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FAS Note: Thomas M. Lehman, a distinguished geologist at Texas Tech University, sent this letter regarding the Thomas Butler case to colleagues and interested others on April 9, 2004.

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Dear --

The following letter is an addendum to [my earlier "essay"](#) on the trial of Dr. Thomas Butler. I am writing again because several of my colleagues and acquaintances here at Texas Tech have stopped me in the hall to ask what I may know, and it was apparent to me that most folks here on campus still do not have any idea what happened right here to one of our own colleagues.

Again, the following comments are solely my own perceptions and opinions - and they are very decidedly biased ones now. I am convinced that a great injustice was committed against Dr. Butler, and I have definitely taken a side in this matter. Some colleagues here were critical of the personal and emotional tone of my previous letter, but I make no apologies for my defense of Dr. Butler. It is difficult to witness someone's life being ruined before your eyes - and really, for no good reason.

I heard via e-mail and phone from many people (literally around the world) because my earlier letter was posted on the FAS website ([fas.org/butler](http://fas.org/butler)). I have not been able to respond to very many of you, but I can assure you that Dr. Butler was well aware of the great outpouring of moral support for him.

I was at the sentencing hearing for Dr. Butler on March 10, along with quite a few of his supporters. Not unexpectedly, the Lubbock news media has done its usual job of "in depth" reporting on the case. In other words, unless you were there, you have no idea what happened in the courtroom. For instance, in the headline story on the day following Butler's sentencing, the Lubbock Avalanche-Journal incorrectly reported the length of his prison term. Many of you read that article, but how many read the correction on page 2 the following day? And this was the culmination of what the AJ had earlier labeled their "number one news story of 2003." One great lesson I've learned in following Dr. Butler's case is that you literally should not believe ANYTHING you read in the paper or hear on the evening news. Like most people I have been quick to make a judgment for or against someone on the basis of scanty, subtly (or not so subtly) biased reports on the news (e.g., Martha Stewart, Michael Jackson, etc...Oh SURE she's guilty, and OF COURSE he did it - well; now I'm not so sure). Anyway, what happened to Tom Butler has taught me that, unless you yourself sat in the courtroom everyday, and listened to all the testimony, and investigated the matters yourself, you are kidding yourself if you think you can come to an informed opinion on the basis of what we call "the news." Unfortunately, I had to leave town for a week following Dr. Butler's sentencing. And so, I've only now had the chance to sit down and give you my thoughts on the matter (if you care to read them).

### **1) WHAT WAS DR. BUTLER'S SENTENCE?**

On the 47 charges Dr. Butler was convicted of, he faced a total of about 240 years or so in prison and about 12 million dollars or so in fines. Recall that 44 of those charges related to Dr.

Butler's supposedly fraudulent consulting contracts he had with pharmaceutical companies, and the other 3 charges had to do with supposedly mislabeling a FedEx package containing bacterial samples sent to Tanzania (I gave you my opinion of these charges in my earlier letter). Of the potential 240 years in prison and 12 million dollars in fines, what was his sentence? 24 months in prison and about 15 thousand dollars in fines and 38 thousand dollars in restitution. How was this sentence arrived at?

The \$15,000 in fines represents the absolute MINIMUM fine allowable in total for all of the charges under the federal sentencing guidelines (the maximum would have been \$150,000). The \$38,675 in restitution represents the MINIMUM amount of money that Judge Cummings determined Texas Tech had coming to it. Of the million or more dollars Dr. Butler supposedly stole from Texas Tech, Judge Cummings decided that they were actually entitled to only \$288,675. Oddly enough, this is close to (plus or minus) an amount Dr. Butler's defense argued might be the most Tech could claim in lost "overhead" from Dr. Butler's consulting contracts.

Since as part of Dr. Butler's previous agreement to resign his position at the university he had agreed to pay Texas Tech \$250,000. (Say a generous 25 percent of his consulting payments), that left \$38,675 -the additional amount Judge Cummings assessed in restitution. (I have further comments regarding this payment below). Although Judge Cummings seemingly did not accept the defense argument (one which I agreed with) that Dr. Butler had already contributed in excess of this amount to the university previously, since he had to pay over the years a significant part of his own salary (non-state supported amount) out of his consulting contracts, in addition to other contributions to support his research in infectious diseases. In any case, the \$38 thousand represents an amount laughably less than the extraordinarily punitive fines the federal prosecutors had argued for.

The federal prosecutors (not unexpectedly) proudly proclaimed victory outside the courthouse for what was really a giant slap in their face - and they knew it. Can you imagine? All of this mess over a paltry \$38 thousand dollars - it certainly supports the argument advanced by many (including myself) that this pitiful disagreement over financial matters was something that all along should have been handled as an internal matter at Texas Tech - I mean come on - a federal case and 44 convictions on what was basically an argument over "overhead" charges. It should make all of you involved in consulting work here sick. Remember, this matter alone accounts for 44 of the 47 "crimes" he was judged guilty of. The 24 months in prison represents SUBSTANTIALLY BELOW THE MINIMUM (actually forty-seven 24 month sentences all served concurrently) since Judge Cummings exercised his option to "depart downward" (lawyer talk) from the minimum sentence allowed under the federal sentencing guidelines (a minimum of 78 months on each count) - not only with regard to the supposed illegal transport of bacteria (a "first tier" downward departure), but also regarding the supposed "shadow" contracts (a "second tier" departure).

Judge Cummings gave elaborate rationale for his downward departure from the guidelines, and he enumerated these reasons in great detail during the sentencing (a transcript of the judge's sentencing statement is posted on the FAS website - [fas.org/butler/sentence.html](http://fas.org/butler/sentence.html) - if you would like to read it, you will find this very informative).

Essentially Judge Cummings argued that the supposed illegal transport charge, 1) occurred on one occasion, 2) involved a minute amount of material, 3) arrived safely causing no harm, 4)

resulted in no financial remuneration to Dr. Butler, 5) was provided as a professional courtesy to colleagues in Tanzania where the samples had originated, 6) the export was without "evil or terroristic intent" but done in the name of medical research, 7) was provided to medical and academic personnel, and 8) would have received a permit from the Dept. of Commerce had permission been requested. Sounds to me like even the judge did not see much of a "crime" there.

Regarding the supposed "shadow" contracts, the judge argued: 1) that Texas Tech would not have received ANY of the monies in question had Dr. Butler not been in their employ, 2) that Dr. Butler's grants and contracts were attributable to HIS research and abilities, not that of Texas Tech, 3) the Health Science Center received great prestige and recognition as a result of Dr. Butler's research abilities, that 4) this "substantially outweighs any potential harm brought upon Texas Tech" by Dr. Butler, and 5) that Dr. Butler's "research and discoveries have led to the salvage of millions of lives throughout the world." Again, hard to find a "crime" there.

As a result, Judge Cummings concluded, "There is not a case on record that could better exemplify a great service to society as a whole, that is substantially extraordinary, and is outside of anything the United States Sentencing Commission could have formulated in their devising of the guidelines governing departures..." and justified his significant downward departure in sentencing. So, in all of the above I have stressed the word MINIMUM because it was obvious to all in the courtroom that in every way possibly available to him, Judge Cummings assessed the smallest possible penalty he could!

Now, unless you live in Lubbock, you are probably not aware of the fact that Judge Sam R. Cummings is well known in these parts as "Maximum Sam." He has no trouble "throwing the book" at real criminals and routinely hands down sentences that many regard as harsh. (I'm not complaining - I've always regarded his decisions very highly). Well, why is this pertinent? IN THIS CASE, JUDGE CUMMINGS HANDED DOWN THE ABSOLUTE BARE MINIMUM SENTENCE HE COULD GIVE. That really says something to me, and if nothing else, it is something of a "moral" victory for Dr. Butler. I believe that Judge Cummings saw very little "fire" behind all of the "smoke" billowing from the prosecutors. It was actually comical after the hearing to see the proud prosecutors pronounce the judge's sentence "fair" to the crowded media while only moments earlier they had practically argued for the death penalty.

Well then you may ask:

## **2) WHY WASN'T DR. BUTLER'S SENTENCE EVEN LESS SEVERE?**

Remember that this was a FEDERAL case, in federal court, where there are strict federal sentencing guidelines. The jury had found Dr. Butler guilty and Judge Cummings was obliged to sentence him (he couldn't declare him "not guilty"). I have learned that federal judges who depart downward from the sentencing guidelines have their sentences routinely overturned on appeal (incurring the wrath of the Attorney General and intimidation by the House and Senate Judiciary Committee - if you're interested, Richard Cohen wrote a sobering article in the Dallas Morning News [March 13, 2004] regarding the rigid federal sentencing system and the resulting "unjust criminal justice system" that ties judges hands). It seems certain that the prosecutors in this case would have appealed a lesser sentence, and very likely would have won, if the judge had simply handed down a probated sentence. The precedence for overturning such a decision

on appeal is very high. In my opinion, this probably motivated Judge Cummings to sentence Dr. Butler to the minimum, departing downward as much as he could without setting in motion an immediate appeal by the prosecution. Of course, only Judge Cummings knows for sure.

### **3) AN OUTPOURING OF SUPPORT FOR DR. BUTLER.**

During the sentencing hearing, one of Dr. Butler's lawyers read aloud from several of over a hundred letters sent to the court by supporters. The letters came from the most exalted of scientists, colleagues and coworkers, to his former AIDS patients, down to his children's school teachers. It was truly a very moving experience to hear such things - few if any of us will ever have the opportunity (or perhaps ever deserve) to have such things said about them. Most of us will be lying in our coffin, and so unable to hear such words even if they were spoken! I hope that Dr. Butler is grateful to have lived and to have deserved to hear people say such things about him. Also heard was the most remarkable and eloquent testimony from Dr. William Greenough (Johns Hopkins University) who worked with Dr. Butler at the Center for Diarrheal Disease Research in Bangladesh. Did you know that Dr. Butler is credited with developing a treatment there for cholera (known as "oral rehydration therapy" - one of the first papers he wrote while working for them in Calcutta) that is currently credited by the World Health Organization for saving between 2 and 3 MILLION lives of children under four-years old EVERY YEAR?!! Apparently this is well known among doctors in the field, but I had never heard of this until Dr. Greenough spoke about it in the courtroom. He went on to explain about Dr. Butler's important contributions to treatment for typhoid fever, shigella, dysentery, and of course plague. Someday when the transcripts of the trial are available, or when someone writes a thorough account of Dr. Butler's life story, you will be embarrassed by what you hear. Has something you've done saved a million babies lives this year or the past year or for the past twenty years? How could such a man be sent to jail? It was embarrassing to be an American sitting there in the courtroom that day, and it should have been embarrassing for the judge and lawyers to sit there and ask themselves "What have I done with my life?", "Who am I to accuse and judge this man?" But then, Texas Tech must have its overhead, and the "Justice" Department must have its "example".

Chief Prosecutor Richard Baker stated on the courthouse steps after the sentencing that America is safer now because American scientists and academicians have been sent a message. I'm afraid however that the "message" he sent was not the one received by scientists. Were the actions of such a scientist a threat to national security?

### **4) WHY DID DR. BUTLER SETTLE "OUT OF COURT" WITH TECH?**

Following the verdict in the trial, but before sentencing, Dr. Butler had reached an agreement with the university in which he agreed to resign his position and "reimburse" Tech to the tune of \$250,000 rather than being "fired".

Some of my fellow faculty members saw this as essentially an admission of guilt on his part. However, that was not the case at all. I believe that Dr. Butler would most definitely have preferred to have a proper hearing before a faculty committee, and to have their judgment as to whether or not there were legitimate grounds for his dismissal.

However, (in my opinion) he was compelled to accept the advice of his lawyers, and to accept

this "deal" offered by the university, because it would demonstrate to Judge Cummings that he was eager to make emends with his aggrieved former employer, and that this could ultimately reduce the judge's sentence - essentially removing those financial charges from consideration in sentencing. I suspect that the university administration was also anxious to settle the matter with Dr. Butler short of his hearing before the faculty committee (where more dirty laundry would be aired and where - in my view - it was likely that the committee would find no grounds for his dismissal).

Moreover, Dr. Ted Reid (an ophthalmology professor at Tech) had circulated a petition - signed by more than a hundred faculty - with a passionate and reasoned appeal to the university administration asking for humanitarian treatment of Dr. Butler. I believe that this may also have played a role in motivating the university to end their dispute with him. Regardless, I have little doubt that the agreement was a major aggravation to the government prosecutors, since university officials publicly declared that their grievance with Dr. Butler was now settled and they "wished him well" in the future!

### **5) THERE NEVER WAS A MOTIVE.**

A major problem that bothered me throughout the trial of Dr. Butler, and its aftermath, was that the prosecution never presented a logical or even plausible motive for Dr. Butler to have committed his "crimes." If a crime is committed, the criminal should have a motive, or so I have supposed.

During the trial, the prosecutors presented the following motives to the jury: 1) that Dr. Butler was greedy, and with his outside consulting contracts he had been defrauding HSC for years, 2) he had become a disgruntled employee and his fraud was about to be discovered, so 3) he initiated the "plague scare" as a distraction to cover up his financial wrongdoings. So, the prosecution scenario was that Dr. Butler's greed and dissatisfaction led to a purposeful distraction intended to cover up an earlier crime. Now if that makes logical sense to you, I'd appreciate your help in explaining it to me. Creating the "plague scare" (in other words, destroying the plague samples himself, saying they were missing, and then lying to the FBI about it) was Dr. Butler's clever way to distract attention from his consulting contracts ("embezzlement"). In my mind, that's like committing murder to cover up shop-lifting, and then hiding the body in the same closet with your stolen goods. Obviously, fabricating something as monumental as the "plague scare" could only be expected to draw extraordinarily close scrutiny to all aspects of your life. The perpetrator of such a crime could only expect the descending investigators to uncover everything about you - far more than any mere university auditor searching your accounts. Nobody with half a brain would conceive or believe in such a scheme. Nevertheless, that's what the prosecution gave us.

The jury acquitted Dr. Butler of all charges related to the "plague scare," so they apparently did not buy this story either. So, that left us with "greed" as the motive for his "crimes."

### **6) MORE COMMENTS ON CONSULTING CONTRACTS AND "GREED".**

To this day I still do not believe that Dr. Butler owed ANY money to Texas Tech (my reasoning is given in the previous letter). As some of you are aware, the university is busily now rewriting its operating procedures regarding faculty consulting work, perhaps to make it

clear now what is or is not "fraud". No one has been able to show me the actual text of any regulation in the university operating procedures with the actual rules that Dr. Butler supposedly broke. In fact, if Dr. Butler had pushed for his hearing before the faculty instead of reaching an agreement to resign, I suspect that the faculty committee would have been unable to find any actual rule that Dr. Butler broke!

Regardless, he should not have been judged against a standard that wasn't in existence at the time. I don't know about you, but the only paperwork I've ever been asked to sign here regarding consulting work is a simple one-page sheet once a year asking me to guess who I may be consulting with over the coming year and about how many hours a week I anticipate spending on consulting activities. I suppose that it's basically only a request for "permission" to consult. I've never been asked by the university to declare how much I make consulting, or how much I may contribute in overhead.

I continue to hear from diehard fellow faculty - supporters of Tech's position in this matter - that Dr. Butler just "got greedy." This is the kind of armchair judgment you can make when you do not actually know someone, or see how they actually live their lives. Until his trial began, Dr. Butler drove a 1987 Chevy Nova, and his wife still drives the same beat-up Volvo station wagon she's had since coming to Lubbock sixteen (?) years ago - that about says it all. How many greedy doctors do you know who drive around in a piece of junk? I'm sure that most of his students and patients at the medical school drove nicer cars. [By the way, he was advised during the trial to get a new car so he could improve the "image" portrayed by news media while walking from the parking lot to the courthouse!]. And make no mistake, the prosecution and loyal media definitely portrayed him as a greedy rich doctor - and quite effectively to the jury. However, did you know that Dr. Butler was financing his work with plague victims in Tanzania OUT OF HIS OWN POCKET? Yes indeed, THAT is the sort of thing he was doing with the consulting money he "embezzled" from Texas Tech. A more "enlightened" university administration would have recognized that.

Furthermore, I have learned recently from other faculty (yes, even right here at Texas Tech) who have in the past and even to this day engaged in consulting work for pharmaceutical companies, that it is not unusual for such companies to utilize "split" contracts as a way to provide the university an amount agreed upon to conduct research (one contract), and to pay the investigator an additional amount for consultation (a second contract) allowing for a confidentiality agreement and protection of any of their patents involved - perhaps to protect their patents from the greedy clutches of the university itself. The prosecutors and the mimicking media (even in the most recent articles) described these contracts as "shadow" contracts - quite successfully painting them in an illicit and greedy light. If anyone was greedy in this matter, it was our Texas Tech administrators.

I have also learned that when Dr. Butler was recruited to come to Tech and hired, his department chair (Dr. Kurtzman) made it clear that Tech could not pay him "what he was worth" and that after his first two years of employment, he would have to make up part of his salary in grants and consulting contracts - the very thing that he did, and the very thing that ultimately Tech went after him for. This was an agreement between Dr. Butler, his chair, and his Dean, Dr. Hartman, but unfortunately, one that was not written down (so much for a "gentleman's" agreement, or what the prosecutors referred to as "financial shenanigans"). Dr. Hartman was eager to testify on Dr. Butler's behalf, but was not called upon - presumably

because the defense felt they had made their case.

## **7) MORE ON THE "PLAGUE SCARE".**

During Dr. Butler's sentencing hearing I learned some other little known facts about "the plague". Did you know that our own government worked for twenty years or more on methods to "weaponize" plague bacteria? What did they find? They couldn't do it! It turns out the plague bacteria are remarkably fragile organisms, and no ready means could be found to disperse and infect people with it easily (Of course, I'm not a microbiologist but it has something to do with the fact that they do not reproduce via spores or cysts that can be contained and dispersed in a dry powder form like anthrax, for example). At any rate, a lot of interesting information was contained among the letters written in support of Dr. Butler from fellow scientists - excerpts of which were read aloud in the courtroom, and I have learned more through conversations with some of Dr. Butler's supporters.

Some fellow doctors maintained that plague bacteria is actually relatively innocuous stuff compared to other much more infectious and deadly microorganisms for which there are no treatments, found in most any hospital, and that are not even on the government's list of special biological agents of concern. Others suggested that Dr. Butler's means of transporting bacterial specimens may actually have been the safest way to do it! There are remarkably very few (? four) documented cases of people (e.g., lab workers) being accidentally infected with plague bacteria during handling. Also, at least in our country, there are effective treatments so only a few people ever die from plague anymore - mostly Native American people living in remote areas who mistake their infection for a case of the flu. It seems that people are still afraid of the plague today primarily because of history lessons about Europe in the 1300's!

Many news agencies continue to report that Dr. Butler's "crimes" had to do with initiating the "plague scare" (that was really the university, government, and media's fault for blowing what trained microbiologists would regard as probably a minor lab incident all out of proportion). Many persist in stating that he "lied to the FBI" about the plague "incident" - but let me remind you HE DID NOT LIE TO THE FBI, and he was not found guilty of any charge relating to the "plague scare"!

Regardless, and sadly as it turns out, plague is really not that scary after all.

## **8) WILL DR. BUTLER APPEAL HIS CASE?**

We learned on March 25 that Dr. Butler's attorneys filed the paperwork to appeal his case. I'm sure that this was a very difficult decision for him.

It would actually be much easier for him to just go ahead and go to jail for 2 years (perhaps much less than that actually, probably about 15 months) and then just go on with his life (conversations with his supporters indicate that he will have absolutely no trouble finding a job when he "gets out"), and thereby save his family from so much more emotional distress and turmoil. Of course, he also runs the risk of incurring a more severe sentence if the case is retried. The appeal process will cost him at least as much money as I could make in four years - even though his supporters have started a legal defense fund (and so if it were me, I would probably just go ahead and go to jail solely on financial grounds). But, I'm sure he wants to

clear his name. He would not agree to a plea bargain before the trial (which sadly would have cost him less money and less time in jail) because he could not bring himself to admit guilt on charges he knew were untrue (lying to the FBI). He wanted then to prove his innocence, and he still wants to.

Unfortunately our system is built on lawyers "making deals" for their clients, not discovering the truth. The judge, lawyers on sides, media, and general public have all expressed surprise that Dr. Butler would appeal his "light" sentence - and many have pressed him not to appeal. But ask yourself, if you were an innocent man and you wanted your good name back for yourself and your children, would you not insist on appeal? Losing your job, spending two years in prison, and all of the enormous expenses incurred, along with the personal cost to his reputation and emotional distress to his family do not seem like a "light" sentence to an innocent man. Only a guilty man would have breathed a sigh of relief at the judge's "light" sentence, congratulated his lawyers, and said "see you in two years."

## **9) WHERE DOES IT GO FROM HERE?**

Although I'm sure that most folks here at Texas Tech are now ready to put this all behind us, and for this whole sad story to be over with, there is little doubt in my mind that there will be lasting repercussions for the university. I have received messages from "activists," concerned scientists, doctors, and administrators from all over the world (I'm not exaggerating) regarding what has happened to Dr. Butler. Some of these people are in positions of authority (for example, those with national organizations and prestigious institutions who may evaluate future grant applications and funding requests, or future attempts to attract prestigious researchers like Dr. Butler to the faculty) and let me tell you if they didn't already have a low opinion of Texas Tech, they certainly have one now.

Of course many people have a short memory, and most of us doing research would rather bury our heads in the sand (or in our labs) and pay no attention to what's going on outside the door. Some of my colleagues here have told me (when they momentarily pulled their head out of the sand) that what happened to Dr. Butler was a Health Science Center problem, not a Texas Tech problem, but I'm sorry - to the outside world there is no difference. We're all Texas Tech here, and we're all tainted by what happened. The events surrounding Dr. Butler's trial, and Tech's lack of support for him (indeed its persecution of him) could and should result in damage to the prestige, hiring, and future financial opportunities for the university.

In the end then, Dr. Butler had to resign from his position, he had to pay Texas Tech its precious overhead on his consulting contracts, and he may spend 2 years in jail for checking the wrong box on a FedEx form. Altogether a miscarriage of justice and a very sad day for Texas Tech. But, while he sits in jail, his oral rehydration therapy for cholera will still save 4 to 6 million beautiful children.

Now, have a good day - and get back to work.

Tom Lehman

Dr. Thomas M. Lehman  
Department of Geosciences



Texas Tech University  
Lubbock, Texas 79409-1053  
phone: (806)742-3102  
fax: (806)742-0100  
e-mail: [tom.lehman@ttu.edu](mailto:tom.lehman@ttu.edu)