TRENDS IN LONG-TERM CARE

HEARING

BEFORE THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

PART 25—WASHINGTON, D.C.

FEBRUARY 19, 1975

Printed for the use of the Special Committee on Aging

U.S. GOVERNMENT PRINTING OFFICE
59-558 WASHINGTON : 1976

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WEDNESDAY, FEBRUARY 19, 1975

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., room 1318, Dirksen Senate Office Building, Senator Frank E. Moss, presiding.

Present: Senators Moss, Randolph, Hartke, Chiles, Clark, Percy, Stafford, Domenici, Brock, and Congressman Edward I. Koch, a Representative from the State of New York.

Also present: William E. Oriol, staff director; Val J. Halamandaris, associate counsel; John Edie, professional staff member; John Guy Miller, minority staff director; Margaret Fayé, minority professional staff member; Patricia Oriol, chief clerk; Gerald Strickler, printing assistant; Kathryn Dann and Joan Merrigan, clerks.

OPENING STATEMENT BY SENATOR FRANK E. MOSS, PRESIDING

Senator Moss. The hearing will come to order.

I should point out that this is a public hearing before the full Special Committee on Aging of the Senate. I am chairman of the Subcommittee on Long-Term Care. The chairman of the full committee, the Senator from Idaho, Senator Church, has directed me, by letter, to conduct this hearing.

[The letter referred to follows:]

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, D.C., February 18, 1975.

Hon. FRANK E. MOSS,
U.S. Senate,
Washington, D.C.

DEAR TED: In order that there should be no question about the importance we place on the issues facing the committee this Wednesday and in order that we be as clear as possible in our resolve, I am asking you to conduct this hearing on behalf of the full Committee on Aging. Your background and expertise in this matter is well known and you certainly have the best grasp of the New York situation.

I regret that because of the press of other duties I will not be able to stay throughout the proceedings.

With best wishes,
Sincerely,

FRANK CHURCH,*
Chairman.

Senator Moss. In effect, it is a continuation of hearings that were being held by the Subcommittee on Long-Term Care, and when certain problems arose, the subcommittee reported back to the full committee

*See page 3224 for statement by Senator Church.

and the full committee decided to hold the hearing here as a full committee hearing. I just want to make that distinction for what it is worth.

The witnesses that are to appear before us today have been subpenaed, under a subpena issued by the full committee, after a vote of the members of the full committee. This is, consequently, a different subpena from the one in controversy in the New York hearings.

The matter about the New York hearings has not been resolved and is now being held in abeyance by the full committee in order to make a decision.

I want to welcome you here this morning as we begin the 25th in our series of hearings on "Trends in Long-Term Care."

I am pleased that the ranking minority member of the Subcommittee on Long-Term Care is again with us at these hearings, the Senator from Illinois, Mr. Percy. Other members of the committee are seated at the dais, and we expect to proceed expeditiously, as we have always tried to do.

By way of background, on January 21, 1975, my Subcommittee on Long-Term Care conducted hearings in New York City, receiving large quantities of nursing home records that we had subpenaed.

On that day we gave Dr. Bernard Bergman and his attorneys an opportunity to make a full and complete statement. Of necessity, our questions to Dr. Bergman were somewhat cursory because we did not previously have an opportunity to examine books and records relating to his nursing homes.

This hearing, the one on January 21, was recessed until February 4, 1975, the date set for Dr. Bergman to resume his testimony.

Our efforts to question Dr. Bergman on February 4 were cut short by his failure to appear. Counsel for Dr. Bergman asserted that the terms of the original subpena did not require his client's appearance at the second hearing. I ruled to the contrary.

After consulting with an expert from the American Law Division of the Library of Congress, and learning that the weight of legal opinion supported my position, I announced the subcommittee's intention to initiate contempt proceedings against Dr. Bergman.

Therefore, I called for an executive session of the full Committee on Aging to discuss this question. The committee voted to hold the contempt citation in abeyance, preferring to give Dr. Bergman another opportunity to testify, this time before the full committee.

Dr. Bergman was served with the second subpena on February 10, 1975, and we expect him to appear and testify this morning. In like manner, a committee subpena was served on Mark Loren, former administrator of the Towers Nursing Home.

At our last hearing on February 4, counsel for Dr. Bergman asserted that our questioning of him "would violate his constitutional liberties" with respect to the first, fourth, and sixth amendments. These are serious charges and cannot be taken lightly.

Specifically, counsel alleged that Dr. Bergman's first amendment rights were being violated because prior questioning concerning his attempts to obtain assistance from political figures insured that no public official would be able to treat any of his petitions on their merits.

I would respond that the committee has clear authority to investigate nursing home matters with obvious legislative objectives. The Supreme Court has ruled that in cases of this nature courts must weigh individual rights versus the legislative need for information.

Over the years my subcommittee has received examples of gross political influence impeding the inspection of nursing homes and enforcement of State and Federal standards. The need of Congress to have information about such transgressions far outweighs any potential prejudice to a future request or petition of the Government by an individual.

With respect to fourth amendment rights, counsel argued that the subcommittee has attempted to invade his client's rights of privacy by prying into "wholly personal affairs."

This charge was made in the contest of the subcommittee's efforts to subpena certain bank records relating to Dr. Bergman and his immediate family. These documents were sought because Dr. Bergman had placed in issue, in testimony and in the press, the extent of his ownership of nursing homes. Therefore, I would respond that our subcommittee had a legitimate interest in obtaining these documents, and this interest had been upheld by the Federal court for the southern district of New York.

With respect to the sixth amendment, counsel alleges that the subcommittee's proceedings have gone beyond the limits of proper investigation and have become accusatory.

I specifically reject this assertion. Our investigation has at all times been within its legitimate authority and all inquiries have been pertinent to the investigation.

As the Supreme Court has held:

> . . . surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrongdoing is disclosed. [*Hutcheson* v. *United States*, 369 U.S. 599, 618 (1962).]

These serious charges of constitutional unfairness notwithstanding, we wish to continue the policy of being as fair as reasonably possible. Therefore, in response to specific requests made by Dr. Bergman and his counsel, the committee has agreed to the following:

1. We will be pleased to receive written statements in rebuttal to any previous testimony. Such statements will be entered in full in the record.

2. We have agreed to receive a list of potential witnesses recommended by Dr. Bergman. We will interview such people and call those who have relevant testimony for future hearings.

3. We will welcome the testimony under oath of auditors, accountants, or others who may aid Dr. Bergman in his response to specific questions.

4. We have agreed to share with Dr. Bergman and his counsel any documents referred to in questioning.

5. We have allowed them to make technical corrections in the hearing transcript.

We have not agreed to allow substantive changes or deletions in the hearing record. Nor have we agreed to allow counsel for Dr. Bergman to cross-examine previous witnesses.

In closing, may I say that we have been investigating issues with respect to nursing homes for many years. Since 1969 we have held 24 hearings in an effort to learn how the nursing home system works; or more specifically, why it has been a colossal failure in the eye of so many of our older citizens.

Our duty and our obligation to make this inquiry is without question since the Federal Government, through medicare and medicaid, pays the great majority of the Nation's $7.5 billion nursing home bill.

I believe it is incumbent upon this committee to monitor all aspects of this much-maligned industry and that is exactly what we shall continue to do. We shall continue to treat all providers, from the smallest to the largest, as fairly as we can.

Finally, I would like to say that it is not enough for the Congress to concern itself about the possibility that laws may have been broken or abused. The Congress must also determine whether those laws are good—whether they do the job that Congress supposed they would do. In the case of nursing homes, we have a special responsibility. We must do all in our power to assure that public funds are providing quality care for ill, elderly people who are often completely dependent upon those who care for them.

Dr. Bergman can provide help to the Congress. He can give expert views on present law; he can tell us whether he is satisfied with present methods of providing care; he can, if he will, answer fully honest questions which have arisen after careful inspection of some business records. We invite him to do so now.

I would like to enter the statement by Senator Frank Church into the record at this point.

STATEMENT BY SENATOR FRANK CHURCH

Senator CHURCH. My comments will be brief because I submitted a statement at the February 4 hearing. At that time, I mentioned that I saw a clear need for concerted effort by the executive branch—in cooperation with the Congress—to monitor and interpret investigations on nursing homes in many parts of the Nation.

I feel that need even more strongly today. It is clear that revelations and allegations about long-term care are occurring at such a rapid rate that special means must be devised to deal with them.

For that reason I am seeking funding for additional activities by the Senate Committee on Aging in regard to long-term care. For that reason I will soon introduce legislation calling for the executive branch to make an interdepartmental and interagency effort to coordinate their monitoring and enforcement functions.

There is just one more thing: I have been disturbed by the tone taken by counsel for Dr. Bergman in criticisms he has made of hearings conducted on January 21 and February 4. He has, in effect, accused a unit of the Congress as acting in bad faith. He has called the hearings accusatory; he has implied that Senators are involved in a conspiracy against his client.

It is one thing for an attorney to take an aggressive tone and position in defending a client's rights. It is quite another to make provocative statements.

In my letter yesterday to Mr. Cassidy and to Mr. Lewin,* I told them that I believe that Senator Moss has proceeded with great fairness and with great latitude to Dr. Bergman.

That is still my view.

And I am sure that today's proceedings will be fair and pertinent despite the accusatory and terse tone of Dr. Bergman's attorney.

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* See appendix 5, item 11, p. 3304.

Senator Moss. Senator Percy, do you have anything you would like to say before we call the witness?

STATEMENT BY SENATOR CHARLES H. PERCY

Senator PERCY. Mr. Chairman, I would like to emphasize the underlying purpose of these hearings is not the investigation of any one individual, but to determine whether or not public funds are properly being used, and to determine, in a sense, what course this Nation should take in the area of national health insurance, an area in which the sums will be substantially larger than the few billion dollars spent on nursing homes.

Dr. Bergman has chosen to feel that this is a personal vendetta against him, and yet I feel very strongly, as the chairman does, that this is a matter of public concern, that the information the committee has asked for is reasonable and proper.

Dr. Bergman is presumed to be a religious leader, and reputed to be a respected citizen in his community.

He conducts a trade, a business, and I should think it would be carried on and conducted in accordance with the strictest ethics of good business practice. I have personally investigated the books kept by Dr. Bergman's organizations. I have never seen a set of books as illegible, in some respects, with key codings, secret markings, irregular accounts, and an intricate web of financial dealings and vast holdings that are concealed behind a maze of interlocking ownership. I simply ask the question of Dr. Bergman. We would like to know why—why these businesses were set up, and because so much of the money that flowed through those businesses was public money, we would like to know why they were set up in this intricate sort of way.

How is it possible for a man to start out with a modest estate of some $30,000 35 years ago, essentially dealing in the nursing home business, and parlay that amount to a net worth estimated by his own accountants of $24 million, with three-fourths of that in the equity ownership of nursing homes?

How is it possible that could have been done? And was it done at the expense of the patients?

For instance, on the basis of the GAO study of subpenaed records, we discovered in the Towers Nursing Home, facilities which were owned by Dr. Bergman, that raw food costs were $1.80 a day, and the total cost for an individual patient was $3.31.

Right down the street was the Jewish Home and Hospital for the Aged, where their raw food costs were $3.21 per day, and their total dietary cost per patient, $7.85.

We ask, were these fortunes amassed as a result of taking it out of the hides of the aged people, who were in those nursing homes, whose subsistence essentially was paid for by the Federal, State, and local governments?

Certainly we also want to know whether or not there is political influence in connection with the proprietary ownership and operation of nursing homes.

Dr. Bergman has admitted contacting elected officials, as well as their aides and advisors, to overcome what he calls "stifling bureaucracy." What we want to know about is the nature of that stifling bureaucracy.

Is it something that we in our oversight responsibility should correct at the governmental level, or were the contacts of the nature to simply use power and wealth and political influence to perpetuate the warehousing of the elderly, for the sake of personal gain?

It is obvious that Dr. Bergman has a great interest and a great capacity for making money. We want to know—and we can only learn from firsthand testimony by him—whether he has an equal interest in providing quality nursing care for the elderly, and whether, in the vast nursing home holdings that he controls and owns, he actually provided quality nursing care.

These are legitimate questions, which I think, Mr. Chairman, we and the members of this committee would be derelict if we did not pursue.

There is no way you can carry on an investigation in general principles. You have to take a specific case and try to trace it through.

We have done the best we can to put the facts together. Now it is up to the man who is the key to this particular situation, to tell us forthrightly and honestly, under oath, what did go on. Was the public interest served, or was it primarily a private interest that was being served at the expense of the elderly?

Thank you.

Senator Moss. Thank you.

Do any other Senators have opening remarks to make?

Senator RANDOLPH. Mr. Chairman, I think it is important that we proceed with the hearing.

I have been helped by the clarity of your statement and by the documentation of the statement of the Senator from Illinois. As for myself, I would like to hear the witnesses.

Senator Moss. Thank you.

Senator Domenici?

STATEMENT BY SENATOR PETE V. DOMENICI

Senator DOMENICI. Mr. Chairman, I have no statement with reference to the nature of our hearing, because I think the chairman and ranking minority member have more than adequately outlined the reasons for the hearing. I would just like to comment on the committee's genuine response to the contention of counsel for Mr. Bergman, and our chairman has outlined a number of responses to some of his questions.

I think we are being more than fair when we tell him, as you did, of our willingness to receive additional information and additional names to investigate other people.

He had made the contention that we were directing our attention only at Dr. Bergman. While in New York, as the chairman knows, I told counsel for Mr. Bergman I thought we could direct our attention at whomever we wanted, so long as they were in the kind of business that we had legitimate interest in, but I think we have gone far more than halfway. In your opening remarks, you indicated to counsel for Mr. Bergman the additional willingness on our part to investigate his contentions, although we have no legal responsibility to talk to other witnesses or to listen to his position through other witnesses; we have no legal responsibility to do that. I think some of his contentions made before us have been clearly set to rest by the fair proposal made by the committee through you in your opening remarks.

Senator PERCY. Mr. Chairman, may I just express appreciation on behalf of all who are here today, and to Representative Koch for inviting us and for the suggestion that we look into the matter, and also to the chairman of the Stein Commission. Mr. Stein, who is here today, whose commission has been helpful and has cooperated with us.

Senator Moss. Thank you. We do welcome you gentlemen who have been with us before, and we are glad you are still with us.

The Senator from Indiana—do you have anything you wish to say?

Senator HARTKE. I am interested in hearing the witnesses.

Senator Moss. The Senator from Vermont.

Senator STAFFORD. Mr. Chairman, I thank you. I have no statement. I think between the statement that you have made, and that of Senator Percy, it has been said, and I am ready to hear the witnesses.

Senator Moss. Fine.

The Senator from Florida.

Senator CHILES. I have no statement, Mr. Chairman.

Senator Moss. The Senator from Tennessee.

Senator BROCK. I have no statement.

Senator Moss. The Senator from Iowa was here to begin with, and had to leave for another hearing. He has a statement, and without objection, I will place it in the record at this point.

STATEMENT BY SENATOR DICK CLARK

Senator CLARK. Mr. Chairman, this is the first hearing of the special committee that I've had the opportunity to attend since being appointed to it at the beginning of this Congress. Let me say at the outset that I look forward to serving on the committee and helping improve the quality of life for this Nation's older citizens.

The past 24 months have been particularly traumatic for older Americans. They have been exposed to the pressures of inflation and recession with little financial protection. For those who need extensive medical care, there always seems to be a shortage. And, for those who turn to a nursing home or long-term care facility for help, there is just not enough protection to insure their well-being.

Today's hearings focus on a particularly acute situation in New York's nursing homes. Right now, the dimensions of the problem are difficult to assess, but many of the difficulties may have been fostered by a Federal law that established a medicaid cost-related reimbursement system that allows nursing homes to be paid for all reasonable costs plus a profit.

In addition to this, there appear to be a number of highly unethical practices associated with the New York nursing home controversy. Questions have been raised about whether the nursing homes have been properly inspected, whether there's been Federal reimbursement for illegitimate expenses, and whether political influence has been used to shelter some nursing home operators from the sanctity of the law.

Mr. Chairman, we are not here today to indict or prosecute any one individual or group—that is a job for a Federal grand jury and the New York special prosecutor. But we are here to find out why the system has not worked, and what can be done to correct it.

We should be especially interested in the effect these alleged practices in New York may have had on the quality of patient care. And we

want to find out whether the New York situation is characteristic of other States that have established some type of cost-related reimbursement program under medicaid.

Mr. Chairman, you, the staff of the Senate Special Committee on Aging, and others who have concerned themselves with these problems, are to be commended for your diligent work. As a member of your panel, I look forward to working with you in this important investigation. Thank you.

Senator Moss. We will now proceed to hear our first witness, Dr. Bernard Bergman.

[Whereupon, Dr. Bernard Bergman was duly sworn.]

[The subpena issued to Dr. Bergman follows:]

UNITED STATES OF AMERICA

Congress of the United States

To Bernard Bergman, Owner-Operator, Park Crescent Nursing Home, 150 Riverside Drive, New York, New York, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the Special Committee on Aging of the Senate of the United States, on February 19, 1975, at 9:30 o'clock a.m., at their committee room 1318 Dirksen Senate Office Building, 1st & "C" Streets, N.E., Washington, D.C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

The Committee requests your appearance along with all of the following records from the Park Crescent and Towers nursing homes: PARK CRESCENT NURSING HOME: 1. Bank Statements; 2. Cancelled Checks; 3. Deposit Slips; and 4. Patient Account Records and Cards. TOWERS NURSING HOME: 1. Loans Payable; 2. Patient Account Records and Cards.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Thomas E. Ferrandina, United States Marshall

to serve and return.

Given under my hand, by order of the committee, this 6th day of February, in the year of our Lord one thousand nine hundred and seventy-five.

Frank Church

Special
Chairman, Committee on Aging

STATEMENT OF DR. BERNARD BERGMAN; ACCOMPANIED BY NATHAN LEWIN, COUNSEL

Senator Moss. Thank you. You may be seated.

Would you please state your name for the record?

Dr. BERGMAN. Bernard Bergman.

Senator Moss. And will you give your address, please?

Dr. BERGMAN. 280 Riverside Drive.

Senator Moss. Dr. Bergman, would you tell this committee what interests you have in nursing homes outside of the State of New York?

Dr. BERGMAN. Mr. Chairman, with full respect for this committee and the job it is trying to do, I must respectfully decline to answer that question, and all other questions the committee may ask me today, because compelling me to respond to these questions would violate my constitutional rights under the first, fourth, fifth, and sixth amendments to the U.S. Constitution.

The legal grounds for the assertion of these rights are spelled out in my attorney's letters of February 4, 14, and 18* to this subcommittee, and to this committee.

Senator Moss. Dr. Bergman, as to your assertion under the first, fourth, and sixth amendments, I, in my opening statement, indicated my ruling on this matter.

I do recognize your right under the fifth amendment to claim the protection of that amendment against self-incrimination which you have a right to do.

We have tried, of course, to proceed as fairly as possible. You did respond, Dr. Bergman, to the first subpena, and you did testify for a matter of 2 hours or more—I did not time it—but 2 or 3 hours before the committee, and then it was thereafter that you claimed your constitutional rights under the fifth amendment.

That has to be respected by the committee, and I have, of course, heard from your counsel that you expected that you might do this.

Your counsel has been furnished—has been supplied with a set of questions. Have you seen these questions? Does counsel have the questions?

Mr. LEWIN. Yes, Senator Moss.

Might I just state at this time, and I think I should state it for the record, that we had, as Dr. Bergman has said, written to the committee on February 4, 14, and 18, advising the committee, certainly as early as February 4, that if Dr. Bergman were subpenaed, it was his intention to invoke the constitutional rights which he has invoked.

At that time, we advised the committee that it was our view under the canons of ethics of the American Bar Association that precisely what has happened here this morning was improper, and we requested most respectfully that the committee not take the steps that it has taken this morning; and I think I should state that for the record, just to indicate the proceedings this morning is not with our acquiescence or consent, and indeed it is over our vigorous objections, as we indicated in correspondence.

With respect to the chairman's specific question as to whether I have seen, and have had an opportunity to discuss with Dr. Bergman, the

* See appendix 5, items 8, 9, and 12, pp. 3296, 3302, and 3306, respectively.

list of questions that Mr. Halamandaris gave me, I believe at approximately 9:15 this morning—I have gone through them very quickly.

I think Dr. Bergman may have had them in his hands for a total of a minute or two, and they are very detailed questions about many detailed matters, and I think that we have no quarrel with any effort by the committee, or any lawful investigation agency, asking those kinds of questions, and indeed, in proper procedures, it has always been Dr. Bergman's intentions to provide, through appropriate officials, proper responses to questions of that kind, and pursuant to his instructions, I have been dealing with the U.S. attorney's office in the southern district of New York, with the office of special prosecutor from New York State, seeking to provide for them answers to these kinds of questions.

Our objections to these proceedings is based, as I said in our letter, on the fact we do not think it is appropriate, we do not think it is constitutional under all of the amendments of the Constitution we have cited, to force an individual who is subject to these investigations, and at the very same time to come and appear before a publicized Senate committee in what can only be termed an inquisitional proceeding.

There have been three sessions of this committee, and as I stated in my letter, I think yesterday—in our law firm's letter of yesterday—which Mr. Cassidy sent to the committee, there has not been a single witness who has been called who has had any specific testimony to give about anyone other than Dr. Bernard Bergman, and in our view—well, specific testimony——

Senator Moss. If you will read the transcript, you will find there are others in there too.

Mr. LEWIN. And it is our view, at an appropriate time, after the conclusion of the criminal investigation, which Dr. Bergman believes will result in his exoneration, he would be prepared to come before this committee and answer questions, but at the present time, given the existence of a very intensive criminal investigation, it is just simply unfair; it is not consistent with what the Constitution is all about, to say to a man at this point, now you have got to come here, and you have got to answer these kinds of detailed questions—even assuming that he had the information in his head to provide answers to questions such as specific journal entries in the ledger of the Park Crescent Nursing Home, which he does not have.

Senator Moss. Thank you for your response, counsel. As always, it is very eloquent, and we have heard it before. We have been through this before, and we have been prepared to rule on it.

I would like to cite again from the *Hutcheson* case, which I did in my opening statement, wherein the Supreme Court of the United States said:

> Surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding * * * or when crime or wrongdoing is disclosed."

So, I think this is a legitimate inquiry.

The objections you have made earlier to the fact that we are here in an open hearing, and with television cameras—I also pointed out that all of our hearings are open, and we had the first one with the tele-

vision cameras, and Dr. Bergman appeared on the stand before television, and gave, what many would say, a rather self-serving testimony at that time.

In fact, the only criticism I recall that was levied against this committee by the press—they said I was too soft of him, I should have gone after him.

He was given his opportunity to tell his story. Now, after that, we have read the records, and had the GAO go through them, and we have a lot of specific questions we need to have answered.

The reason I ask about these questions, and whether they were in your possession, is that I could proceed to put each one, and have Dr. Bergman claim his privilege.

I wanted to ascertain from Dr. Bergman—do you intend to claim your constitutional privilege to refuse to answer the questions that have been given to your counsel, and which hopefully you have seen at this time?

Dr. BERGMAN. Mr. Chairman, as a result of intensive publicity, I have become the target of intensive investigation by State and Federal officials in New York.

I am confident that these inquiries with which I have been cooperating through my counsel, will clear my name, but in view of the nature of this committee's previous sessions, which were directed entirely at me, I am forced to conclude on the advice of counsel that answers I give here might possibly be utilized against me; accordingly, Mr. Chairman, I respectfully refuse to answer the question on the basis of my fifth amendment privilege against self-incrimination.

Senator MOSS. Well, Dr. Bergman, this committee believes that your claims under the first, fourth, and sixth amendments are invalid, and we would overrule them, but you do have a right under the fifth to refuse to answer the questions that you believe might tend to incriminate you, and having that right——

Dr. BERGMAN. Thank you.

Senator MOSS. I would say that the questions that are propounded here are directed to your business dealings; they are germane and pertinent, and I will place them in the record at this point to show that you have responded—that you refuse to answer these questions that are in possession of your counsel.

[The questions referred to above follow:]

QUESTIONS TO DR. BERNARD BERGMAN

GENERAL ITEMS OF INTEREST TO THE COMMITTEE

(1) Your interest and involvement as a major stockholder of the Medic-Home Enterprises, Inc.

(2) The extent of your ownership and other interests in nursing homes in both New York and other States.

(3) The effect of multiple real estate transactions on the New York reimbursement formula.

(4) An explanation of the purpose and the operation of loan and exchange accounts.

(5) Allegations of political influence with respect to your nursing home interests.

(6) Your relationship to various suppliers or vendors.

(7) The management of personal accounts of patients in your nursing homes.

FLORIDA HOLDINGS: NORTH SHORE NURSING HOME

1. Dr. Bergman, I would like to give you a copy of a summary of a consultant visit to the north shore nursing home of Miami, Fla. You have an interest in that facility, do you not? Please look at the first paragraph under "findings." It says that the food service supervisor cannot read or write, and that regular diet menus must be written by the director of nursing. It also says that a consultant dietician gives only 2 hours of monthly consultation instead of the 8 hours required. Page 2 says that there are no written therapeutic menus provided, and that the facility does not have an approved diet manual. One consequence, according to this report, is that all diabetic diets received the same amount of carbohydrate, fat, protein, and calories, regardless of the physician's diet orders. On the basis of these findings, it would seem that patients at North Shore lack important protection when it comes to food service. How will you comply with State requirements.

2. Here is a copy of a letter dated April 10, 1974, from Glenn J. Collins, chief of the Florida Bureau of Health Facilities. It deals specifically with a complaint that nursing home personnel at North Shore did not render appropriate patient care in administration of medications as ordered by the physician and lack of toenail and footcare "in the face of obvious need and as noted by her physician." In addition, the letter says that a review of approximately 70 percent of the clinical records of other patients revealed similar deficiencies pertaining to medications not given or not given as directed when ordered by the patients' physicians. The letter further warns that such deficiencies seriously jeopardize continued receipt of Federal moneys as a medicaid provider. What actions have been taken at North Shore to deal with the deficiencies or else stand to lose Federal funding and even State licensure?

3. Here is a report on North Shore issued by the Health Facilities and Chronic Disease Section of the Dade County Department of Public Health. It reports that an inspection team toured North Shore. It says that: "There were live roaches and bugs seen in 7 rooms and in the hallways and that several acoustical cork tiles were missing from ceilings in two rooms, where 'large American cockroaches' were seen." Apparently, an extensive insect extermination program was then launched, or at least ordered. What is the present situation with regard to insects at North Shore?

4. I submit to you a memorandum dated April 4 to Dr. Collins of the Florida Bureau of Health Facilities. It describes an investigation of a complaint alleging that a patient transferred from North Shore to another nursing home was discovered at the new nursing home to have "a crusty sore on top of her right foot (big toe) approximately the size of a 25-cent piece," and: "Her toenails were greenish-yellow in color and very long and crusty." The report further says that in June 1973 her physician had written that the patient may be seen by a podiatrist. But the patient was not seen while at North Shore. Are you shocked at the condition of the patient's foot? What podiatrists' services do you insist upon at homes in which you have an interest?

TOWERS NURSING HOME, NEW YORK, N.Y.

COMPARISON OF TOWERS GENERAL LEDGER ACCOUNTS WITH THE HE-2

1. Why do the 1973 financial statements filed with the State show bank notes payable of $260,000 when the general ledger shows bank notes payable of $83,000? (A similar discrepancy in the accounts payable account can be explained by Towers' failure to include adjustments on the financial statements; no such explanation exists for bank notes payable.)

2. Why do Towers' financial statements show a December 31, 1974 negative cash balance of —$79,530? What does a negative cash balance mean? The 1972 general ledger shows a negative cash balance for December 31, 1972. Does not this practice understate assets and liabilities?

3. The Towers HE-2P and 1973 G/L lists total expenses of $3,600,000. This includes a year end accrual of $979,000.

Why is this accrual so large (27 percent of the total expense)?

Why does the accrual, which was credited to "Accounts Payable" and "P/R tax payable" exceed the January–March 1974 cash disbursements (net of loans and exchanges) by $63,000?

Why is the payroll accrual, $453,000, almost 325 percent of the January 1974 payroll expense as per the G/L and greater even than the January–March 1974 payroll expense?

What is the meaning of a $309,000 health and welfare accrual when the total 1973 expense was $183,000.

Towers made a similar accrual at December 31, 1972 ($811,000). This was reversed or cleared in 1973, leaving the 1973 net accrual at $168,000. Why was the 1972 accrual so large?

When and why did these large accruals begin?

GENERAL

1. Why did 1973 net payroll fluctuate significantly from month to month as follows: January, $171,000; May, $99,000; August, $98,000; December, $241,000? Payroll is a medicaid reimbursable expense. Also, why were the payroll records not submitted in order to substantiate the reasonableness of these changes?

2. Why is at least $1,925 charged to medicaid as social services and recreation listed as going to religious organizations, such as the Religious Zionists of America?

3. Why is a $1,070 check to Rider College charged to medicaid as a social service and recreation expense? A 1974 voucher, supporting another check—for $450—shows Rider College providing tuition to George W. Goldberg. Who is George W. Goldberg?

4. In 1973 Towers paid out $94,000 in patient allowances, according to the general ledger. The checks are made out to Towers or to patients' allowances. Where did this money go? What is the procedure used by Towers Nursing Home in regard to patient allowances?

5. In 1973, according to its cash disbursements and cash receipts books, Towers paid out at least $575,000 and received at least $442,000 in loans and exchanges. What is the purpose of all these loans and exchanges? Since we have incomplete information, we cannot at this time determine whether or not loan and exchange transactions affect medicaid.

6. In the general ledger, the loan and exchange account is listed with the assets. Therefore, it appears that the loan and exchange account is an asset; in other words, it appears that Towers is a lender. Is Towers lending money?

7. For many of the loans and exchanges transactions, the only record we saw was whatever was in the cash disbursements book or the cash receipts book. Many times the entry in this book only indicated "loan and exchange" and did not name the individuals involved. We were given no loan agreements or individual loan records. How does Towers keep track of who owes money to whom?

8. The HE–2 filed with the New York State Department of Health requires financial statements showing assets, liabilities, and equity. Why don't these financial statements show loans and exchanges?

9. The 1973 general ledger loan and exchange account shows an opening balance of $249,800. This is presumably loans owed to Towers. The HE–2 shows the $249,800 as additional capital contributed to Towers, an addition to equity. How can the $249.800 be a loan or exchange and a part of equity?

10. Why are loan and exchange receipts often recorded in the cash receipt book in pencil when almost all other receipts are recorded in ink? Are these entries temporary? In these entries, why are initials like "BB" (Bernard Bergman) used?

11. The cash disbursements book in 1973 often shows loans and exchanges entered after the month's other entries. Why are these entries in a handwriting different from the others? Sometimes the entries show a check number and a date indicating the check was written in the middle of the month but recorded at the end of the month. Why isn't the check recorded until month's end? Why are there sometimes no dates or check numbers listed for these checks?

12. The leases supplied to the committee show a confusing leasing history for the nursing home. Describe this leasing history. Rent is a reimbursable medicaid expense.

13. The 1973 Towers HE–2 report to New York State shows $298.000 rent paid to Medic-Homes Enterprises in a non-arms-length transaction. The cash disbursement book shows monthly $20,000 to $30,000 rental payments to Liberty

House. What was the relationship of Liberty House to Medic-Homes? What was the ownerships of each?

14. Was Bernard Bergman a chairman of the board and/or director of Medic-Homes as alleged by OWIG? Was he a major stockholder?

15. Were not rent payments actually payments from Towers, operated by Anne Weiss (Mrs. Bernard Bergman), to Medic-Homes Enterprises, directed by Mr. Bernard Bergman? Why should medicaid reimburse such payments?

16. The rent payments are initially made to Liberty House. On one lease, Samuel A. Klurman signed for Liberty House of New York, Inc. The HE–2 lists Sisal Klurman as an operator. Is medicaid reimbursing Towers for rent paid between relatives?

17. Between January 1, 1973, and October 26, 1973, the Towers cash disbursements book showed $365,000 of loans and exchanges disbursed in excess of $10,000. The bank statements from January 1, 1973, to December 31, 1973, show that the following cash disbursements had not cleared by December 31, 1973:

Date	Check No.	Amount
January 18	3511	$25,000
April 19	3850	25,000
February 21	3647	25,000
May 17	3982	25,000
June 20	4102	25,000
July 19	4189	25,000
July	(1)	25,000
March	(1)	25,000
October 26	4517	25,000
October	(1)	25,000
Total		250,000

[1] Not given.

We were given no canceled checks for these payments. Why had these amounts not cleared the bank by December 31, 1973?

18. The bank statements show 13 1973 checks, each for more than $10,000, for which there are no accompanying canceled checks. These 13 checks total $334,000. Nine of the checks are for $30,000 each. These nine were written from January through November 1973. The last pre-November $30,000 payment we saw in the cash disbursements book was made on February 27, 1973. Why are the other $30,000 payments not included in the cash disbursements book?

19. Canceled check No. 3405, dated January 8, 1973, and drawn for $35,000 to the White Plains Nursing Home, does not appear in the cash disbursements book. Why not?

20. The last check written in normal sequence in 1973 was check No. 4746, according to the cash disbursements journal. Check No. 5098, written on December 21, 1973, and clearing on December 24, was to Bernard Bergman for $150,000. Why was a check so far out of sequence used?

A bank advice shows the $150,000 payment resulted in a December 24 overdraft of about $48,000. The general ledger shows that on December 31, the bank account in question still had an overdraft of about $20,000. Did Towers purposely write the $150,000 check to show its year-end cash in an overdraft position?

Park Crescent Nursing Home, New York, N.Y.

Questions from the general ledger and cash disbursements journal

Per the 1973 Cash Disbursements Journal, payments were made to three (3) payees—Riverside, B. Bergman, and Ideal Tours, totaling $1,625,038. These payments were the only disbursements referenced to account No. 7 of the general ledger. The general ledger has account Nos. 5, 6, 8, 9, etc., but *no* account No. 7. Without this ledger account, we are unable to document these payments beyond the cash disbursements journal, nor can we determine what account No. 7 represents.

Cash disbursements referenced to account No. 7 were as follows:

Payee and date of payment	Amount
Riverside Corp:	
Jan. 8	$26,000.00
Jan. 31	100,000.00
Feb. 5	26,000.00
Feb. 26	100,000.00
Mar. 9	26,000.00
Mar. 9	16,000.00
Mar. 30	100,000.00
Apr. 6	100,000.00
Apr. 10	20,000.00
Apr. 12	24,000.00
May 7	20,000.00
May 9	100,000.00
May 29	5,000.00
June 4	20,000.00
June 20	6,000.00
July 6	100,000.00
July 19	8,000.00
Aug. 7	150,000.00
Sept. 14	8,000.00
Oct. 29	8,000.00
Nov. 21	8,300.00
Dec. 20	8,300.00
Dec. 10 (interest)	458.33
Total (1973)	980,058.33
Bernard Bergman:	
Apr. 3	$120,000.00
May 11	60,000.00
July 11	30,000.00
July 11	50,000.00
Aug. 6	30,000.00
Aug. 14	15,000.00
Oct. 8	35,000.00
Dec. 5	75,000.00
Dec. 19	125,000.00
Total	540,000.00
Ideal Tours:	
Sept. 7	20,000.00
Oct. 8	25,000.00
Nov. 5	30,000.00
Dec. 10	30,000.00
Total	105,000.00
Total cash disbursements referred to account No. 7	1,625,058.33

Questions based on the above:

1. What does the ledger account No. 7 represent?
2. Why was this account omitted from the records?
3. What is the Riverside Corp. and why did they receive payments totaling close to $1 million?
4. Does Mr. Bergman have a financial interest in the Riverside Corp.?
5. What is Ideal Tours? What were the disbursements in payment of?
6. Does Mr. Bergman have a financial interest in Ideal Tours?
7. Is account No. 7 the loan and exchange account Mr. Bergman testified to having on January 21, 1975? If so, are copies of the loan agreements available?
8. Explain the purpose of the disbursements to Riverside, B. Bergman, and Ideal Tours.
9. The cash receipts summary shows four receipts from Riverside Corp. totaling $558,809. Although the reference is account No. 7, we noted credits to the capital account in the same four accounts. Explain.
10. Is there any relationship between the loan and exchange account (No. 7) and the drawing/capital account (No. 30/31)?

Other Questions:

1. In each month of 1973, disbursements are made to the Cong. Beth Israel, $1,000, and Cong. Agudath, $1,200. These payments are charged to the KS category under direct expenses chargeable to medicaid.
   (a) What is KS (account No. 41)?
   (b) What type of services do the congregations provide?
   (c) Is this a normal amount of reimbursement for this type of services?
2. We noted large disbursements during 1973 for the below listed vendors—does Mr. Bergman have a financial interest in any of these?

Amsterdam Meats	$124,893
Eastern Paper	68,960
L&S Surgical	154,804
Lev Bros	62,453
U.S. Construction Co	100,684
Lanset Enterprises	132,500

3. The HE–2 1973 balance sheet shows a negative cash balance ($381,844). This is in agreement with cash accounts per the general ledger. Explain the negative balance?

4. Mr. Bergman testified on January 21, 1975, that Mark Loren was employed as a supervisor at the Towers Nursing Home. Explain why Mr. Loren received $833 per month from the Park Crescent Nursing Home for professional services?

U.S. Construction and Remodeling Co.

5. The G/L has a posting for $68,461 for painting and decorating for 1973. We have bills for painting during 1974 totaling $47,880. What type of painting and decorating was done? How, and on what basis, was the contractor selected? We examined bills for window cleaning service during 1974 totaling $12,647. Are these costs reasonable?

Lanset Enterprises, Inc.

6. What type of cleaning and management services does Lanset Enterprises, Inc. provide? During 1973, $132,500 was paid to Lanset. Are these costs reasonable? During 1973, in addition to the $132,500 that was paid to Lanset, $265,198 was expended on housekeeping salaries—a total of $397,698. Invoices from Lanset to Park Crescent were as follows:

Date	Amount	Lanset Invoice No.	Address
Jan. 15, 1974	$23,297.91	1231	1637 62d St., Brooklyn.
Jan. 30, 1974	23,297.91	1234	Do.
Jan. 31, 1974	[1] 8,502.06	1237	Do.
Feb. 15, 1974	23,297.91	1239	Do.
Feb. 28, 1974	23,297.91	1241	Do.
Mar. 15, 1974	23,297.91	1243	Do.
Apr. 1, 1974	23,297.91	1245	Do.
Apr. 15, 1974	23,297.91	1248	Do.
Apr. 30, 1974	23,297.91	1251	Do.
May 15, 1974	23,297.91	1253	Do.
May 30, 1974	23,297.91	1255	Do.
June 15, 1974	23,297.91	1601	Do.
July 1, 1974	23,297.91	1273	Do.
July 15, 1974	23,297.91	1276	Do.
July 29, 1974	23,297.91	1278	Do.
Aug. 15, 1974	23,297.91	1279	Do.
Aug. 26, 1974	23,297.91	1282	Do.
Sept. 13, 1974	23,297.91	1285	Do.
Sept. 30, 1974	23,297.91	1605	Do.
Oct. 15, 1974	23,297.91	002501	1860 Broadway.
Oct. 25, 1974	23,297.91	002753	Do.
Oct. 15, 1974	20,000.00	002251	Do.
Nov. 15, 1974	23,297.91	002806	Do.
Nov. 26, 1974	23,297.91	002253	Do.
Dec. 12, 1974	23,297.91	002257	Do.
Total	564,353.99		

[1] Retro, Inc.

What type of business are Lanset Enterprises, Inc., involved in? They are listed as "Investment, Cleaning, Maintenance."

We noticed that expenditures for liquor ($1,264 in 1973) were charged to the food account and carried forward to the HE–2. The 1973 liquor bill includes 61 bottles of scotch whiskey (six different brands), a wide variety of other hard liquor, and smaller amounts of kosher wines. What was the nature of the expense and how does it merit medicaid-medicare reimbursement?

We noticed that Park Crescent includes $1,029 for parking violations as part of total expense carried forward to the HE–2. What is the nature of these expenses and do they merit medicare-medicaid reimbursement?

COMPARISON OF MAJOR EXPENDITURES IN NURSING HOMES, AS PER 1973 HE-2P

Expense category	Towers	Oxford	Park Crescent	Congress	Carlton	Riverview
Number of beds in nursing home	347	319	520	520	196	180
Total salaries and wages	$2,024,149	$1,862,101	$3,649,372	$3,268,164	$1,167,744	$1,177,965
Total dietary costs, excluding salaries	249,588	218,701	669,458	330,209	147,474	115,797
Dietary salaries	169,890	169,917	333,215	272,013	107,040	87,467
Total housekeeping, excluding salaries	264,796	25,667	312,742	19,271	33,307	5,728
Housekeeping salaries	40,283	167,496	265,198	274,021	103,210	110,261
Total maintenance and plant, excluding salaries	49,800	117,864	187,460	131,427	41,793	42,323
Total repairs and maintenance salaries	42,821	58,732	98,670	64,991		10,080
Total laundry and linen costs	106,380	95,929	117,994	94,161	84,652	35,620
Total raw food costs	228,067	197,517	524,699	306,968	131,794	109,957

NOTES

1. Housekeeping salaries: What accounts for the difference? Towers, $40,283; Oxford, $167,496—a difference of $127,213
2. Total housekeeping, excluding salaries: What accounts for the difference? Towers, $264,796; Oxford $25,667—a difference of $239,129.
3. Why does the total maintenance cost of Oxford and Towers differ so much—$117,864 versus $49,800 (difference of $68,064)?
4. Total housekeeping, excluding salaries: What accounts for the difference—$312,742, Park Crescent; $19,271, Congress—a difference of $293,471?
5. What accounts for the difference in raw food costs—Park Crescent, $524 699; Congress, $306,968 ($217,731 difference)?
6. What accounts for the difference in laundry and linen costs—Carlton $84,652; Riverview, $35, 620 ($49,032 difference)?

PARK CRESCENT NURSING HOME

1. Total housekeeping, excluding salaries, $312,742; building maintenance, $287,597; furnishings, $25,145; total, $312,742 (per general ledger as of December 31, 1973).

2. Total dietary costs, excluding salaries, $669,458; food, $524,699; kitchen maintenance, $119,359; K.S., $25,400; total, $669,458 (per general ledger as of December 31, 1973).

Total dietary costs, excluding salaries (G/L—HE-2P):

General ledger:	
Food	$524,699
Kitchen Maint	119,359
KS	25,400
Total	669,458
HE-2P 1973	
Food	524,699
Nonfood supplies	140,703
Dietary consultation	4,056
Total	669,458

Mr. LEWIN. I think that what should be made clear on the record is that, of course, as is always true that any privilege against self-incrimination is that it is being invoked at a particular point in time, which means the questions having been given to us at this time, considering the nature of the investigations that are going on.

It is our intention certainly to review these questions, and if at some future time it is Dr. Bergman's view that the danger of self-incrimina-

tion either has passed, or that it is overcome by the importance of providing answers to this committee with regard to these specific questions, we intend to be in touch with the committee, and provide those responses, because, as I said, it is our intention to provide proper answers to proper questions.

Senator Moss. Well, Dr. Bergman, you are directed by the committee to answer these questions, and do you now claim your privilege against so doing?

Dr. BERGMAN. Yes, sir.

Senator Moss. I wanted that clear for the record that you make that claim under the fifth amendment.

I am glad to hear that Dr. Bergman may talk at some time. Will you please let us know when, because we still want to hear from him?

Senator Percy.

Senator PERCY. Mr. Chairman, I would like, of course, to say—searching for something good to say—that when the committee convened as a whole, we felt that Dr. Bergman had been in contempt by refusing to appear, but we really felt we should lean over backwards in this case.

We were not interested in citing him for contempt of Congress. We were interested in making it imminently clear that he should be here. I would like to say that I think he was wise in appearing today.

I regret the fifth amendment is being used in this case, because I think your testimony could have shed light on several points. But you are within your rights and privileges in exercising the fifth amendment.

Could I put this question to you, and it has no relationship to your own personal affairs, as such: Could you give this committee any guidance as to whether or not you feel that when something like 80 or 85 percent of nursing homes are proprietary, for-profit nursing homes, whether or not these homes can provide the kind of care that we feel the elderly should be provided? Can you tell us whether or not, as a private operator of such nursing homes, you feel it is possible to operate them under the profit system, and to do so in such a way as to provide the kinds of services that public policy seeks to insure?

Dr. BERGMAN. Senator Percy, I would have liked to answer this question, however——

Senator PERCY. I urge you to do so.

Dr. BERGMAN. My attorney advises me that to do so would jeopardize my legal position.

I think in asserting this constitutional privilege, Senator, accordingly, I must respectfully decline to answer in order to protect my legal rights.

Senator PERCY. One last question I would like to put to you: Is it true that you have a 75-percent ownership in Allentown Nursing Homes, 100 percent in Carlton Nursing Homes, 100 percent in Elizabeth Nursing Homes, 56 percent in Fredricksburg Nursing Home, a long list of nursing homes, and that your accountant, Samuel Dachowitz, certified to you on May 29, 1974, that your net worth was $24,052,293, and that essentially that estate was amassed over a period of years in operating nursing homes? If you do not intend to answer, I do not insist that you do.

Dr. BERGMAN. Senator, I do invoke the fifth amendment.

Senator PERCY. I regret the inability of the committee to have the testimony of our witness, because I think he could provide insight that would be valuable to this committee, but we respect his right.

Dr. BERGMAN. As my counsel said, we will eventually provide the committee with all these answers. I intend to do that, Senator.

Senator Moss. Thank you, Dr. Bergman.

Mr. Lewin, we hope to meet again at a later date.

Mr. LEWIN. Thank you. I would just like to say after three appearances, I would like to thank the committee for its courtesy.

We have engaged in correspondence and we have been in a certain adversarial posture at certain times, but I must say that with regard to the committee and its staff, I think we have been treated with courtesy, and I appreciate it.

Thank you very much.

[The questions prepared by Senator Percy for Dr. Bernard Bergman follow:]

PART I—QUESTIONS FOR DR. BERGMAN BASED ON APPARENT DISCREPANCIES BETWEEN TESTIMONY OF JANUARY 21 AND LETTER TO SENATOR MOSS OF FEBRUARY 3

1. In your letter of February 3 to Senator Moss, you admit a "Bergman family interest in mortgage or receivable" in the Mayflower Nursing Home. On January 21 you stated: "Mayflower Nursing Home, we were out of that maybe 6, 7 years ago." Please explain this apparent discrepancy.

2. In your letter you state that the Bergman family has "an interest in mortgage or receivable" of the Rego Park Nursing Home. You said on January 21 "Amram Kass and Miriam Kass, my son-in-law and my daughter. He was interested in Rego Park, that was over a year, out no longer." Please explain this apparent discrepancy.

3. In your letter to Senator Moss, you state that there is a "Bergman family interest in the mortgage or receivable" of the White Plains Nursing Home. On January 21 you told Senator Moss that Mr. Izbicki was your half-sister's father-in-law. "However," you said, "he has three nursing homes, does he, Burnside Nursing Home, White Plains Nursing Home, Carlton Nursing Home, I have absolutely no relation to those operations except I could qualify that by saying that we *did* have a realty interest." Here again we have an apparent discrepancy which I would like you to explain.

4. The letter of February 3, 1975, indicates "Bergman family ownership of operation and realty" of the Genesee Nursing Home. On January 21, you said: "As I mentioned before, we did have a share in the Utica Genesee Nursing Home, which was sold last October. It is on contract, I should say . . ." Has the contract not gone through? Was this sale reported to the New York State Department of Health as required?

5. Your letter indicated "Bergman family ownership of or interest in realty" of the Willoughby Nursing Home. I can find no mention of this holding in your January 21 description of your holdings. Why this omission?

PART II—QUESTIONS FOR DR. BERGMAN BASED ON HIS SUBMISSION OF FEBRUARY 3

1. What do you mean by the term "family" as it was used in your letter of February 3, 1975, describing nursing home holdings in New York State?

2. Does this list include ownership or interest held by your wife, Anne Weiss or Anne Weiss Bergman? By your daughter, Miriam Kass? By your son Stanley Bergman or his wife? By your son Meyer Bergman or his wife? By your son-in-law Amram Kass? If not, can you provide us this information?

3. Does this list include ownership or interest of your relatives, Dr. Bergman, such as sisters, brothers, half-sisters, half-brothers, cousins, nieces, nephews, plus the ownership or interest which their spouses or their spouses' families may hold? If not, can you provide us this information?

4. Does this list include ownership or interest of your wife's relatives? Does it include the ownership or interest of the families of your son-in-law or daughters-in-law? If not, can you provide us this information?

5. I have seen no list, as requested by Congressman Koch, of your ownership or interest in any vendor doing business with nursing homes. Do you not have any such ownership or interest? Do any of your relatives, your wife's relatives, or your son-in-law's relatives, or your daughters-in-law's relatives have any such ownership or interest?

6. Do you now have or could you supply for the committee the holdings of your family in States other than New York? I am interested here in your direct holdings and those of your family as described above as well as indirect holdings through various corporations which you may control or have an interest in. Medic-Homes Inc. is a specific example, of course.

PART III—QUESTIONS FOR DR. BERGMAN BASED ON KAPLAN REPORT AND GAO AUDIT

(NOTE. The following list is taken from the 1960 Kaplan Report. It includes facilities in which Bergman had direct or indirect interest. The investigators estimated that these homes had overcharged the City by the amounts shown. Bergman is said to have paid back something like 30¢ on the dollar.) During the period July 1, 1956 and June 30, 1958, did you or your wife and anyone directly related to you or your wife, own, operate, or administer any of the following nursing homes in New York City?

Estimated claims for overcharges, July 1, 1956 to June 30, 1958

Manhattan:	
East River	$2,446.84
Mayflower	12,630.00
Park Terrace	65,160.20
Riverside	29,203.40
Towers	231,028.33
Bronx:	
Burnside	20,850.70
Mosholu Parkway	22,056.64
Alinville	12,038.22
Country Club	16,130.56
Pelham Parkway	39,974.16
Rest Haven	31,655.60
Queens: Meadow Park	83,254.14
Brooklyn:	
Belt Parkway	154,659.08
Carlton	215,008.64
Ocean Parkway	79,521.00
Oxford	77,216.50

Source: Department of Investigations, city of New York.

1. I have examined the entries in the cash disbursement book for June 20, 1973. Check No. 4102 for $25,000 is entered, in pencil, as a "loan exchange BB." It is posted to account No. 7 but there is no entry in the general ledger. I assume the check from the Towers was made out to Bernard Bergman.

A. We cannot find check No. 4102. Where is it?

B. Why was no entry made in account No. 7?

C. What was the money for?

D. Was interest paid?

E. Was this money included in any request for reimbursement?

F. Why should Bernard Bergman need $25,000 in cash when as of February 28, 1973, Mr. Dachowitz certified that Mr. and Mrs. Bergman had $410,000 in cash?

2. On November 9, 1973, two checks for $30,000 cleared the bank according to bank statements. The last previous $30,000 payment recorded in the 1973 cash disbursement book was recorded on February 27, 1973. There are similar $30,000 checks for June, July, and two in August. Why weren't these payments recorded in the cash disbursement book?

3. I have examined the cash disbursement book for 1973. On page 143, there is a December 1973 entry of a "Loan and exchange" for $150,003. We know from

the canceled check that the Towers paid $150,000 to Bernard Bergman. A bank advice shows an overdraft of $48,000 as of December 24.

A. In whose handwriting is the entry in the Cash Disbursements Book at the end of December 1973 of this loan and exchange?

B. Who decided what General Ledger Account this transaction would be posted to?

C. What was the payment for?

D. Why is there no evidence of a loan agreement in the material supplied us?

E. Why did Dr. Bergman need $150,000 in cash? (Dr. Bergman deposited the check.)

PART IV—QUESTIONS FOR DR. BERGMAN RELATING TO THE OXFORD NURSING HOME, 148 OXFORD REALTY, AND MOSES BRAUNSTEIN

(NOTE. The Bergmans acknowledge ownership of "operation" and "mortgage" of the Oxford Nursing Home. Mrs. Bergman was at one time the administrator of the home and during 1969 received $117,500 debited to the drawing account plus a $30,000 loan debited to "Due to partners" account. The realty, according to GAO is owned—or was owned as of May 1973—by "148 Oxford Realty." This company is owned, according to GAO, by Moses Braunstein. Dr. and Mrs. Bergman's financial statement for 1973 lists under "Assets" a category entitled "Loans and mortgages receivable." One entry is 148 Oxford Realty Company—$1,974,429." For 1974 the amount reads "$1,944,789." The cash flow chart for 1974 carries the following entry: "148 Oxford Realty Co.—Mortgage—Gross Income or Net Rent—150,000; Net Cash Flow Income—150,000; Dr. Bergman's Percentage—150,000." The Oxford Nursing Home for the period of September 1972 through May 1973 paid rent to "148 Oxford Realty" in monthly disbursements of $20,835, referenced to the general ledger as follows: "Rent—18,750; Leasing—2,084; Total—$20,834." Prior to that time the rent was $10,835 and was paid to Soxford Realty Co. Moses Braunstein also turns up as one of the lenders in the Towers Nursing Home "loans and exchanges" account. In 1973 he loaned the Towers $30,000 according to the report of the Office of the Welfare Inspector General. There is no indication that the money was repaid. According to OWIG, Braunstein is also the holder of the deed of the Mayflower Nursing Home—in which the Bergmans admit a family interest in "mortgage or receivable"—and is identified in the OWIG preliminary report of last December as a director of Medic-Homes Enterprises, Inc.)

1. What is your interest in the Oxford Nursing Home?
2. What is your interest in 148 Oxford Realty?
3. Who owns the realty—the bricks and mortar, the land?
4. Do you know Moses Braunstein?
5. What is his relation to the Oxford Nursing Home? to 148 Oxford Realty?
6. What is his relationship to the Mayflower Nursing Home?
7. What is his relationship to the Towers Nursing Home?
8. Why did he loan money to the Towers in 1973?
9. Was he ever repaid?
10. Did you or your family have any interest in the Oxford Realty Co.?

Senator MOSS. We have an additional witness who was subpenaed to appear this morning, Mr. Mark Loren.

Are you represented by counsel?

Mr. LOREN. I am, sir.

Senator MOSS. Would you raise your right hand and be sworn?

[Whereupon, Mr. Mark Loren was duly sworn.]

[The subpena issued to Mr. Loren follows:]

UNITED STATES OF AMERICA

Congress of the United States

To Mark Loren, Operator, White Plains Nursing Home, 3845 Carpenter Avenue, Bronx, New York 10467

....., **Greeting:**

Pursuant *to lawful authority, YOU ARE HEREBY COMMANDED to appear before the* Special *Committee on* Aging *of the Senate of the United States, on* February 19, *1975, at* 9:30 *o'clock a.m., at their committee room* 1318 Dirksen Senate Office Building, 1st & C Streets, N.E., Washington, D.C. 20510, *then and there to testify what you may know relative to the subject matters under consideration by said committee.*

Hereof fail not, *as you will answer your default under the pains and penalties in such cases made and provided.*

To Thomas E. Ferrandina, United States Marshall

to serve and return.

Given *under my hand, by order of the committee, this* 6th *day of* February, *in the year of our Lord one thousand nine hundred and* seventy-five

Frank Church

Special
Chairman, Committee on Aging

STATEMENT OF MARK LOREN, FORMER ADMINISTRATOR, TOWERS NURSING HOME, NEW YORK, N.Y.; ACCOMPANIED BY PATRICK W. McGINLEY, COUNSEL, AND SUZANNE ANTIPUS, COCOUNSEL

Senator Moss. Would you state the name of your counsel.

Mr. LOREN. Patrick W. McGinley.

Senator Moss. We are glad you have your counsel with you, Mr. Loren. Will you state your name for the record?

Mr. McGINLEY. Mr. Chairman, before we commence, might I be permitted to make a short statement?

Senator Moss. Yes; we will hear from you.

Mr. McGINLEY. My name is Patrick W. McGinley. I am a member of the New York bar and counsel for Mr. Loren. My colleague, Suzanne Antipus, is with us this morning; she is cocounsel and also a member of the New York bar.

On behalf of my client, I state unequivocably that we welcome your study of problems relating to the aged, and to the interrelationship between medicaid laws and the nursing homes.

Hopefully, you will be able to devise new and enlightened legislation in this area. It is, therefore, not our purpose to impede your legislative efforts. Indeed, our intention would be to cooperate, were it not that Mr. Loren's employers, associates, and presumably Mr. Loren himself, are currently the subjects of criminal investigations in New York by at least a New York State special prosecutor, the U.S. attorney's office for the southern district of New York, as well as by other Federal, State, and local law enforcement, licensing, and regulatory agencies.

Under these circumstances, the duty of this committee to hold hearings, and the public's right to know, must be balanced, I think, against the individual's constitutional right to due process.

In this balancing, I submit the scales tilt heavily in favor of due process of the individual.

It is in this context then that Mr. Loren will today invoke his privilege against self-incrimination as to this committee's questions.

In advance of Mr. Loren's scheduled appearance here, I explained his position to your associate counsel and asked that he be excused from appearing, or that he be allowed to invoke his privilege in private session, or at the very least, without the presence of television cameras.

That request has been denied. We deplore the committee's determination to proceed in a manner which must inevitably injure Mr. Loren's reputation, without any compensating benefit to the committee or to the public.

In my judgment, no proper legislative function is advanced by forcing Mr. Loren to assert his constitutional privilege under these conditions.

Certainly, this committee has been advised that current circumstances prohibit Mr. Loren from volunteering any information.

Your approach then, I respectfully submit, is not consistent with fairness or due process, as it relates to Mr. Loren.

Thank you, sir.

Senator Moss. Thank you, Mr. McGinley. I will respond to that in just a moment if I find that Mr. Loren does indeed claim his privilege.

You have stated your name. Will you give us your address?

Mr. LOREN. 3845 Carpenter Avenue, Bronx, N.Y.

Senator Moss. And would you tell this committee what interests you have in nursing homes in the State of New York?

Mr. LOREN. On advice of counsel, I respectfully decline to testify on the ground that such testimony may tend to incriminate me.

Senator Moss. Mr. Loren, there was a list of questions supplied to your counsel before he came here, and those, I think, are available to you now.

They indicate some degree of the parameter of our concern, and these were given to counsel earlier this morning.

I think it is fair to say that there are two conflicting interests here today, both of which we are sensitive to.

On the one hand, we have no wish to require the invocation of your fifth amendment privileges, in response to a long line of questions, and on the other hand, I feel there is an important obligation on the part of this committee to have noted clearly in the record at least some indication of the scope of the inquiry, and the legislative interests.

The specific questions we have presented to you, as well as others we would like to ask, focus on a wide variety of issues, including the extent of your ownership and other interests in nursing homes, both in New York and other States, the effect of multiple real estate transactions under the New York reimbursement formula, an explanation of the purpose of operation of the loans and exchange accounts, your relationship to various suppliers, the management of personal accounts of patients in nursing homes with which you are affiliated.

Having stated generally the interests of the committee with respect to your presence here today, I am sure that I understand the position you take.

Is it your intention to invoke your fifth amendment privileges, and decline to answer the specific written questions presented to you, as well as other questions relating to the inquiry?

Mr. LOREN. I do, sir.

Senator MOSS. And I will place in the record that list of questions that were furnished to your counsel and I direct you to answer them, and I want your response so we have them on the record.*

Mr. LOREN. On advice of counsel, I respectfully decline to testify on the ground that such testimony may tend to incriminate me.

Senator MOSS. You have a right to invoke your rights under the fifth amendment of the Constitution, and we understand that.

In response to Mr. McGinley's argument he presented, of his concern about our summoning you in open hearing to do this, I simply point out that this is the procedure for a Senate hearing on a legislative matter. We are concerned with legislative matters.

I read the citation twice in the *Hutcheson* case, so I will not go over that again. I think that the argument presented by counsel has to do with grand juries and criminal proceedings and not with legislative hearings, and, therefore, I think there is a distinction. I do not think that your claim under any of the other amendments to the Constitution are valid, but under the fifth, I recognize that it is, and I must excuse you.

I don't know whether my colleague—Senator Percy, do you have any comment you wish to make before we excuse the witness?

Senator PERCY. Mr. Chairman, I would like to ask unanimous consent of the committee to submit and supplement the questions that the chairman has put to Mr. Loren,** as well as to supplement the questions put to Dr. Bergman.***

I have just two questions, one relating to Mr. Loren, and one relating to Dr. Bergman, that I hope, Mr. Loren, you can provide answers to.

*See p. 3247.
**See p. 3249.
***See p. 3239.

First, you are listed as the executive director of the Towers Nursing Home. In 1973, the Towers Nursing Home purchased an automobile from the Chrysler Corp. for $6,982.50. According to our investigation, this car was exclusively for your use.

Did the Towers Nursing Home charge the depreciation of that car against its expenses, which, in the end, is paid for by the Federal Government, and in what way did you need a Chrysler motor car in your capacity as executive director of the Towers Nursing Home?

Mr. LOREN. On advice of counsel, I respectfully decline to testify on the ground that such testimony may tend to incriminate me.

Senator PERCY. I would like to ask one last question about Dr. Bergman.

I was going, personally, through all of the books, and as I said, I have never seen a set of books like that; there are a great number of transactions going back onto the name of an account called the loans and exchange account. One particular transaction, for instance, puzzled me.

In the cash disbursement book for 1973, on page 143 is a December 1973 entry for a loan and exchange for $150,003. We know from the canceled check that that $150,000 was paid to Bernard Bergman. The bank advice shows that when that was drawn on the account of Towers for which you were the executive director and had the right to sign checks, there was a bank overdraft of $48,000, for which the Towers Nursing Home was charged $3 for the overdraft.

In checking on the cash account for Dr. Bergman, he carried cash in banks as of Febuary 28, 1974, of $343,518. Why was it necessary for Dr. Bergman to borrow $150,000 from a nursing home when apparently he had far more cash than the nursing home, because it went into an overdraft condition as a result of that?

Was this done for the purpose of using money in nursing homes without paying interest, or was there interest paid?

Was there a note ever signed? We can find no evidence of notes even, evidencing these exchanges of very large amounts of cash.

What kind of business practice is this? What was the underlying purpose of such transfers of funds between a nursing home and an individual?

Mr. LOREN. On advice of counsel, I respectfully decline to testify on the ground that such testimony would tend to incriminate me.

Senator PERCY. Thank you very much.

Senator Moss. The Senator from New Mexico.

Senator DOMENICI. Mr. Chairman, I do not have any questions, but since counsel has used the word "deplore," I would like to borrow it from him. Since he deplores what we are apparently trying to do, I would like to tell him that I deplore what I have found to this point—the unexplained circumstances surrounding the nursing care facilities that involved Dr. Bergman.

Such unexplained situations as vendors that seemed to be joint ventures with owners or operators; such conditions as thousands, in fact, hundreds of thousands of dollars of disparity between what is the real rental value of a nursing home and what is paid by the operator.

If we are speaking of deplorable things, it seems to me that I ought to remind you that we have found some very deplorable things that

are unexplained. It seems to me to be certainly our right to try to get to the bottom of such deplorable conduct.

I certainly do not intend in any way to deny your client his constitutional rights, but since we are speaking of deplorable situations, I thought I might just remind counsel that in just 2 days of participation in hearings, and in investigations, I found some rather deplorable unexplained situations that I thought deserved this committee's attention with reference to the expenditure of Federal funds to take care of the elderly of this country.

Thank you, Mr. Chairman.

Mr. McGINLEY. Senator, may I just slightly respond, because I did not at any time indicate that the mission or the duty of your committee was deplorable. In fact, it is commendable. It is something that is long overdue and very necessary, and if what I read in the newspaper is correct, then I think that there are many deplorable situations which have to be corrected.

The only thing that I deplore this morning was the system which required Mr. Loren to exercise a constitutional privilege before the full glare of the television cameras.

I do not think that was necessary, and I do not think it, in any way, advanced the function of this committee.

Senator DOMENICI. Thank you, Mr. Chairman.

Senator Moss. The Senator from Indiana—does he have any questions or comments?

Senator HARTKE. Mr. Chairman, I do have some questions, but I understand what the results would be. I would hope that the record would be kept open, especially relating to the question of the Senate hearings, and relating to the objections where there is an apparent connection with the questions of the nursing homes being exploited.

Senator Moss. Thank you, Senator Hartke.

Representative Koch, you have been with us before on the hearings. You are directly connected. In fact, you represent the area; I believe it is in your district—the nursing homes, the principal ones we have been talking about.

Do you have any comment before I excuse the witness?

Representative KOCH. All I would like to do, Senator, is first to thank you and the members of your committee for your graciousness in permitting me to participate, both in New York and here in Washington.

More important from the personal aspect is to commend you and express appreciation of the people of this country, that you are undertaking to correct a situation which applies to the most hapless people in our country—the elderly. To have those elderly treated in the abominable way that they are treated in certain homes across the country, not just in New York—this is not a New York problem, it is a national problem—to have them treated in that abominable way, our first priority is to stop it. Of course, equally important is the fact that the taxpayers of this country have to be protected.

We are paying a fortune for services to the elderly, and I want to thank you again for your involvement, the whole committee's involvement, in addressing this problem by the Congress.

Senator Moss. We thank you for your cooperation and assistance to the committee, and Mr. Stein was recognized earlier in doing a fine

job in the State of New York as chairman of the special commission in looking into the problems that deal with the elderly.

I will excuse you, Mr. Loren, as a witness. You have claimed the fifth amendment, and you are entitled to go. Your response is speedy, and we appreciate that.

Mr. LOREN. Thank you.

[The questions prepared for Mark Loren follow:]

QUESTIONS FOR MARK LOREN BY SENATOR MOSS

(1) The extent of your ownership and other interests in nursing homes in both New York and other States.

(2) The effect of multiple real estate transactions on the New York reimbursement formula.

(3) An explanation of the purpose and the operation of loan and exchange accounts.

(4) Your relationship to various suppliers or vendors.

(5) The management of personal accounts of patients in nursing homes with which you are affiliated.

RE: TOWERS NURSING HOME, NEW YORK, N.Y.

COMPARISON OF TOWERS GENERAL LEDGER ACCOUNTS WITH THE HE-2

1. Why do the 1973 financial statements filed with the State show bank notes payable of $260,000 when the general ledger shows bank notes payable of $83,000? (A similar discrepancy in the accounts payable account can be explained by Towers' failure to include adjustments on the financial statements; no such explanation exists for bank notes payable.)

2. Why do Towers' financial statements show a December 31, 1974 negative cash balance of —$79,530? What does a negative cash balance mean? The 1972 general ledger shows a negative cash balance for December 31, 1972. Does not this practice understate assets and liabilities?

3. The Towers HE-2P and 1973 G/L lists total expenses of $3,600,000. This includes a year end accrual of $979,000.

Why is this accrual so large (27 percent of the total expense)?

Why does the accrual, which was credited to "Accounts Payable" and "P/R tax payable" exceed the January-March 1974 cash disbursements (net of loans and exchanges) by $63,000?

Why is the payroll accrual, $453,000, almost 325 percent of the January 1974 payroll expense as per the G/L and greater even than the January-March 1974 payroll expense?

What is the meaning of a $309,000 health and welfare accrual when the total 1973 expense was $183,000?

Towers made a similar accrual at December 31, 1972 ($811,000). This was reversed or cleared in 1973, leaving the 1973 net accrual at $168,000. Why was the 1972 accrual so large?

When and why did these large accruals begin?

GENERAL

1. Why did 1973 net payroll fluctuate significantly from month to month as follows: January, $171,000; May, $99,000; August, $98,000; December, $241,000? Payroll is a medicaid reimbursable expense. Also, why were the payroll records not submitted in order to substantiate the reasonableness of these changes?

2. Why is at least $1,925 charged to medicaid as social services and recreation listed as going to religious organizations, such as the Religious Zionists of America?

3. Why is a $1,070 check to Rider College charged to medicaid as a social service and recreation expense? A 1974 voucher, supporting another check—for $450—shows Rider College providing tuition to George W. Goldberg. Who is George W. Goldberg?

4. In 1973 Towers paid out $94,000 in patient allowances, according to the general ledger. The checks are made out to Towers or to patients' allowances. Where did this money go? What is the procedure used by Towers Nursing Home in regard to patient allowance?

5. In 1973, according to its cash disbursements and cash receipts books, Towers paid out at least $575,000 and received at least $442,000 in loans and exchanges. What is the purpose of all these loans and exchanges? Since we have incomplete information, we cannot at this time determine whether or not loan and exchange transactions affect medicaid.

6. In the general ledger, the loan and exchange account is listed with the assets. Therefore, it appears that the loan and exchange account is an asset; in other words, it appears that Towers is a lender. Is Towers lending money?

7. For many of the loans and exchanges transactions, the only record we saw was whatever was in the cash disbursements book or the cash receipts book. Many times the entry in this book only indicated "loan and exchange" and did not name the individuals involved. We were given no loan agreements or individual loan records. How does Towers keep track of who owes money to whom?

8. The HE-2 filed with the New York State Department of Health requires financial statements showing assets, liabilities, and equity. Why don't these financial statements show loans and exchanges?

9. The 1973 general ledger loan and exchange account shows an opening balance of $249,800. This is presumably loans owed to Towers. The HE-2 shows the $249,800 as additional capital contributed to Towers, an addition to equity. How can the $249,800 be a loan or exchange and a part of equity?

10. Why are loan and exchange receipts often recorded in the cash receipt book in pencil when almost all other receipts are recorded in ink? Are these entries temporary? In these entries, why are initials like "BB" (Bernard Bergman) used?

11. The cash disbursements book in 1973 often shows loans and exchanges entered after the month's other entries. Why are these entries in a handwriting different from the others? Sometimes the entries show a check number and a date indicating the check was written in the middle of the month but recorded at the end of the month. Why isn't the check recorded until month's end? Why are there sometimes no dates or check numbers listed for these checks?

12. The leases supplied to the committee show a confusing leasing history for the nursing home. Describe this leasing history. Rent is a reimbursable medicaid expense.

13. The 1973 Towers HE-2 report to New York State shows $298,000 rent paid to Medic-Homes Enterprises in a non-arms-length transaction. The cash disbursement book shows monthly $20,000 to $30,000 rental payments to Liberty House. What was the relationship of Liberty House to Medic-Homes? What was the ownerships of each?

14. Was Bernard Bergman a chairman of the board and/or director of Medic-Homes as alleged by OWIG? Was he a major stockholder?

15. Were not rent payments actually payments from Towers, operated by Anne Weiss (Mrs. Bernard Bergman), to Medic-Homes Enterprises, directed by Mr. Bernard Bergman? Why should medicaid reimburse such payments?

16. The rent payments are initially made to Liberty House. On one lease, Samuel A. Klurman signed for Liberty House of New York, Inc. The HE-2 lists Sisal Klurman as an operator. Is medicaid reimbursing Towers for rent paid between relatives?

17. Between January 1, 1973, and October 26, 1973, the Towers cash disbursements book showed $365,000 of loans and exchanges disbursed in excess of $10,000. The bank statements from January 1, 1973, to December 31, 1973, show that the following cash disbursements had not cleared by December 31, 1973:

Date	Check No.	Amount
Jan. 18	3511	$25,000
Apr. 19	3850	25,000
Feb. 21	3647	25,000
May 17	3982	25,000
June 20	4102	25,000
July 19	4189	25,000
July	(1)	25,000
March	(1)	25,000
Oct. 26	4517	25,000
October	(1)	25,000
Total		250,000

[1] Not given.

We were given no canceled checks for these payments. Why had these amounts not cleared the bank by December 31, 1973?

18. The bank statements show 13 1973 checks, each for more than $10,000, for which there are no accompanying canceled checks. These 13 checks total $334,000. Nine of the checks are for $30,000 each. These nine were written from January through November 1973. The last pre-November $30,000 payment we saw in the cash disbursements book was made on February 27, 1973. Why are the other $30,000 payments not included in the cash disbursements book?

19. Canceled check No. 3405, dated January 8, 1973, and drawn for $35,000 to the White Plains Nursing Home, does not appear in the cash disbursements book. Why not?

20. The last check written in normal sequence in 1973 was check No. 4746, according to the cash disbursements journal. Check No. 5098, written on December 21, 1973, and clearing on December 24, was to Bernard Bergman for $150,000. Why was a check so far out of sequence used?

A bank advice shows the $150,000 payment resulted in a December 24 overdraft of about $48,000. The general ledger shows that on December 31, the bank account in question still had an overdraft of about $20,000. Did Towers purposely write the $150,000 check to show its year-end cash in an overdraft position?

QUESTIONS FOR MARK LOREN BY SENATOR PERCY

1. Are you a licensed nursing home administrator? When did you take the New York State examination for this license?

2. What is your training in this field? When, where, and in what field did you obtain your education?

3. Briefly trace for us your professional involvement in the field of long-term care.

4. Do you now, or have you ever, owned any nursing homes—realty or operations? Do you hold any mortgages on nursing homes?

5. For how long and in what capacity have you known Bernard Bergman?

6. What professional services did you perform for the Park Crescent Nursing Home in exchange for $833 per month in salary?

7. Have you ever loaned any money to Bernard Bergman? Anne Weiss Bergman? Any member of the Bergman family? Towers Nursing Home?

8. Why did you loan $159,950 to Towers in 1972? Why did the White Plains Nursing Home, which you own, loan $35,000 to Towers? Was any of this money repaid? With what interest?

9. Between August 1972 and September 1974, you received at least five checks totaling $35,000 from Sam Dachowitz. Why did Mr. Dachowitz make these payments to you?

10. The Towers, in 1973, purchased an automobile from Chrysler Corp., apparently for your use. Is this correct? Did you pay taxes on the value of the car?

Senator Moss. This committee, of course, has run into a roadblock again this morning, similar to what occurred on February 4, when Dr. Bergman did not respond to the subpena, and this will require, of course, restructuring our inquiry.

The point I want to make clear is that this is not going to stop our efforts to find the facts concerning this particular situation in New York, or elsewhere.

One thing I did want to emphasize was that we are not just concentrating on New York, or on a particular nursing home operator. As happens in hearings generally, you have to come down to individual cases to spell out the facts in order to decide what the legislative procedure should be. Now, if indeed this operator, or other operators whom we investigate, are able to amass a large amount of money from care of the elderly, and to do it by depressing the kinds of services they give those elderly, that is something we should know about. That is something we should try to find a legislative answer to in order to direct the administrative branch of the Federal Government and of the State governments to deal with this situation.

The policing of nursing homes rests with the States, where the police power is—the inspection, licensing, fire regulations, and things of that sort must be done by the State. We work in close cooperation with the State, but a great deal of money—half of it anyway—is supplied by the Federal Government, and for that reason we have a very deep interest in it. The Congress wants to know that that money is being properly expended, and that people, when they are old and ill, are receiving the kind of care that they are entitled to in this country. As our population trends toward older people with people living longer, the problem becomes more acute, so we must keep after it.

Now, we intend to have—there are two more witnesses scheduled that we will not hear today. We are going to hear them as soon as we can find the time. Peter Franklin, Special Assistant to Secretary Weinberger of HEW, attended this morning, and Dr. Faye Abdellah, director of the Office of Nursing Home Affairs, is also here. I want to thank them for coming, but ask them if we could arrange another time when we could sit and hear them.

Senator Percy?

Senator PERCY. Mr. Chairman, I would like to point out again, just as you and I have tried every time we have held hearings any place in the country, that obviously, in the conduct of this kind of investigation we must devote our time to the abuses in the system.

This is not to say that there are not extraordinarily good nursing homes. This is not to say that there are not very dedicated people running these nursing homes, both in the proprietary side and in the nonproprietary or nonprofit side of it.

I was very distressed when an executive of the American Association of Homes for the Aging, an outstanding organization, representing the nonprofit homes, indicated that when a member of that organization appeared with a badge on, that a group of people, as a result of the hearings in New York, made disparaging remarks about the type of operation the members of the association were engaged in. It would be extraordinarily unfortunate that, because of the adverse publicity, we took the focus away from extraordinarily good homes. I have been in many of them. I think all of us have been in many of them. But it is to point out the abuses in the system, and really to ask the basic question: How can we manage and run this kind of an operation involving the incentive that is there throughout our private sector and still have it consistent with good care? We are earnestly seeking the answer. Probably the biggest single barrier to our moving ahead with any degree of confidence into a massive national health service program, which I believe, is essential and necessary, is that we must learn how to do it.

Other countries have learned how to do it without this kind of problem, and we certainly wish to continue to focus on the good operations that are being carried on, as well as those that appear, at least, to be filled with abuse.

Thank you.

Senator Moss. Thank you, Senator Percy. It was thoughtful of you to bring that up, and I certainly concur with what you say.

In fact, I think I got in a little trouble one time because I criticized a book and said that all it talked about was the abuses, and never

indicated that there were any good nursing homes at all—there are, and there can be more. That is the objective of this committee, to fashion legislation so that we can be sure that there are good nursing homes and that a person does not run a risk of being abused, getting poor care, or being ripped off by going to a nursing home.

It is an institution that has come to our society, and it will be here, and we must make sure that it is operated in a way that is humane, sanitary, and careful attention given to the elderly people who must go there because of their illness and their age. It ought to be a place of haven—not one of warehousing elderly people, waiting for them to die.

Senator PERCY. I think your comment, though, was a very useful comment, because I know when I prepared that section of my own book, because of that comment, I was very careful to give equal time to good nursing homes, as well as those we found considerable fault with.

Senator Moss. We are now in recess subject to call of the Chair.

[Whereupon, the hearings were recessed at 10:45 a.m.]

APPENDIXES

Appendix 1

QUESTIONS RAISED BY GENERAL ACCOUNTING OFFICE ANALYSIS OF NEW YORK NURSING HOMES, FEBRUARY 1, 1975

ITEM 1. VERRAZANO NURSING HOME, STATEN ISLAND, N.Y.

(Records not received: bank statements; canceled checks; deposit slips; check register; purchase journals; balance sheets; income statement; loan agreements.)

QUESTIONS FROM THE GENERAL LEDGER AND THE CASH DISBURSEMENTS JOURNAL

1. During 1973, loans and exchanges are recorded in the general ledger as follows:

Date	Amount	Payee
Jan. 1, 1973	$50,000.00	Department of S. S.
Jan. 31, 1973	750.10	Hartman.
Feb. 28, 1973	42.40	Hartman.
Sept. 30, 1973	1,585.72	Hartman.
Oct. 31, 1973	868.36	Hartman.

2. The Verrazano Nursing Home leases property, parking lot, furniture and equipment from Verrazano Associates for $220,800. Verrazano Associates is located adjacent to the nursing home. Is there any relationship between the principals of this nursing home and this real estate company?

3. Each month, Verrazano Nursing Home pays $2678 to Riverpar Realty Co. for a real estate tax escrow account. Dr. Bernard Bergman and Stanley Bergman are listed on the letterhead of Riverpar Realty. Why is money for real estate taxes put into this escrow account and what connection do the Bergmans have to it?

4. Otto Weingarten, a relative of Israel Weingarten (a partner in Verrazano Nursing Home) sold an automobile to the nursing home on December 28, 1973. The car was a 1970 Buick Electra and the price paid was $2,000. Was this an arm's-length transaction? Why did the home buy this car? Were they reimbursed by medicaid? For what use was the car purchased?

ITEM 2. OXFORD NURSING HOME, BROOKLYN, N.Y.

(Records not supplied: Check register; canceled checks; bank deposit slips; bank statements; loan agreements; balance sheet; income statement.)

COMPARISON OF OXFORD'S GENERAL LEDGER WITH THE HE–2

Total expenditures on HE–2 exceed expenditures reflected in company's books by $101,386—the excess amount. The additional expenditures that do not appear to be charged to the company's records, are composed of $12,000—for value of service rendered by operator and $89,386—for retroactive salary increases for 1973. In December 1973, the payroll account included retroactive pay adjustments for employees and thus was reflected in company's books. We do not have

Oxford Nursing Home records for calendar year 1974 and could not determine if a further adjustment was made for the retroactive payroll reported on the HE–2.

Is there any evidence to support the computation of $89,386 for retroactive pay adjustment?

Did the adjustments to payroll account in December include all or part of this $89,386 pay adjustment?

If any or part of the adjustment of $89,386 for retroactive pay was included in December's payroll account, expenditures reflected on HE–2 were overstated medicaid reimbursements would probably also be overstated.

On Oxford's 1973 HE–2, the loan and exchange balance had a debit of $11,996. The year-end balances in the general ledgers for the following accounts are:

Loans and exchanges	$11,284.90
Patients allowance	710.98
Total	11,995.88

In filing the HE–2, Oxford reported, as the balance in the loan and exchange, the combined balances of the general ledger accounts for patients allowance and loan and exchange.

Why were these two general ledger accounts commingled to arrive at the loan and exchange balance on the HE–2?

In this case, aren't medicaid funds commingled with loan and exchange transactions?

QUESTIONS FROM REVIEWING THE GENERAL LEDGER AND CASE DISBURSEMENTS JOURNAL

1. The Oxford Nursing Home paid Ellen McDew $12,915.15 during 1973 professional services rendered as a physical therapist.

She was also paid as a physical therapist by the Carlton Nursing Home during 1973. Oxford and Carlton are located relatively close to each other. On numerous occasions Ellen McDew appears in the records of these homes as having worked at both homes on the same day.

Is Ellen McDew employed on a full- or part-time basis by the Oxford Nursing Home?

What are her responsibilities in the physical rehabilitation program?

Does she have a physical rehabilitation staff working for her? If so, what are their qualifications?

How many patients are treated each day in the program?

Does this type of program require constant supervision?

The point of these questions is that if Ellen McDew is employed part time at both homes on the same day, how effective can she and the program be.

2. Per the general ledger, cash-special account payments were made to the Soxford Realty Co. for rent in monthly amounts of $10,835 for the period January 1969 through August 1972. September 1972 through May 1973 rent was paid to 148 Oxford Realty in monthly disbursements of $20,835. Beginning June 1973, payments to Oxford Realty were referenced to the general ledger as follows:

Rent	$18,750
Leasing expenses	2,084
Total	20,834

Are Soxford Realty and 148 Oxford Realty the same rental companies?

Why did the rental charge increase by $10,000 ($20,835—10,835)?

Explain the term "leasing expense." How does it differ from rent payment?

Does or did Mr. Bergman have a financial interest in either realty company?

Is Mr. Bergman related to Moses Braunstein, the owner of 148 Oxford Realty Co.?

3. During 1969, Ms. Anne Weiss received cash disbursements of $117,500 debited to the drawing account. In addition, she received a $30,000 loan, debited to the "Due for partners" account.

What were Ms. Weiss' duties as a nursing home administrator?

Why did Ms. Weiss withdraw $117,500?

What was the purpose of the $30,000 loan?

Were the disbursements to Anne Weiss charged to medicaid?

4. During 1973 the following payments were made to the below listed vendors:

Adult care services	$24,040
Emil Asch, Inc	18,262
Beverly Brands, Inc	17,057
E & L Foods	25,144
Sidney's L.E. & S. Food Products	60,198
Edie McDew	12,916
Premier-Essex Linen Service	18,665
Royal Hand Laundry	42,600
H. Schaefer	19,142

Does Mr. Bergman have a financial interest in any of the above vendors?

Is Mr. Bergman related to persons or vendors mentioned above?

5. Oxford Nursing Home made two loans to itself during 1973 for the amount totaling $19,500. The loans were credited to a cash-special account and debited to the loan and exchange account. We haven't seen copies of any checks.

For what purpose would Oxford Nursing Home make a loan to itself?

Who actually received the money?

How does Oxford assure itself that it is getting paid back these loans?

6. In their 1973 general ledger, Oxford Nursing Home debited the loan and exchange account for $10,000. The date of entry was December 31, 1973 and the loan was paid to Willoughby Nursing Home.

Willoughby Nursing Home recorded, in December 1973, the receipt of the loan in their cash receipts journal. During the same month, a cash disbursement of $10,000 was made payable to the Oxford Nursing Home.

We don't have any 1974 accounting records of Oxford Nursing Home.

What was the purpose of the loan?

We would like to see evidence, in Oxford's 1974 accounting records, for the receipt of the loan.

Why would Oxford Nursing Home make a $10,000 loan to Willoughby Nursing Home when they already had a deficit in their cash account.

The HE-2 for 1973 showed that Oxford Nursing Home had a deficit in their cash accounts of $13,233.

7. In their 1973 general ledger, Oxford lists an account, "Health care salary employee." The only entries in this account are credits, which total $3,540. What is the nature of this account?

Are these funds used to offset expenses incurred by the nursing home? If so, to which account were they offset?

The general ledger includes an account, "Cash Special Account," with a December 31, 1973 balance of $6,000. The deposits, checks drawn on the main cash account totaled $390,000. Significant credits include rent to 148 Oxford Realty ($250,226), real estate taxes ($35,208), and loans and exchanges ($29,500). In addition, L. Goldberg, assistant administrator, and S. Bergman, comptroller, were each paid $500 monthly.

What purpose does this special account serve?

Why is a $1,500 contribution to the UJA Israel Emergency Fund included in advertising and promotion, and included in the HE-2?

Included in the expeditures are eight monthly payments (May-December, $211.56) totaling $1,692 to Bankers Trust, charged to auto expense, and carried forward to the HE-2. The HE-2 does not indicate ownership of any automobiles.

Are the Bankers Trust payments for auto note repayments?

If so, is it correct accounting to charge an expense account for the payments?

If the nursing home owns an automobile, why is it not listed on the HE-2?

Why is there a charge for $671 to auto insurance in the special account?

ITEM 3. RESORT NURSING HOME, ROCKAWAY, N.Y.

(Records not received: Check register; canceled checks; bank statements; deposit slips; balance sheet; income statement.)

COMMENTS

1. The Resort Nursing Home did not file an HE-2 with the New York State Department of Health.

2. There was no loan and exchange account in this home's general ledgers, nor did we see any evidence of loan activity in the cash disbursements journal.

ITEM 4. BELT PARKWAY NURSING HOME, BROOKLYN, N.Y.

Records not supplied by the operator: Detailed cash receipts journal; canceled checks; deposit slips; bank statements; balance sheet; income statement; loan agreements.

LEASE

The original owner of the property is the Marel Holding Co. Benzion Frankel is president of Marel. In May 1970 Marel leased the property for $36,000 to a partnership (S. Leifer, I. Rabinovitch, B. Frankel, A. Horowitz, and J. Frankel) of which B. Frankel is a member. In May 1970 the partnership leased the home back to B. Frankel (apparently owner or principal officer or partner of Belt Parkway). Annual rental is $36,000.

Is this lease an arm's-length transaction?

Such an interlocking ownership could inflate the rent for this home charged to medicaid. Moreover there is a question as to whether the $36,000 rent expense is a bona fide expense and properly chargeable to medicaid as the HE–2 shows.

QUESTIONS FROM THE 1973 DISBURSEMENTS JOURNAL

1. Each month the receipts from a "patients allowance account" (ranging from $2,600 to $3,545 per month) are disbursed by two checks, of approximately equal amounts, payable to "cash." What is the disposition of these funds? There is no reference in the books as to how these funds are being used. We were unable to determine whether these funds were being used on behalf of patients.

2. Regular monthly disbursements (ranging from $1,240 to $12,300) to M. Feinstein, Fuga Nunz, and the Ocean Parkway Nursing Home are posted as "exchanges." What is the nature and purpose of these exchanges?

Where are the loan or exchange agreements supporting these transactions? (We saw no formal evidence of indebtedness.)

Are these exchanges/loans related to the operation of the nursing home? The interest on these loans is being charged to medicaid.

We saw no formal evidence of indebtedness—are these bona fide loans?

3. Disbursements to, as drawing, to persons other than the owner (Benzion Frankel): M. Strobel, A. Frankel, and Y. Frankel (ranging from $350 to $1,000 and approximating $30,000 a year total), were charged to the "partners' drawing account." Why are payments being made to these people?

Why are these payments being charged to the Partners' Drawings Account? Where is the money coming from?

4. Four consecutively numbered checks totaling $12,300 were written to Rabbi Silver as an exchange payment in March 1973. They appear to have been written on the same day, but without the check register we cannot tell. Why was this payment made with four checks?

What was this exchange payment for? Was this exchange related to the operation of the nursing home?

5. Each month, payroll taxes are paid through the cash disbursements journal. A check is also drawn from the cash disbursements journal to cover the gross amount of the months' payroll.

(a) Is medicaid being charged twice for the payroll tax expense?

(b) What happens to the cash accumulating in the payroll account?

ITEM 5. CARLTON NURSING HOME, BROOKLYN, N.Y.

Records not received: Check register; canceled checks; deposit slips; bank statements; detailed subsiding accounts payable ledgers; welfare allowance records.

QUESTIONS FROM REVIEWING THE HE–2

The 1973 HE–2 states that no non-arms-length transactions during the year. However the terms of the January 1972 lease modification seem to indicate that Carlton Nursing Home leases the property from Toncarl Holding Co., 16 Court Street, Brooklyn, N.Y. One of the partners in Carlton is Gwendolyn Strauss (per the lease) or J. Strauss (per the HE–2) whose address is listed as 16 Court Street, Brooklyn. It appears that the monthly rent checks ($13,000) are paid to the Central State Bank, although the entry in the accounts payable ledger is to Carlton Ltd.

In view of the similarity of the names of lessor and lessee, the same address of

lessor and one of the partners, and the rent payment being made to a bank, we question whether indeed this is an arms-length transaction.

The effect of a non-arms-length transaction may be to inflate rentals or result in reimbursement for rent paid to oneself.

QUESTIONS FROM THE CASH DISBURSEMENTS JOURNAL

The 1973 general ledger indicates a $62,755.82 debit to income, all of which occurs in an account entitled Welfare allowances. The accounts seems to represent payments to patients of monies paid to them by the department of social service through the nursing home. We analyzed 4 months disbursements charged to this account and found that 86 percent ($15,672) of the total disbursement ($18,217) was represented by checks, as large as $2,500, written to cash.

Given lump sum check written to cash, what controls exist to assure that patients are receiving their allowances?

There is a good possibility that Federal funds are involved in these accounts either via medicaid or city welfare, even though there is no direct claim for these expenses on the HE–2P.

ITEM 6. OCEAN PARKWAY NURSING HOME, BROOKLYN, N.Y.

Records not received: Check register; canceled checks; bank statements; deposit slips.

QUESTIONS FROM THE CASH DISBURSEMENTS JOURNAL

1. During 1973 the cash disbursements journal shows payments to Adult Care Services for about $5,500 and to Eastern Paper Co. for about $5,000. Adult Care Services appear in the books of the Carlton and Verrazano Nursing Homes. Eastern Paper appears in the books of Park Crescent Nursing Home. Do you own or do you have any financial interest in these vendors?

2. In the cash disbursements book there are payments to "exchange" in amounts totaling $38,000. These amounts are debited to a general ledger account called "exchange". We could not find any exchange account in the general ledger.

What is the nature of these disbursements? Why is there no exchange account in the general ledger?

3. In 1973 $11,075 in checks were written to Cong. Bnai Sol. The checks ranged from $875 to $2,100. In these transactions a debit was posted to the "KS" account in the general ledger (account 41). What were these payments for? What is acount "KS"?

Normally, monthly payments to Cong. Bnai Sol are posted to the KS account. Normally, monthly payments of $2,000 are made to Clara Frankel (the executive director) and $1,000 to Muriel Silverstein (the financial consultant). They are posted to the CF and the MS accounts, respectively. (KS, CF, and MS are expense accounts within the Direct Expense General Ledger Account 41.)

In April 1973 in addition to the normal payments to Cong. Bnai Sol, CF, and MS, additional payments of $3,000 each were made to Cong. Bnai Sol, CF, and MS. These payments were posted to the DA General Ledger Account 26.

What are these payments for? What is the DA general ledger account? Why were these payments posted to the DA account and not the KS, CF, and MS accounts?

QUESTIONS FROM THE HE–2

The 1973 balances and wages in the general ledger and those reported on the HE–2 are different.

	General ledger	HE–2
Payroll	$463,668	$546,132
Executive director	24,000	6,000
Financial director	12,000	3 000
Total	499,668	555,132

Salaries and wages reported on the HE–2 appear to be $55,464 higher than those recorded in the general ledger. These could result in higher medicaid reimbursement costs. Can you explain this $55,000 difference?

Appendix 2

BACKGROUND INFORMATION PREPARED BY COMMITTEE STAFF

ITEM 1. INFORMATION SHEET ON DR. BERNARD BERGMAN

Dr. Bergman is 62 years old, an orthodox rabbi without a congregation, and a prominent nursing home operator. He is to be questioned concerning his alleged operation of a nationwide nursing home syndicate and about accusations alleging that he and other members of his family have participated in a massive scheme to defraud the government by filing false claims for medicaid payments.

Dr. Bergman has admitted, in a letter to Senator Moss dated February 3, 1975, interest in the following nursing home operations in New York State:

Bergman family ownership of operation and realty: Park Crescent Nursing Home; Genesee Nursing Home.

Bergman family ownership of operation and mortgage: Oxford Nursing Home.

Bergman family ownership of operation only: Towers Nursing Home (now closed).

Bergman family ownership of or interest in realty only: Laconia Nursing Home; Willoughby Nursing Home; Verrazano Nursing Home; Golden Gate Care Center; Carlton Nursing Home; Danube Nursing Home; Riverside Nursing Home.

Bergman family interest in mortgage or receivable: Mayflower Nursing Home; White Plains Nursing Home; Rego Park Nursing Home.

The subcommittee also has information received from the Securities and Exchange Commission detailing Dr. Bergman's interest in Medic-Home Enterprises, Inc. Medic-Home Enterprises, Inc., is a publicly registered corporation of which, until approximately 1 month ago, Dr. Bergman was chairman of the board. Since 1971, 100 percent of the business of Medic-Home Enterprises, Inc., has been in the owning and leasing, to independent operators, of health care facilities which provide nursing and rehabilitative care, primarily to elderly persons. While Dr. Bergman has resigned from the chairmanship of the board of directors, he still retains a 30.1 percent interest in the voting shares of the corporation.

The SEC lists Medic-Home Enterprises as having interests in nursing homes in the following states:

Virginia	7
Colorado	2
New Jersey	1
Florida	12
Ohio	1
North Carolina	7
Texas	1
Total	31

Other Florida Nursing Home Interests

North Shore Nursing Home—Miami: Owned by Seventh Avenue Nursing Home Corp. (Bergman is vice-president).

Palms Convalescent Home—Miami: Owned by Miami Nursing Home Corp. (Bergman is vice-president).

Other Related Connecticut Interests

Pond Point Skilled Nursing Home; Breakers Convalescent Home: Both are owned by corporations whose president is Ben Zion Frankel who is Bergman's brother-in-law.

Greenwich Laurelton Nursing and Convalescent Home: President of corporate owner is Emanuel Birnbaum (operates Genesee Nursing Home in Utica, N.Y., which was partly owned by Bergman until last October).

Colchester Convalescent; Highland Acres Extend-a-Care Center; Hilldale Extend-a-Care Center; Seaside Convalescent; Meriden Nursing Home; Wyndover Convalescent; Chain of homes owned by Joseph Straus (Brooklyn). Straus was attorney for Carlton Nursing Home (N.Y.) where Bergman has realty interest. Also, Mrs. Straus was listed as partner of Mrs. Bergman in the Stuyvesant Nursing Home in Manhattan (now closed).

New Jersey Interests

Garden Nursing Home—Phillipsburg: Operator-licensee, Bernard Guttman. Stockholders: Bernard Guttman, 98 percent, president; Jeanette Guttman (wife), 1 percent, vice president; Isak Leifer, 1 percent. Forms on file with State of New Jersey indicate Guttman is related to Anne Weiss and Clara Frankel. His wife is Bernard Bergman's half-sister. Guttman was assistant administrator at Towers Nursing Home from 1958–60. The property and structure are owned by Phillipseaston Nursing Home, Inc. Bernard Bergman owns 90 percent of Phillipseaston and Bernard Guttman owns 10 percent. Garden signed a lease with Phillipseaston on December 10, 1960.

Lakeview Nursing Home; Lakeview Convalescent Center—Wayne: Owner, Anne Weiss, owns 100 percent of the stock. Operator, Richard F. Grosso. Officers: Richard F. Grosso, president; Anne Weiss, vice president and treasurer; Rose L. Passavanti, Oakland. Records show that on September 1, 1968, the current operation was leased from Kennedy Towers to Lakeview Convalescent Center, Inc. We have made no determination of the ownership of Kennedy Towers.

Lizmora-Wedgewood Nursing Home—Elizabeth: In operation now as Wedgewood Nursing Home. R. Buckelew is listed as owner-operator. However, it has been learned through the New Jersey Department of Health that the property and facility are owned by Elizabeth Nursing Home, Inc. The last transaction found on file in Elizabeth was a lease signed on November 18, 1969 between Elizabeth Nursing Home, as landlord, and Towne Nursing Center, as tenant. Towne is Buckelew's outfit and Bernard Bergman is listed as president of Elizabeth Nursing Home, Inc. Off the record information from State officials indicate that the Elizabeth Nursing Home operation was of such poor quality that the operators were told to divest themselves. It was at this point, apparently, that there was an overlap of operations between the Bergman company and Buckelew.

Liberty House—Jersey City: Property was purchased in 1966 by Washington Holding Co. of 250 West 57 St., New York City, the address used by most of Bernard Bergman's front companies. The nursing homes was built in 1969. In 1970 it was run by Medic-Home Developers, Inc., and in August 1974 it was mortgaged by Medic-Home Enterprises of 1700 Broadway, New York City. Both firms have involvement with Bernard Bergman. Morris Schmidman is listed as president of Medic-Home Developers. Also involved in the home, at one time, was Howard Trachtenberg of Bayonne. It is believed he was administrator.

ITEM 2. MAJOR ISSUES IN NEW YORK NURSING HOME CONTROVERSY

"Cost-Plus" Reimbursement

Federal law requires that all States go to a "cost related" reimbursement system no later than July 1, 1976. Because of this requirement, the subcommittee is interested in examining New York's "weighted-average cost-plus" system of reimbursement in an effort to evaluate its effectiveness and to determine what, if any, safeguards should be recommended to reduce the possibility of medicaid fraud in nursing home operation.

Responsibility for Inspection

The responsibility for inspecting nursing home operations was transferred from New York City to the State in 1973. Allegations have been made which

suggest that certain politically well-connected operators have consistently been able to short-circuit this investigation process, thus enabling noncomplying nursing homes to continue to collect Federal and State medicaid payments. Within recent weeks city health officials have attempted to reclaim authority for inspections.

"PADDING" OF MEDICAID REIMBURSEMENT

Allegations have been raised that certain nursing home owners or operators have been involved in attempts to "pad" their medicaid payments by claiming reimbursements for nonlegitimate expenses such as: liquor, limousine service, college expenses, fur coats, etc. The subcommittee is interested in determining how such illegal claims could have escaped detection and how they can be prevented in future instances. In New York, nursing home books are generally accepted as valid upon certification of a C.P.A.

ALLEGATIONS OF POLITICAL INFLUENCE

There have been numerous allegations of a continuing pattern of political influence which has been used to benefit certain well connected nursing home operators. It has been suggested that use of political influence has effectively freed certain owners and operators from meeting State and Federal regulations for receipt of medicaid payments; thereby allowing subhuman conditions to persist in many of the State's nursing home facilities.

DISGUISED AND MULTI-STATE OWNERSHIP

There have been repeated allegations that several nursing home operators have been involved in complex nursing home syndicates involving not only New York, but many other States. These allegations suggest that in many cases the ownership is disguised. The subcommittee would like to determine whether or not these alleged syndicates exist and what their effect may be on the quality and cost of care.

SUIT AGAINST NEW YORK TIMES, ANDREW STEIN, AND FORMER EMPLOYEE OF THE STATE WELFARE INSPECTOR GENERAL

Dr. Bergman filed suit against John L. Hess of the *New York Times;* Andrew Stein, a State assemblyman and chairman of the temporary State commission on living costs and the economy; and William D. Cabin, a former employee of the State welfare inspector general's office. In this suit, Dr. Bergman alleged that the above named individuals conspired: (1) to deny him his constitutional rights by inflaming public opinion against him, (2) to force the prosecution of Dr. Bergman irrespective of the underlying merits of the claims, and (3) to prejudice judges, as well as potential petit and grand jurors who might be called upon to consider any such charges. It is also alleged that Stein and Cabin and others conspired to deny Dr. Bergman his right of privacy; the right to be secure in his person, papers, and effects from unreasonable searches and seizures; the right of association; the right to be represented by elected and appointed public officials of the State of New York; and the right to counsel.

Dr. Bergman has also, through his attorney, alleged that the subcommittee appears to have joined in the alleged conspiracy by the above named parties to further deprive him of his constitutional rights and hold him up to public scandal and humiliation via public hearings beng conducted by the subcommittee.

ITEM 3. INFORMATION ABOUT CURRENT INVESTIGATIONS: NEW YORK NURSING HOMES

TEMPORARY COMMISSION ON LIVING COSTS AND THE ECONOMY

This commission, chaired by Assemblyman Andrew Stein, has been conducting serious investigations into possible nursing home fraud in New York State. Thus far, the commission has released a substantial volume of information which allegedly demonstrates a vast array of abuses in the nursing home industry in New York. These allegations run the gamut from inhuman treatment and unhealthful living conditions to medicaid fraud and other unethical or illegal finan-

cial manipulations. Governor Hugh Carey has rebuffed appeals for the continuation of the commission which is scheduled to expire on March 31, 1975.

Federal Grand Juries

There has been at least one Federal grand jury empaneled to examine possible criminal violations arising from the nursing home investigations in New York State.

Moreland Act Commission (New York State)

Governor Carey has appointed Morris B. Abram to head a Moreland Act Commission to investigate possible abuses in nursing home operations and to propose any needed reform to prevent future abuses. Mr. Abram is a former president of Brandeis University and a former prosecutor at the Nuremberg trials after World War II.

Special Prosecutor (New York State)

Governor Carey has also appointed Charles J. Hynes as special prosecutor to head a criminal investigation into alleged fraudulent and abusive practices in the industry. Mr. Hynes had been first assistant district attorney in Brooklyn prior to being appointed to the post of special prosecutor.

ITEM 4. RELATIONSHIP OF NEW YORK PROBLEMS TO SUBCOMMITTEE ON LONG-TERM CARE FINDINGS IN "NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY"

1. See pages 77–91, *Introductory Report*, for discussion of shortcomings of inspection system.
2. See pages 24–26, *Introductory Report*, for extent of public tax dollar going to nursing homes.
3. See pages 38–40, *Introductory Report*, for general discussion of medicaid and nursing homes.
4. See pages 120–132, *Introductory Report*, for innovative State legislation for improving enforcement authority.
5. See pages 111–112, *Introductory Report*, for recommendations for the improvement of inspection and enforcement activities.

Appendix 3

RESPONSE TO POSSIBLE OBJECTIONS BY A WITNESS, PREPARED BY THE AMERICAN LAW DIVISION, LIBRARY OF CONGRESS, FOR THE SPECIAL COMMITTEE ON AGING

Response to objections that may be made by a witness before the Senate Special Committee on Aging with particular regard to the appearance of Dr. Bernard Bergman before the committee on February 19, 1975

This is in response to your request for a memorandum on the above subject.

S. Res. 267 contains ample authorization for the special committee to investigate the subject of nursing homes. Section 3 of that resolution authorizes the special committee to hold hearings and subpena witnesses and documents in furtherance of its investigation.

Since Congress has already enacted statutes relating to the health care of the elderly such as the medicaid program and since Congress undoubtedly possesses the constitutional authority to regulate additional aspects of the nursing home industry, it is apparent that the special committee is acting with a valid legislative purpose in seeking the testimony of Dr. Bergman, the owner of many nursing homes throughout the Nation. *Barenblatt* v. *United States*, 360 U.S. 109 (1959). In the event Dr. Bergman does not appear before the special committee on February 19, 1975, pursuant to the subpena the special committee ordered on February 6, 1975, and duly served upon him by a U.S. marshal, then Dr. Bergman would be liable for a contempt of Congress violation under 2 U.S.C. 192.

If Dr. Bergman does appear before the special committee, his counsel has indicated that he would raise objections to his testifying. Many of these possible objections discussed in counsel's letters to the subcommittee have been mooted by the issuance of a new subpena by the full special committee.

When Dr. Bergman appears before the special committee on February 19, 1975, it is important that the hearing be conducted under the auspices of the full committee as provided by the subpena. As I indicated in a telephone conversation with Mr. Halamandaris, it is not essential that Senator Church actually act as chairman of the committee. It would be sufficient for him to designate a new chairman for the purpose of this particular committee hearing. This designation could be accomplished by letter or by Senator Church's personal designation of a chairman at the committee hearing itself.

Once the special committee hearing is called to order by its chairman, there may be a objection of a lack of a quorum. S. Res. 267, section 2(b), permits the special committee to set its own quorum for the purpose of taking testmiony. Rule 3 of the special committee states that "one member shall constitute a quorum for the receipt of evidence, the swearing of witnesses, and the taking of testimony at hearings." The presence of a quorum allows the committee to rule on all objections to the production of evidence pursuant to a subpena. *Flaxner* v. *United States*, 235 F.2d 821 (D.C. Cir. 1956), *remanded on other grounds*, 354 U.S. 929 (1957).

There are various other objections that counsel for Dr. Bergman might raise.

Declination to Appear Because of Alleged Violation of First Amendment Rights

The argument that appearance of Dr. Bergman would involve a denial of his first amendment guarantees of freedom of speech and association cannot be sustained. The allegation is premised on the thesis that no petition, request, or application that might be filed by Dr. Bergman with a public agency in New York or elsewhere respecting his nursing home activities would be treated on its merit because the purpose of the hearings in New York had been accusatory.

Rights protected by the first amendment have frequently been asserted as a lawful excuse for refusing to answer questions asked by congressional committees. The position of the Supreme Court seems to be that those rights are not an absolute bar to a congressional investigation but that the courts must weigh them against the legislative need for information to make sure that they are not needlessly sacrificed.

In *Barenblatt* v. *United States*, 360 U.S. 109, 126 (1959), the Court upheld the conviction of a witness for refusing to answer questions concerning his membership in the Communist party, over the objection that the inquiry violated his rights under the first amendment. It declared:

"Undeniably, the first amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the first amendment, unlike a proper claim of the privilege against self-incrimination under the fifth amendment, do not afford a witness the right to resist inquiry in all circumstances. Where first amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interest at stake in the particular circumstances shown . . .

"The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose. See *Watkins* v. *United States*, supra, at 198.

"That Congress has wide power to legislate in the field of Communist activity in this country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very committee whose actions have been drawn in question here. . . ."

In support of their claim that their rights under the first amendment would be infringed if they were compelled to testify before a congressional committee, witnesses have sometimes argued that its real purpose was not to obtain information in aid of legislation, but to expose and punish the witness. The Supreme Court has repeatedly held that the latter objectives are unlawful but that "so long as Congress acts in pursuance of its constitutional power, the judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt* v. *United States*, 360 U.S. 109, 132 (1959); *Wilkinson* v. *United States*, 365 U.S. 399, 412 (1961); *Watkins* v. *United States* 354 U.S. 178, 200 (1957).

If a legitimate purpose is present in a congressional committee investigation, alleged ulterior motives alone on the part of committee members of exposure, will not vitiate an investigation. (*Watkins* v. *United States*, 354 U.S. 178, 200 (1957); *Wilkinson* v. *United States*, 365 U.S. 399 (1961).)

When the subject of a congressional investigation is a lawful one, a legitimate legislative purpose is presumed and cannot be rebutted by impugning the motives of individual members of an investigating committee (*United States* v. *Kamin*, (D.C. Mass.) 136 F. Supp. 791 (1956).

Declination To Appear Because of Alleged Violation of Fourth Amendment Rights

The argument that appearance by Dr. Bergman would involve a denial of his fourth amendment right to privacy and right to be secure from unreasonable searches and seizures, cannot be sustained. The allegation is premised on the argument that the subcommittee was attempting to pry into and expose the private affairs and financial condition of himself and his family. The decision in *Bernard Bergman, Anne Weiss, et al* v. *Senate Special Committee on Aging, et al.*, (U.S. District Court, Southern District of New York, No. 75 Civ. 543, February 6, 1975) amply disposes of this charge.

The opinion sustained that part of the subcommittee subpena served on the American Bank & Trust Co., in New York City, seeking financial records of Dr. Bergman and his family, insofar as the records and documents related to corporate and nursing home activities and dealings of the doctor and his family.

The opinion sustained the creation of the committee and subcommittee, the legislative purpose in the congressional authorization, and the responsibility to investigate the nursing home industry. Consequently, paraphrasing *Barenblatt* v. *United States*, 360 U.S. 109, 127 (1959), there was a valid legislative

purpose in the investigation so that Congress could constitutionally require an individual to disclose his political relationships or other private affairs in relation to such a purpose. In order to make express powers effective, Congress may inquire into private affairs and compel disclosures.

DECLINATION TO APPEAR BECAUSE OF ALLEGED VIOLATION OF FIFTH AMENDMENT RIGHTS

The argument that appearance by Dr. Bergman would involve a denial of his fifth amendment right not to give testimony which might be used as evidence in a criminal prosecution against him, cannot be sustained. The allegation is based upon the thesis of pending grand jury investigations in New York and the premise that Dr. Bergman's testimony could have an injurious effect in a subsequent criminal prosecution.

A witness may, of course, object to a question by a committee, even a pertinent one, on grounds of self-incrimination and not be convicted of contempt (Cf. *Adams* v. *Maryland*, 347 U.S. 179 (1954)). The fifth amendment provides a constitutional privilege and in the right circumstances may provide justification for a refusal to answer (*United States* v. *Shelton*, (D.C., D.C.) 148 F. Supp. 926, affirmed 280 F. 2d 701, reversed on other grounds, 369 U.S. 749 (1957).

In *United States* v. *Jaffee*, (D.C., D.C.) 98 F. Supp. 191 (1951), the court set forth a reasonable rule for the protective use of the privilege:

"Privilege . . . may not be used as a subterfuge. . . . The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be convicted of a criminal offense against the United States or (a State) or which would lead to a prosecution of him for such offense, or which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution therefor.

"A witness is not bound to explain why answers to apparently innocent questions might tend to incriminate him when circumstances render such reasonable apprehension evident.

"Once it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions upon the ground that such answers would tend to incriminate him.

"Newspaper articles and comments, while not admissible as evidence as proof of facts therein, are admissible to show comments which may have reasonably caused apprehension . . . that he is in danger of being prosecuted for an offense."

The privilege may not, of course, be used by a witness as a shield behind which he can refuse to answer any questions (supra).

If an investigating committee is aware of a pending grand jury proceeding involving a committee witness, it is faced with a policy decision.

It may go ahead with the hearing publicly (during which the witness may utilize his fifth amendment privilege correctly or incorrectly); or

It may hold the hearing in executive session and not release its minutes until after the grand jury investigation and trial; or

It may utilize 18 U.S.C. 6002, 6005, under which, if a witness exercises his fifth amendment privilege, the committee, by a two-thirds vote, may request from and receive from the U.S. district court an immunity order directing the witness to testify and granting him immunity from its use in any subsequent criminal proceeding, either Federal or State, against him.

Cited by Mr. Lewis is *Delaney* v. *United States*, 199 F. 2d 207 (1st Cir. 1952), a decision which, however, differentiated between a legislative investigation after indictment and a legislative investigation before indictment of a witness (see attached A.). *Delaney* involves a legislative investigation after indictment of a witness.

Since Dr. Bergman has not been indicted, the committee could arguably proceed along the first option mentioned heretofore in accordance with the dicta from the *Delaney* decision. This is a policy decision to be made by the committee.

DECLINATION TO APPEAR BECAUSE OF ALLEGED VIOLATION OF SIXTH AMENDMENT RIGHTS

The argument that appearance by Dr. Bergman would involve a denial of his sixth amendment right to counsel, jury trial, confrontation of witnesses, and cross-examination of witnesses cannot be sustained. It is based upon the allega-

tion that the committee's hearings are accusatory in nature and not investigatory, and are the type of proceedings found unconstitutional by the Supreme Court in *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969).

A legislative investigation is not an adjudicatory process like that of a court, and due process does not require that a witness be represented by counsel, have the right to confrontation, the right to cross-examination, etc. (CF. *Hannah* v. *Larche*, 363 U.S. 420, 442–45 (1960)).

Since congressional investigation is not a criminal proceeding, and Congress has no power to adjudicate criminal sanctions against a witness with respect to matters under investigation, such proceedings were held to be "outside the guarantees of the due process clause of the fifth amendment and the confrontation right guaranteed in criminal proceedings by the sixth amendment", (*United States* v. *Fort*, 443 F. 2d 670, 679 (C.A.D.C. 1970), cert. den. 403 U.S. 932).

These proceedings, not being accusatory or adjudicatory, the objection raised cannot be sustained.

Even accepting for the purposes of argument the objection of Mr. Lewin, a decision that the proceedings are as he has alleged would have to be measured by the committee's conduct over the years (CF. *Stamler* v. *Willis*, 415 F 2d 1365 (C. A. 7th. 1969) cert. denied, 399 U.S. 929 (1970)).

The reference to *Jenkins* v. *McKeithen* in the letter of Mr. Lewin is an irrelevancy since that case involved a situation in which a State legislature, in establishing a State crime investigating commission, clearly authorized the commmission to designate individuals as law violators, and consequently due process was violated by denying witnesses the rights existing in adversary criminal proceedings.

Congressional investigations may not be accusatory (CF *Watkins* v. *United States*, 354 U.S. 178 (1957)), and care should be taken not to make direct, criminal accusations against a witness at a hearing or in a report. Public interest, however, may permit the disclosure of facts adverse to a witness where a valid legislative purpose exists. (*Watkins* v. *United States*, supra.)

Claim of Privilege Against Self-Incrimination Because Witness' Constitutional Rights Under the First, Fourth, and Sixth Amendments Would Be Violated

The fifth amendment privilege against self-incrimination is a privilege protecting a person from giving evidence against himself in a criminal action. It has nothing whatsoever to do with the assertions made by Mr. Lewin that Dr. Bergman's credibility with public licensing agencies would be harmed (first amendment claim). Testimony that is merely personally unpalatable is not a basis for a fifth amendment claim of privilege (*United States* v. *Doe*, 478 F. 2d 194 (C.A. 1st, 1973)). Nor with a claim of privacy where the subject matter was within a valid legislative purpose of Congress (*Barenblatt* v. *United States*, 360 U.S., 109, 117 (1959)). Nor with a lack of cross-examination, etc., where a valid legislative investigation was involved (*Hannah* v. *Larche*, 363 U.S. 420, 442–45 (1960)).

A reliance on "first amendment grounds supplemented by the fifth" can be sufficient to put a committee on notice as to an apparent claim of privilege against self-incrimination (*Quinn* v. *United States*, 345 U.S. 155, 164 (1955)), but it does not add to the scope of the fifth amendment claim.

If Mr. Lewin's argument is that the refusal of Dr. Bergman to testify is to protect his first, fourth, and sixth amendment rights on the grounds of due process, this will arguably not be acceptable (CF *Hutcheson* v. *United States*, 369 U.S. 599, (1960)) where a plea of self-incrimination is invoked.

Other Matters in Mr. Lewin's Letter of February 4, 1975

1. Return of documents to Dr. Bergman: This can be achieved by making Xerox copies of the material and releasing the originals to Dr. Bergman for tax-reporting purposes. (This has been done as of February 7.)

2. Testimony of other witnesses on January 21, 1975, respecting Dr. Bergman: An objection that a committee discriminated against a witness and thereby denied him due process of law by investigating some un-American activities and not others was overruled on the ground that the fifth amendment does not deprive Congress of the discretion to investigate and to legislate against

part of an evil without legislating against the whole (*United States* v. *Josephson*, 165 F. 2d 82 (C.A. 2nd 1947), cert. den. 333 U.S. 838 (1948)).

JACK MELSHEIMER,
Legislative Attorney.
ROBERT L. TIENKEN,
Senior Specialist, American Public Law.

ATTACHMENT A

CONGRESSIONAL INVESTIGATION INTO MATTERS ALREADY BEFORE THE COURTS OR LIKELY TO COME BEFORE THE COURTS

Reference is made to your inquiry of February 13, 1973, requesting information on the aforementioned matter. Specifically, you ask for our views regarding the propriety of congressional committee action which more or less directly bears on matters either currently being investigated or which are reasonably expected to be investigated with a view to instituting appropriate criminal proceedings on the same or related matters.

Questions concerning the impact of a lawful congressional investigation into matters that eventually may come before the courts are largely unresolved. Despite recurrent demands for adoption of standards of fair procedure governing its committee investigations, Congress has failed to take affirmative and conclusive action in the matter. Accordingly, congressional committees confronted with circumstances which portend a congressional inquiry and a criminal proceeding crossing paths, come face to face with a dilemma largely left to ad hoc resolution. In actual practice, committees concerned with the problem appear to follow the approach suggested by Mr. Justice Brennan. That is "[w]hen a congressional inquiry and a criminal prosecution cross paths, Congress must accommodate the public interest in legitimate legislative injury with the public interest in securing the witness a fair trial." Concurring, *Hutcheson* v. *United States*, 369 U.S. 599, 624 (1962). Frequently a reconciliation may be effected by "postponements of inquiry until after an immediately pending trial, or the taking of testimony in executive session—or that the State grant a continuance in the trial." Id. at 625.

The issues raised by such an inquiry before or concurrent with a criminal investigation are the obvious ones of self-incrimination, prejudicial pretrial publicity, and fundamental fairness (due process). Despite widespread appreciation of the fact that a congressional committee's lawful activities can adversely affect court proceedings in the same or a connected matter, it should be noted that the courts generally have not been overly solicitous of a petitioner who raised the issue on appeal. Only one or two contrary cases have come to our attention and these are factually distinguishable from the instant matter. See *McGrain* v. *Daugherty*, 273 U.S. 135 (1927); *Sinclair* v. *United States*, 279 U.S. 263 (1929); *Hutcheson* v. *United States*, *supra*; (cf. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Delaney* v. *United States*, 199 F. 2d 207 (1st Cir. 1952); *Pillsbury Co.* v. *F.T.C.*, 354 F. 2d 952 (5th Cir. 1966). (Case of a congressional "interference" with an administrative adjudication.) However, these case presage various other related developments, and it may be that the hitherto exceptional case of *Delaney* v. *United States*, *supra*, will loom larger in future considerations of the problem than some of the Supreme Court precedents cited above.

One of the earliest relevant cases is *Kilbourn* v. *Thompson*, *supra*, here a narrow view was taken of the congressional power to conduct investigations in aid of its legislative function. In that case, the Supreme Court held that a legislative investigation had overstepped its jurisdiction when it instituted an investigation of losses suffered by the United States as a creditor of Jay Cooke and Company, whose estate was being administered in bankruptcy by a Federal court. In the preamble to the resolution authorizing the investigation, Congress had asserted as justification for the inquiry that the "courts are powerless to afford adequate redress to said creditors" of the bankrupt estate pool. The Court made plain that it perceived the investigation as impinging upon the separation of powers, noting: "The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?" 103 U.S. 194.

In *McGrain* v. *Daugherty*, *supra*, the Court seemingly relaxed the *Kilbourn* standard, ratifying in the latter instance the power of Congress to inquire into

the administration of an executive department and to sift charges of malfeasance in such administration. The Court held that the investigation was presumed to have undertaken in good faith to aid the Senate in legislating. "The only legitimate object the Senate could have in ordering the investigation was to aid in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object." 273 U.S. 178.

The Court summarily dealt with the contention that the courts might be confronted with matters touched upon during the Senate inquiry. The Court answered the argument as follows: "Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part." 273 U.S. 180.

In *Sinclair* v. *United States*, 279 U.S. 263 (1929), the Court affirmed the right of the Senate to carry out the investigation of fraudulent leases of government property after suit for recovery thereof had been instituted. The president of the lessee corporation had refused to testify on the ground that the questions related to his private affairs and to matters cognizible only in the courts wherein they were pending, and that the committee avowedly had departed from any inquiry in aid of legislation. The authorizing resolution had directed the investigating committee to ascertain what, if any, other or additional legislation might be advisable. Reaffirming that aspect of the *Kilbourn* decision "that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits" the Court declared that the authority "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." 279 U.S. 295.

The issue split the Court in *Hutcheson* v. *United States*, 369 U.S. 599 (1962). Hutcheson, president of the Carpenters Union, was subpenaed by a congressional committee investigating union corruption and racketeering and was asked whether union funds had been used to "fix" an Indiana grand jury investigation of a scheme by him and others to defraud the State. At the time of his committee appearance, he was under indictment in an Indiana court for bribing a state official in furtherance of the scheme. He refused to answer the committee's questions concerning the alleged "fix" solely on the ground that the question related to the state prosecution and thus was a denial of due process of law. The Supreme Court affirmed the contempt of congress conviction, holding that a congressional committee need not honor a claim of privilege against self-incrimination solely under State law. Mr. Justice Harlan, writing for the majority, concluded that the mere pendency of a State prosecution did not preclude the committee from questioning him, even though the information elicited might be used to his prejudice in the state proceeding. Any unfairness which might attend the State trial was not ripe for adjudication and had to await review of the State conviction.

The majority observed that to the extent that *Kilbourn* v. *Thompson, supra*, is relied on to support the proposition that "the mere pendency of the State indictment *ipso facto* constitutionally closed . . . [a relevant] avenue of interrogation to the committee," the "loose language" of that older decision was declared to have "been seriously discredited . . . At most [that older decision] . . . is authority for the proposition that Congress cannot constitutionally inquire 'into the private affairs of individuals who hold no office under the government' when the investigation 'could result in no valid legislation on the subject to which the inquiry referred.' 103 U.S. at 195. The tangible fruits of the labors of the . . . committee" before which the petitioner was called "show that such is not the case here;" for "although this congressional inquiry was *related* to the subject matter of the State indictment, the questions that were asked of the petitioner did not bear directly on his guilt or innocence of the state charges . . . [but on whether] union funds had been used to stifle criminal proceedings . . . against the petitioner personally," and as such were pertinent to adoption of a "Federal reporting and disclosure system" regulating handling of union funds. The fact that the chairman of the committee expressed readiness to "assist and help" the State was held insufficient to sustain the witness' contention that the committee had no *bona fide* legislative purpose and was engaged merely in assisting a prosecution. 369 U.S. 613–616 and note 16.

Aside from *Kilbourn, supra*, the only contrary decision appears to be that of the first circuit in *Delaney* v. *United States*, 199 F. 2d 107 (1st Cir. 1952). In September 1951. Delaney was indicted by a Federal grand jury for tax frauds committed while serving as a collector of internal revenue. In October, over objection of the Department of Justice, a congressional subcommittee held public hearings to investigate his past activities. The hearings turned up large

amounts of damaging testimony which, along with the committee chairman's condemnatory statements about Delaney, received widespread press and radio coverage. Defendant was granted a month's continuance of his trial until January 1952, when the trial court refused a further continuance. On appeal from a conviction, the first circuit reversed and remanded.

The court found no error in the denial of defendant's motion to dismiss, observing that neither in defendant's case nor probably in any other would the prejudicial publicity be so "permanent and ineradicable by mere lapse of time, that there was no possibility of receiving a fair trial within the foreseeable future." 199 F. 2d 112. However, the court held that the trial should have been continued for a reasonable time until the prejudicial effect of the adverse publicity had lapsed.

The court noted that "this is not a case of pre-trial publicity of damaging material tending to indicate the guilt of a defendant, dug up by the initiative and private enterprise of newspapers. [Rather], [h]ere the United States, through its legislative department, by means of an open committee hearing held shortly before the trial of a pending indictment, caused and stimulated this massive-pretrial publicity, on a nationwide scale. [The court observed that] [i]f all this material had been fed to the press by the prosecuting officials of the Department of Justice, we think that an appellate court would have had to say that the denial of a longer continuance was an abuse of discretion." 199 F. 2d 213. Notwithstanding that the "committee acted lawfully," the impact of the hearing was analogous to "prosecuting officials if they had made available to the press all this damaging material respecting Delaney. . . . But the prejudicial effect upon Delaney, in being brought to trial in the hostile atmosphere engendered by all this pretrial publicity, would obviously be as great, whether such publicity were generated by the prosecuting officials or by a congressional committee hearing." 199 F. 2d 114.

In the case of an individual under indictment, the court declared, the United States is put to a choice:

"If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed. Cf. *United States* v. *Andolschek*, 2 Cir., 1944, 142 F. 2d 503, 506, in which it was held that, when the United States chose to prosecute an individual for crime, it was not free to deny him the right to meet the case against him by introducing relevant documents, otherwise privileged. The court said the United States must decide in such a case whether the public prejudice of allowing the crime to go unpunished was greater than the public prejudice which would result from the disclosure of such 'state secrets' as might be relevant to the defense. Cf. also *Reynolds* v. *United States*, 3 Cir., 1951, 192 F. 2d 987, 995.

"The acceptance of such a consequence would not, we believe, unduly impair the freedom of the Congress in the exercise of its important investigative functions. We are dealing with a case where the executive had already acted; the official in question had been removed from office and his indictment procured. If it was considered necessary by the Congress, at that juncture, to inform itself at once of the conduct of the Boston office, in conjunction with a general investigation of the Internal Revenue Bureau which might shed light upon the desirability of plans for reorganization of the Bureau, then the committee could have proceeded with a closed hearing, postponing public disclosure of the evidence taken for a comparatively brief period until the trial of Delaney could have been concluded. If this procedure was rejected, because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting the consequence that the trial of Delaney on the pending indictment might have to be delayed." 199 F. 2d 115–116.

The court limited its holding to a situation where a congressional hearing crosses paths with a pending indictment. It distinguished that situation from the one where the committee has no knowledge of an impending indictment. The application of the *Delaney* result in the latter circumstances might unjustifiably hamper the fact-finding function, since the committee cannot foresee where it may impinge on a court's ability to provide an impartial trial later.

"We limit our discussion to the case before us, and do not stop to consider what would be the effect of a public official not then under indictment. Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest utility: Congress is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity. Also, if as a result of such legislative hearing an indictment eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently indicted official than would be the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment." 199 F. 2d 116.

Although the *Delaney* decision was only accorded a fleeting citation in *Hutcheson* v. *United States*, 369 U.S. 613 ["Cf. *Delaney* v. *United States*, (C.A. 1 Mass.) 199 F. 2d 107, 114"] which was decided by the Supreme Court ten years later, we are impelled by a number of more recent developments to give it a bit more weight. First, since *Hutcheson*, the Court has held that the liberty guarantee of the 14th amendment absorbs the prohibition against self-incrimination, thus making it applicable to the states. *Malloy* v. *Hogan*, 378 U.S. 1 (1964). Second, the ruling in *United States* v. *Murdock*, 284 U.S. 141 (1931), which Mr. Justice Harlan relied on in *Hutcheson* was later rejected by the Court. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 77 (1964). It will be recalled that *Murdock* held that a state could compel a witness to give testimony which incriminated him under federal law. Finally, concern with the impact of prejudicial publicity upon jurors and potential jurors has increased in recent times, so much so that it has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it. *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961). However, as applied to the situation which prompted your query, the Delaney distinction between postindictment and preindictment publicity, in the absence of more, indicated the likelihood of a different result. See *Beck* v. *United States*, 298 F. 2d 622 (9th Cir. 1962), *cert. denied* 370 U.S. 919 (1962); *United States* v. *Carper*, 13 F.R.D. 483 (D.D.C. 1953).

Appendix 4

SUPREME COURT DECISION UPHOLDS SUBPENA POWERS OF CONGRESS

ITEM 1. NEWSPAPER ARTICLE FROM THE WASHINGTON POST, MAY 28, 1975, BY JOHN P. MacKENZIE

The Supreme Court gave sweeping endorsement yesterday to the investigative powers of congressional committees, including the right to obtain bank records without judicial interference.

Congressional subpoena power is "an indispensable ingredient of lawmaking," Chief Justice Warren E. Burger said for five members of the court. "The wisdom of congressional approach or methodology is not open to judicial veto."

The five justices, part of an 8-to-1 majority that held the committees immune from court orders blocking subpoenas, were joined by three justices who expressed less enthusiasm for the unbridled power of Congress to demand the records of private individuals.

Over the lone dissent of Justice William O. Douglas, the court said the committees' immunity stems from the Constitution's "Speech or Debate" clause, which provides that members of Congress "shall not be questioned in any other place," including the courts, for legislative acts.

Rejecting pleas on behalf of an antiwar group called the United States Servicemen's Fund, the court held that "the power to investigate is inherent in the power to make laws" because Congress needs information to legislate.

The group argued that the subpoena was issued solely to intimidate political dissenters, but the court, following earlier opinions, said courts are not to probe the motives of legislators.

"We reaffirm," said Burger, "that once it is determined that members (of Congress) are acting within the legitimate legislative sphere, the Speech or Debate clause is an absolute bar to interference."

The decision did not disturb High Court rulings that have sustained some refusals to testify or produce records for congressional committees. Those decisions, however, involved direct defiance by individual targets of investigation while yesterday's ruling involved attempts to block a third party, in this case the bank, from complying with a subpoena.

Also left undisturbed was a 1972 decision that a House committee does not have unlimited power to defame private individuals in its official reports.

Nevertheless, the Court's approval of committee investigative powers amounted to the warmest support the congressional bodies had received after many years of unsuccessful litigation.

The subpoena in question was issued and then blocked 5 years ago. "This case illustrates vividly the harm that judicial interference may cause," Burger said. "A legislative inquiry has been frustrated for nearly 5 years."

Burger was joined in full by Justices Byron R. White, Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist. Concurring in the judgment were Justices Thurgood Marshall, Potter Stewart, and William J. Brennan, Jr.

Justice Douglas' dissent argued that "no official, no matter how high or majestic his or her office, who is within reach of judicial process, may invoke immunity for his actions for which wrongdoers normally suffer."

The concurring Justices emphasized Burger's statement, made in a footnote, that congressional power "is not unlimited," but none of the opinions spelled out any specific limits.

ITEM 2. SUPREME COURT DECISION IN CASE OF EASTLAND ET AL. *v.* UNITED STATES SERVICEMEN'S FUND ET AL.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

Supreme Court of the United States

Syllabus

EASTLAND ET AL. *v.* UNITED STATES SERVICEMEN'S FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–1923. Argued January 22, 1975—Decided May 27, 1975

The Senate Subcommittee on Internal Security, pursuant to its authority under a Senate resolution to make a complete study of the administration, operation, and enforcement of the Internal Security Act of 1950, began an inquiry into the various activities of respondent organization, to determine whether they were potentially harmful to the morale of United States Armed Forces; in connection with such inquiry it issued a subpoena *duces tecum* to the bank where the organization has an account ordering the bank to produce all records involving the account. The organization and two of its members then brought an action against the Chairman, Senator Members, Chief Counsel of the Subcommittee, and the bank to enjoin implementation of the subpoena on First Amendment grounds. The District Court dismissed the action. The Court of Appeals reversed, holding that, although courts should hesitate to interfere with congressional actions even where First Amendment rights are implicated, such restraint should not preclude judicial review where no alternative avenue of relief is available, and that if the subpoena was obeyed respondents' First Amendment rights would be violated. *Held:* The activities of the Senate Subcommittee, the individual Senators, and the Chief Counsel fall within the "legitimate legislative sphere" and, once this appears, are protected by the absolute prohibition of the Speech or Debate Clause of the Constitution against being "questioned in any other Place" and hence are immune from judicial interference. Pp. 9–19.

(a) The applicability of the Clause to private civil actions is supported by the absoluteness of the terms "shall not be questioned" and the sweep of the terms "in any other Place." P. 11.

(b) Issuance of subpoenas such as the one in question is a legitimate use by Congress of its power to investigate, and the subpoena power may be exercised by a committee acting, as here, on behalf of one of the Houses. Pp. 12–13.

(c) Inquiry into the sources of the funds used to carry on activities suspected by a subcommittee of Congress to have a potential for undermining the morale of the Armed Forces is within the legitimate legislative sphere. Pp. 14–15.

(d) There is no distinction between the Subcommittee's Members and its Chief Counsel insofar as complete immunity for the subpoena under the Speech or Debate Clause is concerned, and since the Members are immune because the issuance of the subpoena is "essential to legislating," their aides share that immunity. Pp. 15–16.

(e) The subpoena cannot be held subject to judicial questioning on the alleged ground that it works an invasion of respondents' privacy, since it is "essential to legislating." P. 16.

(f) Nor can the subpoena be held outside the protection of speech or debate immunity on the alleged ground that the motive of the investigation was improper, since in determining the legitimacy of a congressional action the motives alleged to have prompted it are not to be considered. Pp. 16–17.

(g) In view of the absolute terms of the speech or debate protection, a mere allegation that First Amendment rights may be infringed by the subpoena does not warrant judicial interference. Pp. 17–19.

159 U.S. App. D.C. 352, 488, F. 2d 1252, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN and STEWART, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

Appendix 5

EXCHANGE OF CORRESPONDENCE BETWEEN COUNSEL FOR DR. BERNARD BERGMAN AND THE SUBCOMMITTEE ON LONG-TERM CARE

ITEM 1. LETTER FROM JOHN JOSEPH CASSIDY, COUNSEL TO DR. BERNARD BERGMAN; TO SENATOR FRANK E. MOSS, DATED JANUARY 14, 1975

DEAR SENATOR MOSS: We are counsel for the Park Crescent Nursing Home and the Towers Nursing Home of New York City, both of which have received subpoenas to produce all their business records from 1969 to the present at a hearing of your subcommittee to be held in New York on January 21, 1975. We also represent Dr. Bernard Bergman and his immediate family, who are principals in the operation of these two nursing homes. According to news reports, Dr. Bergman may also be called as a witness. He has not, however, been served with any subpoenas.

Initially, we want to assure you that it is the intention and desire of our clients to cooperate fully with your subcommittee, operating under its mandate, as with any other lawful government agency carrying out its proper function under legitimate authority conferred by law. To this end, our client desires to produce any subpoenaed records or documents that the subcommittee needs to carry out its duties under Senate Resolution No. 267, 93d Cong., 2d sess., and under the delegations of authority to the subcommittee by the Senate Committee on Aging to the same end. Dr. Bergman is prepared to appear and to testify at any properly called and conducted session of your committee.

From all the information presently available to us, however, it is most difficult for us not to conclude that the hearings to be conducted on January 21 in New York City may not be a validly authorized and legally conducted hearing of a subcommittee of a committee of the U.S. Senate.

The bases for this troubling conclusion are as follows:

First, the initial news story regarding this prospective hearing published in the *New York Times* on December 21, 1974, reported that at a public hearing on January 21, 1975, "Assemblyman Andrew J. Stein, Democrat of Manhattan . . . will preside" (a copy of the *Times* article is attached). We have, quite candidly, never heard of a precedent for this procedure—under which an individual who is neither a member of the Senate, nor on any staff of any Senator, is given the right to actively participate in the conduct of, much less preside over, an official Senate proceeding.

Second, our concern over the propriety—and indeed the legality—of a "Senate hearing" to be controlled and presided over by a local legislator who is in no way responsible to the U.S. Senate is compounded by the public statements made in recent days by Assemblyman Stein with regard to the operation of that Senate subcommittee. In the *Times* story of January 10, 1975 (see attached), it was announced by Assemblyman Stein that:

> "(a) the Senate subcommittee would be holding 'six major hearings on nursing-home frauds, beginning January 21 here,' and
>
> "(b) he 'had engaged two former Assistant U.S. attorneys, for the southern district . . . as special counsel for the hearings.' "

It appears from these reports—which emanated from New York and not from the subcommittee office in Washington—that the scheduling, employment, and other functions of the subcommittee under Senate Resolution No. 267, have been delegated to a New York legislator. We are totally unaware of any Senate resolution, rule, or other legal sanction which would authorize such an extraordinary procedure. Moreover, it is our belief that a hearing forum so structured and conducted would not only be impermissible under the rules and procedure of the Senate, but would raise substantial questions relative to the rights of citizens

who may be called to respond to a "Senate subcommittee," but who must appear under these conditions.

Third, that our concern about the validity of a "Senate hearing" conducted under the direction or with the participation of Assemblyman Stein is not predicated on purely academic considerations is well illustrated by the history of Assemblyman Stein's activities in this area. As we view it, Mr. Stein has been given no specific authority under New York law to inquire into the matter of proprietary nursing homes; he has been issuing statements to the public media and to the press regarding our clients calculated to inflame public opinion against them; he has served what we believe to be illegal subpoenas on individuals and businesses in excess of the authority given him by law. In short, we cannot in good faith avoid the conclusion, from all the public evidence, that Mr. Stein is seeking to build a personal reputation out of a highly publicized and totally unauthorized local vendetta against the owners of nursing homes in New York State. Nor can we, in good conscience, ignore the fact that the subpoenas served by your subcommittee duplicate, according to the report in the *Times*, the subpoenas that were issued under color of law by his Commission on Living Costs and Economy, all of which are now being challenged as invalid in the New York State courts and none of which has been complied with by a single one of your recipients.

Finally, we note that Mr. Stein has, in the view of our clients, deliberately manufactured false charges against them and conspired with others to disseminate such charges in order to deprive them of dispassionate consideration by prosecutors and grand juries of allegations made against them. The activities of Mr. Stein were of such a nature that a complaint alleging such violations based on the federal Civil Rights laws was filed in the United States District Court for the Southern District of New York on January 10, 1975 (*Bergman* v. *Stein*, Civil Action No. 75–119) and a hearing on a motion for preliminary injunction has been scheduled by District Judge Charles E. Stewart for January 22, 1975. (A copy of our complaint in that case accompanies this letter.) We recognize your subcommittee need not, of course, without further proof, accept the allegations we make in that complaint, but we expect to prove those allegations in the hearings on January 22, and during such later judicial proceedings as are necessary.

In the meantime, however, we strongly suggest that it would be inappropriate and inconsistent with the requirements of fundamental fairness of its procedures for a subcommittee of the U.S. Senate to conduct a proceeding where witnesses are required to testify or to produce documents at the request of or before an individual who is not only totally unconnected with the Senate, but whose active prejudices against the witnesses have been widely reported; whose motives are suspect, and who is currently in Federal litigation with the witnesses as a result of what they claim are his violations of their civil rights.

These are some of the reasons why we believe that with the participation of Mr. Stein, or anyone acting on his behalf, there exists a substantial cloud over the legality and basic fairness of the subcommittee hearing now scheduled for January 21—a hearing that we understand is to be held in the very offices of Mr. Stein's Commission on Living Costs and Economy.

We cannot stress too much, however, that our clients are prepared to produce all requested documents and give any requested testimony on the subject of the subcommittee's mandate at a lawful Senate hearing, so long as it is not used as a conduit to funnel information to Mr. Stein for purposes not related to the business of the Senate, whether they be local political purposes, or for private litigation. We earnestly urge you to ensure that there remain no question that this anticipated session could be considered by anyone to be an unlawful diversion and use of Senate resources by Mr. Stein for his own ends, and to ensure that it is limited to a proper and suitable inquiry by an appropriate tribunal, which we are confident was the intention of the Senate and your subcommittee. Under the present circumstances this can be done only by excluding all persons who are not properly members of the Senate committee and by insuring that the subcommittee's subpoena power is not simply used to substitute that authority which Mr. Stein may wish to have but does not now possess, and which he neither has nor will be able to obtain from any legitimate agency.

Under the circumstances, you have our assurance that your lawful inquiry will receive the cooperation of our clients and, we trust, the cooperation of the entire industry.

Should the hearings go forward with these substantial issues unresolved, however, we would have the gravest reservations about the efficacy of the

committee's process and the legality of the hearing in light of the basic requirements of fundamental fairness and due process applicable to the activities of all the branches of our government—and would have no choice but to advise our clients accordingly.

Sincerely,

MILLER, CASSIDY, LARROCA & LEWIN,
By: JOHN JOSEPH CASSIDY.

ITEM 2. LETTER FROM SENATOR FRANK E. MOSS, CHAIRMAN, SENATE SUBCOMMITTEE ON LONG-TERM CARE; TO JOHN JOSEPH CASSIDY, DATED JANUARY 15, 1975

DEAR MR. CASSIDY: Thank you for your letter of January 14, 1975. I very much appreciate your courtesy in informing me that you have been retained as attorney of record for the Park Crescent and Towers Nursing Home in New York City and for Dr. Bernard Bergman and members of his family. I appreciate also your repeated assurances that your clients will cooperate with the subcommittee in its inquiry. I am delighted with your guarantee that Dr. Bergman will appear and that the records under subpoena will be produced.

I can also appreciate some of the other concerns which your letter expresses which stem from articles appearing in the public press. I am sure I can end your fears.

First, a legitimate and lawful hearing by the subcommittee has been called for New York City on January 21. It will be the 23d hearing in the series "Trends in Long-Term Care" which began July 1969. I will preside. We originally hoped to have joint hearings with Mr. Stein, or otherwise to secure their assistance in our continuing investigation.

But in the course of preparing for the hearing, committee counsel last week brought to my attention the fact that a Senate committee or subcommittee cannot conduct a formal hearing jointly with a noncongressional unit, and we have notified Mr. Stein accordingly.

Second, as for the assertion that six additional hearings will be called, I can assure you that no decision has been made. Some future hearings will be held, if and when I announce them. In this connection you might see today's *Congressional Record* in which I try to spell out the issues we will address.

Third, your assertion that the subcommittee subpoenas duplicate those of the Stein Commission is in error. The subcommittee has and will issue a great many subpoenas to individuals and nursing homes not under scrutiny by the Stein commission. The homes were chosen with reference to subcommittee files. Our concern with Dr. Bergman's operations go back at least 10 years.

I would add that our investigation is presently going forward into other States: Illinois, Massachusetts, and Florida. We have been working with attorneys general to investigate units in other States such as New Jersey, Maryland, and Virginia. It is likely that subpoenas will be issued to providers in the former three States as our study goes forward.

Fourth, I am sure you realize that this letter does not constitute an endorsement of your comments with respect to Mr. Stein. Your assertions that the commission "has no authority under New York law to investigate proprietary nursing homes," or that Mr. Stein's comments are "calculated to inflame public opinion," etc., are matters of dispute between him and you. I am pleased that you will have the opportunity to air your charges in the U.S. district court, which is the proper forum for discussion of such allegations, rather than a Senate hearing.

In summation, I hope I have been successful in removing the "cloud about the efficacy" you see over our hearings. I trust I can count on you and that Dr. Bergman will appear with the requested records at the New York County Lawyers Association, 14 Vesey Street, the new site for the hearing on January 21, beginning at 10 a.m.

Sincerely,

FRANK E. MOSS.

ITEM 3. LETTER FROM SENATOR FRANK E. MOSS; TO JOHN CASSIDY AND NATHAN LEWIN, DATED JANUARY 24, 1975

DEAR MR. CASSIDY AND MR. LEWIN: On January 14 you informed me that you had been retained as counsel for Dr. Bernard Bergman and his family. You offered assurances of your client's willingness to cooperate with my Subcommittee on Long-Term Care. You promised that Dr. Bergman would appear as a witness on January 21 and that the books and records requested would be delivered in full compliance with our subpoena.

On January 21, Dr. Bergman did appear before the subcommittee, for which I am most grateful. I think you will agree that he was given a full and fair hearing and that neither Mr. Stein nor his staff participated in the questioning. I recall we received your personal assurances, Mr. Lewin, that all the requested books and records were provided to our Subcommittee. In return I promised that such books would not be shared with members of the Stein Commission. I have kept my promise.

At the close of business on January 21, I recessed the hearing until 10:00 a.m. on February 4, 1975, and directed Dr. Bergman to reappear at that time. In turn, I received Dr. Bergman's and your promise that he would reappear. Finally, you agreed to supply the Subcommittee with certain information such as business dealings between Dr. Bergman and Rabbi Twersky, a certified family tree, and names and addresses of nursing home employees.

None of that material has yet been received. I hope you will have it in our hands by early next week, at the latest.

However, I am even more concerned about other material which has not yet been transmitted to us. I am referring to material which was to have been included in the subpoenaed material delivered to the hearing room on Tuesday.

The U.S. General Accounting Office informs me that the books and records received with respect to the Towers, Park Crescent, and Oxford homes are substantially incomplete. Specifically, GAO certifies that several items have not been provided to the subcommittee *for each of the above named homes* (years 1969 through the present):

1. No canceled checks were turned over to the committee.
2. No bank statements were provided.
3. No bank deposit slips were received.
4. There are no loan agreements or contracts to support indebtedness.
5. No subsidiary records were provided; that is, records to support accounts payable and receivable or loans payable and receivable.
6. Accounts payable records are missing.
7. Patient account records are missing.
8. Petty cash records were not turned over.
9. No financial statements are provided.
10. No trial balances were tendered.
11. No year end balance sheets.
12. No statements of expense or statements of income were provided.

In addition to the above, the payroll register for the Towers is missing.

When I first learned of these omissions, I was truly incredulous in view of the assurances I received from you, Mr. Lewin, and from your client to the effect that there was full compliance with our request for books and records subject to the condition that they not be shared with the Stein staff.

Having checked with the Special Prosecutor and Federal grand jury and other related agencies, I have learned they do not have these documents thus, I can only assume that the records remain in your client's possession or that the evidence has been destroyed. In any case, I have U.S. Marshals standing by to resubpoena the above items. Knowing of your good reputation in the community, I feel certain that you could not have known that these records were not included in the material turned over to the Subcommittee on January 21.

I would like to offer you the opportunity of making an explanation and bringing in the books without further delay. I have not released this information to the press or anyone else. I expect your answer hand-delivered in my Senate office no later than 3 p.m. Monday, January 27. I want to emphasize

that I consider this a matter of the gravest importance and that I hold both your clients and you personally responsible. However, I do feel certain that there is some misunderstanding, that the listed records will be immediately surrendered.

With best wishes,

Sincerely,

FRANK E. MOSS,
Chairman, Subcommittee on Long-Term Care.

ITEM 4. LETTER FROM NATHAN LEWIN; TO SENATOR FRANK E. MOSS, DATED JANUARY 27, 1975

DEAR SENATOR MOSS: We have received your letter of January 24. Quite frankly, we are astonished at its tone and content. You have accused our clients of massive disobedience of a Subcommittee subpoena, and have threatened to hold us, as well as our clients, "personally responsible" not only for this supposed disobedience, but also for the alleged actions of a nursing home *which we do not even represent.* The facts are that the records you suggest have been either deliberately withheld or "destroyed" in large part were not even demanded by your subpoena; others were in fact turned over, contrary to your assertion; and some, which you are "incredulous" at not having received, are in fact *public* documents readily available to your Subcommittee. Both the specific allegations and the general implications of your letter reinforce troubling questions in our minds as to the propriety of some aspects of the conduct of your Subcommittee's proceedings, and deserve a full reply.

A. *The assertion that records have been withheld or "destroyed."*

The principal point in your letter of January 24 relates to a list of 12 categories of documents that you maintain have "not been provided" for three named nursing homes—Towers, Park Crescent and Oxford. (Since we did not represent Oxford, the inclusion of that home in your letter raises certain questions, about which we will have more comment later.) The facts regarding this assertion are as follows:

1. Sometime in late December 1974, the two nursing homes we represent were served with Senate subpoenas framed in broad and imprecise terms. On January 8, 1975, Mr. Cassidy of our office called your counsel, Mr. Halamandaris, to advise him that we were representing the two homes and Dr. Bergman personally. Mr. Cassidy advised Mr. Halamandaris during this conversation that the requested records were being sought by various agencies (indeed, the State Health Department was then auditing one set of records), but Mr. Halamandaris insisted that the subpoenas would have to be complied with by actual physical delivery of the records to your subcommittee on January 21.

2. This method of securing access to voluminous documents struck us as a highly unusual one. Ordinarily, if government agencies wish to see an individual's or business' full records, they send representatives to the individual's office to examine the records *in situ.* That is the procedure followed by the Internal Revenue Service, by agencies involved in regulating trade practices and by virtually all government inspectors we know of. Indeed, that is exactly what the New York Department of Health was doing at the time. But for some reason unknown to us, your staff insisted that the enormous quantity of documents be crated and transported—at substantial expense, one should note—to the hearing room to be delivered in full view of the television cameras.

3. There ensued over the next two weeks additional discussions between Mr. Cassidy on the one hand and Messrs. Halamandaris and Edie on the other as to how the document delivery was to be made. They spoke on the phone on January 16 and 17, and it was agreed that persons familiar with each set of books would appear on January 21 to identify what was being delivered and respond to any questions you might have. As a former judge, you are undoubtedly aware that this is the procedure almost invariably followed by courts and investigatory agencies that subpoena documents, and it affords the party issuing the subpoena the opportunity at that time to learn the nature of the records provided and to assert, and usually to resolve, any claim by him that documents covered by the subpoena were not produced.

4. On January 21, Mrs. Ray Goldberg of the Towers bookkeeping staff and Mrs. Fay Klauber of the Park Crescent bookkeeping staff arrived with the records at 14 Vesey Street prepared to identify the documents contained in the cartons delivered. Rather than follow the proper and anticipated procedure, however, your Subcommittee chose simply to accept delivery of the cartons from their custodians, without examination of their contents, and then to call on lawyers to stand before the television cameras and announce whether their clients had complied with the subpoenas. Aside from its questionable dramatic purpose, this procedure guaranteed that if your general and imprecise request was intended to cover anything more than what was delivered, the differences would not become known until after the hearing was concluded.

5. Before addressing the particular claims of omissions now made by your letter, it is essential that the language of your subpoenas be examined. After the directive portion appears the following language:

The Committee requests your appearance along with all business records relating to the operation of the above named facility from 1969 to the present including but not limited to general ledgers for all corporations, partnerships and sole proprietorships including any subsidiary ledgers; general journals; all supporting vouchers and invoices; all leases, contracts and mortgages; all records maintained by your Certified Public Accounting firm and all other fiscal and accounting records."

Enclosed as Appendices I and II to this letter are schedules of all the documents submitted in response to this subpoena by the Towers and Park Crescent. These schedules show that *all* the following items specifically mentioned in the subpoena were submitted:

(a) General ledgers;
(b) subsidiary ledgers;
(c) general journals;
(d) bills, invoices, etc., supporting accounts payable;
(e) leases and mortgages.

6. Of the list of 12 particular alleged omissions that appear on page 2 of your letter of January 24, five items—numbers 4, 5, 6, 7, and 8—relate generally to the area covered by the specific enumeration above. None of these five alleged omissions justifies your inference that documents were deliberately withheld:

(a) Item 4—"loan agreements or contracts to support indebtedness." The subpoena asked for "leases, contracts and mortgages," and we understand that lease documents relating to the Towers and mortgage papers relating to the Park Crescent were submitted. To read "contracts" in this context as meaning "contracts of indebtedness" is a highly strained interpretation of the word. If you wanted "notes" or "loan" documents, these words should have been used in the subpoena.

(b) Item 5—"subsidiary records . . . to support accounts payable and receivable or loans payable and receivable." As appendices I and II demonstrate, the Towers and Park Crescent turned over *all* subsidiary ledgers for accounts payable and accounts receivable. We have also been advised by our clients that they do not maintain any subsidiary ledgers on loans payable or receivable. They have also advised that they produced all records and all invoices for bills paid during the requested period.

(c) Item 6—"accounts payable records are missing." Our clients deny this assertion. They state they provided all invoices maintained by them as well as separate purchase books for both homes. If you are referring to something other than "invoices" when you speak of "accounts payable records," that was surely not communicated by the subpoena (which covers only "supporting vouchers and invoices") and remains unclear to our clients and to us.

(d) Item 7—"patient account records are missing." All Medicaid bills were, our clients advise, submitted. In addition, the cash receipts book contains, we are advised, separate entries for patient account receipts. If the Subcommittee intended to secure the home's *cards* relating to individual patients, it surely did not make that meaning clear in the subpoena. (Such a record is not a "voucher," an "invoice," or a "contract".)

(e) Item 8—"petty cash records were not turned over." In fact, according to our clients, the petty cash book for the Towers was turned over for all years through 1974. The petty cash book for the Park Cresent is being delivered to you with this letter (along with the payroll register of the

Towers, omitted by oversight). If the Subcommittee really means to go through the individual vouchers that are subsidiary to these books, they will be made available, although we are led to wonder how such a nickel-and-dime examination can be justified at taxpayers' expense.

7. The list on page 2 of your letter also refers to the absence of any "financial statements" (item 9), "year end balance sheets" (item 11), and "statements of expense or statements of income" (item 12). All of these records that, you imply, were either deliberately withheld or "destroyed"—and which you state you are "incredulous" at not having received—are actually public records, attached to the annual HE–2 forms submitted to the New York State Health authorities. We are advised that the homes do not maintain records in this form except to the extent that they are required to complete the annual HE–2 forms, and it was not remotely contemplated by our clients that the Subcommittee intended such publicly available documents to be among those sought by the subpoenas. If the Subcommittee really does not have these financial statements available to it, our clients will be happy to provide them. But it strains belief to think that the Subcommittee could ever suspect that these documents were deliberately concealed. And as for "trial balances" (item 10), those are accountants' workpapers which, if they exist, must be obtained from the person having them. Our clients tell us they have no "trial balances."

8. This leaves the matter of cancelled checks and other bank records, which are items 1, 2, and 3 on your list. Here again, the documents were not requested by your subpoena under any customary interpretation of its terms. The only terms that could remotely cover canceled checks would be the general introductory request for "all business records relating to the operation of the above name facility" and the concluding reference to "fiscal and accounting records." But the words "business records" as used, for example, in Section 52 of the Model Business Corporation Act, are not usually construed to cover actual negotiable papers such as checks or detail documents such as deposit slips. This is particularly true when the general term "business records" is followed by a listing of particulars such as ledgers and journals. The doctrine of *ejusdem generis* then limits the general introductory phrase.

Indeed, the very question whether canceled checks were covered by the subpoena was one on which our clients sought and received our legal advice. On January 20, 1975, the Towers was served with a federal grand jury subpoena seeking, *inter alia*, bank statements, deposit slips and canceled checks from the years 1971 to the present. We advised our clients that these particular documents should be delivered to the United States Attorney pursuant to the subpoena since they were not encompassed within the subcommittee's demand. Mr. Lewin alerted the Assistant United States Attorney in charge of that investigation that these records were not sought by the Subcommittee, and the documents are being delivered to him on January 27.

9. The short of this entire matter of allegedly missing, untransmitted, incomplete, withheld or "destroyed" documents is that the Subcommittee issued extraordinarily imprecise subpoenas, chose an irregular procedure by which to obtain returns to those subpoenas, and has now accused those on whom the subpoenas were served of withholding documents that was not expressly requested and could not fairly be read into the subpoenas' language. Furthermore, the manner and the circumstances of the accusation have disquieting implications—a matter to which we now turn.

B. *The apparent discrimination in the Subcommittee's Inquiry.*

As we have previously noted, your letter specifies *three* nursing homes and says (emphasis yours) that "*for each of the above named homes*" the enumerated documents are missing. Two of the homes are represented by us. As for the third—the Oxford—Mrs. Bergman has an interest in the home, but the operation is primarily run by her partner. Representing the home at the hearing on January 21 was Jack Hoffinger, Esq. (see p. 17 of the Transcript). Mr. Hoffinger advised the Subcommittee that all the nursing homes he represented were "complying in full" with the subpoenas (Tr. 18). Yet it appears from your letter that, in your view, Oxford "omitted" precisely the same documents about which you complain with regard to Towers and Park Crescent. We wonder, in this regard, whether your staff hand-delivered to Mr. Hoffinger a letter similar to your letter to us of January 24.

Indeed, we believe that members of your Subcommittee and all members of the Senate Special Committee on Aging are entitled to know how many of the approximately 25 other nursing homes which submitted records on January 21 gave the Subcommittee

(a) Cancelled checks and deposit slips;
(b) Notes or loan agreements;
(c) Patient account records;
(d) Petty cash vouchers;
(e) Balance sheets and profit-and-loss statements;
(f) Trial balances.

From our observation of the quantity of records delivered on January 21, it appeared as if our two clients—the Towers and Park Crescent—were delivering far more documents on January 21 than were the other nursing homes. Some seemed to come in with a single small cardboard box or with far less papers than our bookkeepers delivered. Yet, unless we are mistaken, Dr. Bergman and his counsel seem to be singled out for the letter you sent on January 24.

Even before receiving your letter, we were deeply troubled by aspects of the hearing on January 21 which suggest that, whatever might be the good intentions of yourself and other Senators, the Subcommittee's proceedings are being used to pillory Dr. Bergman.

1. In his conversations with Mr. Halamandaris and Mr. Edie, Mr. Cassidy noted that the 1974 books of the Towers and Park Crescent nursing homes were still being used and were needed currently by the bookkeepers. Mr. Cassidy was advised that other subpoenaed operators had been excused from bringing in their 1974 books until a later date, but that the Towers and Park Crescent would not receive this consideration.

2. The two sets of witnesses who testified before Dr. Bergman on January 21 directed their specific criticism only at him. Mr. Moan, for example, testified under oath regarding a series of transactions concerning the property on which the Willoughby Nursing Home is located. He referred repeatedly—and often mistakenly—to "Bergman companies." Thereafter, he asserted that loans were being made "from Bergman to himself" (Tr. 59), or "from Bergman companies to Bergman companies" (Tr. 61). In fact, we would be able to demonstrate on cross-examination of Mr. Moan that *both* the assertions regarding "Bergman companies" *and* the allegation of increased Medicaid costs are wrong—although given to the Subcommittee under oath. Mr. Moan also thereafter delivered himself of the observation, again under oath, that the Willoughby and Towers (both tied to Dr. Bergman) delivered "very bad" and "atrocious" care, respectively. The afternoon-session witnesses referred to no specific nursing home or operator by name other than Dr. Bergman (Tr. pp. 105–122).

3. Although the entire morning and half the afternoon were taken up with witnesses whom the Subcommittee treated in a friendly manner and who castigated and criticized only one nursing home owner, that one owner—Dr. Bergman—was not permitted by the Subcommittee to present rebuttal witnesses on this subject. Mr. Lewin advised the Subcommittee that he had three witnesses waiting in the hall to rebut the adverse testimony, but the Subcommittee refused to hear them (Tr. pp. 134, 182).

4. The returns made to the subpoenas by other nursing homes before your Subcommittee on January 21 were spotted with requests for delay, reasons for noncompliance, and, at times, total nonappearance (Tr. pp. 17–25). One attorney reported that his client had "complied partially," but was unable to comply fully because it was "going under a State audit, which will last approximately four to six weeks" (Tr. 18). This was precisely the situation of the Park Crescent Nursing Home, yet we were told that the State audit would have to defer to the federal subpoena. Another attorney produced "all of the records which are available" and said he would produce the rest "no later than February 4th" (Tr. 21). Yet another attorney stated that there was partial compliance and other records "will be submitted" (Tr. 23). And the Subcommittee granted a one-week extension to another attorney to consider whether to comply at all in light of a state-court ruling *in favor of our client* with respect to a Stein Commission subpoena (Tr. 24). The totally unyielding position taken by the Subcommittee staff with regard to Dr. Bergman and the two homes he controls (one of which is now closed) thus contrasts quite sharply with the solicitude shown other nursing homes under subpoena.

5. On January 24, the Subcommittee served on the American Bank & Trust Co. a subpoena for personal financial records relating to Dr. Bergman and his son-in-law, Amram Kass. What possible relevance these personal records have to the proper function of the Subcommittee or of the full Committee under Senate Res. 267 is difficult to understand.

Each of these factors, we believe, is inconsistent with an impartial, fact-finding investigation of conditions and practices in the nursing home industry. Each

is, however, consistent with another assumption which has troubled our clients both before and, even more strongly, after the hearing—that the Subcommittee is being used to target a particular individual, Dr. Bergman. Several aspects of your letter of January 24 not yet mentioned, we are frank to say, reinforce this very disturbing assumption:

(i) We were amazed to read in the last paragraph of page 1 of your letter the assertion that on the third day after the hearing the material Dr. Bergman is to supply for supplementation of the record has not "yet been received" and that it was to arrive "early next week, at the latest." No such imminent deadline was set during the hearing, and this attitude toward Dr. Bergman contrasts sharply with the Subcommittee's very tolerant attitude (described above) toward other nursing homes. It is particularly unfair in view of the fact that the transcript was not available until January 24, and Mr. Lewin lives in Boston where he teaches at the Harvard Law School on Thursdays and Fridays.

(ii) The last paragraph of your letter, which we can only interpret as a threat to release your letter to the press if you are not satisfied by our response, is a curious manner of conducting Subcommittee business, particularly when coupled with an ultimatum carrying a deadline of 3:00 P.M. on the Monday following the Friday when (in the late afternoon) your letter was delivered. At the very least, an evenhanded approach to the conduct of the Subcommittee's inquiry would dictate that you determine how many of the other nursing homes deserve such criticism before publicly accusing Dr. Bergman's homes of failing to deliver subpoenaed documents.

(iii) Finally, perhaps the strangest assertions in your letter are those regarding "personal assurances" from Mr. Lewin, along with the statement concerning our "good reputation in the community" and the threat to hold Messrs. Lewin and Cassidy "personally responsible" along with our clients. Mr. Lewin, of course, gave no more "personal assurance" with regard to the documents than did any other lawyer forced to answer the question whether his clients had produced the records. Bookkeepers were present to testify to the contents of the cartons delivered, and the Subcommittee chose not to call on them. The assurances made by members of this firm have been kept. Your threats regarding counsel, particularly when coupled with the implied threat to release your letter to the press, recall the efforts made by Assemblyman Stein and the media throughout the investigation of Dr. Bergman to smear his lawyers because they represent an unpopular client. We trust that on reflection, you and your Subcommittee will not become a party to such practices.

C. *The Stein Connection and the legality of the Subcommittee Hearings.*

In our letter to you of January 14, we expressed grave reservations over the legality of the proceedings scheduled for January 21 and asked you to take control of those hearings to ensure that this session not become a tool of Assemblyman Andrew Stein for the pursuit of his personal ends. We accepted your letter of January 15, 1975, as an assurance in that regard, but we must frankly admit that we do not believe assurance has been carried out.

1. The fourth paragraph of your letter of January 15 was understood by us as an assurance that the hearing would not be held "jointly" with Mr. Stein. Yet, as Mr. Lewin noted at the outset of the session, Mr. Stein sat immediately to your right during the entire proceeding (except when he was testifying). The enclosed photograph from the front page of *The New York Times* tells the entire story. What substance is there to the statement that your Subcommittee is not conducting a hearing "jointly" with Mr. Stein when he sits immediately beside you, makes an opening statement, asks questions of witnesses and acts fully as if he is a member of the United States Senate?

2. This brings us to Mr. Naftalis, whose presence on the podium was explained to us initially by Mr. Halamandaris on the ground that he was then "a member of our Committee staff." Our client and Mr. Lewin accepted this assurance at face value, although we were troubled by the fact that a *former* member of Mr. Stein's staff, who had been hired for his prosecutorial talents at a time when Mr. Stein was announcing that he would run the Subcommittee's proceedings, was being accepted as a neutral Senate employee. Since the hearing on January 21, we have heard stories (which we are reluctant to believe) that Mr. Naftalis is *still* on Mr. Stein's staff and is still being paid by Mr. Stein. If this is true—and we have no objective verification of it at the present time—we submit, with great regret, that you have not, as you state in your letter of January 24, "kept [your] promise." It is humanly impossible for Mr. Naftalis

to be employed by the Stein Commission (or by Mr. Stein personally) and for his examination of the records not to be fully equivalent to an examination by Mr. Stein himself.

3. Sitting next to Mr. Stein on the podium during Dr. Bergman's testimony was Congressman Edward Koch, who has participated in generating the feeling in New York that you referred to in your opening statement. As Appendix IV to this letter shows, Congressman Koch, approximately one month ago, issued public statements that made of Mr. Bergman the equivalent of a convicted felon and requested that he be denied asylum in Israel. Our client has hardly been afforded a "full and fair hearing" if those probing his memory include someone who has so conclusively and hastily prejudged him.

4. Finally, we had every reason to believe that your own staff, as well as you, were prepared to treat Dr. Bergman fairly, and to recognize that no weight could be given to totally unproven and inflammatory allegations made against him. But a statement by your own counsel that was quoted in *The New York Times* of January 23 (and which he has admitted to Mr. Lewin that he made) makes us wonder. Mr. Halamandaris said, according to *The Times*:

"Any prosecutor worth his salt knows that you don't jump in. You give the man his day in court. Our purpose was simply to get the stuff on the record. You learn his weak spots."

If your own chief-of-staff now views himself as a "prosecutor" whose job it is to "get the stuff on the record" and "learn [Dr. Bergman's] weak spots," the "atmosphere" of New York has had its lasting effect on your Subcommittee.

5. Another event, which occurred after the hearing, puts directly in issue whether your Subcommittee's processes are not being used by Assemblyman Stein or others to obtain material for release to the press. On January 22, Mr. Stein told reporters that he had *subpoenaed* bank records which showed Dr. Bergman's net worth to be $22 million. (The New York *Post* carried this under a large headline reading "Dispute Bergman on Wealth Data"—though, of course, Dr. Bergman gave no testimony which in any way conflicted with the data reported.) We know of no subpoena by Mr. Stein or any State authorities for personal bank records of Dr. Bergman. But on January 16, your Subcommittee issued a subpoena (attached hereto as Appendix V) for precisely the kind of documents unilaterally disclosed by Mr. Stein. Mr. Chairman, are you *sure* that Mr. Stein does not have access to the records of your Subcommittee?

In conclusion, we should correct one particularly significant error in your letter. You state that you "directed" Dr. Bergman to reappear before the Subcommittee on February 4, and that you received both his and Mr. Lewin's "promise" that Dr. Bergman would be there. The transcript, however, shows (at pp. 187–188) that Dr. Bergman stated a willingness to reappear, that you offered to try to work out "a convenient date," and that Mr. Lewin responded: "I think that could be worked out between us." Dr. Bergman remains, as stated in Mr. Cassidy's letter to you of January 14, prepared to cooperate with your Subcommittee, "operating under its mandate, as with any other lawful government agency carrying out its proper function under legitimate authority conferred by law." We now, however, have even more reason than before to question the accuracy of this description.

In essence, Mr. Chairman, what occurred on January 21 was a trial of Dr. Bergman, before live television, photographers, klieg lights and all the trappings of explosive publicity.[1] And it was a trial conducted without any opportunity for counsel to cross-examine witnesses called by the Subcommittee who have built their careers around criticizing Dr. Bergman. Your staff, openly admitting that their function is to prosecute Dr. Bergman, now wish to put him again before the television cameras to probe his "weak spots," under circumstances that lead us seriously to question the propriety of the purpose for such an appearance. Our clients' decisions as to the future must depend on the response we receive to the matters set forth in this letter.

Sincerely yours,

MILLER, CASSIDY, LARROCA, & LEWIN.
By: NATHAN LEWIN.

[1] On the matter of publicity, we wish to advise the Subcommittee fully of our concerns, and a separate submission is now being prepared to address this matter and the implications it has for the future course of your proceedings.

ITEM 5. LETTER FROM NATHAN LEWIN; TO SENATOR FRANK E. MOSS, DATED JANUARY 29, 1975

DEAR SENATOR MOSS: As you know, we represent Dr. Bernard Bergman in connection with the proceedings in New York City of your Subcommittee on Long-Term Care of the Senate Special Committee on Aging. This letter is to request, for the reasons explained herein, that those hearings insofar as they relate specifically to Dr. Bergman be terminated or, at the very least, postponed.

On January 14, we wrote you to express our grave concerns about the recent activities of State Assemblyman Andrew Stein and others in New York directed against Dr. Bergman, and our apprehension that the proceedings of your Subcommittee were being used by Mr. Stein and those working with him to further their own illegitimate ends. We asked in our letter of January 14 that your Subcommittee take action to exclude Mr. Stein, or anyone acting on his behalf, from participating in the hearing or from using the Subcommittee's process to obtain information for his own ends.

Mr. Stein, as we have informed you, has used his position as Chairman of the Temporary State Commission on Living Costs and the Economy to generate and leak to the press—illegally, as a state court has already determined—false and misleading information about Dr. Bergman, to publicly accuse him of all manner of frauds and offenses, to call for his indictment on criminal charges, to charge—maliciously and totally without basis in fact—that Dr. Bergman has ties to organized crime, and to accuse various political figures in the State of New York—most notably Stanley Steingut, the newly-elected (over Mr. Stein's lone dissenting vote) Speaker of the New York State Assembly—of corruptly seeking to assist Dr. Bergman and to interfere with Mr. Stein's investigation.

On January 15, you replied to our letter that while your Subcommittee had "originally hoped to have joint hearings with Mr. Stein, or otherwise to secure their assistance in our continuing investigation," you had been advised by Committee Counsel that such joint proceedings were unauthorized, and you had "notified Mr. Stein accordingly." You also noted that the Subcommittee had issued and would issue "a great many subpoenas to individuals and nursing homes not under scrutiny by the Stein Commission." We understood these statements to mean that the Subcommittee had disassociated itself from Mr. Stein and his methods, and we hoped that the Subcommittee's hearings in New York would properly focus on conditions and practices in the nursing home industry in New York, rather than on Dr. Bergman personally.

Thus, Dr. Bergman submitted in a dignified and orderly way to the subpoena of your Subcommittee, and on January 21 he appeared and answered every question put to him. In addition, the two nursing homes he operates (one of which is now closed) complied fully—unlike many other homes then under subpoena—with documentary subpoenas at that time.

It came as quite a shock to learn, on Mr. Lewin's arriving at the hearing, that Mr. Stein was seated at your right hand on the dais, that he would give an opening statement along with yourself and Congressman Koch, and that he was permitted to participate in questioning witnesses. It came as an almost equal surprise, in view of your letter, to learn that Mr. Gary Naftalis, a former prosecutor hired by Mr. Stein's Commission only two weeks earlier—as, according to Mr. Stein's announcement carried in the *New York Times* of January 10, his "special counsel" for the joint hearings he was planning with your Subcommittee—was to participate fully in the hearings as a "special assistant" to your Subcommittee.

Under these circumstances, it was not really surprising that the two sets of witnesses called to testify in the morning and early afternoon sessions of the January 21 hearing directed their specific criticisms only at Dr. Bergman, and that the Subcommittee did not wish to hear from three other witnesses offered by Mr. Lewin, who were waiting in the hallway, who would have contradicted that testimony.

Nor was it particularly surprising when, on the day of the hearing, your Subcommittee served a subpoena on Dr. Bergman's bank for personal financial records of himself and his family, followed on the next day by Mr. Stein's announcement that bank records obtained *by subpoena*[1] showed Dr. Bergman to be worth

[1] We know of no subpoena by Mr. Stein's Commission or by State authorities for personal bank records of Dr. Bergman; the only such subpoena we are aware of is that of your Subcommittee, a copy of which is attached to this letter.

$22 million. Mr. Chairman, what conceivable justification can there be in terms the mandate of your Committee to subpoena personal bank records—including loan agreements, "balance sheets" and "statements of net worth"—of Dr. Bergman, his wife, his daughter, and his son-in-law? It bears remembering that such subpoenas are not reviewable by the courts in advance of compliance by the bank, and that, as Mr. Justice Holmes stated years ago, "legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." [2] We call on your Subcommittee to consider whether this subpoena is consistent with your Committee's mandate, and to determine whether it has been misused by Mr. Stein or others.

Your hearing on January 21 was carried on live television in the New York area and, in view of the extensive publicity already generated concerning Dr. Bergman, attracted massive coverage in all media. Your Subcommittee, of course, is not to be held responsible—beyond its own decision to permit live television coverage—for the type of publicity given its sessions, but we wish, for reasons to be explained, to provide a few illustrations of the coverage accorded the January 21 hearing.

1. Even though the heart of Dr. Bergman's testimony on January 21 was that he did *not* own or control the vast number of nursing homes attributed to him earlier by Mr. Stein and the *New York Times*—a fact supported by detailed testimony by Dr. Bergman and not contradicted by any other witness—the *New York Daily News* of January 22 carried on its front page a photograph of Dr. Bergman with the following legend:

"I was smeared, Bergman says:

"Nursing home czar replies, Bernard Bergman presents statement to U.S. Senate Subcommittee at 14 Vesey St. in which he denies allegations that he has illegally siphoned off millions of medicaid dollars in his empire of 100 nursing homes. Calling himself 'victim of horrible nightmare,' he also denied reports of mistreatment of patients."

Thus, notwithstanding unequivocal denials at the hearing, the public heard the very next day Dr. Bergman described as a "nursing home czar" and head of an "empire of 100 nursing homes."

2. The late edition of the *New York Post* of January 21 carried headline reading "SENATOR BLASTS NURSING HOMES." The plain implication to the public—wholly erroneous, we hasten to say—was that you, Mr. Chairman, had "blasted" Dr. Bergman.

3. The coverage of the hearings by the *New York Times*, amounting to several thousands of words, has been the subject of a separate complaint we have made directly to the *Times*, and need not be reviewed in detail here. Suffice it to say that Dr. Bergman's direct refutation of the "family tree" and so-called "syndicate" of nursing homes drawn up by the New York Department of Health, and relied on by the *Times* for its earlier series of articles about Dr. Bergman's "empire," received little mention; the *Times* chose to print in full, however, the improper and inflammatory questions asked by Mr. Naftalis.

This review of the nature of the hearings and the publicity generated by them brings us to the central point of this letter. The point is that your Subcommittee's hearings in New York have, whether by design or through outside influences, become an accusatory proceeding against Dr. Bergman; they have generated and will inevitably continue to generate massive, inflammatory publicity by media already conditioned to believe the absolute worst against Dr. Bergman; they come at a time when at least two grand juries in the State of New York are conducting investigations of which Dr. Bergman is a target; they come at a time when Assemblyman Stein, who sits with you at the hearings, has publicly called for Dr. Bergman's prompt indictment; and, we submit, they should stop or at the very least be postponed as they relate specifically to Dr. Bergman.

You may be familiar, Mr. Chairman, with the decision of the United States Court of Appeals for the First Circuit in *Delaney* v. *United States*, 199 F. 2d 107 (1952), in which a House Committee conducted a publicized hearing involving conduct of a District Director of Internal Revenue who had been charged with bribery. The Court stated, at p. 114:

"If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person await-

[2] *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270 (1904).

ing trial on a pending indictment, then the United States must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed."

The Court reversed Delaney's conviction, noting that the Committee's hearings "afforded the public a preview of the prosecution's case against Delaney without, however, the safeguards that would attend a criminal trial," and concluding that he had been denied his right to a fair trial by being forced to "stand trial while the damaging effect of all that hostile publicity may reasonably be thought not to have been erased from the public mind."

Mr. Chairman, there are now two separate grand juries—one State and one Federal—in New York which are examining Dr. Bergman's affairs, and a Special Prosecutor has been appointed by Governor Carey to investigate the nursing home industry. The press has been full of statements, particularly during the last three months, calling for Dr. Bergman's prosecution on criminal charges. These statements have emanated most notably from Mr. Stein, who as late as the day before yesterday predicted, in a radio interview, that Dr. Bergman would be indicted in three weeks. We believe the charges of criminal fraud against Dr. Bergman are totally groundless, and are quite prepared to meet any charges that may be brought in the appropriate forum—a court of law. But we cannot ignore the enormous pressure for indictment that has been generated by inflammatory and misleading publicity, and the dangers this poses to Dr. Bergman's ability to receive a fair trial.

We understand that your Subcommittee now intends to reconvene its hearings in New York next week, and while no definite arrangement has been made for Dr. Bergman to testify at that time, you obviously anticipate another session at which he would be the primary witness. Statements by your own Committee Counsel quoted in the press, as well as by others, imply that the purpose of this appearance will be to probe Dr. Bergman's so-called "weak spots" in the manner of a "prosecutor." It is inevitable that such an inquisition will create another flood of prejudicial publicity at the very time when grand juries are being expected to consider in an impartial manner, on the basis of evidence before them, whether criminal charges should be laid against Dr. Bergman. It is further clear to us that such an inquisition is, at the very most, tangential to the mandate of your Committee, if not—as we believe—wholly outside its function.

Under these circumstances, Mr. Chairman, we suggest that the full Subcommittee consider, in the words of the Delaney case, whether it believes "conscientiously pursuant to its conception of the public interest" that further publicized interrogation of Dr. Bergman is warranted notwithstanding its impact on pending criminal investigations and its predictable interference with the due course of justice in state and federal courts. The legitimate functions of your Subcommittee can be wholly accomplished without further pillorying of Dr. Bergman, and indeed, now that Dr. Bergman has appeared and answered all questions put to him—in a session terminated early only for your convenience—the proper course of your proceedings would be, we suggest, to return to an investigation of the nursing home *industry* and the medicaid reimbursement practices of New York State rather than of Dr. Bergman personally. The latter function is now, and properly should be, in the hands of those entrusted with law enforcement, and further interrogation of Dr. Bergman can, we suggest, only interfere with the conduct of their responsibilities.

Sincerely,

MILLER, CASSIDY, LARROCA & LEWIN.
By: NATHAN LEWIN.

ITEM 6. LETTER FROM SENATOR FRANK E. MOSS; TO NATHAN LEWIN, DATED JANUARY 31, 1975

DEAR MR. LEWIN: Your letter of January 29 requesting that the Subcommittee's hearings and specifically Dr. Bergman's testimony be terminated or postponed has been received. As I advised you by telegram last night, the proposal is unacceptable. Our hearing which was in recess will reconvene on February 4, 1975, at 14 Vesey Street beginning at 10:00 a.m., as announced at the close of business on January 21. Mindful of the cooperation which your client has expressed and exhibited, we request his appearance at this time under

the authority of our original subpoena to answer questions posed by the full Subcommittee membership.

This decision was not made in haste. I studied at length the arguments you raise to which I respond in some detail below. After weighing these arguments and studying the transcript, I can find no evidence which suggests that your client was treated unfairly or that there was an abrogation of his constitutional rights. Any reasonable review of the record will support the contention that we were more than generous in permitting the witness to testify fully and without interruption. Indeed, I have been criticized for giving Dr. Bergman's Counsel too much latitude and because the questions posed purportedly did not probe deeply enough. I refer in particular to the statement attributed to Morris B. Abram in the January 28, 1975, edition of the *New York Post.* The article reads:

" '. . . I want the documents ahead of time. We won't give witnesses a chance to just talk.' This is what many observers felt was allowed to happen last week when the Senate Subcommittee on Long-Term Care headed by Senator Frank E. Moss (D-Utah), held its first hearing here in nursing home conditions."

With respect to specific points you raise in your letter, *You State:* "We understood . . . that the Subcommittee had disassociated itself from Mr. Stein . . . It came as quite a shock to learn that Mr. Stein was seated on your right hand on the dais . . . It came as an almost equal surprise, . . . to learn that Mr. Gary Naftalis, a former prosecutor hired by Mr. Stein's Commission . . . was to participate fully in the hearings as a 'special assistant' to your Subcommittee."

Comment. A full discussion of these points is found in the record of our January 21 hearing. I see no impropriety. You were specifically informed by Committee Counsel Halamandaris and Mr. Edie in advance of the hearing that Mr. Naftalis had been retained to assist the Subcommittee and that he would participate in the questioning of Dr. Bergman. It should be clear from the record that Mr. Stein started to leave the dais when your client began his testimony and stayed only after your client stated in a loud clear voice that he had no objections. Moreover, Mr. Stein asked no questions of Dr. Bergman. However, in view of your objections, if not your client's, I have asked Mr. Stein not to sit on the dais on February 4. I should add, however, that my action in regard to Mr. Stein should not be construed as concurrence with the assertions that the Commission he heads is not legally constituted or that it has performed improper acts. I have no views on that matter; it is not my function to make such a judgment. I regard Mr. Stein's Commission as a source of information, just as I regard Dr. Bergman's testimony a source of information. In either case, the information thus provided will be subject to scrutiny and, where necessary, questioning. Finally, I would again assure you that no one connected with the Stein office has had access to the documents your client has turned over. In fact, the *only* access to the subpoenaed records has been to Assistant U.S. Attorney Kenneth R. Feinberg pursuant to your request.

You State. "In addition, the two nursing homes he operates (one of which is now closed) complied fully—unlike many other homes then under subpoena".

Comment. The Subcommittee has not received all the books and records requested under its subpoena. You have argued that the language of our subpoena did not require the production of cancelled checks, bank statements or deposit slips. Relying on advice of the U.S. General Accounting Office which supplied the all-inclusive language—I assert the opposite. This is surely an honest difference of opinion, and I am grateful that you arranged for us to receive copies of such items for the Towers Nursing Home which were in the custody of the Federal Grand Jury. If I may prevail on your courtesy, we would request the below listed documents at your earliest possible convenience, hopefully by February 4. I, in turn, will seek arrangements to return copies of the 1974 records over to you to facilitate the preparation of income tax statements.

Towers Nursing Home. Loans Payable; Patient Account Records.

Park Crescent Nursing Home. Bank Statements; Cancelled Checks; Deposit Slips; Patient Accounts.

You State. The two panels of witnesses that appeared on January 21 directed their criticism only at Dr. Bergman, and the Subcommittee did not wish to hear from other witnesses you had waiting in the hall.

Comment. The Record clearly shows that Dr. Jay Dobkin, Anastasia Hopper, and Irene Jarvis testified as to general industry conditions. The same is true for the testimony of the other panel. The only witness to mention Dr. Bergman or his family in any detail was Mr. Moan in conjunction with his explanation

of one visual aid which, he contended, reflected the general industry practice of trading in or pyramiding mortgages.

Rather than hear from employees of Bergman homes chosen by anyone else, the Committee asserted its right to choose and interview employees. The Subcommittee is waiting for a comprehensive list of present and past employees with their addresses so it can carry out this important activity.

You State. Nor was it particularly surprising when, on the day of the hearing, your Subcommittee served a subpoena on Dr. Bergman's bank for personal financial records of himself and his family, followed on the next day by Mr. Stein's announcement that bank records obtained by subpoena showed Dr. Bergman to be worth $22 million. Mr. Chairman, what conceivable justification can there be in terms of the mandate of your Committee to subpoena personal bank records—including loan agreements, "balance sheets" and "statements of net worth"—of Dr. Bergman, his wife, his daughter, and his son-in-law?... We call on your Subcommittee to consider whether this subpoena is consistent with your Committee's mandate, and to determine whether it has been misused by Mr. Stein or others.

Comment. 1) We have subpoenaed several banks and had no idea until you raised it that the American Bank and Trust Company was "Dr. Bergman's bank"; 2) You are incorrect in your charge that the Committee has obtained personal financial statements for your client and turned them over to Assemblyman Stein (who released information to the press showing Dr. Bergman's net worth at $22 million.) The fact of the matter is that we have not yet received any personal financial statements or statements of net worth from American Bank and Trust or any other bank as of this date; 3) The reason for seeking such documents is that your client himself has put in issue the question of the extent of his financial interest in nursing homes by reading at length from an unofficial working paper of the New York State Department of Health and disclaiming interest in numerous facilities.

You State. "Your Subcommittee, of course, is not to be held responsible—beyond its own decision to permit live coverage—for the type of publicity given its sessions... The point is that your Subcommittee's hearings, whether by design or through outside influences, become an accusatory proceeding against Dr. Bergman; they have generated . . . inflammatory publicity by media already conditioned to believe the absolute worst against Dr. Bergman; they come at a time when at least two grand juries in the State of New York are conducting investigations of which Dr. Bergman is a target..."

Comment. 1) I believe the public should watch its government at work; proceedings such as the Watergate hearings permitted live coverage. 2) the dramatic denials invoked by your client have greatly contributed to the publicity naturally attendant to any proceedings involving a man of Dr. Bergman's prominence. The denials to which I refer include: characterizing the charges against Dr. Bergman as "the Big Lie" and describing the media treatment as "having no parallel in modern American history since the days of Senator Joseph McCarthy." In addition you, as Counsel, asserted that the motive inherent in such maltreatment is bias against those of the Orthodox Jewish faith. Furthermore, there is the matter of your suit brought against the *New York Times* and the suit brought by your client against John Hess, William D. Cabin and Assemblyman Andrew Stein. To be clear, I do not challenge your *right* to make such statement or the propriety of the suits actions. But they have fueled the controversy over nursing homes currently raging in New York. 3) Counsel Halamandaris suggested in a telephone conversation with you that we would consider a change of venue should you request it, but no such request was made. 4) Counsel's remarks about "any good prosecutor worth his salt" were stated in the context of your remarks that you had been a prosecuting attorney and could readily discern what you termed "prosecutor's tricks" invoked by Mr. Naftalis. 5) I reject out of hand your recurrent notion that our hearings were or will become an adversary proceeding. We are not conducting an investitation of Dr. Bergman personally, but of the entire nursing home industry. Our hearing in New York City on January 21 was, in fact the 23rd in a series of hearings held all across the nation. We are assessing the entire system as it functions in New York State and elsewhere.

The Delaney case to which you refer is familiar to us. It was raised as a reason to prohibit the Watergate Committee from hearing the testimony of H. R.

Haldeman and John Ehrlichman. The argument was rejected by the Watergate Committee last year and I reject it now.[1] Moreover, I feel certain that the grand juries presently impaneled in New York will consider other parties beyond Dr. Bergman. I have no evidence that he is "a target" of such grand juries. In this connection, I assure you our purpose is to study issues and problems as I have pointed out in my opening statement and in announcements of the hearings appearing in the *Congressional Record.* It will soon be very apparent that we intend to call other witnesses. Indeed, we have investigations underway in several states.

You State: "... We cannot ignore the enormous pressure for indictment that has been generated by inflammatory and misleading publicity, and the dangers this poses to Dr. Bergman's ability to receive a fair trial."

Comment: 1) I do not know *if* Dr. Bergman will be either indicted or brought to trial; 2) The primary if not the only source of publicity favorable to Dr. Bergman has been the hearing of January 21; 3) you yourself stated that your client appeared to testify and cooperate before our Subcommittee (even before he received our subpoena) because you considered our hearings "a fair forum"; 4) if you have any reservations with respect to the progress of proceedings on February 4 hearing, there will be several Senators present along with a Senate Parliamentarian to whom you can appeal; 5) your client, of course, is entitled to full protection as guaranteed by the Constitution, and he may invoke his Constitutional privilege against self-incriminating testimony at any time.

Thank you for the opportunity to respond to your concerns.

With best wishes,

Sincerely,

FRANK E. MOSS.

ITEM 7. LETTER AND ENCLOSURES FROM NATHAN LEWIN; TO SENATOR FRANK E. MOSS, DATED FEBRUARY 3, 1975

DEAR SENATOR MOSS: On January 21, 1975, our client, Dr. Bernard Bergman, appeared and testified in New York City before a session of the Subcommittee on Long-Term Care of the Senate Special Committee on the Aging. During his appearance, he was subjected to questioning over a wide range of subjects by you, by your counsel, by Congressman Edward Koch (who was sitting in the hearing by invitation), and by Gary Naftalis, Esq., an attorney who was represented to us as a member of the subcommittee staff but who, we later learned, was concurrently employed by Mr. Andrew Stein personally (or by a New York State joint commission of which Mr. Stein is chairman). Dr. Bergman answered many totally unanticipated questions to the best of his recollection, although some involved individuals or associations going back more than two decades and details of bookkeeping entries or official forms made by others and completed some time ago.

A transcript of Dr. Bergman's testimony first became available to him about a week ago. The official reporter located in Virginia delivered a copy to our office in Washington on Friday, January 24, and it was forwarded to Dr. Bergman in New York. It has now been reviewed by him, and in the interest of total accuracy we are submitting, on his behalf, the enclosed supplementary material, with the request that it, along with this leter, be made a part of the subcommittee record.

Sincerely yours,

MILLER, CASSIDY, LARROCA & LEWIN.
By: NATHAN LEWIN.

[Enclosures.]

[1] In *Delaney* v. *United States* 199 F. 2d 107 (1952) the Court said: "We mean to imply to criticism of the action of the King Committee. We have no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it. It was for the committee to decide whether considerations of public interest demanded at that time a full-dress public investigation of the affairs of the Internal Revenue Bureau, including particularly the conduct of Delaney's office in Boston."

See also *Hutchinson* v. *United States* 599, where the Court held that the pendency of litigation in a State Court is no bar to an investigation by Congress of the matters involved, if the investigation is for a valid purpose. A witness convicted of contempt of Congress claimed that questioning him on any matters germane to state criminal charges pending against him violated the Due Process Clause of the Fifth Amendment. The Supreme Court upheld the conviction.

SUPPLEMENT TO TESTIMONY OF DR. BERNARD BERGMAN

A. Family Relationships and Involvement With Nursing Homes

On page [2940], Senator Moss asked Dr. Bergman to submit "your family relationships and the involvement with nursing homes." Dr. Bergman's "family relationships" were fully described in his oral analysis of the New York State Department of Health's "family tree." That same review covered the nursing homes listed on the department of health exhibit. But in order to provide a complete and coherent response to Senator Moss' question and to the later question by Congressman Koch [see p. 2953], the following list covers all interests in New York State held by Dr. Bergman, his wife, his children, and his children's spouses.

Bergman Family Ownership of Operation and Realty:

1. Park Crescent Nursing Home.
2. Genesee Nursing Home (subject to contract of sale since October 1974).

Bergman Family Ownership of Operation and Mortgage: Oxford Nursing Home (Mrs. Bergman one of two partners in operation and holder of mortgage on realty).

Bergman Family Ownership of Operation Only: Towers Nursing Home (now closed) (Mrs. Bergman one of two partners).

Bergman Family Ownership of or Interest in Realty Only:

1. Laconia Nursing Home.
2. Willoughby Nursing Home.
3. Verranzano Nursing Home.
4. Golden Gate Care Center.
5. Carlton Nursing Home (10 percent interest in realty held by Mrs. Bergman).
6. Danube Nursing Home (never opened).
7. Riverside Nursing Home (Miriam Kass—⅛ interest).

Bergman Family Interest in Mortgage or Receivable:

1. Mayflower Nursing Home.
2. White Plains Nursing Home.
3. Rego Park Nursing Home.

Bergman Family Interests in Vendors to Nursing Homes: None.

Bergman Family Interests in Suppliers of Services to Nursing Homes: None (except that Amram Kass has performed legal services for various homes).

B. Business Dealings With the First Connecticut Small Business Investment Corp.

Senator Moss asked about "business dealings" between Dr. Bergman and the First Connecticut Small Business Investment Corp., and Dr. Bergman replied that a loan had been made on a nursing home and that he would supply full details. Records indicate that the loan was made on November 5, 1963, in the amount of $60,000 to Utica Nursing Home, Inc., in which Dr. Bergman had an interest. The loan was secured by a mortgage on Genesee Nursing Home. It was repaid on October 23, 1972.

Dr. Bergman also had business dealings with the First Connecticut Small Business Investment Corp. in relation to Medic-Home Developers, Inc., a publicly held corporation of which Dr. Bergman has been an officer and major stockholder. The nature of these transactions was fully described in the Medic-Homes prospectus issued in June 1968, relevant pages of which are attached hereto.

C. Personal Relationships and Charitable Activities

At page [2498], Senator Moss inquired about Dr. Bergman's associations with individuals who may have been on the board of the Home of the Sons and Daughters of Israel, about a charitable foundation in Dr. Bergman's name and about fires in nursing homes operated by Dr. Bergman. On reviewing records and refreshing his recollection, Dr. Bergman is able to make the following statements:

NOTE.—Page numbers within brackets have been converted from original transcript numbers. See "Trends in Long-Term Care," part 23, January 21, 1975.

1. The Yesuscher Dov Foundation was incorporated on or about 1955. For some of the years it has been in existence it received no outside funds, but it did receive contributions from outside sources in 1972 and 1973.

2. I do not have access to any records which would show whether Arthur Klein and Sam Defalco were members of the board of the Home of Sons and Daughters of Israel. To the best of my recollection, Arthur Klein was on the board, but I have no recollections as to Defalco.

3. In the early 1960's there was a fire, resulting in one fatality, in the Waldorf Senior Citizen Home, which, it was believed, resulted from a resident's smoking a cigarette. I have no present interest in this facility, although I did have an interest in it at the time of the fire.

D. Problems With State Officials

In responding to Congressman Koch's questions relating to alleged political influence, Dr. Bergman described from memory the problems he had had with officials of the New York Department of Health. In stating the approvals received for the Danube Nursing Home he said it had been "approved by all city councils." [See p. 2954.] In the interest of total accuracy, this statement should be amended to read that it had been "recommended for approval by the regional planning council and the State planning council."

Similarly, in describing the problems caused to the lawful and proper operation of his business by the New York Department of Health, Dr. Bergman said that "the inspectors did not come down when we asked them to come down" [see p. 2955]. In the interest of total accuracy, verified by examination of records since the hearing, that statement should be amended to read that "the department of health in Albany raised unjustified and harassing issues concerning the establishment of the nursing home."

E. Miscellaneous Matters

1. Senator Moss inquired at the outset of Dr. Bergman's cross-examination whether he was listed as a "business manager" in the Towers license renewal for 1972 [see p. 2937]. Dr. Bergman did not recall any such listing and still has not found a copy of the renewal application to determine whether he was listed in that capacity. Of course, as Ms. Hopper's testimony indicated [see pp. 2920, 2926, and 2927], Dr. Bergman spent substantial time and effort working for the Towers, and the records show that while his wife received compensation as a licensee-operator, he was not paid for his services.

2. At line [27, p. 2944], the name "Mr. Hartmann" appears when, from the context, it is clear that Dr. Bergman intended to say "Mr. Heisler."

3. Senator Moss asked Dr. Bergman to describe the "kind of dealings" he had with Rabbi Bernard Twersky [see p. 2946], and this question was the subject of an additional inquiry by the Subcommittee counsel [see p. 2951]. From Dr. Bergman's review of his records, he is able to advise the subcommittee that the "kind of dealings" have consisted of the following:

(a) Payment of public relations fees
(b) Loans of funds for business purposes
(c) Sales and purchases of stock in closely-held corporations.

Neither the public relations fees, the interest on loans, nor the sales or purchases of stock were charged to or reimbursed by medicaid.

4. Subcommittee counsel asked for the names of employees of the Towers Nursing Home for purpose of interviews relating to conditions in the home [see p. 2950]. The full list appears on the Towers payroll register which has been supplied to the subcommittee.

PROSPECTUS

300,000 SHARES—MEDIC-HOME DEVELOPERS INC.

Common stock (par value $.10)

Prior to the date of this Prospectus, there has been no public market for the Common Stock of Medic-Home Developers Inc. ("Medic-Home") and, accordingly, the offering price has been determined arbitrarily by negotiation between Medic-Home and the Representative of the Underwriters.

These securities have not been approved or disapproved by the Securities and Exchange Commission nor has the Commission passed upon the accuracy or adequacy of this prospectus. Any representation to the contrary is a criminal offense.

	Price to public	Underwriting discounts and commissions [1]	Proceeds to Medic-Home [2]
Per share	$10	$0.85	$9.15
Total	$3,000,000	$255,000	$2,745,000

[1] Medic-Home has agreed to use its best efforts to cause 2 designees of Blair & Co., Inc. (the "representative"), to be elected to Medic-Home's Board of Directors (see "Management"). On Jan. 9, 1968, Medic-Home sold to Blair & Co., Inc., and 2 of its officers common stock which, after a subsequent stock split, aggregated 20,000 shares at a price of $1.50 per share (see "Interest of management and others in certain transactions"). Medic-Home has granted to the First Connecticut Small Business Investment Co. a 1-year option to buy 5,000 shares of Medic-Home's common stock at a price equal to the initial public offering price in consideration of its assistance in negotiating the underwriting arrangements with the representative. None of such 20,000 shares or 5,000 shares will be reoffered for at least 1 year following the effective date of this registration statement and until a posteffective amendment shall have been filed and declared effective; any profit realized on a resale of such 20,000 shares may be considered to be additional underwriting compensation.

[2] Before deducting expenses payable by Medic-Home, estimated at $97,000.

Neither the Attorney General of the State of New York nor the Attorney General of the State of New Jersey nor the Bureau of Securities of the State of New Jersey has passed on or endorsed the merits of this offering. Any representation to the contrary is unlawful.

The above shares of Common Stock are offered by the Underwriters when, as and if received and accepted by them, subject to prior sale, subject to the approval of certain legal matters by counsel and subject to certain further conditions.

At the request of Medic-Home, the Underwriters have agreed to make available at the public offering price 30,000 shares of the Common Stock offered hereby for sale to officers and employees of Medic-Home and to other persons designated by it. The number of shares available to the public will be reduced to the extent that such persons purchase such reserved shares. Upon resale of such shares, certain of such persons may be deemed to be underwriters as that term is defined in the Securities Act of 1933.

BLAIR & CO., INC.

The date of this Prospectus is June 20, 1968

COMPETITION

Each of the Company's nursing homes competes on a local and regional basis with all types of health care institutions, whether publicly or privately operated, including nursing homes, convalescent centers, extended care facilities and other similar institutions. Depending on the demand for hospital beds, there may be direct competition with general hospitals, although the Company's nursing homes are intended to supplement hospital care rather than to compete directly with hospitals.

MANAGEMENT

DIRECTORS AND EXECUTIVE OFFICERS

The directors and executive officers of the Company are as follows:

Name	*Officers*
James M. Breiner	Chairman of the board and director.
Samuel A. Klurman	President, treasurer, and director.
Homer W. Cunningham	Vice president and director.
Jerome Goldman	Secretary.
Bernard Bergman	Director.
Charles Bick	Director.
David Engelson	Director.
Professor Bernard Lander	Director.
William J. Lemon	Director.
Peter Stassa, Jr	Director.

For more than the past five years James M. Breiner has been the Chairman of the Board of The First Connecticut Small Business Investment Company, Bridgeport, Connecticut.

Samuel A. Klurman's principal occupation since the organization of the Company in October 1964 has been to act as its President and principal executive officer. From April 1, 1963 to October 1964, he was a private investor.

Since May 1966 Homer W. Cunningham has been the President of Liberty House Nursing Home of Virginia Beach, Inc. and the Manager of Liberty House of Virginia Beach. Prior to that time he was the President and principal stockholder of H. W. Cunningham & Associates, Inc., a corporation engaged in the real estate business in Virginia Beach, Virginia, where he was also the President of the Virginia Beach Board of Realtors in 1962. He is now the Treasurer of the Virginia Nursing Home Association.

Since August 1963 Jerome Goldman has been a member of the law firm of Burstein & Goldman, Bridgeport, Connecticut, who are counsel for The First Connecticut Small Business Investment Company and have also acted as counsel for Medic-Home Developers Inc. Prior to that date Mr. Goldman was an associate attorney with the predecessor law firm.

For the past twenty-five years Bernard Bergman has been principally engaged in the nursing home field, has developed and owned numerous nursing homes and presently owns interests in nursing homes in New York, New Jersey and Florida and in various real estate ventures.

For more than the past five years Charles Bick has been a Senior Partner in the accounting firm of Zemlock, Levy & Bick, 160 Broadway, New York, N.Y.

For more than the past five years, David Engelson has been the President of The First Connecticut Small Business Investment Company, Bridgeport, Connecticut.

For more than the past five years Professor Lander has been Professor of Sociology at Hunter College and the director of the Bernard Revel Graduate School of Yeshiva University. He has also been a member of the Advisory Council on Public Assistance under President Eisenhower and a member of advisory committees on poverty and aging under President Kennedy and President Johnson.

William J. Lemon's principal occupation for more than the past five years has been that of a member of the law firm of Martin, Hopkins and Lemon, Roanoke, Virginia. In addition, he is the President of Liberty Nursing Homes, Incorporated, which operates Liberty House of Roanoke, Virginia and Liberty House of Lynchburg, Virginia.

For more than the past five years Peter Stassa, Jr., has been Vice President of The Fairfield County Trust Company, Stamford, Connecticut, in its office in Danbury, Connecticut. He is a member of the Danbury Economic Development Commission and the Danbury Redevelopment Commission.

It is expected that Stuart M. Beringer and John W. Hurley, designees of Blair & Co., Inc., the Representative of the several Underwriters, will be elected to the Board of Directors of the Company upon completion of the offering. Messrs. Beringer and Hurley have been Vice Presidents of Blair & Co., Inc., since September 1966. Prior to that time they had for over three and one-half years been officers of P. W. Brooks & Co. Incorporated, an investment banking firm which was acquired by Blair & Co., Inc.

REMUNERATION OF OFFICERS AND DIRECTORS

During the fiscal year ended September 30, 1967, Samuel A. Klurman, the Company's president, received payments of aggregate direct remuneration in the sum of $28,000 in cash and accrued bonuses of $20,000, which were subsequently paid to him in Common Stock, $.10 par value, of the Company, on the basis of $9.15 per share (see "Interest of Management and Others in Certain Transactions"). The total aggregate annual remuneration of all officers and directors was $94,500, including the accrued bonuses referred to above.

On January 30, 1968 Mr. Klurman entered into a 5-year employment contract with the Company at an annual salary of $40,000 for the first year and $50,000 for the succeeding four years.

QUALIFIED STOCK OPTION PLAN

The Company has adopted a stock option plan (the "Plan") intended to qualify as a qualified stock option plan under Section 422 of the Internal Revenue Code of 1954, as amended. Under the Plan, officers and key employees of the Company may be given options at the discretion of the Board of Directors to purchase Common Stock at prices not less than 100% of its fair market value at

the time the option is granted. Each option granted may be exercised commencing two years, but not later than five years, after the grant and, except in the event of death or retirement, may be exercised only while the grantee of the option is in the employ of the Company.

Of the Company's Common Stock, 30,000 shares have been reserved for issuance under the Plan. To date no options have been granted under the Plan.

The Company has also reserved 20,000 shares for incentive, deferred compensation and other employee benefit plans which may be formulated by the Board of Directors.

PRINCIPAL STOCKHOLDERS

The following table sets forth the number of shares of Common Stock owned of record and beneficially as of March 31, 1968 and the percentage of the total number of outstanding shares of such stock so owned (a) by each person who owned of record, or, to the knowledge of the Company beneficially, 10% or more of such shares and (b) by all directors and officers as a group as of that date and as adjusted as of that date to give effect to the issuance of the 300,000 shares being offered by this Prospectus:

	Number of shares	Percentage of outstanding shares— As of Mar. 31, 1968	Percentage of outstanding shares— As adjusted
Bernard Bergman [1]	[2] 188,306	31.5	21.0
Samuel A. Klurman [1]	[2] 165,374	27.7	18.4
The First Connecticut Small Business Investment Co	[3] 189,376	31.7	21.1
All directors and officers as a group	[3] 350,930	63.8	42.5

[1] Pursuant to an agreement with the First Connecticut Small Business Investment Co. ("First Connecticut"), Messrs. Bergman and Klurman have each granted Messrs. Breiner and Engelson, subject to certain conditions, a proxy to vote 41,078 of his shares for the election of directors, for a period of 5 years, as directed by that company. The power to vote these 82,152 shares for directors will give First Connecticut an aggregate voting power for such purpose of 30.2 percent of the shares outstanding on completion of the offering, as compared with 21 percent based on the shares which it holds.

[2] Includes shares owned of record and beneficially by the children of Messrs. Bergman and Klurman.

[3] The company is informed that 122,400 of such shares are owned beneficially by four other small business investment companies licensed under the Small Business Investment Act of 1958. In addition, as set forth on the cover page of the prospectus, the company has granted First Connecticut a 1-year option to buy 5,000 shares of the company's common stock at a price equal to the initial public offering price, in consideration of its assistance in negotiating the underwriting arrangements with the representative of the underwriters.

The above-named stockholders as a group may be said to possess the power to direct or cause the direction of the management and policies of the Company and may be deemed, individually, to be promoters and, collectively, to be the "parent" of the Company, as those terms are defined in the rules and regulations under the Securities Act of 1933, as amended.

DESCRIPTION OF COMMON STOCK

The capital stock of the Company consists of one class, Common Stock, with a par value of $.10 per share. Each share of Common Stock has one vote and, on liquidation, is entitled to receive a pro rata share of the assets of the Company available for distribution to stockholders. Holders of Common Stock are entitled to receive such dividends as the Board of Directors may from time to time declare out of funds legally available therefor. Holders of Common Stock have no pre-emptive, subscription or conversion rights. The outstanding shares of Common Stock are, and the shares offered hereby, when issued and sold as set forth herein, will be fully paid and non-assessable. However, liability may be imposed on the Company's ten largest stockholders, under certain circumstances, by reason of Section 630 of the New York Business Corporation Law which provides that such stockholders, under certain circumstances "shall jointly and severally be personally liable for all debts, wages or salaries, due and owing" to any of the Company's "laborers, servants or employees other than contractors, for services performed by them" for the Company.

NON-CUMULATIVE VOTING

Stockholders do not have the right of cumulative voting. This means that the holders of more than 50% of the shares voted for the election of directors have the power to elect all of the directors and that, if they do so, the holders of the

remaining minority of the shares will not be able to elect any person to the Board of Directors.

REPORTS TO STOCKHOLDERS

The Company will mail annual reports to its stockholders containing financial statements, including a balance sheet and profit and loss statement, certified by an independent public accountant, and, in addition, it is the present intention of the Company to publish unaudited quarterly reports for the first three quarters of each fiscal year.

TRANSFER AGENT

The Transfer Agent for the Common Stock is Chemical Bank New York Trust Company.

INTEREST OF MANAGEMENT AND OTHERS IN CERTAIN TRANSACTIONS

On February 5, 1965 the Company accepted a proposal by Bernard Bergman to convey to the Company parcels of land in Roanoke and Virginia Beach, Virginia, upon which nursing homes were then under construction, and undeveloped parcels of land in Columbus, Ohio, Jersey City, New Jersey and Binghamton, New York suitable for the construction and operation of nursing homes, for the aggregate price of $875,000, payable by the Company as follows: $112.500 in cash, $200,000 by the issuance to Mr. Bergman of its 5-year 6% note in that face amount, $200,000 by the issuance to Mr. Bergman of 100 shares of the Corporation's common stock, without par value, later changed into 320,000 shares of the Company's Common Stock, $.10 per value (see Note G of Notes to Financial Statements) and the balance by the Company's taking the property subject to existing first mortgages of $300,000 on the Roanoke, Virginia property, approximately $45,000 on the Virginia Beach, Virginia property and approximately $17,500 on the Jersey City, New Jersey property. Thereafter, in accordance with this contract the above-described properties were transferred to the Company, which made payments of the purchase price as above set forth and assumed the obligations of the mortgages. The purchase price was determined by negotiation. In the opinion of management the price and terms of purchase are as favorable to the Company as they would have been if the seller had been a non-affiliated person. The Company is informed by Mr. Bergman that the aggregate purchase price of the properties to him was $723,000, of which $348,000 was paid in cash and the balance by the incurring of mortgage indebtedness (of which $12,500 was repaid by him), without attributing any cost to the work done by Mr. Bergman and his office staff in connection with such properties. The dates when he acquired these properties are as follows: Roanoke, Virginia—1963; Virginia Beach, Virginia—1963; Columbus, Ohio—1963; Jersey City, New Jersey—1962; and Binghamton, New York—1961.

As contemplated in connection with the foregoing transaction, Mr. Bergman sold 50 of the shares which he acquired (the equivalent of 160,000 shares of Common Stock, $.10 par value) to Samuel A. Klurman for $100,000 and Mr. Klurman arranged for The First Connecticut Small Business Investment Company ("First Connecticut") to lend Medic-Home $300,000 evidenced by a 6% promissory note in the principal amount of $200,000 and a convertible debenture in the principal amount of $100,000, convertible into 50 shares of common stock, without par value (equivalent to 160,000 shares of Common Stock, $.10 par value). In September, 1965, First Connecticut converted this convertible debenture into 50 shares of common stock, without par value, (the equivalent of 160,000 shares of Common Stock, $.10 par value). As part of the foregoing transaction the Company, on April 15, 1965, entered into Consultation and Advisory Contracts with Mr. Bergman and First Connecticut providing that for a period of seven years the Company would pay each of them compensation for management and consulting services rendered by them to the Company at the rate of $24,000 a year.

On March 11, 1965 Liberty Nursing Homes, Incorporated was organized in the Commonwealth of Virginia and thereafter 51% of the stock of that corporation was issued to William J. Lemon and another individual, both of whom were residents of Roanoke, Virginia, and 49% of the stock was purchased by Mr. Bergman and Mr. Klurman, as nominees for Medic-Home, to which they subsequently transferred such stock. Thereafter, on June 20, 1968, pursuant to agreement dated as of January 1, 1968, the Company obtained from Mr. Lemon an additional 31% of the outstanding stock of Liberty Nursing Homes, Incorporated

(giving it 80% of the outstanding stock of that corporation) and an outstanding promissory note of that corporation in the face amount of $12,500 in exchange for 27,250 shares of Common Stock, $.10 par value, of the Company. In connection with this transaction, Medic-Home on June 20, 1968 guaranteed a $135,000 promissory note of Mr. Lemon's and Mr. Lemon deposited the above-mentioned 27,250 shares in escrow pursuant to an agreement that if Medic-Home shall be required to make any payment on its guarantee, such shares will be transferred and delivered to Medic-Home by the escrow agent. The Company is informed by Mr. Lemon that the cost to him of the above-described securities of Liberty Nursing Homes, Incorporated was approximately $126,000 in cash. The Company and Mr. Lemon are now the only stockholders of Liberty Nursing Homes, Incorporated.

On September 20, 1965 Liberty House Nursing Home of Virginia Beach, Inc. ("Virginia Beach") was organized in the Commonwealth of Virginia and Medic-Home thereafter leased Liberty House of Virginia Beach to that corporation for a basic rental plus 50% of its net profits before taxes. At that time all of the stock of Virginia Beach was owned by diverse individuals, for the most part residents of that area. In 1967, in consideration of deleting from the lease the profit-sharing provision, Virginia Beach issued to Medic-Home 750 shares of its Common Stock, par value $100 a share, constituting 50% of its outstanding stock. Thereafter, in 1967, Medic-Home purchased an additional 20% of the outstanding stock of Virginia Beach for $39,000 and on June 20, 1968, pursuant to agreements dated January 24 and January 31, 1968, it obtained an additional 10%, giving the Company a total of 80%, of the outstanding stock of Virginia Beach in exchange for 6,750 shares of the Common Stock, $.10 par value, of Medic-Home.

Pursuant to an arrangement concluded on September 28, 1967 and later confirmed in writing, the Company on January 9, 1968 issued and sold 5⅝ shares of its common stock, without par value, to Blair & Co., Inc. and 5/16 of a share, each, to Stuart M. Beringer and John W. Hurley, Vice Presidents of that Company, making a total of 6¼ of such shares at a price of $4,800 per share (the equivalent of 20,000 shares of Common Stock, $.10 par value, at a price of $1.50 per share), in connection with financial services and advice which they had rendered to the Company with respect to the development of a program of long-term financing. The Company has agreed that, at the request of the holders, all such shares (which are being registered at this time but are not being offered by this Prospectus) will be included in any registration statements which the Company may hereafter, from time to time, file under the Securities Act of 1933. If any securities are to be sold pursuant to any such registration statement by the Company, the cost of registering such shares will be borne entirely by the Company. Otherwise, the holders of such shares will pay their pro rata share of such cost.

On January 31, 1968 First Connecticut and Bernard Bergman each surrendered the 6% promissory notes of the Company in the principal amount of $200,000 which they held, in consideration of the issuance of 21,858 shares of Common Stock, $.10 par value, of the Company to each of them, on the basis of $9.15 per share.

On the same date the Company issued 7,518 shares of its Common Stock, $.10 par value to First Connecticut, on the basis of $9.15 per share, in full payment of all sums due to it for management and consulting services as of September 30, 1967 under its Consultation and Advisory Contract dated April 15, 1965, which was cancelled, and for other services which it had rendered. On the same day the Company issued 6,448 of such shares to Mr. Bergman on the same basis with respect to sums due to him under the Consultation and Advisory Contract with him, which was also cancelled.

The Company also issued 5,374 shares on the same basis on the same day to Samuel A. Klurman in full payment of all sums due to him as accrued bonuses as of September 30, 1967 under his employment agreement dated April 15, 1965, which was cancelled. That agreement had provided for the employment of Mr. Klurman as the Company's chief executive officer for a period of four years at a salary of $25,000 a year, payable in weekly installments, and a bonus which would accrue at the rate of $20,000 a year. A new employment agreement was then entered into with Mr. Klurman for a period of 5 years commencing February 1, 1968 (see "Management").

Under date of January 26, 1968, the Company entered into a contract with Riverside-87th Street Corp. ("Riverside") to purchase for an aggregate purchase price of $1,500,000 a parcel of land in Newport News, Virginia, together with the nursing home and self-care facilities being constructed on such land by that

corporation. The facilities will include two completely renovated wings of a building formerly operated as a nursing home by Mr. Bergman and an entirely new center portion. The Company is informed by Messrs. Bergman and Klurman, the stockholders of Riverside, that the land and original building was acquired by Riverside from Mr. Bergman on December 1, 1966 and that the total estimated cost thereof to Riverside (comprising estimated construction costs and the purchase price it paid in cash and by incurring indebtedness) is approximately the same as the Company's purchase price. Under the terms of the contract, Riverside is obligated to deliver to the Company a completed facility, with all approvals necessary to enable the Company to commence operations immediately. The contract is conditioned upon the successful consummation of the offering made by this Prospectus and the Company's obligation under the contract is conditioned upon Riverside's obtaining the financing described below. The Company has agreed to advance to the seller $300,000 of the funds realized from the offering, secured by a third mortgage, for the purpose of assisting it in financing the completion of the facilities. At the closing of title, the Company

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part payment of the purchase price. The balance of the purchase price is to be paid by the Company's assuming an institutional first mortgage of $200,000, to be provided by Riverside, and a second mortgage of $300,000, which Riverside is to provide, either with an outside lender or, if that is not feasible, with Riverside itself. The interest on both mortgages is not to exceed 7% per annum, the first mortgage is to run for at least 15 years and the second mortgage for at least ten years. The Company is advised by Riverside that its present intention is to obtain such second mortgage from an outside lender (see "Use of Proceeds"). Bernard Bergman, a director of the Company, owns 75% of Riverside and Samuel A. Klurman, the Company's President, owns 25% of the outstanding stock of that corporation.

Riverside also owns the Park Crescent Hotel at 87th Street and Riverside Drive in New York City and contemplates rebuilding it so that it will become a nursing home facility. Mr. Klurman has granted the Company a 3-year option to purchase from him, so long as he is employed by the Company, all of his interest in the Park Crescent Hotel at a price based upon the average of appraisals to be made by two established and recognized real estate appraisers in the City of New York selected by the Board of Directors of the Company. The Company is advised by Mr. Klurman that he purchased his 25% stock interest in Riverside in 1966 at a price of $50,000 and that Riverside purchased the Park Crescent Hotel in that year at a purchase price of approximately $2,400,000, of which $300,000 was paid in cash and the balance by the assumption of various mortgages aggregating approximately $2,100,000.

In July, 1965 the Company's wholly owned subsidiary, Liberty House of New York, Inc. ("Liberty") purchased from Anne Weiss the lease of the Towers Nursing Home at 2 West 106th Street, New York, New York and sundry receivables for $1,025,000. Anne Weiss, who at that time did business as an individual under the name of Towers Nursing Home, is the wife of Bernard Bergman. The lease expires in 1979, but the Company holds an option to extend the lease to 1989. The rental payable under the lease is $10,833 per month, plus real estate and water taxes. Liberty made payment of the purchase price by paying $133,000 in cash, assuming various liabilities of Towers Nursing Home in the aggregate amount of $163,000 and by delivering its 4% promissory note in the principal amount of $730,000. The principal and interest of this note was made payable in equal monthly installments of $5,000 from January 1, 1966 until January 1, 1967, thereafter, of $3,333 per month until July 1, 1972, and thereafter, of $5,000 per month until paid in full.

Liberty subleased the property back to Anne Weiss, who undertook to maintain the license required to operate the nursing home and to comply with all municipal and governmental regulations required to conduct such home and agreed to pay Liberty rental of $25,000 per month, subject to certain conditions. Effective July 1, 1967 this rental was increased to $30,000 a month in consideration of the addition of 50 beds to the nursing home. The cost of this addition was approximately $122,000, of which approximately $91,000 was paid by Liberty and $31,000 was paid by Anne Weiss.

NOTE: Asterisks indicate illegible copy in material supplied to subcommittee.

Effective January 1, 1968, the above-described sublease was superseded by a new sublease to a new partnership consisting of Alex Forro (the manager of the nursing home), Sissel P. Klurman (the wife of Samuel A. Klurman) and Anne Weiss, doing business under the name of Towers Nursing Home, at a rental of $30,000 per month, subject to certain conditions. As additional consideration for Liberty's granting this sublease, the sublessee paid Liberty $100,000. This sublease will expire in 21 years.

The lease price and the sublease rental were determined by negotiation. In the opinion of management such price and the sublease arrangements are as favorable to the Company as they would have been if the lease had been with a non-affiliated person.

ITEM 8. LETTER AND ENCLOSURES FROM NATHAN LEWIN; TO SENATOR FRANK E. MOSS, DATED FEBRUARY 4, 1975

DEAR SENATOR MOSS: On January 29 we hand-delivered a letter to your office requesting that your Subcommittee terminate or postpone its hearings "insofar as they relate specifically" to our client, Dr. Bernard Bergman. On January 31, you responded to our letter—which you mistakenly characterized as a request that "Dr. Bergman's *testimony* be terminated or postponed"—by advising that the hearing will reconvene on February 4 at 10:00 a.m., and you said, "Mindful of the cooperation which your client has expressed and exhibited, we request his appearance at this time under the authority of our original subpoena to answer questions posed by the full Subcommittee membership." The purpose of this letter is to convey our client's respectful declination of your request and to explain why he is under no legal or other obligation to respond to the questions which may be propounded during the February 4 meeting.

1. *The subpoena.*—During Dr. Bergman's trip abroad in December 1974 and early 1975, it was announced in the newspapers by Mr. Stein, that subpoenas of a Senate committee had been issued to two nursing homes in which he or his family has an interest and to Dr. Bergman personally. On his return to the country, Dr. Bergman arranged to receive service of the subpoena issued to him, and this was done in a respectful and dignified manner, pursuant to agreement of counsel, in an attorney's office during the week before your hearing of January 21. The subpoena served upon Dr. Bergman at that time directed him, in the capacity of "principal or officer, Riviera Furniture Company, 250 West 57th Street, New York" to appear personally on January 21 and bring all the records of the company with him. We understand that the records of the company were fully produced at that time, and there has been no suggestion whatever from your Subcommittee that any possible record you might wish to see of the Riviera Furniture Company is not among those delivered.

Although Dr. Bergman was subpoenaed in this limited capacity, he was asked no questions whatever regarding the Riviera Furniture Company. He arrived on January 21 to testify on a wide range of subjects in the hope that your Subcommittee would offer a fair forum in which allegations would be dispassionately weighed and witnesses who made such allegations would be cross-examined to determine whether they told the truth. His expectation was dashed by the open and notorious alliance of the Subcommittee with Mr. Stein and its refusal, notwithstanding counsel's insistence, to dissociate itself from the reckless charges made by Mr. Stein.

This hope of fairness was further dashed by the presentation made in the morning and early afternoon hours of January 21, when Mr. Stein and his assistants were permitted to make totally erroneous assertions about the effects of real estate transfers on Medicaid reimbursements for the Willoughby Nursing Home (see Exhibit 1) and when three witnesses—who have become well-known in the New York area for their readiness to indict the entire nursing home industry—were permitted to air before this Subcommittee on local television the general charges they have made against nursing homes at large and the particular erroneous allegations against the Towers Nursing Home. In addition, you refused to permit Mr. Lewin to cross-examine the witnesses who had testified against Dr. Bergman or to call to the stand three former employees of the Towers who were waiting in the hall and were ready to rebut the vague charges as well as the specific claims of improper treatment while a boiler was broken in 1971.

We discuss below the obvious intent of the questioning of Dr. Bergman after he read his prepared statement. Suffice it to say, at this point, that it was clear

from the questioning that the focus of the Subcommittee's inquiry was not legislative reform with respect to the nursing home industry, but a detailed examination of rumor and speculation regarding his private and financial life, and sheer inflammatory association of Dr. Bergman with notorious figures such as Meyer Lansky or others affiliated with organized crime.

Toward the conclusion of the hearing, you inquired whether Dr. Bergman would be able to return on February 4 for a hearing. Dr. Bergman made a general statement indicating his readiness "anytime you call me," but Mr. Lewin objected to the harassment of "repeated trips to the Committee" (Transcript, p. 187). He indicated that an appearance of this kind was "a very substantial strain on [Dr. Bergman's] health" and that he should not be required to return time and again (Transcript, p. 188). You then replied that "I am willing to accommodate Dr. Bergman to what is a convenient date for him," and Mr. Lewin replied, "I think that could be worked out between us" (Transcript, p. 188).

As early as January 27 and again in our letter of January 29, we called your attention, in writing, to the fact that the last word regarding Dr. Bergman's next appearance was that a "convenient date" would be "worked out." There has, however, been no negotiation or discussion by your staff toward that end, and your only reference to Dr. Bergman's reappearance was your request of January 31 that Dr. Bergman appear on February 4. Since, for reasons outlined below, it has become clear that your questioning of Dr. Bergman would exceed the proper province of your Subcommittee and would violate his constitutional liberties, we are authorized to state on his behalf that he refuses to cooperate further with the Subcommittee and invokes the constitutional liberties guaranteed by the First, Fourth, Fifth and Sixth Amendments to the United States Constitution.

Before turning to an examination of those specific rights, we emphasize that Dr. Bergman is not, in our view, under any legal obligation to appear on February 4.

First, the only outstanding subpoena directs him to appear on January 21. He did so and testified fully.

Second, the only outstanding subpoena is directed to him as officer of the Riviera Furniture Company. The Subcommittee is apparently uninterested in that entity, and he is under no legal obligation to testify with regard to any other.

Third, the outstanding subpoena does *not* state that Dr. Bergman must arrive on a date certain "and not . . . depart . . . without leave," as do judicial subpoenas or those for grand jury testimony. The outstanding subpoena expired by its own terms on January 21.

Fourth, there was neither an oral nor written understanding that Dr. Bergman would return on February 4—even if such an understanding could be converted to a legal obligation. Indeed, we consistently called your attention to the absence of any such understanding.

Fifth, the subject under inquiry, as disclosed by the questioning on January 21, by subsequent subpoenas of the Subcommittee, and by public announcements to the press exceeds the authority of the Subcommittee and is not pertinent to any legislative goal the Subcommittee may legitimately pursue.

2. *Constitutional rights.*—We continue to feel strongly that further interrogation by your Subcommittee along the lines following on January 21 would be an injudicious exercise of your Subcommittee's powers, and that it will seriously prejudice Dr. Bergman's right to a fair consideration by state and federal law-enforcement authorities of charges made against him in the press—charges which, we might add, have largely originated with persons "cooperating" with your Subcommittee. The response to our arguments made in your letter of January 31 (to which we reply in detail later) are largely irrelevant and wholly unsatisfactory, and we thus have been forced to consider whether, if you should seek at some future time to compel Dr. Bergman's testimony, he should refuse in reliance on his constitutional rights. We have discussed this matter fully with our client, and we wish to advise you at this time that if called, Dr. Bergman will, on the advice of counsel, decline to answer any questions concerning his personal, family, or business affairs.

Dr. Bergman's right to so decline rests on the First, Fourth, Fifth, and Sixth Amendments to the Constitution. The First Amendment quarantees freedom of speech and association, and the right to petition for redress of grievances. The effect of your Subcommittee's hearings—as well illustrated by the improper questions put to Dr. Bergman at the end of the January 21 hearing by Mr. Naftalis—is further to ensure that no public official, in the New York legislature, the Health Department or otherwise, can possibly treat a petition, request or application by

Dr. Bergman on its merits, for fear of being charged by Mr. Stein, Mr. Naftalis and others as a participant in the "scandal" they, with others, have sought to manufacture. The Third Circuit Court of Appeals recently found that the proceedings of a State investigatory body which "has transgressed its investigatory function and become accusatory" could be enjoined, on the basis of similar First Amendment claims. *Freeman & Bass, P.A.* v. *State of N.J. Comm'n of Investigation*, 486 F.2d 176, 179 (3rd Cir. 1973).

The Fourth Amendment protects an individual's legitimate expectations of privacy from unwarranted intrusions by Congress as well as law enforcement authorities. Your Subcommittee's efforts to pry into Dr. Bergman's wholly personal affairs, manifested most clearly by the recent attempt to secure all his and his daughter's and son-in-law's loan agreements, net worth statements, etc., demonstrate that your inquiry is not warranted by anything in your mandate, which is to investigate conditions and practices affecting, *inter alia*, the nursing home industry, not to expose the private affairs of persons who may be active in the industry.

The Fifth Amendment, of course, protects "the innocent as well as the guilty," *Ullman* v. *United States*, 350 U.S. 422, 427 (1956), from being forced to give testimony which "might be used as evidence in or at least supply investigatory leads to a criminal prosecution." *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). In view of the grand jury investigations already under way in New York, the recent appointment of a special prosecutor there, and the enormous pressure generated by Mr. Stein and the media to vindicate their charges by securing Dr. Bergman's indictment, we are unable to conclude that his testimony before your Subcommittee, in the words of *Hoffman* v. *United States*, 341 U.S. 479, 488 (1951), "cannot possibly" have an injurious effect in a criminal prosecution.

Finally, the Sixth Amendment guarantees the right to counsel, to a jury trial, and to confront witnesses in a criminal proceeding, and as we have previously explained, your proceeding not only has many of the earmarks of a criminal trial itself, but also threatens to have a grave impact on any actual trial of Dr. Bergman that may occur in the future. You have refused our request to cross-examine witnesses against Dr. Bergman (including most notably Mr. Stein) and to present rebuttal witnesses. Your hearings have become, in the words of the Third Circuit earlier quoted, "accusatory" rather than "'investigatory," and we believe that the full panoply of Sixth Amendment rights must be accorded prior to any further interrogation of Dr. Bergman. The hearings of your Subcommittee have, in light of the rulings on January 21 and the nature of the witnesses who have testified, become the kind of proceedings that the Supreme Court found unconstitutional in *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969).

Since Dr. Bergman will, for these reasons, refuse to answer further questions by your Subcommittee, there can no longer be any conceivably legitimate reason for requiring his further attendance. To do so—merely in order to place his refusal before the television cameras and submit him to questions taking the form of accusations—would, we are sure you recognize, be patently improper. Indeed, the ethical standards prescribed by the American Bar Association provides:

"It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. *ABA Standards Relating to the Prosecution Function and the Defense Function* § 5.7(c)."

We trust, therefore, that this response will end the matter, so far as your Subcommittee is concerned, of seeking to question Dr. Bergman.

3. *Other responses.*—We also wish to take this opportunity to reply to some of the statements in your letter of January 31.

1. With regard to Mr. Naftalis, you mention that we were told before the January 21 hearing that he would participate—which is true—but you fail to mention that we were not told that he would continue to be paid by or be associated with Mr. Stein's Commission. Is he considered by you—as he certainly is by us—to be one "connected with the Stein office" who will not have access to subpoenaed records of our clients?

2. You imply on page 2 of your letter of January 31 that if certain additional documents are turned over to your Subcommittee you will, "in turn, seek arrangements to return copies of the 1974 records over to you to facilitate the preparation of income tax statements." This conditional access to the 1974 rec-

ords conflicts squarely with your unconditional assurance when the records were turned over that they would be available to us at any time for current use. You said to Mr. Lewin, with reference to the 1974 records, "You will have access to them when you need them" (Transcript, p. 36). On Friday, January 24, Mr. Halamandaris promised Mr. Lewin that the 1974 records of these homes would be copied and returned no later than Tuesday, January 28. On that day, Mr. Jeffress of this firm was told by Mr. Halamandaris that the records would not be available until Wednesday afternoon. They were not made available on Wednesday, and on Thursday morning Mr. Halamandaris professed not to know exactly which records were needed by the homes. Three telephone calls by Mr. Jeffress later that day, and another on Friday, went unreturned by Mr. Halamandaris. Meanwhile, the bookkeepers have been unable to prepare tax returns, financial statements, and other reports for 1974. You will recall that other nursing homes were totally excused from delivering 1974 records on January 21; at the very least, you should immediately honor the promise made by you on January 21 and by your counsel on January 24.

3. You state that the witnesses who testified on January 21 discussed "general industry conditions" and not Dr. Bergman in particular. In addition to Mr. Moan, whose erroneous inferences regarding Bergman family properties have already been discussed (see also Exhibit 1), Anastasia Hopper referred specifically to the Towers Nursing Home and to Dr. Bergman in particular Transcript, pp. 105–106, 122–123). Although witnesses were available in the hall specifically to rebut her allegations, you did not agree to hear from them.

4. With regard to the subpoena served on the American Bank and Trust Company for personal financial data on Dr. Bergman and members of his family, we are at a loss to understand your statement that you "had no idea" that this was "Dr. Bergman's bank." The subpoena, after all, calls upon the bank to produce Dr. Bergman's personal financial statements and loan records. Did you serve that subpoena without any idea that the bank would *have* any such records? Or did you take our statement to mean that Dr. Bergman *owns* the bank—a meaning certainly not intended and, we think, impossible to extract from our statement? In any event, we are pleased to have your assurance that Mr. Stein's information on Dr. Bergman's personal financial statements did not come from your Subcommittee.

The subpoena, it appears, is still outstanding, and we continue to believe—as we suggested in our previous letter—that it is an improper exercise of your Subcommittee's investigatory powers. (Your statement, Mr. Chairman, that the "reason for seeking" Dr. Bergman's personal financial statements was that he had "put in issue" the information contained therein through his testimony on January 21, fails to take account of the fact that the subpoena was dated *January 16* five days *before* Dr. Bergman's testimony. It also fails to take account of the fact that the testimony you refer to was a response to your question. The Subcommittee may hardly "bootstrap" its way into such personal documents by asking improper questions about personal finances). We are presenting this matter to the full Subcommittee through a formal motion to withdraw the subpoena, which requires, we believe, consideration by the full Select Committee on Aging.

5. With regard to the publicity generated by your hearings, we fail to understand how Dr. Bergman's efforts to stem the flow of false charges and inflammatory publicity—either through "dramatic denials" when he was forced to appear before you on January 21, or through filing suit against Mr. Stein and others to obtain an injunction against their activities (done 11 days *before* your hearing took place)—can be cited as reasons for continuing your hearings. Furthermore, you surely realize that a change of venue of your hearings—as suggested by Mr. Halamandaris—would not change at all the publicity, including live television coverage, given those hearings in New York, and thus would not aid our client.

Finally, we cannot leave unrebutted your statement that Mr. Lewin, at the January 21 hearing, "asserted that the motive inherent in such maltreatment [of Dr. Bergman] is bias against those of the Orthodox Jewish faith." Mr. Chairman, you must have been reading the *New York Times*—which carried this charge in a headline as well as a story—rather than, as you describe it, "studying the transcript." Indeed, neither the *Daily News* nor the *Post*, in their stories on the hearing, reported that such a charge had been made by Mr. Lewin. The transcript makes it clear that Mr. Lewin made no such charge even by implication. Mr.

Halamandaris asked Mr. Lewin whether he had any explanation for the Health Department's wildly inaccurate attribution to Dr. Bergman of relatives he does not have and associates he never met, and Mr. Lewin suggested two possible explanations, the second of which was (Transcript p. 185) :

"There are in the industry, the nursing home industry in New York, a variety of people like Dr. Bergman, who are of the Orthodox Jewish faith. That is a small community. There may be an association of those within the Department of Health, that anybody of the Orthodox Jewish faith are associated with each other. . . . I am not suggesting it is in any way based on anything to do with religious faith, but I am talking about the associations that are assumed. . . ."

It is mystifying to us, Mr. Chairman, how that comment could be said by you—or headlined by the *Times*—to constitute a charge that the harassment of Dr. Bergman has stemmed from "bias against those of the Orthodox Jewish faith."

6. You assure us, on page 4 of your letter, that you are, in fact, "assessing the entire system" of nursing homes and "not conducting an investigation of Dr. Bergman personally, but of the entire nursing home industry." Your statement is refuted by the publicity that your staff is generating in other jurisdictions. In Florida, for example, according to an article in *The Miami Herald* of January 24, 1975, your counsel is quoted in a front-page story (featuring a photograph of Dr. Bergman) as asserting that "a small group of individuals own an incredible number of nursing homes." (see Exhibit 2). He further states that "there is an informal syndicate . . . in Chicago . . . [and] the same group has ties with New York." This, according to your counsel, "greatly increases the chances for corruption."

What, one wonders, other than the demonstrably erroneous chart and "family tree" of the New York State Health Department remotely supports such allegations? Although Dr. Bergman has denied ownership or participation in such a syndicate time and again—and although his testimony has been the *only* evidence before this Subcommittee that deals with particulars such as the names of specific nursing homes—the libel is repeated by your staff and gains currency throughout the country. *The Miami Herald* quotes your "subcommittee staffer" as saying that Dr. Bergman is "the principal, the big mover" in New York nursing homes. Is there a shred of credible evidence—as opposed to allegations repeated time and again in a shrill pitch—to support this assertion? We do not see it in the records of this Subcommittee and surely not in the records of Mr. Stein's Commission.

In conclusion, Mr. Chairman, we regret that the hopes expressed in our original letter to you of January 14 have not been fulfilled, and that we have now been forced to conclude that Dr. Bergman should no longer cooperate with your Subcommittee's proceedings. We imply no criticism of you or other individual Senators, or of your motives, by this conclusion, but we do feel that the inevitable effect of your contemplated proceedings will be seriously to injure Dr. Bergman and deprive him of constitutionally guaranteed rights. We hope that you will now turn your efforts to a thorough and even-handed inquiry into the nursing home industry with the laudable purpose of determining what legislation might be needed to make it better serve the interests of senior citizens, and we wish you every success in that effort.

Sincerely yours,

MILLER, CASSIDY, LARROCA & LEWIN.
By : NATHAN LEWIN.

[Enclosures.]

EXHIBIT 1

[From the Albany Knickerbocker News, Jan. 24, 1975]

NO FEE HIKE IN BERGMAN LAND DEALS

(By Gene Weingarten)

Not one of a series of interfamily real estate transfers negotiated by Bernard Bergman and involving his network of nursing homes in the state artificially inflated Bergman's Medicaid paychecks, state health officials have concluded.

The disclosure challenges one of the major contentions of Assemblyman Andrew Stein's Commission on Cost of Living, which told a U.S. Senate subcommittee earlier this week that the land deals were aimed at swelling property values to milk Medicaid for greater rental fees.

Asst. State Health Commissioner William F. McCann said Thursday that the rental components of Medicaid reimbursement to Bergman's nursing homes in

the state have stayed the same since the late 1950's, years before the Medicaid formula was instituted.

McCann ordered a study done of property transfers by nursing home owners earlier this week, to determine if anyone, including Bergman, had profited at state expense from the repeated sale and resale of his property in the last several years.

The study showed that out of hundreds of such transactions, only nine cases, all apparently justified by special circumstances, resulted in increases in Medicaid reimbursements, McCann said. None of those cases involved Bergman-owned properties.

On Tuesday, staff aides on Stein's commission testified before a U.S. Senate subcommittee investigating nursing home abuses that repeated land transfers on one of Bergman's 3 properties artificially inflated the worth of that property by more than 100 percent.

Staff aide Terence Moan said the building, the Willoughby Nursing Home in New York City, had been sold, resold, mortgaged, leased, and subleased more than eight times within the Bergman family between 1965 and 1968.

The Willoughby home, he said, was "one of a dozen" cases of such multiple transactions engineered to manipulate state reimbursements on rental costs based on overstated property values.

"This is an example of (land) transactions before the institution of Medicaid that affected the Medicaid formula," Moan said.

Since the early 1960s, the administration of the home has been handled by a private operator, who pays rent to Bergman.

Any tangential profit that Bergman may have made from the transactions on the property was apparently not made at taxpayer expense, McCann said.

McCann is director of the Health Department's Division of Health Economics.

Real estate analysts told *The Knickerbocker News* late Thursday that multiple sales and resales of property to the same individual or to corporations wholly composed of the same individuals are often done to increase the collateral value of the property.

"An owner can sell his buildings as many times as he wants and even raise the rental price to the operator," McCann said, "but unless there are very special circumstances, we won't permit a Medicaid increase."

EXHIBIT 2

[From the Miami Herald, Jan. 24, 1975]

U.S. SENATE PROBING STATE NURSING HOMES FOR SYNDICATE TIES

(By Frank Beacham)

Possible corruption, political influence peddling and substandard care in Florida's nursing home industry are under investigation by a U.S. Senate subcommittee.

The probe here was spurred by a continuing investigation in New York by newspapers and federal, state and local governments that has produced allegations of widespread kickbacks, Medicaid fraud and infiltration by organized crime.

As many as 18 nursing homes throughout Florida are being probed by investigators to examine their ties to a New York and Chicago syndicate.

"It appears that a small group of individuals own an incredible number of nursing homes," subcommittee counsel Val Halamandaris said Thursday.

"There is an informal syndicate that can be documented in Chicago. Through interlocking directorships it appears the same group has ties with New York. And it appears the New York outfit has ties with Florida."

Though the tight ownership is not illegal, Halamandaris said, it greatly increases the chances for corruption.

Halamandaris said more Senate investigators will be sent to Florida soon to probe nursing homes and there is a "good chance" that hearings will be conducted in the state by the Subcommittee on Long Term Care of the Special Committee on Aging.

The subcommittee, which conducted hearings in New York this week, has focused its investigation on Bernard Bergman, a nonpracticing rabbi who began his career as the director and chaplain of a nonprofit nursing home and now has a reported net worth of $24 million.

Bergman, described by a subcommittee staffer as "the principal, the big mover" in New York nursing homes, is under investigation. Questions had been

raised about the health and treatment of patients and the handling of Medicaid payments at his nursing homes.

He denied all those accusations at a televised hearing in New York this week.

Halamandaris said it was Bergman's wide-ranging involvement with nursing homes that put Florida in the spotlight.

According to The New York Times, which conducted a three-month investigation into nursing home operations, Bergman is the largest stockholder in Medic-Home Enterprises Inc. Medic-Home has reported that it owns 36 nursing homes, all outside New York state.

Halamandaris said there may be as many as 18 homes in Florida with Bergman connections.

Although no specific allegations have yet been aimed at Bergman-connected nursing homes in Florida, questions have been raised about his New York operations.

In a report on nursing homes released last week by New York Secretary of State Mario Cuomo, he said patients in a home there controlled by Bergman were described by a hospital nurse as "severely dehydrated, malnourished, with elevated temperatures, semicomatose, lethargic, confused and disoriented, and (with) large deculbiti (bed sores) with pus-like drainage."

Cuomo also said Anne Weiss, Bergman's wife, was alleged to be receiving $25,000 as the operator of one New York nursing home while also receiving $11,605 for unidentified services, for another. When questioned by state investigators, the head nurse at one of the homes said she had never seen Bergman's wife in the 18 years she had worked at the home.

Cuomo said the 17 separate investigations of nursing homes in New York had come "to the clear conclusion that both nationwide and in New York there is . . . widespread and intolerable abuse of service, massive profiteering, administrative inadequacy, legislative deficiency and political impropriety, if not corruption."

Most abuses in New York involved problems with government reimbursement of funds through the Medicaid program. Investigators suspect similar types of fraud in Florida.

The major abuses include:

Overbilling: When a nursing home owner or employee conspires with a vendor to defraud the government with an inflated bill.

Payroll padding: Listing relatives and friends as employees though they did little or no work.

Cross renting and cross leasing: Owners lease homes at inflated rates to friends and relatives and are later reimbursed by Medicaid.

Theft of welfare checks from elderly persons staying in the home.

ITEM 9. LETTER FROM JOHN J. CASSIDY; TO SENATOR FRANK CHURCH, DATED FEBRUARY 14, 1975

DEAR SENATOR CHURCH: Our client, Dr. Bernard Bergman, has received a subpoena [1] calling upon him to appear at a hearing of the Senate Special Committee on Aging on February 19, 1975, in Washington. Dr. Bergman will, of course, comply fully with this subpoena, as he has with every subpoena served upon him or upon firms he controls by the Subcommittee on Long-Term Care. The purpose of this letter is to advise your committee, however, that—absent certain assurances, which we discuss later—Dr. Bergman will decline to testify, on the basis of his constitutional rights and privileges under the first, fourth, fifth, and sixth amendments.

Dr. Bergman's decision in this respect was communicated to the Subcommittee on Long-Term Care in a letter of February 4 [2] addressed to Senator Moss, a copy of which we have enclosed for your convenience. The decision was made on advice of counsel only after thoughtful consideration of the nature of the subcommittee's proceedings in New York; the pendency of two grand jury investigations in which Dr. Bergman is a primary target; the attacks on Dr. Bergman by certain public officials and by the press in New York over the past few months, including what amount to demands for his prosecution; and the inevitable effect of the prejudicial publicity emanating from the subcommittee's hearings upon

[1] See p. 3228.
[2] See appendix 5, item 8, p. 3296.

Dr. Bergman's chances for a fair and impartial consideration by prosecutors, grand juries and courts of the charges publicly made against him.

We are pleased that the committee has decided to conduct any further questioning of Dr. Bergman in Washington before the full Special Committee on Aging. However, these changes alone will not necessarily alter the amount or type of publicity accorded the proceedings in New York. Nor will they necessarily alter the character of the hearings, which—as others have recognized [3]—have become, at least at this stage, accusatory proceedings. Mr. Chairman, Dr. Bergman has been genuinely eager to cooperate with your committee and answer the allegations against him, and under procedures that adequately protect his rights in what is essentially an adversary proceeding—while at the same time ensuring that your committee, and the public, hears all the facts relevant to your investigation—he was willing to waive, in this instance, his undoubted right to remain silent. For that reason, we suggest, for the consideration of the committee, a number of procedural rights which, if granted and administered prior to his testimony, would lead Dr. Bergman to reassume his position of January 21 and respond, with live testimony, to questions from the committee.

First, Dr. Bergman should have the right, subject only to reasonable limitations, as to time, to present and question, through his counsel, witnesses to rebut charges made at the subcommittee's earlier hearings or at the full committee's hearings which are, in our judgment, false or misleading. The one-sided picture presented by previous witnesses has given the false impression, Mr. Chairman, that perfectly legal practices, including requests for assistance by legislators, are fraudulent or corrupt, and that the patient care in Dr. Bergman's nursing homes is callous and inadequate. Those erroneous impressions should be corrected—both to overcome the prejudicial publicity already generated against Dr. Bergman, and to insure that your committee receives a fair presentation of the facts relevant to the matters under consideration.

Second, Dr. Bergman's counsel should be afforded the right to cross-examine prior witnesses before the subcommittee who have made allegations concerning Dr. Bergman. Our system of justice recognizes that the truth may best be determined by testing accusations in an adversary proceeding, and to the extent that serious accusations have been made by other witnesses against Dr. Bergman, he should in all fairness—and in your committee's interest in knowing the full facts—be allowed to elicit from those witnesses other facts which bear on the accuracy or completeness of their testimony.

Third, questioning as to financial and other details regarding the operation and financial transactions of the nursing homes in which Dr. Bergman has an interest should be directed at persons having first-hand knowledge such as accountants, auditors, or other employees of nursing homes. Prior questions and statements by committee members and staff suggest that Dr. Bergman will be questioned about particular and, in some cases, very detailed transactions, and because he was not generally involved in the day-to-day operation of nursing homes, it is essential that someone who was involved be called on to respond to such questions when necessary.

Fourth, where questions are asked concerning or based on particular documents, Dr. Bergman should be provided a copy of the document. Any lawyer, Mr. Chairman, can make a witness look foolish before the television cameras by asking questions about documents which the witness has never seen or does not recollect in detail, and then suggesting that the most minor discrepancies are intentional falsehoods. The right to be provided with the document at issue is particularly important where, as here, the investigation covers the widest range of the witness' affairs and the most minute facts concerning the operation of his businesses.

Fifth, Dr. Bergman should be afforded the right to make corrections in the transcript of his testimony within 10 days after receipt of the transcript. This right is provided to witnesses in civil depositions in Federal courts; it is, we believe, commonly afforded to witnesses before other congressional committees; and it is particularly important where questioning is conducted under the glare of live television coverage.

We recognize, Mr. Chairman, that some of the procedures detailed above are not commonly followed by congressional committees, and we do not suggest they

[3] We refer particularly to a letter addressed to Senator Moss from the American Civil Liberties Union, a copy of which is enclosed for your convenience.

are necessary in the routine congressional investigation. We do not, however, believe that the present circumstances are in any sense routine. Dr. Bergman is in a highly unusual and vulnerable position of being called to testify before television cameras at the same time that his affairs are the subject of criminal investigations. Our requests for certain elementary procedural guarantees are made in good faith and we hope your committee will consider them seriously.

In the event that, despite our wishes, your committee determines that these procedural safeguards should not be afforded, Dr. Bergman will, as we have stated, decline to testify on the basis of his constitutional rights and privileges. Should that be the case, Mr. Chairman, we respectfully suggest that it would be highly improper to require that Dr. Bergman appear before the television cameras simply to invoke his privileges in response to the committee's questions. Such a practice can serve no conceivable legitimate purpose, and has been flatly condemned by the American Bar Association. The *ABA Standards Relating to the Prosecution Function and the Defense Function* provide as follows:

"§3.6(e). The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law.

"§5.7(c). A prosecutor should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct."

A practice so strongly condemned by the legal profession as to render it "unprofessional conduct," subject to disciplinary sanctions, would hardly befit a body of the U.S. Senate.[4] In the event, therefore, that your committee determines not to grant the requests made earlier in this letter, we request that it withdraw the subpoena or excuse Dr. Bergman from appearing on February 19.

We would be happy to discuss the matters raised in this letter with you, with other members of the committee, or with your staff at your convenience.

Sincerely yours,

MILLER, CASSIDY, LARROCA & LEWIN.
By: JOHN JOSEPH CASSIDY.

ITEM 10. LETTER FROM VAL J. HALAMANDARIS, ASSOCIATE COUNSEL, SPECIAL COMMITTEE ON AGING; TO JOHN J. CASSIDY AND NATHAN LEWIN, DATED FEBRUARY 17, 1975

DEAR JOHN AND NATHAN: We have yet to receive a copy of the letter you released to the press at 3 p.m. on Friday, February 14. However, we will have a response based on my conversation with you at 5 p.m., on Friday. Speaking generally, we would welcome Dr. Bergman's bringing with him accountants or administrators or anyone else who would help him respond to questions raised by the committee. We will pay travel for a reasonable number of people if you will call me with their names.

I also enclose galleys from our February 4 hearing and charts entered in the record by the members of the Stein Commission on January 21. We just received both items. We would welcome in writing your response to the charts and will incorporate your comments in full in the January 21 hearing record.

Best wishes,

Sincerely,

VAL J. HALAMANDARIS.

ITEM 11. LETTER FROM SENATOR FRANK CHURCH; TO JOHN JOSEPH CASSIDY AND NATHAN LEWIN, DATED FEBRUARY 18, 1975

DEAR MESSRS. CASSIDY AND LEWIN: Your letter of February 14 advising me that your client Dr. Bernard Bergman will comply with our subpoena and appear

[4] We have today addressed letters to the Ethics Committee of the District of Columbia Bar and to the American Bar Association, requesting a formal opinion on this subject.

before the committee on February 19 has been received. The hearing will be held in room 1318 of the Dirksen Senate Office Building beginning at 9:30 a.m.

In your letter you inform the committee that "absent certain assurances" your client will "decline to answer on the basis of his constitutional rights and privileges under the first, fourth, fifth, and sixth amendments." In essence, your letter of February 14 restates the objections to our proceedings raised in your February 4 letter to Senator Frank E. Moss, chairman of our Subcommittee on Long-Term Care.

I want to make it very clear that I do not share your characterization of the subcommittee's hearings. In examining the transcript of these hearings of January 21 and February 4, I do not find violations of your client's constitutional rights. Quite to the contrary, Chairman Moss proceeded with great fairness giving Dr. Bergman and his counsel great latitude. Indeed, Chairman Moss allowed much more latitude than is normally required or expected of a Senate committee. Nevertheless, you ask for further concessions, noting that if such "procedural safeguards" are not afforded your client he will decline to testify on the basis of his constitutional rights and privileges. You add that it is "highly improper" to require Dr. Bergman to appear "simply to invoke his privileges in response to the committee's questions."

The specific "procedural safeguards" you request are as follows:

1. The right to call witnesses to rebut charges made at earlier hearings.
2. The right to cross-examine prior witnesses.
3. You request that questions relating to financial details be directed to accountants or auditors rather than to Dr. Bergman.
4. That documents used by the committee in its questioning be shared with the witness and his counsel.
5. The right to make corrections in the transcript within 10 days after the hearing.

Your letter correctly points out that these procedures are not commonly afforded to witnesses before congressional committees. However, in keeping with our desire to be more than fair I am granting some of your assurances. As you point out, this is an unusual case and I do not consider our decision a precedent binding on any other congressional committee.

With respect to your requests under numbers 1 and 3 above, the committee will be pleased to receive written statements in rebuttal to any testimony taken by the Subcommittee on Long-Term Care. Such statements will be entered in full in the record. Second, the committee requests that you submit a list of witnesses whom you would like to be called. The committee and its staff will interview such people and call those who have relevant testimony for future hearings. Third, the committee would welcome the testimony under oath of auditors, accountants, or others to aid Dr. Bergman in his response to specific questions.

With respect to number 4, the committee will be pleased to share any documents used in the examination of Dr. Bergman.

Concerning number 5, technical corrections will be accepted as a matter of course. Substantive changes will not be allowed in the transcript. However, your client will be afforded the opportunity, should he so desire, to offer substantive clarifications or additions as an appendix to the transcript.

Inasmuch as the proceeding on Wednesday is a congressional hearing and not a trial, I have denied your request to cross-examine witnesses appearing at previous hearings.

The above procedures, it seems to me, are more than fair and well beyond the requirements incumbent on congressional committees. Under these circumstances there should be no reason that Dr. Bernard Bergman should not appear and testify fully before the subcommittee. Since most of the "procedural safeguards" requested for your client have been afforded, Dr. Bergman should testify in full and is not in the position of having to assert his fifth amendment rights.

We look forward to Dr. Bergman's appearance on February 19.

With best wishes,

Sincerely,

FRANK CHURCH.

ITEM 12. LETTER FROM JOHN J. CASSIDY; TO SENATOR FRANK CHURCH, DATED FEBRUARY 18, 1975

DEAR MR. CHAIRMAN: This letter supplements our letter to you of February 14 regarding the attendance of our client, Dr. Bernard Bergman, at a hearing of the Senate Committee on Aging to be held in Washington, D.C., tomorrow, February 19. It is intended to convey to you and to the entire committee our client's considered decision, which he takes with regret, to invoke constitutional privileges when he appears pursuant to subpoena and, accordingly, to refuse, with all respect, to answer any questions put to him regarding his and his immediate family's personal and financial affairs.

Little purpose would be served by repeating what has been amply covered in earlier correspondence between our office and the chairman of the Subcommittee on Long-Term Care, Senator Moss. Suffice it to say that, given the extensive investigative activity directed at his affairs by Federal and State agencies, our client would be ill-served by subjecting himself at the present time to a public inquisitional proceeding focusing on him. It is precisely to avoid such a situation—which is repugnant to basic American principles of fair play—that the self-incrimination clause of the fifth amendment was adopted.

February 19 will be the third session conducted by a U.S. Senate committee or subcommittee on the subject of nursing homes in New York State, and not a single witness has yet been called to testify specifically about any nursing home proprietor other than Dr. Bergman or any nursing home operated by anyone other than the Bergman family. We do not question your committee's sincere endeavor to learn the facts about nursing home operations in New York and elsewhere, and Dr. Bergman was initially eager to join your efforts and spread the facts on the public record. But you must recognize that, viewed from his vantage point, the action of the subcommittee and the statements made in anticipation of tomorrow's session make it appear—intentionally or not—as if there is a deliberate effort on the part of the committee to secure information to jeopardize Dr. Bergman's position in active criminal investigations.

We are particularly distressed, for example, to read that the chairman of the subcommittee has been making public statements prejudging Dr. Bergman's testimony. Even though Dr. Bergman unequivocally denied during his appearance of January 21 the oft-repeated false allegation that he headed a large syndicate of "interlocking" nursing homes, Senator Moss has apparently repeated the allegations as fact. And notwithstanding the demonstrable falsity of the assertion that property transfers (undertaken for financing purposes) had increased medicaid costs, which was disproved by independent examination undertaken by an upstate New York reporter and brought to the attention of the subcommittee in our letter of February 4—Senator Moss apparently stated on February 16 that it was "most bizarre" that these were property transfers "used to build up the charge on which [Dr. Bergman] received reimbursement." See the attached copy of an article from the *New York Times* of February 17.

In our letter of February 14 we put forth suggestions for procedural guarantees that might offset the possibility that the committee and the public would obtain only the one-sided view of these matters that certain interests in the media have generated. From informal discussion with the subcommittee's counsel, we have learned that your committee might be prepared to grant the secondary procedural guarantees, but would not allow us to cross-examine witnesses already called or actually offer and question our own witnesses. These procedural guarantees would be the minimum needed to counter the highly charged and poisoned atmosphere attributable to New York activity which Senator Moss aptly described as a "lynch-mob atmosphere." We regret, therefore, that the committee will not give us that opportunity.

In view of all these factors, our client has instructed us to advise you that he intends to invoke the privileges afforded by the first, fourth, fifth, and sixth amendments.

Sincerely yours,

MILLER, CASSIDY, LARROCA & LEWIN.
BY: JOHN JOSEPH CASSIDY.

Appendix 6

ADDITIONAL CORRESPONDENCE RELATED TO THE NURSING HOME INVESTIGATION

ITEM 1. LETTER FROM SIDNEY M. GROSS, COUNSELOR, NEW YORK, N.Y.; TO THE SPECIAL COMMITTEE ON AGING, DATED JANUARY 21, 1975

UNITED STATES SENATE,
Special Committee on Aging,
Washington, D.C. 20510

(*Attention of Mr. Val Halamandaris*).

GENTLEMEN: We are the attorneys for Economy Restaurant Supply Co., Inc. Our client was served with a subpoena to appear before the Special Committee on Aging on January 21, 1975. On such date, our client and the undersigned as counsel, appeared before the committee at the New York County Lawyers Association building, 14 Vesey Street, New York, N.Y. I noted my appearance for the record and advised the committee that pursuant to said subpoena, there was delivered by our client the business records referred to therein.

I further advised the committee that it could expect full and complete cooperation from our client and that if any further records were necessary, the same would be delivered upon request.

I was advised that no testimony of our client would be taken on this date and that we would be notified when and if such testimony would be required.

I would appreciate your noting the appearance of the undersigned as attorneys for Economy Restaurant Supply Co., Inc. Any further requests or communications directed to our client may be made directly to the undersigned.

I should also want to bring to your attention a matter which has caused embarrassment and economic distress to our client. I am enclosing herewith a copy of an article which appeared on the front page of the Long Island Sunday Press on January 19, 1975.[1] You will note that I have bracketed a portion of that article referring to our client. I have questioned our client about the alleged contract with Towers Nursing Home and am advised that the same is totally untrue. While our client did do business with the Towers Nursing Home, it was on an order to order basis and there never has been any contract in that amount or any other amount. I believe that the "leaking" of such information is unfair and unjust and tends to demean our client. Certainly, our client should have had the opportunity to refute such an allegation under oath.

Very truly yours,

SIDNEY M. GROSS.

ITEM 2. LETTER FROM FRANK T. CICERO, ACTING DEPUTY COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH; TO DR. BERNARD BERGMAN, DATED JANUARY 29, 1975

DEAR SIR: Information has been brought to my attention which would indicate that the partnership licensed to operate Park Crescent Nursing Home is not in fact constituted as described on the facility's license. To determine the proper identity of the entity operating the nursing home, you are required to submit complete copies of the facility's Federal income tax returns for the past 3 years.

Failure to clarify the present situation within the next 2 weeks by submitting

[1] Retained in committee files.

the required information will compel the commissioner to consider instituting an administrative hearing to establish the identity of the operating entity and referring the entire matter to the office of the attorney general for review.

Sincerely,

FRANK T. CICERO, M.D.

ITEM 3. LETTER FROM JAMES T. BYRNE, JR., ASSISTANT GENERAL COUNSEL, BANKERS TRUST CO., NEW YORK, N.Y.; TO VAL J. HALAMANDARIS, DATED JANUARY 31, 1975

DEAR MR. HALAMANDARIS: In response to the subpoena dated January 28, 1975, served on Bankers Trust Co. by the Subcommittee on Long-Term Care, U.S. Senate Special Committee on Aging, concerning any account(s) of Rocco Scarfone or Mrs. Anna M. Scarfone, especially account No. 17-31625927, this is to advise you that an account bearing the above number was opened in the name of Anna M. Scarfone on July 28, 1970 and closed on August 12, 1971. The account was opened with an initial deposit of $1,800. No further deposits were made to the account until April 1971. Thereafter, twelve additional deposits were made ranging in amounts from $444.19 to $1.50. The majority of such deposits ranged in the $200 and less area. During the same time span there were approximately 50 withdrawals, most of which were under $100, and none of which exceeded $337.58.

As I indicated to your associate, Mr. Edie, no original checks or photostats are available.

I trust the above satisfies your needs and is in compliance with the subpoena.

Very truly yours,

JAMES T. BYRNE, JR.

ITEM 4. LETTER FROM JAMES J. MURRAY, VICE PRESIDENT, FIRST NATIONAL BANK OF HALLANDALE, FLA.; TO SENATOR FRANK E. MOSS, DATED FEBRUARY 3, 1975

DEAR MR. MOSS: This letter confirms my telephone conversation of this date concerning a subpoena to furnish records on Mr. Rocco Scarfone and Mrs. Anna Scarfone. It was agreed that in view of the insignificance of our records, I would be excused from testifying.

The history of our experience with the Scarfones is, according to our records, a $900 loan made June 29, 1973, and paid November 26, 1973. A $1,000 loan was made December 21, 1973, and paid February 27, 1974. A joint savings account was opened August 8, 1974, and carries a balance of $10.67.

Very truly yours,

JAMES J. MURRAY.

ITEM 5. TELEGRAM FROM LEWIS HORWITZ, ATTORNEY FOR BARNETT BANK OF BAY HARBOR ISLANDS, FLA.; TO VAL HALAMANDARIS, ASSOCIATE COUNSEL, SENATE SPECIAL COMMITTEE ON AGING, DATED FEBRUARY 3, 1975

I represent Barnett Bank of Bay Harbor Islands, Fla. (formerly First National Bank of Bay Harbor Islands), which received witness subpena today for records of account of Scarfone. All records stored in Mississippi impossible to obtain by February 4. No personnel of bank has knowledge.

LEWIS HORWITZ.

ITEM 6. LETTER FROM VAL J. HALAMANDARIS, ASSOCIATE COUNSEL, SENATE SPECIAL COMMITTEE ON AGING; TO VAL THOMACHICH, GENERAL ACCOUNTING OFFICE, DATED FEBRUARY 6, 1975

DEAR VAL: This will formalize my telephone call authorizing the release of Towers documents to U.S. Attorney Kenneth R. Feinberg for purposes of copying and returning under the continuous supervision of GAO.

This letter will also authorize access to Towers and Park Crescent records to Dr. Bergman's attorney, Nathan Lewin, Steven Thal, or their designee. They may use the records at their present site or remove them for copying, providing they are returned the same day subject as always to continuous GAO supervision.

If you have any questions, please call me.

With best wishes.

Sincerely,

VAL J. HALAMANDARIS.

ITEM 7. LETTER FROM ELEANOR K. HOFFMAN, LEGAL DEPARTMENT, THE CHASE MANHATTAN BANK; TO THE SPECIAL COMMITTEE ON AGING, DATED FEBRUARY 7, 1975

DEAR MR. HALAMANDARIS: Pursuant to our telephone conversation of February 7, 1975, enclosed please find copies of the balance of the subpoenaed documents.

In accordance with your agreement with this office we understand that you are accepting such copies in full satisfaction of the subpoena, dated January 16, 1975, issued by your office and served on the bank on January 20, 1975.

Kindly sign and return the enclosed copy of this letter in acknowledgement of receipt.

Very truly yours,

ELEANOR K. HOFFMAN.

ITEM 8. LETTER FROM PATRICK W. McGINLEY, ATTORNEY, NEW YORK, N.Y.; TO VAL HALAMANDARIS, DATED FEBRUARY 7, 1975

DEAR MR. HALAMANDARIS: This is to advise that we have today been retained by Mr. Mark Loren in connection with the inquiry of the U. S. Senate Special Committee on Aging.

Very truly yours,

PATRICK W. MCGINLEY.

ITEM 9. LETTER FROM HUGH S. GLICKSTEIN, ATTORNEY, HOLLYWOOD, FLA.; TO SENATOR FRANK E. MOSS, DATED FEBRUARY 8, 1975

DEAR SENATOR MOSS: I am handing you herewith a copy of a subpoena* which was received by my client, City National Bank of Hallandale.

My client is in the process of gathering the material for transmittal to you; however, I think it appropriate to have a corrective subpoena in our possession which reflects the proper name of the institution, to wit: City National Bank of Hallandale, a National banking association.

Cordially,

HUGH S. GLICKSTEIN.

ITEM 10. LETTER FROM MONSIGNOR CHARLES J. FAHEY, PRESIDENT-ELECT, AMERICAN ASSOCIATION OF HOMES FOR THE AGING; TO WILLIAM E. ORIOL, STAFF DIRECTOR, SPECIAL COMMITTEE ON AGING, DATED FEBRUARY 17, 1975

DEAR MR. ORIOL: May I ask you to commend the committee in general and Senator Moss in particular for the leadership which they and he are exercising in the field of long-term care. Even as I do this, however, may I bring to your attention two unintended but very real problems which are occasioned by your present activities: a debilitating morale problem among many associated with us who feel not only that their efforts are being ignored, but even demeaned, and even more serious, the threat that the climate will engender regressive measures in the name of reform.

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*See "Trends in Long-Term Care," part 23, p. 2981.

A simple and striking example of the first—two student friends of the wife of one of our most distinguished administrators said to her, "Mrs. Reingold, is your husband in trouble?"

Numerous examples of the latter would include, but not be limited to, such things as calls for return of flat grants to nursing home care, additional inspection vehicles (when we already have a neurotic system which itself is not well implemented), return of children's financial responsibility for aged and infirm parents, putting the lid on nursing home expenditures when in many parts of the country expenditures are shockingly insufficient, penalizing facilities because they have developed space for expanded services both to resident and outpatients, and even the disallowing of memberships in such organizations as AHAA or limiting the ability of personnel to attend training sessions.

While not defending the field as a whole, I feel a sense of both outrage and frustration: Outrage at those who profiteer at the expense of the vulnerable, but also frustration at the specter that many years of sound advances in the field could go down the drain through precipitous action. I am reminded of the adage that tough cases make poor laws.

Ironically, most of the real issues have yet to be identified, to say nothing of publicized: Can we tolerate profit-making in the instance of the vulnerable elderly? If not, will government make capital available to nonprofit groups? Will we make a true commitment to the vulnerable and frail wherever they may be? Do we know what are the best modalities of intervention?

The committee has a distinguished record of leadership. I would like to think that AHAA, through its member homes and its leadership, has contributed to its work, even as the committee has assisted it. I hope that serious attention is given to this growing problem.

The committee cannot control the media, I know, but it would be most useful if it will use its good office to heighten the public discussion, contribute to the identification of issues and channeling the considerable energies generated toward creative care of the aging.

With every good wish, I am

Sincerely yours,

MONSIGNOR CHARLES J. FAHEY.

ITEM 11. LETTER FROM MARTIN ELEFANT, ATTORNEY, BROOKLYN, N.Y.; TO SENATOR FRANK E. MOSS, DATED FEBRUARY 28, 1975

Dear SENATOR MOSS: On February 4, 1975, I delivered to your subcommittee, in New York City, to Mr. John F. Hemington, Jr., books, records, and documents (as appears on the annexed receipt), in response to a subpoena, from the Subcommittee on Long-Term Care, directed to Amsterdam Meat Supply Co.

On behalf of my client, I wish to inform you, that the aforementioned books, records, and documents are to be returned to the undersigned, upon completion of your subcommittee's investigation.

Under no circumstances, are any of the books, records, and documents or copies thereof, to be disclosed or given, to any other agency or office, without the prior written consent of my client.

Most respectfully yours,

MARTIN ELEFANT.

ITEM 12. LETTER AND ENCLOSURES* FROM W. HARRISON VAIL, VICE PRESIDENT, BARNETT BANK, BAY HARBOR ISLANDS, FLA.; TO SENATOR FRANK E. MOSS, DATED MARCH 10, 1975

DEAR SIR: In accordance with enclosed copy of subpena dated February 1, 1975,** enclosed please find copies of statements on account No. 063-605 in the name of Mary M. Scarfone, as well as savings history on accounts Nos. 3049 and 3234 in the name of Anna M. Scarfone.

Very truly yours,

W. HARRISON VAIL.

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*Retained in committee files.

**See "Trends in Long-Term Care," part 23, p. 2985.

Appendix 7

STATEMENT OF PETER FRANKLIN, SPECIAL ASSISTANT TO THE SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, FEBRUARY 19, 1975

Mr. Chairman and members of the subcommittee, I am pleased to have the opportunity to appear today to testify on the progress being made by the Department of Health, Education, and Welfare in improving long-term care in the Nation and the specific actions being taken to address the deplorable situation in New York.

The Department's goal is to assure that the residents of nursing homes are given the care they need and are entitled to, and that they receive this care in a safe environment. There are a number of fine facilities in this country, but there are far too many facilities that do not even meet minimum standards. These homes must either be improved or Federal funds must cease to support them. At DHEW, we have moved to strengthen our enforcement posture by clearly warning the States and providers that we will not continue Federal financial participation for facilities that are not in compliance with the conditions of participation for life, safety, and health, and do not have acceptable plans of correction for the deficiencies.

Unfortunately, the withdrawal of Federal financial participation from a nursing home participating in the medicare and medicaid programs most often results in the bankruptcy of the facility. This creates an extremely sensitive situation, for we must assure that it is the nursing home provider and not the nursing home patient or client who is penalized for the substandard facility. Working with the States and other Federal agencies, we must provide owners with a reasonable opportunity to meet our standards which are minimum. We cannot, however, and will not continue to subsidize homes where environmental and health conditions literally endanger the lives of patients.

Mr. Chairman, I would now like to discuss the progress the Department has made to date and then to discuss the Department's role in the New York State investigation.

The Eight-Point Nursing Home Initiatives

Many of the eight-point nursing some improvement initiatives enunciated by the President in 1971 to improve the quality of life and care of the aged and disabled needing long-term care have been accomplished. The emphasis of the original initiatives, which included standards development and enforcement, surveyor and health care personnel training, mechanisms responsive to consumer complaints, and research development and collection efforts, has been modified and expanded to reflect current crises in nursing home care. I should like to highlight here our progress to date by first discussing the regulations governing skilled nursing facilities, intermediate care facilities and utilization review.

Development of Uniform Standards for Skilled Nursing Facilities

The skilled nursing facility and intermediate care regulations published in the *Federal Register* January 17, 1974, consolidate and present many new and uniform standards.

For skilled facilities, significant changes include termination of Federal financial participation for eligible patients and clients, when conditions of participation have not been met and serious deficiencies still exist after a time-limited agreement expires.

Standards have been included strengthening independent medical evaluation and utilization review. Particularly important is the requirement that the health

care of every patient must be under the supervision of a physician who prescribes a planned regimen of total patient care which is reviewed at least once every 30 days.

Other important standards specify requirements for a director of nursing services, charge nurse, 24-hour nursing service, patient care plan, rehabilitative nursing care, supervision of nutrition, administration of drugs by trained personnel, and meeting minimum 1967 Life Safety Code standards.

The publication of the October 3, 1974, regulations for skilled nursing facilities adds to the January regulations and includes almost all the recommendations of this subcommittee. Particularly significant is the inclusion of required policies regarding patients' rights, 7-day registered nurse services, a medical discharge plan, qualified consultant dietitian, and medical direction including an organized medical staff.

Disclosure of ownership is now a condition of participation and a facility must supply full and complete information to the survey agency identifying each person who has any direct or indirect ownership interest of 10 percent or more. Requirements for disclosure affecting corporations and partnerships are also included. The provider is required to report promptly any changes in ownership.

Regulation of Intermediate Care Facilities

The regulations governing intermediate care facilities which were published January 17, 1974, required a new level of care under the medicaid program. Prior to publication of these final regulations the standards which applied had been those established by the States.

DHEW's regulations require that all intermediate care facilities must be surveyed and certified by March 1975. The Department will not permit Federal financial participation to continue for any facility that has not been surveyed and certified by this date. By March 1977 all intermediate care facilities must have corrected all deficiencies and be in compliance with Federal regulations.

Utilization Review

Final regulations covering utilization review were issued on November 29, 1974, and became effective February 1 of this year. These regulations were mandated by Public Law 92–603 and govern hospitals and mental institutions as well as nursing homes. The guidelines that are being developed for nursing home care look to functional considerations as well as diagnosis in developing criteria and norms for extended stays. We expect all facilities to benefit from review of the appropriateness, timeliness and quality of care, and from the requirements to study the aspects of their medical care practice. These regulations are compatible with the operations of professional standards review organizations that are now being organized throughout the country.

Consumer/Provider Interest in Nursing Home Conditions and Federal Standards

The Nation's consumers and providers have shown a high degree of interest in the area of long-term care. This interest should not be surprising in a year marked by Mary Adelaide Mendelsohn's book, *Tender Loving Greed*, and the emotion it generated as well as by the recent reports of this subcommittee on nursing home care and the actions taken by DHEW.

To better communicate and discuss Federal actions with consumers and providers, the Department, through the Office of Nursing Home Affairs, has conducted "open forum" meetings to which representatives of provider, consumer, and professional associations are invited to learn about new regulations and provide input into interpretive guidelines. On February 18, 1975 such a meeting was held at the White House at the request of the President to discuss the nursing home crisis and ways in which all of us can work together to more effectively improve nursing home care. Where DHEW receives a specific complaint from individuals or through other sources such as the White House or the Congress about a facility, the complaint is investigated by the regional offices of long-term care. These offices work closely with the appropriate State agencies to investigate complaints. Unannounced visits are made if indicated.

One mechanism under study to deal specifically with consumer complaints are the DHEW nursing home ombudsman demonstration projects currently operational in seven States. An assessment of the experiences with various models for resolving grievances is underway.

The interest of concerned individuals, families, groups, communities, and the Congress will help to improve nursing home care. The sense of community presence in homes will not only aid in assuring humane treatment, but also in reassuring residents and patient care staff that they are not a forgotten and neglected segment of the population. No one organization or group can bring about improvement in care alone. There must be a concerted effort by all parts of our national community if we are to achieve an optimal level of care in a safe environment for all who require these services.

DHEW Organization

In order to discuss the Department's total long-term care efforts, I feel it is important to have an understanding of how we are organized to meet our mandates, and how we are enforcing our mandates.

The Department's long-term care program, to be effective, must be managed through an organizational structure which offers the highest probability of insuring timely and consistent enforcement actions and of establishing clear lines of accountability for actions taken.

Until recently the approach of the Department to nursing homes has been fragmented along agency lines. Responsibility has been split between the Social Security Administration, the Social and Rehabilitation Service, the Public Health Service, the Administration on Aging, the HEW Regional Directors, and a special Nursing Home Affairs Office in the Office of the Assistant Secretary for Health.

One year ago, the Secretary took certain organizational steps to rationalize our approach in dealing with the complex problems in nursing homes. First, the overall responsibility for the coordination of the long-term care effort has been moved to the immediate office of the Secretary. As Special Assistant to the Secretary, I am responsible for coordinating the long-term care efforts of all the DHEW agencies. All policies affecting nursing homes have final clearance in my office. Second, the operating responsibility for all survey and certification and standards enforcement has been consolidated under the HEW regional directors. Each region has established an Office of Long-Term Care Standards Enforcement. These offices became operational in June 1974. These new offices combine the responsibilities formerly in the Bureau of Health Insurance, the Medical Services Administration, and the Public Health Service.

Third, at headquarters the Secretary has designated the Office of Nursing Home Affairs as the operating focal point for all activities affecting long-term care, nursing homes, and aging in the Public Health Service. The Office of Nursing Home Affairs also provides the direct link between the regional offices of long-term care and the Secretary's Office. An interagency group, cochaired by the Director of the Office of Nursing Home Affairs and me, reviews all long-term care policies in draft form. Once finalized, these policies become a part of the Department's *Standard Operating Procedures Manual* which governs uniform application of policy throughout the country.

Enforcement

With regard to enforcement, over 400 skilled facilities have either voluntarily withdrawn or have had their Federal financial participation terminated. In the past year, landmark regulations were published by DHEW on November 13, 1974, which, for the first time, allowed us in the case of medicaid to go behind the facility's provider agreement. Prior to these regulations where the Department found a home participating only in the medicaid program not in compliance with the Federal conditions of participation, Federal financial participation could not be terminated. The Department could only request the State to resurvey. Now where we find a home does not meet conditions of participation for medicaid, the Department has the authority to refuse Federal matching for the facility in question. These regulations are being enforced by the regional offices of long-term care throughout the country.

The actual survey and certification of a nursing home is a State responsibility. However, it is a Federal responsibility to assure that the States fullfill their obligations. Under medicare the Department contracts with the State to survey and under medicaid the States are required by statute to survey and certify participating facilities. Under both programs, where a State has failed to perform its duties, the Department has not hesitated to take strong action. For example, the Secretary has filed suit against the Commonwealth of Pennsylvania

to require the State to carry out its contractual responsibilities and assure that nursing homes in that State participating in medicare and medicaid programs are in compliance with Federal law and regulations.

Training

During 1974, major emphasis was placed on improving the enforcement of the Life Safety Code in skilled nursing facilities and intermediate care facilities. In July and August, three Life Safety Code survey training sessions were held for State and regional office personnel. Approximately 230 people attended these sessions which were geared to improving interpretation, documentation requirements, and survey techniques. Our regional offices of long-term care conduct periodic training sessions for State surveyors. This effort has led to more uniform interpretation of Life Safety Code requirements and stricter enforcement.

In addition, over 2,200 State and Federal surveyor personnel have attended DHEW sponsored training. This training involves specialized courses normally presented in a University setting. This educational activity is vital if the decisions and judgments required of survey personnel are to be made properly.

The quality of the Nations' nursing homes is very much dependent on the quality of the surveyors who inspect the homes. We have in each regional office a health facility surveyor improvement program coordinator to identify specific needs in that area for surveyor training and to see that needs are met.

On August 7, 1974, Public Law 93-368 extended for 3 years the 100% Federal funding of salaries and training of surveyors for the medicaid program. This continued support was necessary to insure that the States could meet their statutory responsibility to survey all skilled and intermediate care facilities on an annual basis.

Further, the Department has an ongoing effort to provide opportunities for short term training for nursing home personnel throughout the country. Over 74,000 people have been reached by these opportunities since this initiative was implemented. Nine of our ten Regions have identified a "center of excellence" within their jurisdiction, a long-term care facility where on-site training can be given to interdisciplinary teams from other facilities.

Long-Term Care Improvement Campaign—Basis for a National Strategy to Improve Long-Term Care

In addition to the 1971 nursing home initiatives, the Secretary initiated in June 1974 a long-term care improvement campaign.

The initial project was a series of unannounced visits to a random sample of over 300 skilled nursing facilities throughout the Nation. These visits were made by DHEW teams which included a physician, a registered nurse, a physical therapist, a pharmacist, a nutritionist, a life safety engineer, and an administrator. The findings of this study will give us the first statistically valid picture of conditions in nursing homes and will be announced by the Secretary in March. The Department will have a vigorous followup program based on the findings which will guide us in targeting our efforts to upgrade performance, provide technical assistance to States and providers, improve survey/certification procedures, and introduce innovations in the delivery of long-term care services.

Another part of the improvement campaign is development of a management information system responsive to the regional and State needs for long-term care data. Demands for instant information on surveys, certification, status of individual homes, Life Safety Code inspections, termination of Federal financial participation, and other matters of current nursing home concern have now mounted to the point where it is imperative to produce up-to-the-minute answers without delay. The framework for a computer based management information system has been developed and will begin to operate in March of this year to link data-gathering at headquarters with that of the regions and the States.

Several other strategies are underway as a part of the long-term care campaign:

The Department is working with the States to develop a program that would lead to the professional credentialing of State surveyor personnel.

Alternatives to institutional care are urgently needed and DHEW is studying the barriers to the adequate utilization of alternatives to institutionalization such as home health care.

Special needs of the mentally retarded and developmentally disabled populations of all ages are surfacing across the country. The Department is actively involved in implementing the existing developmental disabilities legislation and is developing proposals which would improve current law.

DHEW plans to develop a cost-of-care index to assure that formula for reimbursement to skilled nursing homes and intermediate care facilities is both appropriate and adequate.

The Department is working to develop a national scorecard system for nursing homes. An "A" rating, for instance, should reflect the same quality of care in whatever part of the country the facility is located.

Critical Issues Involving Nursing Homes in New York State

The skilled nursing homes involved in the New York State investigations are primarily those participating in the medicaid program. Medicaid is a State program which receives Federal matching. The State must by law perform the function of the annual certification and survey. Further, the State is responsible for maintaining the fiscal integrity of the program. The Department requires all States to perform the appropriate financial audits of facilities receiving medicaid moneys. This State action is required in binding plans that are filed with DHEW by the State medicaid agency.

There are currently almost 20 ongoing nursing home investigations in New York and New Jersey being conducted by both the State and Federal Governments. The media is also actively investigating the nursing home problem. DHEW has acted as an information clearinghouse for all of the investigations and is actively monitoring the progress of the various investigations. The Secretary has assured the Governor of New York of his full support for the State's investigation.

DHEW has devoted the major portion of its long-term care standards enforcement resources to assuring that Federal moneys do not go to facilities that do not meet Federal standards. In the past 2 months alone the Department has withheld Federal financial participation from 11 facilities in New York State and is reviewing the need to take similar adverse actions against 58 additional nursing homes where conditions of participation are not being met.

These actions have been strengthened by the DHEW regulations published on November 13, 1974, which I mentioned earlier.

○