

# Private Corrections Institute, Inc.

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May 9, 2008

SENT VIA FAX ONLY

The Honorable Patrick Leahy, Chairman  
Senate Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

**RE: Nomination of Gustavus A. Puryear IV / Letter from Prof. Michael Krauss**

Dear Chairman Leahy:

It has come to my attention that the Committee received a letter dated April 13, 2008 from Prof. Michael I. Krauss of George Mason University. Prof. Krauss took issue with comments made by Professor Steven Gillers in a *Time* magazine article that implicated Mr. Puryear in a scheme in which CCA allegedly withheld information contained in internal quality assurance reports from government agencies and the public, by labeling such reports "attorney client privileged."

Believing that Prof. Krauss' comments were somewhat one-sided, I asked for a second opinion from Professor Joshua E. Perry, Adjunct Professor of legal ethics and Assistant Professor at the Center for Biomedical Ethics and Society at Vanderbilt University. Neither I nor the Private Corrections Institute have any connection with Professor Perry; I had never met or conversed with him prior to requesting his professional, unbiased opinion on this matter. His analysis of Prof. Krauss' comments in relation to the *Time* article is attached and is self-explanatory. Prof. Krauss' letter is also attached, for reference.

While Prof. Krauss said in his letter that he does "not know Mr. Puryear personally," he did not disclose that George Mason University is a supporter of the Reason Foundation. For example, George Mason Prof. Walter Williams served on the board of trustees for the Reason Foundation for many years; he now has trustee emeritus status. Two other George Mason faculty members, James M. Buchanan and Gordon Tullock, have served on Reason's Academic Advisory Board. Further, one of the contributing authors to Reason's latest Annual Privatization Report (2007) is Jerry Ellig, Ph.D., acting director of the Regulatory Studies Program at George Mason.

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Dee Hubbard  
President

Alex Friedmann  
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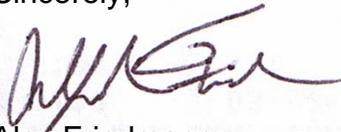
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Senator Patrick Leahy  
May 9, 2008  
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In turn, the Reason Foundation, a libertarian think tank that receives funding from conservative sources including the Scaife Foundation, is one of the nation's most vocal proponents of prison privatization. Reason has accepted funding from CCA and other private prison companies, and has produced numerous reports lauding the benefits of private prisons. Considering that Prof. Krauss is a professor of legal ethics, I am surprised that he neglected to mention the connection between George Mason University (his employer), the Reason Foundation, and the Reason Foundation's strong support of private prison companies – including CCA.

Thank you for your continued time and attention in regard to my correspondence related to Mr. Puryear's pending judicial nomination.

Sincerely,



Alex Friedmann  
Vice President, PCI

cc: Senator Arlen Specter, Ranking Member

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8 May 2008

Alex Friedmann  
Associate Editor, PLN  
Vice President, PCI

VIA E-Mail

Dear Alex,

I write in response to your request that I review the *Time Magazine* article, "Scrutiny for a Bush Judicial Nominee," published March 13, 2008, and the letter written by Professor Michael Krauss in response to that article and a quotation contained therein in which Professor Stephen Gillers questions the propriety of certain actions performed by Gus Puryear IV in his capacity as general counsel for Corrections Corporation of America (CCA). After reviewing the documents you provided me, I think the question I am left with, and the question that demands further Senate scrutiny, is this: Did Mr. Puryear in fact abuse the attorney-client privilege?

This is the question that I think is raised by the *Time Magazine* story, and it's a critically important question to which the Senate Judiciary Committee must get an answer before moving to a vote on Mr. Puryear's lifetime appointment to the federal judiciary.

As quoted in the *Time Magazine* article, Prof. Gillers simply says that CCA's use of the attorney-client privilege seems like "a wholesale, possibly overreaching claim." I agree with Gillers. Given the alleged facts in the *Time Magazine* article (and refusal of Mr. Puryear to comment on the allegations), such use of attorney-client privilege may have been an overreaching abuse. Without further investigation I do not think we can say for certain whether Mr. Puryear's behavior was a technical violation of ethics rules, but the question is certainly worthy of further Senate investigation before a vote on his confirmation.

Here is the situation that the *Time Magazine* presents as I understand it: CCA routinely finds itself embarrassed and legally exposed by the release

to government regulatory agencies (with oversight over prison contracts) of internal records detailing raw factual reports of unnatural deaths, violent outbreaks/disturbances, sexual assaults, hostage situations, and escapes. So, Mr. Puryear mandates that all "detailed raw reports on prison shortcomings" be compiled on one internal document and carry a blanket assertion of A/C privilege. Mr. Puryear forbids external release of this information without his written consent. Following this mandate, prison "shortcomings" detailed in these internal records are not released, but rather "doctored" versions (with Mr. Puryear redacting/editing highly sensitive or potentially damaging information) are prepared for public consumption and then released instead of the original internal report (which has been stamped "Confidential A-C Privilege" and presumably filed away in Mr. Puryear's office).

As a lawyer and adjunct professor of legal ethics, I believe the Senate needs to investigate these allegations and hear directly from Mr. Puryear and others with direct and personal knowledge of the alleged activities. More facts and explanation are required before a conclusion can be reached on Mr. Puryear's ethical qualifications vis-à-vis his use of the attorney-client privilege.

If the allegations set forth in the *Time Magazine* story are true, my view is that these internal records/raw reports, presumably compiled by prison guards & administrators, are "preexisting documents and records" as discussed in Restatement of the Law Governing Lawyers Sec. 69 (j). Therefore I think it is arguably improper to stamp these documents "Confidential: Attorney-Client Privileged" because they do not automatically constitute documents to which the privilege attaches. ("A client-authored document that is not a privileged document when originally composed does not become privileged simply because the client has placed it in the lawyer's hands." See Restatement Sec 69 (j)).

As Prof. Krauss correctly argues, such a blanket, wholesale assertion of attorney-client privilege only becomes an actual abuse or violation of the rules, and thus technically unethical, if it were improperly asserted in the context of a judicial proceeding. In the *Time Magazine* article CCA denies any improper use of the attorney-client privilege in litigation, but this denial demands further investigation, because if the documents are discoverable in a proceeding or through an open records request, and if Mr. Puryear or CCA (with Mr. Puryear's knowledge) attempted to stop the production of the otherwise discoverable documents on the basis of the improper attorney-client privilege designation, then Mr. Puryear could be guilty of violating Tennessee Rule of Professional Conduct 3.4, which states: "A

lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potentially evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

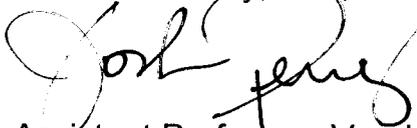
I agree in part with Prof. Krauss' opinion that "no nominee should be deemed unqualified ethically for the Federal Bench because of conduct such as the stamping technique outlined in the *Time.com* article." Indeed, one magazine article should hardly be the foundation for determining one's ethical bona fides, and without more facts I do not think it possible for me (or Krauss or Gillers) to opine on whether Mr. Puryear's actions were improper per se. I certainly do not wish to impugn the reputation or question the ethics of Mr. Puryear without more evidence. However, it is certainly worthy of further Senate investigation on the question of whether it is proper for Mr. Puryear to wield this stamping tactic in the manner in which the *Time Magazine* article alleges he did.

Personally, I am left troubled by the *Time Magazine* story. The notion that Mr. Puryear is allegedly operating as the gatekeeper of facts impacting adversely on the lives of prisoners and constituting CCA prisons' "shortcomings" and, moreover, allegedly preparing scrubbed reports with "appropriate information" for release to government oversight agencies (while the internal report with the raw facts is presumably kept "confidential" in his office) demands more attention. Ultimately, it is the Senate Judiciary Committee that must provide this attention and determine the facts of the situation, their propriety, and Mr. Puryear's ethical qualifications for the federal bench.

Please contact me if I can be of further assistance.

Sincerely,

Joshua E. Perry, J.D., M.T.S.



Assistant Professor, Vanderbilt University School of Medicine  
Adjunct Professor, Vanderbilt University Law School

Member, Tennessee Bar (#22232)



Michael I. Krauss, B.A., J.D., LL.M.  
Professor of Law

Telephone (703) 993-8024

Fax (703) 993-8124

Email: [mkrauss@gmu.edu](mailto:mkrauss@gmu.edu)

<http://classweb.gmu.edu/mkrauss>

School of Law  
3301 Fairfax Drive  
Arlington, Virginia 22201-4426

April 13, 2008

The Honorable Patrick J. Leahy  
Chairman, Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Arlen Specter  
Ranking Member, Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senators Leahy and Specter,

I recently read an article by one Adam Zagorin entitled, *Scrutiny for a Bush Judicial Nominee*, March 13, 2008, at *Time.com*. The article discussed the nomination of Mr. Gus Puryear to the federal bench, and contained comments by Professor Steven Gillers of New York University. As a professor of Legal Ethics, I take the liberty of writing you despite the fact that I do not know Mr. Puryear personally. I do so because I believe that some of Professor Gillers' conclusions, which are adverse to Mr. Puryear, are unwarranted based on facts in the article upon which both Professor Gillers and I apparently rely. Since Professor Gillers' conclusions might lead some members of the Judiciary Committee to conclude that Mr. Puryear was poorly qualified for the federal bench, I write to correct what I respectfully believe are Professor Gillers' errors.

Here is the relevant portion of the *Time.com* article:

*Like other prison companies, CCA [Corrections Corporation of America, where Mr. Puryear serves as General Counsel] has faced numerous lawsuits that stem from allegedly inadequate staff levels that can be a cause of high levels of violence in the prisons. Though hundreds of such lawsuits are often pending at any given time, many brought by inmates in its own facilities, CCA under Puryear has mounted an especially vigorous defense against them, refusing to settle all but the most damaging.*

*Jones [Mr. Ronald T. Jones, a former employee of CCA whom the reporter used as a source] knows CCA intimately. .... He says that in 2005, after CCA found itself embarrassed on several occasions by the public release of internal records to government agencies, Puryear mandated that detailed, raw reports on prison shortcomings carry a blanket assertion of "attorney client privilege," thus forbidding their release without his written consent. From then on, Jones says, the audits delivered to agencies were filled with increasingly vague performance measures. "If the wrong party found out that a facility's operations scored low in an audit, then CCA could be subject to litigation, fines or worse," explains Jones. "When Mr. Puryear felt there was highly sensitive or potentially damaging information to CCA, I would then be directed to remove that information from an audit report." Puryear would not comment on the allegations. Jones resigned from CCA last summer to pursue a legal career.*

*According to Jones, Puryear was most concerned about what CCA described as "zero tolerance" events, or ZT's — including unnatural deaths, major disturbances, escapes and sexual assaults. According to Jones, bonuses and job security at the company were tied to reporting low ZT numbers. Low numbers also pleased CCA's government clients, as well as the company's board, which received a regular tally, and Wall Street analysts concerned about potentially costly lawsuits that CCA might face.*

*In 2006, for example, Jones says CCA had to lock down a prison in Texas to control rioting by as many as 60 inmates. Despite clear internal guidelines defining the incident as a ZT, Jones says he was ordered not to label it that way. Instead it was logged as, "Altered facility schedule due to inmate action". And this was not unusual, says Jones: "Information was misrepresented in a very disturbing way concerning the company's most important performance indicators, which included escapes, suicides, violent outbreaks and sexual assaults."*

*Companies often try to show their best face to customers, and safeguard internal records with "attorney-client privilege." But according to Stephen Gillers, a leading expert on legal ethics at New York University, CCA's use of that privilege seems like "a wholesale, possibly overreaching claim," similar to the blanket assertions of major tobacco companies that tried to keep damaging internal documents from public view. Those assertions of privilege have been rejected by federal judges as an attempt to improperly conceal their internal data on the dangers of smoking from customers, the courts and legal adversaries.*

My review of this article raises two questions:

**First**, if CCA stamped thousands of documents with the annotation "attorney-client privilege" and "confidential," would that constitute a violation of Rules of Professional Conduct or of Rule 11, Fed. R. Civ. P.?

The answer to this question is "No." It is correct that every document forwarded to a general counsel's office does not for this reason become privileged or even subject to attorney confidentiality rules. To be subject to attorney-client privilege, a communication

must be between an attorney and his client, for the purposes of obtaining or conveying a legal opinion. Forwarding documents to a GC's office does not satisfy this condition. But a stamp does not constitute an assertion of privilege. Such an assertion can only come in a judicial proceeding (for example, during "discovery", or if and when an attorney or a client is deposed in court). An abusive assertion of privilege might in fact involve a violation of the Rules of Professional Conduct, but the *Time.com* article detailed no such instance. Therefore, Prof. Gillers' opinion (assuming he was accurately quoted) that Mr. Puryear's behavior "*seems like 'a wholesale, possibly overreaching claim'*", similar to that employed by tobacco manufacturers' counsel, is simply unwarranted. There has been no claim of privilege, at least none reported publicly in this article. Professor Gillers' opinion therefore seems squarely incorrect. Perhaps Professor Gillers was answering the journalist's hypothetical question about the status of a future claim of blanket privilege were Mr. Puryear to make one – in that case the journalist misreported the professor's opinion.

**Second**, if CCA's outside counsel subsequently examined each document so stamped, separately, to determine whether a reasonable basis existed for asserting attorney-client privilege vis-à-vis that document, and if outside counsel in fact took the position that one or several particular documents were privileged and therefore properly not submitted in discovery or on the stand, would that assertion constitute a violation of the Rules of Professional Conduct or Rule 11?

The answer, again, is clearly "No." Each document and assertion of the privilege must be judged individually. The unfounded tobacco industry position referenced by Professor Gillers was that privilege applied to all documents stamped, as opposed to certain documents as a result of a document-by-document assessment. I am unaware that CCA has ever taken the position that all stamped documents are in fact privileged, and neither *Time.com* nor Professor Gillers alleges that CCA has done so.

Accordingly, the article does not allege any conduct by CCA, or its general counsel, Mr. Gus Puryear, that would constitute a violation of either the Rules of Professional Conduct or Rule 11 of the Federal Rules of Civil Procedure.

Again, I am neither a friend nor an acquaintance of Mr. Puryear, and am not writing to generally support or oppose his nomination. I do firmly believe, however, that no nominee should be deemed unqualified ethically for the Federal Bench because of conduct such as the stamping technique outlined in the *Time.com* article.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael B. ...", followed by a horizontal line extending to the right.