-403.

Of course, the manner in which the Mayor violated *Sections 2-106* and *6-403*, i.e., concealing the real terms of the settlement of a case brought against him in his public capacity, implicates Charter *Section 2-112* and MCL § 15.231 et seq. “The purpose of FOIA is to provide all persons, except those persons incarcerated in state or local correctional facilities with ‘full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees.’ ” *Taylor v. Lansing Bd of Water & Light*, 272 Mich App 200, 204 (2006), quoting MCL 15.231(2). Under Charter *Section 2-112*, “[a]ll records of the city shall be made available to the general public in compliance with the Freedom of Information Act.”

When the Detroit Free Press made its FOIA request for the October 17, 2007 Settlement Agreement, the Mayor frantically and under his own signature rejected that Agreement and drafted a new one from which the Confidentiality and Escrow provisions were removed and placed in “separate” documents. He did this to keep the public from learning that he was using public funds to protect his secrets. He violated the letter and spirit of FOIA and the Charter’s requirement that the Mayor conduct himself in accordance therewith..

Finally, under Charter *Section 8-303*,

[a]ny incurring of obligation or authorization of payment in violation of the provisions of this Charter shall be void and any payment so made illegal; the action shall be cause for removal of any officer who knowingly incurred the obligation or authorized to make the payment, and he or she shall also be liable to the city for any amount so paid and to any criminal sanctions imposed by law or ordinance.

The Mayor orchestrated, directed, elicited, participated in and authorized the payment of \$8.4 million, at the public's expense, to serve his private interests. He did so without disclosing material terms of the settlement to, and thus without the true consent of, City Council. His deplorable conduct was "official" in nature and warrants, indeed, necessitates his removal from office.

B. Petitioner's Request For Removal under MCL 168.327 is separate from and independent of the Criminal Indictment by the Wayne County Prosecutor and any other legal proceedings against the Mayor.

The Mayor claims in his brief that the Council's Petition is a repetition of and, therefore, the same as the criminal charges brought by the Wayne County Prosecutor. Respondent states:

In the matter of the removal of the Mayor of the City of Detroit, there are three separate "trials" of the same facts taking place at the same time. Each of these proceedings carried the identical penalty of removal from office: The criminal case, of course, carries additional penalties. All of the proceedings are being conducted by governmental entities: The Wayne County Prosecutor; The Detroit City Council and now, The Governor of the State of Michigan. Both the City Council hearings and the Governor's process (which may lead to a hearing) began after the initiation of charges by the Prosecutor. It could be argued that all three governmental entities have come together in a combined effort to force the defense to provide incriminating evidence against the Mayor.

To suggest that the City Council, the Wayne County Prosecutor, and the Office of the Governor are collaborating in some sort of conspiracy against the Mayor is both insulting and baseless. Further, this argument disregards the duty and responsibility imposed on the Governor by the Michigan Constitution, Article 7, §33 and MCL 168.327, when confronted with official misconduct by elected officials.

Further, as set forth above, the factual basis for this Petition stems from violations of provisions of this Charter and Michigan Statutes, none of which are alleged in the indictment brought by the Wayne County Prosecutor. The Petition does not allege and does not seek to prove that the Mayor is guilty of a crime. Most importantly, it does not seek to imprison the Mayor or inflict punishment of any sort.

The fact that Mayor will obviously no longer be able to hold public office if convicted of felony charges in other pending legal matters is of no consequence to this proceeding. The resolution of criminal charges is, or may be, remote. The City of Detroit is in crisis, and whether the Mayor is acquitted or convicted does not alter the necessity of removal for official misconduct in this proceeding. Indeed, the existence of pending criminal charges is not a reason to stay or delay these proceedings. Precisely the opposite is the case. The pendency of criminal charges not only hangs heavily over the head of the Mayor. It hovers over this entire community like an angry, dark cloud. For that reason these charges require resolution.

Notably, the law upholds the right of government to address its pressing concerns, notwithstanding a pending criminal action. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the United States Supreme Court allowed certain inferences to be drawn from a refusal to testify based upon self incrimination and, in so doing, observed as follows:

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). In criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.

Id. at 318-19.

So too here. The removal of an elected official who has engaged in serious official misconduct certainly defines an important state interest. This forum does not require any instruction from this Petitioner or its attorney as to the importance or urgency of these issues.

There is much support for the basic proposition set forth in *Baxter*, above. For example in *Phillips v. Deihm*, 213 Mich App 389, (1995), the Michigan Court of Appeals stated:

The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.... (citations omitted) However, the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause

Id. at 399-400.

This is not a new idea and, even within a removal context, Michigan jurisprudence has long acknowledged the Governor's authority to undertake removal proceedings, notwithstanding the possibility of pending criminal proceedings arising out of the same circumstances. In *Dullam v. Wilson*, 53 Mich. 392 (1884), the Michigan Supreme Court examined the Governor's powers to remove public officials. In that particular case, the Court ruled with the respondent because there had been a failure to specify charges. However it also considered the possibility of whether the Governor could proceed in the face of pending criminal charges:

An exigency may arise when it would require prompt action to protect the public service or in the interests of the State. The delays incident to common-law prosecutions and convictions for malfeasance in office would afford an *inadequate*, and, in some instances that might be suggested, no remedy.

and

to hold, therefore, after the amendment [to the Constitution to grant removal power to the Governor] . . . the same prosecution and conviction must be had as before, to authorize the Governor to remove, would render the amendment not only a dead letter, but entirely unnecessary. . . .

Id. at 400 and 401 (emphasis added).

For these reasons, this proceeding can and should proceed, notwithstanding the pending criminal charges. It is incumbent on this forum to recognize, as did the Michigan Supreme Court, well over one hundred years ago that to delay now would provide an “inadequate” remedy, or perhaps none at all.

Respectfully submitted,

_____/S/_____
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DATED: August 20, 2008

CERTIFICATE OF SERVICE

WILLIAM H. GOODMAN certifies that on the 20th day of August, 2008, he hand delivered a copy of the PETITIONER DETROIT CITY COUNCIL'S RESPONSE TO

