

IN THE ALABAMA COURT OF THE JUDICIARY

In the Matter of:

DOROTHEA BATISTE,
Jefferson County Circuit Judge

Case No. 4



**MOTION TO STRIKE COMPLAINT, OR, IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGEMENT**

COMES now Jefferson County Circuit Court Judge Dorothea Batiste (hereinafter, "Judge Batiste", and moves this Honorable Court to strike the complaint of the Alabama Judicial Inquiry Commission ("AJIC"), or in the alternative, Judge Batiste moves this Honorable Court to grant her summary judgement. As grounds therefore, Judge Batiste shows:

1. The handbook entitled, "**Judicial Conduct and Ethics (A Reference Manual for Alabama Judges)**" issued by the State of Alabama Judicial Inquiry Commission (AJIC), states at the bottom of page 1 (See Exhibit A):

The Commission...does not review...abuse of judicial discretion during a court proceeding absent evidence of bad faith.

Nowhere in the 38-page AJIC complaint with 23 pages of exhibits is there any allegation that Judge Batiste engaged in bad faith, notwithstanding that the 147-paragraph

complaint basically alleges abuse of discretion by Batiste in the use of her contempt power.

2. **The AJIC**, in pursuing its investigation of Judge Batiste on numerous cases forwarded by Scott Vowell within the last few months **violated its own Rule 6** (concerning "Investigations"), which states (See Exhibit B):

Investigations may be instituted by the Commissionn ONLY upon a verified complaint filed either by a member of the public or by a member of the commission..."

Almost all the underlying complaints Scott Vowell forwarded to the AJIC, including the alleged complaints underlying the Complaint about misused power before the Court of the Judiciary, contain unverified typed letters in which Judge Vowell purports to pass on complaints of unhappy litigants.

3. One of the primary witnesses the AJIC cultivated against petitioner Batiste is Judge Batiste's former judicial assistant Teresa Love, who worked for Judge Batiste for a year-and-a-half, from early 2011 to mid-2012. On February 28, 2013, the AJIC subjected Ms. Love to a lengthy examination under oath, resulting in a 147-page transcript stamped as received by the AJIC on April 19, 2013. (A copy of this transcript was received by petitioner's attorney, McPhillips, on or about May 1, 2013). Attached hereto as

Exhibit C is an unsigned affidavit of Ms. Love, which Ms. Love admitted to the AJIC was true and correct, and was in no way edited or reviewed by Batiste.

I would like to say that Judge Batiste is a very fair and partial Judge, not biased. She is a very hard worker and follows the law to the fullest. She is easy to get along with and she appreciates her staff. Our office carries and maintains many cases, we have a very large docket every week and Judge will take up time with each and every case. Judge Batiste is fast and efficient with her work and her numbers should speak for themselves. She is very strong but soft spoken with a warm heart. She respects the Court and it shows when she is on the bench. She loves her kids and they are her main concern. Attorneys from all over the counties call our office wanting advice or opinion from Judge because she is very knowledgeable and follows the law. When you are in Judge Batiste's Court, you will get a fair day in Court because that is the kind of Court she runs.

4. On pages 138-141 of the Teresa Love transcript (see Exhibit D), it appears the AJIC was trying to wrongfully coach Ms. Love into coming up with a rationale or motive for later turning against Judge Batiste, namely trying to save her (Love's) own job.

Tellingly, on page 141, the AJIC points out to Ms. Love that, at the time Ms. Love prepared her affidavit with the above-quoted language, three of the cases giving rise to the AJIC's current complaint against Judge Batiste (**Bearden, Isom, and Kyle**) had already been heard in 2011, and the

other two (**Austin and Gibson**) were in June, 2012. Bearden, Isom, and Gibson are all anonymous and no **VERIFIED COMPLAINT was ever filed. Anonymous complaints were banned by AJIC rules, and should therefore be struck.**

The Love affidavit attached also talks about how outrageous was the conduct of attorney Valeria Walker against Judge Batiste, yet Judge Scott Vowell strongly sided with attorney Val Walker against Judge Batiste.

5. Judge Batiste avers that the AJIC has engaged in disparate treatment of her, based on race, when she is compared to white circuit judges Susan Childers of the Jefferson County Circuit Court, Domestic Relations Division, and Sibley Reynolds of the Chilton County Circuit Court who have far more abused contempt power usage than she has.

6. Even at a January 18, 2013 meeting before the AJIC, after a six-hour hearing given petitioner, Judge McLauchlin, the Chief Judge of the AJIC, stated on pages 245-246 of a court-reported transcript of the hearing, before the AJIC, that:

"Judge, regardless of what comes of this proceeding, I would urge you to do a careful study of the law of contempt. I think you have a misunderstanding of some of the aspects of contempt. A lot of judges do. It's sort of a difficult aspect of the law; and we don't deal with it as much as we do some other aspects; and,

consequently, we don't - - just not as familiar with it as we need to be." (See Exhibit E).

7. Contrary to the AJIC contention, §12-21-182 Code of Alabama is authority for issuing an attachment order to compel a witness presence at a hearing. That right was not only upheld, but mandated, by the Alabama Court of Civil Appeals in Palmer v. Palmer, 556 So. 2d 390 (1989).

Also, attached hereto as Exhibit F is a Memorandum of Law discussing the widespread confusion in judicial circles over the exercise of the contempt power, but concluding that Judge Batiste was within her sound discretion in issuing writs of attachment for the witnesses' failure to appear.

8. Judge Batiste has no complaint with AJIC scrutiny per se, but she does so for the reasons and, under the circumstances, set forth in her Rule 19 petition to the Alabama Supreme Court (a copy of which is on file in this Court). As a matter of public policy, Judge Batiste asserts that the AJIC's attempted discipline of her, for misuse of her contempt power, amounts to a chilling of the one tool a judge must have to control her (or his) courtroom. Moreover, it sends a loud message to the public, litigants and unruly attorneys alike, that they can challenge the rulings of the judiciary, even with very contemptuous behavior, and get away with it, by filing a frivolous charge with the AJIC.

Whatever Judge Vowell's motives-good as he must maintain, but bad as the evidence strongly suggests-Scott Vowell's well-known and undisputed service as a conduct for numerous complaints against Judge Batiste, truly encouraged disruption (i.e., attorney Val Walker's disruptive behavior) in Judge Batiste's courtroom. It also encouraged disrespectful ignoring of subpoenas by witnesses wanting to evade embarrassing appearances and the authority of Judge Batiste's court. Most of the cases now pending before the Court of the Judiciary fall into this category.

9. Judge Batiste hereby incorporates by reference the entirety of her Rule 19 Petition to the Alabama Supreme Court (a copy of which was served on this Court of the Judiciary and should therefore officially be of record), the same as if more fully set forth herein.

10. Should this Court fail to grant this Motion, Judge Batiste hereby reserves the right to file a Supplemental Motion for Summary Judgement, based on the specifics of the five alleged cases now pending before the Alabama Court of the Judiciary.

WHEREFORE, premises considered, petitioner Judge Batiste strongly opposes the return of this case to the Alabama Court of the Judiciary.

Respectfully,

Judge Batiste

By: 
Julian McPhillips (MCP004)
Attorney for Plaintiff

OF COUNSEL:

McPHILLIPS SHINBAUM L.L.P.

P.O. Box 64

516 South Perry Street

Montgomery, Alabama 36104

(334) 262-1911

(334) 263-2321 FAX

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Griffin Sikes, Counsel for the AJIC, by hand-delivery on this the 13th day of June, 2013.


Julian L. McPhillips

JUDICIAL INQUIRY COMMISSION

* * *

COMMISSION MEMBERS

Norman E. Waldrop, Jr., Esq.
Chairman
Attorney at Law
Mobile

Hon. P. Ben McLaughlin, Jr.
First Vice Chairman
Presiding Judge, 33rd Judicial Circuit
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Mr. Ralph Malone
Masada Resource Group
Huntsville

Mr. David Scott
Scott Builders Supply, Inc.
Opelika

Dr. David Thrasher
Physician
Montgomery

Fournier Gale, Esq.
Attorney at Law
Birmingham

Background, Jurisdiction, and Authority
Prior to 1972, the method for discipline and removal of state judges in Alabama was by impeachment. The Alabama Constitution provided for impeachment of justices of the supreme court for the same grounds and in the same manner as that applicable to impeachment of the governor and other statewide executive officers, *i.e.*, by legislative action, with the house of representatives preferring the charges and the senate sitting as the court of impeachment. Other judges could be removed from office by impeachment proceedings before the Alabama Supreme Court.

In January 1972, the Alabama Judicial Commission was created by constitutional amendment. The Alabama Judicial Commission was authorized to investigate allegations of wrongdoing by judges, conduct hearings on the conduct and qualifications of judges, and make recommendations to the Alabama Supreme Court with regard to the retirement, censure, suspension, or removal of judges. The grounds for Judicial Commission action were willful misconduct in office, willful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice that brought the judicial office into disrepute, and disability that seriously interfered with the performance of duties and was likely to become permanent.

The Judicial Inquiry Commission was established in December 1973 as part of Amendment 328 to the Constitution of Alabama of 1901. Under Amendment 328, a new judicial disciplinary system for the State was created under which the Commission is convened permanently as an independent agency within the judicial branch of government, with authority to receive and initiate complaints; to conduct investigations; and, where reasonable basis is found by a majority of its members to exist, to file and prosecute complaints before the Court of the Judiciary charging violation of any canon of judicial ethics, misconduct in office, failure to

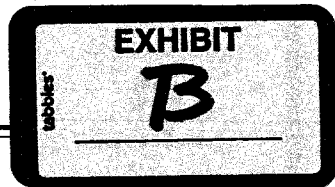
perform duties, or physical or mental inability to perform duties.

A 1996 constitutional amendment made changes in the composition of the Commission but did not alter the powers and responsibilities of the Commission. ALA. CONST. amend. 581, §6.17. The provision governing the Commission is now Article VI, § 156 of the Official Recompilation of the Alabama Constitution of 1901, as Amended.

Another constitutional amendment adopted in 1996 provides that the measures for impeachment in ALA. CONST. art. VII, §173, also apply to Supreme Court justices and judges of the appellate courts. However, no such impeachment proceeding may be initiated or continue while the same matter or charge is pending before the Judicial Inquiry Commission or the Court of the Judiciary. A finding of a lack of probable cause or a termination without a finding of wrongdoing by either the Commission or the Court of the Judiciary is a complete defense to an impeachment proceeding. A judge who has been tried before the Court of the Judiciary may not be impeached on the same subject matter.

The Commission has jurisdiction over all judges of any court of the judicial system of this state. This includes the justices of the Alabama Supreme Court and all appellate, circuit, district, probate, municipal, and retired judges serving in an active duty status, as well as judges pro tempore and other part-time judges who are required to comply with certain canons of judicial ethics. The Commission does not have authority over court employees, referees, masters, or administrative law judges.

The Commission's authority is limited to matters of judicial misconduct and disability. The Commission does not act as an appellate court. It cannot reverse, vacate, or otherwise modify any judicial decision, nor may it interfere in ongoing litigation. It does not review either final judgments or allegations of legal error or abuse of judicial discretion during a court proceeding absent evidence of bad faith. For example, absent



of the fact that a particular judge is under investigation.

(B) The commission shall have no power to restrict speech or communications by persons other than the members, staff, and agents of the commission itself.

C. No mandate for confidentiality shall be construed to abrogate or to restrict in any way the obligations of the commission to communicate with, and to disclose information to, a judge under investigation or charge.

Rule 6. Investigations.

A. Investigations may be instituted by the commission only upon a verified complaint filed either by a member of the public or by a member of the commission and only upon the affirmative vote of a majority of all members of the commission at a duly called meeting agreeing to investigate the complaint.

~~B. Within 42 days after a complaint is filed with the commission, whether by a member of the public or of the commission, the commission must meet and vote on whether or not to investigate the complaint. A complaint shall become null and void if the commission fails to meet for such a vote within the 42 days allowed or if, upon the vote at a meeting, fewer than a majority of all members of the commission vote to investigate it. The commission shall promptly notify the judge named in the complaint upon its becoming null and void.~~

(C) ~~Within ten days after any person, whether a member of the public or of the commission, files a complaint with the commission, the commission must serve upon the judge who is the subject of the complaint copies of the complaint and any and all documents, photographs, tape recordings, transcripts, notes, and other materials of any nature whatsoever constituting, supporting, or accompanying the complaint.~~

D. Within ten days of instituting an investigation upon the vote required by subdivision A above, the commission must serve on the judge to be investigated a full description of the conduct to be investigated and all information received, gathered, or possessed by

the commission tending to establish or to refute that the conduct occurred or that the investigation is appropriate and must serve on the judge copies of any and all documents, photographs, tape recordings, transcripts, notes, and other materials of any nature whatsoever tending to prove or to disprove the occurrence of the conduct to be investigated or the appropriateness of the investigation.

E. Every four weeks after serving the disclosures, statements, and materials required by subdivision D of this rule, the commission must serve on the judge being investigated or to be investigated copies of any and all materials of any nature whatsoever not already served upon him or her tending to establish that the conduct either did or did not occur or that the investigation is or is not still appropriate and shall serve upon the judge a full statement of whether the commission then intends to continue the investigation.

(F) ~~Any failure to serve disclosures, statements, or materials upon the judge as required by subdivisions C and D of this rule shall bar any prosecution for the conduct being investigated or to be investigated and shall bar the continuation of the investigation.~~

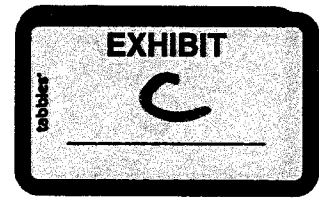
G. Any failure to serve disclosures, statements, or materials upon the judge as required by subdivisions E of this rule shall bar any prosecution for the conduct being investigated or to be investigated and bar the continuation of the investigation if the judge moves the commission to supply the overdue subdivision E disclosures, statements, or materials and the commission does not serve them within seven days thereafter.

H. No judge may be compelled to give evidence against himself or herself; provided, however, that a judge who chooses to testify on his or her own behalf shall be subject to cross-examination.

I. Service shall be by personal service or by certified mail. Service by certified mail shall be deemed complete upon mailing.

Rule 7. Subpoenas and other process.

A. Subpoenas for attendance of witnesses or



LASHUNDRA LEWIS FOWLER,)	CIRCUIT COURT
)	
PLAINTIFF,)	
)	
VS.)	TENTH JUDICIAL CIRCUIT OF ALABAMA
)	
EDDIE E. FOWLER, II.,)	
)	
DEFENDANT.)	CIVIL ACTION NO. DR-11-000411-DB

AFFIDAVIT OF TERESA A. LOVE

I, Teresa A. Love, am the Judicial Assistant to the Honorable Dorothea Batiste. I have been with Judge Batiste since the beginning; we came in office January 2011, and we work very well together. I would like to submit this affidavit in support to her and to respond on her behalf to the allegations and pending appeal filed in the above style case.

First of all, I would like to say that Judge Batiste is a very fair and partial Judge, not Bias. She is a very hard worker and follows the law to the fullest. She is easy to get along with and she appreciates her staff. Our office carries and maintains many cases, we have a very large docket every week and Judge will take up time with each and every case. Judge Batiste is fast and efficient with her work and her numbers should speak for themselves. She is very strong but soft spoken with a warm heart. She respects the Court and it shows when she is on the bench. She loves her kids and they are her main concern. Attorneys from all over the counties call our office wanting advice or opinion from Judge because she is very knowledgeable and follows the law. When you are in Judge Batiste's Court, you will get a fair day in Court because that is the kind of Court she runs.

The above style case was filed on March 11, 2011, there were issues between the Plaintiff and the Defendant, they both had attorneys and needed immediate relief. Both counsels filed the necessary motions that needed to be filed for their client. Ms. Blockton and Ms. Fowler's prior attorney was able to work together and resolve issues. This case was set for pendente lite hearing on June 23, 2011, Judge heard testimony from both sides, the

attorneys asked the Court if they could talk and they came in our office and announced that they had settled the pending issues. An Order was prepared and signed by Judge and there were no problems, this case we set for Compliance in August and set for trial November 11, 2011. On August 26, 2011 the Plaintiff's prior attorney withdrew for reasons she stated in her motion. On October 12, 2011 Valerie Walker Walker entered her name and filed a Notice of Appearance as attorney of record for Ms. Fowler. Ms. Walker had few cases before Judge Batiste, but not many. She would only call me when things are not going her way, such as, orders, court dates, and she would like to argue and debate about everything this Court does. On November 11, 2011 this case was set for trial, Ms. Walker was not prepared, Judge called her trial docket but Ms. Walker insisted on trying to bully the Court into reopening the pendente lite matter because she did not agree with Judge ruling. Judge notice the tension in the Court room between the two attorneys and asked that the meet in her chambers. Judge had a huge docket that day and need to finish calling the docket. Ms. Walker wanted something done right then and kept demanding that her case be heard. She and Ms. Blocton was in Judge chambers, Valerie Walker became very angry with Judge when she was told that she would not reopen a case that has already settled and that Ms. Walker would not tell her how to run her Court. Shortly after, Matthew and I heard something, Judge's door opened and Valerie Walker abruptly came out yelling at Judge and say very loudly so that we all could hear her, stating "I am going to tell everyone" everyone will know!!! She went out of the door leaving her case unattended and not knowing what Judge wanted them to next. When she received the order resetting this case for a new trial date she called me asking why did we pick that date? I told her that there were already other case previously set for trial, and that our docket was full for the year. Valerie Walker is very confrontational and always has to have the last word. She started to make comments about our office and I told her that I was not going to put up with that and that she was being very disrespectful to Judge Batiste. I reminded her how she stormed out of her chambers yelling out what she was going to. I also told her that I had heard about a list that a few attorneys had started to get rid of Judge Batiste. Valerie Walker said to me that she has never put her name

on any list and that she was there at the meeting with other attorney discussing Judge Batiste, she witnessed and knows them all by name but she never filled out the affidavit. I said, oh really, and she said I promise you Teresa I never filled anything out. I told Judge Batiste about this because this was truly unfair and they were picking on her because she is a good Judge who follows the law. The Trial setting was March 14, 2012, a few days before Valerie Walker filed several motions and one was for Judge to recuse herself off this case. The motion hearing was set; Valerie Walker came in with her guards up, very argumentative, cooperative and disrespectful to Judge Batiste. Judge needed security in the Courtroom and her staff was there. The case did not get very far because Valerie Walker would not even listen to what Judge had to say. Judge asked Deputy Brown to take Valerie Walker downstairs and place her in holding to cool off. She refuses to listen to Deputy Brown, when she went to the holding cell she used her cell phone calling one person after another the entire time. Judge Batiste never ordered the deputy to take her to jail. Valerie Walker created this by trying to run Judge Batiste's Court she angry with Judge Batiste when she would reopen an issue that was closed and settled.

In closing, I would like to say I stand behind Judge Batsite all the way and I am honored and I am enjoying this experience in my life of having the pleasure to be her Judicial Assistant. I have known her for many years, she very kind hearted person. When she took her oath as Judge she meant just that and she get rave reviews from attorney's as well as the litigants that go before her. She is not afraid and making a difference and the change is good.

TERESA A. LOVE

COPY

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EXHIBIT

D

1 APPEARANCE OF TERESA LOVE
2 BEFORE THE JUDICIAL INQUIRY COMMISSION
3 THURSDAY, FEBRUARY 28, 2013, 2:48 p.m.

4 * * * * *

5 JIC: Afternoon, Ms. Love. How are
6 you doing today?

7 MS. LOVE: I'm doing fine.

8 JIC: We appreciate you coming in and
9 being willing to talk about the matters
10 Mr. Sikes would like to ask you about.
11 I'm --. I'm the chairman of the Judicial
12 Inquiry Commission. These other
13 gentlemen and ladies around are either
14 members of the Commission or they work or
15 help the Commission.

16 MS. LOVE: Yes, sir.

17 JIC: At this time, if you will raise
18 your right hand, I'll give you the oath
19 under which you will testify.

20 (Ms. Love was sworn)

21 JIC: Thank you ma'am.
22
23

DUNN, KING & ASSOCIATES
Montgomery, Alabama

(334) 263-0261 or (800) 359-8001

1 I'm saying was there any duress? And she
2 didn't put you under duress; but in
3 writing this, did you put yourself --
4 like, well, okay, I need to write this in
5 a way that better supports her?

6 Because like I said, it's just that
7 paragraph that -- because everything
8 you're saying here is just opposite, you
9 know. Because if I read this paragraph,
10 this is the judge I would want to be in
11 front of.

12 THE WITNESS: Sure. Sure.

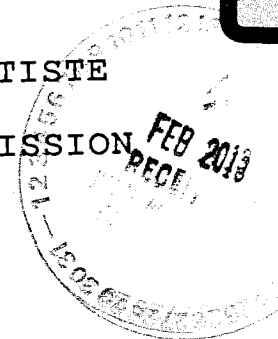
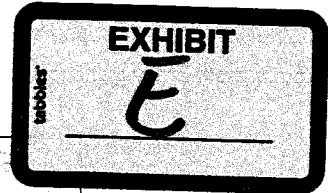
13 JIC: But everything you're telling
14 me, I don't want to be in front of her
15 because it might not come out in my
16 favor.

17 THE WITNESS: Uh-huh.

18 JIC: And, see, I'm a layperson on
19 the Commission. So, you know, a lot of
20 the particulars I might not get, but I'm
21 just saying this statement here doesn't
22 fit everything else I'm hearing because
23 it doesn't sound -- you know, because it

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APPEARANCE OF JUDGE DOROTHEA BATISTE
BEFORE THE JUDICIAL INQUIRY COMMISSION
JANUARY 18, 2013

* * * * *

JIC: Good morning. We appreciate you coming in to respond to the -- several of the complaints that have been filed with the Commission. And you have received copies, I believe, of every complaint that has been filed with us. If you haven't received a copy of a complaint and it was brought up, make sure you let us know, because we will not question you on anything that you have not received a copy of a complaint --

JUDGE BATISTE: Okay.

JIC: -- if, for some reason, you didn't get a copy. So we think you've got all the complaints that have been filed.

JUDGE BATISTE: Okay. Thank you.

JIC: At this time, the different members of the Commission will introduce themselves.

1 Q. How could she purge herself for failure
2 to show up on the 10th at some later
3 date?

4 A. Clearly again, as I establish in the case
5 law, that you -- they are held in civil
6 contempt. It's a correction properly
7 made by the court that she was to be held
8 in civil contempt and not criminal
9 contempt.

10 Q. But you had given her a five-day
11 sentence, hadn't you?

12 A. Yes, I had.

13 Q. Is it your understanding that civil
14 contempt you give sentences?

15 A. I can only go on what the court thought
16 was proper. According to the case law --

17 Q. What court did?

18 A. Me. I did.

19 Q. Okay.

20 A. My court. That it was not proper to hold
21 her in criminal contempt as the case law
22 clearly shows that a failure to show up
23 in court is civil contempt. It is not

1 criminal contempt.

2 Q. That's your understanding of the law?

3 A. No. That is what I just stated what the
4 law is according to Alabama Court of
5 Civil Appeals.

6 Q. Okay. Exhibit B7.

7 A. Okay.

8 Q. That's the order that you entered denying
9 the emergency motion?

10 A. That is -- again, is correct. It is
11 civil contempt only.

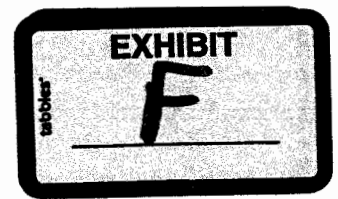
12 Q. Exhibit B8.

13 A. Okay.

14 Q. That's the next page. Indicates that
15 Ms. Bell committed to -- committed to
16 jail. She went to jail on August 19?

17 A. Correct.

18 Q. I believe that's a Friday. Mr. Walls
19 indicates that there was some bargaining
20 back and forth between your office and
21 his that -- to the effect that -- until
22 she went into jail and spent some time in
23 jail, you were not going to sit -- you



Contempt of court, as wielded by Alabama state courts, is a powerful weapon in the judicial arsenal. The power to punish for contempt is inherent in all courts of record at common law. Robertson v. State, 104 So. 561, 565 (1925). Yet, the contempt power serves two primary functions: (1) Maintenance of order and prevention of obstruction of the trial process, and (2) enforcement of orders, injunctions, and decrees. See Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 184-85 (1971). Courts are charged with the important task of balancing the competing concern of contempt as a necessary power of the courts and the danger of abuse of that power. Tara Adams Ragone, First Amendment Law: In Contempt of Contempt?, 1999 Ann. Surv. Am. L. 295, (1999).

Courts have developed two main distinctions to aid their balancing of the need for the contempt power against the power's susceptibility to abuse. Id. at 299. To begin with, courts distinguish between direct and indirect contempt: that is, contemptuous behavior in the court's presence and that which occurs out of court. Id. Additionally, courts distinguish between civil and criminal contempt; this distinction provides a further "consideration" that influences the balance between the necessity and its potentially arbitrary administration of the contempt power. Philip A. Hostak, International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction between Civil and Criminal Contempt, 81 Cornell L. Rev. 181 (1995). The court's classification of behavior as civil or criminal

contempt determines the level of procedural due process protection to which a defendant is entitled. Ragone, 1999 Ann. Surv. Am. L. at 299.

As courts admit, it is difficult to distinguish between criminal and civil contempt. See, e.g., Hicks v. Feiock, 485 U.S. 624, 631 (1988) (“the ‘civil’ and ‘criminal’ labels of the law have become increasingly blurred”); see also International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 n.3 (1994) (referencing numerous articles criticizing civil/criminal distinction as “unworkable”). Compare Gompers v. Buck Stove and Range Co., 221 U.S. 418, 441 (1911) (focusing on character and purpose of the punishment, drawing line between remedial sanctions for benefit of the complainant, i.e., civil contempt, and punitive sanctions intended “to vindicate the authority of the court,” i.e., criminal contempt) with Bagwell, 512 U.S. at 828, 831 (recognizing the Court’s treatment of civil/criminal distinction, that stated purpose of contempt sanction is not determinative of judicial classification of contempt as criminal or civil and declaring that “underlying” the question of whether contempt sanction is civil or criminal is practical inquiry of “what procedural protections are due before any particular contempt penalty may be imposed”).

Even Chief Judge McLaughlin of the Alabama Judicial Inquiry Commission, as recently as January 2013 stated that:

“...a lot of judges have a misunderstanding of some of the aspects of contempt. It’s sort of a difficult aspect of the law; and we don’t deal with it as much as we do some other aspects.” (Batiste Dep. 296 ln 1-6) (emphasis added).

Furthermore, any given contemptuous action may “partake of the characteristics of both” civil and criminal behavior. Bessette v. W.B. Conkey Co., 194 U.S. 324, 329 (1904).

Alabama courts, in reversing a judge’s order of contempt, have been explicit in not criticizing that judge’s discretion in a good faith effort to maintain the dignity of their court. See e.g., Carroll v. State, 350 So. 2d 729 (Ala. Crim. App. 1997); In re Tarpley, 300 So. 2d 409 (Ala. 1974). However, the complaint filed against Dorothea Batiste directly criticizes her effort to maintain her court in dealing with the willing failure of witnesses to not appear, in compliance with court order. The AJIC complaint filed against Judge Batiste in April, 2013, directly cites Rule 70A, as not being followed by Judge Batiste for the witnesses who failed to appear. However, a closer examination of both Rule 70A and Alabama Rules of Civil Procedure 45(e) highlight an ambiguous method for applying a judge’s contempt power.

Rule 70A “provides the scope, definitions, dispositions, and punishments for contempt actions in civil cases in Alabama.” Fludd v. Gibbs, 817 So. 2d 711, 712-13 (Ala. Civ. App. 2001). Rule 70A (a) (2) (A) defines “direct contempt”:

“ ‘Direct contempt’ means disorderly or insolent behavior or other misconduct committed in open court, in the presence of the judge, that disturbs the court’s business, where all of the essential elements of the misconduct occur in the presence of the court and are actually observed by the court, and where immediate action is essential to prevent diminution of the court’s dignity and authority before the public.”

The Alabama Court of Civil Appeals has explained the distinctions in the types of contempt, including “direct contempt”, “constructive contempt”, civil contempt”, and “criminal contempt” :

“ ‘Constructive contempt’, which is sometimes called ‘indirect contempt’, is basically any contempt that does not fit under the definition of ‘direct contempt.’ See Rule 70A (a) (2) (B), Ala.R.Civ.P. Constructive contempt is divided into two categories: ‘criminal contempt’ and ‘civil contempt.’ The rules defines ‘criminal contempt’ as either:

“ (i) Misconduct of any person that obstructs the administration of justice and that is committed either in the court’s presence or so near thereto as to interrupt, disturb, or hinder its proceedings, or

“ (ii) Willful disobedience or resistance of any person to a court’s lawful writ, **subpoena**, process, order, rule, or command, where the dominate purpose of the finding of contempt is to punish the contemnor.”

“Rule 70A (a) (2) (C) .”

Fludd, 817 So. 2d at 713. Furthermore, “[a]bsent an abuse of discretion, or unless the judgment of the trial court is unsupported by the evidence so as to be plainly or palpably wrong, the determination of whether a party is in contempt of court is within the sound discretion of the trial court.” Mullins v. Sellers, 80 So. 3d 935, 943 (Ala. Ci. App. 2011) (citation omitted). “The power to punish is essential to a court to enable it to administer justice. Without it a court will be helpless against persons disposed to obstruct, delay, or thwart its proceedings.” Fludd, 817 So. 2d at 711. Furthermore, “[i]n ore tenus proceedings, the trial court is the sole judge of the facts and of the credibility of the witnesses, and it should accept only that testimony which it considers worthy of belief.” Clemons v. Clemons, 627 So.2d 431, 434 (Ala. Civ. App. 1993).

In regards to the due process requirement of Rule 70A, the Alabama Court of Civil Appeals looks to determine if the following elements were present: (1) notice of the charges; (2) reasonable opportunity to meet them; (3) right to call witnesses; (4) right to confront the accuser; (5) right to give testimony relevant either to the issue of complete exculpation or extenuation of the offense; and (6) right to offer evidence in mitigation of the penalty imposed. Fludd, 817 So. 2d at 711.

The Alabama Legislature has given the Court the power to compel subpoenaed witnesses to appear when they fail to do so. Specifically, Alabama Rules of Civil Procedure 45(e) states:

“ (e) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. And adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of sub paragraph (c)(3)(A).”

Therefore, it follows that the Court has the authority to issue writs of attachment, directing the sheriff's office to apprehend subpoenaed witnesses, when they fail to appear. The Alabama Supreme Court has also held that failure to appear as a witness pursuant to an 'on call' subpoena is an offense punishable as contempt of court. Tarpley, 300 So. 2d at 409. Contempt for failure to appear as a witness is an indirect contempt of the court and as such the accused is entitled to constitutional notice and an opportunity to be heard. Id.

In Tarpley, a doctor was subpoenaed to appear before the court to testify at 1:30 p.m. Id. at 411. However, the doctor did not appear at 1:30 p.m. and he did not call the attorney to let him know the reasons for his failure to appear. Id. The judge

in the case adjourned the court at 3:00 p.m. because of the doctor's absence and issued a writ of attachment for the doctor to "assure his presence" the following day. Id. Due to the doctor's rigorous schedule, he did not appear again and the judge declared a mistrial. Id. Following the mistrial, the judge issued an appearance bond for the doctor "to answer a criminal prosecution for the offense of defaulting witness." Id. at 414. The word contempt was no where found on the bond. Id. However, the doctor appeared before the court at a hearing to ascertain the reason the doctor failed to appear. Id. at 413.

The court reasoned that because the word "contempt" was not on the bond issued to the doctor that he did not have actual notice of the contempt charge against him. Id. The court characterized the requirements of due process in the case as an extremely borderline situation. Id. In concluding, the court stated, "we understand fully the frustration experienced by the trial Court, and nothing in this opinion is to be construed as infringing on the right of the petitioner to run his courtroom in the manner he sees fit." Id. (external citations omitted).

Criminal contempt sanctions are imposed to punish for an act of past disobedience, to preserve the power and vindicate the dignity of the court, and to punish any act which is in disrespect of the court or tends to obstruct the administration of justice, or which tends to bring the court into disrepute. Ex parte Seymore, 264 Ala. 689, 89 So.2d 83 (1956). A constructive contempt prosecution may be initiated by issuing a warrant of arrest requiring the accused to be held and be heard on the charge. Carroll, 350 So. 2d at 729. Alternatively, a constructive

contempt proceeding may be begun by issuing a citation or rule nisi to the contemtor to appear before the issuing court and show cause why he should not be held in contempt. Id.

In Carroll, the court reversed the judge's decision to hold a jury member in contempt of court for abusive and obscene behavior. Id. However, the court concluded their opinion by stating,

“...we are careful not to rebuke or level any criticism against Judge McRae. Petitioner's conduct was as disturbing to him as it is to this court. To tolerate such behavior would turn the courtroom into a jester's stage where fools perform. In his zeal to maintain the dignity of his court and protect it from abuse and scorn, Judge McRae unwittingly but in good faith and with the highest of motives committed another wrong.” Id. (citations omitted)

The Carroll court recognized the importance for a judge to maintain their courtroom despite the due process requirements that were not met in issuing the contempt order.

The complaint filed against Judge Batiste lays out 5 cases of witnesses who were held in contempt for failure to appear in compliance with a court ordered subpoena. On each occasion, Judge Batiste, acting in her authoritative role in maintaining the dignity of her court, determined that the witnesses' failure to appear was a willing resistance to comply with a court's order. In compliance with Rules 45(e) and her understanding of Rule 70A (a)(2)(C)(ii), Judge Batiste properly issued writs of attachment to each witness so that they may show cause for their willful disobedience. The complaint alleges that Judge Batiste abused her discretion in issuing these writs without proper due process requirements. However, the

complaint cites Ingram v. Allred and Ex parte Billy J. Sheffield II as authority to show that a witnesses' willing failure to comply with a court ordered subpoena cannot maintain criminal contempt. AJIC Case No.43, Complaint at 2 n.2. The Ingram decision was decided in October of 2012, and the Sheffield decision was handed down in February of 2013. Both of these cases were decided after Judge Batiste's rulings. She cannot be bound by decisions that clear up a difficult and hazy area of the contempt power after the fact.

In conclusion, Judge Batiste operated within her sound discretion in issuing the writs of attachment for the witnesses' failure to appear. Acting in good faith, she determined that each witness was properly aware of the time that they were supposed to be in court and that their willful disobedience to not appear constituted contempt of court. The complaint filed against Judge Batiste has been nothing more than a witch hunt over a power that is seldom criticized by the Alabama appellate courts. By the Alabama Judiciary Inquiry Commission's own admission, "the contempt power is a difficult aspect of the law, and a lot of judges have a misunderstanding of some of the aspects." However, the investigation strikes right at the difficult nuances of a judge's inherent power. Therefore, this commission should dismiss the complaints filed against Judge Batiste and immediately end her suspension.