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## The Power of the Attorney General to Supercede a District Attorney: Substance, Procedure & Ethics

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The Louisiana attorney general, using powers granted in the Louisiana Constitution of 1974, has successfully obtained judicial authorization to supercede a district attorney in two instances. This article focuses on judicial construction of the substantive grounds or "cause" to supercede and on the procedural innovations developed to implement the substantive power. Both the *Perez*<sup>1</sup> and *Bush*<sup>2</sup> cases involved politically sensitive, well-publicized matters of important public interest. Both dealt with the alleged personal misconduct and the ethics of high-profile district attorneys, rather than illuminating the conceptual conflict between state and local governmental power that underlies the basic constitutional provision.

### BACKGROUND

Under the Louisiana Constitution of 1921, the attorney general was an officer of the judicial branch of government.<sup>3</sup> He was invested with statewide criminal jurisdiction to initiate original criminal prosecutions or to intervene in existing ones.<sup>4</sup> Implicit in this power was the independent prosecutorial discretion as to when and how to exercise it.<sup>5</sup> The Constitution of 1921, however, did not solve the constitutional conflict that would arise when both the district attorney and attorney general exercised their prosecutorial authority simultaneously, but contradictorily,

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1. *In re Superseding the District Attorney of the 25th Jud. Dist.*, 454 So. 2d 806 (La. 1981).

2. *In re Superseding the District Attorney of the 19th Jud. Dist.*, 538 So. 2d 606 (La. App. 1st Cir.), writ denied, 541 So. 2d 903 (1989).

3. La. Const. art. VII, § 56 (1921) specified the powers of the attorney general in the article titled "Judiciary Department." Section 1 of article V ("Executive Department") did not include the attorney general in its listing of the officials in the executive department.

4. *Kemp v. Stanley*, 204 La. 110, 120, 15 So. 2d 1, 4 (1943); *State v. Ardoin*, 197 La. 877, 886, 2 So. 2d 633, 636 (1941).

5. *Id.*

in one case. It did not expressly grant the attorney general the power to replace or supercede the district attorney in such circumstances; it only vested him with the ambiguous authority to "exercise supervision" over the district attorneys.<sup>6</sup>

A statute sought to solve the dispute by giving the attorney general power to supercede the district attorney in those cases in which the attorney general exercised his criminal powers.<sup>7</sup> The Louisiana Supreme Court declared the statute authorizing supercession to be unconstitutional because it infringed upon the district attorney's constitutional authority. A close reading of the court's decision in *Kemp v. Stanley*<sup>8</sup> reveals that the constitutional objection was to the statute's authorization for the attorney general to exercise the power of supercession unilaterally, with or without cause, and without judicial review of possible abuse of discretion. *Kemp v. Stanley* did suggest the attorney general had authority to supercede for cause, subject to judicial review.<sup>9</sup>

The Constitution of 1974 sought to resolve the issue of local versus state authority in article IV, section 8, which grants to the attorney general express power to supercede. When authorized by a court, the attorney general exercises the powers of the district attorney to act as the legal representative of the state in a particular criminal or civil action or proceeding. The grant of the power to supercede was accompanied by the deletion of the former power to institute prosecutions and to intervene in criminal cases. The power to institute criminal proceedings is now exclusively that of the district attorneys, subject only to supercession by the attorney general, which can be done only with court authorization.<sup>10</sup> The Constitution of 1974 resolved the jurisdictional conflict between state and local authority by weighing the scales heavily in favor of the local authority, subject to the check and balance of the attorney general's power to supercede for cause.

Article IV, section 8 of the Louisiana Constitution of 1974 provides:

There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. . . .

6. La. Const. art. VII, § 56 (1921).

7. 1934 La. Acts (1st Extraordinary Session) No. 24 (amending La. Code Crim. P. arts. 17, 156).

8. 204 La. 110, 15 So. 2d 1 (1943).

9. *Id.* at 14-16; Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765, 835 n.308 (1977).

10. *Powers. Except as otherwise provided by this constitution*, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to the grand jury. He shall perform other duties provided by law.

La. Const. Art. V, § 26(B) (emphasis added); See also La. R.S. 16:1(B), (C) (1982) and La. Code Crim. P. art. 64.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

The attorney general has judicially asserted his powers under article IV, section 8(3) in only two cases. In 1981, he sought judicial authorization to supercede the district attorney of Plaquemines Parish, Leander Perez, Jr.<sup>11</sup> ("*Perez*"). In 1989, he twice sought judicial authorization to supercede Bryan Bush, the district attorney of East Baton Rouge Parish<sup>12</sup> ("*Bush*" and "*Bush II*"). These two cases have produced significant definition of the key concepts of the criminal enforcement powers vested in the attorney general by that provision of the constitution.

*Perez* provides the more significant substantive interpretation of the law. However, because the procedure for supercession is vague in the constitutional provision, *Bush* is significant for its procedural innovation which facilitated a final judgment of supercession in a matter of five months, rather than the years required in *Perez*.

#### FACTUAL CONTEXT

The supercession petition in *Perez* alleged as "cause" that the district attorney had engaged in misconduct—obstructing the activities of the grand jury for which he was the legal advisor. The matter involved was the grand jury's investigation and indictment of the district attorney and Delta Development Corporation, a family enterprise, for theft from the parish. An exception of no cause of action to the supercession

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11. In re the Matter of Attorney General William J. Guste, Jr. Superseding the District Attorney of the Twenty-Fifth Judicial District, 454 So. 2d 806 (La. 1981); See also, *State v. Perez*, 464 So. 2d 737 (La. 1985); Superseding of District Attorney of Twenty-Fifth Judicial District, 411 So. 2d 469 (La. 1982).

12. In re: the Matter of Attorney General William J. Guste, Jr. Superseding the District Attorney of the Nineteenth Judicial District, No. 12-88-103 on the docket of the Nineteenth Judicial District Court; writ denied, No. KW 89 0088 (La. App. 1st Cir. 1989); writ denied, No. KW 89 0271 (La. App. 1st Cir. 1989); writ granted, 538 So. 2d 606 (La. 1989); writ denied, No. KW 89 0271 (La. App. 1st Cir. 1989); writ denied, 541 So. 2d 903 (La. 1989).

petition was granted by the trial court, but reversed by the Louisiana Supreme Court, which ruled that the attorney general's allegations of obstruction of the grand jury stated constitutional cause for supercession.<sup>13</sup>

*Bush* was precipitated by newspaper accounts of mishandled or missing funds used to pay informants—funds in the personal custody of the district attorney. The district court granted authorization to the attorney general to supercede *Bush* and to act as district attorney ad hoc.<sup>14</sup>

The *Perez* supercession was effected through what was termed a civil rule to show cause.<sup>15</sup> *Bush* was presented through a contradictory motion to supercede and to recuse under Louisiana Code of Criminal Procedure article 680(1).<sup>16</sup> It was argued that since *Bush* involved criminal procedure, a high burden of proof was needed to support a showing of cause to supercede. The court did not require proof beyond a reasonable doubt and adopted the burden of proof required in recusal proceedings—a preponderance of the evidence. It should follow that the burden of proof in supercession proceedings will be the same regardless of whether the matter is brought before the court for judicial authorization by civil or criminal procedure.

The court found that the evidence preponderated in favor of the attorney general as to five of the six allegations of cause to supercede. It granted supercession and recusal, empowered the attorney general to act as a district attorney ad hoc under Louisiana Code of Criminal Procedure article 682 in relation to the subject matter of the cause alleged, and authorized the empaneling of a special grand jury to hear the case.

The court denied an appeal, ruling that, since the supercession had been brought pursuant to the recusal procedure of the Louisiana Code of Criminal Procedure, article 684 required *Bush* to seek judicial review by an application for supervisory writs. Writs were denied by the court of appeal<sup>17</sup> and the supreme court.<sup>18</sup>

While judicial review by the higher courts was pending, *Bush* sought an indictment against the two assistant attorneys general handling the

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13. 454 So. 2d at 807.

14. District Judge Robert Hester's ruling is reprinted in its entirety in the appendix, pp. 751 to 754, *infra*.

15. Docket No. 62-463, Twenty-Fifth District Court, in and for the Parish of Plaquemine, State of Louisiana.

16. "A district attorney shall be recused when he: (1) has a personal interest in the cause or grand jury proceeding which is in conflict with the fair and impartial administration of justice."

17. No. KW 89 0271 (April 10, 1989) (La. App. 1st Cir.).

18. 541 So. 2d 903 (La. 1989).

supercession proceeding. In response, the attorney general filed a second supercession and recusal motion ("*Bush IP*") seeking to intervene in that grand jury proceeding, to recuse Bush as its legal adviser, and to prohibit institution of prosecution against officers of the Justice Department.<sup>19</sup>

The "cause" for *Bush II* was the alleged violation of due process of law by Bush's abuse of the powers of his office to advance his personal interest in the avoidance of prosecution, conviction and punishment, and the political motivation not to lose political office. Definitive court action in *Bush II* was mooted by the district attorney's conviction pursuant to a plea bargain.<sup>20</sup> Nevertheless, the supreme court gave some credence to the theory advanced in the second petition by issuing stay orders halting both the grand jury proceeding and the institution of prosecution. *Bush II* is also significant in that it was the first assertion by the attorney general that under his powers in article IV, section 8, abuse of prosecutorial power by a district attorney which rises to the level of a substantive due process violation is "cause" for supercession.

#### SUBSTANTIVE GROUNDS FOR SUPERCESSION

The fundamental substantive issue in these proceedings has been the nature of the "cause" required by Louisiana Constitution Article IV, section 8(3) to authorize the attorney general to supercede. The constitution itself does not define cause directly. An early explanation of the requirement was derived from the debates on the proposal during the constitutional convention:

The cause requirement is related to the introductory phrase of the paragraph, "[a]s necessary for the assertion or protection of any right or interest of the state," indicating that the "cause" must be associated with the fact that a right or interest of the state is not being satisfactorily represented or asserted by a district attorney.<sup>21</sup>

This interpretation appeared to be approved by the Louisiana Supreme Court before the attorney general initiated the first supercession proceeding. In *Plaquemine Parish Commission Council v. Perez*,<sup>22</sup> the coun-

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19. In Re: Grand Jury Investigations, No. 3-89-569 on the docket of the Nineteenth Judicial District Court.

20. Bush plead guilty in a plea bargain to one misdemeanor violation of La. R.S. 44:34, :37 (1982).

21. Hargrave, *supra* note 9, at 835.

22. 379 So. 2d 1373 (La. 1980). To the extent the case held that a district attorney could not be recused until an indictment or a bill of information was returned, it was overruled by the amendment to La. Code Crim. P. art. 680 by 1980 La. Acts, No. 195. The amendment added that recusation can be had if the prosecutor has a personal interest in a "grand jury proceeding" or is related to a person "who is a focus of a grand jury investigation."

cil instituted an injunctive and recusal action because of an allegedly bad faith investigation by District Attorney Perez. The Louisiana Supreme Court noted in dictum that even if recusal or an injunction was not legally justified, the district attorney could still be superceded by the attorney general for cause. The supreme court, referring to article IV, section 8(3), stated that "[t]he 'cause' requirement refers to a showing that the district attorney is not adequately asserting some right or interest of the state."<sup>23</sup>

The following year, the attorney general superceded Perez based upon his alleged obstruction of the grand jury which indicted him and a family corporation in which he had a financial interest. The Louisiana Supreme Court found that the conduct alleged—obstructing the grand jury's attempt to indict him and others by causing the grand jury to be prematurely discharged, and by filing criminal charges against members of the grand jury—was cause for judicial authorization for supercession. The attorney general could then assert and protect "the state's rights and interests in the matters under investigation by the additional grand jury or which have arisen therefrom."<sup>24</sup> The "cause" in *Perez* was not so much the abstract power of a district attorney to dismiss a grand jury or to file charges against persons who are members of a grand jury. Rather, it was important that these acts were done to thwart a grand jury inquiry into his own personal interests. The state's right and interest in the fair enforcement of its laws and in the integrity of the grand jury allegedly were being thwarted.

*Perez* demonstrates that the conduct constituting "cause" for supercession need not in fact be criminal. After *Perez's* prosecution for malfeasance and conviction on three counts, the supreme court held two of the three counts, including the institution of prosecution against grand jury members in retaliation, not to be crimes.<sup>25</sup> The jury had acquitted *Perez* on one count of the indictment. The implication is that a failure to assert or protect rights of interests of the state may arise within legal contexts other than objective criminal acts or omissions and be just as constitutionally efficacious as the predicate "cause" for judicial authorization for supercession.

Another clear inference is that allegations of criminal misconduct by the district attorney within his own jurisdiction are a cause of supercession *per se*, even if the allegations are later shown to be untrue. In such situations, the attorney general has original investigative power

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23. *Id.* at 1377.

24. *In Re: Guste*, 454 So. 2d 806, 807 (La. 1981) (Originally published at 401 So. 2d 967 (La. 1981)).

25. *State v. Perez*, 464 So. 2d 737 (La. 1985).

to inquire into allegations even before supercession is judicially sought.<sup>26</sup> Though the constitutional provision does not address the power to investigate, it implies its existence. The attorney general must be able to amass the factual showing necessary to establish cause to act and must be able to investigate criminal matters to establish those facts.

The *Bush* supercession made express what was implied in *Perez*. The *Bush* supercession petition alleged that the grounds for recusal of a district attorney under Louisiana Code of Criminal Procedure article 680(1) constituted "cause" for supercession. These grounds are that a district attorney "[h]as a personal interest in the cause or grand jury proceeding which is in conflict with fair and impartial administration of justice." If there exists a conflict between the prosecutor's personal interest and that of the state in the fair and impartial enforcement of its laws, this conflict simultaneously authorizes both recusal and supercession. Thus, a combination of constitutional values, statutory provisions and ethical considerations come into play in the supercession decision.

In the original *Bush* supercession, the attorney general alleged Bush's personal interest arose as a matter of law from his potential culpability for six criminal offenses, all of which he enjoyed prosecutorial jurisdiction over as the district attorney of East Baton Rouge Parish.<sup>27</sup>

As noted, the ethical grounds for recusal provided by the Louisiana Code of Criminal Procedure article 680(1) do not exhaust the content of "cause" for supercession. In *Bush*, however, cause for supercession was expressly identified with a personal interest incompatible with the fair and impartial administration of the law arising from the circumstances of that case. Supercession in a criminal proceeding conceptually subsumes recusal because the constitutional value which both serve is identical. Recusal would require removal of the district attorney from

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26. Hargrave, *supra* note 9, at 837; *Matter of Morris Thrift Pharmacy*, 397 So. 2d 1301 (La. 1981).

27. These criminal offenses were specified in the contradictory motion filed by the attorney general as follows:

- (a) The misuse of at least \$14,672.92 of public funds in violation of LSA-R.S. 14:67 (theft) and LSA-R.S. 14:68 (unauthorized use of a movable).
- (b) Malfeasance (LSA-R.S. 14:134) for failure to properly budget funds as mandated by LSA-R.S. 39:1304.
- (c) Malfeasance by failure to keep a complete record of informant funds as required by LSA-R.S. 42:282.
- (d) Malfeasance in office by failure to comply with the public bid law, LSA-R.S. 38:2212, for the purchase of office computers.
- (e) Malfeasance in office, by instructing and permitting his investigator to prepare falsified public bids for four office automobiles purchased without actual bids.
- (f) Filing false public records, LSA-R.S. 14:133, or alternatively, injuring public records, LSA-R.S. 14:132, with reference to the action stated in (e) above.



the case in any event, and the supercession decision furnishes the officer responsible for prosecuting the case.

Article IV, section 8 refers to "the assertion or protection of any right or interest of the state" without qualifying the source of the right or interest. It should follow that supercession can be justified whether the right or interest arises from the constitution, statutes, or other sources of law, federal or state. The invasion of a citizen's constitutional right to privacy, or to equal protection of the laws, for example, by a district attorney could therefore constitute cause for supercession. Recusal implements a core constitutional guarantee of substantive due process of law. Similarly, supercession recognizes that not only is an individual entitled to due process, but the state itself has a right and interest in the fairness and impartiality of its criminal justice system and in the validity of convictions in its name.<sup>28</sup> The congruity of supercession and recusal in the facts of the *Bush* case results from this shared constitutional value and purpose. It is also the principal constitutional value animating the judicial ethics upon which article 680 is based.<sup>29</sup>

The Louisiana Supreme Court recognized the nexus between the constitutional guarantee and the recusal authorized by Louisiana Code Criminal Procedure article 680 in *Plaquemine Parish Commission Council v. Perez*.<sup>30</sup> The district attorney there argued that recusal, a statutory procedure, infringed upon his constitutionally granted prosecutorial power and authority.<sup>31</sup> The court held that article 680 implemented the substantive due process guarantee of article I of the Louisiana Constitution, and that the exception clause of article V, section 26 subordinated the constitutional sovereignty of the district attorney to the fundamental guarantees of due process made by the constitution in article I, section 2, and section 22. The supreme court further ruled that the state has

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28. La. Const. art. I, § 1 (Origin and Purpose of Government) provides, in pertinent part: "All government, of right, originates with the people, is founded on their will alone, and is instituted to *protect the rights of the individual and for the good of the whole . . .*" (emphasis added).

29. La. Const. art. I, § 2 provides: "No person shall be deprived of life, liberty or property, except by due process of law."

La. Const. art. I, § 22 provides: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality or unreasonable delay, for injury to him in his person, property, reputation or other rights."

30. "We find, therefore, that C.Cr.P. 680's provision for recusation is not only provided for but required by the constitutional guarantee of the fair and impartial administration of justice." 379 So. 2d at 1378.

31. La. Const. art. V, § 26(B). "*Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to the grand jury. He shall perform other duties provided by law.*" (emphasis added).

an independent right and interest in the presence of due process in the exercise of prosecutorial power, and that this was the constitutional purpose for recusal. The phrase "fair and impartial administration of justice" connotes the state's interest in the provision of due process of law by the criminal justice system: "We find, therefore, that Code of Criminal Procedure [article] 680's provision for recusation is not only provided for but required by the constitutional guarantee of the fair and impartial administration of justice."<sup>32</sup>

Thus, the ultimate "cause" for supercession in *Bush* was the protection of due process. The alleged use of the power of the state by the prosecutor to suborn the enforcement of its laws, or at the expense of fairness, or in service of any other personal interest, justifies supercession and recusal by reason of the injury to the constitutional guarantee of due process in the criminal justice system of the state.

Due process as implemented in the norms of judicial ethics in Code of Criminal Procedure article 680 requires that as a condition for the use of the criminal judicial power of the state, the prosecutor exercise that power for the public interest rather than in his self-interest, and that he be divested of that power in any case in which he is incapable or unwilling to do so. A constitutional harm is present. Recusal proceedings give a defendant an opportunity to redress it, and supercession proceedings give the attorney general a separate power to redress it.

#### PROCEDURE FOR SUPERCESSION

*Perez* and *Bush* employed different procedures for effecting supercession. The initial attempt to fashion a procedure akin to civil proceedings in *Perez* was not expeditious, resulting in a long period of uncertainty and possible taint of a district attorney. It was clear thereafter that a supercession procedure, in addition to being legal and fair, must be expeditious.

In *Perez*, the civil procedure analogue produced not only the delay of extensive pretrial discovery but also that of a formal appeal guaranteed by the Code of Civil Procedure. It was not until the entire course of civil procedure was exhausted that the attorney general enjoyed final judicial authorization to present evidence to a special grand jury and to institute prosecution thereafter. The acts by *Perez* constituting the cause for supercession occurred in February 1981. The final judgment of the Louisiana Supreme Court in the *Perez* case was rendered four years later in 1985. The case spanned two successive terms of office of the incumbent attorney general who initiated the supercession.

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32. 379 So. 2d at 1377. The Court cited *Babineaux v. Judiciary Commission*, 341 So. 2d 396, 400 (La. 1976) to state the essence of due process as "protection from arbitrary and unreasonable action" by the government.

The attorney general in *Bush* sought to use a speedier criminal procedure analogue. Cause for supercession was conformed to the ethical grounds for recusal provided in Code of Criminal Procedure article 680(1), and the related procedure for recusal by a simple contradictory motion was then adopted as the procedure for the supercession. The motion to supercede was tried on the merits six weeks after it was filed.

A district attorney recused pursuant to article 680 has no right of appeal, although judicial review of the order of recusal may be obtained through an application for supervisory writs.<sup>33</sup> Both the court of appeal and the supreme court declined to grant writs to review the case on the merits in *Bush*.<sup>34</sup> In contrast to the delay in *Perez*, the judgment of the trial court became final five months after the initiation of the supercession proceeding.

If *Perez* represents the judicial ratification of the substantive power of supercession vested in the attorney general by the constitution, *Bush* stands for a procedural innovation which more effectively actualizes that substantive power. Procedure enhances substance, and an attorney general who can supercede a district attorney by a simple contradictory motion in practice has gained a more effective measure of supervisory authority. Moreover, by the marriage of the constitutional act of supercession to the procedural vehicle well-established for recusal,<sup>35</sup> the uncertainty regarding the burden of proof in a supercession is eliminated where article 680 is used as an enabling statute for supercession. As noted, cause for supercession does encompass other grounds than article 680, and article IV, section 8 is self-operative. However, the clarity of the procedure for recusal and the settled jurisprudence that grounds for recusal were established by a preponderance of the evidence<sup>36</sup> provided support for the trial court's choice of that standard of proof for the cause alleged in the *Bush* supercession.

In a broader sense, it would be appropriate to recognize that neither the constitution nor the statutes specify a detailed procedure for supercession. All that is required is some type of procedure that provides for court approval or rejection of the attorney general's request and which comports with due process. The procedure need not be formally

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33. La. Code Crim. P. art. 684.

34. Writ denied, No. KW-89-0271 (April 10, 1989) (La. App. 1st Cir. 1989); writ denied, 541 So. 2d 903 (La. 1989).

35. The Court of Appeal, in denying *Bush*'s argument that article IV, section 8 was not self-operative and required enabling legislation, stated: "The attorney general is *proceeding lawfully to show cause*. Additional legislation is not necessary to facilitate these proceedings."

36. *State v. Edwards*, 420 So. 2d 663 (La. 1982); *State v. Vaccaro*, 411 So. 2d 415 (La. 1982); *State v. Marcal*, 388 So. 2d 656 (La. 1980); *State v. Snyder*, 256 La. 601, 237 So. 2d 392 (1970).

“civil” or “criminal” in the traditional sense of those terms. In terms of basic due process, it would seem that the preponderance of the evidence standard and the accelerated procedure of *Bush* meet those standards.

#### ETHICAL CONTEXT OF SUPERCESSION

The Constitution of 1974 did not reinvent the fundamental constitutional values which constrain the exercise of quasi-judicial power by a prosecutor and the ethics which safeguard those values. While the balance between local and state power was altered, due process and ethical considerations apply to whomever exercises the prosecutorial power. Indeed, as suggested earlier, the *Perez* and *Bush* cases did not implicate the basic tension between state and local governmental authority that so permeated the constitutional convention debate on article IV, section 8. Rather, they involved the allegedly unethical behavior of two district attorneys and the means available to ameliorate such conduct.

The prosecutor is a quasi-judicial officer.<sup>37</sup> The near-absolute discretion of the prosecutor to charge or not to charge is an exercise of quasi-judicial power by an officer of the court.<sup>38</sup> In a broad sense, ethics is the phenomenology of choice. Because prosecutorial discretion in the exercise of judicial power is analogous to judicial choice, the ethical norms which apply to each office are similar.

Both *Perez* and *Bush* presented a prosecutor's personal interest arising out of his own potential criminal culpability. The ethical principle underlying Code of Criminal Procedure article 680, as well as its language, encompass any instance of bias for self, not just that arising from criminal conduct. The ethical principle is that judicial power and prosecutorial power is a trust and must be exercised fairly and impartially for the public interest, not for the self-interest of the judicial officer. For this reason Louisiana courts, under both the 1921 and 1974 Constitutions, have applied to district attorneys as quasi-judicial officers the ethical norms which constrain the choices and actions of judges.

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37. *State v. Marcal*, 388 So. 2d 656 (La. 1980), cert. denied, 451 U.S. 977, 101 S. Ct. 2300 (1981); *State v. Snyder*, 256 La. 601, 237 So. 2d 392 (1970); *State v. Cox*, 246 La. 748, 167 So. 2d 352 (1964); *State v. Marcotte*, 229 La. 539, 86 So. 2d 186 (1956); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. Tate*, 185 La. 1006, 171 So. 108 (1936); *Parkerson v. Norris*, 529 So. 2d 1392 (La. App. 2d Cir.), writ denied, 530 So. 2d 552 (1988); *State v. Melerine*, 236 La. 881, 109 So. 2d 454 (1959); *Plaquemine Parish Comm'n Council v. Perez*, 379 So. 2d 1373 (La. 1980).

38. La. Const. art. V, § 26 (1974). “The district attorney has entire charge and control of every criminal prosecution instituted or pending in his district and determines whom, when and how he shall prosecute. [Citations omitted.] The district attorney is given absolute discretion in the institution of criminal charges.” *State v. Perez*, 464 So. 2d 737, 744 (La. 1985).

The parallel character of judicial and prosecutorial ethics has been present at least since the amendment of section 1067 of the Louisiana Revised Statutes of 1870.<sup>39</sup> The present Code of Criminal Procedure maintains this symmetry in article 671(1)(2)(3), providing for recusation of judges, and article 680(1)(2)(3), providing for recusation of district attorneys.

The ethical basis for supercession, even absent allegations of criminal conduct, is of some importance because the second supercession proceeding brought against Bush ("*Bush IP*") was not based upon criminal acts but the violation of due process of law by prosecutorial acts which were allegedly politically motivated and self-interested.

An examination of the other forms of "personal interest" the courts have found to require recusal and the principles developed in the jurisprudence identifies other forms of "cause" for which supercession may be authorized by means of the expedited recusal procedure validated in the first Bush supercession.

The entire doctrine of the ethical responsibility of the prosecutor was stated in one enduring decision of the Louisiana Supreme Court, to which a legion of subsequent cases are but footnotes. In *State v. Tate*, the Supreme Court wrote of the office of the district attorney:

In conducting a criminal case the prosecuting attorney must be fair and impartial, and see that the defendant is not deprived of any constitutional or statutory right, because he is a *quasi-judicial officer*. (Citations omitted.)

This rule, founded on justice and fair dealing, we think is intended not only to restrain the offer of illegal evidence or the violation of the orderly rules of procedure by prosecuting officers, but also to require their recusation in those cases in which their interest, directly or indirectly, may be such as to cause them to *sacrifice justice to personal advantage*.

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The district attorney is a *quasi-judicial officer*. He represents the State, and the State demands no victims. It seeks justice only, equal and impartial justice, and *it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes*. (Citations omitted.) Therefore he should not be involved in any extrinsic matters which might, consciously or unconsciously, impair or destroy his power to conduct the accused's trial fairly and impartially.<sup>40</sup> (Emphasis added.)

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39. 1877 La. Acts No. 35.

40. *Tate*, 185 La. at 1019, 171 So. at 112.

The Louisiana Supreme Court has expressly held that not only do the principles of *State v. Tate* enjoy continued validity, but that those ethical norms are codified in Louisiana Code of Criminal Procedure article 680.<sup>41</sup>

*Tate* supports the earlier analysis of this article that the state itself has a due process interest in the protection of the innocent. With regard to the supercession of a district attorney, once these ethical principles organic to his office are incorporated into the concept of cause, cause for supercession connotes a negligent, intentional or ethical failure or inability by the district attorney to adequately assert or represent some right or interest of the state, either to prosecute the guilty or protect the innocent.

The attorney general's argument in *Bush II* that a political bias or self-interest by the prosecutor which injures his fairness and impartiality disqualifies the prosecutor was not *res nova* in Louisiana law. Several court decisions have so ruled under the doctrine of the *Tate* case. Therefore, if political bias or motivation leads a district attorney to protect the guilty or prosecute the innocent, and such bad faith or negligence may be proven, the existence of the bias causes an ethical failure to assert or protect the rights and interests of the state. It is cause for supercession as well as recusal.

The jurisprudence supports this construction of cause to include political abuse of office and prosecutorial power. In *State v. Marcotte*,<sup>42</sup> the district attorney was recused because of his political animosity toward the defendant. Following the *Tate* doctrine, the *Marcotte* court held that the prosecutor's personal political interest in a defendant's conviction as well as an acquittal violated the due process standard of fairness and impartiality. *State v. Cox*<sup>43</sup> followed *Marcotte*. In *Cox*, the personal animosity created by the defendant's criticism of the prosecutor's official conduct was held to require recusal.

Louisiana Code of Criminal Procedure article 680 is an ethics statute because it attempts to regulate the professional *choice* of the prosecutor which is the predicate of the exercise of power. Article 680's regulation of the personal interest of the prosecutor seeks to exclude extra-legal, subjective influence from the prosecutorial judgment, and thereby from the resulting exercise or non-exercise of judicial power. Ethics is the phenomenology of human choices, both professional and personal.

That the recusal statute is an ethics statute within this context was demonstrated in *State v. Snyder*,<sup>44</sup> the most often-cited case after *Tate*

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41. 379 So. 2d at 1377.

42. 229 La. 539, 86 So. 2d 186 (1956).

43. 246 La. 748, 167 So. 2d 352 (1964).

44. 256 La. 601, 609, 237 So. 2d 392, 395 (1970).

on prosecutorial ethics. In *Snyder*, the defendant was indicted for criminal defamation based on statements made during the course of a political campaign, during which the district attorney campaigned vigorously for two opponents of the defendants. The district attorney admitted a strong political animosity during the course of the campaign, but claimed it dissolved afterwards. The supreme court accepted the prosecutor's good faith, but ruled nonetheless.

. . . [W]hile we do not doubt that he is sincere in his belief that he has vanquished the personal animosity he harbored toward relator during the campaign, we do not believe that, under the circumstances presented, it would serve the public interest for him to remain in the case as a prosecutor. For, after all, while he may believe that his personal animosity has subsided or eroded, still, where such deep seated hatred has once evinced itself, the district attorney might, *even though unconsciously*, have impaired his power to conduct relator's trial fairly and impartially. (Emphasis added.)

That even an unconscious personal interest could harm due process is a radical application of article 680, and demonstrates that its burden is the professionalization of prosecutorial judgments. The ethical ideal of *Tate* and its codification, article 680, is that of the district attorney as an excellent instrument of the law, who actualizes the law objectively in his professional choices and judgments, but without the influence of personal or self interest in those judgments. Yet it is a metaphysical truth that no human choice is free from some measure of subjective value judgments. *Tate*, *Snyder*, and article 680 do not prohibit all personal interests which may affect the judgment of the district attorney. Only those personal interests which impact the core constitutional value of due process by compromising the district attorney's ability to provide the "fair and impartial administration of justice" are grounds for supercession or recusal. That value is the "public interest" which the *Snyder* court believed might be infringed by a prosecutor who even unconsciously prosecuted a defendant for private reasons of revenge or anger.

Although it never proceeded beyond the initial stay order, the second supercession proceeding in the Bush case ("*Bush IP*") was significant in that it was based entirely upon this line of jurisprudence and the ethical interpretation of article 680(1). It was the first and only occasion in which the attorney general alleged that there was cause for supercession under article IV, section 8 that was not based in fact or law upon alleged criminal conduct by the district attorney. *Bush II* alleged as its principal cause for supercession and recusal that the political self interest of the prosecutor offended due process of law by an abusive exercise

of the judicial power of the district attorney, by transforming the grand jury into an instrument of retaliation.<sup>45</sup>

Upon adequate proof of the malicious political motivation, the attorney general's allegation of a non-criminal cause for supercession based upon the *Tate* principles and article 680 would have entitled him to a second judgment of supercession and recusal.

#### LIMITATIONS ON SUPERCESSION

One interpretation urged in *Perez* was that the power to supercede by the attorney general would produce complete removal of the district attorney from office.<sup>46</sup> Under that theory, the attorney general would supercede the district attorney as prosecutor for the state in all present and prospective criminal actions and proceedings, until all legal matters connected to or arising out of the facts constituting the original cause for supercession were finally concluded.

The Louisiana Supreme Court, while it legitimated generally the substantive constitutional power of the attorney general to supercede for cause,<sup>47</sup> rejected the broad interpretation that supercession authorized the attorney general to divest the district attorney of his office. The court limited the scope of authority granted by a judgment of supercession to the power to prosecute only those criminal offenses arising from and based upon the facts judicially recognized to constitute cause for the supercession. In short, supercession is to a "case" or "cases" rather than to the office. The *Bush* supercession motion conformed to this interpretation, as did the judgment of supercession by the district court.

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45. In brief in support of the *Bush II* motion, Attorney General William J. Guste, Jr. argued that "a consequence of the prosecutor's status as a quasi-judicial officer . . . is that he or she is subject to judicial ethics in the exercise of those powers." Guste further argued that article 680's requirement that the district attorney be free from a compelling political self-interest in any given case "is at the heart of the independence and integrity of judgment required of his office by substantive due process. The exercise of prosecutorial power . . . in service of a personal purpose or political self-interest, is an inherently arbitrary and unreasonable action under color of law, and a violation per se of the constitutional right to substantive due process . . ."

46. [T]he Attorney General is compelled by the overriding state interest to move this court to exercise its authority over District Attorney Leander H. Perez, Jr. and his assistants by relieving them from handling any criminal matters now pending before them until the disposition of these matters and further, to ensure the integrity and impartiality of the criminal justice system this court must authorize the Attorney General to supercede the District Attorney in all pending criminal matters.

Supercession motion In Re: Guste, No. 62-463 on the docket of the Twenty-fifth Judicial District Court in and for the Parish of Plaquemine.

47. 454 So. 2d 806 (1981).



To what extent is the post-supercession grand jury investigation and institution of prosecution limited by the cause for supercession? This important issue was not resolved by *Perez* or *Bush*. The ambiguity of the issue results from the supreme court's language in the *Perez* case as to the authority granted to the attorney general by a judgment of supercession:

... [to] institute and prosecute, or to intervene in any proceeding, as he may deem necessary for the assertion or protection of the rights and interests of the state in the matters under investigation by the additional grand jury or *any other matters arising therefrom*.<sup>48</sup>

The jurisprudence is silent as to what measure of legal or factual connexity a newly-discovered but related criminal offense, not within the scope of the original cause for supercession, must have to the criminal cases included in the judicial authorization as part of the cause, in order for the attorney general to have the power to prosecute that offense as well under the original judgment of supercession.

In *Bush*, the court of appeal correctly declared the limitations on the prosecutorial authority of the attorney general after supercession. However, it provided no standard for determining additional offenses not clearly constituting cause but which were nonetheless judicially authorized cases for investigation and prosecution because of the connection to the cause. The court of appeal placed this limitation upon the special grand jury in *Bush*:

[The grand jury] investigation is limited to the scope of Judge Hester's ruling in which he found cause for the Attorney General to supercede the District Attorney, i.e. the offenses for which cause was found and all matters related there to and arising out of its investigation.<sup>49</sup>

The elasticity of "arising from" presents two choices for the attorney general. Either he can charge and test his prosecutorial authority by a judicial interpretation of "arising from," or he can file a second original supercession proceeding to obtain express judicial authorization to prosecute the newly-discovered offense.

The other consequence of the limited construct of supercession in *Perez* is that the district attorney remains in office and continues to exercise his constitutional power and authority in all other matters pending in his jurisdiction.<sup>50</sup> A prosecutor in bad faith can exploit this situation to tamper with justice. Such an extraordinary situation, a

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48. 454 So. 2d at 807 (emphasis added).

49. In Re: Guste, No. KW-89-0748 (May 11, 1989) (La. App. 1st Cir.).

50. Id.

criminal defendant lawfully possessing the power to prosecute his lawful prosecutor, illustrates anew the tension between state and local power in the constitutional polity.

The constitution in its framework for balancing primary local prosecutorial power with limited and extraordinary state prosecutorial power did not expressly contemplate the obstruction of justice or interference with the constitutional process by the exploitation by the district attorney of the retained powers of his office. The authorizing district court, pursuant to article IV, section 8 and article V, section 16, should have the judicial power to protect the integrity of the constitutional process of supercession.

Concurrent to the filing of a supercession proceeding, the attorney general, who acts on behalf of the State of Louisiana, should be entitled to an *ex parte* stay order restraining the exercise of all prosecutorial and investigative powers of the district attorney against all officers and employees of the Department of Justice until final disposition of all cases arising out of the supercession or until the supercession proceeding itself is dismissed by final judgment. At any time that the district attorney has grounds for such investigation or prosecution, he may simply recuse himself and move the court to appoint a special district attorney ad hoc to act for the state in those matters.

The authority of the courts to issue such orders to protect the supercession process was judicially recognized in *Bush II*. The supreme court initially issued such a stay order, as did the district court thereafter.

#### SUMMARY

The constitution only adumbrates supercession; the *Perez* and *Bush* cases give that constitutional action definitive legal form. *Perez* provided a substantive standard by its definition of "cause," and also established the limited nature of supercession to authorize the superceding exercise of prosecutorial power by the attorney general only in a certain specified "case" or "cases," but not the powers of the office of the district attorney itself. *Bush* exemplified one effective procedure for supercession grounded in the constitutional value of due process for state as well as the individual. *Bush* further demonstrated that an ethical default by a district attorney can constitute cause for supercession, even absent criminal conduct, for a violation of the judicial ethics imposed upon prosecutors by Code of Criminal Procedure article 680(1) also violates due process of law, in which the state has a right and an interest.

The Constitution of 1974 entrusts the primary prosecutorial power to the district attorneys and gives them great autonomy in its exercise. The supercession power at the state level is granted to the attorney general to protect the ideal of legality in the criminal justice system. By refining the means for the fair but swift exercise of this extraordinary

but essential power of the attorney general, *Perez* and *Bush* have helped to frame the balance between local and state power in criminal prosecution in a manner faithful to the constitutional intent.

**Appendix**  
**19TH JUDICIAL DISTRICT COURT**  
**PARISH OF EAST BATON ROUGE**  
**STATE OF LOUISIANA**

In Re; The Matter of Attorney Number: 12-88-103  
General William Guste, Jr. Super- Section: II  
seding the District Attorney of the Written Reasons for Judgment  
19th Judicial District

**GENTLEMEN:**

The motion before this Court has been filed by the Attorney General in accordance with Article 4 Subsection 8 of the 1974 Louisiana Constitution. By this proceeding "to show cause," the Attorney General seeks to have the East Baton Rouge Parish District Attorney recused and to have the Attorney General supersede the District Attorney in an investigation of and possible prosecution for crimes alleged to have been committed by the District Attorney, and for all matters arising therefrom or related thereto. Further, the Attorney General seeks authority to request a grand jury pursuant to its request to supersede.

At the outset, this Court notes that it is confronted with a situation that is virtually *res nova*, with few guidelines regarding the appropriate procedure and attendant standard of proof to be employed. Therefore, to facilitate appellate review of the issues addressed, this Court has incorporated in this judgment procedural determinations and reasons therefor.

The motion itself appears to be civil in nature, but the underlying factual basis therefor alleges criminality on the part of the respondent. By law, this Court has jurisdiction over both civil and criminal matters.

The Attorney General argued in brief that the "cause" issue is something less than "proven cause", citing the discussion of the 1973 Constitutional Convention. However, due to the fact that the ultimate resolution of this issue may result in a criminal prosecution and the possibility of loss of liberty, due process seems to require more than a bare, unilateral allegation of cause. In balancing the respondent's substantive and constitutional rights against those of the Attorney General to make a showing of the legitimacy and good faith of its requests, this Court determined that the appropriate burden of proof should be by a preponderance of evidence. This Court is not being called upon to make any ultimate findings of fact or to decide guilt or innocence, and consequently, to require of the movant a standard of proof beyond a reasonable doubt would be unduly onerous. In practice, such a mandate would result in dual trials.

For the same considerations above and below stated, this Court allowed the admission of evidence that would, in a criminal trial, constitute hearsay. The Court notes that this hearing was somewhat analogous to a preliminary hearing, and as such subject to the attendant informalities.

The sole issue before this Court is whether or not the Attorney General has shown sufficient legal "cause" to proceed in accordance with Article 4 Subsection 8 of the 1974 Louisiana Constitution. A general definition of the requisite cause employed by this Court can be found in the Louisiana Supreme Court decision in *Plaquemines Parish Commission Council v. Perez*, 379 So2d 1373 (1980): "This 'Cause' requirement refers to a showing that the District Attorney is not adequately asserting some right or interest of the state."

It is the opinion of this Court that in its determination of cause, the trial court is limited to deciding whether or not the Attorney General possesses information sufficient to warrant official inquiry into the actions of the District Attorney. In other words, the question before the Court is, "Is the Attorney General's request to supersede a legitimate and good faith inquiry based upon the rights and interests of the state, (and its citizenry)?" In resolving this issue, the Court is required to make certain findings of fact and conclusions of law. These findings are not substantive and are not intended to indicate a judicial finding that the respondent is guilty of any actual wrongdoing. Such is not the function of this Court and would indeed result in the usurpation of the jury function, if a jury is ultimately necessary.

With this explanation of the procedures utilized at the hearing and the Court's purpose in the outcome, this Court makes the following findings of fact and conclusions of law, as required by the Louisiana Supreme Court. *In re the Matter of Attorney General Guste Superseding the District Attorney of the 25th Judicial District.*

The evidence preponderates in favor of the Attorney General's request and suggests a serious and legitimate inquiry into the misuse of funds by the District Attorney in contravention of the laws of this State. The evidence indicates that the District Attorney could not and did not properly account for over \$14,000.00 in public funds which was missing from his office.

This evidence further preponderates in favor of the Attorney General's request and suggests a serious and legitimate inquiry into the offense of malfeasance by the District Attorney for failing to keep a complete and full record of the funds contained in the Narcotics Fund and Special Investigation Fund, as required by R.S. 42:282. The testimony of the DA investigator, Mike Thompson, specifically indicated that there were no written records kept by the District Attorney's Office with regard to the monetary status of the Narcotics Fund. The testimony of Mr. Loller indicated that members of the District Attorney's staff

confirmed that the same lack of written records applied to the Special Investigation Fund.

The evidence preponderates against the Attorney General's request and suggests a lack of cause to inquire into the offense of malfeasance by the District Attorney in failing to comply with R.S. 38:2212. Although the testimony was clear that no bid was filed in connection with the purchase of a computer for the office, it was also clear that a declaration of emergency *was* filed by the District Attorney, albeit late, in accordance with the procedure set out to excuse no bids being requested. The emergency declaration appeared to be filed in good faith and not as a response to any outside inquiries or investigations of the District Attorney or his office. The allegation of an intentional failure to perform an affirmative duty in this matter appears to be insubstantial and not supported by the evidence.

The evidence preponderates in favor of the Attorney General's request and suggests a serious and legitimate inquiry into the allegation of malfeasance by the District Attorney in instructing his employee to prepare falsified public bids on automobiles purchased by the District Attorney's Office, and further into the allegation of filing false records or injuring public records in violation of R.S. 14:132 and 14:133, respectively. There is evidence in the record to indicate that the District Attorney instructed an employee to obtain and/or prepare bids after the purchase of the automobiles for the purpose of providing them to media representatives who had requested those specific public documents. Respondent argues that preparing false documents in response to that request and presenting the same to the media does not transform the documents into "public records" within the purview of R.S. 14:132 and 14:133. This Court pretermits this question as not within the ambit of its inquiry into "cause". The undisputed testimony that the District Attorney instructed an employee to fabricate what was purportedly a public bid for the purpose of deceiving the media, and thus the public, presents an incident that warrants further investigation.

This Court is not in a position to and is not being called upon to determine actual guilt or innocence, and certain arguments for both parties should be more appropriately raised at a later time. Some arguments of justification and/or defense were made during these proceedings. These, often, were allowed by this Court for the sake of the record and were not necessarily pertinent to this proceeding to show cause. Some of the evidence introduced would be more properly considered in a later proceeding, rather than the hearing to show cause. Absent further guidelines, this Court limited itself to assessing the legitimacy of the proposed inquiry by the Attorney General by considering whether or not the Attorney General has shown a necessity to be allowed to investigate further, with the possibility of ultimate prosecution. Thus,

this Court has attempted to gather information and to proceed logically, equitably and with common sense.

Having considered the pertinent evidence, and finding that it is sufficient to warrant further inquiry:

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. the Attorney General is authorized to supersede and usurp the East Baton Rouge Parish District Attorney and his office, and to institute, prosecute, or intervene in any matters involving the District Attorney's, or any of his employees', potential criminal liability in connection with the subject matter of the hearing before this Court, and any other matters arising therefrom. (The exception to this general authority is the finding by this Court of insufficient cause on the allegation of the District Attorney's failure to let bids on the purchase of a computer.)
2. In accordance with article 680 of the Louisiana Code of Criminal Procedure, the East Baton Rouge Parish District Attorney is hereby recused from representing the State in all matters under the authority, investigation or prosecution by the Attorney General as herein above authorized by this Court.
3. In accordance with article 682 of the Louisiana Code of Criminal Procedure, the Attorney General is hereby notified that the East Baton Rouge Parish District Attorney is recused from the proceedings hereinabove described, and that the Attorney General, or his staff, is exclusively empowered with all of the authority of the recused District Attorney with reference to the matters hereinabove described.
4. The Attorney General is hereby authorized to request of the appropriate judge of the 19th Judicial District to empanel a grand jury for the purpose of investigating the alleged criminal culpability of the East Baton Rouge District Attorney and/or his staff, for the offenses for which cause was found and for all matters related thereto or arising out of their investigation.

JUDGMENT READ, RENDERED AND SIGNED in Open Court in Baton Rouge, Louisiana, this 27th day of January, 1989.

S/ Robert Hester  
JUDGE, 19TH JUDICIAL DISTRICT COURT  
CRIMINAL DIVISION II