faith of the government, ruling that he did not have the evidence to impugn the U.S. Attorney's *intentions*, the entities' contention that the government did act in bad faith was vindicated.

Mr. Kuney said that he was evaluating the decision also from the standpoint of a professor of bankruptcy law (he is Adjunct Professor of Law at American University in Washington). He answered affirmatively when asked whether he thinks this ruling may become a "classroom text." It "will become a leading, seminal decision."

"They shut down three companies for two and a half years, and put them under interim trustees. Can the government now just walk away and say, 'We're sorry?' "

Attorney Kuney was asked whether he believed the government will appeal the Bostetter ruling. He replied that Hudson has said that they will, "but I do not think they will."

Hudson should be investigated

One reporter at the press conference asserted, "I happen to know of well-substantiated allegations about a major Vietnamese mafia operating in the northern Virginia area, which Henry Hudson refused to allocate the manpower to investigate. Do you have any idea of the amount of investigative manpower Hudson applied to this case, that was taken away from such serious cases?" Hamerman replied that he thought the Government Accounting Office ought to be called upon to do an audit of U.S. Attorney Hudson's misuse of manpower and funds for the fraudulent bankruptcy action, as well as other "Metro-Goldwyn-Mayer-style actions by Hudson, such as the June 1988 Pentagon raid conducted under Operation Ill Wind."

Documentation

From Judge Bostetter's decision of Oct. 25

Below are excerpts from the 106-page ruling in the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, In re: Caucus Distributors, Inc., *debtor,* Campaigner Publications, Inc., *debtor, and* Fusion Energy Foundation, Inc., debtor. *Footnote numbers have been omitted, except for the instance where we are reprinting the relevant footnote.*

Memorandum opinion

This matter is before the Court upon the involuntary petitions in bankruptcy filed by the United States against Caucus Distributors, Inc. ("Caucus"), Campaigner Publications, Inc. ("Campaigner"), and Fusion Energy Foundation, Inc. ("Fusion"). The involuntary petitions, which request relief under Chapter 7 of the United States Bankruptcy Code ("the Code"), were filed on April 20, 1987. . . . The United States based the petitions upon claims outstanding against the debtors totaling approximately 16-million dollars. The claims consisted of contempt fines imposed upon the debtors for their failure to comply with grand jury subpoenas. The United States filed the petitions as a sole petitioning creditor and did not make reference to the total number of creditors of each debtor.

Upon the denial of two motions for dismissal, answers to the petitions were filed on June 25, 1987. The government then filed a motion for summary judgment in each case. After the filing of the debtors' answers but before the Courts' disposition of the motions for summary judgment, creditors intervened in each of the petitions, bringing the number of petitioning creditors to a minimum of three in each case.

On March 8, 1988, this Court issued a memorandum opinion, which clarified that the United States was the holder of a claim, which was not contingent as to liability, nor subject to a bona fide dispute. . . . This Court denied the government's motion for summary judgment, however, on the basis that a genuine issue remained as to whether Caucus and Fusion were debtors against whom the United States may proceed, and whether the debtors were generally not paying their debts. . . . Accordingly, the Court declined to rule on the issue of whether the government filed the involuntary petitions against the debtors in bad faith. . . .

A trial on the issues remaining for adjudication was held and at the close of the government's case, counsel for the debtors moved again to dismiss the involuntary petitions. . . .

The first basis asserted by the debtors in support of the instant motion to dismiss is that the government should not be allowed to proceed as a matter of law in an involuntary bankruptcy proceeding against parties whom the government also is prosecuting for criminal violations in another forum. Secondly, the debtors assert that an involuntary petition filed by a sole petitioning creditor *with* the knowledge that a debtor has in excess of twelve creditors warrants dismissal as a matter of law. We consider these grounds in the order proposed.

Parallel criminal proceedings

At the time the involuntary petitions were filed, the alleged debtors had been the subject of criminal investigations for approximately two and one-half years. . . .

With respect to the alleged debtors' contention that they were unable to defend themselves adequately in the instant proceedings, we note that such an argument only has merit, if any at all, if the outcome of these cases is unfavorable to the debtors. We, therefore, decline to consider this argument as a proper element of the debtors' motion to dismiss.

Accordingly, we find no improprieties in the prosecution

of parallel criminal and civil proceedings against the alleged debtors in the instant cases, and deny the debtors' motion to dismiss on this basis. Whether the government acted in "bad faith" by pursuing relief in this Court with a "prosecutorial mind-set" is a different question entirely and must be examined in view of the totality of the circumstances in these cases. We, therefore, defer our examination of the issue of bad faith until we have evaluated the defenses of the alleged debtors to the instant petitions.

Three creditor requirement

. . . We note, however, that it is precisely because the jurisdiction of this Court may be invoked so easily, thrusting an unsuspecting debtor into the uncertain status imposed during the "gap" period of an involuntary petition, that this Court has the obligation to determine once a petition is filed whether to *retain* jurisdiction if the circumstances of the filing indicate a dismissal is warranted. Moreover, despite the government's having avoided a finding of actual fraud, by making no statement regarding the number of debtors' creditors, we find the government's deliberate actions and omission of an allegation pertaining to the number of the debtors' creditors to evidence the improper use of the statute and invocation of this Court's jurisdiction.[25]

In contrast to the narrow legal issue of whether a deficient petition intentionally has been filed, the issue of bad faith is factual, *see United States Fidelity & Guar. Co. v. DJF Realty & Suppliers,* 58 B.R. 1008, 1011 (N.D.N.Y. 1986) (bad faith in an involuntary petition is a factual issue), and based upon the totality of the circumstances, *see In re Elsub Corp.*, 66 B.R. 189, 193 (Bankr. D. N.J. 1986) (existence of bad faith is determined by the totality of the circumstances). It may well be that a creditor who filed an involuntary petition with knowledge that the debtor has more than twelve creditors acted in bad faith, but the two issues are not necessarily one and the same. . . .

On the basis of the foregoing, we find that the government had actual knowledge that each of the debtors had in excess of twelve creditors on the date the petitions were filed. The government's decision to file the petitions despite that knowledge constituted an improper use of the involuntary bankruptcy statute and consequently an improper invocation of this Court's jurisdiction; we, therefore, dismiss the involuntary petitions pending against the three named debtors. We again note that to determine whether the government acted in "bad faith" in filing these involuntary cases, we must examine the totality of the circumstances surrounding the decision to file. We, therefore, proceed at this time to examine the merits of the government's cases against the debtors.

Moneyed, business, or commercial corporation

. . . Turning to the evidence proffered by Fusion Energy Foundation, the exhibit upon which it primarily relies is its corporate charter. . . . The charter reflects that Fusion was founded in August 5, 1975 and provides in pertinent part:

> 3. The purposes for which the corporation is to be formed are for scientific, educational and charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954 and in this connection are:

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[25] Although the government ultimately conceded that it knew that the debtors had in excess of twelve creditors, the government was less than forthright in revealing its actual knowledge.

On April 21, 1987, the day after the petitions were filed, counsel for the alleged debtors argued specifically that the government alone could not file the involuntary cases in view of the references to "numerous creditors" in the petitions. Transcript of Hearing on April 21, 1987, p. 18. In responding, counsel for the government addressed not the issue of the government's actual knowledge, but rather its right to file a petition as a single creditor, and wait for the debtors to state in their answers that they had more than twelve creditors *and* file a list of creditors in accordance with Bankruptcy Rule 1003 (b). *Id.* at 42; *see* Bankr. R. P. 1003 (b), *supra* note 9. The government noted that until that was done, "there [wa]s no jurisdictional argument to make." Transcript of Hearing on April 21, 1987, p. 43.

On June 15, 1987, United States Attorney Henry Hudson testified:

> [T]he Government would be less than candid with the Court if we were to mention to you that we weren't aware or suspect (sic) that there were more than 12 creditors at the time this petition was filed.

Transcript of Hearing on June 15, 1987, p. 21.

The Court at that time formed the following opinion:

> [T]he Government concedes that they suspected that there were more than 12 [creditors]. I don't have any evidence that they know there are more than 12, but certainly from their pleadings one would have to draw the inescapable conclusion that they suspect there are more than 12 creditors.

Id., p. 24.

In March of 1988, the government indicated in answers to interrogatories that it "reasonably believed the alleged debtors had other creditors[,]" and that "the documents seized in the October 1986 search do contain what appear to be numerous loan files indicating many creditors."

(Responses to Interrogatory No. 4, Interrogatory No. 5, respectively, filed March 15, 1988).

On March 23, 1988, the Court addressed in a telephone conference call between the Court and counsel what the Court believed to be an admission in the answers to the interrogatories:

> COURT: In this connection, the government has admitted it, as I understand it, and they can say "No" now if they don't, that the debtor has more than twelve creditors.
>
> MR. SZYBALA: Yes, your Honor, that's been our position at the outset. We have already stated that at the first hearing.

Transcript of Hearing, March 23, 1988, p. 3. The government did not state affirmatively the extent of its knowledge to the Court until the second day of trial, May 6, 1988. Tr. Vol. III, pp. 83-85 (*see* text, *supra* p. 14-15).

On the basis of the above, the government's actions could be liken[ed] to a constructive fraud on the court, wherein the court may infer the fraudulent nature of the government's conduct. *See Kitchen v. Throckmorton*, 223 Va. 164, 171, 176, 286 S.E.2d 673, 676, 679 (1982) (court adopted definition of constructive fraud as a "breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests[;]" and determined that administratrix had perpetrated a constructive fraud upon the court).

a. To provide sustained intellectual and financial support and direction to educational and scientific activities directed to the achievement of industrial-scale fusion power, and to initiate and conduct campaigns in its own name to that end.

b. To sponsor and receive studies relevant to scientific and technical strategies for the achievement of a Manhattan Project-type crash program for the development of fusion energy on an industrial scale, and relevant to the economics of fusion-based production.

c. To disseminate the results to government and international officials and bodies, the press, and the population-at-large.

d. To establish liason (sic) with representatives of labor, farms, anti-fission and environmental groups, scientists and other professionals, and governmental and international agencies.

e. To produce, buy, distribute and lease film and related media and material on the nature and necessity of fusion power for the achievement of purposes stated above paragraphs a, b and c. . . .

In one of the internal documents to which the government has directed our attention in connection with the issue of the debtors' eleemosynary status, we took note of the following excerpt:

> 1984 was the "Year of the Loan" in which a majority of income was comprised of loans. Infrastructure loan principal (including the first quarter of 1985) now stands somewhere around $10,000,000. About 90% of these notes come due in 1985. The attempt to change the composition of income is not only necessary from the standpoint of expanding our numbers and educating our base. It is also the case that we are losing a large number of supporters (and some quite bitterly) who made 1984 loans in the $1000-$5000 range.

Exh. 79, p. 1. This passage is representative of many within the internal documents seized by the government, which has led this Court to conclude that the debtors strived more to expose the world to its political viewpoint than attain private monetary gain. . . .

In view of the foregoing, this Court finds that the government could not proceed against the alleged debtors, Fusion and Caucus, in an involuntary bankruptcy proceeding. In so holding, we seek not to protect the promotion of a particular ideology, but to preserve the intention of the Act and now the Code to limit the application of involuntary bankruptcy proceedings to only those entities truly commercial in nature. . . .

Bad faith

We examine first whether a "reasonable person in the position of the petitioning creditor would have initiated the bankruptcy proceeding." . . . With respect to [the petitioner's pre-filing inquiries—ed.], this court need not dwell upon what inquiries the government made and whether the government should have known that the alleged debtors had in excess of twelve creditors, in view of its admission on this issue. It is clear that the government knew of the number of the debtors' creditors, and chose to file as a single creditor. . . .

With respect to the pre-filing inquiries into the substantive aspects of the instant petitions, we note summarily that the government's decision to file in the instant case reflected less the good faith extension of the law, than a questionable reliance upon existing law. While one court has indicated that the lack of time may justify a less than complete examination of the law on involuntary bankruptcy petitions, the government did not face an inflexible deadline in the instant cases. *See In re Turner,* 80 B.R. 618, 620, 626-27 (Bankr. D. Mass. 1987) (existence of the first of two *ex parte* court orders approving attachments on debtor's homes required counsel to make a quick decision to prevent attachment from becoming immune from attack as a preference.)

Accordingly, an evaluation of the government's filing on an objective level leads this Court to conclude that the alleged debtors have established that the government filed the petition in bad faith. It is not the filing of an involuntary petition by the United States that constitutes bad faith, as suggested by the debtors, in that we are aware of at least one instance where the government filed an involuntary petition without notoriety in *Missco Homestead Ass'n v. United States,* 185 F.2d 280 (8th Cir. 1950), but the failure to comply with the applicable provisions of the Code that compels this conclusion with regard to the objective prong of the bad faith test.

It is quite apparent that a determination of the subjective motivations of a petitioning creditor is a most difficult task. While in some instances courts may have the benefit of direct evidence or testimony regarding the creditor's decision making process, it is the more usual situation that courts must surmise the petitioning creditor's intent based upon the circumstances of the case. In this regard, one avenue of the courts has been to grant liberal discovery requests to enable a debtor to determine better what the petitioning creditor's motivations were. *See In re Elsub,* 66 B.R. 189, 196 (Bankr. D. N.J. 1986) ("[I]t is clear that this court must permit [the debtor] to conduct further inquiry into the pre-filing inquiry and objective and subjective motivations of [the petitioning creditor] in filing the involuntary petition[.]"); *see also In re Turner,* 80 B.R. at 620-28 (reviewing extensively the pre-filing considerations of petitioning creditors and their counsel). This Court in an effort to understand fully the basis for the filing of these involuntary petitions, agreed to review research notes and documents created in preparation for litigation by the government *in camera*. While declining to reveal in detail the contents of each document, we have incorporated our *in camera* review into our findings.

The alleged debtors have in their post trial memoranda outlined extensively their perceptions of how the government conceived and developed the idea to file these involuntary petitions. Essentially, the debtors maintain that the government has initiated criminal investigations of organizations affiliated with Lyndon H. LaRouche because of the government's belief that Mr. LaRouche is a "political extremist."

Accordingly, the debtors assert that the civil division of the United States Attorney's Office derived its inspiration to file these petitions from the criminal division, and thus proceeded to file these petititons with a "prosecutorial mind-set." The debtors maintain that evidence of this mind-set is found not only in the lack of evidence to support the filing of the petitions and in the decision to ignore more traditional means of collection, but by the testimony of the officials who shared responsibility for the decision to file.

The government consistently has responded to these allegations by noting that it was not operating under the direction, or on behalf of the criminal division, and actually had three very distinct policy reasons for filing these petitions. . . .

Upon a review of all of the evidence, and the serious concern of the debtors that they have been targeted by the government in view of their association with a figure of allegedly "political extremist" views, we find that it is mere speculation that the government was influenced by the media, and/or the criminal division of the United States Attorney's Office, and that the alleged debtors have not proven their theories by a preponderance of the evidence. Rather, we are impressed by the government's primary motivation that the involuntary mechanism was the most appropriate under the circumstances. Where the government's motivations may have been suspect to the alleged debtors, but the primary basis for filing the instant petitions was consistent with the Bankruptcy Code, it does not appear appropriate to condemn the government's action as constituting bad faith. *See In re Turner,* 80 B.R., 618, 627 (Bankr. D. Mass. 1987) (noting that suspicions of debtors did not taint petitioners' actions with bad faith). . . .

A petition may be deemed to have been filed in bad faith where the petition does *not* accomplish the goals of bankruptcy and alternatives methods were available to the petitioning creditor. *In re McDonald Trucking Co.,* 74 B.R. 474, 478-79 (Bankr. W.D. Pa. 1987) (noting that no evidence was offered to indicate that petitioning creditor considered any of the less radical and more traditional methods of debt collection); *In re FRP Indus., Inc.* 73 B.R. 309, 313 (Bankr. N.D. Fla. 1987) (noting that petitioning creditor made no effort at all to avail himself of collection remedies provided under state law and true motive was to use Bankruptcy Code as a means of effectuating a takeover of the debtor corporation). After reviewing all of the evidence, it appears that the decision to file the instant involuntary petitions by the government may not have been the best one in hindsight, but was made with the attempt to accomplish goals consistent with the Bankruptcy Code. . . .

In determining that the bad faith of the government has not been established on the facts of this case, we do not diminish the concerns of the alleged debtors who sought vigorously to expose the allegedly improper motivations of the government throughout this litigation. We note here that the government itself may have fostered suspicions by its choice of words, and litigative zeal. An excerpt from one of the government's pre-trial filings is revealing:

> The United States filed pursuant to the Court's pre-trial order, April 20, 1988, United States' exhibits 1-129 in support of its involuntary Chapter 7 bankruptcy petitions against the debtors. As a whole, the exhibits demonstrate beyond any reasonable question that the debtors have consciously and maliciously engaged in a scheme to defraud banks, merchants, suppliers, and most cruelly the elderly by incurring debt without intent to repay the indebtedness. The Court is not likely to see an involuntary case where entry of the orders for relief is more appropriate than these cases. With the debtors, the facts mandate entry of orders for relief.

Memorandum of Law in Support of Admissibility of United States' Exhibits, Filed April 29, 1988, p. 1.

It is possible that mixed with the government's conviction that the bankruptcy forum was the best one to address all of the alleged claims against the debtors was its sense of obligation to enforce the laws of this country. With this possibility, the question arises as to whether a bankruptcy court is a permissible forum for the government to enforce its claims and the claims of other citizens by seeking an involuntary liquidation. This question was of grave concern to the instant debtors who maintained that by considering the status of other "aggrieved creditors," perhaps even before its own standing as a creditor, the government somehow corrupted or exploited the involuntary bankruptcy process. . . .

. . . [T]his Court is without authority to determine that *any* involuntary petition filed by the United States Attorney's Office against a debtor who is the subject of a parallel criminal proceeding is by its nature improper, or executed in "bad faith." We suggest, therefore, that the policy considerations cited by the debtors may only be addressed by Congress.

Accordingly, this Court grants the motions of Caucus Distributors, Inc. Campaigner Publications, Inc., and Fusion Energy Foundation, Inc. to dismiss the involuntary proceedings pending against them. Upon the filing of an appropriate motion and a hearing thereon this Court will consider the alleged debtors' request for cost and fees under 11 U.S.C. § 303(i).

An appropriate order shall enter.

Dated: October 25th 1989

Martin V. B. Bostetter, Jr.

Chief Judge