

# Auburn University

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December 2, 2004

## VIA HAND DELIVERY AND FACSIMILE

Commission on Colleges  
Committee on Compliance and Reports  
Southern Association of Colleges and Schools  
1866 Southern Lane  
Decatur, Georgia 30033-4097

c/o Dr. James Rogers  
Executive Director  
Commission on Colleges

Re: Results of External, Independent Review

Dear Dr. Rogers:

In the Report of the Commission on Colleges Special Committee which visited Auburn on September 28-30, 2004, the Special Committee asked the Board to consider engaging one or more appropriate external, independent organizations to review the business relationships among Auburn's Board of Trustee members. As promised in Auburn's response to the Special Committee's report, and pursuant to your instructions for me to do so, I write to report the steps taken by the University in response to the Special Committee's request and to deliver to you, for delivery to the C&R Committee when it deems appropriate, the attached report from the selected reviewers.

Upon receipt of the Special Committee's request, the Board of Trustees empowered me to select one or more external, independent organizations for the purposes stated above. So empowered, I contacted several organizations who referred the following three individuals, whose credentials are discussed below. Those individuals have completed their review and have submitted to Auburn the attached report.

### Fred Gray

Fred David Gray was recommended to me by the President and President-elect of the Alabama Bar Association. Mr. Gray is a native of Montgomery, Alabama, and a civil rights lawyer. He was educated at the Nashville Christian Institute, Alabama State University, and Case Western Reserve University. He has received honorary Doctorates of Law degrees from The University of Massachusetts at Amherst, Alabama State University, Southwestern Christian College, Case Western Reserve University, Pepperdine University, Abilene Christian University, Jones School of Law of Faulkner University and Santa Clara University and the honorary Degree of Humane Letters, Huntingdon College. Mr. Gray is a member of the Alabama and Ohio Bar Associations.

Mr. Gray's legal career spans a time period of over 45 years. As a relatively young man, Mr. Gray represented Mrs. Rosa Parks following her infamous Montgomery arrest. He was Dr. Martin Luther King, Jr.'s first civil rights attorney. The list of his civil rights cases that he won can be found in most constitutional law textbooks.

One of the first African Americans to serve in the Alabama Legislature since reconstruction, Mr. Gray served from 1970-1974. His love and commitment in promoting the works of the National Bar Association gave him recognition as its 43rd President in 1985. He initiated the NBA Hall of Fame (becoming an inductee in August of 1995), and was the recipient of the Charles Hamilton Houston Medallion of Merit from the Washington Bar Association.

Currently he is the senior partner in the law firm of Gray, Langford, Sapp, McGowan, Gray & Nathanson, with offices in Montgomery and Tuskegee, Alabama. The firm is nationally recognized and has received extensive press coverage in such publications as *USA Today*, *Ebony Magazine*, *Jet Magazine*, *NBA Magazine*, *The Washington Times*, *Case Western Reserve University Magazine*, *New York Times*, and *ABC's Prime Time Live*.

Mr. Gray currently serves as a member of the Board of Trustees of Case Western Reserve University, Chairman Emeritus of the Board of Trustees Southwestern Christian College, a member of the Board of Trustees of Faulkner University, a member of the Board of Directors of Alabama Exchange Bank, a Master Benchler of the Montgomery Chapter of the Hugh Maddox Inns of Courts, a life member of the National Association for the Advancement of Colored People, and a Fellow of the American Bar Foundation.

Mr. Gray has lectured on the local, state and national levels. He was Practitioner-In-Residence at Pepperdine University; Lecturer at Case Western Reserve University, School of Law; Tenneco Distinguished Speaker, University of Houston; guest lecturer for the Harvard Law Forum Speaker Series, Harvard Law School; and facilitator for the Federal Executive Institute, Charlottesville, Virginia. In December of 2000, Gray was appointed to the Charles Hamilton Houston Chair in Law at The North Carolina Central University School of Law.

Mr. Gray is the first person of color elected as President of the Alabama State Bar Association and served as its 126<sup>th</sup> President for the year 2002-2003.

#### John J. McMahon, Jr.

John McMahon is a well-known business and community leader who has supported numerous civic and public efforts of great significance during his career. He currently serves as Chairman of Ligon Industries, LLC, and as Chairman of the Executive Committee of McWane, Inc. During the time he was a senior officer, McWane became one of the largest and most significant private companies in the State of Alabama and the Southern United States. Under his leadership, McWane has played a significant role in supporting public and civic activities, including the creation of the McWane Center Science Museum and establishing the first true merit scholarship at Birmingham-Southern College.

John McMahon was also involved in the creation of the National Bank of Commerce which became Alabama's largest privately owned bank. The bank is now part of Alabama National Bancorporation, one of the five largest bank holding companies headquartered in Alabama, and, incidentally, one of the largest competitors to the Colonial BancGroup, the entity for which Auburn Trustee Lowder serves as Chairman. Mr. McMahon has served on numerous boards including the Alabama National Bancorporation, National Bank of Commerce, Protective Life Insurance Company, The John H. Harland Company, ProAssurance Corporation, Birmingham Airport Authority, UAB Health Systems, The University of Alabama Health Services Foundation (Kirklin Clinic) and the Hugh Kaul Foundation. He has also served as Chairman of the Birmingham Police Foundation, the Alexis de Toqueville Society of Birmingham, and as President pro tempore of the Board of Trustees of the University of Alabama; He has served as the Director of the Birmingham Opera, and as a Trustee of Birmingham-Southern College. Mr. McMahon received his B.A. degree from Birmingham-Southern College in 1965 and his LL.B. from The University of Alabama in 1968.

#### Bill Weary

Dr. William A. Weary is a nationally recognized educational consultant from Washington, D.C. who helps develop strategy for boards and administrations of colleges, universities, schools, associations, governmental bodies, churches, and other nonprofit groups, around the country and the world. He has consulted with over 200 institutions since 1994.

A Phi Beta Kappa graduate of Amherst College, Dr. Weary holds both master's and doctoral degrees in history from Yale University. He has taught European history at Amherst and Bowdoin Colleges, done research on early modern France as a graduate fellow at the University of Wisconsin's Institute for Research in the Humanities, and headed the upper schools of Abington Friends School in Philadelphia and the Dalton School in New York City. He also worked at Independent School Management (DE).

Each year since 1994, at the National Conference on Trusteeship of the Association of Governing Boards of Universities and Colleges (AGB), Dr. Weary has led the workshops on presidential search and presidential and board assessment. Dr. Weary has served as director of the former AGB Presidential Search Consultation Service and interim director of AGB On-Campus Programs. As a consultant to AGB, he has developed its presidential search workshop, designed and coordinated its presidential and board assessment service, written its *Essentials of Presidential Search* and *Guidelines on Selecting a Presidential Search Consultant*, and, in 2000, with AGB's president, published *Presidential and Board Assessment in Higher Education: Purposes, Policies & Strategies*. An article on the role of the board will figure in a 2004 study of presidential transitions published by Johns Hopkins University Press.

Dr. Weary also has been a regular speaker at regional and national conferences of independent school educators, including the National Association of Independent Schools, the Canadian Association of Independent Schools, the Independent School Association of Northern New England, the Independent School Association of the Central States, the Virginia Association of Independent Schools, the

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Association of Delaware Valley Independent Schools, the Association of Independent Maryland Schools, and the Solomon Schechter Day School Association. In 1999, he assisted NAIS in preparation of its new strategic plan, and, in 2000, concluded a new plan for the International Boys' School Coalition.

In summary, I am hopeful that the attached reports from these esteemed individuals will allay the Commission's concerns regarding the relationships among Auburn's board members. I am firmly committed to the accreditation process and stand ready to answer any further questions you may have regarding the subject of this letter or any other matter related to Auburn University's status as a member institution in the Southern Association.

Sincerely,



Ed Richardson  
Interim President

ER/bw  
Enclosures

**GRAY, LANGFORD, SAPP, MCGOWAN, GRAY & NATHANSON**

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December 2, 2004

ALSO LICENSED:  
\*OHIO  
\*\*DISTRICT OF COLUMBIA  
\*\*\*ARIZONA

Dr. Ed Richardson  
Interim President  
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107 Samford Hall  
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Dear Dr. Richardson:

We are writing to acknowledge receipt of your letter of November 18, 2004 and to accept your request that we evaluate the business relationships between Auburn University and its trustees to determine whether the Board has conducted itself in accordance with the standard established by SACS and by its own Code of Ethics.

We have reviewed the list of Auburn trustees and can confirm that we have no business relationship with Auburn University or any member of the Auburn Board of Trustees, except that Mr. McMahon has been a contributor to the political campaigns of Governor Riley.

In accordance with your request, we have reviewed the conflict of interest forms and other pertinent information, including the Bradley report. We have also reviewed the disclosure forms to determine whether any member of the Board of Trustees is in violation of Auburn's Code of Ethics. We have interviewed each trustee to determine that the disclosure forms are accurate and current and that each believes he or she is in compliance with the requirements of the Code of Ethics. Additionally, we have inquired as to whether any trustee is aware of any violation by any other trustee or knows of an incident in which one trustee has attempted to improperly influence another.

The Code of Ethics adopted by the Board has two segments; first, it requires each trustee to act independently and in the best interest of Auburn University. Secondly, it is a disclosure tool. If a trustee answers the forms truthfully and subsequently complies with the laws of the State of Alabama in performing his or her duties, no Code of Ethics violation would occur. Significant external business relationships between the trustees, in and of itself, are not a violation of the Code of Ethics. However, if the relationships are such that

the trustee's independence is affected and if the trustee's actual conduct is compromised, a Code of Ethics violation would occur.

In reviewing the disclosure forms, the public record and our discussions with members of the Board of Trustees, we find no evidence that any trustee has committed acts that constitute a violation of the Code of Ethics. The Code of Ethics governs behavior, not relationships, and in the absence of direct evidence of misconduct, one cannot assume a violation solely because of inter-locking business or personal relationships.

In ascertaining whether the Board is in violation of SACS governing principles, we believe the determinative standard is whether, because of business relationships or other interactions, a minority of the Board is capable of exercising effective control over the majority. In our opinion, this minority control can involve two sources: first, one or more of the trustees has coercive economic power over the remaining trustees or, secondly, one or more trustees has coercive economic power over a large minority of the Board and this minority consistently acts as a group on matters of consequence to the Board. Actual control over the majority would not be necessary if, for example, one trustee controlled, for example, six of the fourteen votes on all significant matters. Effective control could be assumed since the remaining trustees would have to act unanimously to defeat control by that trustee - an event not likely to happen very often.

With this analysis in mind, we have reviewed the disclosure forms to determine whether any of the above conditions exist on the Auburn Board of Trustees.

The Code of Ethics forms filed by Trustees Ball, Carlisle, Franklin, McCrary, Newton and Riley disclose that they have no business relationships with any other trustee. They are therefore deemed to be independent and not subject to coercive economic or any other inappropriate influence. The remaining trustees have disclosed financial relationships with Colonial Bank or its Chief Executive Officer Mr. Robert Lowder. In order to determine whether these relationships are of sufficient import to allow for economic coercion that would interfere with a trustee's ability to function independently, it is necessary to analyze each one of them independently. Relationships disclosed with Colonial Bank include depositor, borrower, director and two professional relationships.

Based on our experience and knowledge as Directors of FDIC insured banks, we have concluded that the mere existence of a depositor relationship confers no economic power over the depositor. Obviously, a deposit relationship can be changed with minimal effort and cost to the depositor and there are dozens of financial institutions that offer services comparable to Colonial.

Virginia Thompson has disclosed that her only business relationship to any other trustee is that of a Colonial Bank depositor. For the reasons discussed above, this relationship creates no conflict of interest and she is deemed independent.

Ms. Thompson and Ms. McDaniel have disclosed that they have the same employer. However, they work in different sections and have no supervisory authority over the other. As such, no conflict exists.

Ms. McDaniel has no other relationship with any other trustee. Therefore, she is deemed to be independent.

Messrs Blackwell, McWhorter, Spina, and Miller have disclosed that they have significant borrowing relationship with Colonial Bank. These relationships were reviewed by Richard Bradley of Bradley and Hatcher in connection with the litigation between Auburn University and SACS. He concluded that each of these relationships was "arms length" and reflected appropriate terms and conditions for similarly situated borrowers. Inherent in the conclusion is the fact that these borrowers could obtain similar loans at competing banks. We have been advised that, in reaching its conclusion that the Auburn Board of Trustees had not fully corrected its governance problems; the Special Committee did not consider the Bradley Report. Mr. Bradley's reputation for integrity and business acumen is well known. Therefore, we conclude that the requisite economic power to inappropriately influence trustee behavior does not result merely from these borrowing relationships with Colonial Bank.

Mr. McWhorter has disclosed that the only business relationship he has with any trustee is as a Colonial Bank borrower. For the reasons discussed above, he is deemed to be independent.

Mr. Rane has disclosed that he is a member of the Board of Directors of Colonial Bank and that he has, on occasion, engaged the law firm of which Mr. Miller is a member, to perform legal services for his company. While it might appear at first that Mr. Rane's position as a Director of Colonial might create a potential conflict of interest, the oath of office and duties of a director of a bank have always emphasized the special fiduciary obligations of a director to the public and to the depositors, rather than the management of the bank. For public companies, such as Colonial, this separation has been intensified significantly by the enactment of Sarbanes - Oxley Act, which in effect insulates the appointment and operation of the Board of Directors from the control of the Chief Executive Officer. We therefore conclude that the presence of Mr. Rain as a director of Colonial Bank

does not interfere with his ability to operate independently as a trustee of Auburn University. In addition, his occasional use of Mr. Miller as a lawyer for his business would create no conflict of interest which would impact Mr. Rane's independence. We therefore conclude that Mr. Rane is independent.

Mr. Spina has disclosed that he is a borrower from Colonial and also a member of the local advisory board. As in the case of Mr. Rane, we do not believe his participation as an advisory director involves a conflict of interest. In addition, as discussed in the Bradley report, his status as a borrower from Colonial Bank is not a factor. He is therefore deemed to be independent.

Mr. Miller has disclosed that he is a Board member, a lawyer for Colonial Bank, a lawyer for Mr. Lowder, a borrower and a depositor at Colonial Bank. For the reasons detailed previously, Mr. Miller's status as a board member, a depositor or a borrower does not affect his independence. Mr. Miller's role as a lawyer for Colonial Bank does raise significant issues and requires further analysis. Mr. Miller's firm is a substantial Alabama based firm with over fifty lawyers and has offices located in three Alabama cities, Atlanta, Georgia and Washington D.C. An examination of the Bradley report and other information furnished indicates that Colonial Bank is a substantial and important client to Mr. Miller's law firm and that the loss of that client would have a material, though probably temporary, impact on the profitability of the firm. In order to analyze the impact of this relationship, we think it is important to view the role of lawyers and the relationship between the lawyer-client in a historical context. From the end of the civil war through the first three quarters of the 20th century, the prestige and influence of the legal profession was profound. Lawyers played a pivotal role in creating the rules and practices of our democratic - capitalistic society. It was quite common for lawyers to serve on major corporate boards and to move in and out of senior government positions with ease. Economically, socially, and politically, they were at least the equal of their CEO clients and no one would have suggested that the existence of a lawyer -client relationship compromised their integrity or independence.

In the last two decades, the perceived role of the lawyer in the lawyer - client relationship has deteriorated substantially. With the advent of advertising and self promotion, law firms are often viewed as interchangeable commodities and lawyers are viewed as being subordinate to high paying clients. From the public record and from discussions with current and former trustees, it is apparent that the role that Mr. Miller plays is that of a valued counselor to Mr. Lowder and Colonial Bank and not a commodity lawyer. It appears that Mr. Lowder values Mr. Miller's legal skills, business acumen and sound judgment as least as much as Mr. Miller values the fees generated by his representation of Colonial Bank. In addition, he is a widely known and respected lawyer beyond his

representation of Colonial Bank. His firm actively represents almost 200 financial institutions located through the country. Finally, Mr. Miller has a substantial personal net worth independent of his relationship with Mr. Lowder or Colonial Bank.

As licensed attorneys, we are familiar with the Code of Ethics of the legal profession and the great tradition of the independence of the Bar. For Mr. Miller to compromise his independence as an Auburn trustee because of his representation of Colonial Bank or Mr. Lowder would, in our opinion, be a violation of not only the Auburn Code of Ethics, but also a violation of the Code of Ethics of the Alabama Bar Association and of his professional responsibility as an attorney. Therefore, in the absence of direct evidence that Mr. Lowder has in fact improperly influenced Mr. Miller's behavior, we cannot conclude that such a violation has occurred.

Mr. Blackwell has disclosed that he is a borrower from Colonial Bank and that his real estate company has developed numerous projects where Colonial Bank is the sole or a major tenant. It appears these projects were negotiated and not competitively bid. Based on the Bradley report, we do not believe his status as a borrower of Colonial would affect his independence. However the opportunity to develop numerous real estate projects for a high quality tenant such as Colonial Bank confers significant economic benefit on Mr. Blackwell and his company. For this reason, we cannot conclude Mr. Blackwell is completely independent.

In our interview with the current trustees, each trustee including Mr. Blackwell, has confirmed that the information contained in their disclosure statement is accurate and is current. Each trustee has confirmed that they believe they are in full compliance with all of the provisions of the Code of Ethics. In addition, each trustee has confirmed that there has been no incident in which any other trustee has attempted to influence his or her performance as a trustee in an improper way nor are they aware of any incident in which such conduct has occurred with respect to any other trustee.

In conclusion, we find that all trustees are independent, with the possible exception of Mr. Lowder and Mr. Blackwell. Determining Mr. Blackwell's independence would require additional information not available to us and not contained in the Bradley report. However, as twelve out of the fourteen trustees are completely independent of each other, it would be impossible for a minority of the Board to control the majority. We therefore conclude that the Board is performing in accordance with the governance requirements mandated by SACS.

Dr. Ed Richardson  
December 2, 2004  
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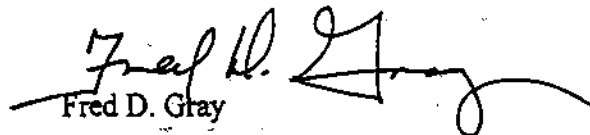
With respect to the Code of Ethics, we find no evidence that any member of the Board of Trustees has committed any act or engaged in any behavior which would constitute a violation of the Code of Ethics.

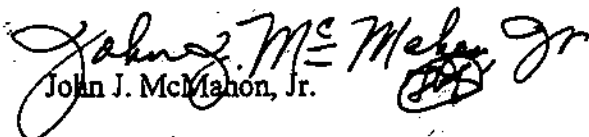
Based on the public record and our interviews with the current Board of Trustees, we are not aware of any other conduct that would otherwise constitute inappropriate or unethical behavior. It is certainly the case that members of Auburn Board of Trustees have a number of personal, political and economic relationships in their various roles and responsibilities other than trustees. We do not find this unusual or inconsistent with their effective functioning as members of the Board of Trustees. Commonality of interest, exposure and background is what often leads to selection of one as trustee of an educational institution. Balanced with the need for diversity, this commonality of background and experience usually promotes the effectiveness of a Board in fulfilling its governing responsibilities.

Because of the pressures of time, this report is submitted as a joint report by the two signatories. However, we wish to point out that the conclusions contained in this report were reached independently by each signatory based on the public record, material supplied by Auburn University, the opinions of experts, and a review of the disclosure forms. After these conclusions were reached, the current trustees were interviewed by one or more of the signatories in order to confirm the information contained above.

In reaching the above conclusions, we emphasize that we have evaluated the Auburn Board of Trustees as it is currently comprised. Of the fourteen trustees interviewed, five were not members of the Board at the time that SACS reached its initial conclusions. We express no opinion as to whether the composition of the previous Board would have met the strenuous standards set forth by SACS and by the Auburn University Code of Ethics.

Yours very truly,

  
Fred D. Gray

  
John J. McMahon, Jr.

## FIELDSTONE CONSULTING, INC.

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December 2, 2004

Dr. Ed Richardson  
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Dear Dr. Richardson:

At your request and within the constraints of the time available, I have reviewed the report of John McMahon and Fred Gray, examining the business relationships among Auburn University's trustees. This most recent investigation is the last of a number directed at determining whether the Board has acted in accordance with the standards established by SACS, its own Code of Ethics, and other reasonable ethical practices.

As a consultant to Auburn, I am familiar with the history of this discussion. I know of no Board whose business relationships have been examined as exhaustively or in such detail as have Auburn's. No evidence of misuse of those relationships has emerged.

No national standards of best practice prohibit business relationships among trustees, and nothing in the investigations at Auburn reveals inappropriate use of those relationships. No evidence of coercion by one trustee of another has emerged at Auburn either.

In view of the investigations, the Auburn Board's Code of Ethics, and SACS standards, I find the Auburn Trustee's behavior consistent with national expectations and practice.

Sincerely,



William A. Weary  
President, Fieldstone Consulting

**GRAY, LANGFORD, SAPP, MCGOWAN, GRAY & NATHANSON**

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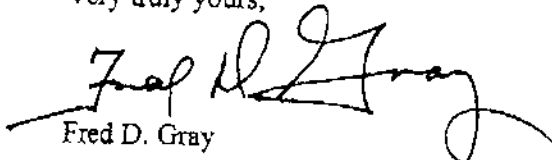
Dr. Ed Richardson  
Interim President  
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107 Samford Hall  
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Dear Dr. Richardson:

In our initial evaluation of the independence of the Auburn trustees, we indicated that, based on the information available to us, we could not conclude that Trustee John Blackwell was independent. Subsequent to that letter, we have received supplemental information from Auburn University and from Mr. Blackwell, and have had additional conversations with Mr. Blackwell.

Our initial concerns were based on Mr. Blackwell's status as a developer for Colonial Bank. The information furnished to us indicates that Mr. Blackwell has not developed any projects for colonial Bank since June of 2001, and he has verbally assured us that he does not intend to develop any other projects for the bank. Furthermore, a review of Mr. Blackwell's financial condition indicates that his ownership in Colonial Bank related projects constitutes less than 3% of his net worth. Based on these facts we have concluded that Mr. Blackwell's relationship with Colonial, while substantial, does not rise to a level that could result in undue economic influence. We, therefore, conclude that he is independent.

Very truly yours,

  
Fred D. Gray

  
John J. McMahon, Jr.

FDG:j