Ho, James C.

From: Ho, James C.
Sent: Wednesday, October 18, 2017 2:47 PM
To: Kingo, Lola A. (OLP); King, Kara (OLP)
Subject: RE: Senate Questionnaire

[redacted] (b) (5)

[redacted] (b) (5)

[redacted]

[redacted]

. . .

[redacted]

From: Kingo, Lola A. (OLP) [mailto:Lola.A.Kingo@usdoj.gov]
Sent: Wednesday, October 18, 2017 1:43 PM
To: Ho, James C. <JHo@gibsondunn.com>; King, Kara (OLP) <Kara.King2@usdoj.gov>
Subject: RE: Senate Questionnaire

Of course. We'll circulate the SJQ to you for authorization to file, but before doing so, [redacted] (b) (5)

From: Ho, James C. [mailto:JHo@gibsondunn.com]
Sent: Wednesday, October 18, 2017 1:57 PM
To: King, Kara (OLP) <kking@jmd.usdoj.gov>; Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Subject: RE: Senate Questionnaire

Kara,

[redacted] (b) (5)

[redacted]

From: Ho, James C. [mailto:JHo@gibsondunn.com]
Sent: Tuesday, October 17, 2017 4:23 PM
To: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Cc: [redacted] (b)(6) - AOUSC Email Address ; King, Kara (OLP) <kking@jmd.usdoj.gov>
Subject: RE: Finalizing Your Financial Disclosure Report

[redacted] Duplicative Material

Ho, James C.

From: Ho, James C.
Sent: Wednesday, October 18, 2017 4:30 PM
To: King, Kara (OLP)
Cc: Kingo, Lola A. (OLP)
Subject: RE: SJQ Authorization

You have my authorization. Thanks so much!

From: Ho, James C.
Sent: Wednesday, October 18, 2017 3:22 PM
To: 'King, Kara (OLP)' <Kara.King2@usdoj.gov>
Cc: 'Kingo, Lola A. (OLP)' <Lola.A.Kingo@usdoj.gov>
Subject: RE: SJQ Authorization

(b) (5) [redacted]

From: Ho, James C.
Sent: Wednesday, October 18, 2017 3:13 PM
To: 'King, Kara (OLP)' <Kara.King2@usdoj.gov>
Cc: 'Kingo, Lola A. (OLP)' <Lola.A.Kingo@usdoj.gov>
Subject: RE: SJQ Authorization

(b) (5) [redacted]

From: Ho, James C.
Sent: Wednesday, October 18, 2017 3:05 PM
To: 'King, Kara (OLP)' <Kara.King2@usdoj.gov>
Cc: Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov>
Subject: RE: SJQ Authorization

Thanks much. Reviewing now.

FYI, (b) (6) [redacted].

From: King, Kara (OLP) [mailto:Kara.King2@usdoj.gov]
Sent: Wednesday, October 18, 2017 2:58 PM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov>
Subject: SJQ Authorization

Hello Jim,

Attached please find final versions of the public and confidential portions of your Senate

Attached please find final versions of the public and confidential portions of your Senate Questionnaire. OLP has uploaded your final Attachment Package to the file-sharing site (JEFS/Box). Please follow the instructions you received in a previous email to login and download and save your Attachment Package to have a copy for your records.

Please review the documents (including the attachments) carefully and, if you have no further changes, let us know by return email whether you authorize us to submit these documents to the Senate Judiciary Committee on your behalf.

If you are able to give your authorization by **5pm**, that would be very helpful. Please let us know if you have any questions.

Thank you!

Kara

Kara King
Nominations Researcher
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607
Cell: (b) (6)

Ho, James C.

From:	Ho, James C.
Sent:	Monday, November 06, 2017 3:02 PM
To:	Kingo, Lola A. (OLP)
Cc:	(b)(6) - Joe Kosanda Email Address
Subject:	letter
Attachments:	Ho 2016 Household payroll taxes letter & Sch H.PDF

Lola,

Thanks so much for your call this morning. Letter attached here for your review and consideration. Please let us know what else I can do to facilitate the process!

James C. Ho

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Dallas, TX 75201-6912
Office 214.698.3264 • Mobile (b) (6)
JHo@gibsondunn.com • www.gibsondunn.com/lawyers/JHo

KOSANDA & COMPANY, PLLC
CERTIFIED PUBLIC ACCOUNTANTS

12222 MERIT DRIVE
SUITE 1070
DALLAS, TEXAS 75251

TELEPHONE (214) 442 0090
TELEFAX (214) 442 0097
(b)(6) - Joe Kosanda Email Address

MEMBERS OF
AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS

TEXAS SOCIETY OF CERTIFIED
PUBLIC ACCOUNTANTS

November 6, 2017

Mr. Brett Talley
Office of Legal Policy
U. S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: James Ho
Payroll taxes for household employees

Dear Mr. Talley:

In response to your request (b) (5), (b) (6)

(b) (5), (b) (6)

Please call if you have any questions.

Sincerely,

Joe Kosanda

Joe Kosanda, CPA
enclosures

SCHEDULE H (Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Household Employment Taxes

(For Social Security, Medicare, Withheld Income, and Federal Unemployment (FUTA) Taxes)

▶ **Attach to Form 1040, 1040NR, 1040-SS, or 1041.**

▶ **Information about Schedule H and its separate instructions is at *www.irs.gov/scheduleh.***

OMB No. 1545-1971

2016

Attachment Sequence No. **44**

Name of employer

JAMES C. HO

Social security number

(b) (6)

Employer identification number

(b) (6)

Calendar year taxpayers having no household employees in 2016 don't have to complete this form for 2016.

A Did you pay **any one** household employee cash wages of $2,000 or more in 2016? (If any household employee was your spouse, your child under age 21, your parent, or anyone under age 18, see the line A instructions before you answer this question.)

(b) (6)

Yes. Skip lines B and C and go to line 1.
No. Go to line B.

B Did you withhold federal income tax during 2016 for any household employee?

(b) (6)

Yes. Skip line C and go to line 7.
No. Go to line C.

C Did you pay **total** cash wages of $1,000 or more in **any** calendar **quarter** of 2015 or 2016 to **all** household employees? (**Don't** count cash wages paid in 2015 or 2016 to your spouse, your child under age 21, or your parent.)

(b) (6)

No. **Stop.** Don't file this schedule.
Yes. Skip lines 1-9 and go to line 10.

Part I Social Security, Medicare, and Federal Income Taxes

(b) (6)

1	Total cash wages subject to social security tax	
2	Social security tax. Multiply line 1 by 12.4% (0.124)	
3	Total cash wages subject to Medicare tax	
4	Medicare tax. Multiply line 3 by 2.9% (0.029)	
5	Total cash wages subject to Additional Medicare Tax withholding	
6	Additional Medicare Tax withholding. Multiply line 5 by 0.9% (0.009)	
7	Federal income tax withheld, if any	
8	**Total social security, Medicare, and federal income taxes.** Add lines 2, 4, 6, a	

9 Did you pay **total** cash wages of $1,000 or more in **any** calendar **quarter** of 2015 or 2016 to **all** household employees? (**Don't** count cash wages paid in 2015 or 2016 to your spouse, your child under age 21, or your parent.)

(b) (6)

No. **Stop.** Include the amount from line 8 above on Form 1040, line 60a. If you're not required to file Form 1040, see the line 9 instructions.

Yes. Go to line 10.

(b) (6)

Part II Federal Unemployment (FUTA) Tax

(b) (6)

10 Did you pay unemployment contributions to only one state? If you paid contributions to a credit reduction state, see instructions and check **"No."** 10

11 Did you pay all state unemployment contributions for 2016 by April 18, 2017? Fiscal year filers see instructions 11

12 Were all wages that are taxable for FUTA tax also taxable for your state's unemployment tax? 12

Next: If you checked the **"Yes"** box on **all** the lines above, complete Section A.
If you checked the **"No"** box on **any** of the lines above, skip Section A and complete Section B.

Section A

(b) (6)

13 Name of the state where you paid unemployment contributions ..... ▶

(b) (6)

14 Contributions paid to your state unemployment fund 14

15 Total cash wages subject to FUTA tax 15

16 **FUTA tax.** Multiply line 15 by 0.6% (0.006). Enter the result here, skip Section B, and go 16

Section B

17 Complete all columns below that apply (if you need more space, see instructions):

(a) Name of state	(b) Taxable wages (as defined in state act)	(c) State experience rate period From	(c) To	(d) State experience rate	(e) Multiply col. (b) by 0.054	(f) Multiply col. (b) by col. (d)	(g) Subtract col. (f) from col. (e). If zero or less, enter -0-.	(h) Contributions paid to state unemployment fund

(b) (6)

18 Totals .....

19 Add columns (g) and (h) of line 18 19

20 Total cash wages subject to FUTA tax (see the line 15 instructions) .....

21 Multiply line 20 by 6.0% (0.060) .....

22 Multiply line 20 by 5.4% (0.054) 22

23 Enter the **smaller** of line 19 or line 22 .....

(Employers in a credit reduction state must use the worksheet and check here) .....

24 **FUTA tax.** Subtract line 23 from line 21. Enter the result here and go to line 25 .....

Part III Total Household Employment Taxes

25 Enter the amount from line 8. If you checked the "**Yes**" box on line C of page 1, enter -0- .....

26 Add line 16 (or line 24) and line 25 .....

27 Are you required to file Form 1040?

(b) (6)

Yes. Stop. Include the amount from line 26 above on Form 1040, line 60a. **Don't** complete Part IV below.

No. You may have to complete Part IV. See instructions for details.

Part IV Address and Signature - Complete this part **only** if required. See the line 27 instructions.

Address (number and street) or P.O. box if mail isn't delivered to street address | Apt., room, or suite no.

City, town or post office, state, and ZIP code

Under penalties of perjury, I declare that I have examined this schedule, including accompanying statements, and to the best of my knowledge and belief, it is true, correct, and complete. No part of any payment made to a state unemployment fund claimed as a credit was, or is to be, deducted from the payments to employees. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ Employer's signature ▶ Date

Paid Preparer Use Only	Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self- employed	PTIN
	Firm's name ▶			Firm's EIN ▶	
	Firm's address ▶			Phone no.	

Ho, James C.

From: Ho, James C.
Sent: Monday, November 6, 2017 5:47 PM
To: Kingo, Lola A. (OLP)
Cc: (b)(6) - Joe Kosanda Email Address
Subject: RE: letter
Attachments: Ho 2016 Household payroll taxes letter & Sch H.PDF

Thank you so much. Does the attached work?

From: Kingo, Lola A. (OLP) [mailto:Lola.A.Kingo@usdoj.gov]
Sent: Monday, November 6, 2017 3:36 PM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: (b)(6) - Joe Kosanda Email Address
Subject: RE: letter

Thank you. (b) (5), (b) (6) . If you have any questions, please let me know.

From: Ho, James C. [mailto:JHo@gibsondunn.com]
Sent: Monday, November 06, 2017 3:02 PM
To: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Cc: (b)(6) - Joe Kosanda Email Address
Subject: letter

Duplicative Material

KOSANDA & COMPANY, PLLC
CERTIFIED PUBLIC ACCOUNTANTS

12222 MERIT DRIVE
SUITE 1070
DALLAS, TEXAS 75251

TELEPHONE (214) 442 0090
TELEFAX (214) 442 0097
(b)(6) - Joe Kosanda Email Address

MEMBERS OF
AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS

TEXAS SOCIETY OF CERTIFIED
PUBLIC ACCOUNTANTS

November 6, 2017

Mr. Brett Talley
Office of Legal Policy
U. S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: James Ho
Payroll taxes for household employees

Dear Mr. Talley:

In response to your request (b) (6)

(b) (6)

(b) (6)

Attached is a copy of Schedule H which was included with his 2016 individual income tax filing. (b) (6)

Please call if you have any questions.

Sincerely,

Joe Kosanda

Joe Kosanda, CPA
enclosures

Ho, James C.

From: Ho, James C.
Sent: Monday, November 13, 2017 1:38 PM
To: King, Kara (OLP)
Cc: Kingo, Lola A. (OLP)
Subject: Re: Nominations Hearing Schedule

Thank you so much! Here's our list:

Allyson Ho
(b) (6)
(b) (6)
(b) (6)
(b) (6)

Sent from my iPhone

On Nov 13, 2017, at 1:33 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

Hello Jim,

I'm just following up to see if you have any guests that you would like reserved seating for during Wednesday's hearing. If you do, please send me their names and your relationship to them by tomorrow at 9am.

Thank you!

Kara

From: King, Kara (OLP)
Sent: Wednesday, November 8, 2017 6:21 PM
To: 'Ho, James C.' <JHo@gibsondunn.com>
Cc: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Subject: Nominations Hearing Schedule

Dear Jim,

The Senate Judiciary Committee has scheduled a hearing on judicial nominations for **Wednesday, November 15,** and you have been added as a witness. Congratulations!

Please make arrangements to meet the following schedule:

Monday, November 13, 2017, 10:00am — (b) (5) Please arrive at the Department of Justice Visitor Center (on Constitution Avenue, between 9th and 10th Streets, NW). Please give the desk officer your name and you will either be given a badge or we will be called to escort you. There are sometimes lines at the entrance, so please arrive ten to fifteen minutes early to allow time to pass through security. Once inside, please proceed to Room 4525 on the fourth floor.

Tuesday, November 14, 2017, 10:00 a.m. — [redacted] (b) (5) (Please follow the same instructions as above)

Wednesday, November 15, 2017, 10:00 a.m. — Senate Hearing, to take place in Dirksen Senate Office Building, Room 226. Please try and arrive at the Dirksen Senate Office Building approximately thirty minutes before the start of the hearing to allow enough time to get through security and locate the hearing room.

Thursday, November 16, 2017, 9:00 a.m. – 4:00 p.m. — Judicial Nominee Orientation Program, hosted by the Administrative Office of U.S. Courts (AO). The Orientation Program will be held in the Thurgood Marshall Federal Judiciary Building, located at One Columbus Circle, NE (next to Union Station). Please confirm with Fawne Lindsey at 202-502-1800 as soon as possible whether you will be attending the Orientation Program. Ms. Lindsey will need the date and time you are scheduled to depart Washington, DC, to prepare a travel authorization letter that you will receive at the conclusion of the Orientation Program.

Travel

If you participate in the Orientation Program, the AO will pay for your transportation and reimburse you for at least some of the costs of your lodging. It is advised that you book your travel through National Travel Service (NTS) to ensure that you receive the maximum reimbursement allowed by the judiciary travel regulations. NTS may be reached at 800-445-0668 and will assist you in making airline and hotel reservations at government rates. When contacting NTS, identify yourself as a judicial nominee and reference the name of your AO contact—Ms. Lindsey—so that some costs can be directly billed to the AO. Please contact the AO for assistance if you are unable to arrange transportation and lodging at the government rates. You may wish to stay at a hotel on Capitol Hill because both your hearing and AO training will take place there.

Preparation

In preparation for your hearing, [redacted] (b) (5)

Submit Guest List

Family members and guests are welcome to attend the hearing, and you will have an opportunity to introduce your family. The Committee will reserve up to eight seats for your family and guests. Additional guests will be seated in open seating, but will have to stand in the public line for entry. Please provide us with your "reserved seating" list of up to eight names by e-mail no later than **9:00 a.m. EST on Tuesday, November 14, 2017**. Please also indicate your relationship to your guests (spouse, nephew, friend, colleague, etc.).

If you have any questions, please contact Lola, Brett, or me. We look forward to seeing you next week!

Best,

Kara

Kara King
Nominations Researcher
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607
Cell: [redacted] (b) (6)

Ho, James C.

From: Ho, James C.
Sent: Monday, November 13, 2017 1:40 PM
To: King, Kara (OLP)
Cc: Kingo, Lola A. (OLP)
Subject: Re: Nominations Hearing Schedule

Thank you so much! Here's our list:

Allyson Ho (wife)
[redacted]

Sent from my iPhone

On Nov 13, 2017, at 1:33 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

[redacted]
Duplicative Material

Ho, James C.

From: Ho, James C.
Sent: Thursday, November 23, 2017 12:15 PM
To: Talley, Brett (OLP)
Subject: RE: QFRs
Attachments: Feinstein QFRs for Ho.docx

Thanks much, and will do.

Before sending all drafts to everyone on the email, I thought I'd send just this one to you, to give you a flavor. [redacted] (b) (5) [redacted].

Thank you so much, and happy Thanksgiving!

From: Talley, Brett (OLP) [mailto:Brett.Talley@usdoj.gov]
Sent: Thursday, November 23, 2017 10:25 AM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: King, Kara (OLP) <Kara.King2@usdoj.gov>; Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov>; Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov>
Subject: Re: QFRs

Send it along. Happy Thanksgiving.

Sent from my iPhone

On Nov 23, 2017, at 9:55 AM, Ho, James C. <JHo@gibsondunn.com> wrote:

> I have a working draft that I can send to you all anytime—just let me know, as I do not want to interrupt unnecessarily with anyone's family time.
>
> If it would be appropriate to schedule a call to go through anything, I would welcome the opportunity—if it would be possible to do it Friday morning rather than Friday afternoon, I would be most grateful, but naturally I will make myself available to you all anytime that is convenient for you!
>
> ---
>
> **From:** Ho, James C.
> **Sent:** Wednesday, November 22, 2017 7:31 PM
> **To:** King, Kara (OLP) <Kara.King2@usdoj.gov>
> **Cc:** Talley, Brett (OLP) <Brett.Talley@usdoj.gov>; Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov>; Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov>
> **Subject:** Re: QFRs
>
> Thanks so much — will do! And have a great Thanksgiving!
>
> Sent from my iPhone
>
> On Nov 22, 2017, at 5:27 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

Hello Jim,

Attached are your QFRs from Ranking Member Feinstein and Senators Durbin, Whitehouse, Klobuchar, Coons, Hirono. Please provide your answers in the attached documents, retaining the formatting, and return them to us for review by the close of business on Friday.

If you have any questions, please give us a call. Thank you.

Kara

Kara King
Nominations Researcher
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607
Cell: (b) (6)

<Feinstein QFRs for Ho.docx>
<Durbin QFRs for Ho.docx>
<Whitehouse QFRs for Ho.docx>
<Klobuchar QFRs for Ho.docx>
<Coons QFRs for Ho.docx>
<Hirono QFRs for Ho.docx>

Ho, James C.

From:	Ho, James C.
Sent:	Friday, November 24, 2017 12:53 AM
To:	Talley, Brett (OLP)
Cc:	King, Kara (OLP); Kingo, Lola A. (OLP); Dickey, Jennifer (OLP)
Subject:	RE: QFRs
Attachments:	Whitehouse QFRs for Ho (002).docx; Klobuchar QFRs for Ho.docx; Coons QFRs for Ho (002).docx; Hirono QFRs for Ho.docx; Feinstein QFRs for Ho.docx; Durbin QFRs for Ho.docx

First drafts attached here.

From: Talley, Brett (OLP) [mailto:Brett.Talley@usdoj.gov]
Sent: Thursday, November 23, 2017 10:25 AM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: King, Kara (OLP) <Kara.King2@usdoj.gov>; Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov>; Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov>
Subject: Re: QFRs

Send it along. Happy Thanksgiving.

Sent from my iPhone

On Nov 23, 2017, at 9:55 AM, Ho, James C. <JHo@gibsondunn.com> wrote:

Ho, James C.

From:	Ho, James C.
Sent:	Saturday, November 25, 2017 1:47 AM
To:	Dickey, Jennifer (OLP)
Cc:	Talley, Brett (OLP)
Subject:	RE: QFRs
Attachments:	Whitehouse QFRs for Ho (jbd).docx; Feinstein QFRs for Ho (jbd).docx; Durbin QFRs for Ho (jbd).docx

[redacted] (b) (5)

Thanks so much as always! I look forward to your thoughts.

From: Ho, James C.
Sent: Saturday, November 25, 2017 12:34 AM
To: 'Dickey, Jennifer (OLP)' <Jennifer.B.Dickey@usdoj.gov>
Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Subject: RE: QFRs

Thanks so much.

I meant to ask during our call today: [redacted] (b) (5)

From: Dickey, Jennifer (OLP) [mailto:Jennifer.B.Dickey@usdoj.gov]
Sent: Friday, November 24, 2017 1:28 PM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Subject: QFRs

Jim,

Here's my first cut at your QFRs. Happy to look at another round once you've made your changes.

Jennifer B. Dickey
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Rm 4244
Washington, D.C. 20530
Direct: 202.514.2456
Cell: [redacted] (b) (6)

Ho, James C.

From: Ho, James C.
Sent: Sunday, November 26, 2017 10:00 AM
To: Talley, Brett (OLP)
Cc: Dickey, Jennifer (OLP)
Subject: Re: QFRs

(b) (5) –

Sent from my iPhone

On Nov 25, 2017, at 10:03 AM, Talley, Brett (OLP) <Brett.Talley@usdoj.gov> wrote:

(b) (5) .

Sent from my iPhone

On Nov 25, 2017, at 12:35 AM, Ho, James C. <JHo@gibsondunn.com> wrote:

Duplicative Material

Ho, James C.

From: Ho, James C.
Sent: Monday, November 27, 2017 10:44 AM
To: Talley, Brett (OLP)
Cc: Dickey, Jennifer (OLP)
Subject: RE: QFRs
Attachments: (b) (5) ; (b) (5) ; (b) (5) ; (b) (5)

(b) (5)

From: Ho, James C.
Sent: Sunday, November 26, 2017 9:00 AM
To: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Cc: Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov>
Subject: Re: QFRs

Duplicative Material

Ho, James C.

From: Ho, James C.
Sent: Monday, November 27, 2017 11:28 AM
To: Dickey, Jennifer (OLP)
Cc: Talley, Brett (OLP)
Subject: RE: QFRs

Just to finalize this discussion: [redacted (b) (5)] Let me know if I need to do anything on this front. Thanks so much!

> -----Original Message-----
> From: Dickey, Jennifer (OLP) [mailto:Jennifer.B.Dickey@usdoj.gov]
> Sent: Monday, November 27, 2017 9:51 AM
> To: Ho, James C. <JHo@gibsondunn.com>
> Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
> Subject: Re: QFRs
>
> From our discussions with OLC, [redacted (b) (5)]
>
> [redacted (b) (5)]
>
> [redacted (b) (5)].
>
>> On Nov 27, 2017, at 10:47 AM, Ho, James C. <JHo@gibsondunn.com> wrote:

Duplicative Material

[redacted]

Ho, James C.

From: Ho, James C.
Sent: Monday, November 27, 2017 11:31 AM
To: Dickey, Jennifer (OLP)
Cc: Talley, Brett (OLP)
Subject: RE: QFRs

Sounds good. (b) (5) :

(b) (5)

From: Dickey, Jennifer (OLP) [mailto:Jennifer.B.Dickey@usdoj.gov]
Sent: Monday, November 27, 2017 10:27 AM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Subject: Re: QFRs

(b) (5)

On Nov 27, 2017, at 11:13 AM, Ho, James C. <JHo@gibsondunn.com> wrote:

(b) (5)

In other words, (b) (5) :

(b) (5)

-----Original Message-----
From: Ho, James C.
Sent: Monday, November 27, 2017 10:00 AM
To: 'Dickey, Jennifer (OLP)' <Jennifer.B.Dickey@usdoj.gov>
Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Subject: RE: QFRs

Ok, got it. (b) (5)

-----Original Message-----
From: Dickey, Jennifer (OLP) [mailto:Jennifer.B.Dickey@usdoj.gov]
Sent: Monday, November 27, 2017 9:59 AM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Subject: Re: QFRs

(b) (5)

(b) (5)

> On Nov 27, 2017, at 10:57 AM, Ho, James C. <JHo@gibsondunn.com> wrote:
>
> Ok, got it, thx so much for checking!
>
> (b) (5)

>
> -----Original Message-----
> From: Dickey, Jennifer (OLP) [mailto:Jennifer.B.Dickey@usdoj.gov]
> Sent: Monday, November 27, 2017 9:51 AM
> To: Ho, James C. <JHo@gibsondunn.com>
> Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
> Subject: Re: QFRs

Duplicative Material

Ho, James C.

From: Ho, James C.
Sent: Monday, November 27, 2017 4:06 PM
To: Talley, Brett (OLP)
Cc: Dickey, Jennifer (OLP)
Subject: RE: QFRs

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

From: Ho, James C.
Sent: Monday, November 27, 2017 1:48 PM
To: Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov>
Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Subject: Re: QFRs

So sorry to miss your call — pls call me when you free up at (b) (6)

Sent from my iPhone

On Nov 27, 2017, at 12:55 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(

(b) (5)

Let me know what you think.

From: Ho, James C. [mailto:JHo@gibsondunn.com]
Sent: Monday, November 27, 2017 12:18 PM
To: Dickey, Jennifer (OLP) <jdickey@jmd.usdoj.gov>
Cc: Talley, Brett (OLP) <btalley@jmd.usdoj.gov>
Subject: RE: QFRs

Can I give you a call?

From: Dickey, Jennifer (OLP) [mailto:Jennifer.B.Dickey@usdoj.gov]
Sent: Monday, November 27, 2017 10:33 AM
To: Ho, James C. <JHo@gibsondunn.com>
Cc: Talley, Brett (OLP) <Brett.Talley@usdoj.gov>
Subject: Re: QFRs

(b) (5) :

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5) ?

On Nov 27, 2017, at 11:30 AM, Dickey, Jennifer (OLP) <jdickey@jmd.usdoj.gov> wrote:

(b) (5)

On Nov 27, 2017, at 11:28 AM, Ho, James C. <JHo@gibsondunn.com> wrote:

Duplicative Material

Kyle Duncan

From:	Kyle Duncan
Sent:	Wednesday, May 03, 2017 2:07 PM
To:	Kingo, Lola A. (OLP)
Cc:	Talley, Brett (OLP); Shannon, Gail
Subject:	Re: Background Investigation
Attachments:	Fillable Supplement to the SF-86 STUART K DUNCAN.pdf; Additional Instructions SF-86 Duncan Signed.pdf; Credit Check Waiver STUART K DUNCAN.pdf; Tax Check Waiver STUART K DUNCAN Signed.pdf; WH Waiver STUART K DUNCAN.pdf

Dear Lola,

I have completed the SF86 via e-QIP and released it back to OLP, along with the necessary certification and releases. In addition, please find attached PDFs of the following documents (signed where applicable):

1. Completed SF86 Supplement
2. Additional Instructions
3. White House Waiver
4. Credit Check Waiver
5. Tax Check Waiver (signed and dated by hand)

Finally, I have an appointment for fingerprinting this afternoon and I will overnight the cards to you.

Please let me know if I have omitted anything or if you need anything further.

Regards,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On May 1, 2017, at 9:57 AM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> Dear Mr. Duncan,
>
> I work with Deputy Assistant Attorney General Brett Talley (copied) in the U.S. Justice Department's Office of Legal Policy, which vets candidates for federal judgeships. The White House has asked us to work with you on a series of forms that will be used in connection with your FBI background investigation. Our goal is to initiate your background investigation no later

your FBI background investigation. Our goal is to initiate your background investigation no later than **Friday, May 5th**. Before we can initiate your background investigation, there are a number of documents for you to review and complete, mainly the:

- **SF86 (completed via e-QIP)** — We have generated an SF86 for you to complete in e-QIP in connection with the FBI's background investigation. You should receive an email inviting you to get started on your SF86 from the Office of Personnel Management. To get started, please follow the attached e-QIP applicant instructions. If you have any trouble accessing e-QIP, please contact Gail Shannon (copied), who can be reached via email or during business hours at (724) 794-5612 x7764 (office) and after business hours at (724) 612-8679 (mobile).

- **SF86 Supplement (attached Word DOC)** — In addition to the SF86 that you complete via e-QIP, please complete the attached SF86 Supplement.

- **Additional Instructions (attached Word DOC)** — The attached instructions are especially important because they contain instructions that **supersede** some of the instructions on the forms themselves (for example, we ask you to list your Residence and Employment Histories back to age 18, rather than just going back 7 years as the SF86 specifies). Please remember to sign the Additional Instructions.

- **White House Waiver (attached PDF), Credit Check Waiver (attached PDF), Tax Check Waiver (attached PDF)** — These are additional waivers needed for aspects of your background investigation. Please do not date or sign the tax check waiver electronically as it will delay processing, rather please handwrite the date and sign the hard copy.

- **Immigration Addendum (attached PDF)** — Only complete the Immigration Addendum if applicable to you.

- **Fingerprint Cards (sent via FedEx)** – We have mailed you two sets of fingerprint cards, which you should promptly take to your local police station, FBI office, or a private company, to get your fingerprints taken.

Once you have completed the SF86 via e-QIP, please release it back to OLP for review. Also, once you complete the SF86 Supplement, Additional Instructions, Waivers, and Immigration Addendum (if applicable), please email them to me. Finally, once your fingerprints are taken, please return the cards via overnight mail to the address in my signature block.

We look forward to working with you. If you have any questions about the forms, please let me know. I can be reached at 202-514-1818 (office) and (b) (6) (mobile). Thank you.

Lola A. Kingo
Senior Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(202) 514-1818
Lola.A.Kingo@usdoj.gov

<Fillable Supplement to the SF-86.docx><WH Waiver.pdf><Credit Check Waiver.pdf><Tax Check Waiver.pdf><Immigration Addendum.pdf><Additional Instructions for Completing SF86.doc><e-QIP Applicant Instructions.docx>

Additional Instructions for Completing Standard Form 86
"Questionnaire for National Security Positions"

YOU MUST READ AND FOLLOW CAREFULLY THE FOLOWING INSTRUCTIONS WHEN COMPLETING THE STANDARD FORM 86 (SF-86). NOTE THAT IN A NUMBER OF IMPORTANT RESPECTS THESE ADDITIONAL INSTRUCTIONS VARY FROM THE INSTRUCTIONS PRINTED ON THE FORM ITSELF.

GENERAL INSTRUCTIONS

Although many of the questions of the SF-86 ask you to provide information for the last seven years, the FBI requires that you answer the following questions with information since your 18th birthday: Q.11, Q.13, Q.15(d), Q.19, Q. 20, Q.21, Q.22(a)and(b), Q.23(a),(c)and(d), Q.24, Q.26, Q.27, and Q.28. Question 16 is the only exception to this instruction. For Q.16 you only need to cover the last 7 years when providing the names and contact information for people who know you well.

Although the instructions on the SF-86 indicate that you may legibly print your answers, you must type this form and all attachments.

It is essential that all information be provided in as much detail as requested. Ambiguous and incomplete information will impede the FBI's investigation and will cause valuable time to be lost. Be specific: exact and complete names, dates, and addresses and explanations of answers are necessary for an expeditious handling of the investigation. Do not abbreviate the names of cities. The inclusion of zip codes is particularly helpful.

INSTRUCTIONS REGARDING PARTICULAR QUESTIONS

Q.9 **Citizenship:** If you are a U.S. citizen other than by birth, you must also execute the "Immigration Addendum to the SF-86."

Q.11 **Where You Have Lived:** For apartment complexes, include the name of the complex and the specific unit number. If you lived in a residence that was leased or rented, include the name of the individual in whose name the rental agreement or lease was established.

Q.12 **Where You Went to School:** Please list all education received <u>including</u> high school.

Q.13 **Employment Activities:** Provide complete addresses (street/city/state/zip code) for each employment listed. Be as specific as possible (i.e., include divisions or departments, etc.)

Include all periods of unemployment, self-employment, volunteer employment, or internships. Provide names, complete addresses and telephone numbers of persons who can verify periods of unemployment or self-employment.

Q.13C **Employment Record:** If you have ever been denied employment while undergoing or upon completion of a background investigation or polygraph examination, please identify the prospective employer and the date and reason for voluntary/involuntary withdrawal from consideration.

Q.14 **Your Selective Service Record:** Inquiries regarding your own registration can be directed to the Selective Service at 847-688-6888.

Q.15 **Your Military History:** If you are a member of a military reserve component or National Guard unit, list the organization, its location, the name of your immediate officer and telephone number, if known.

Q.18 **Relatives:** Although the SF-86 requests only the country of birth, also provide the city and state or city and country of birth. If relatives live overseas, please indicate whether or not they are serving in the military. Provide their complete address, including city and country. Do not list APO or FPO address.

If any relatives or cotenants were born outside the United States and/or are a U.S. citizen other than by birth, complete the "Immigration Addendum to the SF-86" with respect to those persons.

Q.22 **Police Record:** List all arrests, charges, and convictions since your 18th birthday (except traffic fines of less than $300.00).

Q.23 Q.24 **Illegal Use of Drugs or Drug Activity/Use of Alcohol:** If you have ever abused legal or prescription drugs to the point of dependency, also list. In addition, list treatment for drug or alcohol dependency. **Please note that Question 23(a) refers to any drug use since your 18th birthday.**

Q.26 **Financial Record:** If a collection procedure has ever been instituted against you by Federal, state, or local authorities, please give full details. In addition, list any incidents of bankruptcy.

SF-86 Supplement Form

Q.1S(d) **Professional License/Memberships:** Please include all professional licenses, current and former, particularly all former bar admissions.

Certification

I have read and understand these supplemental instructions and have provided my answers in accordance with such instructions.

Signature

S. Kyle Duncan

Printed/Typed Name

5/3/2017

Date

(1/9/10)

THE WHITE HOUSE
WASHINGTON

PRIVACY ACT PROTECTED INFORMATION
(When Completed)

Disclosure and Authorization
Pertaining to Consumer Reports
Pursuant to the Fair Credit Reporting Act

This is a release for the Federal Bureau of Investigation and/or the Office of Counsel to the President, acting on the President's behalf, to obtain one or more consumer/credit reports about you in connection with consideration of your appointment to a position within the Executive Branch or the Federal Judiciary, or in the course of your employment with the Federal Government. One or more reports about you may be obtained for employment purposes, including evaluating your fitness for employment, promotion, reassignment, retention, or access to classified information.

I, *Stuart Kyle Duncan*, hereby authorize the Federal Bureau of Investigation and/or the Office of Counsel to the President, acting on the President's behalf, to obtain such reports from any consumer/credit reporting agency for employment purposes.

[redacted]

Signature

(b) (6)

Social Security Number

[redacted]

SF-86 Supplement

Note: For all of the following questions, *please provide as much detail as possible*.

1. Have you or your spouse ever registered as an agent for, performed work for, received any payments from and/or made any payments to, any foreign government, foreign business, or non-profit organization with any foreign government ownership? If yes, please provide:

a. Name of foreign government/business/non-profit with which you dealt;

b. Address/telephone of the organization(s);

c. Date of payment;

d. Amount of payment;

e. Circumstances.

(b) (6)

2. Has a tax lien or other collection procedure ever been instituted against you or your spouse by federal, state, or local authorities? If yes, please provide:

a. Date of tax lien/collection procedure;

b. Recipient of action (you and/or your spouse);

c. Source of action (specific local/state/federal authority);

d. Circumstances;

(b) (6)

e. Resolution of the action.

3. Have any claims of sexual harassment, racial discrimination, or any other workplace misconduct, ever been made against you or any employee directly supervised by you? If yes, please provide:

a. Type of claim;

b. Organization/business/entity where it took place;

c. Date of claim;

d. Your involvement in the claim;

e. Nature of allegations/circumstances;

(b) (6)

f. Resolution of the claim.

4. To your knowledge, have you or your spouse, or has either of your conduct been the subject of any civil or criminal case, administrative proceeding, or government investigation, other than a minor traffic infraction? If yes, please provide:

a. Type of proceeding (e.g., civil case);

b. Date(s) of proceeding;

c. Nature of your involvement, issue(s) and disposition;

d. Location of Records (e.g., court);

e. issues(s) and disposition;

f. Location of records (e.g. court).

(b) (6)

g. Name/address/telephone of General counsel/other official

5. Have you ever paid late or had lapses in payment of child support and/or alimony owed by you? If yes, please provide:

a. Date of late payment(s)/lapse(s);

b. State/local authority handling the matter;

c. Circumstances;

d. Resolution of the matter.

(b) (6)

6. Do you have any current or former professional licenses/membership such as bar associations, medical licenses, real estate licenses, etc.? **Please see list below.** If yes, please provide:

a. Type of license/membership;

b. Location;

c. License number;

d. Date issued/expiration;

- **Louisiana Bar (Bar No. 25038; admitted Oct. 1, 1997)**
- **Texas Bar (Bar. No. 24010002; admitted May 3, 1999) (currently inactive)**
- **D.C. Bar (Bar No. 1010452; admitted Oct. 15, 2012)**
- **Louisiana Bar Association**
- **D.C. Bar Association**
- **Federalist Society**
- **ABA Committee on the Relationship of the Legislative, Executive, and Judicial Branches**
- **U.S. Supreme Court (admitted Oct. 6, 2010)**
- **U.S. Fifth Circuit Court of Appeals (admitted 1998 when clerking; readmitted Jan. 21, 2009)**
- **U.S. Fourth Circuit Court of Appeals (admitted July 21, 2016)**
- **U.S. Sixth Circuit Court of Appeals (admitted Feb. 12, 2016)**
- **U.S. Ninth Circuit Court of Appeals (admitted Oct. 21, 2014)**
- **U.S. Tenth Circuit Court of Appeals (admitted Nov. 30, 2012)**
- **U.S. Eleventh Circuit Court of Appeals (admitted July 11, 2014)**
- **U.S. Court of Appeals for the D.C. Circuit (admitted Aug. 31, 2012)**
- **Eastern District of Louisiana (admitted Jan. 14, 2009)**
- **Middle District of Louisiana (admitted Apr. 24, 2009)**
- **District of Columbia Federal District Court (admitted June 6, 2016)**

e. Details of any complaints, citations, disciplinary actions, etc. against you.

(b) (6)

7. With as much detail as possible, please provide any other information, including information about other members of your family, which could suggest a conflict of interest, be a possible source of embarrassment, or be used to coerce or blackmail you.

(b) (6)

U.S. Department of Justice

Tax Check Waiver

I am signing this waiver to permit the Internal Revenue Service to release information about me which would otherwise be confidential. This information will be used in connection with my appointment or employment by the United States Government. This waiver is made pursuant to 26 U.S.C. §6103(c).

I request that the Internal Revenue Service release the following information to Lola Kingo (Senior Nominations Counsel), Bridget C. Coehins, or designee of U.S. Department of Justice:

1. Have I failed to file any Federal income tax return for any of the last three years for which filing of a return might have been required? (If the filing date without regard to extensions and normal processing period for most recent year's return has not yet elapsed on the date IRS receives this waiver, and the IRS records do not indicate a return for the most recent year, the "last three years" will mean the three years preceding the year for which returns are currently being filed and processed.)

2. Were any of the returns in #1 filed more than 45 days after the due date for filing (determined with regard to any extension(s) of time for filing)?

3. Have I failed to pay any tax, penalty or interest during the current or last three calendar years within 45 days of the date on which the IRS gave notice of the amount due and requested payment?

4. Am I now or have I ever been under investigation by the IRS for possible criminal offenses?

5. Has any civil penalty for fraud been assessed against me during the current or last three calendar years?

I authorize the IRS to release any additional relevant information necessary to respond to the questions above.

To help the IRS find my tax records and the Department of Justice to evaluate my tax history, I am voluntarily giving the following information:

MY NAME: Stuart Kyle Duncan (Please print or type) MY SSN: (b) (6)

CURRENT ADDRESS: (b) (6)

TELEPHONE NUMBERS: (HOME) (b) (6) (WORK) (b) (6)

(Please include area codes)

IF MARRIED AND FILED A JOINT RETURN:

SPOUSE'S NAME: Martha D. Duncan SPOUSE'S SSN: (b) (6)

NAMES AND ADDRESSES SHOWN ON RETURNS (IF DIFFERENT FROM ABOVE)

YEAR	NAME	ADDRESS
(b) (6)		

1. If a tax return for any of the last three years was not filed, please explain why in the space provided below.

2. If a tax return for any of the last three tax years was filed more than 45 days after the due date for filing, please explain why in the space provided below.

3. If a tax payment for any of the last three tax years was made more than 45 days after notice and demand, please explain why in the space provided below.

4. If there was insufficient income to meet filing requirements or filing requirements were met by filing with a foreign tax agency (e.g., Puerto Rico or the Virgin Islands), please describe the circumstances in the space provided below.

n/a

DATE: 5/3/2017
(Waiver Invalid Unless Received
By the IRS Within 60 Days of This Date)

Stuart K Duncan
(Signature of Taxpayer Authorizing the
Disclosure of Return Information)

DOJ-488A (Rev. 10/97)

(DOJ-OLP-1/12/10)

THE WHITE HOUSE
WASHINGTON

Date: _____

To: Federal Bureau of Investigation
Attn: SIGBIU (Room 10861)

From: The White House
White House Counsel's Office

Subject's Full Name: Stuart Kyle Duncan

Other names used (incl. birth, prior married, nickname) n/a

SSN (b) (6) DOB (b) (6) Place of Birth (b) (6)

Permanent Address (b) (6)

(also current residence, if different) n/a

Current employer(s) Schaerr Duncan LLP

SUBJECT'S CONSENT: I hereby authorize the FBI to provide the information specified below to the White House.

[redacted] _____

(Subject's Signature) (Date)

Request of FBI (Use of this form to request information developed by the FBI or contained in FBI files requires the subject's consent. Exceptions will only be permitted as authorized by the Attorney General / Deputy Attorney General.)

☒ Full field investigation ○ Level 1 ○ Level 2 ○ Level 3

The applicant is being considered for:

☒ Presidential Appointment ☒ Position Requiring Senate Confirmation

Attachments: ☒ SF-86 ☒ SF-86 Supplement ☒ SF-87 Fingerprint Card

Remarks /
special instructions: _____
(position of possible appointment)

I certify, subject to 18 U.S. C. § 1001, that the above is sought for official purposes only and I understand that obtaining this information under false pretenses or any unauthorized disclosure may be a violation of the Privacy Act, 5 U.S.C. § 552a.

Requested by: _____
(Signature)

This request has been reviewed and approved by the White House Counsel's Office.

Approved by: _____
(Signature, White House Counsel's Office)

[redacted]

Kyle Duncan

From: Kyle Duncan
Sent: Monday, May 8, 2017 5:07 PM
To: Kingo, Lola A. (OLP)
Subject: Re: Background Investigation

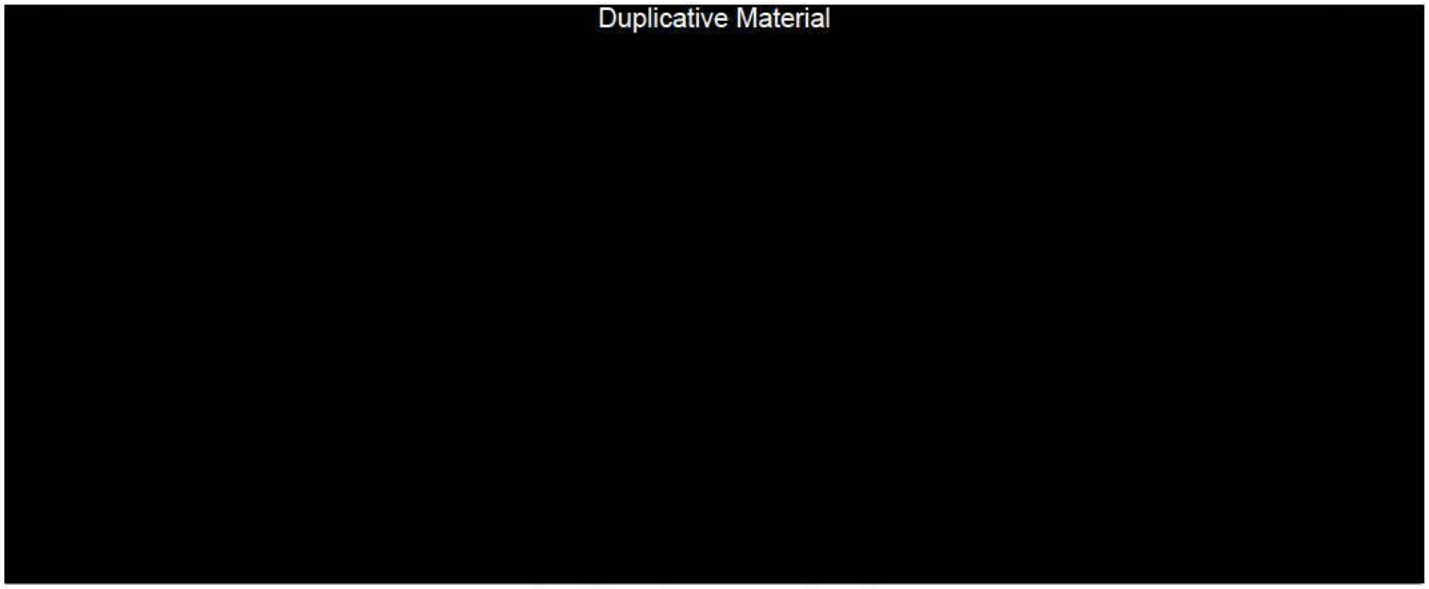
Lola,

My fingerprint cards are being overnighted to you and should arrive tomorrow (Tuesday).

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On May 3, 2017, at 2:14 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> Terrific; thank you! OLP will review your paperwork and circle back with suggestions if needed.
>
> ---
>
> **From:** Kyle Duncan [mailto:kduncan@schaerr-duncan.com]
> **Sent:** Wednesday, May 03, 2017 2:07 PM
> **To:** Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov>
> **Cc:** Talley, Brett (OLP) <Brett.Talley@usdoj.gov>; Shannon, Gail <Gail.Shannon@nbib.gov>
> **Subject:** Re: Background Investigation



Kyle Duncan

From:	Kyle Duncan
Sent:	Tuesday, July 25, 2017 4:18 PM
To:	Kingo, Lola A. (OLP)
Cc:	(b)(6) - AOUSC Email Address
Subject:	Re: Financials
Attachments:	FDR Confidential Registration for Electronic Filing DUNCAN.pdf

Lola,

Attached is a signed PDF of my registration form. The original is being overnighted to you by FedEx.

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Jul 24, 2017, at 12:05 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> <FDR Confidential Registration for Electronic Filing.pdf>

FINANCIAL DISCLOSURE

Confidential Registration for Electronic Filing

This form shall be used to register for an account with the Financial Disclosure Online Reporting System. Registered filers and other participants will have privileges to submit documents electronically and to receive electronic notice of documents filed in their personal folders in the Financial Disclosure Online Reporting System.

NOTE: The Financial Disclosure Online Reporting System is a restricted Web site for official use only. Unauthorized entry or use or any use that attempts to circumvent access controls is prohibited and subject to prosecution under Title 18 of the U.S. Code. All activities and access attempts are logged and any prohibited actions may result in immediate withdrawal of access privileges and referral for prosecution.

The following information is required for registration:

First/Middle/Last Name: Stuart Kyle Duncan

Title: n/a

Circuit: U.S. Fifth Circuit

District: n/a

Court: Court of Appeals

Court or Office Address: 1717 K St NW, Suite 900

Court or Office City, State and Zip Code: Washington, DC

Court or Office Voice Phone Number: (202) 787-1060

Court or Office Fax Number: n/a

Official Court or Office E-Mail Address: kduncan@schaerr-duncan.com
(address ending in ".gov" or ".org")

Secondary E-Mail Address: [redacted]
(address ending in ".com," ".net," ".gov," or ".org")

Initial: skd

By submitting this registration form, the undersigned agrees as follows:

1. This system is designed for filing with and records management by the Committee on Financial Disclosure. It may be used by individual filers only to file reports and other required documents and to view specific documents and notices contained within the filer's own financial disclosure records.

2. At this time, the requirements for filing, viewing, and retrieving case documents are: a personal computer running a standard platform such as Windows or Macintosh, an Internet provider using Point to Point Protocol (PPP), Internet Explorer 7 or higher or Mozilla Firefox 3.5.x, the current version of the FDR report preparation software, and software such as Adobe Acrobat Writer to convert supplemental documents from a word processor format to a portable document format (PDF).

3. In accordance with the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111), each financial disclosure document submitted shall be signed by the filer. The filer's log-in and the password, combined with his or her "s/typed name," serves as and constitutes the filer's signature. It is the responsibility of each filer to protect and secure the password issued by the Committee. If there is any reason to suspect that the password has been compromised in any way, or upon the resignation or reassignment of an individual with authority to use the password, it is the duty and responsibility of the filer immediately to change the password and notify the Committee at 202-502-1850.

4. It is the responsibility of the filer to keep all contact information current. Upon relocation and/or change of e-mail addresses, it is imperative that the filer update the information in his or her account. Electronic delivery of documents will be attempted to both e-mail addresses of record, but successful delivery need only be to one such address.

The undersigned agrees to abide by the Committee's Policies and Procedures Guide for Electronic Filing and all technical and procedural requirements set forth therein, and any updates or amendments.

_____

Signature

Please return to: Committee on Financial Disclosure
One Columbus Circle, N.E., Suite 2-301
Washington, DC 20544

Kyle Duncan

From:	Kyle Duncan
Sent:	Thursday, July 27, 2017 11:28 AM
To:	Kingo, Lola A. (OLP)
Cc:	(b)(6) - AOUSC Email Address
Subject:	Re: Financials
Attachments:	FDR_NOM_Duncan-S-K DRAFT 7-27-17.pdf; DUNCAN Net Worth Statement.doc

Dear Lola and Kristina,

Attached are drafts of my Financial Disclosure Report (in PDF) and my Net Worth Statement (in Word). I look forward to your comments and corrections.

Regards,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Jul 24, 2017, at 12:05 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> Dear Kyle,
>
> (b) (5), I was hoping you could turn your attention to finalizing the financial documents that must be completed should you be nominated.
>
> First, please complete and sign the attached registration form, which will enable you to register for electronic filing of the Financial Disclosure Report. This Report is filed with the Administrative Office of the US Courts to ensure compliance with the Ethics in Government Act of 1978 and is also attached to your Senate Questionnaire. For the "Title," "Circuit," "District," and/or "Court" lines, please reference the court for which you are a candidate (and feel free to put "N/A" in those fields that are not applicable). For the remaining entries, please use your current office address and contact information. Once you have completed the form, **please email me a PDF** of the form and then **send the original by overnight delivery** (either FedEx or UPS) to me at the address in my signature block.
>
> Second, please complete a draft of the Financial Disclosure Report, which must be both filed with the Administrative Office of the U.S. Courts within five calendar days of your nomination and attached to your Senate Judiciary Questionnaire. You can access the software needed to

generate the Financial Disclosure Report, as well as related documents, at https://fd-docs.uscourts.gov. Please use the following credentials to log-in to the website, where you may download the software, **User ID:** (b) (6) **; Password:** (b) (6) . Please note that both are case sensitive. I have attached Filing Instructions for completing the Financial Disclosure Report. If you have any questions about completing the Financial Disclosure Report, please contact Kristina Usry (copied) at (b) (6) –she knows everything there is to know about the Financial Disclosure Report and can walk you through any questions you have.

Finally, please complete a Net Worth Statement. A blank Net Worth Statement as well as Net Worth Statement Guidelines are attached. If you have any questions about the Net Worth Statement, please do not hesitate to reach out to me.

If possible, please email me and Kristina your Registration Form, a draft of your Financial Disclosure Report and Net Worth Statement by the close of business on **Monday, July 31st.** We look forward to working with you. Thank you!

Lola A. Kingo
Senior Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(202) 514-1818 (o)
(b) (6) (m)
Lola.A.Kingo@usdoj.gov

<filing-instructions.pdf><Net Worth Statement Guidelines and Sample.doc><Blank Net Worth Statement.doc><FDR Confidential Registration for Electronic Filing.pdf>

Kyle Duncan

From:	Kyle Duncan
Sent:	Thursday, September 21, 2017 4:07 PM
To:	King, Kara (OLP)
Cc:	Kingo, Lola A. (OLP)
Subject:	Re: ABA Waivers and JEFS Registration
Attachments:	Duncan ABA Waiver - SIGNED 9-21-17.pdf

Kara,

Attached is a PDF of my signed ABA waiver. I'm traveling at present, but I'll try to get you the signed JEFS page by tomorrow or Friday.

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Sep 21, 2017, at 2:28 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:
>
> Hello Mr. Duncan,
>
> Prior to your hearing before the Senate Judiciary Committee, the American Bar Association's Standing Committee on the Federal Judiciary will provide the Senate with an evaluation of your professional qualifications. To begin its evaluation, the ABA's Standing Committee requires the attached waiver. We ask that you please complete and sign the attached waiver, which we will submit to the ABA's Standing Committee on your behalf, along with a draft of the public portion of your Senate Questionnaire. Please email us back the signed copy of the waiver **(we do not need the original)**.
>
> In the event you would like additional information about the ABA's evaluation process, please visit the following:http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf.
>
> Additionally, under DOJ security policies, we need to register judicial nominees with the DOJ online file-sharing system ("JEFS") in order to exchange files larger than 10 MB (including our sending you the final assembled version of the Attachments to your Senate Questionnaire). On the attached form, please confirm your email address is listed correctly on the first page, and

then sign the final page of the User Agreement. Please physically sign in hard copy (do not e-sign). You should leave "Component and Sub-Component" blank. The User Agreement contains the Rules of Behavior for handling/receiving files securely from DOJ.

One final note: if you already have a Box account associated with the email address listed for you on page 1 of the attached, please let me know. We will need either to deactivate your account and re-register you, or use an alternate email address when registering you through DOJ.

Please email me back a scanned pdf of the last page of the JEFS containing your signature and the signed ABA waiver **by close of business on Monday, September 25th.** If you are able to get the paperwork to us earlier, that would be much appreciated.

Let me know if you have any questions!

Best,

Kara

Kara King
Nominations Researcher
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607
Cell: (b) (6)

<Duncan ABA Waiver.docx><Duncan JEFS Account Request.pdf>

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON THE FEDERAL JUDICIARY
WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with or in the possession of any governmental, judicial, disciplinary, investigative or other official agency, the Louisiana Bar's Office of Disciplinary Counsel, the State Bar of Texas Chief Disciplinary Counsel, the District of Columbia Office of Disciplinary Counsel or any educational institution, or employer, and I hereby authorize a representative of the American Bar Association Standing Committee on the Federal Judiciary to request and to receive any such information.

Stuart Kyle Duncan
Typed or Printed Name

Signature

Dated: September 21, 2017

Kyle Duncan

From: Kyle Duncan
Sent: Friday, September 22, 2017 12:41 AM
To: Berry, Jonathan (OLP)
Subject: Oral arguments, etc.

Jonathan,

(b) (5)

(b) (5)

.

(b) (5)

(b) (5)

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Friday, September 22, 2017 11:02 AM
To: Berry, Jonathan (OLP)
Subject: Re: (b) (5)

(b) (5)

Sent from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
(b) (6) (cell)
Kduncan@Schaerr-Duncan.com

On Sep 22, 2017, at 9:54 AM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Thanks, Kyle. (b) (5)
>
> Sent from my iPhone
>
> On Sep 22, 2017, at 9:08 AM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:
>
> > I'll think about it today but nothing immediately comes to mind. (b) (5)
> >
> > Kyle Duncan
> > SCHAERR | DUNCAN LLP
> > 1717 K Street NW, Suite 900 | Washington, DC 20006
> > 202-787-1060 (office) (b) (6) (mobile)
> > KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com
> >
> >
> >
> > On Sep 22, 2017, at 8:04 AM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
> >
> > Thanks, Kyle. (b) (5)
> >
> > Sent from my iPhone

Sent from my iPhone

On Sep 22, 2017, at 12:20 AM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:

> Jonathan,
>
> [redacted]
>
> Kyle
>
> Kyle Duncan
> SCHAERR | DUNCAN LLP
> 1717 K Street NW, Suite 900 | Washington, DC 20006
> 202-787-1060 (office) [redacted] (mobile)
> KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com
>
>

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, September 22, 2017 4:28 PM
To:	King, Kara (OLP)
Cc:	Kingo, Lola A. (OLP)
Subject:	Re: ABA Waivers and JEFS Registration
Attachments:	Duncan JEFS Signature Page SIGNED.pdf

Kara,

Attached is the signed signature page for my JEFS form. The e-mail on the first page is accurate.

Have a good weekend.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

On Sep 21, 2017, at 3:28 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

Duplicative Material

you meet required security controls.[9]

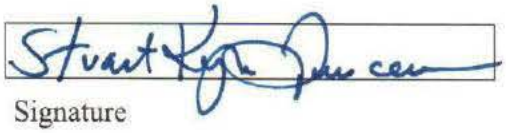
66. Disclose PII in accordance with appropriate legal authorities and the Privacy Act of 1974.

67. Dispose of and retain records in accordance with applicable record schedules, National Archives and Records Administration guidelines and Department Policies.[10]

68. Do not perform unauthorized querying, review, inspection, or disclosure of Federal Taxpayer Information.[11]

III. Statement of Acknowledgement

I acknowledge receipt and understand my responsibilities as identified above. Additionally, this acknowledgment accepts my responsibility to ensure the protection of PII that I may handle. I will comply with the DOJ IT Security ROB for General Users, Version 9, dated January 1, 2016.



Signature

September 22, 2017

Date

Stuart Kyle Duncan

Printed Name

Component and Sub-Component

Note: Statement of acknowledgement may be made by signature if the ROB for General Users is reviewed in hard copy or by electronic acknowledgement if reviewed online. All users are required to review and provide their signature or electronic verification acknowledging compliance with these rules. Users with privileged accesses and permissions shall also agree to and sign the ROB for Privileged Users. If you have questions related to this ROB, please contact your Help Desk, Security Manager, or Supervisor.

The Department has the right, reserved or otherwise, to update the ROB to ensure it remains compliant with all applicable laws, regulations, and DOJ Standards. Updates to the ROB will be communicated through the Department's ISES Team Lead and Component Training Coordinators.

JEFS is Strictly for DOJ Authorized Use Only.

Clear Form Print Form

[9] For additional guidance on PII, please refer to *Information Technology Security, DOJ Order 2640.2F* (https://portal.doj.gov/sites/dm/dm/Directives/2640.2F.pdf).

[10] For disposal guidance, please refer to *Records Management, DOJ Order 2710.11* (http://dojnet.doj.gov/directives/canceled-orders/doj-2710-11.pdf).

[11] For additional information on disclosure of federal taxpayer information, please refer to *Internal Revenue Code Sec. 7213 and 7213A* (http://www.irs.gov/irm/part11/irm_11-003-001.html#d0e176).

Kyle Duncan

From: Kyle Duncan
Sent: Tuesday, September 26, 2017 2:56 PM
To: Berry, Jonathan (OLP)
Subject: Re: (b) (5)

(b) (5)

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Sep 26, 2017, at 1:23 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
>
> Thanks, Kyle. (b) (5)
>
> ---
>
> **From:** Kyle Duncan [mailto:kduncan@schaerr-duncan.com]
> **Sent:** Tuesday, September 26, 2017 1:17 PM
> **To:** Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
> **Subject:** (b) (5)
>
> Jonathan,
>
> (b) (5), (b) (6)
>
> (b) (5)
>
> (b) (5), (b) (6)

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From:	Kyle Duncan
Sent:	Wednesday, September 27, 2017 3:01 PM
To:	Berry, Jonathan (OLP)
Subject:	Fwd: Contact info
Attachments:	Kyle Duncan.msg; ATT00001.htm

See below

Sent from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
(b) (6) (cell)
Kduncan@Schaerr-Duncan.com

Begin forwarded message:

(b) (5), (b) (6)

(b) (5), (b) (6)

(b) (5), (b) (6)


(b) (5), (b) (6)


(b) (5), (b) (6)

Kyle Duncan

From: Kyle Duncan
Sent: Wednesday, September 27, 2017 7:45 PM
To: Hudson, Andrew (OLP)
Cc: Berry, Jonathan (OLP)
Subject: Re: Media

(b) (5)

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Sep 27, 2017, at 7:44 PM, Hudson, Andrew (OLP) <Andrew.Hudson@usdoj.gov> wrote:
>
> Great, thank you. (b) (5)
>
> > On Sep 27, 2017, at 7:28 PM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:
> >
> > Will do in next 30 min
> >
> > Sent from my iPhone
> >
> > Kyle Duncan
> > Schaerr | Duncan LLP
> > 1717 K Street NW, Suite 900
> > Washington, DC 20006
> > (202) 787-1060 (office)
> > (b) (6) (cell)
> > Kduncan@Schaerr-Duncan.com
> >
> > On Sep 27, 2017, at 7:22 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
> >
> > (b) (5) Please also send to my colleague Drew (cc'ed) too. Thanks.
> >
> > Sent from my iPhone

Kyle Duncan

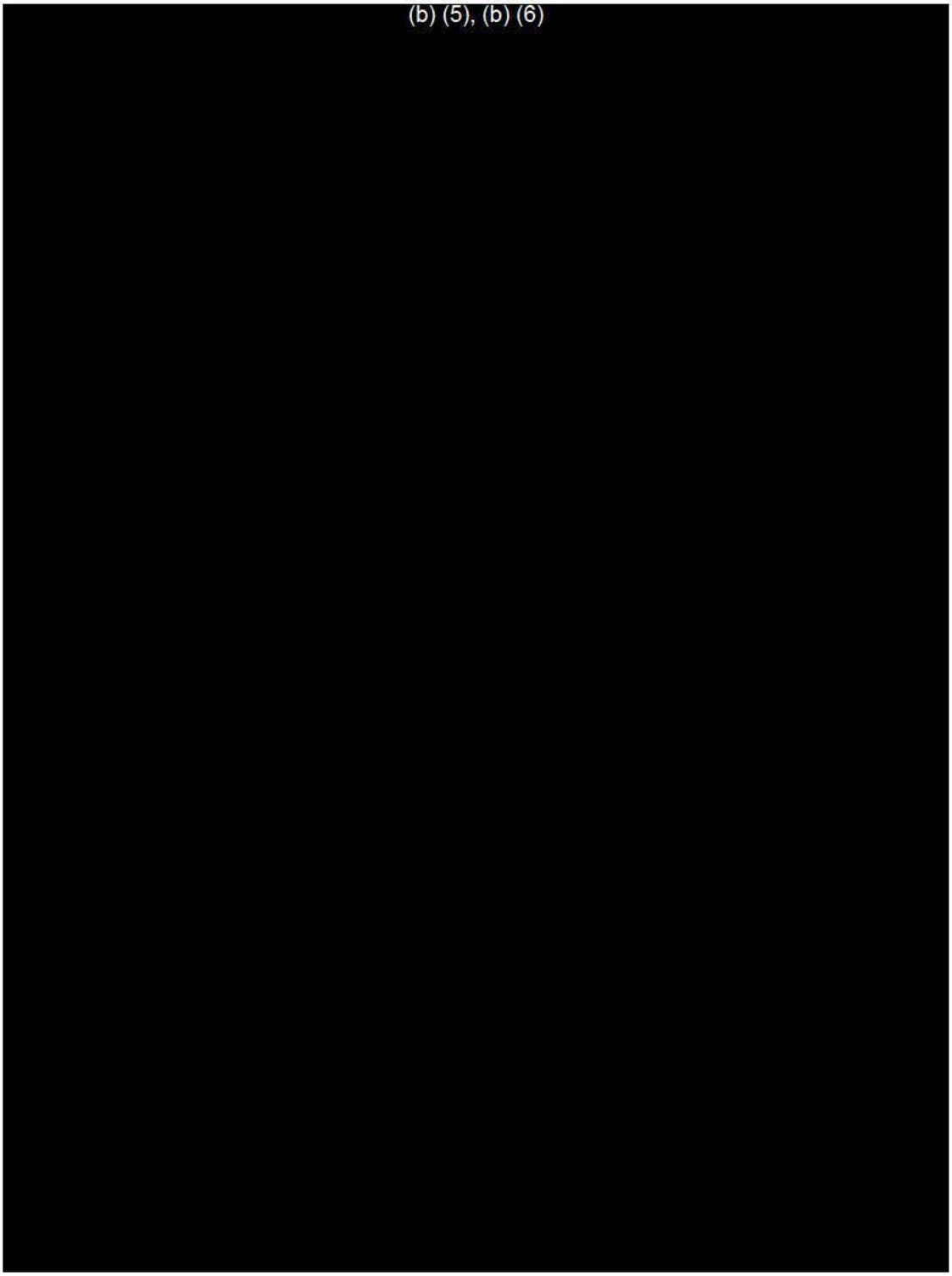
From: Kyle Duncan
Sent: Wednesday, September 27, 2017 8:02 PM
To: Berry, Jonathan (OLP)
Cc: Hudson, Andrew (OLP)
Subject: Re: Media

(b) (5)

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Sep 27, 2017, at 8:00 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
>
> These are great, Kyle. Just to confirm, (b) (5)
>
> Sent from my iPhone
>
> On Sep 27, 2017, at 7:56 PM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:
>
> (b) (5), (b) (6)

(b) (5), (b) (6)



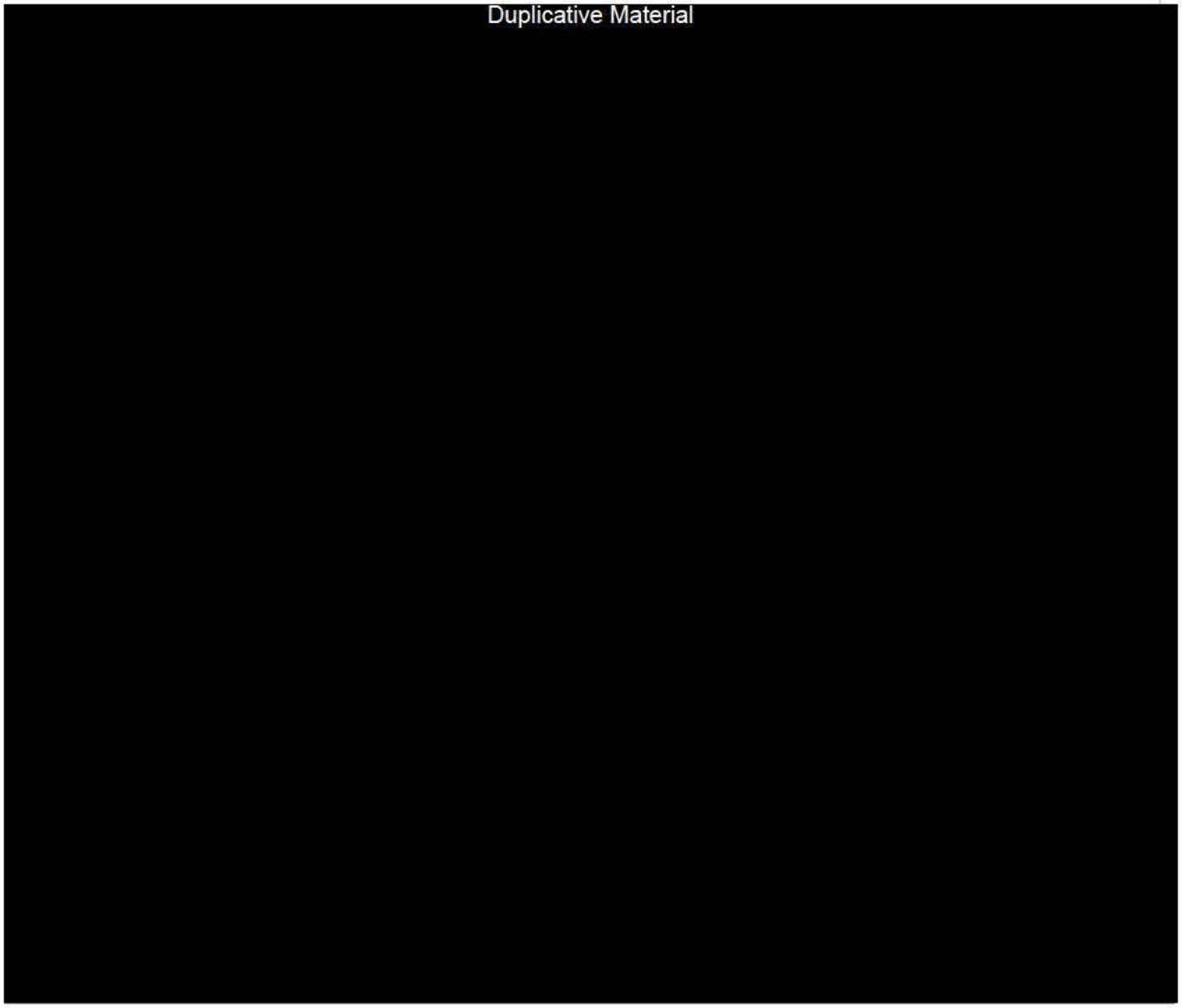
I'll update you with further developments on contacts.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

in error, please notify us immediately by e-mail, and delete the original message.

On Sep 27, 2017, at 7:22 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:



Kyle Duncan

From: Kyle Duncan
Sent: Thursday, September 28, 2017 9:59 AM
To: Hudson, Andrew (OLP)
Cc: Berry, Jonathan (OLP)
Subject: Re: Media

Further update this morning. [redacted (b) (5)]

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) [redacted (b) (6)] (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Sep 27, 2017, at 10:24 PM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:
>
> Further update [redacted (b) (5)]
>
> [redacted (b) (5), (b) (6)]
>
> Sent from my iPhone
>
> Kyle Duncan
> Schaerr | Duncan LLP
> 1717 K Street NW, Suite 900
> Washington, DC 20006
> (202) 787-1060 (office)
> [redacted (b) (6)] (cell)
> Kduncan@Schaerr-Duncan.com
>
> On Sep 27, 2017, at 9:39 PM, Hudson, Andrew (OLP) <Andrew.Hudson@usdoj.gov> wrote:
>
> > Excellent, thanks! This should probably do perfectly for now. Thanks for pulling this together so quickly--it was nice to meet you earlier!

On Sep 27, 2017, at 9:07 PM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:

Couple of updates:

(b) (5)

Kyle

from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
(b) (6) (cell)
Kduncan@Schaerr-Duncan.com

On Sep 27, 2017, at 7:56 PM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:

Duplicative Material

Kyle Duncan

From:	Kyle Duncan
Sent:	Thursday, September 28, 2017 6:41 PM
To:	Talley, Brett (OLP); (b)(6) - Robert Luther Email Address; (b)(6) - James Burnham Email Address
Subject:	Fwd: Cassidy Commends Trump Judicial Nominations

FYI, from Cassidy.

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Begin forwarded message:

From: "Quinn, James (Cassidy)" <(b) (6)
Subject: Re: Cassidy Commends Trump Judicial Nominations
Date: September 28, 2017 at 6:29:20 PM EDT
To: Kyle Duncan <kduncan@schaerr-duncan.com>

Sen. Cassidy will return the blue slip as soon as we receive it to proceed w your confirmation hearing.

James Quinn
Chief of Staff
Sen. Bill Cassidy M.D., R-LA
202-224-5824

On Sep 28, 2017, at 6:23 PM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:

Thanks so much, James. Really appreciate Senator Cassidy's support.

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

On Sep 28, 2017, at 6:21 PM, Quinn, James (Cassidy) (b) (6) > wrote:

FYI, just want to make sure you saw.

James Quinn
Chief of Staff
Sen. Bill Cassidy M.D., R-LA
202-224-5824

Begin forwarded message:

From: "Cassidy Press (Cassidy)" <Press_Cassidy@cassidysenate.gov>
Subject: Cassidy Commends Trump Judicial Nominations

<Picture (Device Independent Bitmap) 1.jpg>

For Immediate Announcement
September 28, 2017

Contact: Ty Bofferding
202-224-5824

Cassidy Commends Trump Judicial Nominations

WASHINGTON— Today, US Senator Bill Cassidy, MD (R-LA) released a statement following President Trump's nomination of Kurt Engelhardt and Kyle Duncan to the US 5th Circuit, and Barry Ashe to the Eastern District of Louisiana.

"The President made a sound decision in nominating Kurt Engelhardt and Kyle Duncan to the U.S. 5th Circuit Court of Appeals and Barry Ashe to the Eastern Louisiana District Court. All three are immensely qualified and will serve our state and country well in these new positions," said **Dr. Cassidy**. "I will work for their speedy confirmation in the Senate."

Kurt Engelhardt is a current judge in the Eastern District of Louisiana and graduated from Louisiana State University's Paul H. Hebert Law Center. Before his confirmation to the federal bench, Engelhardt became a partner with the Hailey, McNamara firm. He recently was appointed to chair the Fifth Circuit's Judicial Impairment Protocol Committee and has served on eight different panels of the United States Fifth Circuit Court of Appeals.

S. Kyle Duncan is from Baton Rouge, Louisiana and received his LLM from Columbia School of Law after receiving his JD from Louisiana State University. Prior to becoming a founding partner and managing partner of Schaerr, Duncan LLP, Duncan served as Solicitor General and Appellate Chief in the Louisiana Department of Justice. He has taught at several universities and is featured in six publications.

Barry Ashe graduated from Tulane Law School and was a member of the Tulane Law Review. Since 1985, Ashe has been a partner at Stone Pigman Walther Wittmann LLC in New Orleans, Louisiana. Ashe is a recipient of the John R. "Jack" Martzell Professionalism Award of the New Orleans Chapter of the Federal Bar Association and selected by peers to *The Best Lawyers in America*.

###

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, September 29, 2017 10:43 AM
To:	Kingo, Lola A. (OLP)(b)(6) - AOUSC Email Address
Cc:	Dickey, Jennifer (OLP)
Subject:	FDR Form
Attachments:	FDR_NOM_Duncan-S-K 9-29-2017.pdf

Dear Lola and Kristina,

You may have seen that yesterday the President was kind enough to nominate me to the Fifth Circuit. I believe I have to get my FDR form file within five days.

Attached is an updated FDR that reflects changes suggested by Kristina back in July. Please let me know if it looks complete and correct, and remind me what I need to do to file it.

Many thanks for your assistance.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, September 29, 2017 12:01 PM
To:	Dickey, Jennifer (OLP)
Cc:	Kingo, Lola A. (OLP)
Subject:	SJQ Affidavit Page
Attachments:	Signed SJQ Affidavit Page - DUNCAN.pdf

Jenn and Lola,

Attached is a scan of my signed and notarized SJQ affidavit page. The original is being sent to the person and address indicated in my post-nomination instructions (Bridget Coehins).

I'll be traveling for the rest of the day, but available by cell (b) (6) and email in case you need anything further. (b) (5)

Thanks for all your work on this.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

AFFIDAVIT

I, Stuart Kyle Duncan, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

9/29/2017
(DATE)

(NAME)

(NOTARY)

BRIAN DAVID ALGER
NOTARY PUBLIC
REG. #
251114
COMMISSION
EXPIRES
1/31/2019
COMMONWEALTH OF VIRGINIA

Kyle Duncan

From:	Kyle Duncan
Sent:	Tuesday, October 03, 2017 5:02 PM
To:	Kingo, Lola A. (OLP); King, Kara (OLP)
Cc:	(b)(6) - AOUSC Email Address
Subject:	Filed FDR
Attachments:	FDR Duncan FILED 10-03-2017.pdf

Dear Lola and Kara,

With Kristina's help, I just filed the attached FDR form. Please let me know if I need to do anything else to meet the five-day deadline.

Thanks!
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Tuesday, October 3, 2017 5:17 PM
To: Talley, Brett (OLP); (b)(6) - Michael McGinley Email Address
(b)(6) - Robert Luther Email Address
Subject: Financial form

Just FYI, I filed my financial disclosure report this afternoon. I'm available to help finalize SJQ when it's ready.

Kyle

Sent from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
(b) (6) (cell)
Kduncan@Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Wednesday, October 04, 2017 2:34 PM
To: Mike H. EOP/WHO McGinley; Robert EOP/WHO Luther; Talley, Brett (OLP)
Subject: Fwd: Senate Judiciary

FYI

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Begin forwarded message:

From: "Quinn, James (Cassidy)" (b) (6) >
Subject: Senate Judiciary
Date: October 4, 2017 at 2:32:11 PM EDT
To: "kduncan@schaerr-duncan.com" <kduncan@schaerr-duncan.com>

Sen. Cassidy has returned your blue slip so Senate Judiciary can schedule your hearing.

James Quinn
Chief of Staff
Sen. Bill Cassidy M.D., R-LA
202-224-5824

Kyle Duncan

From:	Kyle Duncan
Sent:	Thursday, October 05, 2017 7:19 PM
To:	Mike H. EOP/WHO McGinley; Robert EOP/WHO Luther
Cc:	Talley, Brett (OLP); Dickey, Jennifer (OLP)
Subject:	Fwd: ABA SCFJ - Nomination to the United States Court of Appeals for the Fifth Circuit
Attachments:	2017-10-5 Chair to Stuart Kyle Duncan regarding Nomination to the United States Court of Appeals for the Fifth Circuit.pdf

The ABA's letter is attached below. The lawyer assigned to conduct my evaluation is Robert Rothman, a commercial litigation attorney in Atlanta.

http://www.agg.com/Robert-Rothman/?

I'll let you know when he schedules an interview with me. [redacted (b) (5)]

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | [redacted (b) (6)] (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Begin forwarded message:

From: "Shoemaker, Teresa J." <tjshoemaker@vorys.com>
Subject: ABA SCFJ - Nomination to the United States Court of Appeals for the Fifth Circuit
Date: October 5, 2017 at 6:43:31 PM EDT
To: "kduncan@schaerr-duncan.com" <kduncan@schaerr-duncan.com>
Cc: "Robert L. Rothman" <robert.rothman@agg.com>, "Bresnahan, Pamela A." <PABresnahan@vorys.com>

Please see the attached correspondence from Pamela A. Bresnahan, Chair of the American Bar Association's Standing Committee on the Federal Judiciary, in connection with your nomination to the United States Court of Appeals for the Fifth Circuit.

Best regards,

Teresa J. Shoemaker

VORYS
Legal Counsel

Teresa J. Shoemaker
Litigation Practice Assistant
Vorys, Sater, Seymour and Pease LLP
1909 K Street, N.W. | Suite 900 | Washington, DC 20006-1152
Direct: 202.467.8850
Fax: 202.533.9064
Email: tjshoemaker@vorys.com
www.vorys.com

CHAIR
Pamela A. Bresnahan
9th Floor
1909 K Street, NW
Washington, D.C. 20006-1115

FIRST CIRCUIT
Peter Bennett
Suite 300
121 Middle Street
Portland, ME 04101-7123

SECOND CIRCUIT
Joseph M. Drayton
1114 Avenue of the Americas
New York, NY 10036-7798

THIRD CIRCUIT
Adriane J. Dudley
Suite 3
5194 Dronningens Gade
St. Thomas, VI 00802-6921

FOURTH CIRCUIT
Timothy W. Bouch
P.O. Box 59
Charleston, SC 29402-0059

FIFTH CIRCUIT
J. Douglas Minor, Jr
Suite 400
188 E. Capitol Street
Jackson, MS 39201-2100

SIXTH CIRCUIT
John R. Tarpley
Suite 2500
424 Church Street
Nashville, TN 37219-8615

SEVENTH CIRCUIT
Tiffany M. Ferguson
Suite 879
1507 E. 53rd Street
Chicago, IL 60615-4573

EIGHTH CIRCUIT
Cynthia E. Nance
1653 N. Applebury Drive
Fayetteville, AR 72701-2418

NINTH CIRCUIT
Marcia Davenport
Suite 200
900 North Last Chance Gulch
Helena, MT 59601

Laurence Pulgram
12th Floor
555 California Street
San Francisco, CA 94104-1503

TENTH CIRCUIT
Shannon L. Edwards
3400 South Air Depot Boulevard
Edmond, OK 73013-9029

ELEVENTH CIRCUIT
Robert L. Rothman
Suite 2100
171 17th Street, NW
Atlanta, GA 30363-1031

D.C. CIRCUIT
Robert P. Trout
Suite 300
1350 Connecticut Avenue, NW
Washington, D.C. 20036-1728

FEDERAL CIRCUIT
Marylee Jenkins
1675 Broadway
New York, NY 10019-5820

STAFF COUNSEL
Denise A. Cardman
Suite 400
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Please respond to:
Pamela A. Bresnahan
Vorys, Sater, Seymour and Pease LLP
1909 K Street, N.W.
9th Floor
Washington, D.C. 20006
E-mail: pabresnahan@vorys.com

October 5, 2017

VIA E-MAIL AND
ORIGINAL VIA FEDERAL EXPRESS

CONFIDENTIAL

Stuart Kyle Duncan
Schaerr Duncan LLP
1717 K Street, N.W.
Suite 900
Washington, D.C. 20006

Re: Nomination to the United States Court of Appeals for the Fifth Circuit

Dear Mr. Duncan:

The ABA Standing Committee on the Federal Judiciary has been informed that you have been nominated to the United States Court of Appeals for the Fifth Circuit. Congratulations!

The Standing Committee conducts an evaluation of all nominees to the Federal bench. We consider only a nominee's integrity, professional competence and judicial temperament. Robert L. Rothman is conducting your evaluation on behalf of the Committee. His e-mail address is Robert.rothman@agg.com.

Bob will interview attorneys, members of the bench and others with personal knowledge of your qualifications. He will also review some of your writings and may request that you send him writing samples. Bob will contact you shortly to schedule a mutually convenient time when he can interview you in person.

The Committee's brochure, "Standing Committee on the Federal Judiciary – What It Is and How It Works," is available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.pdf, and should answer your questions with respect to the role of the ABA Standing Committee on the Federal Judiciary's rating process. Please also feel free to call Bob at (404) 873-8668 or me at (202) 467-8861.

Best regards.

Sincerely,

Pamela A. Bresnahan

PAB/tjs

cc: Robert L. Rothman (via e-mail only)
ABA Standing Committee on the Federal Judiciary (via e-mail only)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary,
Staff Counsel (via e-mail only)

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, October 06, 2017 11:44 AM
To:	McGinley, Mike H. EOP/WHO
Cc:	Luther, Robert EOP/WHO; Talley, Brett (OLP); Dickey, Jennifer (OLP)
Subject:	Re: NY Times

Yes. Couple of other things:

(b) (5)

(b) (5)

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

On Oct 6, 2017, at 10:54 AM, McGinley, Mike H. EOP/WHO (b) (6) wrote:

Kyle,

We saw it this morning, (b) (5)

Mike

From: Kyle Duncan [mailto:kduncan@schaerr-duncan.com]
Sent: Friday, October 6, 2017 10:40 AM
To: McGinley, Mike H. EOP/WHO [redacted (b) (6)] Luther, Robert EOP/WHO [redacted (b) (6)] Brett Talley <Brett.Talley@usdoj.gov>
Cc: Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov>
Subject: [EXTERNAL] NY Times

Here's a NYT article about the death of John Thompson, who was the plaintiff in *Connick v. Thompson*. The article takes a swipe at me for arguing the case in Scotus. [redacted (b) (5)] [redacted (b) (5)]

>https://www.nytimes.com/2017/10/05/opinion/john-thompson-exonerated.html<

KD

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | [redacted (b) (6)] (mobile)
KDuncan@Schaerr-Duncan.com | >www.Schaerr-Duncan.com<

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, October 06, 2017 11:58 AM
To:	Dickey, Jennifer (OLP)
Cc:	Kingo, Lola A. (OLP)
Subject:	Interview on Connick v. Thompson
Attachments:	sblawyer_471.pdf

Jenn,

(b) (5)

. Sorry to have overlooked that.

(b) (5)

. I'll let you know.

Kyle
Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Friday, October 6, 2017 12:45 PM
To: (b)(6) - Michael McGinley Email Address; (b)(6) - Robert Luther Email Address; Talley, Brett (OLP)
Subject: Kennedy

(b) (5)

(b) (5)

Kyle

Sent from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
(b) (6) (cell)
Kduncan@Schaerr-Duncan.com

Kyle Duncan

From:	Kyle Duncan
Sent:	Tuesday, October 10, 2017 10:12 AM
To:	Mike H. EOP/WHO McGinley; Robert EOP/WHO Luther; Talley, Brett (OLP)
Subject:	ABA Contacts
Attachments:	2017-10-09 RRothman Ltr.doc; 2017-10-10 RRothman Ltr (2).doc

The chair of my ABA evaluation committee (Robert Rothman) touched base with me yesterday. We scheduled a meeting in McLean for Oct 30. He asked me for attorneys, judges, etc. he could contact for the evaluation; attached are the two lists I've already sent him. (b) (5) [redacted]

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

SCHAERR
DUNCAN
LLP

TO: Robert L. Rothman
ARNALL GOLDEN GREGORY LLP

FROM: S. Kyle Duncan
SCHAERR DUNCAN LLP

RE: Attorneys / Judges for ABA Evaluation

DATE:October 9, 2017

Dear Bob,

I enjoyed talking with you earlier today. Below you will find a list of attorneys, judges, and others who can attest to my qualifications, temperament, and impartiality with respect to potential service as a circuit judge on the U.S. Fifth Circuit. I have included current contact information if I have it.

I look forward to our meeting on Monday, October 30 in McLean.

Attorneys (Opposing Counsel)

Andrew Lee / Jones Walker LLP (New Orleans, LA)	(504) 582-8664 alee@joneswalker.com
Gordon Cooney / Morgan Lewis & Bockius LLP (Philadelphia, PA)	(215) 963-4806 jgcooney@morganlewis.com
George Kendall / Squire Patton Boggs (New York, NY)	(212) 872-9834 george.kendall@squirepb.com
Mark Plaisance (Thibodeaux, LA)	(985) 227-4588 Plais77@aol.com
Professor Paul Baier, Louisiana State University Law Center (Baton Rouge, LA)	(225) 578-8326 Paul.Baier@law.lsu.edu

Attorneys (Co-Counsel / Former Colleagues / Clients)

KYLE DUNCAN

KDuncan@Schaerr-Duncan.com
(202) 787-1060 (office)
(b) (6) (mobile)

SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006

www.Schaerr-Duncan.com

SCHAERR
DUNCAN
LLP

Elizabeth Murrill, Solicitor General, Louisiana Attorney General's Office (Baton Rouge, LA)	(b) (6) MurrillE@ag.louisiana.gov
Don McKinney, Adams & Reese (New Orleans, LA)	(504) 585-0134 don.mckinney@arlaw.com
Thomas Enright, First Assistant State Treasurer of Louisiana (Baton Rouge, LA)	(b) (6)
Hillar Moore, East Baton Rouge Parish District Attorney (Baton Rouge, LA)	(225) 389-3400 Hillar.Moore@ebrda.org
Jimmy Faircloth, Faircloth, Melton & Sobel LLC (Alexandria, LA) (former Executive Counsel to Louisiana Gov. Bobby Jindal)	(b) (6) jfaircloth@fairclothlaw.com
Leon Cannizzaro, Orleans Parish District Attorney (New Orleans, LA)	(b) (6) (504) 822-2414 (assistant)
Marlin Gusman, Orleans Parish Sheriff (New Orleans, LA)	[contact info unavailable]
Kurt Wall, Livingston Parish District Attorney's Office (Livingston, LA)	(b) (6)
Devin George, State Registrar and Center Director, Louisiana Department of Health (New Orleans, LA)	(b) (6)
Paul Clement, Kirkland & Ellis (Washington, DC)	(202) 879-5000 paul.clement@kirkland.com
Noel Francisco, Solicitor General of the United States, Department of Justice (Washington, DC)	(b) (6)
Dori Bernstein, Director, Supreme Court Institute, Georgetown Law School (Washington, DC)	(202) 662-9630 (b) (6) dkb37@law.georgetown.edu

SCHAERR
DUNCAN
LLP

Dan Schweitzer, Director and Chief Counsel, National Association of Attorneys General (NAAG) Center for Supreme Court Advocacy (Washington, DC)	(202) 326-6010 dschweitzer@naag.org
Kannon Shanmugam, Williams & Connolly (Washington, DC)	(202) 434-5050 kshanmugam@wc.com
Dean Thomas Galligan, Louisiana State University Law Center (Baton Rouge, LA)	(225) 578-8491; (b) (6) thomas.galligan@law.lsu.edu
Dean Emeritus Samuel Davis, University of Mississippi School of Law (Oxford, MS)	(b) (6) smdavis@olemiss.edu
Professor Ronald Rychlak, University of Mississippi School of Law (Oxford, MS)	(662) 915-6841 rrychlak@olemiss.edu
Associate Dean Deborah Bell, University of Mississippi School of Law (Oxford, MS)	(662) 915-6867 dbell@olemiss.edu
Julie Caruthers Parsley, Parsley, Coffin & Renner (Austin, TX)	(b) (6) julie.parsley@pcrllp.com
Professor Lisa Eskow, University of Texas Law School (Austin, TX)	(512) 232-5741 leskow@law.utexas.edu
Melanie Plowman, Alexander, Dubose, Jefferson, Townsend (Austin, TX)	(214) 369-2358 mplowman@adjtlaw.com
David Corrigan, Harman, Claitor, Corrigan & Wellman (Richmond, VA)	(804) 543-7667 dcorrigan@hccw.com
Randall Nichols, Massey, Stotser & Nichols PC (Birmingham, AL)	(205) 838-9002 rnichols@msnattorneys.com
Bill Stewart, Millberg, Gordon, Stewart PLLC (Raleigh, NC)	(919) 836-0090 bstewart@mgsattorneys.com
Karl Bowers, Bowers Law Firm (Columbia, SC)	(803) 260-4124 Butch@ButchBowers.com

SCHAERR DUNCAN LLP

Judges

Circuit Judge Leslie Southwick, U.S. Fifth Circuit Court of Appeals	601-608-4760 Leslie Southwick@ca5.uscourts.gov
Circuit Judge Jennifer Elrod, U.S. Fifth Circuit Court of Appeals (Houston, TX)	[contact info unavailable; contact chambers]
Circuit Judge Carolyn Dineen King, U.S. Fifth Circuit Court of Appeals (Houston, TX)	[contact info unavailable; contact chambers]
Circuit Judge Edith Jones, U.S. Fifth Circuit Court of Appeals (Houston, TX)	[contact info unavailable; contact chambers]
Circuit Judge Jerry Smith, U.S. Fifth Circuit Court of Appeals (Houston, TX)	[contact info unavailable; contact chambers]
Senior Circuit Judge Eugene Davis, U.S. Fifth Circuit Court of Appeals (New Orleans, LA)	(504) 310-8036
Senior Circuit Judge John Duhé, Jr., U.S. Fifth Circuit Court of Appeals (Dallas, TX)	(b) (6)
U.S. District Judge Martin Feldman, Eastern District of Louisiana (New Orleans, LA)	[contact info unavailable; contact chambers]
U.S. District Judge Jay Zainey, Eastern District of Louisiana (New Orleans, LA)	[contact info unavailable; contact chambers]
U.S. District Judge James Brady, Middle District of Louisiana (Baton Rouge, LA)	[contact info unavailable; contact chambers]
U.S. District Judge John deGravelles, Middle District of Louisiana (Baton Rouge, LA)	[contact info unavailable; contact chambers]

Others

Nina Totenberg, National Public Radio (Washington, DC)	(b) (6)

SCHAERR
DUNCAN
LLP

Stephen Moret, President & CEO, Virginia Economic Development Partnership (Richmond, VA)	(b) (6)

SCHAERR
DUNCAN
LLP

TO: Robert L. Rothman
ARNALL GOLDEN GREGORY LLP

FROM: S. Kyle Duncan
SCHAERR DUNCAN LLP

RE: Additional Attorneys for ABA Evaluation

DATE:October 10, 2017

Dear Bob,

This morning I thought of some additional attorneys you should contact. Their relationship to me is indicated below.

David Cassidy / Brezeale, Sachse & Wilson (New Orleans, LA) David chaired the judicial evaluation committee for Louisiana's senior Senator, Bill Cassidy.	(504) 299-2100 David.Cassidy@bswllp.com
Cade Cole / Sigler & Raglin PLLC (Lake Charles, LA) Cade served on Senator Cassidy's judicial evaluation committee.	(337) 802-4539 crcole@siglerlaw.com
Alisa Klein / Civil Appeals, U.S. Department of Justice (Washington, DC) Alisa was opposing counsel to me in the *en banc* Tenth Circuit in *Hobby Lobby v. Sebelius*	(b) (6)
Michael Dreeben / Deputy Solicitor General, U.S. Department of Justice (Washington, DC) Michael was one of the counsel opposing me in the U.S. Supreme Court in *Montgomery v. Louisiana*.	(b) (6) [Michael is currently on leave from the Solicitor General's office to assist Special Counsel Robert Mueller]

KYLE DUNCAN

KDuncan@Schaerr-Duncan.com
(202) 787-1060 (office)
(b) (6) (mobile)

SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006

www.Schaerr-Duncan.com

SCHAERR
DUNCAN
LLP

Etienne Balart / Jones Walker LLP (New Orleans, LA) Etienne was a classmate in law school and we clerked together on the Fifth Circuit.	[redacted] (504) 582-8584 ebalart@joneswalker.com

Kyle Duncan

From: Kyle Duncan
Sent: Wednesday, October 11, 2017 9:45 PM
To: Riggs, Kate M. (OLP)
Cc: Kingo, Lola A. (OLP); King, Kara (OLP)
Subject: Re: Senate Questionnaire Authorization

Kate,

I've scrolled through all the attachments, and they look good. You have my authorization to file the SJQ.

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Oct 11, 2017, at 4:37 PM, Riggs, Kate M. (OLP) <Kate.M.Riggs@usdoj.gov> wrote:
>
> Thank you – (b) (5)
>
> There's no rush, (b) (5)
>
> Best,
> Kate
>
> Kate M. Riggs
> Senior Nominations Counsel
> Office of Legal Policy
> U.S. Department of Justice
> 950 Pennsylvania Avenue, N.W.
> Room 4235
> Washington, D.C. 20530
> 202-307-3024
> Kate.M.Riggs@usdoj.gov
>
> ---
>
> **From:** Kyle Duncan [mailto:kduncan@schaerr-duncan.com]
> **Sent:** Wednesday, October 11, 2017 2:48 PM

To: Riggs, Kate M. (OLP) <kmriggs@jmd.usdoj.gov>
Cc: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>; King, Kara (OLP) <kking@jmd.usdoj.gov>
Subject: Re: Senate Questionnaire Authorization

Kate,

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

Everything looks great! (b) (5)

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Oct 11, 2017, at 1:21 PM, Riggs, Kate M. (OLP) <Kate.M.Riggs@usdoj.gov> wrote:
>
> Kyle,
>
> Attached please find final versions of the public and confidential portions of your Senate Questionnaire. OLP has uploaded your final Attachment Package to the file-sharing site (JEFS/Box). (b) (5)
>
> (b) (5)
>
> Please let us know if you have any questions.

Thank you,

Kate

Kate M. Riggs
Senior Nominations Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4235
Washington, D.C. 20530
202-307-3024
Kate.M.Riggs@usdoj.gov

<Duncan Senate Questionnaire Confidential.pdf><Duncan Senate Questionnaire Public.pdf>

Kyle Duncan

From: Kyle Duncan
Sent: Saturday, October 14, 2017 2:49 PM
To: Mike H. EOP/WHO McGinley; Robert EOP/WHO Luther; Talley, Brett (OLP)
Subject: Responses to Kennedy's stated concerns

[redacted] (b) (5)

[redacted] (b) (5) [redacted] But Mike wants to respond, and so I send him the bullet points pasted below. [redacted] (b) (5)

Kyle does not live in Louisiana; we want a judge from Louisiana

- Kyle was born and raised in Baton Rouge; he attended public schools in Baton Rouge (Buchanan Elementary; McKinley Middle Magnet; McKinley Senior High); his entire extended family still lives in Baton Rouge.
- Kyle graduated from LSU ('90) and the LSU Law Center ('97)
- Kyle clerked for a Louisiana-based US Fifth Circuit judge (John Duhe', Jr.)
- Kyle served as appellate chief of the Louisiana Department of Justice from 2008-12; he argued numerous appeals on behalf of Louisiana in the Louisiana Supreme Court, the US Fifth Circuit, and the US Supreme Court
- In private practice, Kyle regularly represents Louisiana, Louisiana officials, and Louisiana agencies in trial and appellate matters in Louisiana courts.
- Kyle moved to DC simply because he was recruited by a nationally recognized non-profit to manage its litigation; this was a good way to get introduced to the DC legal market; but Kyle has always intended to return to his home state of Louisiana.
- Kyle would like nothing better than to move his wife (who is also from Baton Rouge) and five children (two of whom were born at Women's Hospital in Baton Rouge) back to Baton Rouge to spend the rest of his life there.

Kyle's career has focused too narrowly on religious liberty cases, which are only a tiny fraction of the cases heard in the Fifth Circuit

- Over Kyle's twenty year legal career, he has personally handled a wide range of exactly the kinds of matters that regularly come before the Fifth Circuit.
- While Louisiana appellate chief, he personally handled cases involving:
  - federal habeas corpus
  - section 1983 liability
  - municipal liability
  - qualified immunity
  - Eleventh Amendment immunity
  - prisoner rights

- prisoner rights
  - Sixth Amendment right to counsel
  - free speech rights
  - Eighth Amendment / juvenile sentencing
  - double jeopardy
  - full faith and credit
  - Louisiana insurance law
  - *Brady v. Maryland* issues
  - prosecutorial immunity
  - federal evidentiary law
  - Fourth Amendment law
- While in private practice, he personally handled cases involving:
  - federal election law / Voting Rights Act
  - interstate compacts
  - immigration
  - Title IX
  - Title VII
  - Equal Protection claims
  - Substantive Due Process claims
  - abortion regulation
  - administrative law
  - privileges and immunities / dormant commerce clause
  - Affordable Care Act insurance regulations
- While a professor at University of Mississippi law school, he taught courses on:
  - Uniform Commercial Code / Sales / Contracts
  - Professional Responsibility and Ethics
  - Admiralty
  - Constitutional Structures / Federalism
  - First Amendment (Speech and Religion Clauses)
  - Law and Economics
  - European Union Law
- While working for the Texas Solicitor General's office, Kyle personally handled cases involving:
  - State sovereign immunity / Eleventh Amendment immunity
  - Americans with Disabilities Act
  - Sixth Amendment right to counsel
  - Criminal habeas / ineffective assistance of counsel claims
- While at Vinson & Elkins, Kyle worked exclusively on appeals involving commercial litigation.
- While clerking on the US Fifth Circuit, Kyle personally worked on cases involving: criminal habeas, federal evidence law, immigration law, First Amendment law, products liability, qualified immunity.

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Monday, October 16, 2017 11:03 AM
To: Mike H. EOP/WHO McGinley; Robert EOP/WHO Luther; Talley, Brett (OLP)
Subject: Think Progress article

(b) (5):

"Kyle Duncan, who Trump nominated to the United States Court of Appeals for the Fifth Circuit, is the former general counsel to the Becket Fund for Religious Liberty — probably the most sophisticated religious conservative litigation shop in the nation.

At the most superficial level, Becket claims to be neutral on marriage equality — "the Becket Fund does not take a position on same-sex marriage as such," it claims on its website. Yet it filed an amicus brief in the Supreme Court claiming that extending equal marriage rights to same-sex couples would threaten religious liberty. And it's filed multiple briefs on behalf of business owners claiming a right to discriminate against same-sex couples.

Since leaving Becket in 2014, moreover, a major component of Duncan's private practice has been briefs asking the Supreme Court to limit LGBTQ rights. He unsuccessfully defended an Alabama Supreme Court decision stripping a lesbian woman of her parental rights. He represented a bloc of 15 states opposed to marriage equality. And he represented a school district that prohibited trans students from using the bathroom that aligns with their gender identity."

https://thinkprogress.org/trump-is-filling-the-federal-bench-with-anti-lgbtq-activists-a82882c336ea/

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006 202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Thursday, October 19, 2017 1:58 PM
To: Mike H. EOP/WHO McGinley; Robert EOP/WHO Luther; Talley, Brett (OLP)
Subject: More Thompson v. Connick

Here's another story on John Thompson that mentions my nomination.

https://www.huffingtonpost.com/entry/the-legacy-of-john-collin-thompson-proves-the-flaws-in-our-court-system_us_59e4d914e4b0a52aca19a416

I have talked with the author a few times (Emily Maw), [redacted (b) (5)]:

"Some of us who have had the monumental privilege of knowing John take a perverse satisfaction in seeing last week that the man who argued to reverse his jury verdict in the Supreme Court was nominated to the Fifth Circuit Court of Appeals. Because if John's legacy speeds all of America's realization that its society — as reflected in its courts — does not value black lives as it does white lives, he will continue to rest in the incredible power he had in life. John died early of a heart attack that was undoubtedly caused by the stress of what he had endured at the hands of the State of Louisiana. Days before, Kyle Duncan, the man who had argued that the prosecutors need not be liable for the terrible damage they caused him and his community, was elevated to one of the highest positions in the law. There again is the power of John Thompson's story, showing us who we really are."

KD

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) [redacted (b) (6)] (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Monday, October 30, 2017 12:33 PM
To: Mike H. EOP/WHO McGinley; Robert EOP/WHO Luther; Talley, Brett (OLP)
Subject: ABA interview
Attachments: Gloucester Cty Cert Pet FINAL.pdf

I just had a 4-hour interview with the chair of my ABA committee, Bob Rothman, who is a lawyer from an Atlanta firm. (b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted] Bob's internal deadline to finish the report is Friday, and I thought he said to expect the letter next week, but I'm not sure exactly when.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

No.

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JONATHAN F. MITCHELL
D. JOHN SAUER
JAMES OTIS LAW GROUP, LLC
12977 North Forty Drive
Suite 214
St. Louis, MO 63141
(314) 682-6067

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
(804) 747-5200

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner

QUESTIONS PRESENTED

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer* v. *Robbins*, 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent—who was born a girl but identifies as a boy—to use the boys' restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

PARTIES TO THE PROCEEDING

Petitioner Gloucester County School Board was Defendant-Appellee in the court of appeals in No. 15-2056, and Defendant-Appellant in the court of appeals in No. 16-1733.

Respondent G.G., by his next friend and mother, Deirdre Grimm, was Plaintiff-Appellant in the court of appeals in No. 15-2056 and Plaintiff-Appellee in the court of appeals in No. 16-1733.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Administrative Materials

Other Authorities

INTRODUCTION

As petitioner Gloucester County School Board (the Board) pointed out in the stay application that the Court granted on August 3, 2016, this case presents an extreme example of judicial deference to an administrative agency's purported interpretation of its own regulation. For that and several other reasons, this case provides the perfect vehicle for revisiting the deference doctrine articulated in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and subsequently criticized by several Justices of this Court.

The statute at the heart of the administrative interpretation here is Title IX of the Education Amendments of 1972. Enacted over forty years ago, Title IX and its implementing regulation have always allowed schools to provide "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. No one ever thought this was discriminatory or illegal. And for decades our Nation's schools have structured their facilities and programs around the idea that in certain intimate settings men and women may be separated "to afford members of each sex privacy from the other sex." *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996).

The Fourth Circuit's decision turns that longstanding expectation upside down. Deferring to the views of a relatively low-level official in the Department of Education (Department), the court reasoned that for purposes of Title IX the term "sex" does not simply mean physiological males and females, which is what Congress and the Department (and everyone else) thought the term meant when the regulation was promulgated. Instead, the Department and the Fourth Circuit now tell us that "sex" is ambiguous as applied to persons whose subjective gen-

der identity diverges from their physiological sex. App. 17a–20a. According to the Fourth Circuit, this means a physiologically female student who self-identifies as a male—as does the plaintiff here—must be allowed under Title IX to use the boys' restroom.

The Fourth Circuit reached this conclusion, not by interpreting the text of Title IX or its implementing regulation (neither of which refers to gender identity), but by deferring to an agency opinion letter written just last year by James Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights. App. 121a. The letter is unpublished; its advice has never been subject to notice and comment; and it was generated in direct response to an inquiry about the Board's restroom policy *in this very case*. Nonetheless, the Fourth Circuit concluded—over Judge Niemeyer's dissent—that the letter was due "controlling" deference under *Auer*. App. 25a. On that basis, the district court immediately entered a preliminary injunction allowing the plaintiff to use the boys' restroom.

Shortly after the Fourth Circuit's decision, the Department (along with the Department of Justice) issued a "Dear Colleague" letter seeking to impose that same requirement on every Title IX-covered educational institution in the Nation. But just last week, the Departments' effort was halted by a nationwide injunction issued by a federal district judge in Texas.

These recent developments highlight the urgent need for this Court to grant this petition and resolve the is-

sues presented by the Fourth Circuit's decision. As explained in more detail below, the Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering—and abolishing or refining—the *Auer* doctrine. Second, if the Court decides to retain *Auer* in some form, this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX reflected in the Ferg-Cadima and "Dear Colleague" letters must be given effect—thereby resolving once and for all the current nationwide controversy generated by these directives.

OPINIONS BELOW

This petition seeks review of two related cases in the court of appeals, Nos. 15-2056 and 16-1733. No. 15-2056 is G.G's appeal of the district court's order denying his request for a preliminary injunction. The opinion of the court of appeals in that case is available at 822 F.3d 709 (4th Cir. 2016). App. 1a–60a. The district court's opinion in that case is available at 132 F.Supp.3d 736 (E.D. Va. 2015). App. 84a–117a.

No. 16-1733 is the Board's appeal of the district court's order granting a preliminary injunction after the remand in No. 15-2056. The district court's opinion in that case is available at 2016 U.S. Dist. LEXIS 93164. App. 71a–72a.

JURISDICTION

In No. 15-2056, the court of appeals entered its judgment on April 19, 2016. App. 3a. It denied the Board's petition for rehearing en banc on May 31, 2016. App. 61a. No. 16-1733 remains pending in the court of appeals. The Board timely filed this petition for a writ of certiorari on August 29, 2016. See 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a).

34 C.F.R. § 106.33 provides:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

STATEMENT

A. Facts

G.G. is a 17-year-old student at Gloucester High School. G.G. is biologically female, meaning that G.G. was born a girl and recorded as a girl on the birth certificate. "However, at a very young age, G.G. did not feel like a girl," and around age twelve began identifying as a boy. App. 85a. In July 2014, between G.G.'s freshman and sophomore years, G.G. changed his first name to a boy's name and began referring to himself with male pronouns.[1] He has also started hormone therapy, but has not had a sex-change operation.

In August 2014, before the start of G.G.'s sophomore year, G.G. and his mother met with the principal and guidance counselor to discuss G.G.'s situation. The school officials were supportive of G.G. and promised a welcoming environment. School records were changed to reflect G.G.'s new name, and the guidance counselor helped G.G. e-mail his teachers asking them to address G.G. using his male name and male pronouns. App. 87a–88a. As G.G. admits, teachers and staff have honored these requests. *Id.* at 148a.

Neither G.G. nor school officials, however, thought that G.G. should start using the boys' restrooms, locker

---

[1] This petition uses "he," "him," and "his" to respect G.G.'s desire to be referred to with male pronouns. That choice does not concede anything on the legal question of what G.G.'s "sex" is for purposes of Title IX and its implementing regulation.

rooms, or shower facilities. Instead, G.G. and his mother suggested G.G. use a separate restroom in the nurse's office rather than the boys' room, and the school agreed. App. 149a. G.G. claims he accepted this arrangement because he was "unsure how other students would react to [his] transition." *Id.* But four weeks into the school year G.G. changed his mind and sought permission to use the boys' restroom. The principal granted G.G.'s request on October 20, 2014. G.G. says he asked for access to the boys' restroom because he found it "stigmatizing" to use the restroom in the nurse's office. *Id.*

Immediately after G.G. started using the boys' restrooms, the Board began receiving complaints from parents and students who regarded G.G.'s presence in the boys' room as an invasion of student privacy. App. 144a. Parents also expressed general concerns that allowing students into restrooms and locker rooms of the opposite biological sex could enable voyeurism or sexual assault. The Board held public meetings on November 11 and December 9, 2014, to consider the issue, and citizens on both sides expressed their views in thoughtful and respectful terms.[2] At the December 9 meeting, the Board

---

[2] The Fourth Circuit's opinion tries to depict the citizens who opposed G.G's presence in the boys' room as largely "hostil[e]" to G.G., selectively quoting the few intemperate statements and subtly implying they represented the whole. App. 10a. The video of the meetings, however, shows that the overwhelming majority of those expressing concern did so with courtesy and decency, not "hostility." *See* http://bit.ly/2bsVO6h (Dec. 9, 2014 meeting); http://www.gloucesterva.info/channels47and48 (containing link to Nov. 11, 2014 meeting video).

adopted a resolution recognizing "that some students question their gender identities," and encouraging "such students to seek support, advice, and guidance from parents, professionals and other trusted adults." The resolution then concluded:

> Whereas the [Board] seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the [Board] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. at 144a.

Before the Board adopted this resolution, the high school announced it would install three single-stall unisex bathrooms throughout the building—regardless of whether the Board approved the December 9 resolution. These unisex restrooms would be open to *all* students who, for whatever reason, desire greater privacy. They opened for use shortly after the Board adopted the resolution. G.G., however, refuses to use these unisex bathrooms because, he says, they "make me feel even more stigmatized and isolated than when I use the restroom in the nurse's office." App. 151a.

A few days after the Board's decision, a lawyer named Emily T. Prince[3] sent an e-mail about the Board's resolution to the Department, asking whether it had any "guidance or rules" relevant to the Board's decision. App. 118a–120a. In response, on January 7, 2015, James A. Ferg-Cadima, an Acting Deputy Assistant Secretary for Policy in the Department's Office of Civil Rights sent a letter stating that "Title IX . . . prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity*," and further opining that:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms locker rooms, shower facilities, housing, athletic teams, and single-sex classes *under certain circumstances*. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.

App. 121a, 123a (emphasis added).

The Ferg-Cadima letter cites no document requiring schools to treat transgender students "consistent with their gender identity" regarding restroom, locker room, or shower access. It instead cites a Q&A sheet on the

---

[3] Ms. Prince describes herself as the "Sworn Knight of the Transsexual Empire." *See* https://twitter.com/emily esque?lang en. Her name appears in the signature of the e-mail that DOJ filed in the district court, when the file is opened in Preview for Mac.

Department website, which says only that schools must treat transgender students consistent with their gender identity *when holding single sex classes*. See United States Department of Education, *Questions and Answers on Title IX and Single Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), http://bit.ly/1HRS6yI (emphasis added) (last visited Aug. 29, 2016) (Q&A #31) (opining "[h]ow . . . the Title IX requirements *on single sex classes* apply to transgender students) (emphasis added).

B. District Court Proceedings

G.G. filed suit against the Board on June 11, 2015—two days after the end of the 2014–15 school year. His complaint alleged that the Board's resolution violated Title IX and the Equal Protection Clause, and sought declaratory and injunctive relief, damages, and attorneys fees.

On June 29, 2015, the Department of Justice ("DOJ") filed a "statement of interest" accusing the Board of violating Title IX. See App. 160a–183a. The statement did not even cite 34 C.F.R. § 106.33, let alone explain how the Board's policy could be unlawful under the regulation's text. Instead, DOJ trumpeted the Ferg-Cadima letter as the "controlling" interpretation of Title IX and the regulation, even though DOJ acknowledged that the letter had never been "publicly issued." See *id.* at 171.[4] DOJ

[4] DOJ cited two other documents issued by the Department of Education, but neither addresses whether schools must allow transgender students into restrooms or locker rooms that corre-
(continued…)

also asserted that "an individual's gender identity is one aspect of an individual's sex," *id.* at 169a, but failed to cite any statute or regulation adopting or supporting that view.

Without ruling on G.G.'s equal-protection claim, the district court dismissed G.G.'s Title IX claim and denied a preliminary injunction. See App. 82a–83a (order); 84a–117a (opinion). It held that G.G.'s Title IX claim was foreclosed by 34 C.F.R. § 106.33, the regulation allowing comparable separate restrooms and other facilities "on the basis of sex." App. 97a–98a.

The district court assumed, for the sake of argument, that the phrase "on the basis of sex" includes distinctions based on *both* gender identity as well as biological sex. App. 99a, 102a. Yet even under this broad reading of "sex," it would remain permissible under section 106.33 to separate restrooms by biological sex *or* gender identity. Consequently, as the district court pointed out, section 106.33 would forbid the Board's policy only if "sex" refers *solely* to distinctions based on gender identity, and excludes those based on biological sex. *Id.* at 99a. The district court held that this would be an absurd construction, however. Indeed, if applied to the Title IX *statute*, it would permit discrimination against men or women, so long as the recipient discriminates on account of gender identity rather than biological sex. *Id.* at 102a.

---

spond with their gender identity. See ECF No. 28 at 9; see also, *supra*, at 7–8.

Consequently, the district court refused to give controlling weight to the interpretation of Title IX and 34 C.F.R. § 106.33 in the Ferg-Cadima letter. First, the district court observed that letters of this sort lack the force of law under *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), and cannot receive *Chevron* deference when interpreting Title IX. App. 101a. The Court also held that the letter should not receive deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), because it contradicts the unambiguous language of 34 C.F.R. § 106.33, which allows schools to establish separate restrooms "on the basis of sex"—even if one assumes that "on the basis of sex" refers to *both* gender identity *and* biological sex. Thus, the district court regarded the Ferg-Cadima letter as an attempted amendment to, rather than an interpretation of, 34 C.F.R. § 106.33, and held that to be binding any such amendment must go through notice-and-comment rulemaking. App. 102a–103a.

C. Appeal to the Fourth Circuit in No. 15-2056

Over Judge Niemeyer's dissent, the Fourth Circuit reversed the district court's dismissal of G.G.'s Title IX claim, and held that the district court should have enforced the Ferg-Cadima letter as the authoritative construction of Title IX and 34 C.F.R. § 106.33 under *Auer*. App. 13a–25a.

First, the panel held that section 106.33 was "ambiguous" as applied to "whether a transgender individual is a male or a female for the purpose of access to sex-segregated restrooms," and that the Ferg-Cadima letter

"resolve[d]" this ambiguity by determining sex solely by reference to "gender identity." *Id.* at 19a, 18a.

Second, the panel held that the letter's interpretation—"although perhaps not the intuitive one," *id.* at 23a—was not, in the words of *Auer,* "plainly erroneous or inconsistent with the regulation or the statute." *Id.* at 20a. In the panel's view, the term "sex" does not necessarily suggest "a hard-and-fast binary division [of males and females] on the basis of reproductive organs." *Id.* at 22a.

Third, the panel found that the letter's interpretation was a result of the agency's "fair and considered judgment," because the agency had consistently enforced this position "since 2014"—that is, for the previous several *months*—and it was "in line with" other federal agency guidance. *Id.* at 24a. While conceding that the Ferg-Cadima interpretation was "novel," given that "there was no interpretation of how section 106.33 applied to transgender individuals before January 2015," the panel nonetheless thought this novelty was no reason to deny *Auer* deference. *Id.* at 23a.

The panel, however, did not address the district court's reason for rejecting the agency interpretation—namely, that it would make the phrase "on the basis of sex" *exclude* biological sex and refer *only* to gender identity, a construction that would absurdly mean that Title IX no longer protects men or women from discrimination on the basis of biological sex. App. 99a, 102a. Nor did the panel acknowledge that the agency was expressly interpreting the Title IX *statute*, not merely the regula-

tion. See App. 121a (stating that "*Title IX* . . . prohibits [funding] recipients . . . from discriminating on the basis of sex, *including gender identity* . . . .") (emphases added). The panel thus did not address the district court's conclusion that giving the letter controlling deference would permit agencies to "avoid the process of formal rulemaking by announcing regulations through simple question and answer publications." App. 103a

Judge Niemeyer dissented from the panel's decision to give controlling effect to the Ferg-Cadima letter, for many of the reasons given by the district court. App. 40a–60a. Judge Niemeyer explained that the premise for applying *Auer* was absent, because "Title IX and its implementing regulations are not ambiguous" in allowing separate restrooms and other facilities on the basis of "sex." *Id.* at 43a. To the contrary, those provisions "employ[ ] the term 'sex' as was generally understood at the time of enactment," as referring to "the physiological distinctions between males and females, particularly with respect to their reproductive functions." *Id.* at 53a–55a. He also explained that the DOJ's conflation of "sex" in Title IX with "gender identity" would produce "unworkable and illogical result[s]," undermining the privacy and safety concerns that motivated the allowance of sex-separated facilities in the first place. *Id.* at 42a–43a.

Judge Niemeyer also noted that the Fourth Circuit's endorsement of the Ferg-Cadima letter will require schools to allow students with gender-identity issues not only into the restrooms but also into the locker rooms and showers reserved for the opposite biological sex. In Judge Niemeyer's view, this would violate other stu-

dents' "legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex." *Id.* at 50a.

The Board moved for rehearing en banc, which the panel denied on May 31, 2016. *Id.* at 61a–66a. Judge Niemeyer dissented but declined to call for an en banc poll, stating that "the momentous nature of the issue deserves an open road to the Supreme Court." *Id.* at 65a. The Board then asked for a stay of the Fourth Circuit's mandate pending the filing of a certiorari petition. This, too, was denied, again over Judge Niemeyer's dissent. *Id.* at 67a–70a. The mandate in No. 15-2056 issued on June 17, 2016.

D. The "Dear Colleague" Letter Of May 13, 2016

After the Fourth Circuit's ruling, two federal officials, the Department's Catherine E. Lhamon and DOJ's Vanita Gupta, quickly issued a "Dear Colleague" letter to every Title IX recipient in the country. *Id.* at 126a–142a. This document expands on the Ferg-Cadima letter by imposing detailed requirements on how schools must accommodate students with gender-identity issues, including the following edicts:

- Every student claiming to be transgender must be allowed to access restrooms, locker rooms, shower facilities, and athletic teams consistent with his or her gender identity. The Ferg-Cadima letter had hedged this requirement by including the word "generally." App.

123a. The "Dear Colleague" letter removes the hedge and allows for no exceptions. *Id.* at 134a.

- A school must allow a student access to the restrooms, locker rooms, and showers of the opposite biological sex after the "student *or* the student's parent or guardian, as appropriate" merely notifies the school that the student will *assert* a gender identity different from his or her biological sex. App. 130a (emphasis added). No medical or psychological diagnosis or evidence of professional treatment need be provided. *Id.*

- Non-transgender students who are unwilling to use restrooms, locker rooms, or showers at the same time as a classmate of the opposite biological sex may be relegated to a separate, individual-user facility. App. 134a. But a school cannot require the transgender student to use that separate, individual-user facility, no matter how many non-transgender students object to the presence of a student of the opposite biological sex in restrooms, locker rooms, or showers. *Id.*

The letter went out on May 13, 2016, only 24 days after the Fourth Circuit's decision. Needless to say, it did not go through notice-and-comment rulemaking.

The Dear Colleague letter has been challenged by over twenty States in two federal lawsuits. See *Texas* v. *United States of America*, No. 7:16-cv-00054 (N.D. Tex.

May 25, 2016); *Nebraska* v. *United States of America*, No. 4:16-cv-03117 (D. Neb. July 8, 2016). On August 21, 2016, a federal district court in Texas issued a nationwide preliminary injunction against enforcement of the regulatory interpretation contained in the Dear Colleague letter and in similar guidance documents. See *Texas, supra*, ECF No. 58; Pet. App. 183a–229a.

E. The Proceedings After Remand, Including No. 16-1733

Meanwhile, on remand from the Fourth Circuit, the district court promptly entered a preliminary injunction without giving the Board any notice or opportunity to submit additional briefing or evidence. App. 71–72a. The injunction orders the Board to permit G.G. to use the boys' restroom at Gloucester High School "until further order of this Court." *Id.* at 72a. It does not enjoin the Board from enforcing its policy with respect to locker rooms and showers — even though the Ferg-Cadima letter, which the Fourth Circuit endorsed as "controlling" authority, generally requires schools to allow transgender students to access locker rooms, shower facilities, housing, and athletic teams that accord with their gender identity. App. 123a.

The Board appealed this preliminary-injunction order, which created a second case in the Fourth Circuit, No. 16-1733. The district court denied the Board's request to stay its injunction pending appeal. App. 73a–75a. The Board's request that the Fourth Circuit stay the injunction pending appeal was also denied, again over Judge Niemeyer's dissent. App. 76a–81a.

Finally, the Board asked this Court to recall and stay the Fourth Circuit's mandate in No. 15-2056, and to stay the district court's preliminary injunction, pending this certiorari petition. This Court granted the Board's request on August 3, 2016. *Gloucester Cnty. Sch. Bd.* v. *G.G.*, 136 S. Ct. 2442 (2016) (per curiam). In this combined petition, the Board seeks a writ of certiorari as to No. 15-2056, and a writ of certiorari before judgment at to No. 16-1733. See S. Ct. R. 12.4.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering—and abolishing or refining—the doctrine of *Auer* deference that has recently been questioned by several Justices. Second, if the Court decides to retain *Auer*, this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX and section 106.33—an understanding it has recently sought to impose upon educational institutions throughout the Nation—is controlling.

I. THE COURT SHOULD GRANT CERTIORARI TO RECONSIDER THE DOCTRINE OF *AUER* DEFERENCE.

As to the first reason: The Fourth Circuit did not even attempt to show that the Ferg-Cadima letter reflects the most plausible construction of 34 C.F.R. § 106.33. Instead, its ruling hinged entirely on *Auer* deference—a doctrine that requires courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation omitted); see also *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945). Several members of this Court have expressed interest in revisiting the doctrine of *Auer* defer-

ence, which gives agencies enormous power over policy issues of interest across the political spectrum.[5] This case presents an ideal vehicle for doing so, because the issue is fully preserved and because the Fourth Circuit discussed the *Auer* framework extensively and regarded it as outcome-determinative. App. 15a–24a.[6]

The problems with *Auer* deference have been well rehearsed. See, *e.g.*, *Decker*, 133 S. Ct. at 1339–42 (Scalia, J., concurring in part and dissenting in part); *Perez*, 135 S. Ct. at 1213–25 (Thomas, J., concurring in the judgment); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 4–12 (1996). Four of the most important reasons for this Court to abandon or limit the scope of the *Auer*-deference regime are as follows:

---

[5] See, *e.g.*, *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., concurring in part and dissenting in part); *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

[6] By contrast, in *Foster* v. *Vilsack*, 820 F.3d 330 (8th Cir. 2016) (petition for certiorari pending), the Eighth Circuit's opinion does not cite or discuss *Auer* or any *Auer*-related rulings from this Court. It simply declares, without analysis, that the agency's "reasonable interpretation" is "owe[d] deference." *Id.* at 335.

First, as this case illustrates, *Auer* deference effectively gives an agency the power to invade the province of both Congress and the courts in determining federal law on all kinds of issues of interest to all kinds of constituencies. See, *e.g., Decker*, 133 S. Ct. at 1342 (Scalia, J., dissenting) (*Auer* "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation."); *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment) (*Auer* is an unconstitutional "transfer of judicial power to the Executive branch," and "an erosion of the judicial obligation to serve as a 'check' on the political branches."); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment) (noting that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect").

Here, in purporting to interpret section 106.33, the Department effectively changed the meaning of the *statutory* term "sex" in Title IX. To be sure, it did so in a manner that furthered the views of the present Administration. But that same strategy could easily be adopted by a future administration with radically different views. Indeed, it could be deployed to effectively amend in a different direction, and without any meaningful judicial review, not only Title IX, but also other federal statutes dealing with matters such as health care, the environment, labor relations, and financial-services regulation. For those reasons, the type of *Auer* deference applied by the Fourth Circuit here raises serious separation-of-powers problems. See, *e.g.,* Manning, *supra,* at 631–54.

Second, the *Auer* doctrine is poorly formulated. It instructs courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous *or* inconsistent with the regulation." *Auer*, 519 U.S. at 461 (emphasis added). But that disjunctive formulation leaves substantial ambiguity: The phrase "inconsistent with the regulation" implies *de novo* rather than deferential review. And it is not apparent how the "plainly erroneous" prong of the *Auer* deference test will ever do any work: Every "plainly erroneous" interpretation of a regulation will also be "inconsistent with the regulation," and the disjunctive "or" means that a litigant challenging the interpretation need only show that the agency's interpretation fails under the less deferential half of this test. This petition presents a prime opportunity for the Court to resolve this ambiguity—even if a majority of the Court wishes to retain some form of *Auer* deference.

The third problem for the *Auer* doctrine is the text of the Administrative Procedure Act, which plainly states that:

> *[T]he reviewing court shall decide* all relevant questions of law, interpret constitutional and statutory provisions, and *determine the meaning or applicability of the terms of an agency action.*

5 U.S.C. § 706 (emphases added). How can this statutory command be reconciled with a regime that requires the judiciary to *defer* to an agency's interpretation of its regulations, rather than "determine the meaning" of

those agency rules for itself? No one thinks the APA's command to "interpret constitutional . . . provisions" requires courts to defer to an agency's beliefs on what the Constitution means. So why do matters suddenly become different when an agency purports to "determine the meaning" of one of its rules?

To be sure, some APA provisions require courts to defer to some forms of agency decisionmaking, but those provisions do so in unmistakable language. See, *e.g.*, 5 U.S.C. § 706(2)(E) (authorizing courts to set aside agency factfinding only when "unsupported by substantial evidence"); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) (holding that section 706(2)(E) requires deferential judicial review of agency factfinding). In contrast to those provisions, the APA's straightforward instruction that courts "decide all relevant questions of law" and "determine the meaning . . . of an agency action" leaves the *Auer* doctrine in a precarious position. The APA tells the *courts* to "determine the meaning" of an agency's rules, but *Auer* tells the *agency* to "determine the meaning" of its rules so long as it stays within the boundaries of reasonableness.

The opinion in *Seminole Rock* said nothing about how its ostensible deference regime might be reconciled with the text of the APA, see 325 U.S. 410, but it had good reason for that omission: the APA had not been enacted yet. So the *Seminole Rock* Court can be forgiven for failing to explain how its deference concept can co-exist with section 706 of the APA. It is harder to justify the post-*Seminole Rock* decisions that reflexively followed this pre-APA decision without acknowledging the intervening

statute or attempting to explain how *Seminole Rock* could survive the APA.[7]

Nor can *Auer* be defended on the ground that *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), likewise ignored section 706 of the APA. This Court eventually supplied a rationale for *Chevron* that comports with the APA: Influenced heavily by Justice Breyer's scholarship,[8] the Court held in *United States* v. *Mead Corp.* that *Chevron* can apply only when Congress affirmatively intends to delegate interpretive or gap-filling authority to an agency. See 533 U.S. 218, 229–34 (2001). After *Mead*, a court that applies *Chevron* is not "deferring" to an agency's interpretation of a statute. Rather, it is interpreting the statute *de novo*, and asking whether Congress intended to authorize the agency to act within certain statutory boundaries. If the answer is "yes," the statute *means* that the agency gets to decide and that reviewing courts must respect the agency's decision. *Mead* enables *Chevron* to co-exist with

---

[7] See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16–17 (1965); *Thorpe* v. *Hous. Auth. of City of Durham*, 393 U.S. 268, 276 (1969).

[8] See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986); *id.* at 373 (criticizing notion that *Chevron* should apply to all agency interpretations of law as "seriously overbroad, counterproductive and sometimes senseless."); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006) (explaining how Justice Breyer's views influenced this Court's rulings in *Christensen*, *Mead* and *Barnhart* v. *Walton*, 535 U.S. 212 (2002)).

section 706 of the APA. No such rationale has ever been provided for *Auer*.

This leads to the fourth problem with *Auer* deference: It cannot be sustained in its current form after this Court's decisions in *Christensen*, *Mead*, and *Barnhart* v. *Walton*, 535 U.S. 212 (2002). In pre-*Mead* days, when the *Chevron* framework established a blanket presumption that agencies rather than courts would fill gaps and resolve ambiguities in statutory language, *Auer* deference could be defended as *Chevron*'s logical corollary. If an agency's interpretive rules or informal correspondence would receive *Chevron* deference when courts interpret federal statutes, it was reasonable to accord those documents equal weight when interpreting agency regulations—which, after all, have the same force and effect as a federal statute.

Auer became much harder to defend after *Mead*, which withholds *Chevron* deference from interpretive rules and other agency correspondence that never went through notice-and-comment rulemaking. For example, how can a document like the Ferg-Cadima letter receive nothing more than *Skidmore* deference when interpreting a statute,[9] but trigger much higher deference as soon as it purports to interpret an agency regulation? And if the Ferg-Cadima letter is entitled to *Chevron*-like deference when it purports to interpret 34 C.F.R. § 106.33, why doesn't that make it into a substantive rule that car-

---

[9] See *Mead*, 533 U.S. at 229–34; *Christensen*, 529 U.S. at 587.

ries the force of law and therefore must go through notice and comment? See 5 U.S.C. § 553.

In short, *Mead* established symmetry between the *Chevron–Skidmore* divide and the distinction between substantive and interpretive rules. "Interpretive rules" need not go through notice and comment because they lack the force of law, but for this reason cannot receive *Chevron* deference. To confer *Chevron* deference upon such interpretive rules would give them the force of law, thereby triggering section 553's notice-and-comment requirements. But *Auer* deference throws a wrench into this perfectly crafted arrangement, by allowing such things as the Ferg-Cadima letter to receive the force of law even though they never went through notice and comment. If nothing else, the Court should grant certiorari to align the *Auer*-deference regime with the post-*Mead Chevron* regime. That alone would require reversing the Fourth Circuit's decision.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE DISAGREEMENTS AMONG THE LOWER COURTS OVER WHEN THE *AUER*-DEFERENCE FRAMEWORK, IF IT SURVIVES, SHOULD BE APPLIED.

Assuming *Auer* survives, this case also presents an opportunity for the Court to resolve serious disagreements among the lower courts on the proper application of *Auer* deference. As explained below, there currently exists a serious circuit conflict on the question whether *Auer* deference can apply at all to informal agency pronouncements. There is also deep disagreement among

the circuits about whether *Auer* deference can apply to agency positions that—like the Ferg-Cadima letter—are developed in the context of the very dispute in which deference is sought. And the Texas district court's recent decision to enjoin the Department's efforts to impose its interpretation on schools throughout the Nation both exacerbates the conflict and illustrates the urgent need for this Court to resolve the questions presented here.

A. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Conflicts With Rulings From The First, Seventh, And Eleventh Circuits.

As noted, the Ferg-Cadima letter did not go through notice and comment, and it is about as informal an agency document as one can imagine. The letter was not publicized; there is no evidence it was approved by the head of an agency; and it was signed only by a relatively low-level federal functionary, an Acting Deputy Assistant Secretary for Policy. The Fourth Circuit did not think any of this mattered; it was enough that the Department was willing to stand by the letter in the federal amicus brief. App. 16a–17a. But a letter such as this would not have received *Auer* deference in the First, Seventh or Eleventh Circuits.

For example, the First Circuit's ruling in *United States* v. *Lachman*, 387 F.3d 42, 54 (1st Cir. 2004), refused to extend *Auer* deference to non-public or informal agency interpretations—and it linked *Auer* deference to the same formality requirements that trigger *Chevron* deference under *Mead*:

> [A]gency interpretations are only relevant if they are reflected in public documents. . . . [U]nder *Chevron,* the Supreme Court has made clear that informal agency interpretations of statutes, even if public, are not entitled to deference. See generally *United States v. Mead Corp.,* 533 U.S. 218 (2001). While this is not a situation involving the interpretation of a statute, *the same requirements of public accessibility and formality are applicable in the context of agency interpretations of regulations.* . . . The non-public or informal understandings of agency officials concerning the meaning of a regulation are thus not relevant.

387 F.3d at 54 (emphasis added).

The Seventh Circuit has likewise held that it will not extend *Auer* deference to informal agency pronouncements such as the Ferg-Cadima letter. In *Keys* v. *Barnhart*, 347 F.3d 990 (7th Cir. 2003), that court explained that *Christensen* and *Mead* have curtailed the scope of *Auer* deference, limiting it to agency pronouncements that carry the "force of law" and that would qualify for deference under *Chevron* if they were purporting to interpret statutes:

> *Auer* . . . gave full *Chevron* deference to an agency's amicus curiae brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforce-

> ment guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." . . . Briefs certainly don't have "the force of law." . . .
>
> Probably there is little left of *Auer*. The theory of *Chevron* is that Congress delegates to agencies the power to make law to fill gaps in statutes. See, *e.g.*, *United States* v. *Mead Corp.*, *supra*, 533 U.S. at 226–27. . . . It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

347 F.3d at 993–94 (Posner, J.). And in *U.S. Freightways Corp.* v. *Commissioner*, 270 F.3d 1137 (7th Cir. 2001), the Seventh Circuit applied *Skidmore* rather than *Auer* to the IRS Commissioner's interpretation of his regulations, because "the interpretive methodologies he has used have been informal." *Id.* at 1141–42.

Likewise, the Eleventh Circuit's decision in *Arriaga* v. *Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002), applied *Skidmore* rather than *Auer* to agency opinion letters that purport to interpret the agency's regulations.

Against the First, Seventh, and Eleventh Circuits stand the Fourth Circuit as well as other courts of appeals that have found the lack of procedural formality

irrelevant to whether the *Auer*-deference framework should apply—even after this Court's decisions in *Christensen* and *Mead*. See, *e.g.*, *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 207–08 (2nd Cir. 2009) (holding that "agency interpretations that lack the force of law," while not warranting deference when interpreting ambiguous statutes, "do normally warrant deference when they interpret ambiguous *regulations*"); *Encarnacion ex. rel George* v. *Astrue*, 568 F.3d 72, 78 (2nd Cir. 2009) (holding agency's interpretation is entitled to *Auer* deference "regardless of the formality of the procedures used to formulate it") (quotation omitted); *Bassiri* v. *Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (granting *Auer* deference to agency interpretation "even if [adopted] through an informal process" that "is not reached through the normal notice-and-comment procedure" and that "does not have the force of law"); *Smith* v. *Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006) (affording *Seminole Rock* deference "even when [the agency's interpretation] is offered in informal rulings such as in a litigating document").

It appears the circuits are currently divided 4-3 on whether an agency's regulatory interpretation produced through informal processes can qualify for *Auer* deference after *Christensen* and *Mead*. The Fourth Circuit's decision here directly implicates this circuit split, and it is ripe for this Court's review.

B. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Is In Substantial Tension With Decisions In The Ninth And Federal Circuits.

Another relevant feature of the Ferg-Cadima letter is that it was issued solely in response to G.G.'s dispute with the Board. Days after the Board passed its resolution of December 9, 2014, a transgender activist e-mailed the Department and solicited the letter, specifically with respect to the Board's policy. App. 118a–120a. But this fact was of no moment to the Fourth Circuit, which held that *Auer* deference should apply even if the agency had never before expressed these views apart from G.G.'s dispute with Board. App. 17a. The Fourth Circuit had company in reaching this conclusion: At least four other courts of appeals agree that *Auer* deference should apply even when the agency adopts its interpretation solely in the context of the dispute before the court.[10]

---

[10] *Intracomm, Inc.* v. *Bajaj,* 492 F.3d 285, 293 & n.6 (4th Cir. 2007) (deferring to Secretary's interpretation advanced in case under review); *Woudenberg* v. *U.S. Dep't of Agric.*, 794 F.3d 595, 599, 601 (6th Cir. 2015) (deferring to agency ruling in the case under review); *Bible ex rel. Proposed Class* v. *United Student Aid Funds, Inc.,* 799 F.3d 633, 639, 651 (7th Cir. 2015) (deferring to agency's interpretation advanced in amicus briefs), *cert. denied*, 136 S. Ct. 1607 (2016); *Biodiversity Conservation All.* v. *Jiron*, 762 F.3d 1036, 1062–68 (10th Cir. 2014) (deferring to agency interpretation advanced during administrative appeal); *Polycarpe* v. *E&S Landscaping Serv. Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010) (deferring to agency interpretation advanced in amicus brief).

But opinions from the Ninth Circuit and the Federal Circuit have refused to extend *Auer* deference in similar situations. In *Vietnam Veterans of America* v. *CIA*, 811 F.3d 1068 (9th Cir. 2015), the Ninth Circuit refused to apply *Auer* deference to an interpretation of agency rules that was "'developed . . . only in the context of this litigation.'" *Id.* at 1078. And in *Massachusetts Mutual Life Insurance Co.* v. *United States*, 782 F.3d 1354 (Fed. Cir. 2015), the Federal Circuit refused to apply the *Auer* framework to an IRS interpretation that was "advanced for the first time in litigation." *Id.* at 1369–70. So the Fourth Circuit's ruling implicates yet another division among the courts of appeals, and the Court should grant certiorari to resolve it.[11]

C. The Nationwide Federal Injunction Decision From Texas Also Conflicts With The Fourth Circuit's Approach.

The lower courts are also divided over whether *Auer* deference should extend to the specific agency interpretations at issue in this case. Eight days ago, on August 21, 2016, a federal district court in Texas refused to ex-

---

[11] To be sure, the Fourth Circuit's decision to invoke *Auer* deference in the circumstances presented here was also wrong for a host of other reasons, see Application for Stay, No. 16A52, at 18–29, including this Court's reminder in *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), that *Auer* deference is inappropriate where that pronouncement "cannot be considered an interpretation of the regulation" as opposed to the underlying statute. *Id.* at 247. As discussed, the Ferg-Cadima letter offered an interpretation of Title IX itself, and not merely the regulation. See *supra* at 11.

tend *Auer* deference to the Department's bathroom, locker room and shower edicts, finding that 34 C.F.R. § 106.33 unambiguously allows Title IX recipients to establish separate facilities on the basis of biological sex. See *Texas* v. *United States of America*, Case No. 7:16-cv-00054, ECF No. 58; Pet. App. 183a–229a. That decision is significant here for two distinct reasons.

First, as a practical matter, it exacerbates the existing conflicts and disagreements over the proper application of *Auer* deference and Title IX to transgender individuals. Indeed, given that decision, and based on competing views of *Auer,* schools in one section of the Nation—states within the Fourth Circuit—are now bound by the Department's view of Title IX, while at the same time the Department is currently prohibited from even attempting to impose that same view on schools in the rest of the Nation.

Second, the Texas decision highlights the urgent, nationwide importance of the issues presented in this petition. Every recipient of Title IX funds throughout the Nation—ranging from universities to elementary schools—is now being substantially affected by the disagreement among the lower courts about the proper application of *Auer* deference. That is an additional reason for this court's review, especially given the deep disagreements that already exist over whether *Auer* deference should extend to agency documents such as the Ferg-Cadima letter.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEPARTMENT'S INTERPRETATION OF TITLE IX AND 34 C.F.R. § 106.33 IS BINDING.

Finally, granting this petition will give the Court an excellent opportunity to determine whether the Department's specific interpretation of Title IX is binding. In fact, that interpretation is flatly wrong and therefore, under any reasonable view of *Auer*, is not legally binding on anyone.

1. Nothing in Title IX's text or structure supports the foundational premise of the Ferg-Cadima letter—namely, that the proscription of discrimination "on the basis of sex . . . includ[es] gender identity." App. 121a. The term "gender identity" is nowhere in Title IX. Congress knows how to legislate protection against gender identity discrimination: it has done so elsewhere, but not in Title IX.[12] Conversely, numerous bills have attempted to introduce the concept of gender identity into federal laws, but failed.[13] The interpretive alchemy of deeming

---

[12] See, *e.g.*, 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination based on "sex, gender identity …, sexual orientation, or disability"); 42 U.S.C. § 3796gg (assisting victims "whose ability to access traditional services and responses is affected by their … gender identity").

[13] See, *e.g.*, H.R. 2015 (110th Cong. 2007); H.R. 3017 (111th Cong. 2009); S. 1584 (111th Cong. 2009); H.R. 1397 (112th Cong. 2011); S. 811 (112th Cong. 2011); H.R. 1755 (113th Cong. 2013); S. 815 (113th Cong. 2013) (unenacted versions of Employment Non-

(continued…)

"sex" to include "gender identity" would revise those legislative defeats into victories. That is not how statutory interpretation works. See, *e.g.*, *Hively* v. *Ivy Tech Cmty. Coll.*, __ F.3d __, 2016 U.S. App. LEXIS 13746, at *7 & n.2 (7th Cir. July 28, 2016) (noting, "despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation").

To the contrary, when federal law deploys the term "sex" in anti-discrimination statutes, it prohibits discrimination based on "nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston* v. *Univ. of Pittsburgh*, 97 F.Supp.3d 657, 676 (W.D. Pa. 2015) (citing *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007). As Judge Niemeyer's dissent explained, during the period when Title IX was enacted and its regulations promulgated, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions." App. 54a (collecting definitions). In other words, the prohibition on "sex" discrimination in laws like Title IX and Title VII "do[es] not outlaw discrimination against . . . a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be a male."

Discrimination Act, which would have prohibited gender identity discrimination).

Ulane v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

2. Moreover, reading "sex" to include "gender identity" would make a hash of Title IX's scheme allowing facilities and programs to be separated by "sex."[14] If "sex" signifies, not biology, but rather one's "internal" sense of maleness or femaleness, the whole concept of permissible sex-separation collapses. What sense could there be in allowing "separate living facilities for the different sexes," 20 U.S.C. § 1686, if a biological male could legally qualify as a woman based merely on his *subjective* perception of being one? The answer is none. *Cf. United States* v. *Virginia*, 518 U.S. 515, 550 n. 19 (1996) (admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

3. Nor is the Ferg-Cadima interpretation supported by the theory of sex-stereotyping discrimination in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). *Cf.* App. 122a n.2 (relying on *Price Waterhouse*). A *Price Waterhouse* claim is "based on behaviors, mannerisms, and appearances," such as when a male employee is fired because he "wear[s] jewelry . . . considered too effeminate,

---

[14] See, *e.g.*, 20 U.S.C. § 1686 (allowing "separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing "separate housing on the basis of sex," provided facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact").

carr[ies] a serving tray too gracefully, or tak[es] too active a role in child rearing." *Johnston*, 97 F.Supp.3d at 680 (internal quotations and citation omitted). But *Price Waterhouse* does not require "employers to allow biological males to use women's restrooms," because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. If anything, the Board's policy is the *opposite* of sex stereotyping: it designates male and female restrooms based solely on biology, regardless of whether a man or a woman satisfies some stereotypical notion of masculinity or femininity. See, *e.g.*, *Johnston*, 97 F.Supp.3d at 680–81 (rejecting sex stereotyping claim on this basis).

4. Furthermore, an interpretation of Title IX according to the Ferg-Cadima view would render the statute unconstitutional, and must be avoided for that reason alone. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 190 (1991) (describing constitutional avoidance canon). For instance, it would cause Title IX to violate the Spending Clause by failing to give "clear notice" of conditions attached to federal funding.[15] No funding recipient could have had "clear notice" of the novel interpretation of Title IX in

---

[15] *Arlington Cent. Sch. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297 (2006) (clear notice absent where text "does not even hint" fees due to prevailing party); *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2606 (2012) (Congress's spending clause power "does not include surprising participating States with post-acceptance or retroactive conditions" (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 25 (1981)).

this case. Indeed, the *G.G.* majority confirmed as much by finding the Title IX regulation was ambiguous as applied to transgender individuals. App. 18a. *Cf. Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985) (no "clear notice" violation where there was "no ambiguity with respect to" funding condition).

5. Finally, taking the Ferg-Cadima letter's construction of "sex" seriously would turn Title IX against itself. As the district court pointed out, the relevant regulation would bar the Board's policy only if "sex" means *solely* "gender identity" and excludes any notion of "biological sex." App. 99a–102a. As applied to Title IX, that preposterous construction would legalize just the kind of biologically based discrimination against men and women that Title IX was enacted to prevent. For instance, schools could exclude biological women from taking science classes or joining the chess team, so long as they allowed biological men who identify as females to do so. Only transgendered people would be protected under this Title IX regime; men and women who identify with their biological sex would receive no protection at all.

Indeed, if "sex" means *only* "gender identity," the Board's policy would not implicate Title IX *at all* because it addresses only "biological sex" and *excludes* consideration of gender identity. But that is absurd: everyone agrees that the Title IX regulation squarely addresses—and expressly allows—sex-separated restrooms, exactly like the ones provided by the Board's policy.

CONCLUSION

Some regard transgender restroom access as one of the great civil-rights issues of our time. But that makes it all the more important to insist that federal officials follow the procedures for lawmaking prescribed in the Constitution and the Administrative Procedure Act. To condone the agency behavior displayed in this case is to condone future use of these maneuvers by other agency officials, and in support of other causes—without any way of ensuring that the Executive Branch will always be controlled by people who share one's most deeply held beliefs.

At bottom, then, this case is not really about whether G.G. should be allowed to access the boys' restrooms, nor even primarily about whether Title IX can be interpreted to require recipients to allow transgender students into the restrooms and locker rooms that accord with their gender identity. Fundamentally, this case is about whether an agency employee can impose that policy in a piece of private correspondence. If the Court looks the other way, then the agency officials in this case—and in a host of others to come—will have become a law unto themselves.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JONATHAN F. MITCHELL
D. JOHN SAUER
JAMES OTIS LAW GROUP, LLC
12977 North Forty Drive
Suite 214
St. Louis, MO 63141
(314) 682-6067

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
(804) 747-5200

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW,
Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

August 29, 2016

Kyle Duncan

From:	Kyle Duncan
Sent:	Wednesday, November 1, 2017 2:05 PM
To:	Dickey, Jennifer (OLP); Kingo, Lola A. (OLP)
Subject:	Additional Scotus Brief
Attachments:	Evol Intell Cert Pet.pdf

Hi Jenn and Lola,

We filed the attached cert petition on Oct 23. I'm not lead counsel, but my name is listed as counsel for the petitioner.

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

No. 17-

In the Supreme Court of the United States

EVOLUTIONARY INTELLIGENCE LLC, PETITIONER,

v.

SPRINT NEXTEL CORPORATION, SPRINT COMMUNICATIONS COMPANY, L.P., SPRINT SPECTRUM L.P., SPRINT SOLUTIONS, INC., APPLE INC., FACEBOOK INC., FOURSQUARE LABS, INC., GROUPON, INC., LIVINGSOCIAL, INC., MILLENNIAL MEDIA, INC., TWITTER, INC., YELP, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

MEREDITH M. ADDY
TABET DIVITO & ROTHSTEIN LLC
209 S. LASALLE STREET
SUITE 700
CHICAGO, IL 60604

GENE C. SCHAERR
Counsel of Record
S. KYLE DUNCAN
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

QUESTIONS PRESENTED

In *Alice Corp. Pty. Ltd.* v. *CLS Bank Int'l*, 134 S. Ct. 2347 (2014), this Court sought to clarify the proper approach to issues of "abstractness" under Section 101 of the Patent Act, while emphasizing the need to "tread carefully in construing this exclusionary principle lest it swallow all of patent law." *Id.* at 2354. Unfortunately, many district courts — including in this case — have interpreted *Alice* as authorizing invalidation of issued patents on abstractness grounds based solely on the pleadings, even where the invalidation rests on resolution of a disputed issue of fact or of claim construction or scope. Although this overreading of *Alice* has been widely criticized by patent commentators, it has often been abetted, as here, by the Federal Circuit.

The questions presented are:

1. Whether *Alice* authorizes a district court to invalidate a patent solely on the pleadings based on an abstractness argument that depends upon one view of a disputed question of fact — notwithstanding the presumption of patent validity in Section 282 of the Act and settled procedural and Seventh Amendment safeguards that ordinarily prevent the resolution of such questions on the pleadings.

2. Whether *Alice* and its predecessors authorize a court to invalidate a patent on the pleadings based on one view of a disputed question of claim construction or scope — including (in *Alice*'s words) what the claims "are directed to" — notwithstanding the presumption of patent validity and the general principle that, on a motion to dismiss, any legal instrument must be construed in the light most favorable to the non-moving party.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Evolutionary Intelligence LLC was the plaintiff-appellant in the United States Court of Appeals for the Federal Circuit, in In Nos. 2016-1188, -1190, -1191, -1192, -1194, -1195, -1197, -1198, and -1199.

Respondents Sprint Nextel Corporation, Sprint Communications Company, L.P., Sprint Spectrum L.P., Sprint Solutions, Inc., Apple Inc., Facebook Inc., Foursquare Labs, Inc., Groupon, Inc., LivingSocial, Inc., Millennial Media, Inc., Twitter, Inc., and Yelp, Inc. were the defendants-appellees in that court.

Evolutionary Intelligence LLC's parent company is Incandescent, Inc. No publicly held company owns 10% or more of Evolutionary Intelligence LLC's stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

As this Court explained in *Alice Corp. Pty. Ltd.* v. *CLS Bank Int'l*, 134 S. Ct. 2347 (2014), Section 101 of the Patent Act makes eligible for patenting those inventions that are "new and *useful*," but not those that merely seek a monopoly on, for example, an "abstract idea." *Id.* at 2354. In so holding, however, the Court emphasized the need to "tread carefully in construing this exclusionary principle" the abstractness exclusion "lest it swallow all of patent law." *Id*. Quoting its prior decision in *Mayo Collaborative Servs.* v. *Prometheus Labs., Inc.,* 566 U.S. 66 (2012), the Court observed that, "[a]t some level, 'all inventions … embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.'" *Id.* (quoting *Mayo,* 566 U.S. at 71) (emphasis added). Hence even if an invention is built on an abstract idea, "'application[s]' of such concepts '*to a new and useful end*' … remain eligible for patent protection." *Id.* (emphasis added) (quoting *Gottschalk* v. *Benson*, 409 U.S. 63, 67 (1972)).

In keeping with this caution, and with the presumption of patent validity embodied in 35 U.S.C. 282, this Court has never sanctioned the resolution of a disputed "abstractness" challenge based solely on the pleadings. Nevertheless, *Alice* and *Mayo* have led inadvertently to an ongoing avalanche of district court decisions that do just that decisions that have been affirmed in scores of Federal Circuit cases.

These "pleading invalidations" have resulted in the cancellation of hundreds of valuable patents each one a vested private property right with no opportunity for fact-finding, claim-construction briefing, or any of the other protections usually afforded in litigation on issued patents. As former Chief Judge Michel

has recently pointed out in congressional testimony, this misunderstanding of *Mayo* and *Alice* has placed virtually every inventor and patent holder at risk, while dramatically reducing the incentives and capital for innovation. And the Federal Circuit has done nothing to clear up the district courts' confusion, but instead has affirmed pleading invalidations more than 90 percent of the time since *Alice*.

This case gives the Court a much-needed opportunity to bring clarity to this important area of the law an area that, as Judge Michel has emphasized, remains central to the Nation's economic growth and international competitiveness. Specifically, if the Court doesn't fully resolve the Seventh Amendment issue presented in the pending *Oil States* case (No. 16-712), this case gives the Court an opportunity to establish that ordinary legal principles governing fact-finding adjudications including the Seventh Amendment also govern "abstractness" determinations in patent litigation. This case also gives the Court an opportunity to clarify the type of analysis of patent claims that should be undertaken to determine what those claims, in *Alice*'s formulation, are "directed to." The Court's resolution of both issues will also bring needed clarity to the proper interplay between Section 101's eligibility requirements and Section 282's presumption of validity.

OPINIONS BELOW

The order denying rehearing and rehearing *en banc*, App.6a-7a, is unreported. The opinion affirming the judgment of the U.S. District Court for the Northern District of California is reported at 677 Fed. Appx. 679 (Fed. Cir. Feb. 17, 2017). App. 1a-5a. The district court's opinion and order dismissing the petitioner's

complaint on the pleadings is reported at 137 F. Supp. 3d 1157 (N.D. Cal. Oct. 6, 2015). App. 10a-42a

JURISDICTION

The court of appeals entered its order denying rehearing on May 24, 2017. An application to extend the time to file a petition for a writ of certiorari was granted on August 16, 2017. An application for a further extension of time was granted on September 15, 2017, making the petition due on or before Saturday, October 21, 2017, and extended to Monday, October 23 under the weekend rule. S. Ct. R. 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 101 of the Patent Act, 35 U.S.C. 101, provides that:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

Section 282(a) of the Act, 35 U.S.C. 282(a), further provides:

> "A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof

> shall rest on the party asserting such invalidity."

The Seventh Amendment provides that:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

This is one of many recent cases in which district courts with the Federal Circuit's blessing have invalidated patents on abstractness grounds *on the pleadings*. They have done this without the usual hearings to determine the scope or meaning of the challenged patent claims, and without fact-finding or other rigorous analysis to determine whether the invention claims an abstract idea, or if so, as *Alice* put it, properly "appl[ies]" such an idea "to a new and useful end." *Alice*, 134 S. Ct. at 2354 (citation omitted).

1. Petitioner Evolutionary Intelligence LLC ("Evolutionary") applied for patents for its location and search technologies at issue here in 1998, with patents issued in 2006 and 2010.[1] App. 19a. On their face and

[1] The patents in dispute are U.S. Patent Nos. 7,010,536 ("the '536 patent") and 7,702,682 ("the '682 patent"). Both patents are entitled "System and Method for Creating and Manipulating Information Containers with Dynamic Registers." The '682 patent, which issued on April 20, 2010, is a continuation of the '536 patent, which issued on March 7, 2006. Both patented technologies were invented by Michael De Angelo, are owned by Evolutionary, which he effectively manages, and are the subject of continued

especially when read in light of the statutory presumption of validity the innovation described in Evolutionary's patents is not an "abstract idea." And even if it were, those patents go well beyond that by explaining *how* to implement a new invention crucial to today's smartphones.

Evolutionary's patents claim a groundbreaking technology that today benefits billions of users a specific method for using information about a user's precise location and other rapidly-changing information in the outside world to improve search results. App. 30a. The invention is an advanced method of storing the results of *past* internet searches in a digital location called a "container." App. 46a. Those containers then consult with each other to optimize search results and to deliver pertinent notifications. App. 45a 60a.

For example, Evolutionary's invention makes it possible for someone stepping off an airplane in an unfamiliar city to learn about restaurant dinner offers announced only minutes ago within a one-mile radius. These offers may have been encoded into the uniquely identified electronic "container" of a restaurant, zip code, or neighborhood. One container might contain, for example, a list of all businesses within a one-mile radius. A second container might contain a list of all restaurants in the county, and a third container might include a list of all restaurants with dinner offers in a particular time period for that evening.

---

efforts at commercialization. The patents claim priority to a provisional application dating to January 30, 1998 (No. 60/073,209). The '536 patent is available at http://bit.ly/Evol536Patent, and the '682 Patent is available at http://bit.ly/Evol682Patent.

Unlike prior art, the patent's innovations permit the three containers to consult with each other electronically so as to govern search results or notifications to meet all three of the search criteria that is, "within one mile," "restaurants," and "dinner offers," according to present times and locations of users.

Also unlike prior art, the technology then prioritizes the search results based on an indicator of relevance, such as proximity or consumer ratings. For example, to prioritize results by consumer rating (i.e. place the highest rated restaurants at the top of the search results), there might be another container including a list of the highest rated restaurants in the area. Thus, the first three containers would interact with each other to narrow the search results, then interact with additional containers to prioritize the results by their relevance.

This process allows search engines through dynamic updating to make more meaningful use of information external to the computer performing the search. Indeed, absent the invention the user could only search one list at a time for example, the list of highest rated restaurants in the city, or a list of restaurants that have had dinner offers previously. Without additional searches, the user could not easily get the additional list showing which *nearby* restaurants had discounts on that particular night.

Every day, billions of search results are now distributed in precisely this way. While commonplace now, the invention was far from simple: Evolutionary's two patents comprise in their common specification 45 pages of technical description, 31 flowcharts and diagrams, and detailed processes comprising over 700 citations to computer processes, hardware components,

and software elements. Given the importance and complexity of this patent, it is not surprising that it has been cited at the Patent and Trademark office when evaluating later patents assigned to respondent Apple,[2] Microsoft,[3] Hewlett-Packard,[4] IBM,[5] and others.

2. The present dispute arose when Evolutionary brought infringement suits against the respondents. Eventually the nine cases were consolidated, but not before respondents Apple, Facebook, Twitter, and Yelp had brought nine separate petitions for *inter partes* review against Evolutionary's patents before the Patent Trial and Appeal Board (PTAB). The PTAB outright rejected eight of the petitions, thereby upholding the patents' validity.[6] And in the only petition the PTAB elected to hear on the merits, the agency also upheld the patents' validity as against an "anticipation" challenge based on prior art. App. 44a 45a.

In so holding, the PTAB concluded that, contrary to respondents' assertions, the claimed "containers" were not generic. Instead, unique specifications about each container and the way it interacted with other containers and electronic "registers" were crucial to making the invention function. App. 45a 57a.

---

[2] U.S. Patent No. 8,667,023, at [56] (filed Aug. 20, 2012).

[3] U.S. Patent No. 7,516,455, at [56] (filed Sep. 5, 2003).

[4] U.S. Patent No. 8,266,272 at [56] (filed Nov. 7, 2005).

[5] U.S. Patent No. 7,383,347 at [56] (filed Jul. 18, 2001).

[6] See, *e.g., Apple* v. *Evolutionary Intelligence*, No. 2014-00080 at 2 (PTAB April 25, 2014) ("[W]e conclude that Petitioner has not established a reasonable likelihood that it would prevail with respect to claims 1-23 of the '682 patent.").

In sustaining the patents' validity, the PTAB also expressed its view of what the invention is "directed to" an issue known as "step one" of the framework established in *Alice*. The PTAB found that the patent's claims are "directed to developing intelligence in a computer or digital network by creating and manipulating information containers with dynamic interactive registers in a computer network." App. 45a (emphasis added).

3. Shortly after the patents survived these nine attacks in the PTAB, the district court nevertheless invalidated Evolutionary's patents under Section 101 and did so on the pleadings. In so doing, the court simply accepted *respondents'* characterization of the patents including what the invention is "directed to" rather than addressing disputed issues of fact and of claim construction or scope in the light most favorable to the non-moving party, i.e., Evolutionary.

Purporting to apply "*Alice* step one," the district court implicitly rejected the PTAB's characterization of the invention. Instead it adopted a broad view of what Evolutionary's claims are "directed to" that is, merely "searching and processing containerized data." App. 30a. Then, apparently applying "*Alice* step two," the district court held, necessarily as a factual matter, that the invention merely computerizes "age-old forms of information processing," such as those used in "libraries, businesses, and other human enterprises with folders, books, time-cards, ledgers, and so on." App. 30a. The district court similarly found, also as a factual matter, that the claimed invention is no more inventive than the practice of a "local barista or bartender who remembers a particular customer's favorite drink." App. 35a. And once again, the district

court failed to give Evolutionary the benefit of the doubt on any of these matters.

4. The Federal Circuit affirmed. As to *Alice* step one, the Federal Circuit (in a short "non-precedential" opinion) adopted a third and even broader view of what the patent's claims are "directed to" specifically, the general activity of "selecting and sorting information by user interest or subject matter." Not surprisingly, the court then held that this too was nothing more than an abstract idea. App. 4a. But in so holding, the court ignored the more specific aspects of the patent claims recognized by the PTAB in its narrower articulation of what the claims are "directed to" that is, the purpose of "*developing* intelligence *in a computer or digital network*," and achieving that purpose by "*creating and manipulating information containers with dynamic interactive registers*." App. 45a (emphasis added).

As to *Alice* step two, the Federal Circuit held that the claims "lack an inventive concept to transform the abstract idea" as broadened by the court "into a patent-eligible invention." App. 5a. With no analysis of the claims, the specification, or even the prior art, the court based that holding on its own conclusory factual determination that, "[w]hether analyzed individually or as an ordered combination, the claims recite … conventional elements at too high a level of generality to constitute an inventive concept." App. 5a.

Neither of the Federal Circuit's holdings acknowledged, much less analyzed the impact of, Section 282's presumption of patent validity, even though that point was repeatedly pressed below.

The court of appeals then denied panel rehearing and rehearing *en banc*. App. 6a 7a.

REASONS FOR GRANTING THE PETITION

In the aftermath of *Alice*, district courts with the Federal Circuit's approval are routinely committing two basic errors in using "pleading invalidations" to extinguish patent owners' property rights on abstractness grounds. First, as this case illustrates, courts are relying on their *own* views of disputed factual issues, in violation of the ordinary rules governing fact-finding. Second, as this case also illustrates, courts are using arbitrary and overly broad characterizations of what the claims are "directed to," so as to make them *seem* abstract. These "pleading invalidations" have resulted in the wrongful extinguishing of hundreds of valuable patents along with their associated property rights. And, as Judge Michel has recently noted, this has substantially reduced the incentives and capital for innovation throughout the Nation.

I. If it does not resolve the issue in *Oil States*, the Court should grant review to decide whether any tribunal may invalidate a patent based on an argument that depends on one view of a disputed question of fact.

Despite being decided on motions for summary judgment, *Alice* and *Mayo* have been misinterpreted to allow determinations of disputed facts by judges based on the pleadings. As a result, judges now routinely resolve disputed factual issues bearing on patent validity by "looking beyond the allegations in the complaint" and making "historical observations about alleged longstanding commercial practices and deciding whether the claimed invention is analogous to such

practices."[7] As with Congress's decision to lodge fact-finding authority in the PTAB (an issue before this Court in *Oil States*), this shift away from traditional fact-finding processes deprives patentees of their rights under the Federal Rules of Civil Procedure (and the Seventh Amendment) to have factual disputes settled by a jury, and of the statutory presumption of validity. That widespread misinterpretation of this Court's decisions warrants the Court's immediate review.

A. In the wake of *Alice*, many district judges with the Federal Circuit's blessing improperly invalidate patents on eligibility grounds based on their own views of disputed factual issues.

As noted, *Alice* mandates a two-step analysis for distinguishing "useful" inventions from abstract ideas. *Alice*, 134 S. Ct. at 2356 2357. Step one asks whether the invention contains (or is based upon) an abstract idea. *Id.* at 2355. If it does, step two determines whether the patent claims contain an "'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application" that is, something that is "useful" within the meaning of Section 101. *Id.* at 2357 (quoting *Mayo*, 566 U.S. at 78). Unfortunately, many district judges with the blessing of the Federal Circuit are resolving disputed questions of fact bearing on both steps of the *Alice* inquiry, and are doing so at the pleading stage.

---

[7] David Boher, *In a Rush to Invalidate Patents at Pleadings Stage, Are Courts Coloring Outside the Lines?*, Patentlyo (July 1, 2015), https://patentlyo.com/patent/2015/07/invalidatepleadings-coloring.html.

1. Both steps of the *Alice* analysis frequently involve disputed factual issues. Indeed, the ultimate question of "usefulness" the underlying issue in all abstractness disputes is a quintessential issue of fact. See *Ultramercial, Inc.* v. *Hulu, LLC*, 722 F.3d 1335, 1339 (Fed. Cir. 2013) ("[T]he analysis under 101, while ultimately a legal determination, is rife with underlying factual issues"), *vacated for consideration in light of* Alice *sub nom. Wildtangent, Inc.* v. *Ultramercial, LLC*, 134 S. Ct. 2870 (2014). This is true whether the overarching issue turns on *Alice* step one whether a claimed invention is based on an abstract idea or step two whether the claimed invention provides a new and useful application of that idea.

Unfortunately, many district judges with the Federal Circuit's active acquiescence routinely resolve these factual issues based on the pleadings alone thereby stripping disputed factual issues from juries and from the usual fact-finding processes specified in the Federal Rules.[8] Moreover, those decisions go far beyond the judicial role contemplated by *Alice* and *Mayo*, where the lower court decisions were reached on summary judgment. *Alice*, 134 S. Ct. at 2253; *Mayo*, 566 U.S. at 76. Yet, since *Alice*, more than half of all motions for dismissal on the pleadings under

---

[8] See*, e.g.*, *Appistry, Inc.* v. *Amazon.com, Inc.*, No. C15-311, 2015 U.S. Dist. LEXIS 90004, at *7 (W.D. Wash. July 9, 2015) (granting judgment on the pleadings based on analogy at pleadings stage between computer farming and military processes); *TDE Petroleum Data Solutions, Inc.* v. *AKM Enterprise, Inc.*, No. H-15-1821, 2015 U.S. Dist. LEXIS 121123, at *21 (S.D. Tex. Sep. 11, 2015) (granting motion to dismiss based on factual determination of insufficient connection to a computer), *aff'd*, 657 F. App'x 991 (Fed. Cir. 2016).

Section 101 have succeeded. See Summary of Post-*Alice* Decisions by the Federal Circuit ("Summary"), App. 77a 90a.[9] This is a new phenomenon: Petitioner has been unable to find *any* district court decision in the two years prior to *Mayo* that granted such relief at the pleading stage.

3. Since *Alice*, moreover, the Federal Circuit has decided ninety-five Section 101 patent cases. See App. 95a (Summary). Eighty-eight of those (92.6 percent) held the patent not eligible. *Ibid.*[10] In fifty-five of those cases (64.0 percent), the district court had invalidated the patents on the pleadings alone. *Ibid.* And in fifty-one of those same cases, the Federal Circuit affirmed without an opinion. *Ibid.* Only seven decisions reversed district court opinions holding the underlying patents ineligible for patenting. *Ibid.*

As these statistics illustrate, since *Alice* the Federal Circuit has routinely affirmed often without opinion district court decisions that invalidate patents under Section 101 often on the pleadings alone. This disturbing shift towards a presumption of patent *invalidity* not only flouts Congress's decision to impose

---

[9] See Robert R. Sachs, *Alice Brings A Mix of Gifts for the Holidays*, Bilski Blog (Dec. 23, 2016), http://www.bilskiblog.com/blog/2016/12/alice-brings-a-mix-of-gifts-for-2016-holidays.html; Edward Tulin and Leslie Demers, *A Look At Post-Alice Rule 12 Motions Over The Last 2 Years*, Law360 (Jan. 27, 2017), https://www.law360.com/articles/882111/a-look-atpost-alice-rule-12-motions-over-the-last-2-years.

[10] One decision even reversed a district court finding of patent *eligibility*, *Smartflash* v. *Apple*, 621 Fed. Appx. 995 (Fed. Cir. 2015). In *Smartflash*, after a jury verdict that the patent was valid and infringed, the Federal Circuit reversed the district court's prior denial of judgment as a matter of law, and held the patent not eligible.

a presumption of validity, but it also threatens the American economy by reducing rewards for innovation. See *infra* Section III.

B. Where material facts are disputed, such "pleading invalidations" violate not only the Seventh Amendment, for reasons explained in *Oil States,* but also the Federal Rules of Civil Procedure and the presumption of validity.

Such "pleading invalidations" are improper whenever they require the resolution even implicit of disputed issues of fact. As explained at length in the briefing in *Oil States,* the Seventh Amendment preserves the right to trial by jury on factual questions of the sort that would have been tried to a jury before and during the founding era. And questions of "usefulness" the core of the whole abstractness inquiry[11] are among the factual questions that were resolved by juries in the founding era. Thus, contrary to the courts below, the issue of abstractness is properly a jury question. In any event, the Federal Rules of Civil Procedure and the presumption of patent validity compel the same result.

1. This Court has emphasized that the original "thrust of the [Seventh] Amendment was to preserve

---

[11] Although the Court has sometimes said that abstractness is an "exception" to the general rule in Section 101 that "useful" inventions are patentable, *e.g., Mayo,* 566 U.S. at 84–87; *Alice*, 134 S. Ct. at 2354, historically "abstractness" was simply one way that a purported invention could flunk the "usefulness" requirement. See, *e.g., Bilski* v. *Kappos*, 561 U.S. 593, 602 (2010); *Le Roy* v. *Tatham*, 55 U.S. (14 How.) 156, 185 (1853). So the inquiry into abstractness is, at bottom, a necessary part of the inquiry into "usefulness."

the right to jury trial as it existed in 1791[.]" *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974). And factual issues related to patent validity have been tried to juries under the common law since early in the 17th Century, including in cases involving patents' usefulness.[12] Several cases following the Seventh Amendment's ratification reaffirm that juries were routinely instructed on usefulness, and therefore that usefulness (and all subsidiary factual questions) was considered a jury issue.[13]

Because patent validity questions were tried to juries in 1791 as part of infringement cases, and the Seventh Amendment protects the right to a jury trial as it existed in 1791, it violates the Seventh Amendment to subject patentees to summary invalidation of their patents in the face of unresolved factual disputes.

---

[12] In the 1785 case *Rex* v. *Arkwright*, the prosecution claimed that the invention was of no use. I Decisions on the Law of Patents for Inventions 29, 39 (K.B. 1785) (Buller, J.) (charging jury). The King's Bench instructed the jury that one of the questions to be addressed was whether the invention was in fact useful. *Id.* (Buller, J.); see also *Hill* v. *Thompson*, I Decisions on the Law of Patents for Inventions 299, 301 (Ct. Chancery 1817) (charging jury).

[13] In 1817, Justice Story instructed a patent jury that the plaintiff must show that his invention is "a useful invention." *Lowell* v. *Lewis*, 15 F. Cas. 1018 (C.C. Mass. 1817) (Story, J., Circuit Justice) (charging jury); *see also Earle* v. *Sawyer*, 8 F. Cas. 254, 256 (C.C.D. Mass. 1825) (Story, J., Circuit Justice) (charging jury that an invention "must also be useful, that is, it must not be noxious or mischievous, but capable of being applied to good purposes"). Three years later, Justice Washington gave similar jury instructions on usefulness. *Kneass* v. *Schuylkill Bank*, 14 F. Cas. 746, 748 (C.C.D. Pa. 1820). (Washington, J., Circuit Justice) (charging jury).

Yet, as explained above, both the Federal Circuit and district courts regularly under-enforce patentees' rights to jury trials by making factual findings relevant to "abstractness" without juries. In patent cases, lower courts thus seem to have forgotten that the Seventh Amendment prohibits them from resolving disputed factual issues in those cases just as in any other circumstance. The technical complexity of patent cases is no excuse for resolving them in a way that violates the Constitution.

This issue whether disputed factual issues relevant to patent validity may be adjudicated without a jury is squarely presented in the pending *Oil States* case, and may well be resolved there. See, *e.g.*, Brief of Petitioner in No. 16-712, at 50 58; Brief of *Amicus Curiae* Evolutionary Intelligence at 14 17. If the Court holds in *Oil States* that the resolution of factual issues bearing on validity violates the Seventh Amendment, that ruling may effectively resolve the first question presented in this petition.

2. In any event, judicial resolution of such disputed factual questions also violates the Federal Rules of Civil Procedure. On Rule 56 summary judgment motions or even on Rule 12(c) motions to dismiss, all evidence or even allegations on a factual question must be viewed in the "light most favorable" to the nonmoving party. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Equally important, any material factual dispute must be resolved by a jury, not a judge whether or not the presence of a factual dispute is deemed to convert a motion to dismiss into a motion for summary judgment. *E.g.*, *Amgen Inc.* v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 480 (2013); *Anderson* v. *Liberty Lobby,* 477 U.S. 242, 247 48 (1986).

Here, the district court improperly resolved factual disputes against Evolutionary by comparing the claimed invention to "age-old forms of information processing." Pet. App. 3a. And the district court granted the motion to dismiss by determining necessarily as a *factual* matter that the patent's methodology was similar to other previous methods and thus not "useful" under the *Alice* framework. Pet. App. 30a, 33a 35a. The court thus relied on factual conclusions that resolved disputed issues that should have been resolved by a jury or, at a minimum, by summary judgment after discovery. The Federal Circuit then accepted the district court's factual assertions and based its affirmance on them. App. 3a.

3. Finally, resolving material factual disputes at the pleading stage also violates the presumption of validity. The Patent Act clearly states that "[a] patent shall be presumed valid." 35 U.S.C. 282(a). It also explains that, for a patent to be held invalid, "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." *Ibid.*

The implications for claims of abstractness like the one in this case are clear. Here the defendants had the burden of demonstrating invalidity. At the motion to dismiss stage, then, they had the burden of demonstrating that the patent was invalid even when resolving all disputed factual issues in favor of Evolutionary. But they did not make such a demonstration. As the plain text of the district court opinion shows, the court violated this presumption by resolving factual disputes in favor of respondents, rather than waiting for respondents to carry their burden. See *supra* 8 9.

The Federal Circuit appears to be split on whether to apply the presumption of validity to issues of abstractness. Some panels appear to have applied the presumption in abstractness cases at least before *Alice*. See, *e.g., MySpace* v. *Graphon Corp.*, 672 F.3d 1250, 1258 1259 (Fed. Cir. 2012); *Research Corp. Techs.* v. *Microsoft Corp.*, 627 F.3d 859, 870 (Fed. Cir. 2010). But in 2014 after *Alice* a concurrence by former Chief Judge Mayer opined that there is no presumption of validity in this context. *Ultramercial, Inc.* v. *Hulu, LLC*, 772 F.3d 709, 720 721 (Fed. Cir. 2014) (Mayer, J., concurring).

Judge Mayer reached that conclusion based, not on an analysis of the text of the Patent Act, but on his own policy views. He opined that, because the Patent Office applies an "insufficiently rigorous subject matter eligibility standard, no presumption of eligibility *should* attach when assessing whether claims meet the demands of section 101." *Id.* at 720 721 (emphasis added). And perhaps for that reason, many decisions under Section 101 including the one below appear to simply ignore the presumption of validity. This split among Federal Circuit judges is another reason to grant review.

For at least two reasons, moreover, the position articulated by Judge Mayer and apparently followed here is wrong and must be corrected. First, as Justice Kagan recently explained for the Court, "Congress gets to make policy, not the courts." *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 (2015). The Federal Circuit's routine disregard of the statute's text in favor of an unsupported stereotype about the Patent Office is therefore plainly incorrect.

Second, in any event, this Court has already held that the same policy considerations compel *adherence* to the presumption of validity. In *Microsoft Corp*. v. *i4i Ltd. P'ship*, this Court held that the presumption of validity must be respected *despite* any failings of the PTO. 564 U.S. 91, 109 110 (2011). Thus, Judge Mayer in *Ultramercial* and apparently many other judges and panels of the Federal Circuit have been ignoring this Court's reasoning when they assume that the ordinary presumption of validity does not apply to Section 101 "abstractness" determinations.

In summary on this point: in invalidating the patent on the pleadings based on their own views of the pertinent facts, the courts below failed to properly apply the Federal Rules of Civil Procedure and the statutory presumption of validity, and in so doing violated the Seventh Amendment. All three violations are present both here and in many other cases, making the need for review both substantial and urgent.

II. The Court should also grant review to decide whether a district court may invalidate a patent on the pleadings based on one view of a disputed question of claim construction or scope including what the claims are "directed to."

Just as they have done as to factual issues, many district courts including the one here have declared patents invalid at the pleading stage through ill-considered, one-sided rulings about the proper scope of the patent's claims. This practice violates recent decisions of this Court. It also violates not only the presumption of validity, but also the otherwise-standard rule that, at the pleading stage, disputes about the meaning of a legal document must be construed in the light most favorable to the non-moving party.

A. In the wake of *Alice*, many district courts with the Federal Circuit's blessing invalidate patents on the pleadings based on their own view of disputed issues of claim construction and/or scope.

As mentioned above, both *Alice* and *Mayo* were decided on summary judgment motions, and thus do not suggest that disputes regarding a claim's scope or construction should be resolved at the pleading stage. But this is precisely what lower courts are now doing. And the Federal Circuit has "repeatedly affirmed § 101 rejections at the motion to dismiss stage, before claim construction or significant discovery has commenced." *Cleveland Clinic Found.* v. *True Health Diagnostics*

LLC, 859 F.3d 1352, 1360 (Fed. Cir. 2017); *OIP Technologies, Inc.* v. *Amazon.com*, *Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015) (similar). [14]

In this case, for example, the district court rejected at the pleading stage petitioner's (and the PTAB's) narrow framing of what the patent claims are "directed to" for purposes of *Alice*'s step one. As noted, the PTAB correctly characterized those claims as "directed to developing intelligence in a computer or digital network by creating and manipulating information containers with dynamic interactive registers in a computer network." App. 46a. In contrast, without even acknowledging the PTAB's narrower framing and rejecting expert testimony on the point the district court simply asserted that the claims were "directed to" something broader, that is, "searching and processing containerized data." App. 39a, 26a 27a n.5. But this verbal gymnastic simply made the claimed invention *seem* abstract ensuring that it would fail *Alice* step one automatically.

Not content with the district court's arbitrary construction of the claims' scope, the Federal Circuit adopted an even broader view of what the patent's

---

[14] Having the luck to be before the Federal Circuit more than once on the same issue, the *Ultramercial* "pleadings dismissal" was decided by the Federal Circuit both before and after *Alice*. *Ultramercial*, 722 F.3d at 1339. Prior to *Alice*, the Federal Circuit reversed the district court's "pleading dismissal," but after a GVR in view of *Alice*, the Federal Circuit affirmed that same dismissal. *Ultramercial*, 772 F.3d at 709 (Fed. Cir. 2014). Although not justified by *Alice, Ultramercial* appears to have signaled to the district courts that pleading dismissals are now the preferred way to handle abstractness issues. And the Federal Circuit has done nothing since *Ultramercial* to allay that impression.

claims are "directed to" specifically, "selecting and sorting *information* by user interest or subject matter." App. 4a (emphasis added). This *ipse dixit* broadened the scope of the claims even beyond the computer context, to include the manipulation of "information" in any form. Not surprisingly, the result of this second verbal gymnastic was, once again, to make the claims seem hopelessly abstract and, hence, to be found abstract under *Alice* step one. App. 4a 5a.[15]

Petitioner's experience having its claims construed to be overly broad and then invalidated as abstract on the pleadings is far from unique. Rather, in the wake of *Alice,* the majority of district courts appear willing to decide claim such issues on the pleadings even when the parties dispute the characterization of the claims in a way that is pivotal to whether the claimed invention is found abstract.[16]

For its part, the Federal Circuit has routinely affirmed invalidations under Section 101 based solely on the pleadings, thereby conveying the clear impression

---

[15] The lower courts' progressively broadening view of what the claims here are "directed to" is also obviously contrary to the PTAB's view of what constituted the broadest reasonable construction of the pertinent claims. As this Court has noted, "[c]onstruing a patent claim [in the PTO] according to its broadest reasonable construction helps to protect the public." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2144 (2016). However, the decision below has now effectively held that for purposes of the *Alice* inquiry a district court may determine that the claims are "directed to" something even *broader* than the PTAB's broadest reasonable construction.

[16] Kevin J. McNamee, *A View from the Trenches: Section 101 Patent Eligibility Challenges in the Post-Bilski Trial Courts,* NYIPLA Bull., Dec. 2013/Jan. 2014, at 13–14, http://perma.cc/F4RX-U4HQ.

that no more formal claim construction or analysis is necessary in this context. And when as here that court has provided its own analysis of the issues, it has routinely found invalidity on the pleadings based on broad, unsupported characterizations of claim scope, which in turn form the basis for the desired findings of abstractness. See App. 77a 90a (Summary).

Surely this Court's choice of the phrase "what the claims are directed to" in *Alice* wasn't intended to give the lower courts an all-purpose weapon for simply invalidating any patent they choose. Yet in the Federal Circuit's hands, that is what that phrase has become.

B. Such actions improperly short-circuit the deliberative claim-construction process established in *Markman* and violate both the "light most favorable" dismissal standard and the presumption of validity.

At least three lines of authority demonstrate that the district court and the Federal Circuit were wrong to decide disputed issues of claim scope in a way that invalidated petitioner's patents as well as the host of other patents that have been or are now being invalidated on similar reasoning. First, two recent decisions by this Court *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.* 135 S. Ct. 831 (2015), and *Markman* v. *Westview Instruments, Inc.* 517 U.S. 370 (1996) suggest that the wording and context of a patent's claims must be taken seriously. Second, like other legal documents, at the dismissal stage patents must be read in the light most favorable to the non-moving party. Third, the statutory presumption of validity requires the same approach.

1. *Teva* and *Markman* both treated the construction of patent claims as a highly deliberative process.

Indeed, *Teva* corrected a Federal Circuit decision that disregarded a district court's efforts at sound deliberation. The district court there had taken expert testimony and made a specific determination concerning the breadth of a claim term, holding it was sufficiently narrow for the overall patent to be valid. *Teva*, 135 S. Ct. at 836. On appeal, the Federal Circuit disregarded that testimony, suggesting instead that the term was broader and that the patent was therefore invalid. *Id.* This Court reversed, explaining that the conclusions drawn by the district court based upon its greater familiarity with the facts and access to extrinsic evidence must be given deference.

Markman likewise illustrates the importance of careful deliberation in determining the meaning of patent claims. While concluding that judges must decide issues of claim construction, 517 U.S. at 390 391, *Markman* also anticipated that the construction process would be complicated, with the necessity of weighing dueling expert testimony and carefully construing complex terms. *Id.* at 389 390. Indeed, the term "*Markman* hearing" has come to mean a hearing that is sometimes as long as a jury trial, in which the court hears conflicting expert testimony over a host of different topics. See *Phillips* v. *AWH Corp.*, 415 F.3d 1303, 1332 (Fed. Cir. 2005) (en banc) (Mayer, J., dissenting).

Unlike in *Teva* and *Markman*, in conducting the analysis of claim scope required by *Alice,* district courts are now doing exactly what was condemned in those cases: ignoring deliberative processes such as expert testimony and careful, fair analysis of exactly what the claims are "directed to." Instead, district courts are now deciding that question based solely on the pleadings, without any opportunity for meaningful

analysis, including the presentation of expert testimony or other detailed analysis of claim terms.[17]

2. Pleading invalidations based on disputed issues of claim scope also violate the settled rule that, on a motion to dismiss, legal documents of all kinds must be construed in the light most favorable to the party opposing dismissal. Indeed, the circuit courts that have addressed this issue the First, Second, Fourth and Seventh Circuits unanimously hold that ambiguities in a written document must be construed in the light most favorable to the plaintiff at the motion to dismiss stage.[18] And state courts of last resort including the business-heavy Delaware Supreme Court apply the same standard under state law.[19]

Ironically, the Federal Circuit also applies that rule in patent cases, but only when construing affidavits

---

[17] Indeed, the PTAB decision below exemplifies the value in such a deliberative process. That decision examined carefully how various key parts of the patent operated, Pet. App. 46a–51a, reviewed expert declarations, Pet. App. 56a, and construed the claims, Pet. App. 56a–60a.

[18] See*, e.g.*, *Young* v. *Wells Fargo Bank, N.A.*, 717 F.3d 224, 235-36 (1st Cir. 2013); *Luitpold Pharm., Inc.* v. *Ed. Geistlich Söhne A.G. Für Chemische Industrie*, 784 F.3d 78, 86 (2d Cir. 2015); *Martin Marietta Corp.* v. *Int'l Telecomms. Satelite Org.*, 991 F.2d 94, 97 (4th Cir. 1992); *188 LLC* v. *Trinity Indus.*, 300 F.3d 730, 737 (7th Cir. 2002).

[19] *See*, *e.g.*, *VLIW Tech., L.L.C.* v. *Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) ("In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions."); *Dorman* v. *Petrol Aspen, Inc.*, 914 P.2d 909, 912 (Colo. 1996); but see *Datel Holdings Ltd.* v. *Microsoft Corp.*, 712 F. Supp. 2d 974, 990 (N.D. Cal. 2010) (relying on state law to read contract in light most favorable to the drafter).

and materials *other than* patents. *E.g.*, *Avocent Huntsville Corp*. v. *Aten Int'l Co*., 552 F.3d 1324, 1329 (Fed. Cir. 2008). But, as this case and many others illustrate, district courts and the Federal Circuit frequently defy that rule when construing patent claims, construing them against the patentee in Section 101 cases.[20] Given that the patent is usually the most important legal document in a patent case, this disparity makes no sense.

In this case, in addressing *Alice* step one, the district court and Federal Circuit both went out of their way to construe the patent claims, not in the light most favorable to validity, but in the light most *unfavorable* to validity. See Pet. App. 30a (district court); 4a (Federal Circuit). Indeed, the district court and the Federal Circuit opinions do not even mention whether they evaluated the claims in the light most favorable to validity. See generally Pet. App. 10a 42a (district court); 1a 5a (Federal Circuit). But they obviously had available a construction of claim scope more favorable to the patentee the one adopted by the PTAB.

The Federal Circuit's refusal to follow the "light most favorable" rule in this important context further illustrates the urgent need for this Court's review.

3. If this were not enough, in addressing what patent claims are "directed to" for purposes of *Alice,* district courts and the Federal Circuit also routinely defy the statutory presumption of validity.

---

[20] As one example, the district court refused to consider the declaration of Evolutionary's expert on what the claims "are directed to," holding instead that: "such a declaration is not appropriate for the court to consider on a motion to dismiss or motion for judgment on the pleadings." Pet. App. 26a–27a n.5.

As noted above, Section 282(a) requires courts to presume a patent valid. Logically and as a matter of common sense, this statutory requirement must apply to issues of claim interpretation as much as other validity-related issues: If there are two plausible ways to interpret a claim, or a set of claims, the burden rests on the party challenging the patent. See *id.*

Once again, however, in addressing *Alice* step one, the district court and Federal Circuit in this case contravened the presumption of validity. If they had been complying with that presumption, they would have adopted the PTAB's view of what the claims as a whole are "directed to." But instead, both courts addressed that question in a way that seemed to presume *invalidity* by adopting a broad and inherently abstract characterization of the claims' purpose and operation. See Pet. App. 39a (district court); 4a 5a. (Federal Circuit). And neither court even acknowledged the presumption of validity thus appearing to agree with Judge Mayer and, apparently, many of his colleagues that the presumption does not apply to Section 101 eligibility. See *supra* Section I.B.

Because so many judges and panels of the Federal Circuit appear to be flouting the presumption of validity in addressing eligibility under *Alice,* this Court should grant review and hold that the presumption *does* apply in this context, just as it applies to other validity-related inquiries.

III. Resolution of these issues is urgently needed to rescue the American economy from the current patent-eligibility "chaos," and the resulting reduction in returns to innovation, that have resulted from misunderstandings of *Alice*.

The questions presented in this case are crucial not only to Evolutionary, but to all patent holders and the economy at large. Indeed, the Federal Circuit's former chief judge, Paul R. Michel, recently highlighted how these erroneous applications of Section 101 harm the economy. Paul R. Michel, *The Impact of Bad Patents on American Businesses*, Supplemental Testimony, House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet at 18 (Sep. 12, 2017) ("Michel Supplemental Testimony"), http://bit.ly/PMichelTest. Judge Michel explained that courts have yet to precisely define what is an "abstract idea," which leads, of course, to inconsistency. *Id.*[21] And the Federal Circuit has recently issued several decisions on the abstractness question including the decision in this case that Judge Michel has called "difficult, if not impossible" to reconcile. *Id.*

This uncertainty harms our economy. When it is the luck of the draw whether a patent is upheld at the Federal Circuit, that uncertainty stifles innovation. As Judge Michel put it, "the law has created unacceptable chaos for inventors, innovators, business, and investors. Legal chaos is the exact opposite of what the U.S.

---

[21] See also Paul R. Michel, *The Impact of Bad Patents on American Businesses*, Statement, House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet at 5 (Jul. 13, 2017) (expressing skepticism that the term "abstract idea" has a clear meaning), http://bit.ly/MichelStatement.

economy needs." *Id.* at 18. Such uncertainty means that attorneys can no longer predict whether an inventor's patent will be held valid, thereby severely curtailing the incentives to innovate and to invest in new companies and technologies.

As explained above, the source of this confusion is a misreading of *Alice* and *Mayo*. True, nowhere do those decisions authorize courts to dismiss complaints on the pleadings based on factual determinations related to abstractness, or on one-sided determinations about claim scope or what the claims are "directed to." As shown above, however, *Alice* and *Mayo* have provided the excuse for disregarding these basic rules of fair process. And this Court is in a far better position than Congress to resolve what Judge Michel has aptly called the "chaos" caused by these misinterpretations of the Court's precedents.

IV. This case is an excellent vehicle for resolving the questions presented.

This case is also an excellent vehicle for resolving the questions presented, especially given (a) the straightforward and obviously "useful" nature of the invention at issue, (b) the presence of a thorough PTAB decision explaining the invention and properly identifying what it is "directed to," and (c) the presence of a Federal Circuit opinion that clearly commits the errors highlighted in this petition despite that court's manifest reluctance to squarely address or resolve the questions presented.

A. This case presents the questions cleanly, in the context of a straightforward but highly "useful" innovation.

Evolutionary's patent and its importance are easy to comprehend: The patent describes a process for using computerized modules containers, registers, etc. to get useful, timely, and location-based search and notification results based on information retrieved from the user as well as external, dynamic data sources. As explained above (at 5 6), this allows the end user to request or obtain more current useful information pertinent to the user's present activity and objectives than was before possible.

The use of the patented technology by respondents Apple and Facebook also illustrates its utility both to the end user and the respondents. For example, a visitor to Facebook's website, scrolling through the user's news feed on the user's iPhone, may see an ad that is targeted based on the user's location. Indeed, Facebook's default setting when it sells advertisements is to have location-based advertisements target "anyone determined to be in that location based on device and

connection information."[22] But this is exactly what petitioner's patent explains *how* to do, using digital containers and registers: combining already-existing larger lists of advertisements with real-time location data from the user to create a list (that is, "search results") of advertisements most tailored to the user.

To be sure, the district court (at App. 35a) compared the claimed invention to a barista memorizing favorite drinks. But that is neither accurate nor fair. Nothing in the *pleadings* discusses how a barista's activity might related to the patented computer technology. And no barista could have a working knowledge of all the restaurants in the state, all businesses near a user, or much less, which ones were offering specials at particular times. No barista could subsequently cross-check these lists to create a new list of restaurants close to a user's immediate location. Yet this is what petitioner's invention allows users to do in fractions of a second. At a minimum, this is an issue of fact subject to the usual constraints on judicial fact-finding.

In short, the obvious utility and comprehensibility of Evolutionary's invention make this an excellent vehicle for resolving both questions presented.

B. The PTAB's analyses of the same patents will facilitate this Court's analysis.

The PTAB's prior analysis of the patents also makes this case an ideal vehicle for resolving those questions. First, the PTAB's lucid analysis will assist the Court in understanding both the relevant field of

---

[22] Facebook Business, *About Location Targeting*, https://www.facebook.com/business/help/202297959811696..

invention and the specific invention claimed in the patents.

Second, the PTAB's careful fact-finding with respect to the (different) validity issues presented there contrasts markedly with the lower courts' armchair approach. See, *e.g.,* App. 45a 60a. The PTAB's careful fact-finding also contrasts markedly with the casual approach employed by district courts and affirmed by the Federal Circuit in many other decisions invalidating other patents on the pleadings. See App. 77a 90a.

Third, the PTAB's careful analysis of the patent claims here also contrasts with and highlights the absurdity of the lower courts' refusal to engage in such an analysis, especially in their varying conclusions about what the claims are "directed to" for purposes of *Alice* step one. As noted earlier, after careful analysis, the PTAB concluded that the claims are "directed to" something concrete and specific that is, "developing intelligence in a computer or digital network by creating and manipulating information containers with dynamic interactive registers in a computer network." App. 46a (emphasis added). That is a fair and precise summary of the invention's purpose and how it achieves its purpose. By contrast, both of the (differing) statements of what the claims are "directed to" by the district court and the Federal Circuit appear to have been concocted to make the claims' purposes and operation *appear* as broad as possible and, hence, subject to characterization as "abstract."

The contrast between these approaches illustrates the need for this Court to clarify exactly *how* lower courts are supposed to determine what a patent's claims are "directed to" for purposes of *Alice'*s critical first step. And the presence of the PTAB's careful

analysis of that very issue will assist the Court in resolving that fundamental question.

C. Petitioner raised the issues presented with the Federal Circuit which, although unwilling to address them head-on, at least issued a written opinion making its errors clear.

Despite the importance of the legal issues presented here, the Federal Circuit has declined to address them in any meaningful way, and despite many opportunities to do so. See App. 77a 90a (Summary).

To the contrary, some judges on that court appear to be signaling to district judges that they should *continue* on their current pleading-invalidation path. For example, another former chief judge, Judge Mayer, has acknowledged even trumpeted that disputed issues of fact are being resolved at the pleadings stage in cases alleging unpatentability under Section 101. See, *e.g.*, *OIP Technologies* v. *Amazon.com, Inc.*, 788 F.3d 1359, 1364 (Fed. Cir. 2015) (Mayer, J., concurring). And Judge Mayer has sought to justify that trend by claiming that the practice of dismissal on the pleadings is compelled by this Court's statement that "[t]he § 101 patent-eligibility inquiry is … a *threshold* test." *Id.* (quoting *Bilski* v. *Kappos*, 561 U.S. 593 (2010)) (emphasis added). Consistent with that view, as noted earlier, Judge Mayer has likewise claimed that Section 282's presumption of validity doesn't even apply to determinations of patent eligibility under Section 101 because, in his view, the PTO isn't rejecting enough patents on that ground. See *supra* 18 19.

No panel of the Federal Circuit has squarely disagreed with Judge Mayer on either of these points. The closest is a panel opinion that merely "questioned"

whether Judge Mayer was correct about the Section 282 presumption. See *Tranxition, Inc.* v. *Lenovo (United States) Inc.*, 664 Fed. Appx. 968, 972 n.1 (Fed. Cir. 2016).

Moreover, as noted, since 2014 the Federal Circuit has affirmed pleading dismissals in over ninety percent of the cases in which such dismissals have been challenged. See App. 77a 90a. Indeed, unlike this case (which at least generated an opinion), over half of such affirmances have been without any opinion at all. See App. 90a. This practice means that district courts are receiving little guidance on *how* to apply this Court's decisions in *Alice* and *Mayo* a void only this Court can now fill.

As Judge Michel recently noted, moreover, this very case exemplifies the problems inherent in deciding abstractness issues on the pleadings. In citing the decision below, Judge Michel even noted that the Federal Circuit's holding here is "difficult, if not impossible" to reconcile with other Federal Circuit decisions by other panels that have upheld similar patents. Supplemental Testimony, *supra* page 28 at 18.

Evolutionary also raised both of the specific issues presented here as well as the need to follow Section 282's presumption of validity in addressing Section 101 eligibility with the Federal Circuit.[23] However, the Federal Circuit including the *en banc* court was simply unwilling to address those issues head-on, as it

---

[23] See, *e.g.*, Brief of Evolutionary Intelligence in Support of Rehearing en banc, dkt no. 164, at 8–14, No. 16-1188 (Fed. Cir. Apr. 19, 2017); Corrected Opening Brief of Evolutionary Intelligence, dkt no. 94, at 22–31, No. 16-1188 (Fed. Cir. Apr. 19, 2017).

has been unwilling to do in many other cases. See App. 77a 90a.

Still, unlike many cases in which the Federal Circuit has summarily affirmed pleading invalidations under Section 101, the Federal Circuit in this case at least provided an opinion that, as explained above (at 10-23), clearly committed both of the widespread errors described in this petition. That opinion, combined with Evolutionary's diligent efforts to preserve the issues presented here, likewise makes this case a good vehicle for this Court to use in resolving those critical issues.

CONCLUSION

The Court should hold this petition pending its decision in *Oil States* and then, depending on how the issues presented there are resolved, grant a writ of certiorari on Question 2 and, if Question 1 is not effectively resolved in *Oil States,* on that question as well. Such review is essential to ensure that this Court's abstractness analysis in *Mayo* and *Alice* does not, as the Court feared, "swallow all of patent law."

Respectfully Submitted,

MEREDITH M. ADDY
TABET DIVITO & ROTHSTEIN LLC
209 S. LASALLE STREET
SUITE 700
CHICAGO, IL 60604

GENE C. SCHAERR
Counsel of Record
S. KYLE DUNCAN
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

October 23, 2017

APPENDIX

APPENDIX TABLE OF CONTENTS

Note: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

EVOLUTIONARY INTELLIGENCE LLC,
Plaintiff-Appellant

v.

SPRINT NEXTEL CORPORATION, SPRINT COMMUNICATIONS COMPANY, L.P., SPRINT SPECTRUM L.P., SPRINT SOLUTIONS, INC., APPLE INC., FACEBOOK INC., FOURSQUARE LABS, INC., GROUPON, INC., LIVINGSOCIAL, INC., MILLENNIAL MEDIA, INC., TWITTER, INC., YELP, INC.,
Defendants-Appellees

2016-1188, 2016-1190, 2016-1191, 2016-1192, 2016-1194, 2016-1195, 2016-1197, 2016-1198, 2016-1199

Appeals from the United States District Court for the Northern District of California in Nos. 5:13-cv-03587RMW, 5:13-cv-04201-RMW, 5:13-cv-04202-RMW, 5:13-cv04203-RMW, 5:13-cv-04204-RMW, 5:13-cv-04205-RMW, 5:13-cv-04206-RMW, 5:13-cv-04207-RMW, 5:13-cv-04513-RMW, Senior Judge Ronald M. Whyte.

Decided: February 17, 2017

TODD KENNEDY, Gutride Safier LLP, San Francisco, CA, argued for plaintiff-appellant.

HEIDI LYN KEEFE, Cooley LLP, Palo Alto, CA, argued for all defendants-appellees. Defendant-appellee Facebook Inc. also represented by REUBEN HO-YEN CHEN, MARK R. WEINSTEIN.

JAY E. HEIDRICK, Polsinelli PC, Kansas City, MO, for defendants-appellees Sprint Nextel Corporation, Sprint Communications Company, L.P., Sprint Spectrum L.P., Sprint Solutions, Inc. Also represented by KAREN ZELLE MORRIS, St. Louis, MO.

PATRICK E. KING, Simpson Thacher & Bartlett, LLP, Palo Alto, CA, for defendant-appellee Apple Inc. Also represented by ELIZABETH HEATHER WHITE, JEFFREY E. DANLEY, SEED Intellectual Property Law Group, PLLC, Seattle, WA.

CRAIG ROBERT SMITH, Lando & Anastasi, LLP, Cambridge, MA, for defendant-appellee Foursquare Labs, Inc. Also represented by ERIC P. CARNEVALE.

THOMAS LEE DUSTON, Marshall, Gerstein & Borun LLP, Chicago, IL, for defendants-appellees Groupon, Inc., LivingSocial, Inc. Also represented by TRON Y. FU.

CHRISTOPHER C. CAMPBELL, Cooley LLP, Reston, VA, for defendant-appellee Millennial Media, Inc. Also represented by NATHAN K. CUMMINGS.

STEVEN MOORE, Kilpatrick Townsend & Stockton LLP, San Francisco, CA, for defendants-appellees Twitter, Inc., Yelp, Inc.

Before LOURIE, MOORE, and TARANTO, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Evolutionary Intelligence, LLC ("EI") appeals from the decision of the United States District Court for the Northern District of California, concluding that all claims of U.S. Patents 7,010,536 ("the '536 patent") and 7,702,682 ("the '682 patent") (collectively, "the asserted patents") are invalid under 35 U.S.C. § 101. *See Evolutionary Intelligence, LLC v. Sprint Nextel Corp.*, 137 F. Supp. 3d 1157 (N.D. Cal. 2015) ("*Decision*").

EI owns the asserted patents, which have the same written description and are directed to systems and methods for allowing computers to process data that are dynamically modified based upon external-to-the-device information, such as location and time. *See*, *e.g.*, '536 patent Abstract.

EI sued Sprint Nextel Corporation and the other Appellees (collectively, "Sprint") for infringement of the asserted patents. The district court granted Sprint's motion to dismiss EI's complaint and for judgment on the pleadings, concluding that all claims of the asserted patents are invalid under § 101 as being directed to the abstract idea of "searching and processing containerized data." The court held that the invention merely computerizes "age-old forms of information processing," such as those used in "libraries, businesses, and other human enterprises with folders, books, time-cards, ledgers, and so on." *Decision*, 137 F. Supp. 3d at 1165.

EI timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1). On appeal, EI argues that the claims are patent eligible because: (1) they are not directed to an abstract idea, but rather to an improvement in the functioning of the computer itself; and (2) even if they were directed to an abstract idea, they are patent eligible as containing an inventive concept because they recite a specific arrangement of particular structures, operating in a specific way.

We disagree on both accounts. First, the claims at issue here are directed to an abstract idea. We have held that "tailoring of content based on information about the user such as where the user lives or what time of day the user views the content is an abstract idea." *Affinity Labs of Texas, LLC v. Amazon.com Inc.*, 838 F.3d 1266, 1271 (Fed. Cir. 2016) (describing *Intellectual Ventures I LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1369 (Fed. Cir. 2015)); *see Elec. Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016) ("collecting information, including when limited to particular content," is "within the realm of abstract ideas"). The claims are unlike those in *Enfish, LLC v. Microsoft Corp.*, where "the plain focus of the claims" was on "an improvement to the computer functionality itself," 822 F.3d 1327, 1336 (Fed. Cir. 2016), *i.e.*, "a specific improvement a particular database technique in how computers could carry out one of their basic functions of storage and retrieval of data," regardless of subject matter or the use to which that functionality might be put, *Elec. Power*, 830 F.3d at 1354 (describing *Enfish*). Here, the claims are directed to selecting and sorting information by user interest or subject matter, a longstanding activity of libraries and other human enterprises.

Second, the claims lack an inventive concept to transform the abstract idea into a patent-eligible invention. EI does not dispute that merely using a computer is not enough. Moreover, EI conceded that "containers," "registers," and "gateways" are "conventional and routine" structures. *See Decision*, 137 F. Supp. 3d at 1167. Whether analyzed individually or as an ordered combination, the claims recite those conventional elements at too high a level of generality to constitute an inventive concept. *See*, *e.g.*, *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350, 1352 (Fed. Cir. 2016) (finding claims patent eligible where they "recite a specific, discrete implementation of the abstract idea," in contrast to implementing the abstract idea "on generic computer components, without providing a specific technical solution beyond simply using generic computer concepts in a conventional way").

We have considered EI's remaining arguments, but find them to be unpersuasive. For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

Note: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

EVOLUTIONARY INTELLIGENCE LLC,
Plaintiff-Appellant

v.

SPRINT NEXTEL CORPORATION, SPRINT COMMUNICATIONS COMPANY, L.P., SPRINT SPECTRUM L.P., SPRINT SOLUTIONS, INC., APPLE INC., FACEBOOK INC., FOURSQUARE LABS, INC., GROUPON, INC., LIVINGSOCIAL, INC., MILLENNIAL MEDIA, INC., TWITTER, INC., YELP, INC.,
Defendants-Appellees

2016-1188, -1190, -1191, -1192, -1194, -1195, -1197, -1198, -1199

Appeals from the United States District Court for the Northern District of California in Nos. 5:13-cv-03587-RMW, 5:13-cv-04201-RMW, 5:13-cv-04202-RMW, 5:13-cv-04203-RMW, 5:13-cv-04204-RMW, 5:13-cv-04205-RMW, 5:13-cv-04206-RMW, 5:13-cv-04207-RMW, 5:13-cv-04513-RMW, Senior Judge Ronald M. Whyte.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, AND STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellant Evolutionary Intelligence LLC filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on May 31, 2017.

FOR THE COURT

May 24, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

United States Court of Appeals for the Federal Circuit

EVOLUTIONARY INTELLIGENCE LLC,
Plaintiff-Appellant

v.

SPRINT NEXTEL CORPORATION, SPRINT COMMUNICATIONS COMPANY, L.P., SPRINT SPECTRUM L.P., SPRINT SOLUTIONS, INC., APPLE INC., FACEBOOK INC., FOURSQUARE LABS, INC., GROUPON, INC., LIVINGSOCIAL, INC., MILLENNIAL MEDIA, INC., TWITTER, INC., YELP, INC.,
Defendants-Appellees

2016-1188, 2016-1190, 2016-1191, 2016-1192, 2016-1194, 2016-1195, 2016-1197, 2016-1198, 2016-1199

Appeals from the United States District Court for the Northern District of California in Nos. 5:13-cv-03587RMW, 5:13-cv-04201-RMW, 5:13-cv-04202-RMW, 5:13-cv04203-RMW, 5:13-cv-04204-RMW, 5:13-cv-04205-RMW, 5:13-cv-04206-RMW, 5:13-cv-04207-RMW, 5:13-cv-04513-RMW, Senior Judge Ronald M. Whyte.

MANDATE

In accordance with the judgment of this Court, entered February 17, 2017, and pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT
/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

United States District Court for the Northern District of California, San Jose Division

Evolutionary Intelligence, LLC v. Sprint Nextel Corp. et al.

October 6, 2015, Filed

Case No. 13-04513; Case No. 13-04201; Case No. 13-04202; Case No. 13-04203; Case No. 13-04204; Case No. 13-04205; Case No. 13-04206; Case No. 13-04207; Case No. 13-03587

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. SPRINT NEXTEL CORPORATION, SPRINT COMMUNICATIONS COMPANY L.P., SPRINT SPECTRUM L.P., SPRINT SOLUTIONS INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. APPLE, INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. FACEBOOK, INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. FOURSQUARE LABS, INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. GROUPON, INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. LIVINGSOCIAL, INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. TWITTER, INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. YELP, INC., Defendants.

EVOLUTIONARY INTELLIGENCE, LLC, Plaintiff, v. MILLENNIAL MEDIA, INC., Defendants.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-03587): Charles Ainsworth, LEAD ATTORNEY, Parker Bunt & Ainsworth, Tyler, TX; Seth A. Safier, Todd Michael Kennedy, LEAD ATTORNEYS, Todd M Kennedy, Marie Ann McCrary, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA; Robert Christopher Bunt, Parker, Bunt & Ainsworth, P.C., Tyler, TX.

For Yelp Inc., Defendant (5:13-cv-03587): Robert John Artuz, LEAD ATTORNEY, Matthew Joseph Meyer, Kilpatrick Townsend & Stockton LLP, Menlo Park, CA; Jeffrey Matthew Connor, Kilpatrick Townsend & Stockton LLP, Denver, CO.

For Apple Inc., 3rd party defendant (5:13-cv-03587): Patrick E. King, LEAD ATTORNEY, Simpson Thacher & Barlett LLP, Palo Alto, CA.

For Facebook Inc., 3rd party defendant (5:13-cv-03587): Reuben Ho-Yen Chen, Cooley LLP, Palo Alto, CA.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-04513): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Anthony J Patek, Marie Ann McCrary, Seth A. Safier, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA.

For Sprint Nextel Corporation, Sprint Communications Company L.P., Sprint Spectrum L.P., Sprint Solutions Inc., Defendants (5:13-cv-04513): Bart Starr, PRO HAC VICE, Polsinelli PC, Denver, CO; Jay Edward Heidrick, PRO HAC VICE, Polsinelli PC,

Kansas City, MO; Karen Zelle Morris, Polsinelli PC, St. Louis, MO; Walter Thomas Henson, Ramey & Flock, Tyler, TX; Zuzana S. Ikels, Polsinelli PC, San Francisco, CA.

For Foursquare Labs, Inc., Defendant (5:13-cv-04513): Craig R. Smith, LEAD ATTORNEY, Lando & Anastasi LLP, Cambridge, MA; Beth Ann Larigan, Shook, Hardy and Bacon, Kansas City, MO; Eric Carnevale, Lando and Anastasi, Cambridge, MA.

For Apple Inc., Miscellaneous (5:13-cv-04513): Patrick E. King, LEAD ATTORNEY, Simpson Thacher & Barlett LLP, Palo Alto, CA; Beth Ann Larigan, Shook, Hardy and Bacon, Kansas City, MO.

For LivingSocial, Inc., Miscellaneous (5:13-cv-04513): Jordan Adam Sigale, LEAD ATTORNEY, Dunlap Codding PC, Chicago, IL; Beth Ann Larigan, Shook, Hardy and Bacon, Kansas City, MO; Laura Ann Wytsma, Loeb & Loeb LLP, Los Angeles, CA.

For Yelp Inc., Twitter, Inc., Miscellaneous (5:13-cv-04513): Robert John Artuz, LEAD ATTORNEY, Kilpatrick Townsend & Stockton LLP, Menlo Park, CA; Beth Ann Larigan, Shook, Hardy and Bacon, Kansas City, MO.

For Groupon, Incorporated, Miscellaneous (5:13-cv-04513): Thomas L. Duston, LEAD ATTORNEY, Marshall, Gerstein & Borun, Chicago, IL; Beth Ann Larigan, Shook, Hardy and Bacon, Kansas City, MO; Tron Yue Fu, Marshall Gerstein and Borun LLP, Chicago, IL.

For Millennial Media, Inc., Miscellaneous (5:13-cv-04513): Christopher Charles Campbell, LEAD

ATTORNEY, Nathan Kay Cummings, Cooley LLP, Restone, VA.

For Facebook Inc., Miscellaneous (5:13-cv-04513): Christopher Edward Stretch, LEAD ATTORNEY, Lori L. Holland, Keller Sloan Roman & Holland LLP, San Francisco, CA; Jennifer Robin McGlone, Krieg, Keller, Sloan, Reilley & Roman LLP, San Francisco, CA.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-04201): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Marie Ann McCrary, Seth A. Safier, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA; Robert Christopher Bunt, Parker, Bunt & Ainsworth, P.C., Tyler, TX; Charles Ainsworth, Parker Bunt & Ainsworth, Tyler, TX.

For Apple Inc., Defendant (5:13-cv-04201): Patrick E. King, LEAD ATTORNEY, Brandon Cody Martin, Jeffrey E Danley, Simpson Thacher & Barlett LLP, Palo Alto, CA.

For Apple Inc., Counter-claimant (5:13-cv-04201): Patrick E. King, LEAD ATTORNEY, Jeffrey E Danley, Simpson Thacher & Barlett LLP, Palo Alto, CA.

For Evolutionary Intelligence, LLC, Counter-defendant (5:13-cv-04201): Seth A. Safier, LEAD ATTORNEY, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA; Robert Christopher Bunt, Parker, Bunt & Ainsworth, P.C., Tyler, TX; Charles Ainsworth, Parker Bunt & Ainsworth, Tyler, TX.

For Apple Inc., Counter-claimant (5:13-cv-04201): Patrick E. King, LEAD ATTORNEY, Brandon Cody

Martin, Jeffrey E Danley, Simpson Thacher & Barlett LLP, Palo Alto, CA.

For Evolutionary Intelligence, LLC, Counter-defendant (5:13-cv-04201): Todd M Kennedy, LEAD ATTORNEY, Seth A. Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA; Robert Christopher Bunt, Parker, Bunt & Ainsworth, P.C., Tyler, TX; Charles Ainsworth, Parker Bunt & Ainsworth, Tyler, TX.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-04202-RMW): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Marie Ann McCrary, Seth A. Safier, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA; Robert Christopher Bunt, Parker, Bunt & Ainsworth, P.C., Tyler, TX; Anthony J Patek, Attorney at Law, San Francisco, CA; Charles Ainsworth, Parker Bunt & Ainsworth, Tyler, TX.

For Facebook Inc., Defendant (5:13-cv-04202-RMW): Heidi Lyn Keefe, LEAD ATTORNEY, Andrew Carter Mace, Mark R. Weinstein, Reuben H. Chen, Reuben Ho-Yen Chen, Cooley LLP, Palo Alto, CA; Michael Graham Rhodes, LEAD ATTORNEY, Cooley LLP, San Francisco, CA; Christopher Edward Stretch, Keller Sloan Roman & Holland LLP, San Francisco, CA; Deron R Dacus, Shannon Marie Dacus, Ramey & Flock, Tyler, TX; Jennifer Robin McGlone, Krieg, Keller, Sloan, Reilley & Roman LLP, San Francisco, CA; Lori L. Holland, Keller, Sloan, Roman & Holland LLP, San Francisco, CA.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-04203-RMW): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Marie Ann

McCrary, Seth A. Safier, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA.

For Foursquare Labs, Inc., Defendant, Counterclaimant (5:13-cv-04203-RMW): Alan D. Albright, LEAD ATTORNEY, Bracewell & Giuliani, Austin, TX; Craig R. Smith, William Joseph Seymour, PRO HAC VICE, Lando & Anastasi LLP, Cambridge, MA; Eric Carnevale, PRO HAC VICE, Lando and Anastasi, Cambridge, MA; Karen I. Boyd, Turner Boyd LLP, Redwood City, CA.

For Evolutionary Intelligence, LLC, Counter-defendant (5:13-cv-04203-RMW): Seth A. Safier, LEAD ATTORNEY, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA.

For Evolutionary Intelligence, LLC, Plaintiff, Counter-defendant (5:13-cv-04204-RMW): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Marie Ann McCrary, Seth A. Safier, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA; Robert Christopher Bunt, Parker, Bunt & Ainsworth, P.C., Tyler, TX; Charles Ainsworth, Parker Bunt & Ainsworth, Tyler, TX.

For Groupon Inc., Defendant (5:13-cv-04204-RMW): Jeffrey G. Knowles, LEAD ATTORNEY, Julia D. Greer, Coblentz, Patch, Duffy & Bass, San Francisco, CA; Thomas L. Duston, LEAD ATTORNEY, PRO HAC VICE, Marshall, Gerstein & Borun, Chicago, IL; Tron Yue Fu, PRO HAC VICE, Marshall Gerstein and Borun LLP, Chicago, IL.

For Groupon Inc., Counter-claimant (5:13-cv-04204-RMW): Jeffrey G. Knowles, LEAD ATTORNEY, Julia D. Greer, Coblentz, Patch, Duffy & Bass, San Francisco, CA; Thomas L. Duston, LEAD ATTORNEY, Marshall, Gerstein & Borun, Chicago, IL; Tron Yue Fu, Marshall Gerstein and Borun LLP, Chicago, IL.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-04205-RMW): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Adam Gutride, Marie Ann McCrary, Seth A. Safier, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA;

For LivingSocial, Inc., Defendant (5:13-cv-04205-RMW): Jordan A Sigale, LEAD ATTORNEY, PRO HAC VICE, Loeb & Loeb, LLP - Chicago, Chicago, IL; Jordan Adam Sigale, Dunlap Codding PC, Chicago, IL; Allen Franklin Gardner, Potter Minton PC, Tyler, TX; Christopher M Swickhamer, PRO HAC VICE, Loeb and Loeb, LLP - Chicago, Chicago, IL; John Anthony Cotiguala, Loeb and Loeb LLP, Chicago, IL; Laura Ann Wytsma, Loeb & Loeb LLP, Los Angeles, CA; Michael Edwin Jones, Potter Minton PC, Tyler, TX.

For LivingSocial, Inc., Counter-claimant (5:13-cv-04205-RMW): Jordan A Sigale, LEAD ATTORNEY, Loeb & Loeb, LLP - Chicago, Chicago, IL; Jordan Adam Sigale, Dunlap Codding PC, Chicago, IL; Allen Franklin Gardner, Potter Minton PC, Tyler, TX; Christopher M Swickhamer, PRO HAC VICE, Loeb and Loeb, LLP - Chicago, Chicago, IL; John Anthony Cotiguala, Loeb and Loeb LLP, Chicago, IL; Laura Ann Wytsma, Loeb & Loeb LLP, Los Angeles, CA; Michael Edwin Jones, Potter Minton PC, Tyler, TX.

For Evolutionary Intelligence, LLC, Counter-defendant (5:13-cv-04205-RMW): Seth A. Safier, LEAD ATTORNEY, Todd M Kennedy, Seth Adam Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-04206-RMW): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Marie Ann McCrary, Seth A. Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA.

For Millennial Media Inc., Defendant (5:13-cv-04206-RMW): Christopher Charles Campbell, LEAD ATTORNEY, Christopher Campbell, Nathan Kay Cummings, Cooley LLP, Reston, VA; Matthew J. Brigham, Cooley Godward Kronish LLP, Palo Alto, CA; Nathan K Cummings, Cooley LLP- Reston Va, Reston, Va.

For Millennial Media Inc., Counter-claimant (5:13-cv-04206-RMW): Nathan K Cummings, Cooley LLP- Reston Va, Reston, Va.

For Evolutionary Intelligence, LLC, Counter-defendant (5:13-cv-04206-RMW): Seth A. Safier, Gutride Safier LLP, San Francisco, CA.

For Evolutionary Intelligence, LLC, Plaintiff (5:13-cv-04207-RMW): Todd M Kennedy, Todd Michael Kennedy, LEAD ATTORNEYS, Marie Ann McCrary, Seth A. Safier, Gutride Safier LLP, San Francisco, CA; Anthony J Patek, Attorney at Law, San Francisco, CA.

For Twitter Inc., Defendant (5:13-cv-04207-RMW): Robert John Artuz, LEAD ATTORNEY, Kilpatrick Townsend & Stockton LLP, Menlo Park, CA; Jeffrey Matthew Connor, Kilpatrick Townsend & Stockton LLP, Denver, CO; Matthew Joseph Meyer, Kilpatrick Townsend Stockton LLP, Menlo Park, CA.

ORDER GRANTING MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants Sprint Nextel Corporation, Sprint Communications Company L.P., Sprint Spectrum L.P., Sprint Solutions Inc., Apple, Inc., Facebook, Inc., Foursquare Labs, Inc., Groupon, Inc., LivingSocial, Inc., Twitter, Inc., Yelp, Inc., and Millennial Media, Inc. (collectively, "defendants") move to dismiss plaintiff Evolutionary Intelligence, LLC's ("EI") complaint, and for judgment on the pleadings. Dkt. No. 188.[1] Defendants argue that all claims of the asserted patents, U.S. Patent Nos. 7,010,536 ("the '536 patent") and 7,702,682 ("the '682 patent"), are invalid for failure to claim patent-eligible subject matter. For the reasons explained below, the court GRANTS the motion.

I. BACKGROUND

EI asserts that defendants each infringe the '536 and '682 patents, both of which are entitled "System

---

[1] ECF citations are to the docket in *Evolutionary Intelligence, LLC v. Sprint Nextel Corporation et al.*, Case No. 13-4213, unless otherwise noted.

and Method for Creating and Manipulating Information Containers with Dynamic Registers." The '682 patent issued on April 20, 2010, and is a continuation of the '536 patent, which issued on March 7, 2006. '682 patent at 1; '536 patent at 1. The two patents share the same specification, claim priority to the same provisional application (No. 60/073,209, filed January 30, 1998), identify the same sole inventor (Michael De Angelo), and are both now owned by EI. '682 patent at 1; '536 patent at 1; Dkt. No. 1 ¶¶ 12, 17.

The common specification describes the patents as directed to a "means to create and manipulate information containers." '682 patent, col.1 ll.28.[2] EI previously characterized the patents as containing three broad categories of independent claims: (1) methods of tracking searches; (2) time-based information containers; and (3) location-based information containers. *See Evolutionary Intelligence LLC v. Sprint Nextel Corp.*, Case No. 12-0791, Dkt. No. 167, at 2 (E.D. Tex. Oct. 17, 2012). The specification explains that such containers store information on various types of computer and digital networks, as well as on physical, published, and "other" media. '682 patent, col.3 ll.13-15. The containers include various types of "registers" which perform functions such as identifying the container or contents, providing rules of interaction between containers, and recording the history of the container. *Id.* col.13 ll.4-10. The containers also

---

[2] Because the two asserted patents share the same specification, the court adopts defendants' convention of citing the column and line numbers in the '682 patent when referencing the specification. Claim references are of course patent-specific.

have "gateways" to "control[] the interaction of the container with other containers, systems or processes." '536 patent, claims 1, 2, 15, and 16. The patents also state that the patented invention "includes a search interface or browser" which allows a "user to submit, record and access search streams or phrases generated historically by himself, other users, or the system." '682 patent, col.6 ll.10-14.

The specification summarizes the invention in very broad terms as:

[A] system and methods for manufacturing information on, upgrading the utility of, and developing intelligence in, a computer or digital network, local, wide area, public, corporate, or digital-based, supported, or enhanced physical media form or public or published media, or other by offering the means to create and manipulate information containers with dynamic registers.

Id. col.3 ll.10-16.

The specification describes a preferred embodiment configured with "an input device 24, an output device 16, a processor 18, a memory unit 22, a data storage device 20, and a communication device 26 operating on a network 201." *Id.* col.7 ll.35-38, Fig. 1; *see also id.* col.7 l.38 – col.8 l.44 (describing components).

A. The '682 Patent

The '682 patent contains seven independent claims (claims 1 and 18-23), and sixteen dependent claims. Independent claim 1 is representative:

1. A computer-implemented method comprising:

receiving a search query;

searching, using the computer, first container registers encapsulated and logically defined in a plurality of containers to identify identified containers responsive to the search query, the container registers having defined therein data comprising historical data associated with interactions of the identified containers with other containers from the plurality of containers, wherein searching the first container registers comprises searching the historical data; encapsulating the identified containers in a new container; updating second container registers of the identified containers with data associated with interactions of the identified containers with the new container;

and providing a list characterizing the identified containers.

'682 patent, col. 29 ll.52-67. Independent claim 19 is identical to claim 1 except that the preamble states "[a] computer program product, tangibly embodied on computer-readable media, comprising instructions operable to cause data processing apparatus to" perform the steps of the method in claim 1. *Id.* col.31 ll.28-30. Likewise, independent claim 21 is identical to claim 1 except that it is an apparatus claim in means-plus-function form. *Id.* col. 32 ll.5-22. Independent claim 23 is identical to claim 1 except for the fact that it claims "search query templates" in the place of "containers" in claim 1. *Id.* col. 32 ll.44-61.

Independent claims 18, 20, and 22 are identical to independent claims 1, 19, and 21 respectively, except they claim "polling" gateways rather than "searching" containers. *See id.* col.31 ll.7-27; col.31 l.47 col.32 l.4; col. 32 ll.23-43. However, the claims make clear that "polling the plurality of gateways comprises searching the historical data," and therefore claims 18, 20, and 22 rise or fall with the other independent claims. *See, e.g., id.* col.31 ll.18-20.

Dependent claims 2-17 depend from claim 1, and add various component and process limitations such as a "data tree having at least one parent-child relationship" (claim 2), *id.* col.30 ll.1-3, and specifying that the "list characterizing the identified containers" "provides a title of each identified container and a short description of its contents" (claim 7), *id.* col.30 ll.25-27.

B. The '536 Patent

The '536 patent contains four independent claims (claims 1, 2, 15, and 16) and twelve dependent claims. Each is an apparatus claim. Independent claim 1 is representative:

> **1**. An apparatus for transmitting, receiving and manipulating information on a computer system, the apparatus including a plurality of containers, each container being a logically defined data enclosure and comprising:
> an information element having information;
> a plurality of registers, the plurality of registers forming part of the container and including

> a first register for storing a unique container identification value,
> a second register having a representation designating time and governing interactions of the container with other containers, systems or processes according to utility of information in the information element relative to an external-to-the-apparatus event time,
> an active time register for identifying times at which the container will act upon other containers, processes, systems or gateways,
> a passive time register for identifying times at which the container can be acted upon by other containers, processes, systems or gateways, and
> a neutral time register for identifying times at which the container may [interact] with other containers, processes, systems or gateways; and
> a gateway attached to and forming part of the container, the gateway controlling the interaction of the container with other containers, systems or processes.

'536 patent, col.30 ll.6-30. Independent claim 2 is identical to claim 1 except that whereas claim 1 is directed to the use of "time" as a means of governing interaction between containers, claim 2 is directed to the use of "space." *Compare id.* col.30 ll.15-27 and ll.40-54. Independent claims 15 and 16 are identical to claims 1 and 2, respectively, except claims 15 and 16 contain an "at least one acquire register" limita-

tion in lieu of the three "active," "passive," and "neutral" "space" or "time" registers in claims 1 and 2. *Id.* col.32, ll.15-18, 39-42.

Dependent claims 3-14 all depend from claims 1 or 2. Dependent claims 3-8 add various additional registers to the "plurality of registers" claimed in claims 1 and 2. *See, e.g., id.* col.30 ll.58-62 ("The apparatus of claim **1** or **2**, wherein the plurality of registers includes at least one container history register for storing information regarding past interaction of the container with other containers, systems or processes, the container history register being modifiable."). Dependent claims 9-12 add various additional means-plus-function limitations to the "gateway" claimed in claims 1 and 2. *See, e.g., id.* col.31 ll.18-22 ("The apparatus of claim **1** or **2**, wherein the gateway includes means for acting upon another container, the means for acting upon another container using the plurality of registers to determine whether and how the container acts upon other containers."). Dependent claim 13 adds an "an expert system" limitation to the "gateway" claimed in claims 1 and 2. *Id.* col.31 ll.38-41. Finally, dependent claim 14 limits the "information element" in claims 1 and 2 to "one from the group of text, graphic images, video, audio, a digital pattern, a process, a nested container, bit, natural number and a system."). *Id.* col.31 ll.42-45.

In October 2012, Evolutionary Intelligence, LLC ("Evolutionary Intelligence") filed complaints alleging infringement of the '536 and '682 patents in the

Eastern District of Texas against nine groups of defendants.[3] From July to September 2013, the nine actions were transferred to this district.

The parties subsequently sought *inter partes* review ("IPR") of the asserted patents at the U.S. Patent and Trademark Office ("PTO"). On April 25, 2014, the Patent Trial and Appeal Board ("PTAB") granted one IPR petition as to claims 2-12, 14, and 16 of the '536 patent, but denied defendants' IPR petitions as to the other claims of the '536 patent and all claims of the '682 patent. *See* '536 patent, IPR2014-00086, Institution of *Inter Partes* Review (P.T.A.B. April 25, 2014) (granting Apple's IPR petition as to claims 2-12, 14, and 16 of the '536 patent). Before the cases were related, all nine defendants brought motions to stay pending IPR in their separate actions, and each motion to stay was granted.

On June 23, 2014, the undersigned ordered that the parties in all cases show cause why the *Evolutionary Intelligence* cases should not be consolidated for all pretrial proceedings through claim construction.

---

[3] The nine cases are *Evolutionary Intelligence LLC v. Apple, Inc.*, 12-0783 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. Facebook, Inc.*, 12-0784 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. Foursquare Labs, Inc.*, 12-0785 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. Groupon, Inc.*, 12-0787 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. LivingSocial, Inc.*, 12-0789 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. Millenial Media, Inc.*, 12-0790 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. Sprint Nextel Corp.*, 12-0791 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. Twitter, Inc.*, 12-0792 (E.D. Tex. Oct. 17, 2012); *Evolutionary Intelligence LLC v. Yelp, Inc.*, 12-0794 (E.D. Tex. Oct. 17, 2012).

See, e.g., Evolutionary Intelligence LLC v. Sprint Nextel Corp., et al., Case No. 13-04513 (N.D. Cal. June 23, 2014), Dkt. No. 143. Following a hearing and an order assigning the issue of consolidation and relation to the undersigned, *see Evolutionary Intelligence LLC v. Sprint Nextel Corp., et al.*, Case No. 13-04513 (N.D. Cal. July 28, 2014), Dkt. No. 158, the court ordered that the *Evolutionary Intelligence* cases be related, *see Evolutionary Intelligence LLC v. Sprint Nextel Corp., et al.*, Case No. 13-04513 (N.D. Cal. July 28, 2014), Dkt. No. 159. Following consolidation, on October 17, 2014 the court granted a motion to maintain the stay in each case. Dkt. No. 184.

On April 16, 2015 the PTAB issued its final written decision in the IPR proceedings, holding the '536 patent to be valid over the cited prior art. Dkt. No. 185, at 1. Upon the PTAB's issuance of its final written decision, the stay in these cases automatically expired. *See* Dkt. No. 184, at 14.

Defendants filed the instant motion to dismiss and for judgment on the pleadings on June 1, 2015.[4] Dkt. No. 188. EI filed an opposition on June 26, 2015, Dkt. No. 193,[5] and defendants replied on July 14,

---

[4] Because they have yet to file an answer, defendants Groupon and Twitter move under Federal Rule of Civil Procedure 12(b)(6) for an order to dismiss for failure to state a claim, while the remaining defendants move under Federal Rule of Civil Procedure 12(c) for an order granting judgment on the pleadings. Dkt. No. 188, at 1. Because, as discussed below, the standard for decision both motions is the same, the court does not distinguish between the two in this order.

[5] EI filed with its opposition an expert declaration from Scott Taylor. Dkt. No. 193-1. In it, Taylor opines on various aspects of

2015, Dkt. No. 200. The court held a hearing on the motion on July 28, 2015.

II. Analysis

A. Legal Standard

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering whether the complaint is sufficient to state a claim, the Court must accept as true all of the factual allegations contained in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). However, the Court need not accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). While a complaint need not allege detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556

---

the prior art, and states his opinions regarding the ways in which the asserted patents claim patent-eligible subject matter. *See id.* However, such a declaration is not appropriate for the court to consider on a motion to dismiss or motion for judgment on the pleadings. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). On such motions, the court may only consider the complaint, documents incorporated by reference in the complaint, and judicially noticed facts. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007). Accordingly, because the Taylor declaration meets none of these criteria, the court does not consider it.

U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

B. Motion to Dismiss and for Judgment on the Pleadings

Defendants contend that the '536 and '682 patents are invalid for failure to claim patent-eligible subject matter. For the reasons set forth below, the court finds that both patents fail to claim patent-eligible subject matter, and GRANTS defendants' motion to dismiss and for judgment on the pleadings.

Section 101 of the Patent Act describes the types of inventions that are eligible for patent protection: "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U.S.C. § 101. Section 101 has long contained "an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable." *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116, 186 L. Ed. 2d 124 (2013) (quoting *Mayo Collaborative Servs. v. Prometheus Labs.*, Inc., 132 S. Ct. 1289, 1293, 182 L. Ed. 2d 321 (2012)). In *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, the Supreme Court

explained that "the concern that drives this exclusionary principle [is] one of pre-emption." 134 S. Ct. 2347, 2354, 189 L. Ed. 2d 296 (2014). "Monopolization of [laws of nature, natural phenomena, and abstract ideas] through the grant of a patent might tend to impede innovation more than it would tend to promote it, thereby thwarting the primary object of the patent laws." *Id.* (quoting *Mayo*, 132 S. Ct. at 1293). However, the Supreme Court has also recognized the need to "tread carefully in construing this exclusionary principle lest it swallow all of patent law." *Id.* Accordingly, "[a]pplications of [abstract] concepts to a new and useful end . . . remain eligible for patent protection." *Id.* (internal quotations omitted).

The Supreme Court in *Mayo* "set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Alice*, 134 S. Ct. at 2355. First, a court must "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If the court finds that the patent claim recites a patent-ineligible abstract idea, the court then must "consider the elements of each claim both individually and as an ordered combination to determine whether the [elements in addition to the abstract idea] transform the nature of the claim into a patent-eligible application." *Id.* In this step, the court "must examine the elements of the claim to determine whether it contains an inventive concept sufficient to transform the claimed abstract idea into a patent-eligible application." *Id.* at 2357.

1. '682 Patent

The court first looks to whether the '682 patent recites an abstract idea. Defendants argue that the '682 patent claims the abstract idea of "searching historical data." Dkt. No. 188, at 12. EI argues with regard to both the '682 and '536 patents that "the purpose of the claims is to enable computers to process containerized data in a way that results in dynamic modifications in order to improve future processing efforts by computers." Dkt. No. 193, at 15. EI states that the '682 patent "focus[es] on making dynamic modifications when processing computer search queries" in order to make future searches more efficient. *Id*. The court finds that the '682 patent recites the abstract idea of searching and processing containerized data. Updating searchable containers of information based on past search results or based on external time or location resembles age-old forms of information processing such as have previously been employed in libraries, businesses, and other human enterprises with folders, books, time-cards, ledgers, and so on. The '682 patent merely computerizes this abstract idea, taking advantage of the conventional advantages of computers in terms of efficiency and speed.

Because the court finds that the '682 patent claims the abstract idea of searching and processing containerized data, the court proceeds to the second step in the *Mayo* framework. At this step, the court must determine whether the limitations in the '682 patent represent a patent-eligible application of the abstract idea of searching and processing containerized data. *Alice*, 134 S.Ct. at 2357. According to the

Supreme Court, "the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Id.* at 2358. Rather, to satisfy this requirement, a computer-implemented invention must involve more than performance of "well-understood, routine [and] conventional activities previously known to the industry." *Id.* at 2359 (internal quotation marks and citation omitted). The patent must contain an inventive concept which "transform[s] the nature of the claim[s] into a patent-eligible application." *Id.* at 2355. Ultimately, the patented invention must amount to "significantly more" than a patent on the ineligible abstract idea itself. *Mayo*, 132 S. Ct. at 1294.

The method claimed in the '682 patent comprises the following steps: (1) receiving a search query; (2) searching; (3) encapsulating responsive containers in a new container; (4) updating registers; (5) generating a list. *See* '682 patent, claim 1.[6] The language of the claims describes the use of containers, registers and gateways to perform these steps on a computer. EI concedes that the structures recited in the claims are conventional and routine. *See* Dkt. No. 193, at 17 (Arguing "[a]lthough the *fundamental* structures are containers, registers, and gateways," the claims are

[6] Because EI identifies provides no analysis of how either patent's dependent claims differ from the independent claims (and in particular claim 1), and the court does not credit their conclusory assertion in the opposition that the dependent claims recite "significant limitations," the court finds that the dependent claims for each patent rise and fall with the independent claims. As discussed herein, the court finds that the independent claims fail to claim patent-eligible subject matter, and therefore finds that the dependent claims fail for the same reason.

patent-eligible because they implement the inventive concepts with "specific arrangements" of structures) (emphasis added). Each step individually is also conventional and routine, and EI does not argue otherwise. Instead, EI argues that the claims, viewed in combination, contain an inventive concept sufficient to transform the claimed abstract idea into a patent-eligible application. Specifically, EI emphasizes that the patent was designed to overcome limitations associated with the static information model of computerized data processing, and that the claims are drawn to patent-eligible subject matter because they improve the functioning of computers. Dkt. No. 193, at 14-17. EI relies primarily on *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014), in which the Federal Circuit upheld a patent on the basis that it claimed a particular unconventional solution to an internet-specific problem by overriding the conventional behavior of website hyperlinks. However, far from supporting EI's position, the Federal Circuit's decision in *DDR Holdings* demonstrates how the asserted claims here are not patent-eligible.

The patents at issue in *DDR Holdings* disclosed a system to create composite websites for electronic shopping in an effort to address the problem of websites losing visitor traffic when visitors clicked on advertisements. *Id.* at 1248-49. Under the prevailing mode of operation, host websites would direct visitors to external advertiser websites when visitors clicked on advertisements. *Id.* By contrast, the patents at issue in *DDR Holdings* described a system that would generate a composite web page displaying the advertiser's product or other content while retaining the "look and feel" of the host website. *Id.* "Thus, the host

website can display a third-party merchant's products, but retain its visitor traffic by displaying this product information from within a generated web page that gives the viewer of the page the impression that she is viewing pages served by the host's website." *Id.* at 1249 (internal quotation marks omitted). The Federal Circuit observed that "the precise nature of the abstract idea [implemented in the asserted claims was] not as straightforward as in *Alice* or some of our recent cases." *Id.* at 1257. Rather, the claims "address[ed] a business challenge (retaining website visitors), [which was] a challenge particular to the internet." *Id.* The Federal Circuit distinguished cases invalidating patents that "merely recite the performance of some business practice known from the pre-internet world along with the requirement to perform it on the internet" on the basis that the patent in *DDR Holdings* was "necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks." *Id.* The court emphasized that the creation of a composite web page, as opposed to re-direction, "overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink," and concluded that the claims survived *Alice* because they "recite an invention that is not merely the routine or conventional use of the internet." *Id.* at 1258-59.

Here, EI argues that the asserted patents "were designed overcome the significant limitations associated with the static information model of computerized data processing," by "enabl[ing] computers to process containerized data in a way that results in dynamic modifications in order to improve future processing efforts by computers." Dkt. No. 193, at 15.

The court in *DDR Holdings* held that asserted claims in that case were patent-eligible because they "specified how . . . to yield a desired result" by "overriding the routine and conventional" operation of the claimed technology. *DDR Holdings*, 773 F.3d at 1258-59. However, unlike in *DDR Holdings*, the problem identified by EI — failure to dynamically update data structures over time and by location, or based on search history — is not unique to computing. Indeed, it is not even a computing problem, but an information organization problem. EI's attempt to provide a concrete example of the patented idea reveals the deficiency of the claims: according to EI, the claimed invention "could enable a computer to provide a user a dynamically changing list of restaurants that depends on the user's location, the time of day, ratings provided by other users, and the user's browsing history," as well as "store historical information to ensure that future processing for that user and other users is handled even more efficiently." Dkt. No. 193, at 4. Implementations of these ideas have long existed outside the realm of computing. As defendants' note, "searching for a nearby place to eat, or for a list of restaurants open at a particular hour, or for those most frequented by others, does not solve a problem unique to any field of computing." Dkt. No. 200, at 4. Restaurant guides have long provided lists of restaurants organized by cuisine, city, neighborhood, and rating. Libraries have long organized their holdings by subject matter and author name, and have employed "dynamic" containers in the form of rotating selections based on staff review, recent release, or other criteria, located in a specific section of the library. Nor is the sort of curation envisaged by EI a

new phenomenon: galleries stage curated exhibitions, video rental stores (when there were video rental stores) had shelves of "customer favorites," and merchants of every kind have long kept track of what is popular, what is new, and presented selections for purchase on these bases. Finally, the idea of "storing historical information to ensure that future processing for that user and other users is handled more efficiently" is practiced by every local barista or bartender who remembers a particular customer's favorite drink. The claims here merely take these age-old ideas and add a computer, which is insufficient to confer patent eligibility. *See Alice*, 134 S. Ct. at 2358; *see also Bascom Research, LLC v. LinkedIn, Inc.*, 77 F. Supp. 3d 940, 2015 WL 149480, at *9-10 (N.D. Cal. 2015) (finding patent-ineligible "claims [that] amount[ed] to instructions to apply an abstract idea i.e., the concept of establishing relationships between documents and making those relationships accessible to other users.").

EI's insistence that the asserted claims are patent-eligible because they address specific problems in the prior art related to the "static information model" used in computing also confuses the "inventive feature" analysis under Section 101 with the ideas of novelty and nonobviousness under Sections 102 and 103. Dkt. No. 193, at 2-4. To be novel, a patent claim must include an element not present in the prior art. *See* 35 U.S.C. § 102. The "inventive feature" language in Section 101 analysis is similar to language used in discussing anticipation and obviousness under 35 U.S.C. §§ 102 or 103. However, in the context of Section 101, "inventive feature" is better understood as referring to the abstract idea doctrine's

prohibition on patenting fundamental truths, whether or not the fundamental truth was recently discovered. *Alice*, 134 S. Ct. at 2357 ("Because the algorithm was an abstract idea, the claim had to supply a 'new and useful' application of the idea in order to be patent-eligible. But the computer implementation did not supply the necessary inventive concept; the process could be 'carried out in existing computers long in use.'") (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67, 93 S. Ct. 253, 34 L. Ed. 2d 273 (1972)). The inventive feature question under Section 101 concerns whether the patent adds something to the abstract idea that is "integral to the claimed invention . . . ." *Bancorp Servs., LLC v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012). It is therefore important to distinguish between claim elements that are integral to the claimed invention from those that are merely integral to the abstract idea embodied in the invention. As discussed above, the application of the idea of searching and processing containerized data in the '682 patent amounts to the use of common, conventional computing components in a way that could be carried out in existing computers long in use. Regardless of whether the concept of "dynamically" updating information containers and registers may have been novel and nonobvious at the time this patent was filed, the claims do nothing to ground this abstract idea in a specific way, other than to implement the idea on a computer.

EI also contends that the asserted claims require "specific arrangements" of "computer-specific" structures, "operating in a specific way." Dkt. No. 193, at 17. EI further argues that the claims are inventive

because they include significant structural limitations such as the specific types of registers that containers must have: "active time registers," "passive time registers," "acquire registers," "identified search query templates," and so forth. *Id.* However, the limitations EI identifies are simply functional descriptions of conventional concepts of data processing, such as using data registers, or labels, to govern the interaction of various data. EI fails to explain how these claimed fundamental elements, either individually or collectively, perform anything other than their normal and expected functions. *See Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Assoc.*, 776 F.3d 1343, 1349 (Fed. Cir. 2014) (rejecting argument that inventive concept could be found because additional claim limitations were "well-known, routine, and conventional functions of scanners and computers"); *see also Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 2015 WL 3852975, at *5 (Fed. Cir. 2015). The elements of the '682 patent's claims are directed to employing time, location, and history information in connection with data processing, and encompass nothing more than the conventional and routine activities of searching, updating, and modifying data on a "computer network operating in its normal, expected manner" using conventional computers and computer components. *DDR Holdings*, 773 F.3d at 1258.

Furthermore, the above analysis makes clear that '682 patent claims no more than a computer automation of what "can be performed in the human mind, or by a human using a pen and paper." *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372 (Fed. Cir. 2011). These methods, "which are the

equivalent of human mental work, are unpatentable abstract ideas." *Id.* at 1371; *see also Bancorp*, 687 F.3d at 1278-79. ("To salvage an otherwise patent-ineligible process, a computer must be integral to the claimed invention, facilitating the process in a way that a person making calculations or computations could not. [Merely] [u]sing a computer to accelerate an ineligible mental process does not make that process patent-eligible."); *Cogent Med., Inc. v. Elsevier Inc.*, 70 F. Supp. 3d 1058, 1060 (N.D. Cal. 2014) (Finding patent-ineligible claims that amounted to no more than a computer automation of what can be performed in the human mind, or by a human using a pen and paper) (internal quotation marks and citation omitted).[7]

Finally, the patent's ineligibility is confirmed by the machine-or-transformation test.[8] Here, the transformation prong is inapplicable and the claimed methods are not tied to any particular machine. The claims require nothing more than a general purpose computer, "the mere recitation of [which] cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Alice*, 134 S. Ct. at 2358. In-

---

[7] The court is also mindful that a patent on the abstract idea of searching and processing containerized data which lacks a specific inventive concept to limit its scope poses a real threat of preemption, and might well "tend to impede innovation more than it would tend to promote it, thereby thwarting the primary object of the patent laws." *Alice*, 134 S. Ct. at 2354.

[8] While "[t]he machine-or-transformation test is not the sole test for deciding whether an invention is a patent-eligible 'process,'" it is still "a useful and important clue." *Bilski v. Kappos*, 561 U.S. 593, 604, 130 S. Ct. 3218, 177 L. Ed. 2d 792 (2010).

stead, to confer patent eligibility on a claim, the computer "must play a significant part in permitting the claimed method to be performed, rather than function solely as an obvious mechanism for permitting a solution to be achieved more quickly . . . ." *SiRF Tech., Inc. v. Int'l Trade Comm'n*, 601 F.3d 1319, 1333 (Fed. Cir. 2010). As was discussed above, the generic computer required by the claims does no more than automate what "can be done mentally." *Benson*, 409 U.S. at 67.

In sum, the '682 patent is directed to the abstract idea of searching and processing containerized data and does not contain an inventive concept sufficient to transform the claimed subject matter into a patent-eligible application. Like the computer elements in *Alice*, the steps of the '682 patent, considered individually or as an ordered combination, add nothing transformative to the patent. Rather, the claims of the '682 patent merely recite routine and conventional computer operations and structures as a means of implementing the abstract idea of searching and processing containerized data.[9] Accordingly, because the '682 patent fails to claim patent-eligible

---

[9] *Alice* makes clear that the '682 patent's apparatus and computer product claims rise and fall with the method claims. "[N]one of the hardware recited by the [apparatus or computer component] claims offers a meaningful limitation beyond generally linking the use of the [method] to a particular technological environment, that is, implementation via computers." *Alice*, 134 S. Ct. at 2360 (internal quotations omitted, [method] alteration in original). "Put another way, the [apparatus and computer component] claims are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the [apparatus and computer

subject matter, the court GRANTS defendants' motion to dismiss as to the '682 patent.

2. '536 Patent

Defendants contend that the '536 patent claims the abstract idea of "storing information in labeled containers with rules and instructions on how the container or contents may be used." Dkt. No. 188, at 16. EI's position is that the '682 patent "focus[es] on processing constantly changing information corresponding to time and location to make future processing of time and location information by computers more efficient." Dkt. No. 193, at 15. The independent claims of the '536 patent are directed to "containers" comprising: (1) "an information element having information," (2) various "registers," and (3) a "gateway" for controlling interaction of the container with other containers, systems, or processes. The court finds that the '536 patent is also directed to an abstract idea: containerized data storage utilizing rules and instructions. Also like the '682 patent, the '536 patent merely computerizes the underlying abstract idea, taking advantage of the conventional advantages of computers in terms of efficiency and speed.

EI advances no separate arguments regarding the patent eligibility of the '536 patent under the second step of the *Mayo* analysis, and so the court finds

---

component claims] claims recite a handful of generic computer components configured to implement the same idea." *Id.* Because the apparatus and computer product claims "add nothing of substance to the underlying abstract idea," they also fail to claim patent-eligible subject matter required by Section 101. *Id.*

that this patent also fails to claim patent-eligible subject matter, for the reasons set forth above. Accordingly, the court GRANTS defendants' motion to dismiss as to the '536 patent.

III. Order

For the foregoing reasons, defendants' motion to dismiss and for judgment on the pleadings is GRANTED.

Dated: October 6, 2015

/s/ Ronald M. Whyte

RONALD M. WHYTE

United States District Judge

Judgment

On October 6, 2015 the court issued an order granting the motion to dismiss and motion for judgment on the pleadings filed by defendants Sprint Nextel Corporation, Sprint Communications Company L.P., Sprint Spectrum L.P., Sprint Solutions Inc., Apple, Inc., Facebook, Inc., Foursquare Labs, Inc., Groupon, Inc., LivingSocial, Inc., Twitter, Inc., Yelp, Inc., and Millennial Media, Inc. (collectively, "defendants"). Case No. 13-4513, Dkt. No. 225. Pursuant to Federal Rule of Civil Procedure 58, the court hereby ENTERS judgment in favor of defendants and against plaintiff. The Clerk of Court shall close the file in this matter.

Dated: October 6, 2015

/s/ Ronald M. Whyte

RONALD M. WHYTE

United States District Judge

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC., TWITTER, INC., AND YELP INC.,
Petitioner,

v.

EVOLUTIONARY INTELLIGENCE, LLC,
Patent Owner.

Case IPR2014-00086
Case IPR2014-00812
Patent 7,010,536 B1

Before KALYAN K. DESHPANDE, BRIAN J. McNAMARA, and GREGG I. ANDERSON, *Administrative Patent Judges*.

ANDERSON, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

INTRODUCTION

On October 22, 2013, Apple, Inc. ("Petitioner")[1] filed a Petition requesting *inter partes* review of claims 2 14 and 16 of U.S. Patent No. 7,010,536 (Ex. 1001, "the '536 patent"). Paper 1 ("Pet."). On April 25, 2014, we granted the Petition and instituted trial for claims 2 12, 14, and 16 of the '536 patent on all of the grounds of unpatentability alleged in the Petition. Paper 8 ("Decision on Institution" or "Dec. Inst.").

After institution of *inter partes* review, Twitter, Inc. ("Twitter") and Yelp Inc. ("Yelp") filed a corrected Petition and Motion to Join the *inter partes* review. IPR2014-00812, Papers 4, 8. We granted the motion and joined Apple, Twitter, and Yelp (collectively, "Petitioner") in the *inter partes* review. Paper 16. Evolutionary Intelligence, LLC ("Patent Owner") filed a Patent Owner Response. Paper 20 ("PO Resp."). Petitioner filed a Reply. Paper 28 ("Pet. Reply"). Patent Owner filed a Motion to Exclude. Paper 34 ("PO Mot. Exclude")

An oral hearing was held on January 6, 2015. The transcript of the consolidated hearing has been entered into the record. Paper 41 ("Tr.").

We have jurisdiction under 35 U.S.C. § 6(c). This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a). For the reasons discussed below, we determine that Petitioner has not shown by a preponderance of the evidence that claims 2 12, 14, and 16

---

[1] Twitter, Inc. and Yelp Inc. filed a Petition in case IPR2014-00812 against the same patent, which case was joined with this case. Decision Granting Motion for Joinder (Paper 16). Twitter, Inc. and Yelp Inc. are also collectively referred to as "Petitioner" in this case.

of the '536 patent are unpatentable. Patent Owner's Motion to Exclude is denied.

A. Related Proceedings

Petitioner states that on October 23, 2012 it was served with a complaint alleging infringement of the '536 patent in Civil Action No. 6:12- cv-00783-LED in the District of Eastern District of Texas (Ex. 1007), which was transferred to the Northern District of California as Civil Action No. 3:13-cv-4201-WHA. The '536 patent is also the subject of several other lawsuits against third parties. Pet. 2.[2]

B. The '536 Patent

The '536 patent is directed to developing intelligence in a computer or digital network by creating and manipulating information containers with dynamic interactive registers in a computer network. Ex. 1001, 1:11 20; 3:1 5. The system includes an input device, an output device, a processor, a memory unit, a data storage device, and a means of communicating with other computers. *Id.* at 3:6 11. The memory unit includes an information container made interactive with, among other elements, dynamic registers, a search engine, gateways, a data collection

[2] The Petition does not include page numbers. We have assigned page numbers beginning with page 1 at heading I.A. and concluding with page 31 at heading V. This convention corresponds to the assigned page numbers in the Table of Contents. As Patent Owner did in Patent Owner's Response (PO Resp. 1), all citations to the "Petition" are to the Petition filed by Apple in IPR 2014-00086. The Petition filed by Twitter and Yelp is a virtual copy but the page numbers differ and we will not add those additional citations.

and reporting means, an analysis engine, and an executing engine. *Id.* at 3:15 23.

The '536 patent describes a container as an interactive nestable logical domain, including dynamic interactive evolving registers, which maintain a unique network-wide lifelong identity. *Id.* at 3:29 35. A container, at minimum, includes a logically encapsulated portion of cyberspace, a register, and a gateway. *Id.* at 9:2 4. Registers determine the interaction of that container with other containers, system components, system gateways, events, and processes on the computer network. *Id.* at 3:43 46. Container registers may be values alone or contain code to establish certain parameters in interaction with other containers or gateways. *Id.* at 9:19 22. Gateways are integrated structurally into each container or strategically placed at container transit points. *Id.* at 4:54 57. Gateways govern the interaction of containers encapsulated within their domain by reading and storing register information of containers entering and exiting that container. *Id.* at 4:58 66; 15:46 49.

The system for creating and manipulating information containers is set forth in Figure 2B as follows:

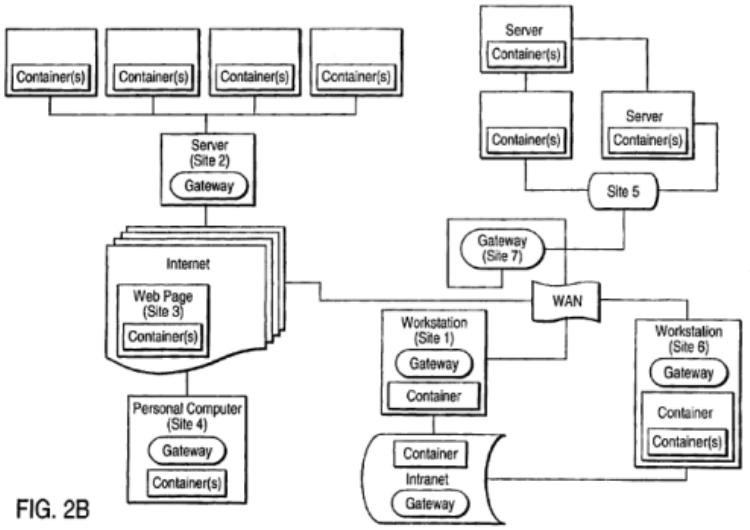


FIG. 2B

Figure 2B illustrates a computer network showing nested containers, computer servers, and gateways at Site 1 through Site 7. *Id.* at 10:59 62.

Any of Sites 1 through 7 may interact dynamically within the system; for example, Site 1 shows a single workstation with a container and gateway connected to an Intranet. *Id.* at 10:64 67. Site 2 shows a server with a gateway in relationship to various containers. *Id.* at 11:2 3. Site 3 shows an Internet web page with a container residing on it. *Id.* at 11:3 4. Site 4 shows a personal computer with containers and a gateway connected to the Internet. *Id.* at 11:4 6. Site 5 shows a configuration of multiple servers and containers on a Wide Area Network. *Id.* at 11:6 7. Site 6 shows a work station with a gateway and containers within a container connected to a Wide Area Network. *Id.* at 11:7 9. Site 7 shows an independent gateway, capable of acting as a data collection and data reporting site as it gathers data from the registers of transiting

containers and as an agent of the execution engine as it alters the registers of transient containers. *Id.* at 11:8 13.

An example of the configuration the containers may have is provided in Figure 4 as follows:

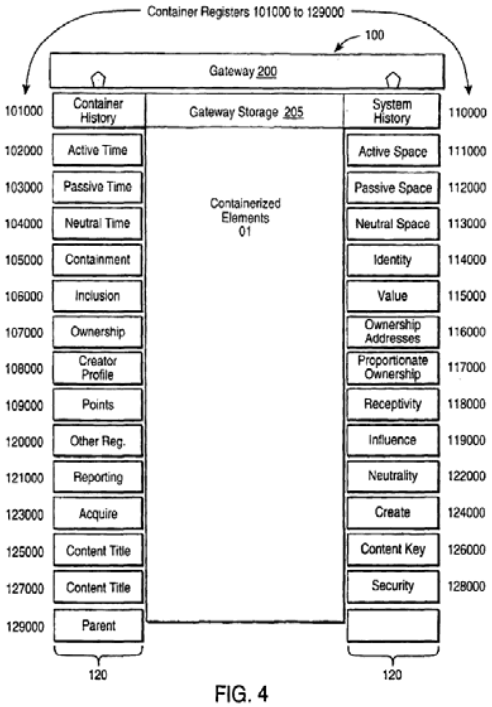


FIG. 4

Figure 4 shows an example of container 100 that includes containerized elements 01, registers 120, and gateway 200. *Id.* at 12:65 67. Registers 120 included in container 100 include, *inter alia*, active time register 102000, passive time register 103000, neutral time register 104000, active space register 111000, passive space register 112000, neutral space register 113000, and acquire register 123000. *Id.* at 14:31 39.

C. Illustrative Claim

Claims 2 and 16 are the two independent claims challenged. Claim 2 is reproduced below:

2. An apparatus for transmitting, receiving and manipulating information on a computer system, the apparatus including a plurality of containers, each container being a logically defined data enclosure and comprising:

an information element having information;

a plurality of registers, the plurality of registers forming part of the container and including

a first register for storing a unique container identification value,

a second register having a representation designating space and governing interactions of the container with other containers, systems or processes according to utility of information in the information element relative to an external-to-the-apparatus three-dimensional space,

an active space register for identifying space in which the container will act upon other containers, processes, systems or gateways,

a passive resister for identifying space in which the container can be acted upon by other containers, processes, systems or gateways,

a neutral space register for identifying space in which the container may interact with other containers, processes, systems, or gateways; and

a gateway attached to and forming part of the container, the gateway controlling the interaction of the container with other containers, systems or processes.

D. Ground Upon Which Trial Was Instituted

Trial was instituted on the ground that claims 2 12, 14, and 16 of the '536 patent were anticipated under 35 U.S.C. § 102(e)[3] by Gibbs.[4] Dec. Inst. 27. Patent Owner does not contend that Gibbs is not prior art.

---

[3] The '536 patent was filed prior to the effective date of § 102, as amended by the America Invents Act ("AIA")—March 16, 2013— and is governed by the pre-AIA version of § 102(e). *See* AIA § 3(n)(1).

[4] 4 U.S. Patent No. 5,836,529, filed Oct. 31, 1995 ("Gibbs," Ex. 1006

ANALYSIS

A. Claim Construction

In an *inter partes* review, claim terms in an unexpired patent are interpreted according to their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *In re Cuozzo Speed Techs., LLC*, 778 F.3d 1271, 1279 83 (Fed. Cir. 2015). If an inventor acts as his or her own lexicographer, the definition must be set forth in the specification with reasonable clarity, deliberateness, and precision. *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1249 (Fed. Cir. 1998). The terms also are given their ordinary and customary meaning as would be understood by one of ordinary skill in the art in the context of the disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007).

Neither Petitioner nor Patent Owner disputes our constructions in the Decision on Institution. PO Resp. 15, n. 3. Our prior constructions, including the rationale for them, are repeated below.

1. "container"

Independent claims 2 and 16 recite the term "container," as do several of the dependent claims, e.g., claims 5 and 7. The Specification describes a "container" as "a logically defined data enclosure which encapsulates any element or digital segment (text, graphic, photograph, audio, video, or other), or set of digital segments, or referring now to FIG. 3C, any system component or process, or other containers or sets of containers." Ex. 1001, 8:64 9:2.

Thus, we construe "container" to mean "a logically defined data enclosure which encapsulates any element or digital segment (text, graphic, photograph, audio, video, or other), or set of digital elements."

2. "register"

Independent claims 2 and 16 recite "a plurality of registers, the plurality of registers forming part of the container." The Specification of the '536 patent broadly describes "container registers" as follows:

> Container registers 120 are interactive dynamic values appended to the logical enclosure of an information container 100, and serve to govern the interaction of that container 100 with other containers 100, container gateways 200 and the system 10, and to record the historical interaction of that container 100 on the system 10. Container registers 120 may be values alone or contain code to establish certain parameters in interaction with other containers 100 or gateways 200.

Ex. 1001, 9:14 23.

Thus, we determine "register" means a "value or code associated with a container."

3. "active space register"/"passive space register"/"neutral space register"

The terms "active space register," "passive space register," and "neutral space register" appear in independent claim 2.

The Specification of the '536 patent states, at several locations, that registers are "dynamic" and "interactive." *See* Ex. 1001, 7:25 30. As discussed above, registers are user-created and attach to a unique container. *Id.* at 14:23 26. Registers may be of different types, including pre-defined registers. *Id.* at 14:1 3. Pre-defined registers are available immediately for selection by the user, within a given container. *Id.* at 14:3 6. Pre-defined registers may be active, passive, or interactive and may evolve with system use. *Id.* at 14:29 30. In the context of predefined registers, "active space," "passive space," and "neutral space" are part of the system history. *Id.* at 14:30 42, Fig. 4. The Specification does not describe further any of the terms.

The claim 2 elements, "active space register," "passive space register," and "neutral space register" each expressly defines the function of the element in claim 2.

The "active space register" is:

> "for identifying space in which the container *will act upon* other containers, processes, systems or gateways . . ." (emphasis added).

The "passive space register" is:

> "for identifying space in which the container *can be acted upon* by other containers, processes, systems or gateways . . ." (emphasis added).

The "neutral space register" is:

> "for identifying space in which the container *may interact* with other containers, processes, systems, or gateways . . ." (emphasis added).

Patent Owner lists "neutral space register" as a term for further construction. PO Resp. 19 22. Patent Owner's argument is directed toward whether "neutral space register" is a limitation shown in Gibbs and will be addressed in our anticipation analysis section below.

As discussed above, we have construed the term "register" to mean "value or code associated with a container." The modifiers "active," "passive," and "neutral" serve to distinguish the claimed registers that are defined functionally in claim 2. No further construction is required.

4. "acquire register"

The term "acquire register" appears in claims 8, which depends from claim 2, and independent claim 16. The Specification describes the acquire register as "enabling the user to search and utilize other registers residing on the network." Ex. 1001, 15:27 29. This is consistent with the claim language itself. Dec. Inst. 13. No further construction is required.

5. "gateway"

Independent claims 2 and 16 recite "a gateway attached to and forming part of the container, the gateway controlling the interaction of the container with other containers, systems or processes."

The '536 patent describes that:

> [g]ateways gather and store container register information according to system-defined, system-generated, or user determined rules as containers exit and enter one another, governing how containers, system processes or system components interact within the domain of that container, or after exiting and entering that container, and governing how containers, system components and system processes interact with that unique gateway, including how data collection and reporting is managed at that gateway.

Ex. 1001, 4:58 66.

Neither party raises any issue with our preliminary construction (Dec. Inst. 13 14) and thus, based on the Specification, our final construction of "gateway" is "hardware or software that facilitates the transfer of information between containers, systems, and/or processes."

6. means elements

Claims 9 12 each contain means plus function elements. Petitioner contends that there is a lack of structure for certain means plus function elements. We do not reach this issue because, for reasons discussed below, Petitioner has not put forth a sufficient case of unpatentability as to the independent claim from which claims 9 12 depend.

7. "first register having a unique container identification value"

Unlike all the previous terms, "first register having a unique container identification value" was not construed in the Decision on Institution. Patent

Owner contends the term requires construction in light of contentions made by Petitioner's expert, Dr. Henry Houh, in his deposition testimony. PO Resp. 16 19 (citing "Houh Deposition," Ex. 1008). The term appears in claims 2 and 16. Specifically, Patent Owner contends the Houh Deposition asserts that the term "unique container identification value" is for "any container." PO Resp. 16 (citing Ex. 1008, 106:21 109:8) (emphasis omitted). Patent Owner contends this testimony is contrary to the Declaration of Dr. Houh ("Houh Declaration," Ex. 1003, ¶¶ 110 111). *Id.*

Patent Owner cites the language of the claim itself to assert "first register having a unique container identification value" is directed to the container of which the term is an element and not "any" container." PO Resp. 16. Patent Owner argues use of the article "a" is dictated because it is the first reference to the term, which has no antecedent basis. Id.

Patent Owner cites to the Specification as describing "a register with a 'unique network-wide lifelong identity' for the given container." PO Resp. 16 17 (citing Ex. 1001 at 3:29 39) (emphasis omitted). Patent Owner argues the system-defined registers may include "an identity register maintaining a unique network wide identification and access location for a given container." *Id.* at 17 (citing Ex. 1001, 3:57 64) (emphasis omitted).

Patent Owner also references the prosecution of the '536 patent, in which claim 29 recites interacting between first and second information containers, and claim 30, which depends from claim 29, recites "wherein the steps of determining identification in-

formation are performed by reading respective identification registers of the first and second containers." *See id*. at 17 (citing Ex. 1002, 50 51). Patent Owner argues this claim language "make no sense if the 'unique identification value' is construed as identifying containers other than those interacting, because the entire point of the exchange was to compare unique identifiers to see if interaction between the two containers would be allowed." *Id*. Patent Owner thus proposes the term "first register having a unique container identification value" means "a first register having a value that uniquely identifies the given container." *Id*. at 19.

Petitioner argues that absent "reference to any particular container" the term applies to "any" container. Pet. Reply 9. In further support of its position, Petitioner argues the use of the article "a," as opposed to "the," precludes the claim language from being limited to the "the container that includes the register." Id. Petitioner notes all the other registers recited reference "the" container, so "a" must mean any. *Id*. Petitioner contends the "identity register" disclosure is not dispositive and is just "one example" of the first register. *Id*. 9 10 (citing Deposition of Mathew Daniel Green, Ph.D. ("Green Deposition," Ex. 2009, 113:1 22, 107:2 110:22; *see id*. at 66:11 22). The Petitioner alleges the original claims from the prosecution are irrelevant. Id. at 10.

In construing claims we consider the broadest reasonable interpretation consistent with the Specification. *In re Cuozzo*, 778 F.3d at 1278 1282. We start with the claim language. Claim 2 recites "[a]n apparatus . . . including a plurality of containers, *each container* being a logically defined data enclosure and comprising." Ex. 1001, 30, 31 34 (emphasis added).

The claim proceeds to recite "a first register for storing a unique container identification value." From this language, we conclude that the "first register" is a part of "each container." The "first register" claim limitation further includes "a unique container identification value." In the context of this claim, we are not persuaded by Petitioner's argument that the use of "a" before the disputed term broadens the disputed term to "any" container. Pet. Reply 9.

The Specification describes a "container" in some detail, a description which we noted above in construing "container." *See* Ex. 1001, 3:29 35. The Specification describes "container" as follows:

> A container is an interactive nestable logical domain configurable as both subset and superset, including a minimum set of attributes coded into dynamic interactive evolving registers, containing any information component, digital code, file, search string, set, database, network, event or process, and *maintaining a unique network-wide lifelong identity*.

Id. (emphasis added). Among other things, the container "maintain[s] a unique network-wide lifelong identity." *Id.* at 3:34 35. While "first register" appears only in the Abstract and the claims, registers are described and include "an identity register maintaining a unique network wide identification and access location for a given container." PO Resp. 17 (citing Ex. 1001, 3:57 64) (emphasis omitted). The claims do not include an "identity register," but do include the "first register," and the term under consideration, "a unique container identification value." While Petitioner correctly notes that the Green Deposition states the "identity register" is an "example,"

Dr. Green goes on to testify "[h]owever, I think that from the context of the specification, my interpretation is that those descriptions refer to the first register for storing a unique container identification value." Ex. 2009, 113:11 15. Based on the Specification, we conclude the description of "identity register" in the Specification describes the "unique container identification value" of the "first register." There is no other reasonable explanation associating the functionality of the "identity register" with the claimed invention. Petitioner's argument that the "identity register" is an "example" does not persuade us otherwise. Pet. Reply 9. An "example" does not preclude the "first register" claimed from being described as the "identity register," particularly given that "first register" is not otherwise described in the Specification and "identity register" is not part of any claim.

We disagree with Petitioner's argument that claims asserted in the prosecution history are irrelevant to claim construction. Pet. Reply 10. We note that originally filed claim 30 recites, in pertinent part: "steps of determining identification information are performed by reading respective identification registers of the first and second containers." We read this language to support Patent Owner's contention that each container has an "identification register" to determine whether interaction between containers is allowed. Originally filed claim 30 recites in part "reading respective identification registers." Claim 30's language corresponds to the Specification's description of the "identity register" and the claimed "first register for storing a unique container identification value."

Neither party has specifically relied on any extrinsic evidence and our construction is based primarily

on intrinsic evidence. To the extent the Houh and Green Depositions may be considered extrinsic evidence; we have considered the party's citations to them, noting them above.

Thus, we adopt Patent Owner's proposed construction and construe "first register having a unique container identification value" to mean "a first register having a value that uniquely identifies the given container."

B. Anticipation of Claims 2 12, 14 and 16 by Gibbs

Petitioner contends that claims 2 14 and 16 of the '536 patent are anticipated under 35 U.S.C. § 102(e) by Gibbs. Pet. 12 31. To support this position, Petitioner cites the testimony of Henry Houh. The only ground of unpatentability presented is anticipation.[5]

"[U]nless a reference discloses within the four corners of the document not only all of the limitations claimed but also all of the limitations arranged or combined in the same way as recited in the claim, it cannot be said to prove prior invention of the thing claimed and, thus, cannot anticipate under 35 U.S.C. § 102." *Net MoneyIn, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008). Notwithstanding the preceding, we must analyze prior art references as a skilled artisan would, but this is "not, however, a substitute for determination of patentability in terms of § 103." *Cont'l Can Co. USA v. Monsanto Co.*, 948 F.2d 1264, 1268 69 (Fed. Cir. 1991).

---

[5] Patent Owner "reasserts" its objection to the Petition as improperly incorporating by reference the Houh Declaration. PO Resp. 22, n.5 (citing 37 C.F.R. § 42.6 (a)(3)).

For reasons discussed below, Petitioner has not established by a preponderance of the evidence that claims 2 12, 14, and 16 are unpatentable as anticipated by Gibbs.

1. Gibbs Overview

Gibbs describes a system and process for monitoring and managing the operation of a railroad system. Ex. 1006, 3:65 4:10. The railroad management system operates on a computer system and its components are connected via a network. *Id*. at 5:12 14. Figure 1 is reproduced below.

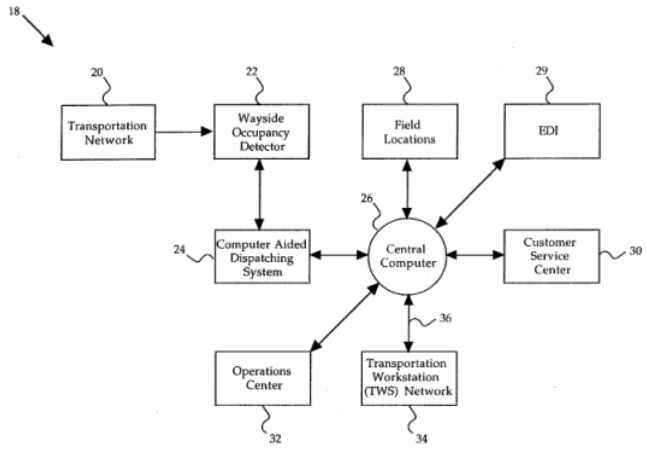


Fig. 1

Figure 1 is an object based railroad transportation network management system. As shown in Figure 1, central computer 26 organizes and stores this railroad system information so that it can later retransmit the information in response to a request from any node 24, 28, 29, 30, 32, or 34. Ex. 1001, 5:28 31.

The system is object oriented and uses objects to represent important aspects of the railroad system such as train object 72, locomotive object 74, crew object 78, car object 80, end-of-train object 82, and computerized train control object 89. *Id.* at 7:5 8. A map object library contains map objects to generate a transportation network map object and to display and transmit information in response to a user request. *Id.* at 8:53 63. A control management object allows the user to activate any object within the map object library. *Id.* at 8:20 31.

Each object in the railroad management system has at least four distinct types of data: locational attributes, labeling attributes, consist attributes, and timing attributes. *Id.* at 9:28 10:4, Fig. 7. These attributes can include information such as a unique ID, the physical location of the object, and object specific data. *Id.* at 10:46 51. Each object contains references to its associated data structure, i.e., the four data types described above, and program instructions. *Id.* at 7:21 27.

2. Whether Gibbs discloses the claimed "container"[6]

In the Petition, Petitioner argued the objects used by Gibbs's railroad management system are examples of logically defined data enclosures. Pet. 13.

The objects are, therefore, the "containers" specified in the preamble of claim 2[7] of the '536 patent. *Id.* (citing Ex. 1003 ¶¶ 107 111). In its Reply, Petitioner contends Gibbs "shows the claimed 'container' via its description of a collection of transport, map, and report objects that are instantiated and used to display maps and reports to users." Pet. Reply 1, 3 (citing Pet. at 15, 18 19, 23; Ex. 1003 ¶¶ 89 90, 94, 96 97; "Houh Supplemental Declaration," Ex. 1009 ¶¶ 5 16). Dr. Houh uses the term "TMR subsystem," i.e., "transport object/map object/report object," as "shorthand for the architecture and objects" described in

---

[6] Both independent claims 2 and 16 include the limitation in question.

[7] The preamble forms an antecedent basis for "containers" as used in the claims and will be given weight. *See, Eaton Corp. v. Rockwell Int'l Corp.*, 323 F.3d 1332, 1339 (Fed. Cir. 2003).

Gibbs's collection of objects. Pet. Reply 2. "TMR subsystem" is not a term used in Gibbs.

a. Denial of Petition based on change of theory

Patent Owner argues that Petitioner changed its position from citing Gibbs's objects as meeting the container limitation to now contending the TMR subsystem is the "container." PO Resp. 24 (citing Ex. 1008, 102:19 104:13). Patent Owner characterizes the change as a switch from express anticipation to an inherency argument. *Id.* at 37. Patent Owner contends we should deny the Petitioner because of the change of position. *Id.* at 38.

The Petition asserted that the objects of Gibbs meet the container limitation. Pet. 13 (citing Ex. 1003 ¶¶ 107 111). In particular, on behalf of Petitioner, Dr. Houh asserted that "[T]he objects used by the Gibbs railroad management system are examples of logically defined data enclosures, and exemplify the 'containers' claimed in claim 2 of the '536 patent." Ex. 1003 ¶ 110. Patent Owner notes that Dr. Houh subsequently stated in his deposition that the TMR subsystem "must be" present in Gibbs. PO Resp. 3. Patent Owner argues that this testimony represents an impermissible change in Petitioner's position from express anticipation to inherent anticipation. PO Resp. 3, 24, 37 38. Petitioner denies it is now proceeding on an inherency theory, arguing that Dr. Houh's use of the label "TMR subsystem" during his deposition is a shorthand for the architecture and objects in Gibbs that anticipate the claims, rather than new evidence. Pet. Reply 3. Dr. Houh contends that his position is not new. Ex. 1009 ¶38. Nevertheless, Petitioner argues that anticipation exists when a

claimed limitation is implicit in the relevant reference. *Id.* at 5.

Anticipation by Gibbs remains the sole challenge asserted by Petitioner. Even if Petitioner has altered some of its positions concerning its challenge, in this case we do not find cause to dismiss the Petition on that basis. In view of Petitioner's argument that it has not changed its position, we proceed on the basis that Dr. Houh stands by his testimony that "[T]he objects used by the Gibbs railroad management system are examples of logically defined data enclosures, and exemplify the 'containers' claimed in claim 2 of the '536 patent." Ex. 1003 ¶ 110.

b. Whether the "collection of transport, map and report objects" of Gibbs discloses "a plurality of containers" comprising all the registers of the claims

The objects of Gibbs fall within our construction of "container" as meaning "a logically defined data enclosure which encapsulates any element or digital segment (text, graphic, photograph, audio, video, or other), or set of digital elements." We, however, determine that Gibbs does not disclose a "container" *as claimed*. Claims 2 and 16 recite "each container being a logically defined data enclosure and comprising," among other things, the specified registers. As discussed above, each of the active, passive, and neutral registers of claim 2 "identif[y] space" in which the claimed container "will act," "can be acted upon," and "may interact with other containers, processes, systems, or gateways." Claim 16 recites a second register that "govern[s] interactions of the container with

other containers, systems or processes."[8] Claim 16 also recites an "acquire register" that controls "whether the container adds a register from other containers or adds a container from other containers when interacting with them."

In order to show that the various objects of Gibbs are the necessary registers of the claimed "container," Petitioner argues that the "discrete" entities of Gibbs are within an "object-oriented programming structure" as is conventionally known. Pet. Reply 4 (citing Ex. 1003 ¶¶ 78, 89; Ex. 1006, 7:24 27) (emphasis omitted). Thus, according to Petitioner, Gibbs's system combines the transport, map, and report objects so a user can access data about the train system. *Id.* at 4 5. Petitioner contends this "[c]ompound 'object' created by combining the transport, map, and report objects in varying manners to give users access to real-time data about the train system is plainly a 'container.'" *Id.* (citing Ex. 1009 ¶¶ 33 37, 42 48; *see* Ex. 1001, 3:28 34). Thus, Petitioner contends the "discrete" objects of Gibbs may be combined to disclose the registers of the claimed "container." *See* Pet. 13 18.

Patent Owner disputes Petitioner's contention that Gibbs shows a collection of objects that disclose the claimed "container." PO Resp. 25. Patent Owner argues Gibbs discloses "22 distinct objects" which are "treated by the processing unit 48 as discrete entities." *Id.* (citing Ex. 1006, 7:24 27; 8:20 23; 8:48 52; 9:27 31). In addition, Patent Owner argues that

---

[8] Furthermore, each claimed container of claims 2 and 16 has a gateway attached to it. (Ex. 1001, 30:55–57; 32:43–45). Similar to the registers, the gateway "control[s] the interaction of the container with other containers, systems or processes."

Gibbs differentiates between two "genuses of objects," i.e., transport objects and service objects, which do not overlap. *Id.* More specifically, the transport objects are detailed in a transport object library as shown in Figure 5 of Gibbs. *Id.* Details of service objects are shown in Figures 6a, 6b, and 6c. *Id.* at 26.

Because the objects are discrete, Patent Owner argues Gibbs's attributes and other data items belong with a specific object and not every object. PO Resp. 26. In support of its argument, Patent Owner points to the attributes of the transport object data structure, e.g., locational attributes, labelling attributes, consist attributes, and timing attributes, are retrieved to effect maps in the map object library. *Id.* (citing Ex. 1006, Fig. 7, 9:58 67). The attributes described in Gibbs's transport object are not, according to Patent Owner, attributes of any other object. *Id.*

Petitioner further argues what an anticipatory reference teaches must be viewed from the perspective of the person of ordinary skill and what is implicit in the reference. Pet. Reply 5. Thus, Petitioner relies on various disclosures from Gibbs to support its contention that the collection of objects having different functions and attributes, e.g., transport, map, and report objects, would be considered a container to a person of ordinary skill. *Id.* at 5 6.

As discussed above, the Houh Declaration submitted with the Petition contends that the objects of Gibbs "exemplify the 'containers' claimed in claim 2 of the '536 patent." Ex. 1003 ¶ 110. However, the Houh Deposition states that the container is "the thing that comprises the transport object library ob-

jects, the map object library objects, report object library objects that are instantiated and running in the system." Ex. 1008, 73:17 24. The Houh Supplemental Declaration alleges the deposition testimony is consistent with the Houh Declaration. Ex. 1009 ¶ 38. We have reviewed the paragraphs of the Houh Declaration submitted with the Petition (Ex. 1003 ¶¶ 90, 92, 94, 96 97, 104) cited in the Houh Supplemental Declaration at paragraph 38. Other than ¶ 110 of the Houh Declaration, the Houh Supplemental Declaration does not identify any specific object or collection of objects as constituting the "container."

Petitioner also argues that its position in the Petitioner Reply on what constitutes a "container" is supported by the original Houh Declaration. Pet. Reply 3 (citing Ex. 1003 ¶¶ 89 90, 94, 96 97). As discussed above, however, the original Houh Declaration described the various objects of Gibbs in some detail but, other than paragraph 110, did not specify what particular object or group of objects constitutes a "container."

Petitioner argues that what an anticipatory reference teaches must be analyzed from the perspective of one of ordinary skill and that is it proper to take into account not only specific teachings of the references, but also what inferences one of ordinary skill in the art reasonably would be expected to draw. Pet. Reply. 5 (citations omitted). In view of the apparently inconsistent testimony of Dr. Houh, we are not persuaded that the inferences a person of ordinary skill reasonably would be expected to draw from Gibbs would anticipate the claimed "container." The Houh Declaration is not consistent in identifying where the

"container" element is found in Gibbs. The Houh Declaration differs from the Houh Deposition and Houh Supplemental Declaration. We relied on the Houh Declaration in instituting *inter partes* review. Dec. Inst. 17 18. Petitioner now relies on the Houh Deposition testimony and Houh Supplemental Declaration. *See, e.g.*, Pet. Reply 3 (heading A.), 4. As such, Petitioner's evidence is inconsistent and does not specify where the container element is found in Gibbs.

Instead, we credit the testimony of Patent Owner's expert, Dr. Green, who testifies that the transport object library of Gibbs is distinct from the service object library. Ex. 2006 ¶¶ 86 94; *see* Ex. 1006, Fig. 4. Dr. Green concludes:

> Gibbs thus discloses the objects in Figure 4 as falling into two genuses: transport objects and service objects. Gibbs discloses each of these genuses as a library (i.e., "transport object library 64" and service object library 66") that consists of specific types of objects.

Ex. 2006 ¶ 88. This testimony distinguishes the claimed container from the two separate collections of objects, transport and service, in Gibbs. Neither are we persuaded by the extensive description in the Houh Declaration of the various objects of Gibbs. Pet. Reply 3 (citing Ex. 1003 ¶¶ 89 100, 108 109). We agree with Patent Owner that "Gibbs does not disclose any single," logically defined container that "comprises the instantiation of the transport, map, and object libraries." PO Resp. 39.

Thus, while Gibbs may disclose some objects that function like the claimed registers, Gibbs does not disclose the claimed container. Rather, the "attributes or data items disclosed by Gibbs are each described as belonging to particular objects, not as generically belonging to every object in Gibbs'[s] system." PO Resp. 26.

c. Nesting of containers-inherency

Petitioner states it is not proceeding on principles of inherency, arguing the disclosure is explicit. Pet. Reply 3. Patent Owner noted that, while it is "unclear," Dr. Houh apparently argued the disclosure of Gibbs inherently disclosed the claimed container. PO Resp. 38 40 (citing Ex. 1008, 76:23 78:10, 75:16 76:16).

The argument Patent Owner understood as one of inherency was based on the TMR subsystem "nesting," which also is described in the '536 patent. *Id.* at 39. Patent Owner contends nesting is present only when a container includes "the logical description of another container." *Id.* (citing Ex. 1001 at 9:4 9; 4:46 53). Patent Owner argues Gibbs does not disclose any nestable containers each including the logical description of another container. *Id.* Petitioner responds that nothing in the claim language limits encapsulation of other containers to those including a logical description of another container. Pet. Reply 6 7.

Patent Owner raises nesting only in the context of a perceived inherency argument by Petitioner. PO Resp. 39. Petitioner is not alleging inherency. Pet. Reply 3. Thus, inherency is not before us.

To the extent Petitioner perceives nesting as supporting its argument that Gibbs discloses the claimed container, it is not persuasive. Petitioner argues that Gibbs discloses a unique ID for the transport object within the boundaries of the map. *Id.* at 7. That one object of Gibbs has a unique ID allowing it to interact with another object is insufficient. The '536 discloses that every container includes a logical description of "all containers defined and to be defined in cyberspace." Ex. 1001, 9:8 9. As discussed above, this feature is claimed, for example,[9] in the neutral register of claim 2 which recites that "each container" of the apparatus claimed has a neutral register that "may interact" with other containers. That one transport object of Gibbs has an ID that allows it to be available to one other object does not disclose what is claimed. *See* PO Resp. 28 (arguing transport objects have unique IDs but service objects do not).

d. Conclusion

For the reasons discussed above, we determine Petitioner has not shown by a preponderance of the evidence that Gibbs discloses the claimed container.

3. Whether Gibbs Discloses "first register having a unique container identification value"

Petitioner also contends the railroad management system of Gibbs also discloses the claimed "plurality of registers" because it includes a number of libraries. Pet. 18 (citing Ex. 1003 ¶¶ 77, 82 85, 87, 115 117). Petitioner argues the "first register" of claim 1 is dis-

[9] Claim 2 includes four other registers.

closed in Gibbs because objects in the train management system of Gibbs have unique IDs which correspond to the object. *Id.* (citing Ex. 1003, ¶¶ 82, 118-119).

Specifically, Petitioner relies on the transport object, which is uniquely identified. Pet. Reply 10. Petitioner's position is based on its proposed construction of "a unique container identification value," that "any" one object or container with a unique ID meets the limitation. We construed the term above and found that the term relates to a value that "uniquely identifies the *given container*." Thus, each container claimed must include the first register having a unique identifier. Gibbs is presented by Petitioner as showing only the transport object, i.e., container, with a unique identifier.

For the reasons discussed above, we determine Petitioner has not shown by a preponderance of the evidence that Gibbs discloses "a first register having a unique container identification value."

4. Whether Gibbs Discloses "a neutral space register"

Claim 2 recites a "neutral space register for identifying space in which the container *may interact* with other containers, processes, systems, or gateways." (Emphasis added). Gibbs discloses a train consist report. Ex. 1006, 16:53 17:4. To generate a train consist report a particular train is selected. *Id.* A train report object retrieves data from the train object and car object of the selected train. *Id.* The train report object allows the user to see graphically the positioning of the cars in the selected train. *Id.* Petitioner al-

leges the train object and car object therefore intersect, i.e., interact, in the report object to meet the neutral register limitation. Pet. 18 (citing Ex. 1003 ¶ 98).[10]

Patent Owner argues the fact that the train consist report lists the train object and associated car objects does not show the required interaction with other objects, i.e., containers. PO Resp. 50 51. Patent Owner contends the mere retrieval of data and reporting the data graphically is not the required interaction because each of the train and car objects separately returns the data. *Id.* at 51.

Patent Owner further argues Gibbs does not "identify space" where interaction may occur. PO Resp. 52. Instead, a user of the train management system of Gibbs selects a train. *Id.* Only after the train is selected is locational information in the form of latitude and longitude generated for the selected train. *Id.* Patent Owner contends that the train consist report described in Gibbs is based on train selection, "not the locations of the train and cars." *Id.* (citing Ex. 1006, 16:53 54 ("To generate a train consist report, the train report object 414 prompts the user to select a particular train.")). To the extent train location is identified by latitude and longitude, Patent

---

[10] In its Response at page 20, Patent Owner objects to the Decision on Institution stating: "In addition, Petitioner cites the disclosures related to the active and passive space registers, as meeting the neutral space register limitation." Dec. Inst. 20 (citing Pet. 18 (citing Ex. 1003 ¶¶ 138–140)). The Decision on Institution found support for a "neutral space register" based on the map report object generated from the train and car objects. *Id.* The quote above was a restatement of Petitioner's argument, prefaced by "[i]n addition."

Owner argues they are "mere data; they do not identify the space in which the 'interaction' may occur." *Id.* We find both of Patent Owner's substantive arguments relating to Gibbs's train report persuasive.

First, the claim limitation requires "interaction" and the mere collection of separate data does not disclose any interaction. Second, merely because spatial information is generated after another event, i.e., selection of a train object is not "identifying space," it is, at best, identifying space based on another action. The claim language supports both of our conclusions.

Petitioner's Reply fails to address the arguments made by Patent Owner, restating what is shown in Gibbs, and concluding the train reports shows interaction. Pet. Reply 14 15. Similarly, Petitioner conclusorily argues "the location of the transport object" meets the "identifying space" limitation. *Id.* at 15. These arguments are not persuasive because they fail to set forth a factual basis and persuasive rationale for reaching the conclusion.

Thus, we determine Petitioner has not shown by a preponderance of the evidence that Gibbs discloses "neutral space register" as claimed.

5. Whether Gibbs discloses an "active space register," "passive space register," and "acquire register"

Claim 16 is not unpatentable as anticipated by Gibbs because Gibbs does not disclose either the claimed container or the first register. Claim 2 is not anticipated for the additional reason that the neutral

register is not disclosed by Gibbs. Given our conclusions above, we need not address Patent Owner's additional arguments regarding the other claimed registers of claims 2 and 16.

6. Conclusion

Petitioner has not shown by a preponderance of the evidence that independent claims 2 and 16 are anticipated under § 102(e) by Gibbs.

Claims 3 12, and 14 are multiply dependent on claims 1 or 2. By reason of their dependency on claim 2, Petitioner has not shown by a preponderance of the evidence that claims 3 12, and 14 are anticipated under § 102(e) by Gibbs.

B. Patent Owner's Motion to Exclude

Patent Owner filed a Motion to Exclude ("Mot. Exclude," Paper 34) the Houh Supplemental Declaration. The Houh Supplemental Declaration was filed with Petitioner's Reply Brief. Mot. Exclude 2. Petitioner filed an Opposition to Patent Owner's Motion to Exclude. ("Opp. Mot. Exclude," Paper 36). Petitioner alleges principally that the Houh Supplemental Declaration was not objected to prior to filing the Motion to Exclude. Opp. Mot. Exclude 1. Patent Owner did not file a Reply.

Patent Owner must object to the evidence it seeks to exclude. 37 C.F.R. § 42.64(a). Once an objection is filed, a motion to exclude "must be filed to preserve any objection." 37 C.F.R. § 42.64(c). The motion to exclude must identify the objection. *Id.*

There is no record that Patent Owner objected. The Motion to Exclude does not identify any objection, as is required. Accordingly, the Motion to Exclude is denied.

ORDER

ORDERED,

For the reasons given, it is

ORDERED that claims 2 12, 14, and 16 of U.S. Patent No. 7,010,536 have not been shown by a preponderance of the evidence to be unpatentable;

FURTHER ORDERED that Patent Owner's Motion to Exclude is denied; and

FURTHER ORDERED that, because this is a Final Written Decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

Summary of Post-*Alice* Decisions by the Federal Circuit

The following chart summarizes the Section 101 patent-eligibility decisions from the Federal Circuit since 2014. Decisions in which patents were held ineligible are listed first. Within that category, decisions in which the Federal Circuit did not provide an opinion are listed first

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
American Needle v. *Zazzle*, 670 F. App'x 717 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Appistry v. *Amazon.com* 676 F. App'x 1007 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Appistry v. *Amazon.com* 676 F. App'x 1008 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Becton, Dickinson & Co. v. *Baxter Int'l Inc.*, 639 F. App'x 652 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
Broadband iTV, Inc. v. *Hawaiian Telcom, Inc.*, 669 F. App'x 555 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
CallWave Commc'ns LLC v. *AT & T Mobility LLC*, 672 F. App'x 995 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
CertusView Techs., LLC v. *S&N Locating Servs., LLC*, 695 F. App'x 574 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Clear with Computers LLC v. *Altec Indus. Inc.*, 636 F. App'x 1015 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
CMG Fin. Servs., Inc. v. *Pac. Tr. Bank*, 616 F. App'x 420 (Fed. Cir. 2015)	Summary judgment granted	Affirmed without opinion	Ineligible
Concaten, Inc. v. *AmeriTrak Fleet Sols., LLC*, 669 F. App'x 571 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
DietGoal Innovations LLC v. *Bravo Media LLC*, 599 F. App'x 956 (Fed. Cir. 2015)	Summary judgment granted	Affirmed without opinion	Ineligible
East Coast Sheet Metal Fab. Corp. v. *Autodesk, Inc.*, 645 F. App'x 992 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
EResearchTechnology, Inc. v. *CRF, Inc.*, 681 F. App'x 964 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Exergen Corp. v. *Sanomedics Int'l Holdings, Inc.*, 653 F. App'x 760 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
FairWarning IP, LLC v. *CynergisTek, Inc.*, 669 F. App'x 570 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Front Row Techs. LLC v. *MLB Advanced Media, L.P.*, 2017 WL 4127880 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Glob. Check Servs., Inc. v. *Elec. Payment Sys., LLC*, 2017 WL 4461127 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
GoDaddy.com, LLC v. *RPost Commc'ns Ltd.*, 685 F. App'x 992 (Fed. Cir. 2017)	Summary judgment granted	Affirmed without opinion	Ineligible
Gonzalez v. *New Life Ventures, Inc.*, 2017 WL 3587862 (Fed. Cir. 2017)	Summary judgment granted	Affirmed without opinion	Ineligible
GT Nexus, Inc. v. *INTTRA, Inc.*, 669 F. App'x 562 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Hemopet v. *Hill's Pet Nutrition, Inc.*, 617 F. App'x 997 (Fed. Cir. 2015)	Summary judgment granted	Affirmed without opinion	Ineligible
Inventor Holdings, LLC v. *Bed Bath & Beyond, Inc.*, 643 F. App'x 1014 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
IPLearn-Focus, LLC v. *Microsoft Corp.*, 667 F. App'x 773 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
Joao Bock Trans. Sys., LLC v. *Jack Henry & Assocs., Inc.*, 803 F.3d 667 (Fed. Cir. 2015)	Summary judgment granted	Affirmed without opinion	Ineligible
Jericho Sys. Corp. v. *Axiomatics Inc.*, 642 F. App'x 979 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Kickstarter, Inc. v. *Fan Funded, LLC*, 654 F. App'x 481 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
Kombea Corp. v. *Noguar L.C.*, 656 F. App'x 1022 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
Kroy IP Holdings, LLC v. *Safeway, Inc.*, 639 F. App'x 637 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
Macropoint, LLC v. *Fourkites, Inc.*, 671 F. App'x 780 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Morales v. *Square, Inc.*, 621 F. App'x 660 (Fed. Cir. 2015)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Morsa v. *Facebook, Inc.*, 622 F. App'x 915 (Fed. Cir. 2015)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Multimedia Plus, Inc. v. *PlayerLync LLC*, 695 F. App'x 577 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Netflix, Inc. v. *Rovi Corp.*, 670 F. App'x 704 (Fed. Cir. 2016)	Summary judgment granted	Affirmed without opinion	Ineligible
Nextpoint, Inc. v. *Hewlett-Packard Co.*, 680 F. App'x 1009 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
NexusCard, Inc. v. *Kroger Co.*, 688 F. App'x 916 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
NICE Sys. Ltd. v. *ClickFox Inc.*, 2017 WL 4534822 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Novo Transforma Techs. LLC v. *Sprint Spectrum, L.P.*, 669 F. App'x 555 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Open Parking, LLC v. *ParkMe, Inc.*, 683 F. App'x 932 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Papst Licensing GmbH & Co. KG v. *Xilinx, Inc.*, 684 F. App'x 971 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Parus Holdings Inc. v. *Sallie Mae Bank*, 677 F. App'x 682 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Personalized Media Commc'ns, L.L.C. v. Amazon.com., 671 F. App'x 777 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Pres. Wellness Techs. LLC v. *Allscripts Healthcare Sols.*, 684 F. App'x 970 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Priceplay.com, Inc. v. *AOL Advert., Inc.*, 627 F. App'x 925 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
RaceTech, LLC v. *Kentucky Downs, LLC*, 676 F. App'x 1009 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
SkillSurvey, Inc. v. *Checkster LLC*, 683 F. App'x 930 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
VideoShare, LLC v. *Google Inc.*, 695 F. App'x 577 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Voxathon LLC v. *FCA US LLC*, 671 F. App'x 793 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
White Knuckle Gaming, LLC v. *Elec. Arts, Inc.*, 683 F. App'x 931 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Whitepages, Inc. v. *Isaacs*, 2017 WL 4534820 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Wireless Media Innovations, LLC v. *Maher Terminals*, 636 F. App'x 1014 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Williamson v. *Citrix Online, LLC*, 683 Fed. App'x. 956 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed without opinion	Ineligible
Allvoice Developments US, LLC v. *Microsoft Corp.*, 612 F. App'x 1009 (Fed. Cir. 2015)	Summary judgment granted	Affirmed in unpublished opn.	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
Clarilogic, Inc. v. *FormFree Holdings Corp.*, 681 F. App'x 950 (Fed. Cir. 2017)	Summary judgment granted	Affirmed in unpublished opn.	Ineligible
Coffelt v. *NVIDIA Corp.*, 680 F. App'x 1010 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in unpublished opn.	Ineligible
Content Extraction & Trans. LLC v. *Wells Fargo Bank*, 776 F.3d 1343 (Fed. Cir. 2014)	Motion to dismiss granted	Affirmed in unpublished opn.	Ineligible
Cyberfone Sys., LLC v. *CNN Interactive Grp., Inc.*, 558 F. App'x 988 (Fed. Cir. 2014)	Motion to dismiss granted	Affirmed in unpublished opn.	Ineligible
EasyWeb Innovations, LLC v. *Twitter, Inc.*, 689 F. App'x 969 (Fed. Cir. 2017)	Summary judgment granted	Affirmed in unpublished opn	Ineligible
Evolutionary Intelligence LLC v. *Sprint Nextel Corp.*, 677 F. App'x 679 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in unpublished opn.	Ineligible
Planet Bingo, LLC v. *VKGS LLC*, 576 F. App'x 1005 (Fed. Cir. 2014)	Summary judgment granted	Affirmed in unpublished opn.	Ineligible
Shortridge v. *Found. Constr. Payroll Serv., LLC*, 655 F. App'x 848 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed in unpublished opn.	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
Smartflash LLC v. *Apple Inc.*, 680 F. App'x 977 (Fed. Cir. 2017)	Judgment as a matter of law after trial	Reversed in unpublished opn.	Ineligible
TDE Petroleum Data Sols., Inc., v. *AKM Enter., Inc.*, 657 F. App'x 991 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed in unpublished opn.	Ineligible
Tranxition, Inc. v. *Lenovo (United States) Inc.*, 664 F. App'x 968 (Fed. Cir. 2016)	Summary judgment granted	Affirmed in unpublished opn.	Ineligible
Vehicle Intelligence & Safety LLC v. *Mercedes-Benz USA*, 635 F.App'x 914 (Fed. Cir. 2015)	Motion to dismiss granted	Affirmed in unpublished opn.	Ineligible
Affinity Labs of Texas, LLC v. *Amazon.com Inc.*, 838 F.3d 1266 (Fed. Cir. 2016)	Summary judgment granted	Affirmed in published opn.	Ineligible
Ariosa Diagnostics, Inc. v. *Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015)	Summary judgment granted	Affirmed in published opn.	Ineligible
buySAFE, Inc. v. *Google, Inc.*, 765 F.3d 1350 (Fed. Cir. 2014)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
Cleveland Clinic Found. v. *True Health Diagnostics LLC*, 859 F.3d 1352 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in published opn.	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
Digitech Image Techs., LLC v. *Elecs. for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014)	Summary judgment granted	Affirmed in published opn.	Ineligible
Elec. Power Grp., LLC v. *Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016)	Summary judgment granted	Affirmed in published opn.	Ineligible
FairWarning IP, LLC v. *Iatric Sys., Inc.*, 839 F.3d 1089 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed in published op.	Ineligible
Genetic Techs. Ltd. v. *Merial L.L.C.*, 818 F.3d 1369 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
Intellectual Ventures I LLC v. *Erie Indem. Co.*, 850 F.3d 1315 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
Intellectual Ventures I LLC v. *Symantec Corp.*, 838 F.3d 1307 (Fed. Cir. 2016)	Summary judgment granted	Affirmed in published opn.	Ineligible
Intellectual Ventures I LLC v. *Capital One Fin. Corp.*, 850 F.3d 1332 (Fed. Cir. 2017)	Summary judgment granted	Affirmed in published opn.	Ineligible
Intellectual Ventures I LLC v. Capital One Bank (USA), 792 F.3d 1363 (Fed. Cir. 2015)	Summary judgment granted	Affirmed in published opn.	Ineligible
Internet Patents Corp. v. *Active Network, Inc.*, 790 F.3d 1343 (Fed. Cir. 2015)	Motion to dismiss granted	Affirmed in published opn.	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
LendingTree, LLC v. *Zillow, Inc.*, 656 F. App'x 991 (Fed. Cir. 2016)	Summary judgment granted	Affirmed in published opn.	Ineligible
Mortg. Grader, Inc. v. *First Choice Loan Servs. Inc.*, 811 F.3d 1314 (Fed. Cir. 2016)	Summary judgment granted	Affirmed in published opn.	Ineligible
OIP Techs., Inc. v. *Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
RecogniCorp, LLC v. *Nintendo Co.*, 855 F.3d 1322 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
Secured Mail Sols. LLC v. *Universal Wilde, Inc.*, 2017 WL 4582737 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
Smart Sys. Innovations v. *Chicago Transit Auth.*, 2017 WL 4654964 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
Synopsys, Inc. v. *Mentor Graphics Corp.*, 839 F.3d 1138 (Fed. Cir. 2016)	Summary judgment granted	Affirmed in published opn.	Ineligible
In re TLI Commc'ns LLC Patent Litig., 823 F.3d 607 (Fed. Cir. 2016)	Motion to dismiss granted	Affirmed in published opinion	Ineligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
Ultramercial, Inc. v. *Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
In re BRCA1- & BRCA2-Based Hereditary Cancer Test Patent Litig., 774 F.3d 755 (Fed. Cir. 2014)	Denial of Preliminary injunction	Affirmed in published opn.	Ineligible
W. View Research, LLC v. *Audi AG*, 685 F. App'x 923 (Fed. Cir. 2017)	Motion to dismiss granted	Affirmed in published opn.	Ineligible
Amdocs (Israel) Ltd. v. *Openet Telecom, Inc.*, 841 F.3d 1288 (Fed. Cir. 2016)	Motion to dismiss granted	Reversed in published opn.	Eligible
Bascom Glob. Internet Servs., Inc. v. *AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016)	Motion to dismiss granted	Reversed in published opn.	Eligible
Enfish, LLC v. *Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016)	Summary judgment granted	Reversed in published opn.	Eligible
McRO, Inc. v. *Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016)	Motion to dismiss granted	Reversed in published opn.	Eligible
Rapid Litig. Mgmt. Ltd. v. *CellzDirect, Inc.*, 827 F.3d 1042 (Fed. Cir. 2016)	Summary judgment granted	Reversed in published opn.	Eligible

Case Name	*Outcome at District Court*	*Outcome at Federal Circuit*	*Eligibility result*
Thales Visionix Inc. v. *United States*, 850 F.3d 1343 (Fed. Cir. 2017)	Motion to dismiss granted	Reversed in published opn.	Eligible
Visual Memory LLC v. *NVIDIA Corp.*, 867 F.3d 1253 (Fed. Cir. 2017)	Motion to dismiss granted	Reversed in published opn.	Eligible
DDR Holdings, LLC v. *Hotels.com L.C.*, 773 F.3d 1245 (Fed. Cir. 2014).	JMOL denied	Affirmed in published opn.	Eligible
Trading Techs Int'l, Inc. v. *CQG, Inc.*, 675 F. App'x 101 (Fed. Cir. 2017)	JMOL denied	Affirmed in nonprecedential opn.	Eligible
Sociedad Espanola De Electromedicina Y Calidad v. *Blue Ridge X-Ray Co.*, 62 F. App'x 644 (Fed. Cir. 2015)	Summary judgment granted	Vacated & remanded on claim construction	Not Reached

In summary:

- Of 94 Section 101 appeals of lower court patent ineligibility rulings, the Federal Circuit upheld patent ineligibility in 87 cases.
- In one additional case, the Federal Circuit reversed a district court decision that the patent was eligible, making 88 total Federal Circuit decisions holding patents ineligible.
- Of these 88 Federal Circuit decisions holding patents ineligible, 51 were affirmances without opinion.
- Of the 87 Federal Circuit affirmances of ineligibility, in 55 the district court invalidated the patents on the pleadings alone.
- Of the 55 Federal Circuit affirmances of ineligibility, 35 decisions affirmed without an opinion the district court's pleadings invalidation.
- Only seven decisions out of 94 total appeals of patent ineligibility reversed district court opinions holding the underlying patents ineligible.
- Two cases were appeals of a district court decision denying a JMOL of patent invalidity, which the Federal Circuit affirmed, upholding eligibility.
- One district court ruling of patent ineligibility was reversed on claim construction, therefore not reaching the ineligibility holding.

Kyle Duncan

From:	Kyle Duncan
Sent:	Thursday, November 09, 2017 10:34 AM
To:	McGinley, Mike H. EOP/WHO; Robert EOP/WHO Luther; Talley, Brett (OLP)
Cc:	Berry, Jonathan (OLP)
Subject:	Fwd: request for interview/comment from The Nation

All:

I received the email below from the Nation, and as I've been instructed I referred her to DOJ's press office.

[redacted] (b) (5) [redacted] (b) (5), (b) (6) [redacted] (b) (5) [redacted]

[redacted] (b) (5) [redacted]

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) [redacted] (b) (5) [redacted] (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Begin forwarded message:

From: Sarah Posner [redacted] (b) (6) [redacted] >
Subject: request for interview/comment from The Nation
Date: November 9, 2017 at 10:22:07 AM EST
To: kduncan@schaerr-duncan.com

Hi Kyle,

For a story I'm writing for The Nation (deadline Monday, Nov. 13) about Alliance Defending Freedom and the Masterpiece Cakeshop case, I wanted to talk with you about the grants to your law firm from ADF for The Marriage Project, as well as your role as an allied attorney with ADF. Would you have a few moments to chat on the phone between now and and end of day Monday? Many thanks.

Best

Best,
Sarah

--
Sarah Posner
202.813.0084
c. (b) (6)
www.sarahposner.com

Kyle Duncan

From:	Kyle Duncan
Sent:	Thursday, November 09, 2017 4:17 PM
To:	McGinley, Mike H. EOP/WHO; Robert EOP/WHO Luther; Talley, Brett (OLP)
Cc:	Berry, Jonathan (OLP)
Subject:	Hayride

http://thehayride.com/2017/11/push-get-conservative-superstar-kyle-duncan-appointed-5th-circuit/

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Monday, November 20, 2017 1:23 PM
To: (b)(6) - Michael McGinley Email Address; (b)(6) - Robert Luther Email Address; Talley, Brett (OLP); Dickey, Jennifer (OLP)
Subject: Hayride

Look at this:

http://thehayride.com/2017/11/kennedys-treatment-kyle-duncans-5th-circuit-nomination-concerning/

Sent from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
(b) (6) (cell)
Kduncan@Schaerr-Duncan.com

Kyle Duncan

From:	Kyle Duncan
Sent:	Monday, November 20, 2017 6:31 PM
To:	Berry, Jonathan (OLP); Dickey, Jennifer (OLP); Talley, Brett (OLP)
Subject:	Good news
Attachments:	2017-11-20 Chair to Stuart Kyle Duncan regarding Nomination to the United States Court of Appeals for the Fifth Circuit.pdf

[redacted] see attached.

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) [redacted] (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Please respond to:
Pamela A. Bresnahan
Vorys, Sater, Seymour and Pease LLP
1909 K Street, N.W.
9th Floor
Washington, D.C. 20006
E-mail: pabresnahan@vorys.com

November 20, 2017

VIA E-MAIL AND U.S. MAIL
Stuart Kyle Duncan, Esquire
Schaerr Duncan LLP
1717 K Street, N.W.
Suite 900
Washington, D.C. 20006

Re: Nomination to the United States Court of Appeals for the Fifth Circuit

Dear Mr. Duncan:

The American Bar Association Standing Committee on the Federal Judiciary has completed its evaluation of your qualifications with regard to your nomination to the United States Court of Appeals for the Fifth Circuit. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence, and judicial temperament. A Substantial Majority of the Standing Committee is of the opinion that you are **"Well-Qualified,"** and a Minority determined that you are Qualified to serve on the United States Court of Appeals for the Fifth Circuit. The Majority Rating represents the Committee's official rating.

I have enclosed copies of my letters to Chairman Grassley and Ranking Member Feinstein of the Senate Judiciary Committee, and to White House Counsel, Mr. Donald F. McGahn, II, advising them of the Standing Committee's determination.

Congratulations and best wishes with the upcoming hearing.

Sincerely,

Pamela A. Bresnahan

Pamela A. Bresnahan

PAB/tjs
Enclosures
cc: Robert L. Rothman (via e-mail only)
ABA Standing Committee on the Federal Judiciary *(via e-mail only)*

Kyle Duncan

From: Kyle Duncan
Sent: Tuesday, November 21, 2017 8:32 AM
To: McGinley, Mike H. EOP/WHO; Luther, Robert EOP/WHO; Talley, Brett (OLP); Dickey, Jennifer (OLP)
Subject: Hayride update

[redacted] (b) (5)

http://thehayride.com/2017/11/kennedys-treatment-kyle-duncans-5th-circuit-nomination-concerning/

Thanks again for the great prep yesterday. [redacted] (b) (5)

KD

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | [redacted] (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From:	Kyle Duncan
Sent:	Tuesday, November 21, 2017 4:13 PM
To:	McGinley, Mike H. EOP/WHO; Luther, Robert EOP/WHO; Talley, Brett (OLP); Dickey, Jennifer (OLP)
Subject:	Fwd: ?PRESS RELEASE: Louisiana Business and Free-Market Leaders Support Nominations of Kyle S. Duncan and Judge Kurt D. Engelhardt

FYI

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Begin forwarded message:

From: Stephen Waguespack <stephenw@labi.org>
Subject: Fwd: ?PRESS RELEASE: Louisiana Business and Free-Market Leaders Support Nominations of Kyle S. Duncan and Judge Kurt D. Engelhardt
Date: November 21, 2017 at 4:11:29 PM EST
To: "kduncan@schaerr-duncan.com" <kduncan@schaerr-duncan.com>

FYI

Sent from my iPhone

Begin forwarded message:

From: LABI Communications <camillei@labi.org>
Date: November 21, 2017 at 2:04:57 PM CST
To: <stephenw@labi.org>
Subject: ?PRESS RELEASE: Louisiana Business and Free-Market Leaders Support Nominations of Kyle S. Duncan and Judge Kurt D. Engelhardt
Reply-To: LABI Communications <camillei@labi.org>

FOR IMMEDIATE RELEASE

Contact: Camille Ivy-O'Donnell
Communications Manager
Louisiana Association of Business and Industry
(817) 944-5091
camillei@labi.org

FOR IMMEDIATE RELEASE:

Louisiana Business and Free-Market Leaders Support Nominations of Kyle S. Duncan and Judge Kurt D. Engelhardt

Baton Rouge, LA. (November 21, 2017) – Friday, November 17th, the Louisiana Association of Business and Industry (LABI), in conjunction with the Louisiana Oil and Gas Association (LOGA) and the Pelican Institute for Public Policy, voiced their support for the nominations of Kyle S. Duncan and Judge Kurt D. Engelhardt to the Fifth Circuit Court of Appeals.

"Louisiana native Kyle S. Duncan and Judge Kurt Engelhardt are excellent choices for the Fifth Circuit Court of Appeals. We represent businesses and free-market policy leaders in Louisiana with a broad range of political views and a shared commitment to a thriving Louisiana economy. Having well-qualified judges and a fair and impartial judiciary serves the interest of all businesses by creating a level playing field with a robust commitment to the rule of law."

"Our state is in dire need of strong leadership, and our court system is no exception," Stephen Waguespack LABI's president and CEO, said. "Mr. Duncan and Judge Engelhardt have proven time and time again their steadfast commitment to a fair and impartial judiciary system. I, along with my colleges, urge the swift confirmation of these strong candidates to the Fifth Circuit."

"The leadership, experience, and knowledge that Mr. Duncan and Judge Engelhardt possess cannot be overstated," said Don Briggs, president of LOGA. "As the business and industry community looks to clean up the legal environment in order to attract more jobs and investment in Louisiana, it is imperative that we confirm fair and impartial judges that realize the value that businesses bring to our great state. I urge the swift confirmation of both Mr. Duncan and Judge Engelhardt to the Fifth District Court of Appeals."

"Liberty, equality, and the rule of law are fundamental to a free society and an America where everyone can flourish and pursue opportunity. That's why it's so important to have good judges at all levels of our judicial system who are committed to upholding these principles and defending the Constitution of the United States. Kyle Duncan and Judge Kurt Engelhardt are two such men, and I look forward to their swift confirmation to the Fifth Circuit," said Daniel Erspamer, CEO of the Pelican Institute for Public Policy.

Read LABI, LOGA and the Pelican Institute for Public Policy's joint letter **HERE**

For Press Inquiries Contact:

Camille Ivy-O'Donnell
(817) - 944-5091
camillei@labi.org

About the Louisiana Association of Business and Industry

The Louisiana Association of Business and Industry was organized in 1975 to represent Louisiana businesses. LABI is proud to be Louisiana's official state chapter of the U.S. Chamber of Commerce and the National Association of Manufacturers. LABI's primary goal is to foster a climate for economic growth by championing the principles of the free enterprise system and representing the general interest of the business community through active involvement in political, legislative, judicial and regulatory processes. Find out more information at http://www.labi.org.

About the Louisiana Oil & Gas Association

The Louisiana Oil & Gas Association was organized in 1992 to represent the Independent and service sectors of the oil and gas industry in Louisiana; this representation includes exploration, production and oilfield services. LOGA's primary goal is to provide our industry with a working environment that will enhance the industry. LOGA services its membership by creating incentives for Louisiana's oil & gas industry, warding off tax increases, changing existing burdensome regulations, and educating the public and government of the importance of the oil and gas industry in the state of Louisiana. Find out more information at: http://www.loga.la

About the Pelican Institute for Public Policy

The Pelican Institute for Public Policy is a leading voice for free markets, individual liberty, and economic opportunity in Louisiana. Founded in 2008, the Pelican Institute is committed to conducting research and working to advance policies that

will create jobs and unleash opportunity for all Louisianans. To learn more, visit www.pelicaninstitute.org.

###

Kyle Duncan

From:	Kyle Duncan
Sent:	Wednesday, November 22, 2017 5:57 PM
To:	McGinley, Mike H. EOP/WHO; Talley, Brett (OLP); Luther, Robert EOP/WHO; Dickey, Jennifer (OLP)
Cc:	Berry, Jonathan (OLP)
Subject:	AFJ Report
Attachments:	AFJ-Duncan-Report.pdf

Here's my AFJ report. [redacted (b) (5)]

[redacted (b) (5)].

I kind like the picture on the front, however. I wonder if they'd give me a copy...

Happy Thanksgiving!

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) [redacted (b) (6)] (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

AFJ NOMINEE REPORT

KYLE DUNCAN

U.S. Court of Appeals for the Fifth Circuit

CONTENTS

INTRODUCTION

On October 2, 2017, President Trump nominated Stuart Kyle Duncan for a seat vacated by W. Eugene Davis on the United States Court of Appeals for the Fifth Circuit.[1] Alliance for Justice strongly opposes his confirmation.

In opposing Executive nominations in the past, Senate Republicans have claimed that nominees whose records are defined by political ideologies are disqualified. For example, Senator Chuck Grassley claimed, "[t]he President's nominee can't be so committed to political causes, and so devoted to political ideology, that it clouds his or her judgment."[2] Similarly, Senate Majority Leader Mitch McConnell disqualified a nomine whose litigation record was, in McConnell's words, "marked by ideologically driven positions[.]"[3]

Kyle Duncan is a nominee whose record is unquestionably "marked by ideologically driven positions." In fact, Duncan has spent his career fighting reproductive rights for women and civil rights for LGBTQ Americans, defending discriminatory voting laws, and dismantling protections for immigrants:

» ***Duncan has fought contraception coverage for women.*** He served as lead counsel in *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014); he opposed the Affordable Care Act's contraception mandate in an amicus brief in *Zubic v. Burwell*, 136 S. Ct. 1557 (2016); and he authored a brief in *Stormans Inc. v. Weisman*, 794 F.3d 1064 (2015) opposing a Washington law that required pharmacies to stock some forms of birth control.

» ***Duncan has fought against a woman's right to choose to have an abortion.*** Duncan co authored an amicus brief in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) supporting Texas's restrictions on abortion, restrictions that the Supreme Court found were an undue burden on the rights of women.[4]

» ***Duncan has actively fought LGBTQ equality.*** Duncan authored briefs opposing marriage equality in *Obergefell v. Hodges*, 576 U.S.___ (2015) and supporting Louisiana's and Virginia's discriminatory "Defense of Marriage" laws in *Robicheaux v. George*, 135 S.Ct. 995 (2015) and *Schaefer v. Bostic*, 135 S.Ct. 308 (2014).[5] Indeed, Duncan questioned the legitimacy of the Supreme Court itself following the *Obergefell* decision, saying "[the same sex marriage case] raises a question about the legitimacy of the Court."[6] Moreover, he has repeatedly attacked the rights of same sex couples attempting to adopt children. *See Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010); *V.L. v. E.L.*, 136 S. Ct. 1017

1 Press Release, Eight Nominations Sent to the Senate Today, The White House (June 7, 2017), https://www.whitehouse.gov/the-press-office/2017/10/02/eight-nominations-sent-senate-today

2 Press Release, Senator Chuck Grassley, Grassley statement on the Nomination of Debo Adegbile to be Assistant U.S. Attorney (Mar. 5, 2014), https://www.grassley.senate.gov/news/news-releases/grassley-statement-nomination-debo-adegbile-be-assistant-us-attorney

3 Press Release, Senator Mitch McConnell, McConnell to Oppose Justice Nominee Over Advocacy on Behalf of Philadelphia Cop-Killer (Mar. 5, 2014), https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=AEDCCD4C-73B9-4D8C-A511-243AFD40C898

4 *See* Brief of Amicus Curiae Assoc. of Am. Physicians and Surgeons, Inc. in Support of Respondents, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (Feb. 3, 2016)

5 *See* Brief of Louisiana, et al., as Amici Curiae Supporting Respondents in *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, 14-574 (Apr. 2, 2015); Respondents' Brief in Support of Petition for Writ of Certiorari Before Judgment in *Robicheaux v. George*, No. 14-596 (Dec. 2, 2014); Petition for a Writ of Certiorari in *Schaefer v. Bostic*, No. 14-225 (Aug. 22, 2015)

6 Interview with Raymond Arroyo, World Over, EWTN Global Catholic Network (July 2, 2015)

(2016). This year, he represented the Gloucester County School Board in *Gloucester County Sch. Bd. v. G.G.*, No. 16 273 (Mar. 6, 2016). the well publicized Gavin Grimm case, in which Duncan fought to keep transgender students from using the bathroom that conforms to their gender identity by advancing arguments that construe transgender Americans as mentally ill. Disturbingly, Duncan has spoken multiple times before the Alliance Defending Freedom.[7] The Southern Poverty Law Center has classified the Alliance Defending Freedom as a "Hate Group" that "has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a 'homosexual agenda' will destroy Christianity and society."[8]

» ***Duncan has fought to make it more difficult for people of color to vote.*** In *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399 (2017), he (along with fellow Trump judicial nominee Thomas Farr[9]) unsuccessfully petitioned the Supreme Court to uphold a law that attacked the voting rights of communities of color, and that the Fourth Circuit said had been enacted with discriminatory intent, "target[ing] African Americans with almost surgical precision[.]" *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (2016). Similarly, Duncan defended a controversial voter photo ID law in an amicus brief supporting the state of Texas in *Abbott v. Veasey*, 137 S. Ct. 612 (2017).[10]

» ***Duncan has taken a hardline stance against immigrants.*** Duncan filed an amicus brief against President Obama's Executive Order that established the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.[11] In his brief, Duncan challenged the naturalization of undocumented immigrants on the basis that it threatens public safety by arguing that "[m]any violent criminals would likely be eligible to receive deferred action under DAPA's inadequate standards."[12] This line of reasoning reinforces troubling stereotypes and misconceptions about immigrants.

» ***Duncan has opposed criminal justice reform.*** For example, Duncan challenged the retroactive application of the Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life sentences without the possibility of parole were unconstitutional for juveniles.[13]

» ***Duncan has made it clear he will not respect legal precedent.*** Federal judicial nominees often stand before the Senate Judiciary

7 Sen Comm on the Judiciary, 115th Cong , Stuart Kyle Duncan: Questionnaire for Judicial Nominees, 1

8 *See* Southern Poverty Law Center, Extremist Files: Alliance Defending Freedom, available at https://www splcenter org/fighting-hate/extremist-files/group/alliance-defending-freedom; see *also* Alex Amend, *Anti-LGBT Hate Group Alliance Defending Freedom Defended State-Enforced Sterilization for Transgender Europeans*, SPLC HATEWATCH (July 27, 2017), https://www splcenter org/hatewatch/2017/07/27/anti-lgbt-hate-group-alliance-defending-freedom-defended-state-enforced-sterilization

9 *See* Alliance for Justice Report: Thomas Farr, available at https://www afj org/our-work/nominees/thomas-alvin-farr

10 Brief of Amici Curiae Members of Congress Representing States in the Fifth Circuit Supporting Petitioners in *Abbott v Veasey*, No 16-393 (Oct 27 2016)

11 Brief of Amici Curiae National Sherriffs' Assoc , the Rememberance Project, and American Unity Legal Defense Fund Supporting Respondents in *United States v Texas*, No 15-674 (Apr 4, 2016)

12 *Id* at *15

13 *See* Brief of Respondent State of Louisiana, *Montgomery v Louisiana*, No 14-280 (Aug 24, 2015)

Committee and pledge that they will follow judicial precedent. Duncan, by his own admissions, has indicated he will not respect precedent when he disagrees with the outcome of a case. After the *Obergefell* decision upheld the right to same sex marriage, Duncan questioned the legitimacy of the Supreme Court, saying "[the same sex marriage case] raises a question about the legitimacy of the Court."[14] He similarly disparaged the legitimacy of the Ninth Circuit before the court heard a case that required pharmacies to provide contraceptive drugs.[15] And when asked at a Federalist Society event about the Affordable Care Act's contraceptive mandate, Duncan commented that he was "very friendly philosophically to making arguments" not to follow precedent.[16]

BIOGRAPHY

Kyle Duncan was born in Baton Rouge, Louisiana in 1972.[17] He attended Louisiana State University for both his undergraduate work and law school, obtaining his degrees in 1994 and 1997, respectively. He later obtained his L.L.M. from Columbia University Law School in 2004.

After graduating law school, Duncan clerked for Hon. John M. Duhé, Jr. on the Fifth Circuit Court of Appeals.[18] He then joined Vinson & Elkins LLP for a year, before becoming an Assistant Solicitor General in the Texas Attorney General's Office. In 2001, Duncan joined the firm Weil, Gotshal & Manges LLP for a year before stints teaching at Columbia Law School and The University of Mississippi School of Law. In 2008, he became the appellate chief of the Louisiana Attorney General's Office.

He left the public sector in 2012 to join the Becket Fund for Religious Liberty.[19] He then left that position in 2016 to co found his own firm, Schaerr Duncan LLP. Duncan is currently one of three attorneys at the firm, one of whom is fellow Trump judicial nominee Stephen Schwartz.[20]

LEGAL AND OTHER VIEWS

I. REPRODUCTIVE RIGHTS

Duncan has vigorously fought the contraceptive mandate in the Affordable Care Act. In fact, Duncan has dismissed the importance of access to contraception. For example, he has accused the government of treating "contraceptives as 'the sacrament of our modern life,'" and has criticized what he considers the idea that contraceptives are "necessary for 'the good life,' health and economic success of society, particularly women."[21]

14 Interview with Raymond Arroyo, World Over, EWTN Global Catholic Network (July 2, 2015)
15 *See* Presenter, "Legal Issues in a Culture of Life Practice," Annual Meeting of American Academy of Fertility Care Professionals (Aug 10, 2013)
16 Duncan, Presenter at HHS Contraceptive Mandate Litigation Update, Federalist Society Religious Liberty Practice Group Podcast (Oct 25, 2012)
17 Sen Comm On the Jud , 115th Cong , Stuart Kyle Duncan: Questionnaire for Judicial Nominees, 1
18 *Id* at 3
19 *Id* at 2
20 Alliance for Justice Report: Stephen Schwartz, available at https://www.afj.org/our-work/nominees/stephen-schwartz
21 Adelaide Darling, *Experts warn of troubling mindset behind conscience threats*, ETWN News (Mar 5, 2013), http://www.ewtnnews.com/catholic-news/US.php?id=7163

Duncan has even questioned Supreme Court precedent in this area. When asked at a Federalist Society event about the Affordable Care Act's requirement to cover contraceptives, Duncan was dismissive. A participant asked: "[C]an't we just once in a while make the argument that shows that we do not accept those precedents?" Duncan responded, "[W]ell, you know I have to say I may be very friendly philosophically to making arguments like that..."[22]

Most notably, Duncan served as lead counsel in *Hobby Lobby v. Burwell*, where the Supreme Court found in a 5 4 decision that closely held for profit corporations can have religious beliefs, and can deny contraceptive coverage as part of their employer sponsored health insurance plans when contraception conflicts with those beliefs.

In his brief, Duncan minimized the burden placed on women by businesses that fail to provide health insurance contraceptive coverage. In fact, he held that the impact on women was irrelevant:

> In a situation like this, where the government program forces one party to provide a benefit to another, the loss of that benefit is not the kind of impact on third parties that should matter. From the perspective of the [Religious Freedom Restoration Act], a hypothetical government mandate that a person mow his lawn on Sundays should be analyzed no differently from a mandate that the same person mow his neighbor's lawn on Sundays. The fact that the neighbor loses free yard work in one scenario does not alter the substantial burden analysis in the least.[23]

Duncan also co authored an amicus brief in *Zubik v. Burwell*, another case challenging the Affordable Care Act's contraceptive mandate.[24]

Duncan, like another Trump nominee, Matthew Kacsmaryk,[25] unsuccessfully opposed women's reproductive rights in *Stormans Inc. v. Weisman*.[26] Duncan co wrote an amicus brief petitioning the Supreme Court to overturn a Washington state law that required pharmacists to stock a "representative assortment of drugs...in order to meet the pharmaceutical needs of its patients," including birth control.[27]

In the *Stormans* case, the Ninth Circuit decided that the pharmacists were required to follow the law, finding that when pharmacies deterred women from accessing birth control they burdened "ensuring timely and safe delivery" of medical services. *See Stormans, Inc.*, 794 F.3d at 1078. The Court elaborated on the importance of women having access to birth control at a local pharmacy:

> The immediate delivery of a drug is always a faster method of delivery than requiring a customer to travel elsewhere. Speed is particularly important considering the time sensitive nature of emergency contraception and of many other medications. The time taken to travel to anther pharmacy, especially in rural

22 Duncan, Presenter at HHS Contraceptive Mandate Litigation Update, Federalist Society Religious Liberty Practice Group Podcast (Oct 25, 2012)

23 *See* Brief for Respondents at 43-44, *Sebelius v Hobby Lobby Stores, Inc* , No 13-354 (Oct 21, 2013)

24 *See* Brief of Amicus Curiae Eternal Word Television Network in Support of Petitioners, Nos 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191 (Jan 11, 2016)

25 Alliance for Justice Report: Matthew Kacsmaryk, available at https://afj.org/our-work/nominees/matthew-kacsmaryk

26 *See* Brief of Amici Curiae United States Conference of Catholic Bishops and Washington State Catholic Conference Supporting Petitioners, No 15-862 (Feb 5, 2016)

27 *Id*

> areas where pharmacies are sparse, may reduce the efficacy of those drugs.

Id. In addition, the Court focused on how deferring pregnant customers "could lead to feelings of shame in the patient[.]" *Id.* The Supreme Court denied the cert petition, leaving the Ninth Circuit decision in place. *Stormans, Inc. v. Weisman*, 136 S. Ct. 2433 (2016).

When discussing *Stormans* before it arrived in the Ninth Circuit, Duncan disparaged the legitimacy of the court:

> The Ninth Circuit Court of Appeals, often, well let's just say, goes off on its own. One of the leading jurists on the Ninth Circuit Court of Appeals, who will remain nameless, because I'm sure this talk is being recorded, said at one point 'well sure I get some things wrong, but the Supreme Court can't catch them all.' Right? This is the view of many on the Ninth Circuit, although I am sure there are some solid judges on the Ninth Circuit as well.[28]

Beyond contraceptive access, Duncan has consistently fought against women's reproductive rights in the form of the right to choose to have an abortion. He co authored an amicus brief in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).[29] The *Whole Woman's Health* case involved a Texas law that required abortion providers to have admitting privileges within 30 miles of the clinic, which led to a mass closing of facilities that offered abortion procedures. Duncan's brief argued that the regulation "enhance[ed] patient safety for an array of outpatient procedures."[30] However, the Supreme Court found that the admitting privileges requirement was unconstitutional as "there was no significant health related problem that the new law helped to cure" and it placed an undue burden on women's right to an abortion. *Whole Woman's Health*, 136 S. Ct. at 2311.

II. LGBTQ DISCRIMINATION

In an interview, Duncan decried the dangers of society accepting LGBTQ citizens:

> We are seeing, as you all are, a rapid movement towards sort of general cultural acceptance of homosexuality and homosexual practices and also at the same time you're seeing a rapid move towards marginalizing people who adhere to a traditional view of human sexuality and marriage.[31]

Duncan has vigorously fought equality for LGBTQ persons, raising serious concerns about whether he will be an unbiased jurist who will give proper effect to some of our nation's most important Supreme Court precedents and equal justice to LGBTQ Americans.

a. Marriage Equality

Duncan has long opposed same sex marriage, and has been an outspoken critic of the Supreme Court's decisions in *Obergefell v. Hodges* and *United States v. Windsor*. Tellingly, Duncan co authored an amicus brief representing Louisiana's

28 *See* Presenter, "Legal Issues in a Culture of Life Practice," Annual Meeting of American Academy of Fertility Care Professionals (Aug 10, 2013)
29 *See* Brief of Amicus Curiae Assoc of Am Physicians and Surgeons, Inc in Support of Respondents, *Whole Woman's Health v Hellerstedt*, No 15-274 (Feb 3, 2016)
30 *Id* at *6
31 Panelist, "Religious Liberties Roundtable," EWTN Global Catholic Network, Aug 17-18, 2013

opposition to same sex marriage. The brief argued that:

> States may rationally structure marriage around the biological reality that the sexual union of a man and a woman unique among all human relationships produces children...man woman marriage furthers society's "need to regulate male female relationships and the unique procreative possibilities of them[.]"[32]

Duncan wrote elsewhere that if the Court recognized that same sex marriage was a fundamental right, the "harms" to our democracy "would be severe, unavoidable, and irreversible."[33] In one interview, Duncan stoked fears about what a constitutional right to marriage would mean, speculating:

- The Court has not recognized a constitutional right to same sex marriage. If it does so, is it printing a license to persecute churches?
- Every one of those [religious] groups should be afraid that the government will now view them as, open season on them because of their now unconstitutional view on marriage.
- Why not let the people work this out instead of recognizing a constitutional right and printing a license to persecute...[34]

Before *Obergefell*, when a court upheld Louisiana's same sex marriage ban, only one of two decisions in the country at that time to uphold such bans, Duncan said "[t]he Louisiana decision provides a crucial counterpoint to the many erroneous decisions usurping state authority to define marriage[.]"[35] Duncan also co wrote a petition for writ of certiorari in the *Robicheaux v. George* case, requesting that the high court uphold the district court decision that allowed Louisiana to refuse to recognize same sex marriage in other states.[36]

Similarly, Duncan defended Virginia's "Defense of Marriage" law in *Schaefer v. Bostic*. In *Schaefer*, the Fourth Circuit upheld a district court ruling striking down Virginia's same sex marriage ban. Duncan authored a petition for writ of certiorari on behalf of the state officials refusing to issue or recognize marriage licenses for same sex couples.[37] The Supreme Court denied the writ. *Schaefer*, 135 S. Ct. at 308.

After the *Obergefell* decision upheld the right to same sex marriage, Duncan questioned the legitimacy of the Supreme Court, saying "[the same sex marriage case] raises a question about the legitimacy of the Court."[38] He expanded on his rejection of *Obergefell*, claiming, "[a]ssessed from [the legal process] point of view, I find *Obergefell* to be an abject failure[,]" and "the decision imperils civic peace."[39]

b. LGBTQ Adoption

As counsel in *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010) and *V.L. v. E.L.*, 136

32 Brief of Louisiana, et al as Amici Curiae Supporting Respondents, at *11 (quoting *DeBoer v Snyder*, 772 F 3d 388, 404—05 (6th Cir 2014)(internal citation omitted)
33 Duncan, *Marriage, Self-Government, and Civility*, PUBLIC DISCOURSE (Apr 23, 2015)
34 Ducan Interview with Raymond Arroyo, World Over, EWTN Global Catholic Network (Apr 30, 2015)
35 Janet McConnaughey, *La asks US Supreme Court to hear gay marriage case*, ASSOC PRESS (Dec 4, 2014)
36 Respondents' Brief in Support of Petition for Writ of Certiorari Before Judgment in *Robicheaux v George*, No 14-596 (Dec 2, 2014)
37 Petition for a Writ of Certiorari in *Schaefer v Bostic*, No 14-225 (Aug 22, 2015)
38 Interview with Raymond Arroyo, World Over, EWTN Global Catholic Network, July 2, 2015
39 Kyle Duncan, *Obergefell* Fallout, CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE, 132 (ABC-CLIO 2016) (David Newton, Ed)

S. Ct. 1017 (2016), Duncan sought to deny same sex couples adoption rights. In *Adar*, Duncan represented the Louisiana Department of Justice in opposing a same sex couple who adopted a Louisiana born child from being named the child's fathers on the birth certificate.[40] Duncan argued that under Louisiana law, adoptive parents can only be named on a birth certificate if they were eligible to adopt in Louisiana. At the time, same sex marriage was still banned in Louisiana. In 2010, a three judge panel of the Fifth Circuit affirmed a district court judgment ordering the Louisiana government to issue a new birth certificate listing the adoptive parents. See *Adar v. Smith*, 597 F.3d at 701. However, in 2011, a divided en banc panel of the Fifth Circuit reversed. *See Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (en banc). Of course, since the Supreme Court's decision in *Obergefell v. Hodges*, Louisiana's ban on same sex marriage has been nullified. *See Robicheaux v. Caldwell*, 791 F.3d 616, 618 19 (5th Cir. 2015).

In *V.L. v. E.L.*, Duncan represented the birth mother of three children whom she and her same sex partner had raised for eight years.[41] In 2007, the non birth parent was granted adoption rights. After the birth mother moved back to Alabama, the couple split up. The birth mother then attempted to block the other parent from fulfilling any of her parental rights, including visitation. The Alabama Supreme Court ruled that it would not recognize the adoption judgment of a same sex couple. *See V.L. v. E.L.*, 136 S. Ct. at 1019. When Duncan was asked whether visits by the adoptive mother, who had raised the children for eight years, would be in the best interest of the children, Duncan said, according to a Wall Street Journal article, he believed "it is unclear, at least until an Alabama court holds a hearing to examine whether such visits would be in the children's best interest."[42] The Supreme Court reversed the decision of the Alabama Supreme Court in 2016. *Id.* at 1022.

40 See Brief in Opposition in *Adar v Smith*, No 11-46 (Sept 9, 2011)
41 See Respondent E L 's Brief in Opposition, No 15-648 (Dec 21, 2015)

c. *Transgender Rights*

At a speech before the Heritage Foundation in 2016, Duncan criticized federal protections against discrimination based on gender identity, claiming "[t]he whole concept of sex has been turned on its head."[43] Duncan remarked:

> [N]ote that DOJ's position on these matters is not *merely* about the positive law. Listen again to what they say in their brief: "For purposes of determining whether a person is a man or a woman, gender identity is the critical factor...." [] Let that sink in. Our federal government is telling us not merely what it thinks the law is but what "is a man" and what "is a woman." Something has gone wrong.[44]

Duncan represented Virginia's Gloucester County School Board and argued that Gavin Grimm, a transgender high school boy, should not be allowed to use the men's restroom. *See Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (2017). The Gloucester school board attempted to isolate the transgender student, enforcing use of a separate, private facility. After the

42 Jess Bravin, *Supreme Court Allows Lesbian Adoptive Mother to See Children in Alabama Case*, THE WALL STREET JOURNAL (Dec 14, 2015), https://www.wsj.com/articles/supreme-court-allows-lesbian-adoptive-mother-to-see-children-in-alabama-case-1450123712
43 Moriah Balingit, *Texas A G attacks transgender ruling*, WASH POST (July 8, 2016)
44 Duncan, Remarks Notes on "Obama's Edict on School Showers, Lockers and Bathrooms: Challenges and Legal Responses," Heritage Foundation, Washington, D C (July 7, 2016)

Fourth Circuit struck down the school board's policy, Duncan filed a brief appealing the decision to the Supreme Court, claiming that Title IX does not protect transgender students.[45] In reviewing Duncan's brief, Lambda Legal noted:

> In particular, Mr. Duncan's brief deployed offensive and baseless "gender fraud" arguments, suggesting that schools were entitled to refuse to respect a student's gender identity in order to "prevent[ ] athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women" a myth that has not materialized across hundreds of school districts with nondiscriminatory policies over many years.[46]

Duncan also served as lead trial and appellate counsel for the North Carolina General Assembly in *Carcaño v. McCrory*, 315 F.R.D. 176 (M.D.N.C. 2016) and *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 174103 (M.D.N.C. Dec. 16, 2016), defending North Carolina's discriminatory "bathroom bill." The bill in question stated that "multiple occupancy bathrooms and changing facilities, including those managed by local boards of education, must be 'designated for and only used by persons based on their biological sex.'" *See United States v. North Carolina*, 2016 U.S. Dist. LEXIS 174103 at *5 (citing North Carolina's Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3).

In *Carcaño*, Duncan introduced expert declarations that characterized transgender Americans as being mentally ill:

> With regard to public restrooms and other intimate facilities, there is no evidence to support social measures that promote or encourage gender transition as medically necessary or effective treatment for gender dysphoria.
>
> What is missing is sound science to show that gender identity discordance is not a delusional state.
>
> In psychiatry, a delusion is defined as a fixed, false belief which is held despite clear evidence to the contrary. In psychiatric practice, patients with the common diagnosis of anorexia nervosa have the false belief that they are overweight ("fat") in spite of overwhelming evidence of their cachexia. Similarly, those who are gender incongruent believe they are of the opposite sex despite clear and overwhelming evidence to the contrary.[47]

d. Alliance Defending Freedom

Duncan has spoken several times before the Alliance Defending Freedom (ADF).[48] The Alliance Defending Freedom, an organization that has defended the state enforced sterilization of transgender people overseas, is classified as a hate group by the Southern Poverty Law Center.[49]

45 Brief of Petitioner, *Gloucester County Sch Bd v G G*, 2017 U S S Ct Briefs LEXIS 25 (Jan 3, 2017)

46 *See* Lamda Legal Letter to Chairman Grassley and Ranking Member Feinstein, Re: 35 Groups Oppose Confirmation of Don Willett, Stuart Kyle Duncan and Matthew Kacsmaryk (Nov 14, 2017) (quoting Brief of Petitioner at 41), available at https://www lambdalegal org/sites/default/files/legal-docs/downloads/final_lgbt_letter_opposing_willett_duncan_and_kacsmaryk_002 pdf

47 Supplemental Brief of State Defendants and Intervenor-Defendants in Opposition to Plaintiff's Due Process Claim, Carcaño v McCrory, No 1:16-cv-00236-TDS-JEP (M D NC Oct 28, 2016), Decl of Paul W Hruz, M D ¶ 38 (p 137), Quentin L Van Meter, M D ¶ 50 (p 170), Decl Allan M Josephson, M D ¶ 42 (p 189), available at https://docs google com/viewerng/viewer?url=http://files eqcf org/wp-content/uploads/2016/11/173-Ds-and-I-Ds-Supp-Brief-Oppn-Ps-Due-Process-Claim pdf

48 Sen Comm on the Judiciary, 115th Cong , Stuart Kyle Duncan: Questionnaire for Judicial Nominees, 14–15

49 *See* Alex Amend, *Anti-LGBT Hate Group Alliance Defending Freedom Defended*

III. VOTING RIGHTS

In 2016, Duncan, along with fellow Trump judicial nominees Thomas Farr and Stephen Schwartz, unsuccessfully represented North Carolina in an attempt to obtain a Supreme Court reversal of the Fourth Circuit's ruling in *North Carolina v. N.C. St. Conf. of the NAACP*. The Fourth Circuit had struck down a restrictive voting law that required voters to have photo identification, reduced the days of early voting, and eliminated same day registration, out of precinct voting, and preregistration. In its ruling, the Fourth Circuit observed that the law "target[s] African Americans with almost surgical precision." *N.C. State Conf. of NAACP*, 831 F.3d at 214.

In his petition for writ of certiorari, Duncan's brief argued that there is no evidence that the law was passed with discriminatory intent or had a discriminatory impact.[50] Taking umbrage with the Fourth Circuit's findings, the brief stated, "the decision insults the people of North Carolina and their elected representatives by convicting them of abject racism. That charge is incredible on its face given the pains the legislature took to ensure that no one's right to vote would be abridged[.]"[51] Of course, the Supreme Court denied cert, letting stand the decision that the law had clear racially discriminatory intent and therefore violated the Equal Protection Clause of the United States Constitution. *See North Carolina. v. N.C. St. Conf. of the NAACP*, 581 U.S. _____ (2017).

Duncan's record of defending discriminatory voting laws is not limited to North Carolina. In 2016, Duncan co authored a brief on behalf of elected officials in *Abbott v. Veasey* petitioning for Supreme Court review of a Fifth Circuit decision.[52] In his brief, Duncan defended Texas' strict voter identification law. *See Abbott v. Veasey*, 137 S. Ct. 612 (2017). The District Court had found that the law "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect on Hispanics and African Americans, and was imposed with an unconstitutional discriminatory purpose." *Veasey v. Perry*, 71 F.Supp 627, 633 (S.D. Tex. 2014). The Fifth Circuit, sitting en banc, remanded the case, but did not overturn the conclusion that the law was unconstitutional in its discriminatory effects and violated Section 2 of the Voting Rights Act, which bans any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen . . . ." *See Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc) (quoting 52 U.S.C. § 10301(a)). The Supreme Court denied Duncan's petition for cert. *Veasey*, 137 S.Ct. at 613. But following Texas' passage of a new voter ID law in June 2017, the Fifth Circuit has temporarily stayed enforcement of the district court's injunction from enforcing the voter ID laws until after the recent election cycle. *See Veasey v. Abbott*, 870 F.3d 387, 391 92 (5th Cir. 2017). Oral arguments have been scheduled for December.[53]

IV. IMMIGRATION

Duncan was involved in the litigation involving President Obama's Executive Order that established the Deferred

State-Enforced Sterilization for Transgender Europeans, SPLC HATEWATCH (July 27, 2017)
50 Petition for a Writ of Certiorari and Volume 1 of the Appendix in *State of North Carolina v N C State Conf of the NAACP*, No 16-833 (Dec 27, 2016)
51 *Id* at *2

52 Brief of Amici Curiae Members of Congress Representing States in the Fifth Circuit Supporting Petitioners in *Abbott v Veasey*, No 16-393 (Oct 27 2016)
53 *Texas NAACP v Steen* (consolidated with *Veasey v Abbott*), Brennan Center for Justice (Nov 20, 2017), https://www brennancenter org/legal-work/naacp-v-steen

Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. Duncan filed an amicus brief on behalf of National Sheriffs' Association, the Remembrance Project, and Americans Unity Legal Defense Fund, in support of Texas in *United States v. Texas*, 579 U.S. ___ (2016).[54] In the brief, Duncan challenged DAPA on the basis that it threatened public safety. In particular, Duncan argued that "[m]any violent criminals would likely be eligible to receive deferred action under DAPA's inadequate standards."[55]

Duncan also fought President Obama's Deferred Action for Childhood Arrivals (DACA). In an amicus brief supporting a petition for cert on behalf of Governor Jeb Bush and the State of Florida, in the case *Brewer v. Arizona Dream Act Coalition*, Duncan argued that DACA was not properly enacted by Congress, was not legally valid, and thus, is not binding on the state of Arizona. [56]

Duncan also participated as counsel for amicus curiae in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) while at the Louisiana Attorney General's Office. The Supreme Court examined whether Padilla's counsel misadvised him of the consequences of a plea deal that resulted in his deportation. The Court, in a 7 2 decision, held that counsel must inform her client about the direct consequences of a plea. Duncan's amicus brief argued that Padilla's counsel was not constitutionally deficient, claiming that deportation should not be a consequence about which counsel must inform a client.[57] Justice Stevens, writing for the majority, disagreed, observing that deportation in the event of the plea at issue was "practically inevitable," and noted that "[w]e too have previously recognized that 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id.* at 1480, 1483 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

54 Brief of Amici Curiae National Sherriffs' Assoc , the Rememberance Project, and American Unity Legal Defense Fund Supporting Respondents in *United States v Texas*, No 15-674 (Apr 4, 2016)

55 *Id* at *9

56 Brief of Governor Jeb Bush as Amicus Curiae Supporting Petitioners in *Brewer v Ariz DREAM Act Coal* , No 16-1180, at *11 (May 1, 2017)

57 *See* Brief for the State of Louisiana, et al in *Padilla v Kentucky*, No 08-651 (Aug 17, 2009)

V. CRIMINAL JUSTICE

While a private attorney, Duncan represented the State of Louisiana at the U.S. Supreme Court in fighting the retroactivity of the *Miller v. Alabama* rule forbidding life sentences without the possibility of parole for juveniles in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).[58] The Court, in a 6 3 decision, rejected Duncan's arguments. Justice Kennedy explained in his majority opinion why the Court chose to forbid life sentences for all juvenile offenders:

> Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17 year old boy. In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be

58 *See* Brief of Respondent State of Louisiana, *Montgomery v Louisiana*, No 14-280 (Aug 24, 2015)

Kyle Duncan

From: Kyle Duncan
Sent: Thursday, November 30, 2017 8:00 PM
To: (b)(6) - Michael McGinley Email Address Talley, Brett (OLP); (b)(6) - Robert Luther Email Address Dickey, Jennifer (OLP); Berry, Jonathan (OLP)
Subject: It's ...

... official. We are now BFFs.

http://www.theadvocate.com/baton_rouge/news/politics/article_9cb5f682-d629-11e7-afaf-1bfae34e3f8d.html

Sent from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
(b) (6) (cell)
Kduncan@Schaerr-Duncan.com

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, December 08, 2017 9:02 PM
To:	Dickey, Jennifer (OLP)
Cc:	King, Kara (OLP); Talley, Brett (OLP); Kingo, Lola A. (OLP)
Subject:	Re: QFRs
Attachments:	Blumenthal QFRs for Duncan.docx; Coons QFRs for Duncan.docx; Durbin QFRs for Duncan.docx; Feinstein QFRs for Duncan - DRAFT 1.docx; Hirono QFRs for Duncan.docx; Leahy QFRs for Duncan.docx; Whitehouse QFRs for Duncan.docx

Here's the whole set. My apologies for being late. Happy to revise and wordsmith over the weekend if necessary.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Dec 8, 2017, at 6:21 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:
>
> You can send the whole set--that's fine.
>
> On Dec 8, 2017, at 6:05 PM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:
>
> All:
>
> I'm just about done with 5 of the 7 QRFs and will be done with the other 2 in about an hour. Let me know if you want me to send what I've completed now or just wait until around 7 to send the whole set. Sorry for the delay.
>
> Kyle
>
> Kyle Duncan
> SCHAERR | DUNCAN LLP
> 1717 K Street NW, Suite 900 | Washington, DC 20006
> 202-787-1060 (office) | (b) (6) (mobile)
> KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com
>
>

in error, please notify us immediately by e-mail, and delete the original message.

On Dec 6, 2017, at 6:16 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

Dear Kyle,

Attached are your QFRs from Ranking Member Feinstein and Senators Leahy, Durbin, Whitehouse, Coons, Blumenthal and Hirono. Please provide your answers in the attached documents, retaining the formatting, and return them to us for review by the close of business on Friday.

If you have any questions, please give us a call. Thank you.

Kara

Kara King
Nominations Researcher
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607
Cell: (b) (6)

<Feinstein QFRs for Duncan.docx><Leahy QFRs for Duncan.docx><Durbin QFRs for Duncan.docx><Whitehouse QFRs for Duncan.docx><Coons QFRs for Duncan.docx><Blumenthal QFRs for Duncan.docx><Hirono QFRs for Duncan.docx>

Kyle Duncan

From: Kyle Duncan
Sent: Sunday, December 10, 2017 1:03 PM
To: Dickey, Jennifer (OLP)
Cc: Talley, Brett (OLP)
Subject: Re: Suggested QFR edits

Thanks, Jenn. I'll get back to you later today.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Dec 10, 2017, at 12:55 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:
>
> Kyle,
>
> You did a nice job on these. Attached are some suggestions. Happy to discuss if you have any questions.
>
> Jennifer B. Dickey
> Office of Legal Policy
> U.S. Department of Justice
> 950 Pennsylvania Ave., N.W., Rm 4244
> Washington, D.C. 20530
> Direct: 202.514.2456
> Cell: (b) (6)
>
> <Blumenthal QFRs for Duncan.v1 (jbd).docx><Coons QFRs for Duncan.v1 (jbd).docx><Durbin QFRs for Duncan.v1 (jbd).docx><Feinstein QFRs for Duncan.v1 (jbd).docx><Hirono QFRs for Duncan.v1 (jbd).docx><Leahy QFRs for Duncan.v1 (jbd).docx><Whitehouse QFRs for Duncan.v1 (jbd).docx>

Kyle Duncan

From:	Kyle Duncan
Sent:	Sunday, December 10, 2017 10:22 PM
To:	Dickey, Jennifer (OLP)
Cc:	Talley, Brett (OLP)
Subject:	Re: Suggested QFR edits
Attachments:	Blumenthal QFRs for Duncan FINAL.docx; Coons QFRs for Duncan FINAL.docx; Durbin QFRs for Duncan FINAL.docx; Feinstein QFRs for Duncan FINAL.docx; Hirono QFRs for Duncan FINAL.docx; Leahy QFRs for Duncan FINAL.docx; Whitehouse QFRs for Duncan FINAL.docx

Jenn,

(b) (5)

(b) (5) . Thanks again.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Dec 10, 2017, at 12:55 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:

Duplicative Material

Kyle Duncan

From: Kyle Duncan
Sent: Friday, December 15, 2017 8:07 AM
To: Berry, Jonathan (OLP); Dickey, Jennifer (OLP); Talley, Brett (OLP)
Subject: Re: Confirmation hearing / Louisiana Solicitor General

Sorry, one other thing. (b) (5)

(b) (5)

:

(b) (5)

KD

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Dec 15, 2017, at 7:57 AM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:
>
> Brett, Jon, and Jenn:
>
> See the email inquiry below from a Louisiana-based journalist / blogger. (b) (5)
>
> (b) (5)
>
> (b) (5)

(b) (5)

Thanks and happy Advent.

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Begin forwarded message:

From: Lamar White <lamar@bayoubrief.com>
Subject: Confirmation hearing / Louisiana Solicitor General
Date: December 15, 2017 at 7:17:34 AM EST
To: kduncan@duncanpllc.com

Dear Mr. Duncan-

I interviewed you a few years ago for an article in *The Independent* of Lafayette. You included the story in your response to the Senate Judiciary Committee's questionnaire.

First, I'm writing to express my admiration for the answers you provided during your confirmation hearing in front of the committee a few weeks ago. I was particularly impressed by your response to Sen. Kennedy's hypothetical about *Brown v. Board of Education*. That really stood out to me. It was impressive.

I have a few questions for you. I'm just seeking some clarity. I've noticed there's a lot of recent coverage about your pending confirmation that refers to you as Louisiana's first Solicitor General; in fact, during your hearing, the C-SPAN chyron stated that as your former title.

When you worked for Buddy Caldwell, was your *actual* job title Solicitor General?

Because I can't seem to locate any contemporaneous reference in the news media that the position had ever actually been created, and you state in your written response to the Senate that you "fulfilled the functions of a state solicitor general" but that you were actually appointed "Appellate Chief of the Louisiana Department of Justice." I've scoured the internet, and there are plenty of

articles listing you as Louisiana's "former Solicitor General" but none, at the time of your tenure, that referred to you as such.

I'm curious if there was an actual job title- Solicitor General of Louisiana- that was created for you and in which you served or if the title was informal. Or was your title Appellate Chief? The media at the time typically referred to you as an assistant attorney general and then afterwards as special counsel.

For the sake of Louisiana's history and the public interest, I just want to make sure we get the facts right, and I am sure you will understand and appreciate that.

Again, I just seek some clarification.

Good luck on your confirmation.

All the best,

Lamar

--

Lamar White, Jr.
Publisher
The Bayou Brief
www.bayoubrief.com

"Action speaks louder than words but not nearly as often." - Mark Twain

Kyle Duncan

From: Kyle Duncan
Sent: Saturday, December 16, 2017 11:38 AM
To: Dickey, Jennifer (OLP); Berry, Jonathan (OLP); Talley, Brett (OLP)
Subject: Bayou Brief article

(b) (5)

https://www.bayoubrief.com/2017/12/16/kyle-duncan-nominee-for-the-u-s-5th-circuit-says-he-held-a-prominent-historic-job-in-louisiana-theres-just-one-small-problem/

(b) (5)

(b) (5)

Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Wednesday, December 20, 2017 2:43 PM
To: Dickey, Jennifer (OLP); Berry, Jonathan (OLP); Talley, Brett (OLP)
Subject: Fwd: Media request from NBC News

FYI. [redacted (b) (5)]

Sent from my iPhone

Kyle Duncan
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060 (office)
[redacted (b) (6)] (cell)
Kduncan@Schaerr-Duncan.com

Begin forwarded message:

> **From:** "Brammer, John Paul (Contractor-NBCUniversal)" <JohnPaul.Brammer@nbcuni.com>
> **Date:** December 20, 2017 at 2:30:10 PM EST
> **To:** "kduncan@schaerr-duncan.com" <kduncan@schaerr-duncan.com>
> **Subject: Media request from NBC News**
>
> Hello, I hope this email finds you well.
>
> My name is John Paul Brammer and I am a reporter at NBC Out, NBC News' LGBTQ vertical. I am reaching out in regards to a story I'm pursuing on how President Trump is shaping the federal courts, specifically in regards to LGBTQ civil rights. I understand you represented the Gloucester County, Va. school board in a case involving a transgender teen wanting access to his school's bathroom. This, among other things, has led to concerns from some of the advocates I've spoken to, and I wanted to request a comment.
>
> Do you believe there is any basis for LGBTQ advocates to be concerned about your previous work and the work you might do within the 6th Circuit Court of Appeals, and do you have a response to those who have voiced anxiety as to whether or not you would, in their description, roll back LGBTQ civil rights?
>
> Thank you!
>
> John Paul
> **John Paul Brammer**
> Associate Producer, NBC OUT

NBC NEWS
(b) (6) | @jpbrammer

Kyle Duncan

From:	Kyle Duncan
Sent:	Thursday, December 28, 2017 10:28 AM
To:	Dickey, Jennifer (OLP)
Cc:	Kingo, Lola A. (OLP); King, Kara (OLP)
Subject:	Re: Upcoming Judicial Renomination
Attachments:	Duncan Renomination Letter DRAFT.doc; LSU Honors College Duncan Interview Jan 2018.pdf

Jenn,

Attached is a draft renomination letter. Also attached is a draft of the LSU Honors College interview. They tell me the interview will run in either the first or second week of January. I've already sent you the *Evolutionary Intelligence* cert petition.

Let me know if you need anything else.

Thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Dec 28, 2017, at 7:34 AM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:
>
> Hi Kyle,
>
> I hope you had a Merry Christmas. I'm back up and running now from the holidays.
>
> I've spoken to Brett, (b) (5)
>
> Lola and/or Kara will reach out to you directly to assist you with your FDR update.
>
> Jenn

Jennifer B. Dickey
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Rm 4244
Washington, D.C. 20530
Direct: 202.514.2456
Cell: (b) (6)

<2018 Renominations.docx><Parrish Renomination Letter.pdf><Hanks Renomination Letter.pdf><Bennett Renomination Letter.pdf>

Learning How to Think
Honors Program Alumnus and Appellate Court Nominee Kyle Duncan Reflects on His Years at LSU

For LSU Honors program alumnus Kyle Duncan, his intellectual journey began with learning how to write and think critically skills that he confides have been invaluable for him, both in the study and practice of law.

Duncan, who was recently nominated to the U.S. Fifth Circuit Court of Appeals, boasts a distinguished law career as both an educator and litigator. At various points he has worked as an appellate lawyer for both Texas and Louisiana, taught at Columbia University and the University of Mississippi School of Law, and argued cases before the U.S. Supreme Court. Now a partner at his own firm, Schaerr Duncan LLP in Washington D.C., Duncan devotes his time and energy to constitutional law cases, which is where his passion truly lies.

His extensive experience has earned him praise as a confident litigator able to handle high-pressure cases. For instance, in a recent article in *The National Review* highlighting Duncan's nomination, Carrie Severino of the Judicial Crisis Network called Duncan "the complete package."

"I have watched Kyle successfully handle high stakes litigation in courts across the country, including the Supreme Court, and he is a superstar who can translate sophisticated arguments for the general public," Severino said.

Before he launched his career, however, Duncan attended LSU for both his bachelor's degree in English Literature and his law degree. In light of his recent nomination and the prospect of returning home to Louisiana, Duncan took some time to reflect on his years at LSU.

Q: What brought you to LSU and the Honors College?

A: I was fortunate enough to get a scholarship to LSU, and this was a great opportunity for me to get some help going to college but also to work on campus. I was immediately recruited to the Honors Program. A couple of my professors encouraged me to take Honors classes at LSU. I found them extremely valuable because of and really, two things stand out in my mind they were very small classes and that they were seminar-style classes. I got to know my fellow students and my professors very well. They were also extremely rigorous academically. I remember having to work very, very hard at writing, in particular. I got a lot of critical feedback from professors in the Honors courses, and to this day I remember that feedback being very rigorous and really helping me learn to be a better writer and a critical thinker.

Q: Did you have the opportunity to study abroad while at LSU?

A: Ironically, the course I think I enjoyed the most was a course on Dante, which is obviously not English literature, but Professor Bob McMahon taught me a course on *The Divine Comedy*, and that encouraged me to study Italian. I actually ended up spending a year abroad in Siena as a result. LSU made it very easy for me to study abroad, in two ways. I did a summer program in Siena, Italy. That was taught by faculty from the Italian and French Departments. It was a wonderful experience, and I ended up wanting to do a year abroad. Now, LSU at the time did not have a formal year abroad program in Italy but, thanks to the scholarship I was on and the number of college credits I had from high school, I was allowed to design my own year abroad program in Siena. So I took classes on both Italian and English

literature, film history, and art history, all in Italian, and it was a wonderful experience. While I was in Italy I also took the opportunity to get a certificate in Italian Language. It was very important to me to get proficient in a foreign language because it wasn't something I had done in high school and LSU really made that possible and I was very grateful for it.

Q: What ultimately led you to apply to law school?

A: I was a little uncertain about what I wanted to do with my life as someone with a degree in English and Italian. I took an aptitude test that said I might make a good lawyer, so I thought I'd give law school a try. I was pleasantly surprised by how much I enjoyed law school. It seemed very much like a continuation of my studies in literature that I had done as an undergraduate. I found it intellectually stimulating and a lot of fun.

Q: What are some of your fondest memories of your time at LSU?

A: When I went to Italy for the summer was a really formative experience. I had never been to Europe before I had never been anywhere where English was not the dominant language. I found that to have to try to interact with people in a foreign language was a formative experience. I'll never forget that.

I'll also never forget my first day of law school at LSU because I didn't know what to expect. No one really prepared me for the Socratic approach to teaching in which the professor ends up asking the students questions, and not simply lecturing and imparting information. It was such an eye-opening experience to see what was to be expected from the students. Real critical thinking, not just taking the information and regurgitating it on the test. That sort of experience inspired me to try to be a law professor.

Q: What do you feel was your greatest accomplishment in your undergraduate years?

The accomplishment I was proudest of was learning Italian. It was very difficult for me; it's very difficult for someone to learn a spoken foreign language who hasn't done it from a young age. I had to work very hard at it. It required a lot of discipline and a lot of putting yourself in difficult situations where you don't really understand what people are saying. I was very happy and grateful to be able to do that.

Q: What are your hopes for current and future Honors students based on your experience there?

A: The first thing I would say is that I had a wonderful experience in the Honors College, and I hope current and future students have a similar experience. The thing that I remember most vividly about my professors in the Honors College is that they pushed me to think critically about anything we were dealing with whether it was a book, or a poem, or whatever else, they pushed me to think critically and to try to express myself as clearly as I could. That was extremely valuable. Entering college, I thought I was a good writer but I felt like I made huge strides early on in my career at LSU because of the Honors College, and it has helped me be a much better lawyer than I would have been otherwise. That ability to clearly express yourself it's something that people get to law school and they think that they know how to write and express themselves, but they don't really, and it’s because they haven't been pushed to do it. The Honors College at LSU gave me a head start on that for which I am very, very grateful.

Kyle Duncan

From:	Kyle Duncan
Sent:	Tuesday, January 2, 2018 8:16 PM
To:	Kingo, Lola A. (OLP); King, Kara (OLP); (b)(6) - AOUSC Email Address
Cc:	Dickey, Jennifer (OLP)
Subject:	Re: Upcoming Judicial Renomination (Financial Disclosure Report)
Attachments:	FDR_NOM_Duncan-S-K_Amended.PDF; DUNCAN Updated Net Worth Statement.doc

Dear Lola, Kara, and Kristina:

Attached is a PDF of my draft amended FDR, as well as an updated net worth statement (in Word).

Please let me know if I need to change or correct anything.

Thanks as always for your assistance.

Best,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Dec 28, 2017, at 1:20 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> Dear Kyle,
>
> As Jenn mentioned, once you are renominated, you will be required to file a Financial Disclosure Report (FDR) within five calendar days of your renomination. You can access the software needed to generate the FDR, as well as related documents, at https://fd-docs.uscourts.gov. Please use the following credentials to log-in to the website where you may download the software: User ID: (b) (6); Password: (b) (6) (the credentials are both are case sensitive).
>
> I have attached Filing Instructions for completing the FDR. (b) (5)

(b) (5)

If you have any questions about completing the Financial Disclosure Report, please contact Kristina Usry (copied) at (b) (6) and me. Otherwise, once you have completed a draft of your renomination FDR, please email it to Kara (copied), Kristina, and me so we may review the paperwork before it is required to be filed. Once we complete our review and the FDR is finalized, we will be in touch with you again when it is time to file your nomination report.

If we don't chat before the New Year, wishing you a terrific start to 2018!

Lola A. Kingo
Senior Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(202) 514-1818 (o)
(b) (6) (m)
Lola.A.Kingo@usdoj.gov

From: Kyle Duncan [mailto:kduncan@schaerr-duncan.com]
Sent: Thursday, December 28, 2017 10:28 AM
To: Dickey, Jennifer (OLP) <jdickey@jmd.usdoj.gov>
Cc: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>; King, Kara (OLP) <kking@jmd.usdoj.gov>
Subject: Re: Upcoming Judicial Renomination

Duplicative Material

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, January 05, 2018 2:55 PM
To:	Kingo, Lola A. (OLP)
Cc:	King, Kara (OLP); (b)(6) - AOUSC Email Address ; Dickey, Jennifer (OLP)
Subject:	Re: Upcoming Judicial Renomination (Financial Disclosure Report)
Attachments:	FDR_NOM_Duncan-S-K 01-05-2018.pdf; DUNCAN Updated Net Worth Statement.doc

Lola,

I was renominated today, and so I've attached my new FDR with the corrections you suggested, along with an updated net worth statement.

Let me know what the next steps are.

Many thanks,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Jan 3, 2018, at 9:50 AM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> Thank you, Kyle!
>
> I have a few edits to the FDR: (b) (5) The FDR otherwise looks fine subject to Kristina's approval.
>
> Once you are renominated, we will circle back with filing instructions. If you have any questions before then, please don't hesitate to reach out.
>
> Best,
> Lola
>
> ---
>
> **From:** Kyle Duncan [mailto:kduncan@schaerr-duncan.com]
> **Sent:** Tuesday, January 02, 2018 8:16 PM
> **To:** Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>; King, Kara (OLP) <kking@jmd.usdoj.gov>;

(b)(6) - AOUSC Email Address

Cc: Dickey, Jennifer (OLP) <jdickey@jmd.usdoj.gov>

Subject: Re: Upcoming Judicial Renomination (Financial Disclosure Report)

Duplicative Material

Kyle Duncan

From:	Kyle Duncan
Sent:	Tuesday, January 9, 2018 9:57 AM
To:	Kingo, Lola A. (OLP)
Cc:	Dickey, Jennifer (OLP); King, Kara (OLP); (b)(6) - AOUSC Email Address
Subject:	Re: Renomination—Next Steps
Attachments:	FDR_NOM_Duncan-S-K 1-9-2018 FILED.pdf; DUNCAN Updated Net Worth Statement FINAL 1-9-18.doc; DUNCAN Updated Net Worth Statement FINAL 1-9-18.pdf; Duncan Renomination Letter 1-9-2018 FINAL.pdf

Dear Lola,

I made the corrections you suggested below to my FDR and filed it this morning (1/9) through FiDO. Attached are:

1. My filed FDR;
2. My updated net worth statement (in Word and PDF);
3. My update letter (in which Ranking Member Feinstein is cc'd).

Please let me know if these look acceptable and if you need me to do anything further.

Thanks for your assistance with this process.

Best regards,
Kyle

> On Jan 8, 2018, at 7:43 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> Dear Kyle,
>
> Your renomination was transmitted to the Senate today. Congratulations.
>
> There are a few things we'll need from you to finalize your letter to the Senate and transmit it to the Senate Judiciary Committee (SJC) on your behalf:
>
> 1. As a reminder, your Financial Disclosure Report (FDR) is due within five calendar days of today. Before you file your FDR, please input your date of nomination (Box 5a)—January 8, 2018—and update the date of the report (Box 3) to reflect the date that you file your FDR. If you have any additional information to update since your draft FDR was last reviewed by Kristina and/or our office, please let us know. Otherwise, you may use the filing credentials you used to file your FDR last year and file your current FDR once you update Boxes 3 and 5a. To find your filing credentials, look for any email sent by the Committee on Financial Disclosure; your User ID is made up of the Circuit (05) (-) and the 5 digits after the -Report- for example if your report number was 05-12345, your user ID is 05-Report-12345. Unless you changed your password, the default password is (b) (6) Should you run into any problems when filing your report, please contact Kristina Usry (copied) at (b)(6) -

[redacted] on weekdays after 8AM or the AO at 202-502-1850. Once your FDR is filed, please send us a PDF of the report as we need it to transmit your update letter to the SJC on your behalf.

2. When finalizing your update letter, please confirm you have addressed both Chairman Grassley and Ranking Member Feinstein. Alternatively, you may address Chairman Grassley and indicate somewhere in the letter that Ranking Member Feinstein is receiving a copy of the letter as well. Please send us a PDF of your signed letter (if we haven't already received it) and we will transmit it along with your Net Worth Statement, FDR, and any attachments, to the SJC on your behalf.

If you have any questions, please do not hesitate to reach out. Thank you.

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(202) 514-1818 (o)
[redacted] (m)
Lola.A.Kingo@usdoj.gov

SCHAERR
DUNCAN
LLP

January 9, 2018

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the questionnaire submitted to the Senate Judiciary Committee on October 2, 2017, in connection with my nomination to be a circuit judge on the United States Court of Appeals for the Fifth Circuit. Incorporating the additional information listed below, I certify that the information contained in those documents is, to the best of my knowledge, true and accurate.

Question 12(e):

Jacqueline DeRobertis, *Learning How to Think: Honors Program Alumnus and Appellate Court Nominee Kyle Duncan Reflects on His Years at LSU*, LOUISIANA STATE UNIVERSITY OGDEN HONORS COLLEGE, Jan. 2018. Copy supplied.

Question 16(e):

I appeared as supporting counsel on the following petition for writ of certiorari:

Evolutionary Intelligence LLC v. Sprint Nextel Corp., et al., No. 17-609 (Dec. 4, 2017). Copy supplied.

Question 26(a):

On November 29, 2017, I testified before the Senate Judiciary Committee concerning my nomination. The recording and copy of my Questions for the Record are available at https://www.judiciary.senate.gov/meetings/11/29/2017/nominations.

I am also forwarding an updated net worth statement and financial disclosure report. I thank the Committee for its consideration of my nomination.

KYLE DUNCAN

KDuncan@Schaerr-Duncan.com
(202) 787-1060 (office)
(b) (6) (mobile)

SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006

www.Schaerr-Duncan.com

SCHAERR
DUNCAN
LLP

Sincerely,

S. Kyle Duncan

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		450	000	Notes payable to banks secured (auto)			
U.S. Government securities				Notes payable to banks unsecured			
Listed securities see schedule		635	170	Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable see schedule		850	000
Real estate owned see schedule		900	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts itemize:			
Autos and other personal property		75	000				
Cash value life insurance							
Other assets itemize:							
				Total liabilities		850	000
				Net Worth	1	210	170
Total Assets	2	060	170	Total liabilities and net worth	2	060	170
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)			
On leases or contracts				Are you defendant in any suits or legal actions?			
Legal Claims				Have you ever taken bankruptcy?			
Provision for Federal Income Tax		100	000				
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities

Stock

ASPZX	41,721.27
BLRYX	8,215.33
FMPOX	5,342.72
IPOIX	17,096.12
KLCIX	41,286.19
MCVIX	5,193.23
MDIJX	9,689.53
MEIIX	41,365.88
MINIX	7,702.39
NSCRX	5,246.71
PAVLX	41,685.34
PCBIX	10,280.50
POSIX	8,257.62
PRDSX	5,209.57
QLEIX	32,029.45
QUAYX	5,350.14
SGOIX	16,961.44
UBVSX	3,333.29
Morgan Stanley Money Market	7,367.02
VY Invesco Eqty & Inc Port I	39,570.47
Voya Growth and Income Port I	39,030.84
FidelityVIP Eqty-IncomePort I	37,679.34
Fidelity VIP Contrafund Port I	44,926.80
Invesco V.I. American Franchise Fd I	18,304.93
VY Oppenhmr Global Port I	21,534.60
AAFXX	4,000.00
CAFAX	19,961.92
CWIAX	8,361.80
CEUAX	7,396.98
CGFAX	20,115.89
CICAX	29,526.24
CNPAX	14,499.17

CNPCX	607.58
QSPIX	16,320.50

Total Listed Securities	$635,170.80
Real Estate Owned	
Personal Residence	$900,000
Total Real Estate Owned	*$900,000*
Real Estate Mortgages Payable	
Personal Residence Mortgage	$850,000
Total Real Estate Mortgages Payable	*$850,000*

Kyle Duncan

From:	Kyle Duncan
Sent:	Wednesday, January 10, 2018 10:38 AM
To:	King, Kara (OLP)
Cc:	Kingo, Lola A. (OLP)
Subject:	Re: Senate Questionnaire Update for Elizabeth L. Branch (to be USCJ - 11th Cir.) and Stuart Kyle Duncan (to be USCJ - 5th Cir.)
Attachments:	Duncan Renomination Letter 1-9-2018 FINAL.pdf

Dear Kara,

My renomination letter is being overnighted to you today and should arrive tomorrow. I have attached a PDF of the letter, which I have reformatted slightly.

Let me know if you need anything else from me on this.

Kyle

> On Jan 9, 2018, at 3:35 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:
>
> Congratulations, Kyle. Your paperwork has officially been filed. Please send us a hard copy of your letter via FedEx Overnight Delivery as soon as possible to my address (in my signature below) so we can submit it to the SJC. If you have any questions, please let us know.
>
> Best,
>
> Kara
>
> Kara King
> Nominations Researcher
> Office of Legal Policy (OLP)
> U.S. Department of Justice
> 950 Pennsylvania Avenue, NW
> Washington, DC 20530
> Room 4234
> Office: (202) 514-1607
> Cell: (b) (6)
>
> **From:** King, Kara (OLP)
> **Sent:** Tuesday, January 9, 2018 3:33 PM
> **To:** (b)(6) - Kasey O'Connor Email Address
> ; 'Mehler, Lauren (Judiciary-Rep)' <(b) (6)
> (b)(6) - Jason Covey Email Address

(b)(6) - Jason Covey Email Address >; (b)(6) - J Duck Email Address
(b)(6) - Paige Herwig Email Address
>; (b)(6) - Nazneed Mehta Email Address
(b)(6) - Alexandria Deitz Email Address
(b)(6) - Oliver Mittelstaedt Email
; (b)(6) - Madeline Alagia Email Address
; 'Nominations (Judiciary-Rep)' <Nominations@judiciary-rep.senate.gov>
Cc: Talley, Brett (OLP) <btalley@jmd.usdoj.gov>; Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Subject: Senate Questionnaire Update for Elizabeth L. Branch (to be USCJ - 11th Cir.) and Stuart Kyle Duncan (to be USCJ - 5th Cir.)

Attached are letters updating the Senate Questionnaire for the following nominees:

Elizabeth L. Branch, of Georgia, to be United States Circuit Judge for the Eleventh Circuit, vice Frank M. Hull, retired.

Stuart Kyle Duncan, of Louisiana, to be United States Circuit Judge for the Fifth Circuit, vice W. Eugene Davis, retired.

Hard copies with attachments will follow.

Kara King
Nominations Researcher
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607
Cell: (b) (6)

<Duncan Letter.pdf>

Kyle Duncan

From:	Kyle Duncan
Sent:	Wednesday, January 10, 2018 3:31 PM
To:	Kingo, Lola A. (OLP)
Cc:	King, Kara (OLP)
Subject:	Re: Senate Questionnaire Update for Elizabeth L. Branch (to be USCJ - 11th Cir.) and Stuart Kyle Duncan (to be USCJ - 5th Cir.)
Attachments:	Duncan Renomination Letter 1-9-2018 FINAL.pdf

Lola,

Per our conversation, I changed back to the original margins on the renomination letter. That version is attached and is the one being overnighted to Kara.

Thanks again!

Kyle

On Jan 10, 2018, at 10:37 AM, Kyle Duncan <kduncan@schaerr-duncan.com> wrote:

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, January 12, 2018 8:19 PM
To:	King, Kara (OLP)
Cc:	Talley, Brett (OLP); Kingo, Lola A. (OLP); Dickey, Jennifer (OLP); Berry, Jonathan (OLP)
Subject:	Re: QFRs
Attachments:	Booker QFR for Duncan DRAFT.docx

Dear Kara,

Here are my responses to Senator Booker.

Have a nice holiday weekend.

Kyle

> On Jan 12, 2018, at 6:19 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:
>
> <1.12.18 Kyle Duncan QFRs dps.docx>

Kyle Duncan

From:	Kyle Duncan
Sent:	Saturday, January 13, 2018 4:47 PM
To:	Dickey, Jennifer (OLP)
Cc:	King, Kara (OLP); Talley, Brett (OLP); Kingo, Lola A. (OLP); Berry, Jonathan (OLP)
Subject:	Re: QFRs
Attachments:	Booker QFR for Duncan DRAFT (jbd) + KD.docx

Jenn,

[redacted] (b) (5) [redacted].

Thanks again,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) [redacted] (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Jan 13, 2018, at 4:05 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:
>
> <Booker QFR for Duncan DRAFT (jbd).docx>

Kyle Duncan

From: Kyle Duncan
Sent: Saturday, January 13, 2018 5:46 PM
To: Dickey, Jennifer (OLP)
Cc: King, Kara (OLP); Talley, Brett (OLP); Kingo, Lola A. (OLP); Berry, Jonathan (OLP)
Subject: Re: QFRs

(b) (5) . Thanks.

> On Jan 13, 2018, at 5:27 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:
>
> <Booker QFR for Duncan DRAFT (jbd) + KD + jbd.docx>

Michael Francisco

From:	Michael Francisco
Sent:	Thursday, February 08, 2018 2:24 PM
To:	(b)(6) - Michael McGinley Email Address (b)(6) - Robert Luther Email Address Davis, Mike (Judiciary-Rep)
Cc:	Berry, Jonathan (OLP)
Subject:	Letter of Support for Kyle Duncan - representation of lesbian client
Attachments:	Duncan.Kyle.Recommendation - Nichols.pdf

Kyle Duncan has a good letter of support sent to the Senate Judiciary Committee by co-counsel in a Supreme Court case, *V.L. v. E.L.*, 136 S.Ct. 1017 (2016).

As the letter notes on the second page,

> "I note that some may criticize Mr. Duncan for representing clients in the same-sex marriage litigation. It must not go without notice that our mutual client, E.L., was *a same-sex woman* asserting a strong, albeit unsuccessful, legal argument. *Mr. Duncan represented our mutual client without once making an issue of her sexual orientation, without once displaying any personal bias, and without once indicating a desire to advance any agenda other than winning the case for E.L.*" (emphasis added).

A copy of the letter is attached for convenience.

Michael

Michael Francisco
Partner MRD Law
michael.francisco@mrd.law
620 N. Tejon St, suite 101,
Colorado Springs CO, 80903
719-399-0890 (direct)

MASSEY, STOTSER & NICHOLS, PC
ATTORNEYS
www.msnattorneys.com

GARRICK L. STOTSER*
RANDALL W. NICHOLS
ANNE LAMKIN DURWARD
RICHARD A. BEARDEN+
STEPHANIE LANIER WEEMS
CHESLEY P. PAYNE
SHAY REYNOLDS
CINDY SELF WEBB
SPENSER TEMPLETON
MICHAEL D. BRYMER

TIMOTHY A. MASSEY
(1952-2004)

* ALSO ADMITTED IN TENNESSEE
+ ALSO ADMITTED IN GEORGIA

RANDALL W. NICHOLS
Direct Dial: (205) 838-9002
Direct Fax: (205) 838-9022
rnichols@msnattorneys.com

November 27, 2017

The Honorable Chuck Grassley
Chairman Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

The Honorable Bill Cassidy
United States Senator, Louisiana
Committee on the Judiciary, Member
520 Hart Senate Office Building
Washington, DC 20510

The Honorable John Kennedy
United States Senator, Louisiana
Committee on the Judiciary
SR 383 Russell Senate Building
Washington, DC 20510

Re: Support for Nomination of Kyle S. Duncan

Dear Senators Grassley, Feinstein, and Judiciary Committee Members:

I write in support of the nomination of Stuart Kyle Duncan to serve as a judge on the United States Court of Appeals for the Fifth Circuit.

My experience with Mr. Duncan surrounds his role as Counsel of Record in United State Supreme Court Case of *V.L. v. E.L.,* 136 S.Ct 1017 (2016). I served as lead counsel in the case for the appellate proceedings in the Court of Civil Appeals (intermediate) and Supreme Court (highest court of record) of Alabama. I represented E.L., who is the biological mother of three children who were born during the course

of her same-sex relationship with V.L. The case challenged the jurisdiction of Georgia courts to enter certain adoption orders being litigated in Alabama courts. Mr. Duncan joined me in representing E.L. at the petition for certiorari to the U.S. Supreme Court stage.

I note that some may criticize Mr. Duncan for representing clients in the same-sex marriage litigation. It must not go without notice that our mutual client, E.L., was a same-sex woman asserting a strong, albeit ultimately unsuccessful, legal argument. Mr. Duncan represented our mutual client without once making an issue of her sexual orientation, without once displaying any personal bias, and without once indicating a desire to advance any agenda other than winning the case for E.L.

Mr. Duncan very quickly and ably became well-versed in the intricacies of a very fact-intensive and legally challenging case. His response to the petition for writ of certiorari was masterful. Although the United States Supreme Court ultimately reversed the Alabama Supreme Court, our mutual client was represented in exemplary fashion. Anyone who has experience in appellate litigation understands that success cannot be measured solely by purported "wins" and "losses." It is an attorney's challenge to present a passionate, well-reasoned and thorough argument on behalf of each and every client, regardless of the popularity of the client's cause or the likelihood of her success. Mr. Duncan did that in this case and, I am sure, has done so in each of his cases.

I recommend Mr. Duncan for the position to which he has been nominated without hesitation. I want the Committee to know that my experience with Mr. Duncan as co-counsel revealed a lawyer who is devoted foremost to defending his client's interest. He demonstrated a keen intellect and an enthusiastic interest in and affinity for our legal system. If I can provide any further assistance to the Committee or any of its members, I stand ready to do so.

Respectfully,

Randall W. Nichols

Sent via Electronic Mail Only:

Nominations@judiciary-rep.senate.gov
(b)(6) - Michael McGinley Email Address
(b)(6) - Robert Luther Email Address
(b)(6) - Mike Davis Email Address
(b)(6) - Beth Williams Email Address

Kyle Duncan

From:	Kyle Duncan
Sent:	Friday, February 09, 2018 4:35 PM
To:	McGinley, Mike H. EOP/WHO; Talley, Brett (OLP); Berry, Jonathan (OLP); Luther, Robert EOP/WHO; Dickey, Jennifer (OLP)
Subject:	Whelan response to NYT op-ed

http://www.nationalreview.com/bench-memos/456279/laverne-thompson-smears-kyle-duncan

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) (b) (6) (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

Kyle Duncan

From: Kyle Duncan
Sent: Wednesday, February 21, 2018 8:16 AM
To: Berry, Jonathan (OLP); Talley, Brett (OLP); Luther, Robert EOP/WHO
Subject: "The siren of Baton Rouge"

Believe it or not, I am trying to give up worrying about the nomination for Lent. (b) (5)

(b) (5)

http://thehill.com/blogs/congress-blog/judicial/374671-the-siren-of-baton-rouge

KD

Michael Francisco

From:	Michael Francisco
Sent:	Wednesday, February 28, 2018 10:56 AM
To:	Davis, Mike (Judiciary-Rep); (b)(6) - Robert Luther Email Address; Kenny, Steve (Judiciary-Rep)
Cc:	Berry, Jonathan (OLP); Talley, Brett (OLP)
Subject:	Helpful letter of support for Kyle Duncan,
Attachments:	Duncan-Support-11.6.17-LSU Prof Baier.pdf

Mike,

In addition to the helpful letter of support from Randall Nichols regarding the same-sex adoption case where Kyle Duncan represented a lesbian client, there is a very strong letter from Paul Baier, law professor at LSU (http://faculty.law.lsu.edu/paulrbaier/) and opposing counsel to Duncan in a same-sex marriage case, post-*Obergefell*. In addition to strong overall support, Mr. Baier notes,

> "Kyle knows the difference between the advocate's role for his client, the State of Louisiana, and what he would be called upon to decide as a judge on the Fifth Circuit in adjudging the same case."

He provides an unqualified endorsement of Duncan from someone who served as an advocate for the same-sex couple in post-*Obergefell* litigation.

> "let me render my humble opinion as an observer of the Supreme Court and the Fifth Circuit for over forty years: Kyle Duncan is a magnificent nominee. He will make a surpassing Fifth Circuit judge and jurist. Please support his confirmation with all your might."

I hope this helps alleviate any last minute question about Kyle Duncan's exemplary qualifications.

Michael

Michael Francisco
Partner MRD Law
michael.francisco@mrd.law
620 N. Tejon St, suite 101,
Colorado Springs CO, 80903
719-399-0890 (direct)

LSU Law

Paul R. Baier
Judge Henry A. Politz
Professor of Law

6 November 2017

Senators Bill Cassidy, John Kennedy
United States Senate

Senators, I know Kyle Duncan well, as a colleague at LSU Law School, as a scholar of constitutional law, as an advocate at the Bar of the Fifth Circuit, the Louisiana Supreme Court, and the U.S. Supreme Court. I know him as a family man, four boys, one girl. Kyle bragged on his son Thomas a moment ago when I called him to remind me of his early scholarship while at University of Mississippi. He joined the Ole Miss Law faculty after his LL.M. degree at Columbia Law School. My earliest contact with Kyle was reading his early law review articles. He asked me to read them and comment on them. Here was a young man of professorial talent. His rise thereafter is public record. The joy in Kyle's voice when he told me that his eleven-year-old son Thomas placed second in his school's declamation competition—reciting Lincoln's Second Inaugural Address no less—indicates a sensitive appreciation of vital moments in life. Kyle is a great father, husband, and friend.

I will mention two to other personal contact points: I teach a class at LSU Law Center entitled Appellate Practice and Procedure. We go on-line to the Oyez Project, bring up *Connick v. Thompson*, and watch Kyle argue successfully for District Attorney Harry Connick's office, reversing the Fifth Circuit and a jury verdict of some 20 millions of dollars in damages, interest, and fees. His success in that case launched a spectacular career. In his argument in *Connick v. Thompson*, Kyle pounded his theory of the case home to the Court; his oral argument is brilliant. It won the case. He is as sharp a lawyer as any of the leading Supreme Court advocates with whom I am familiar.

And then there is our clash as adversaries in the Louisiana Supreme Court in *Costanza v. Caldwell*, 167 So.3d 619 (July 7, 2015), the same-gender marriage case that followed *Obergefell v. Hodges*, declaring Louisiana's prohibition of same-sex marriages unconstitutional. Kyle represented the State; I represented the two women involved who petitioned for an intra-family adoption of a son they had jointly raised for ten years. Ultimately, we were successful against Kyle Duncan. But I can tell you that Kyle's commitment to limited judicial review as I observed his advocacy in our joint appearance is lineal to Antonin Scalia's. I suggest that you urge the Judiciary Committee to have a look at Kyle's brilliant oral argument on the internet. Google "Costanza/Caldwell oral argument" and you will see for yourself. Both of us strove mightily as adversaries. But we continue to eat and drink as friends.

One last reflection before I render judgment on Kyle's nomination to the Fifth Circuit: Kyle knows the difference between the advocate's role for his client, the State of Louisiana, and what he would be called upon to decide as a judge on the Fifth Circuit in adjudging the same case. This was Kyle's post-argument insight to me. Now, let me render my humble opinion as an observer of the Supreme Court and of the Fifth Circuit for over forty years: Kyle Duncan is a magnificent nominee. He will make a surpassing Fifth Circuit judge and jurist. Please support his confirmation with all your might.

Yours,

Paul R. Baier

Paul R. Baier
Judge Henry A. Politz
Professor of Law

Cc: Senator Chuck Grassley
Senator Dianne Feinstein

LSU Paul M. Hebert Law Center
1 East Campus Drive • Baton Rouge, LA • 70803 • O 225-578-8646 • F 225-578-8647 • law.lsu.edu

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Monday, August 21, 2017 5:14 PM
To: Lola.A.King@usdoj.gov; sean.day.@usdoj.gov
Cc: Talley, Brett (OLP); (b)(6) - Kurt Engelhardt Email Address
Subject: Senate Judiciary Questionnaire (SJQ); OLP Data Form
Attachments: Senate Questionnaire 8-21-17.doc; Senate Questionnaire Affidavit Signed and Notarized.pdf; OLP Data Form.8-21-17.pdf; Item 12 - Senate Questionnaire - The Advocate - Summer 2003 - Oral Argument Column.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Fall Edition 2011.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Winter Edition 2012.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Spring Edition 2012.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Summer Edition - 2012.pdf; Item 12 - Senate Questionnaire - 5-20-05 LSU A&S Commencement Speech.pdf; (b) (5) ; Item 12 - Senate Questionnaire - 3-2-10 Speech to Loyola Chapter of The Federalist Society.pdf; Item 12 - Senate Questionnaire - Kaleidoscope Interview 2007.pdf; Item 12 - Senate Questionnaire - The Federal Lawyer Interview 2010 - Torres.pdf; Item 12 - Senate Questionnaire - Court Reporter Speech.pdf; 9-17-13 Order & Reasons - USDC-EDLA No. 10-204.pdf; Item 19 - Senate Questionnaire - Bulgarian Lecture Outline - 2012.pdf

Dear Ms. King and Mr. Day:

Attached please find Judge Kurt D. Engelhardt's SJQ, along with attachments referenced therein, the Questionnaire Affidavit which has been signed and notarized, and the OLP Data Form.

Should you have any questions or need anything further at this time, please advise.

Thank you.

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(See attached file: Senate Questionnaire 8-21-17.doc) (See attached file: Senate Questionnaire Affidavit Signed and Notarized.pdf)

(See attached file: OLP Data Form.8-21-17.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Summer 2003 - Oral Argument Column.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Fall Edition 2011.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Winter Edition 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Spring Edition 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Summer Edition - 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - 5-20-05 LSU A&S Commencement Speech.pdf)

(See attached file: [redacted] (b) (5) [redacted])

(See attached file: Item 12 - Senate Questionnaire - 3-2-10 Speech to Loyola Chapter of The Federalist Society.pdf)

(See attached file: Item 12 - Senate Questionnaire - Kaleidoscope Interview 2007.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Federal Lawyer Interview 2010 - Torres.pdf)

(See attached file: Item 12 - Senate Questionnaire - Court Reporter Speech.pdf)

(See attached file: 9-17-13 Order & Reasons - USDC-EDLA No. 10-204.pdf)

(See attached file: Item 19 - Senate Questionnaire - Bulgarian Lecture Outline - 2012.pdf)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	
KENNETH BOWEN ROBERT GISEVIUS ROBERT FAULCON ANTHONY VILLAVASO ARTHUR KAUFMAN GERARD DUGUE	NO. 10-204 SECTION "N" (1)

ORDER AND REASONS

Before the Court is the Motion for New Trial (Rec. Doc. 963) originally urged by defendant Arthur Kaufman, and joined in by the other defendants in this matter who were tried and convicted in 2011 (hereinafter referred to as "Defendants" or "the defendants).[1] The government opposes this motion. (Rec. Doc. 1007.) The Court heard oral argument on the defendants' motion on June 13, 2012 (Rec. Doc. 1020). A detailed recounting of subsequent events is set forth in this Court's Order and Reasons dated November 26, 2012 (Rec. Doc. 1070). As an expected result of that Order, the

[1] Kenneth Bowen, Robert Gisevius, Robert Faulcon and Anthony Villavaso, all former officers with the New Orleans Police Department ("NOPD"), along with Kaufman. (Defendant Gerard Dugue filed a similarly-based Motion to Dismiss (Rec. Doc. 1079), arguing many of the same grounds for the dismissal of the pending charges against him. The Court does not rule on Dugue's motion herein.)

Court is in receipt of additional information[2] to which it was not privy at the time of its last Order. With such information and for the reasons stated herein, **IT IS ORDERED** that Defendants' motion is **GRANTED**.

For ease of reference, the following sets forth a "Table of Contents" for review of this Order:

TABLE OF CONTENTS

[2] Also before the Court is a "Motion to Intervene to Address Access Issues" (Rec. Doc. 1126) and a "Motion for Access to Future Proceedings and to Sealed and Un-Docketed Information" (Rec. Doc. 1126-2) both filed by The Times-Picayune, L.L.C. ("Times-Picayune") on August 6, 2013. On August 19, 2013, the Associated Press ("AP") joined in the Times-Picayune's motions (Rec. Doc. 1129 and Rec. Doc. 1129-2). These motions are opposed by the government and the defendants, and will be disposed of separately.

I. INTRODUCTION

With a history of unprecedented events and acts, consideration of the defendants' motion has taken the Court on a legal odyssey unlike any other. With the relatively recent advent of the age of cyberspace and social media/networking, courts have anticipated a myriad of issues and potential

controversies. This Court is unaware of any case, however, wherein prosecutors acting with anonymity used social media to circumvent ethical obligations, professional responsibilities, and even to commit violations of the Code of Federal Regulations. Hence, to the Court's knowledge, there is no case similar, in nature or scope, to this bizarre and appalling turn of events.

From the landfall of Hurricane Katrina on August 29, 2005, the subsequent failure of the levees surrounding the City of New Orleans resulting in massive and severe flooding of the metropolitan area, the exodus/evacuation of hundreds of thousands of people from southeast Louisiana both before and after August 29, 2005; the outbreak of intense and wide-spread civil unrest and the response of the New Orleans Police Department ("NOPD"), including the tragic events on the morning of September 4, 2005, in which two civilians were killed and others injured, some severely, by NOPD gunfire; the aborted prosecution in state court,[3] the United States

---

[3] Four of the defendants in this case (Bowen, Gisevius, Faulcon and Villavaso), were charged in Criminal District Court for the Parish of Orleans, State of Louisiana, with first degree murder, in Case No. 468-037. Along with these four defendants, NOPD officers Ignatius Hills and Michael Hunter (both of whom pled guilty to reduced charges in federal court and testified for the government in defendants' trial) were charged in Criminal District Court for the Parish of Orleans, State of Louisiana, with either attempted first degree murder or attempted second degree murder, in Case No. 468-038. Officer Robert Barrios was also charged in the latter state court indictment, and also later entered a plea of guilty to reduced federal charges; he testified at trial after being called as a witness not by the government, but by the defense. Barrios is the *only* cooperating defendant that the government chose not to present to the jury at trial, despite his plea deal.

These state court indictments were dismissed, on August 13, 2008, under *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653 (1972), *State v. Edmundson*, 97-2456 (La. 7/8/98) 714 So.2d 1233; and *State v. Lehrmann*, 532 So.2d 802 (La. App. 4th Cir.), *writ denied*, 533 So.2d 364 (La. 1988). The primary basis for the dismissal of the indictment was the order of defendant Kenneth Bowen to give testimony, over his assertion of his Constitutional rights, before the state grand jury on October 30, 2006, in exchange for immunity under La. C.Cr.P. Art. 439.1(C). Defendant Bowen timely raised this issue before this Court under *Kastigar* by way of pretrial motion and hearing, which will be discussed later in this Order; and by post-trial motion.

Department of Justice's ("DOJ") active take-over[4] of this case in 2008, followed by this federal indictment on July 12, 2010; the multi-week trial during the summer of 2011, followed by the separate mistrial of severed defendant Dugue in January 2012; the noteworthy sentencing of the defendants to mandatory consecutive minimums;[5] and the later discovery of disturbing online misconduct of the government throughout, the Court has dutifully attempted to negotiate all the twists and turns in order to apply fundamental bedrock principles in achieving the result here. In particular, the Court notes that the issue of prosecutorial misconduct involving at least two high-ranking members of the United States Attorney's Office for the Eastern District of Louisiana (USAO) has not been dispositively addressed by this Court, or any other, in a case where the defendants went to trial. Although other sections of this Court have encountered the misconduct of improper online posting by these two federal prosecutors in other cases,[6] such issues have heretofore been raised only by defendants who had already entered guilty pleas, admittedly establishing all of the essential elements of the crimes for which they pled guilty and were sentenced. This case, however, involves at least one more posting prosecutor, and postings both significantly higher in quantity, and more egregious and inflammatory in quality, given the tone, timing, and identities of persons posting, than has been seen in prior cases.

---

[4] The DOJ began monitoring the state proceedings no later than November 2006. See Declaration of Karla Dobinski, Rec. Doc. 277-1, ¶ 21.

[5] See Rec. Doc. 792. Based largely on the statutory consecutive mandatory minimums set forth in 18 U.S.C. § 924(c), these defendants were sentenced to the following cumulative prison terms: Bowen - 40 years; Gisevius - 40 years; Faulcon - 65 years; and Villavaso - 38 years. *Id.* Defendants Bowen, Gisevius and Villavaso have been incarcerated without bond since their initial appearances on July 14, 2010; Defendant Faulcon has been incarcerated since July 27, 2010. Defendant Kaufman was sentenced to 6 years, reported to the designated Bureau of Prisons institution on June 21, 2012, and has been incarcerated since then.

[6] See, e.g., *United States v. Broussard*, No. 11-299; *United States v. Mouton*, No. 11-48.

In considering the present motion, which was filed on May 18, 2012, the Court has continued to receive more and more information albeit in the fashion of slowly peeling layers of an onion. During this time, the Court has remained ever cognizant of multiple factors, including: the sanctity of this jury's verdict and the undesirability of upsetting it; the consumption of resources by the government and the defendants in preparing to try this matter in 2011; the cost in financial and other resources in staging this trial; the efficient use of judicial resources; the substantial interest in achieving finality; and last, but certainly not least, the heavy emotional toll that the trial, and subsequent proceedings, have taken on the victims and their families, as well as the defendants and their families. Further, the undersigned has spent countless hours considering these factors against the backdrop of the longstanding integrity and respect afforded the United States criminal justice system and courts, and the special role of prosecutors, especially federal prosecutors from the Department of Justice acting in the name of the people of the United States of America. Try as it might to reconcile all of these interests, in light of the facts set forth, the Court is unable to achieve a disposition contrary to the one reached here, and most assuredly does not take such action lightly. Quite simply, in the most general sense, traditional notions and concepts of criminal justice cannot be served by minimizing such misconduct and preserving a verdict under these peculiar circumstances.

The Court is, of course, also very cognizant that, on September 4, 2005, two men died, while three others were seriously injured, under tragic circumstances at the hands of some of the defendants herein, and that the state court criminal justice system was corrupted to the prejudice of at least one victim, Lance Madison. Mr. Madison's riveting testimony – both at trial and at sentencing – is surely not soon forgotten. Indeed, it echoes in this case, making the abuses set forth

herein all the more astonishing. This case started as one featuring allegations of brazen abuse of authority, violation of the law, and corruption of the criminal justice system; unfortunately, though the focus has switched from the accused to the accusors, it has continued to be about those very issues. After much reflection, the Court cannot journey as far as it has in this case only to ironically accept grotesque prosecutorial misconduct in the end.

For the most part, the Court will attempt herein to simply continue the chronology set forth in its Order and Reasons dated November 26, 2012 (which the Court considers and refers to as **"PART ONE"** of this saga), although some of the events described herein must necessarily be placed on the existing overall timeline in order to reflect the important context as it relates to this case. Additionally, as an exordium, the Court believes it prudent, for the sake of clarity, to first provide a brief summary of Part One.

At this juncture, the most precious commodities are candor and credibility, both of which seem to be in short supply, despite the best efforts of this Court and a couple of federal prosecutors from Georgia. But for the Court's disposition today, a detailed evidentiary hearing would be certain, and would be the only way to ascertain the entirety of facts surrounding these exploits and uncover the further extent of misdeeds herein. As will be explained, however, the Court does not find taking that likely arduous route to be necessary. In short, despite the many remaining questions that would have great bearing on the subject motion, the Court believes more than sufficient grounds exist warranting the disposition set forth herein.

II. BACKGROUND: PART ONE – MAY 18, 2012 TO NOVEMBER 26, 2012

Following their convictions and sentencings on multiple counts, Defendants, on May 18, 2012, filed the instant motion under Rule 33 of the Federal Rules of Criminal Procedure, arguing

essentially two grounds. The first ground is that the government allegedly "engaged in a secret public relations campaign" designed to make the NOPD "the household name for corruption," inflame public opinion against the defendants and others involved with NOPD, establish community acceptance of the government's version of the facts "before anyone set foot in a courtroom," urge defendants and others to plead "guilty" as a result, and prejudice the defendants during trial through online activities designed to secure their convictions. The second ground for new trial is that the government, or someone associated with the government, allegedly improperly disclosed, to The Times-Picayune, L.L.C. ("Times-Picayune") and the Associated Press ("AP"), the government's theories regarding the defendants' alleged guilt, the status of plea negotiations, and the upcoming guilty plea of cooperating defendant and former NOPD lieutenant Michael Lohman, all in violation of Rule 6(e) of the Federal Rules of Criminal Procedure.[7] At the time the instant motion was filed, the defendants based the first argument in large part on persistent online posting of "comments" by former USAO Senior Litigation Counsel Sal Perricone, who was exposed, on March 12, 2012, as

---

[7] Rule 6(e) provides, in pertinent part:

(2) Secrecy.

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter–other than the grand jury's deliberations or any grand juror's vote–may be made to:

(ii) any government personnel–including those of a state, state subdivision, Indian tribe, or foreign government–that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

the Nola.com[8] poster "Henry L. Mencken1951." Defendants suspected, but had no proof, that Perricone had posted under other pseudonyms in the past, and had been doing so for a long time. Defendants further alleged that others in the USAO became aware of and accepted Perricone's activities.

Oral argument on Defendants' motion was held on June 13, 2012. At that time, based upon the government's representations, including that of Jim Letten, then United States Attorney ("USA") for the Eastern District of Louisiana, the Court expressed considerable doubt about the merits of the motion. Nonetheless, in the interest of completeness, full disclosure, and seeking satisfaction that what obviously might be a very grave transgression by the government did not occur, the Court ordered the government to pursue an investigation of the leak of the Lohman plea. (Minute Entry, Rec. Doc. 1020; and June 13, 2012 Transcript, p. 44, l. 2 - p. 45, l. 24.) The Court further ordered Defendants to set forth what they intended to cover at the evidentiary hearing requested of the Court. (Minute Entry, Rec. Doc. 1020; June 13, 2012 Transcript, pp. 46-47.)

Based upon Defendants' submission, the Court, on July 9, 2012, ordered the government to produce documents relating to any posting activity on the website Nola.com between the dates of February 17, 2010 (one week before the Lohman plea) and March 24, 2012 (approximately ten days after Perricone's activities were admitted). (Rec. Doc. 1034.) Both the investigation into the Lohman plea leak, and the gathering and production of documents in response to the July 9, 2012 Order, were handled by former First Assistant United States Attorney ("AUSA") Jan Mann, who also

---

[8] "Nola.com" is the online version of the Times-Picayune newspaper, featuring news stories and other information traditionally found in the print edition. After certain articles, there exists a "Comments" section, where readers may register under a self-created "user ID" or "alias" to publicly post an opinion or comment which would then accompany the article.

responded to the Court's inquiries regarding the investigation of Perricone that had been undertaken by the DOJ's Office of Professional Responsibility ("OPR").

Later, on October 10, 2012, because Perricone had not yet been questioned under oath about his online activities, but during an interview with a local magazine had asserted that in posting he had acted alone with no one else's knowledge, the Court undertook further questioning of Perricone under oath at a status conference. At the October 10th interview, Perricone admitted that he had used several other online user IDs, including "dramatis personae," "legacyusa," and "campstblue," but denied using or knowing the real life personas of several other commenters, including "eweman." He also reiterated that he had acted solo (referring to his postings as "my little secret"), and without the knowledge of anyone else at the USAO or DOJ. Perricone was also asked about various posts he made, including some relative to potential non-public grand jury information. Then First AUSA Jan Mann attended the conference on behalf of the government, and occasionally lodged objections on the record to questions posed of Perricone by defense counsel. Additionally, at the conclusion of the meeting, Mann, to the Court's surprise, professed suspicions that other court personnel might also be posting.

Thereafter, in a follow-up letter exchange with the undersigned, Mann stated that, in speaking at the October 10th conference, she "did not intend to suggest that anyone else in particular was posting," and that "[p]rior to the Perricone incident, [she] was not a follower of Nola.com postings and had no real sense of what was happening there." (Letter dated October 19, 2012 from former First AUSA Jan Mann to U.S. District Judge Kurt D. Engelhardt.) On Friday, November 2, 2012, however, a lawsuit was filed in Louisiana state court, alleging that Mann, as "eweman," had in fact posted inappropriate comments on Nola.com from November 2011 to March 2012. Days later, the Court was advised that the allegations were true.

At a status conference held on November 7, 2012, attended by all counsel and USA Letten, DOJ lead prosecutor Barbara "Bobbi" Bernstein advised the Court that neither she nor her "trial team" co-counsel[9] were aware of the Perricone or Mann postings until they became public. Nevertheless, considering the gravity of the Perricone postings, and the unfortunate assignment by the government of then First AUSA Jan Mann to submit responsive investigatory information and other materials to the Court, in connection with both the alleged Rule 6(e) violation and the Perricone issue,[10] the Court, expressing its dismay over the already-known troubling government hijinks, ordered the government, on November 26, 2012, to recommence compliance with its prior Orders, including an investigation of the leak of the Lohman plea pursuant to Rule 6(e), and a full and complete report regarding government internet posting activity relative to this case. (Rec. Doc. 1070.)

At that time, the Court indicated that defendants were surely correct in their suspicions of prosecutorial misconduct, but concluded that the facts, as of November 2012, still did not yet warrant an evidentiary hearing or the relief requested by the defendants. On the other hand, the Court clearly had sufficient grounds to continue seeking full and candid disclosure by the government of all

---

[9] The "trial team" or "prosecution team" consisted of Barbara Bernstein, Deputy Chief of the Criminal Section of the Civil Rights Division of DOJ; Trial Attorney Cindy Chung, also of the Civil Rights Division of DOJ; and AUSA Ted Carter of the USAO. This team initially also included EDLA AUSA Julia Evans, who was a signatory on the original Indictment filed on July 12, 2010, but who withdrew as counsel of record on May 5, 2011. (Rec. Doc. 337.)

[10] In addition to handling the government's investigation into the Lohman plea leak and the government's response to this Court's Order for production of documents related to online posting, Jan Mann was connected to this prosecution throughout as First AUSA for the USAO. She was frequently included on email exchanges during the investigation and prosecution of this matter (See Part One, Rec. Doc. 1070, p. 7, fn. 9), and as First AUSA, supervised the work of EDLA AUSA's Ted Carter and Julia Evans, members of the prosecution team.

relevant facts bearing on the defendants' motion. That being said, recognizing that the drastic action of overturning a jury verdict is not favored, and fully considering such action a last resort, the undersigned sincerely hoped that, with a clear, unequivocal and all-inclusive reliable report, the government could represent with confidence the breadth and ends of any unethical and unprofessional conduct directed towards the prosecution and trial of these defendants.

III. BACKGROUND: PART TWO – NOVEMBER 26, 2012 TO PRESENT

A. Special Attorney to the Attorney General - John Horn's Assignment

On December 3, 2012, following the Court's issuance of the November 26, 2012 Order and Reasons (Rec. Doc. 1070), John Horn,[11] the DOJ's First Assistant United States Attorney for the Northern District of Georgia, was assigned as "Special Attorney to the Attorney General," pursuant to 28 U.S.C. § 1515,[12] to accomplish the tasks set forth in this Court's previous Orders of June 13, 2012 (Rec. Doc. 1020), July 9, 2012 (Rec. Doc. 1034) and November 26, 2012 (Rec. Doc. 1070, p. 49). Although the Court previously had afforded the government thirty days to properly compile those reports, an extension of an additional thirty days was requested and granted on December 21, 2012 (Rec. Doc. 1076). Mr. Horn's request for additional time also contained a "Status Report in Partial Compliance," dated December 19, 2012, which described the commencement of his investigatory efforts.

---

[11] Throughout his endeavors in this case, Mr. Horn has been ably assisted by Special Attorney Charysse L. Alexander, also of the United States Attorney's Office for the Northern District of Georgia.

[12] On page 33 of the November 26, 2012 Order and Reasons (Rec. Doc. 1070), the Court suggested that DOJ "seriously consider appointment of an independent counsel to review the activities of Perricone and AUSA Mann, both with regard to the online postings, as well as subsequent matters before this Court as described herein." DOJ apparently chose to disregard this suggestion.

B. Departures from the USAO

Shortly after Mr. Horn's appointment, Jim Letten, United States Attorney for this district, resigned his office on December 11, 2012.[13] Then, on or about December 14, 2012, First AUSA Jan Mann retired from the United States Attorney's Office; her husband, AUSA Jim Mann,[14] retired the same day.

C. The Horn Report of January 25, 2013

On January 25, 2013, Mr. Horn submitted ex parte[15] a "Report in Compliance with Order and Reasons Dated November 26, 2012" (hereinafter referred to as "the Horn Report" or "First Horn Report"). The Horn Report summarizes the government's compliance with the guidance set forth in *In Re: Grand Jury Investigation (Lance)*, 620 F.2d 202 (5th Cir. 1980), including the completion

---

[13] First Assistant United States Attorney Dana J. Boente of the Eastern District of Virginia was appointed to serve as Interim United States Attorney for the Eastern District of Louisiana on December 6, 2012.

[14] At the time of his retirement, AUSA Jim Mann held the position of Supervisor of the Financial Crimes and Computer Crimes Unit. See Transcript of Jim Mann, August 8, 2012, p. 5.

[15] All of the reports and related materials provided by Mr. Horn were submitted ex parte and under seal, and have remained so, except where provided herein. Additionally, the Horn Report and those that followed contain a "Reservation of Applicable Privileges":

> This Report and its attachments contain information protected by the attorney-client privilege, work-product privilege, and deliberative process privilege. At this time, the government waives these privileges only for the limited purpose of complying with the instructions in the Court's Order and enabling the Court to conduct an ex parte, in camera review of the government's submissions in response to the Order. The government does not waive, and expressly asserts, these privileges with respect to any further disclosure of this Report or the materials submitted in connection with the Report.

On Friday, August 2, 2013, the Court requested that the DOJ provide the basis and authoritative support for each privilege asserted, which was received on August 21, 2013. The Court has been and is sensitive to the narrow assertion of applicable privileges, and has given due consideration to each in releasing this Order. Indeed, the Court has purposefully included only those aspects of Mr. Horn's reports it thought essential at this time, and omitted various aspects of the Horn Reports and documents produced that have additional bearing on the disposition of the defendants' Motion for New Trial, but might be subject to such privileges.

of nearly 200 interviews of various DOJ, FBI, and USAO personnel, as well as the submission of sworn affidavits of certain federal law enforcement personnel,[16] regarding the grand jury proceedings and subsequent guilty plea of cooperating defendant/witness Michael Lohman. The Horn Report also further examines the conduct of Perricone and Jan Mann.

Regarding the premature media reports of Lohman's guilty plea agreement, the First Horn Report indicates that the media sources ("two people familiar with the investigation" and "a source close to the probe") responsible for the Lohman plea leak have never been identified, and that the publishers (the Times-Picayune and AP) of the information "formally rejected" DOJ's request for their identities (even in a general exclusionary sense, i.e., by group or category of potential persons). See First Horn Report, Attachment 10 (Letter from AP's counsel dated December 17, 2012; and letter dated December 17, 2012 from counsel for the Times-Picayune). Nonetheless, the body of evidence set forth in the Horn Report purports to rebut any assumptions under *Lance* that federal law enforcement personnel were the sources of the information reported. The Horn Report also indicates that, although attempts to negotiate with the Times-Picayune and AP for the disclosure of the identity of the sources (or even the general group from which they might come) failed, the DOJ believes it has sufficiently pursued the information through other sources (the aforementioned DOJ affidavits), and "has concluded that the factors required for the issuance of a subpoena to the reporters have not

---

[16] In addition to submitting to questioning by an Inspector General Assistant Special Agent in Charge, the involved law enforcement personnel were asked to sign a pre-printed standard form affidavit. The form affidavit used for employees of the U.S. Attorney's Office for the Eastern District of Louisiana records the sworn answers to ten questions. The form affidavit used for employees of DOJ's Civil Rights Division asks nine questions. The one used for employees of other agencies propounds eight questions. See Attachment 1 to Horn Report, Exhibit 1, pp. 08-21. None of the executed affidavits has been provided to the Court, nor have they been requested at this time.

been met."[17] Perhaps significantly, however, though it had been reported in the Times-Picayune that a subpoena had issued to discover the identities of at least eleven Nola.com user IDs of interest to Mr. Horn, the First Horn Report does not reference the other user IDs of persons obviously posting curiously similar information and/or opinions about DOJ/USAO business.

With regard to the internet postings of comments by Perricone and Jan Mann, the First Horn Report not unexpectedly concludes "that Mr. Perricone's and Ms. Mann's conduct reflects no broader effort/campaign within the USAO to provide non-public information about this or other cases through Nola.com or other websites." (Horn Report, p. 16.) However, Horn did learn that Perricone used (but could not recall) yet another user ID on the Nola.com website, but could not confirm the specific name. Likewise, Mann admitted that she too may have posted a few comments under a different user ID than "eweman" approximately one year before her first post as "eweman" (which would also be about six months before the start of this trial in June 2011). Nevertheless, although she reportedly could not recall that particular user ID, she assured the government investigators that those comments did not relate to DOJ matters. Both Jan Mann and Jim Mann declined to provide affidavits, although both agreed to be and were interviewed in December 2012.

---

[17] The Court disagrees with this conclusion; but, in light of the disposition of the pending motion, it is moot. It is not without irony, however, that the Court notes the Times-Picayune's and AP's recent noble assertion of the "right of access to information regarding the alleged misconduct of federal prosecutors", "the right of access [to] ensure[s] that the public has the information it needs to intelligently assess the activities of its government", and a "right of access to information regarding not only the events that led to the convictions . . . but also the facts surrounding Defendants' allegations of prosecutorial misconduct in connection with that case." (See Rec. Doc. 1126-1, pp. 2, 4 and 5.) Specifically, as to alleged prosecutorial misconduct regarding Rule 6(e), the critical piece of information – the gravamen of defendants' motion – is the identity of the source of the AP's and Times-Picayune's premature publication of information regarding the unannounced Michael Lohman plea deal – a fact known, even today, only by the movants Times-Picayune and the AP. By formally rejecting the DOJ's request for this information, and choosing to keep it "confidential" and thus hidden from the public, these two media outlets perpetuate the viability of defendants' Rule 6(e) motion, and support its merit by implication, while relying on an inapplicable claim of journalistic "privilege." See *United States v. Sterling*, 2013 WL 3770692 (4th Cir. July 19, 2013) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)); and *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

Aside from those who used the internet to post comments concerning only non-DOJ matters, Horn also uncovered two other law enforcement personnel who posted about this case: (1) "the first employee, from the Civil Rights Division and who had first-hand knowledge of the Danziger Bridge case but was not a member of the prosecution team, . . ." posted six comments under the pseudonym "Dipsos" over the course of four days of the Danziger Bridge trial in 2011; and (2) [DOJ agency employee "A"][18] in New Orleans who was not involved in the Danziger Bridge or Glover investigations . . ."[19] Neither law enforcement employee was named or further identified in the First Horn Report. Though the first was described as only an "employee" in the Civil Rights Division of the DOJ in Washington, D.C., the First Horn Report excused the posted comments by characterizing them as not "inflammatory, critical or prejudicial," and not containing grand jury or non-public information. As to the unnamed DOJ agency employee "A," the First Horn Report identifies only two (out of over 100) comments relating to this matter, both of which were made in connection with the mistrial declared in the separate Dugue trial in January 2012. Again, the First Horn Report concludes that these comments were not "inflammatory, critical, or prejudicial, or otherwise contained grand jury non-public information."

Finally, the First Horn Report also identified and produced several other previously undisclosed email communications that the Court ordered produced back on July 9, 2012 (Rec. Doc. 1034).

---

[18] The Court has deleted the actual descriptive reference and replaced it with more general terminology.

[19] On August 21, 2013, Mr. Horn advised the Court of a significant correction: DOJ agency employee "A" had, in fact, served in a supervisory capacity over the Danziger Bridge investigation, at times directly supervising the matter. This activity included reviewing and approving related documents, sometimes attending interviews of relevant persons, and assisting in the conduct of searches.

D. The March 29, 2013 Supplement to the Horn Report

After carefully reviewing the January 25, 2013 Horn Report and determining additional information was needed, the Court, on February 22, 2013, propounded thirteen questions/requests in response. These include the following:

> (1) The absence of sworn affidavits from Jan Mann (hereinafter "Mann") and Jim Mann is problematic. Both need to submit sworn affidavits regarding all pertinent matters (including those several in your report, as well as those outlined here), or be questioned under oath in the presence of a court reporter, in the same manner as Sal Perricone (hereinafter "Perricone").
>
> (2) How did the employee from the Civil Rights Division who posted under the pseudonym "Dipsos" during the Danziger Bridge trial obtain "first-hand knowledge of the case" without being a member of the prosecution team? What position within the division did this person hold at the pertinent time? What duties and job responsibilities did he/she have? Who are his/her superiors and underlings? Has he or she been asked why information was sought from "bloggers" rather than a member of the trial team or their support staff? (See January 15, 2013 Report by John Horn ("Report"), p. 20.)
>
> (3) When interviewed, why were FBI personnel not questioned about posting comments on websites, [omitted by the Court]. (See Report, pp. 7-8 and 20-21.) Were any FBI personnel asked whether he or she had knowledge of other federal employees (Assistant U.S. Attorneys, other FBI personnel, etc.) posting on public websites?
>
> (4) The Report indicates that Perricone used another user-id on nola.com similar to "fed up" and that a DOJ review of those comments for non-public information was ongoing at the time of the Report's submission. (See Report, p.17, n. 3.) What information has been obtained since then? If any DOJ/USAO matters are referenced in any of the posts, please provide the Court with a complete copy of them.
>
> (5) The Report indicates that Mann may have posted under another user-id prior to posting as "eweman" but, at the time of her intereview, she could not recall the user-id in question. Has an additional inquiry regarding that user-id been made since the submission of your report? If the user-id and the content of the posts has been determined, what was the nature of the posts, if they did not concern DOJ/USAO matters? If any DOJ/USAO matters are referenced in any additional posts by Mann, please provide the Court with a complete copy of them. (See Report, p.17, n. 4.)

* * *

(7) A February 1, 2013 article by Gordon Russell, a reporter for Nola.com/The Times-Picayune, states that "authorities sent the NOLA Media Group a subpoena asking for information about commenters on NOLA.com." (The article presently can be found at http://www.nola.com/crime/index.ssf/2013/02/deadline_passes_quietly_for_in.html.) Is Mr. Russell correct? Is this subpoena (or its results) referenced in the Report? The article additionally indicates that "a catalog of comments and the associated IP addresses" of about 11 other commenters[20] was sought by "the feds" from (but not provided by) the NOLA Media Group. Is this correct? Are those efforts reflected in the report? What was the intended purpose of the request(s)? Why these 11 commenters?

(8) Footnote 30 of the Court's November 26, 2012 Order and Reasons states:

> It would seem obvious that, upon news of Perricone's activities, among the first questions to be answered were: (1) Is anyone else in the U.S. Attorney's Office posting inappropriate and/or compromising online comments? and (2) Did anyone in the U.S. Attorney's Office know or suspect that Perricone was posting prior to his admission in March 2012? (Even if OPR asked the first question in March, one shudders to imagine what answer was given by First AUSA Mann. Either she confessed to such activity, or falsely denied it.) Regardless, had the DOJ proactively and independently investigated and carefully analyzed the online comments in March 2012 as did the expert who uncovered Perricone and Mann, the answer to the first question would have been known months ago.

Regarding this, why were Mann's postings as "eweman" not discovered prior to late October/early November 2012? And what have you been able to ascertain regarding previous efforts, if any, by OPR (or the EDLA US Attorney's office (hereinafter referred to as "USAO")) to determine whether anyone in the USAO in addition to Perricone was improperly posting online?

(9) What efforts, if any, have been made as to whether Mann, Perricone, or anyone else in the USAO, has made improper public comments regarding DOJ/USAO matters via any website, blogs, newspapers, etc., *other* than nola.com,? If such an inquiry has made, what information has been gathered?

---

[20] The eleven user IDs/aliases sought are: **"FormerNOPDman," "mardigraswizard," "lawdawg1963," "nolacat60," "FSU1982," "alafbi," "thewizard," "copperhead504," "isthisthingon?," "Andjusticeforall,"** and **"uckzerto."** As of this date, the Court knows the identity of only one with certainty, though the Court suspects the likely general identity of some of the others.

> (10) The Report addresses the question of whether anyone else within the U.S. Attorney's office was posting online, but does not address the question of who within the office knew about Perricone's and/or Mann's postings, as indicated in Footnote 30 of the Court's November 26, 2012 Order and Reasons. What inquiry, if any, has been made relative to this question? For instance, on November 7, 2012, Michael Magner ("Magner") testified that he previously had told at least three supervisory personnel, and others, within the USAO that he suspected Perricone was posting online about DOJ/USAO matters. Have the referenced persons, including Greg Kennedy, Maurice Landrieu, and Matt Coman, as well as Carter Guice and the others identified, been interviewed under oath, or otherwise, regarding Magner's assertions? If so, what information was obtained? Please provide a complete copy of any pertinent findings resulting from any such inquiries.
>
> * * *

On March 29, 2013, Mr. Horn and Ms. Alexander responded to these questions. The Supplemental March 29, 2013 Report (herein after, the "First Supplemental Report") disclosed that both former First AUSA Jan Mann and former AUSA Jim Mann had been interviewed under oath in the presence of a court reporter on November 15, 2012, by OPR attorneys.[21] Thereafter, in December 2012, both were interviewed by Mr. Horn and Ms. Alexander, who were accompanied by a special agent with the DOJ Office of Inspector General (OIG). On that occasion, neither were placed under oath, and both, according to the First Supplemental Report, declined to sign an affidavit containing the answers given.[22] Both reiterated their denial of being the source of any unauthorized release of information in connection with the Rule 6(e) issue.

---

[21] OPR counsel had also previously conducted unsworn interviews of Jan and Jim Mann on August 8, 2012 (prior to the discovery that she had posted comments online as "eweman").

[22] The First Supplemental Horn Report indicates that, in December 2012, both Jan Mann and Jim Mann were questioned "in the presence of two federal prosecutors and a federal agent, placing themselves at the same risk of consequence for a false statement under 18 U.S.C. § 1001 as if they had signed affidavits with those responses." (March 29, 2013 Supplement, p. 2.) While the Court appreciates this representation, if one or both witnesses were required to testify under oath and be cross-examined at an evidentiary hearing, the assessment and enforcement of penalties for false testimony, if found by the Court, would be the independent responsibility of the Court, not simply the discretionary decision of DOJ, their former employer and a party to this prosecution with an obviously strong interest in its dispositive result.

The March 29, 2013 First Supplemental Report still conspicuously did not name the Civil Rights Division employee who posted as "Dipsos," an omission the Court found truly odd, and which further peaked its curiosity, especially given that the First Supplemental Report *did* further disclose that this "employee" actually is an attorney, who had gained first-hand knowledge of this case "pursuant only to her review of investigative materials and not by participating in the investigation or on the prosecution team." (First Supplemental Report, p. 3.) The First Supplemental Report then explained that:

> the attorney was walled off from the prosecution team and was prohibited from having any substantive discussion about the investigation with any member of the prosecution team or any supervisor over the prosecution team. The attorney thus discussed the Garrity review with the team and passed along evidence that had been reviewed and cleared for use by the prosecution team. The attorney is not a supervisor, and the attorney's direct supervisor had no involvement in the case except to oversee the Garrity work. The attorney does not supervise others. The attorney said under oath that the attorney was in Washington [D.C.] during the trial and followed the progress of the trial in the Times-Picayune because the prosecution team was busy and there was not a good flow of information back about the trial events.

Id.

In further response to the Court's February 22, 2013 queries, Mr. Horn reported that, in December 2012, counsel for the New Orleans FBI office "asked all employees in that office if they had engaged in any online posting activity relating to any federal or state criminal investigations." (First Supplemental Report, p. 4.) In addition, the First Supplement Report reiterated that Perricone did not recall the specific user ID he used that was similar to "fed up," though a search indicated six comments posted under this particular user ID ("fed up") occurring from October 12, 2009 to October 20, 2009, did bear some semblance to Perricone's writing style and content. But according to the First Supplemental Report, none of the comments relate to legal matters or cases. The First

Supplemental Report also states that, although former First AUSA Jan Mann could not recall her prior user ID, she thought it possible that, approximately one year prior to registering as "eweman," she posted one or two comments in a single day about Louisiana Attorney General Buddy Caldwell in response to an article. Again, however, she had assured investigators that she did not post about DOJ matters using her unknown prior user ID.

In response to the Court's Question No. 7, the First Supplemental Report further explains that the government deferred its request [to media outlets] for information associated with the other eleven referenced user IDs "until such time that more specific evidence of misconduct was developed." The First Supplemental Report additionally states that, given other investigatory work, including obtaining affidavits from all USAO personnel, "we believe that the results [of the subpoena] yield little probative evidence when compared with the other evidence summarized in the Report." (First Supplemental Report, p. 8.)

Of significance, with regard to the Court's Question No. 8, the First Supplemental Horn Report admits that OPR did **not** initially inquire as to whether any other USAO employees had posted online comments,[23] but asserts OPR did ask EDLA attorneys "to provide all information they possessed relevant to its inquiry regarding Perricone's postings." According to the First Supplemental Report, at that time "no USAO employee, including Jan Mann, volunteered that he or she had posted online comments in response to that question." (First Supplemental Report, p. 9.) The First Supplemental Report indicates that only later in November 2012, when it initiated its investigation into former First AUSA Mann's postings, did OPR specifically inquire as to whether any other employee had posted comments about DOJ matters on Nola.com or any other internet website.

---

[23] This omission did not escape the notice of First AUSA Jan Mann, as discussed *infra*.

In responding to the Court's Question No. 10, the First Supplemental Report deferred to the OPR's continuing investigation, relative to whether anyone in the USAO knew about Perricone's and/or Jan Mann's postings. Nonetheless, it reiterated the government's belief that neither Perricone nor Mann posted confidential information about this case; that no USAO personnel other than Perricone and Mann posted comments online about DOJ matters; and yet again denied that the comments posted by Perricone and Mann were part of a broader or collusive effort within the USAO, or federal law enforcement, to provide non-public information about this case, or any other cases, through Nola.com or any other websites.

On April 16, 2013, the Court held a status conference at the request of defense counsel, wherein an oral update of a general nature was provided.[24] Defense counsel were not provided any of the Horn Reports or documents, or any substantive information based on such material.[25]

E. Further Inquiry of the Court, and the May 15, 2013 Meeting

On Monday, April 22, 2013, the undersigned contacted Mr. Horn via telephone[26] to thank him for his prior efforts, but to also advise that a further request for specific documentation and materials would be forthcoming from the Court. During that conversation, the Court expressed a concern that the two previous Horn Reports seemed to not only contain appropriate factual information, but also further verbiage that either was anodyne in nature, or expressed advocation in

---

[24] The government's prosecution team (lead counsel Bernstein by phone, AUSA Carter in person) also attended and participated in this status conference. They, however, were aware of and had previously reviewed the then-existing Horn Reports and submitted materials, and thus were already fully informed.

[25] To this day, defense counsel have not been provided any of the Horn Reports or other documentary materials submitted by Mr. Horn.

[26] This was the first direct person-to-person contact, verbal or otherwise, between the undersigned and Mr. Horn.

the form of arguably debatable mitigating commentary.[27] The undersigned further noted that some provisions of the Horn Reports seemed to incite obvious further inquiry or investigation, and thus follow up by the Court with Mr. Horn.

That same day, the Court requested, via email, eight additional items for in-camera review, including:

> 1. Full and complete transcripts, including any exhibits, of the interviews of former AUSA's Jan Mann and Jim Mann taken before a court reporter on November 15, 2012.
>
> 2. All notes (handwritten or otherwise) no matter how recorded, electronic recordings, transcripts, or other materials memorializing (a) the "unsworn interview" of former AUSA Jan Mann on August 8, 2012; and (b) the "supplemental interview(s)" of former AUSA's Jim Mann and Jan Mann that occurred in December 2012.
>
> 3. The full name and title of (a) the Civil Rights Division employee referenced on Page 3 of the March 29, 2013 Supplemental Report; and (b) the direct supervisor referenced in the first full paragraph of Page 3 of the March 29, 2013 Supplemental Report.
>
> 4. The full name and title of [DOJ agency employee "A"] who is under administrative investigation and referenced on Pages 20-21 of the January 25, 2013 Report and Page 4 of the March 29, 2013 Supplemental Report.
>
> * * *
>
> 6. The full name and title of the ..... FBI agent referenced on Page 4 of the March 29, 2013 Supplemental Report regarding former AUSA Mike Magner's statement to him.
>
> 7. The full name and title of the .... FBI agent referenced on Page 6 of the March 29 Supplemental Report (regarding Question No. 6).

---

[27] On April 22, 2013, the Court specifically inquired: "My concern, when I ask you about who all might have reviewed the report before you submit it to me, is whether anyone is adding to the report after you do your fact-finding; is anyone adding to the report, before it comes to me, in the nature of advocacy?"

* * *

At that same time, the undersigned propounded ten more questions, including these:

> 1. Before the Court rules on the pending motion for new trial and motion to dismiss filed by Defendant Dugue (Rec. Docs. 963 and 1079 (sealed)), the Court might require former AUSA Jan Mann to answer questions under oath, or sign a sworn statement or affidavit that provides clear, comprehensive and unequivocal information regarding the entirety of the Court's inquiry in this matter, as well as her own conduct relative to it. This will, to some extent, depend on what was covered on November 15, 2012, as set forth in that transcript. Please state the legal basis given for her decision to decline to sign an affidavit, as described on Page 2 of the March 29, 2013 Supplemental Report.
>
> 2. With regard to Question No. 4, and the response thereto on Page 5 of the March 29, 2013 Supplemental Report, has former AUSA Perricone been asked about the user name "martyfed" and/or "camp?" Has the DOJ reviewed any comments from either of these user ids?
>
> 3. Has former AUSA Jan Mann been questioned about the user id "bowatch?" Has the DOJ attempted to review and analyze comments posted by the user id "bowatch?"
>
> 4. Is the Court to understand, with certainty, that the DOJ does not intend to further pursue the subpoena referenced in Question No. 7 (Page 7 of the March 29, 2013 Supplemental Report)?
>
> 5. Page 8 of the March 29, 2013 Supplemental Report states that "DOJ's own forensic evidence identified any USAO personnel who posted comments on Nola.com using the USAO's internet portals during 2012." The last paragraph of Page 21 of the January 25, 2013 Report appears to indicate that such evidence was not obtained for 2010 and 2011 (prior to December 19, 2011) because it was impossible to do so. Is that correct? If not, please explain why the same evidence was not obtained for pertinent time periods prior to December 19, 2011.[28]
>
> 6. Page 9 of the March 29, 2013 Supplemental Report, in response to Question No. 8, provides information regarding OPR's previous efforts, following former AUSA Perricone's March 2012 admission, to determine whether anyone else in the USAO was posting anonymous comments about DOJ matters, but not any

---

[28] The trial in this matter commenced on June 22, 2011, and the verdict was returned on August 5, 2011. At no time was the jury sequestered. This period, and the time before it, are obviously highly relevant to the issues facing the Court in the motion *sub judice*.

independent efforts by the USAO. What have you been able to ascertain regarding the USAO's own past efforts, if any, to determine whether anyone in the USAO was posting anonymous comments about DOJ matters?

* * *

8. On Pages 11-12 of the March 29, 2013 Supplemental Report, you state that you did not understand the Court's Order and Reasons to encompass Question No. 10 of the Court's February 22, 2013 email inquiry. The Court believes the question to be well within the scope of issues raised in both the motion for new trial (and the subsequent *Dugue* motion to dismiss).fn. In any event, the Court understands that this question will be answered fully, completely, and comprehensively in the OPR report. Please advise if this is inaccurate.

> [fn. Of course, the Court's Order of June 13, 2012, rendered at the conclusion of the hearing conducted on that date, was based on what was then known. Since that time, many intervening events have warranted a logical extension of the inquiry.]

9. Although Page 16 of the March 29, 2013 Supplemental Report indicates that the process of investigating and generating the OPR report "may be lengthy", is there any estimate as to when that report will be completed, including the time delays for any challenges to OPR's findings? Additionally, please identify and provide contact information for the persons, including any supervisory personnel, who are conducting the OPR investigation and/or are responsible for the report.

10. Please provide the names and title of all persons, as well a short description of their respective roles, participating in the preparation, including drafting, editing, approving, and/or supervising, of your reports and submissions to the Court.

On Wednesday, May 1, 2013, Mr. Horn and Ms. Alexander contacted the Court to request an in-chambers meeting, attended by a court reporter, to discuss their response to the April 22, 2013 queries. At the meeting on May 15, 2013, Mr. Horn and Ms. Alexander delivered some of the requested materials to the Court, with an explanation/clarification of the content and their attempts to gather information in response to the Court's request.

During the meeting, Mr. Horn also again raised the issue of the review of his reports by others in the DOJ. Mr. Horn assured the Court that, although drafts of each report were shown to

various other DOJ/government personnel (including the prosecution trial team) to confirm accuracy, "Charysse and I hold the drafting authority for the documents that we submitted to the Court. We are the drafters of the language in it, of the factual findings, and the information that is summarized is what we have concluded and what our observations are." (May 15, 2013 Transcript, p. 20.) Mr. Horn additionally confirmed that "drafts were shared with our supervisors in the D[eputy] A[ttorney] G[eneral]'s office," but that, "[A]s far as any suggestions that were given by anyone other than anyone in the DAG's office, Charysse and I had the final authority over what content and what suggestions were made." *Id.*

While accepting Mr. Horn's assertion, the Court nonetheless again expressed its concern and objection to anyone editing his reports to either change or delete facts that have been found, or changing accurate information that was originally included, or adding verbiage in the nature of advocacy to mitigate what findings had been made. *Id.* at 26-27. In response, Mr. Horn stated forthrightly: "There's not been anything that anybody within the department [DOJ] has asked us to change in terms of correcting a fact or a representation that we've made in our report that has not been based on the intent to make it more accurate, . . ." *Id.* at 28. Mr. Horn continued:

> I think I can address what your concern is by saying that what Charysse and I have put into our submissions is our work product, it's our assessments. There may have been – there may have been suggestions, and there may have been clarifications offered; but in terms of the trial team, in terms of the U.S. Attorney's Office here, suggestions that they made were subject to our final approval and authority and drafting.
>
> * * *
>
> So all of that contribution would be filtered through Charysse and me and our assessment of the record, the evidence, the materials that we reviewed, the interviews that we've conducted, and subject to the oversight and the final authority of the DAG's office, and that would be people who had no, I think, involvement in the

> Danziger Bridge matter. We're talking about, we were reporting to, at one point, the chief of staff to the Deputy Attorney General, and then now to, who I mentioned on the phone, Stuart Goldberg, who is the Principal Associate Deputy Attorney General.
>
> * * *
>
> So there were certainly suggestions and comments made along the lines that I think a supervisor has an appropriate role to make in saying, "Are you looking at this? Are you looking at that?" But there has never been anything that was changed factually, or an assessment that we've made that did not reflect Charysse and my judgment and assessment and determination about what happened or whether that representation is appropriate and accurate to be in the report.

Id. at 34-35.

During the May 15, 2013 meeting, the undersigned was told orally the identity of "Dipsos" by name for the first time. As will be discussed, it was a rather familiar one.

F. Second Supplemental Report of May 20, 2013

In further response to the Court's April 22, 2013 written inquiry, and as discussed at the May 15, 2013 conference, Mr. Horn and Ms. Alexander provided to the undersigned much of the materials requested, including transcripts of the interviews conducted by OPR, and related documents. Then, on May 20, 2013, Mr. Horn delivered his Second Supplemental Report responding to the questions posed, and the rest of the materials sought.

In that report, Mr. Horn indicated that Jan Mann was advised, in December 2012, that "she could answer all the [10] questions in the affidavit [previously utilizied by OPR] or complete another form of the affidavit [containing only 8 questions] that omitted [the 2] questions about the OPR survey." After consulting with counsel, she agreed to answer the questions in the ten-question affidavit relating to the alleged disclosures. In so doing, however, Jan Mann again declined to submit an affidavit, but agreed to an interview "in the telephonic presence of an OIG Special Agent."

Mr. Horn reported that Jan Mann's attorney "provided no legal basis for her decision not to sign the affidavit." (Second Supplemental Report, p. 2.) Mr. Horn also indicated his belief that the questions in the affidavit had been orally covered during the sworn November 15, 2012 interview of Jan Mann by OPR attorneys. To the contrary, however, in the DOJ's "Memorandum Of Investigation," reflecting the results of the Horn and Alexander interview of Jan Mann on December 21, 2012, Jan Mann was again asked only questions one through eight from the original ten-question affidavit presented by OPR during the summer of 2012. According to the Memorandum Of Investigation: "Mann was not asked questions nine or ten,[29] because her attorney had previously advised Horn that Mann would not answer those questions. Mann declined to swear to the statement."

The Second Supplemental Report also revealed that, through his counsel, Perricone denied ever posting comments under the user IDs "martyfed" or "camp;" whereas through her counsel, Jan Mann similarly denied posting comments under the user ID "bowatch."

The Second Supplemental Report additionally confirmed that DOJ does not intend to pursue the subpoena it issued in January 2013 (relating to the eleven user IDs) to the NOLA Media Group, in light of its collection of affidavits. The DOJ concluded that pursuing the subpoena "would yield little additional probative evidence."[30] (Second Supplemental Report, p. 5.)

---

[29] Questions nine and ten were:

> 9. For AUSAs only: do you affirm that your answers to OPR's July 2012 survey remain the same, or do you have changes, clarifications, or additional information to provide?
>
> 10. If you completed OPR's November 2012 survey asking whether you had posted any comments online and about your knowledge of others posting comments online, do you affirm that your answers to this survey remain the same, or do you have changes, clarifications, or additional information to provide?

In fact, as Mr. Horn stated, Jan Mann gave sworn testimony on November 15, 2012, that related to the answers to these two questions.

[30] The Court disagrees with this conclusion too, but again finds the issue moot in light of its disposition of the subject motion.

In a truly disappointing and unsettling crucial development, the Second Supplemental Report also indicates that DOJ could not forensically recover computer data evidence from the USAO's internet portals for years 2010 and 2011 (prior to December 19, 2011) because it "did not retain data for the period before that." *Id.* Thus, critical information regarding further prosecutorial misconduct in the months before and during this trial seems forever unavailable.[31]

The Second Supplemental Report then indicates that, with one important exception (discussed *infra* at pp. 88-95), no evidence was found that USAO management had information about any other posters (besides Perricone) before November 2012, when the state court civil lawsuit against First AUSA Jan Mann was filed. Furthermore, the USAO reportedly held two staff meetings, led by former USA Jim Letten, in March 2012, shortly after the Perricone activity became known, wherein he urged all in attendance to advise him promptly if they had any information of like nature that should be disclosed before he addressed Perricone's conduct with the media. No one volunteered during either meeting that they had posted online comments.

The Second Supplemental Report further states that OPR will make its final report available for the Court's review when it is completed, but adds: ".... it is difficult to predict with certainty the time at which OPR's final report will be available for disclosure to the court." (Second Supplemental Report, p. 7.) An expected time line of legal delays was provided, but suffice it to say, the Court does not anticipate the OPR final report to be forthcoming for many months after the date of this Order.

---

[31] The inability of DOJ to forensically recover computer data evidence at material times to this inquiry, particularly when coupled with both Perricone's and Jan Mann's reported inability to recall prior user IDs, indeed troubles the Court, and supports the Court's ruling.

Finally, in further response to the Court's inquiry regarding DOJ persons participating in the preparation, including drafting, editing, approving, and/or supervising the Horn Reports to the Court, the Second Supplemental Report states:

> ". . . we have acted under the supervision of Deputy Attorney General James Cole, initially through former Associate Deputy Attorney General Scott Schools[32] and presently through Principal Associate Deputy Attorney General Stuart M. Goldberg. As described more fully below, at all times the undersigned have held the responsibility for conducting our investigation and preparing all submissions to the Court in response to the November Order, subject to the editing and final approval of the above supervisors. We have been given the authority to independently conduct this investigation and have not been restricted in pursuing leads or information. Similarly, we have not been restricted in reporting information in our submissions that we concluded to be appropriate."

(Second Supplemental Report, pp. 8-9.)

G. Third Supplemental Report Dated June 17, 2013

The Court reviewed the material delivered by Mr. Horn and Ms. Alexander on May 15 and 20, 2013, and thereafter asked seven more questions in the nature of clarification, none of which was of a substantive nature. A Third Supplemental Report was filed by Mr. Horn, on June 17, 2013, in response to the Court's inquiries.

H. Fourth Supplemental Report Dated June 25, 2013

As a matter of even further follow-up, the Court made two additional requests of Mr. Horn on June 18, 2013, to which Mr. Horn responded via a Fourth Supplemental Report dated June 25, 2013. The first of those questions related to the interview of Jan Mann; the second related to the DOJ agency employee "A." Then, on Friday, July 26, 2013, the Court requested the transcript or

---

[32] See p. 89, fn. 100.

recording of the December 20, 2012, OIG interview of "Dipsos,"[33] which recording was received on July 31, 2013.

As of that date, July 31, 2013, with the body of information gathered by Mr. Horn and Ms. Alexander, along with other information received and confirmed during this time period, the Court was strongly inclined to hold an in-depth evidentiary hearing, as originally requested by defendants, given that their allegations, based then on very few known facts, deductive reasoning, and supposition, had clearly blossomed into a series of newly-discovered facts and admissions, unanswered questions, additional apostasies, and a fetor extending far beyond the simple disconcerting notion of a single rogue prosecutor known to counsel and the Court at the hearing on June 13, 2012. But, with these admissions, and confirmed facts reported and verified sufficient to tip this matter toward disposition, the Court is able and instead finds it more appropriate to simply rule on defendants' motion now, for the reasons stated.

IV. STATEMENT OF ISSUES

A. The Government's Opposition to Defendants' Motion

In its original opposition memorandum (Rec. Doc. 1007), filed on June 5, 2012, the government staked out two general arguments: (1) the defendants' motion is untimely and must be dismissed without consideration of its merits; and (2) the defendants' motion should be denied because the defendants have failed to demonstrate a violation of their rights to due process. (Rec. Doc. 1007, p. 3.)

---

[33] Though not otherwise referenced by quote in this Order, the Court finds certain other particular information on this recording tends to support its decision.

B. Questions Raised

Generally speaking, as reflected in the government's opposition memorandum, the Court is faced with a motion for new trial under Rule 33. This particular new trial request, however, unlike most, poses many interesting questions, some groundbreaking: (1) Initially, as raised by DOJ, was the defendants' motion timely filed when some of the government's conduct was not discovered until months later, and much of it is being disclosed to defense counsel for the first time in this Order? (2) Did the government violate the Code of Federal Regulations? (3) Did the government attorneys violate the other Rules of Professional Responsibility and Local Court Rules set forth herein? (4) Can the government do indirectly that which it is strictly prohibited from doing directly? (5) Can the government do in cyberspace, with anonymity, that which it is strictly prohibited from doing otherwise? (6) Because these posts by government attorneys were made anonymously (or under a fake name), should the Court overlook and excuse the fact that they were made by government prosecutors and employees of DOJ? (7) Was Rule 6(e) violated? (8) If Rule 6(e) was violated, by whom? (9) Are the defendants entitled to an evidentiary hearing on any or all of these issues? (10) Under these extraordinary circumstances, are the defendants required to show prejudice? (11) If so, have the defendants shown sufficient prejudice?

The Court again points out that a search of existing case law does not reveal that factually similar circumstances have occurred elsewhere in this nation (which is a relief, in a way) for prior court treatment. This is not entirely surprising, given that social media and internet posting are relatively new phenomena, and the minatory nature of the conduct occurring both before and during this high stakes trial. Any precedential discussion of them in the jurisprudence, however, would have been helpful. Nonetheless, with certain irrefragable facts before it juxtaposed against a number

of unanswered material questions, the Court believes this matter can be disposed of at this time based upon longstanding fundamental principles of due process.

V. GOVERNING LAW

A. Fundamental Guiding Principles

"[F]air play . . . is the essence of due process." *Galvan v. Press*, 347 U.S. 522, 530 (1954). Such fair play includes "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-21 (1959). This deep-rooted feeling extends even deeper where prosecutors are concerned, given their status as officers of the court bound to special rules of professional conduct. *See, e.g.*, La. Rules of Professional Conduct, Rule 3.8 (Special Responsibilities of a Prosecutor).

Addressing the special obligations owed by federal prosecutors, in *United States v. Lopez-Avila,* 678 F.3d 955 (9th Cir. 2012), the Ninth Circuit Court of Appeals recently explained:

> The Department of Justice has an obligation to its lawyers and to the public to prevent prosecutorial misconduct. Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; they must serve truth and justice first. *United States v. Kojayan,* 8 F.3d 1315, 1323 (9th Cir. 1993). Their job is not just to win, but to win fairly, staying within the rules. *Berger,* 295 U.S. at 88, 55 S.Ct. 629.
>
> * * *
>
> When a prosecutor steps over the boundaries of proper conduct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again.

Id. at 964-65. Having found prosecutorial misconduct committed by one AUSA, the Court of Appeals remanded the case to the district court to consider "two different courses of action that

would deter future misconduct like this since 'quite as important as assuring a fair trial . . . is assuring that the circumstances that gave rise to the misconduct won't be repeated in other cases.' *Kojayan,* 8 F.3d at 1324." *Lopez-Avila,* 678 F.3d at 965-66. The two remedial options set forth by the Ninth Circuit are (1) retrial, or dismissal with prejudice, pursuant to the district court's supervisory powers over the attorneys who practice before it, and (2) discipline of the prosecutor(s) directly pursuant to a show cause order. *Lopez-Avila,* 678 F.3d at 966. The Ninth Circuit finally noted, as is the case herein, that the DOJ Office of Professional Responsibility (OPR) is required to review the conduct of the DOJ attorney involved.[34]

B. Laws Governing Conduct of Prosecutors

The conduct of prosecutors and other personnel of the DOJ is governed in several respects, the most significant here being 28 C.F.R. § 50.2. That provision of the Code of Federal Regulations states, in pertinent part:

> **§ 50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.**
>
> (a) *General.*
>
> * * *
>
> (2) While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the law. The task of striking a fair balance between the protection of individuals accused of crime or involved in civil

---

[34] In *Lopez-Avila,* upon the initial release of the original opinion, the government filed a motion requesting that the Circuit remove the prosecutor's name (AUSA Jerry Albert) from the opinion and replace it with references to simply "the prosecutor", arguing that naming Albert publicly was inappropriate. The Circuit rejected the government's request, stating: "If federal prosecutors receive public credit for their good works - as they should - they should not be able to hide behind the shield of anonymity when they make serious mistakes." 678 F.3d at 965. To the extent DOJ and AUSA attorneys have objected to being publicly named herein, this maxim applies here as well.

proceedings with the Government and public understandings of the problems of controlling crime and administering government depends largely on the exercise of sound judgment by those responsible for administering the law and by representatives of the press and other media.

* * *

(b) *Guidelines to criminal actions.*

(1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, *if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.*[35]

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

---

[35] Significantly, this regulation sets forth an objective standard: ". . . could reasonably be expected . . ." and ". . . may reasonably be expected to influence the outcome of a pending or future trial." Thus, a violation is **not** measured subjectively, i.e., whether it *actually* influenced a pending or future trial. In other words, actual "influence" is not required for a violation of this regulation.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. **Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include** ***only information which is clearly not prejudicial.***

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

* * *

> (9) Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. **If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.**
>
> * * *

[italic and bold face emphasis added.][36] Moreover, as if this provision in the Code of Federal Regulations is not sufficient and clear, much the same legal directive is contained in the DOJ's United States Attorneys Manual, Chapter 1-7.000, entitled "Media Relations." Those provisions state, in pertinent part [italics and bold face emphasis added]:

---

[36] See also 28 C.F.R. § 16.26, which governs production or disclosure of information pursuant to a demand:

> (a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:
>
> (1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and
>
> (2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.
>
> (b) Among the demands in response to which disclosure will **not** be made by any Department official are those demands with respect to which any of the following factors exist:
>
> (1) Disclosure would violate a statute, . . . or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),
>
> (2) **Disclosure would violate a specific regulation;**
>
> * * *

1-7.110 Interests Must Be Balanced

These guidelines recognize three principal interests that must be balanced: the right of the public to know; an individual's right to a fair trial; and, the government's ability to effectively enforce the administration of justice.

* * *

1-7.112 Need for Free Press and Public Trial

Likewise, careful weight must be given in each case to the constitutional requirements of a free press and public trials as well as the right of the people in a constitutional democracy to have access to information about the conduct of law enforcement officers, prosecutors and courts, consistent with the individual rights of the accused.

* * *

1-7.401 Guidance for Press Conferences and Other Media Contacts

The following guidance should be followed when Department of Justice components or investigative agencies consider conducting a press conference or other media contact:

* * *

D. There are also circumstances involving substantial public interest when it may be appropriate to have media contact about matters after indictment or other formal charge but before conviction. In such cases, any communications with press or media representatives should be limited to the information contained in an indictment or other charging instrument, other public pleadings or proceedings, and any other related non-criminal information, within the limits of USAM [United States Attorneys Manual] 1-7.520, .540, .550, .500 and 28 C.F.R. 50.2.

E. **Any public communication by any Department component or investigative agency or their employees about pending matters or investigations that may result in a case, or about pending cases or final dispositions, must be approved by the appropriate Assistant Attorney General, the United States Attorney, or other designate responsible for the case.**

* * *

G. All Department personnel must avoid any public oral or written statements or presentations that may violate any Department guideline or regulation, or any legal requirement or prohibitions, including case law and local court rules.

H. Particular care must be taken to avoid any statement or presentation that would prejudice the fairness of any subsequent legal proceeding. See also 28 C.F.R. 16.26(b).

* * *

1-7.500 Release of Information in Criminal and Civil Matters—Non-Disclosure

At no time shall any component or personnel of the Department of Justice furnish any statement or information that he or she knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[37]

* * *

1-7.550 Concerns of Prejudice

Because the release of certain types of information could tend to prejudice an adjudicative proceeding, Department personnel should refrain from making available the following:

A. Observations about a defendant's character;

B. Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement;

C. Reference to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or forensic services, including DNA testing, or to the refusal by the defendant to submit to such tests or examinations;

D. Statements concerning the identity, testimony, or credibility of prospective witnesses;

E. Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial;

F. Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea of a lesser offense.

* * *

[italics and bold face emphasis added.]

---

[37] Importantly, this express prohibition also carries an objective standard ("knows or reasonably should know" and "substantial likelihood"), rather than requiring actual "material prejudice" for a violation to occur.

In addition, and just in case the aforementioned federal regulation and the DOJ's U.S. Attorneys Manual were not quite enough, the United States District Court for the Eastern District of Louisiana has also enacted Local Criminal Rules, which state the following [italics and bold face emphasis added]:

> **LCrR53.1 Dissemination of Information Concerning Pending or Imminent Criminal Litigation by Lawyer Prohibited**
>
> **It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he or she is associated, if there is a *reasonable likelihood* that such dissemination will interfere with a fair trial *or otherwise prejudice the due administration of justice.***
>
> * * *
>
> **LCrR53.3 Extrajudicial Statements Concerning Specific Matters**
>
> From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, **a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by means of public communication relating to that matter and concerning:**
>
> * * *
>
> (B) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
>
> * * *
>
> **(D) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;**
>
> **(E) The possibility of a plea of guilty to the offense charged or a lesser offense;**

> **(F)** ***Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.***
>
> * * *
>
> **LCrR53.5 Extrajudicial Statements During Trial**
>
> During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.
>
> **LCrR53.6 Extrajudicial Statements After Trial and Prior to Sentence**
>
> After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.
>
> * * *

[italics and bold face emphasis added.]

Finally, at all times, of course, the conduct of attorneys licensed to practice in the State of Louisiana also were and are governed by the Louisiana Rules of Professional Conduct. Rule 3.8 singles out those serving as prosecutors in the State of Louisiana with a clear and direct special obligation [italics and bold face emphasis added]:

> **RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR**
>
> **The prosecutor in a criminal case shall:**
>
> * * *
>
> (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, **refrain from making extrajudicial comments that have a substantial**

> **likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.**

[bold face emphasis added.] As for "Dipsos," the DOJ attorney identified in the Horn Reports, the Rules of Professional Conduct for lawyers practicing in Washington, D.C., are governed by the District of Columbia Rules of Professional Conduct. In particular, Rule 8.4 provides, in pertinent part:

> **Rule 8.4 – Misconduct**
>
> **It is professional misconduct for a lawyer to:**
>
> **(a) Violate or attempt to violate the Rules of Professional Conduct,** knowingly assist or induce another to do so, **or do so through the acts of another;**
>
> * * *

[bold face emphasis added.]

The government might argue that violations of these regulations and directives are simply *malum prohibitum* and not *malum in se*. As discussed below, case law indicates otherwise.

C. Law Governing Motions For New Trial

Rule 33 of the Federal Rules of Criminal Procedure states:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.
>
> * * *
>
> (b) Time to File.
>
> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.[38]

---

[38] The Court treats this motion for new trial under both subsections (b)(1) and (b)(2). To the extent the motion is based on "newly discovered evidence," the Court proceeds under the Fifth Circuit case of *United States v. Redd,* 355 F.3d 866, 880-81 (5th Cir. 2003), in which the Court is, for jurisdictional purposes, indicating its intent to rule as set forth herein.

> (2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Ordinarily, Rule 33 recognizes that if a trial court concludes for any reason that the trial has resulted in a miscarriage of justice, the court has broad powers to grant a new trial. *United States v. Scroggins,* 379 F.3d 233 (5th Cir. 2004), *vacated on other grounds,* 543 U.S. 1112 (2005). Nevertheless, motions for a new trial are to be granted with caution, *United States v. Wall,* 389 F.3d 457, 467 (5th Cir. 2004), *cert. denied,* 544 U.S. 978 (2005), and are generally subject to the harmless and plain error provisions of Rule 52 of the Federal Rules of Criminal Procedure. *United States v. Valencia,* 600 F.3d 389 (5th Cir.), *cert. denied,* 131 S.Ct. 285 (2010). In determining whether the substantial rights of the defendant were affected, courts may aggregate all alleged errors, under the cumulative effect doctrine, to determine if together any harmless errors are no longer harmless, making it necessary for a new trial to be granted. *United States v. Barrett,* 496 F.3d 1079, 1121 (10th Cir. 2007).

In this instance, the Court again states the obvious: this motion for new trial has evolved and is not analogous to other motions for new trial featured in the jurisprudence. In fact, it is *sui generis*, difficult to categorize as either one based on newly discovered evidence;[39] one based upon prosecutorial misconduct so significant and repugnant as to undermine these proceedings; or, most likely, a combination of both. Generally, however, a district court may grant a new trial, "if the

---

[39] To obtain a new trial based solely on newly-discovered evidence, a defendant must show: (1) that the evidence is newly discovered and was unknown to him at the time of trial; (2) that the failure to discover the evidence was not due to his lack of diligence; (3) that the evidence is not merely cumulative, but is material; and (4) that the evidence would probably produce an acquittal. *United States v. Blackthorne,* 378 F.3d 449, 452 (5th Cir. 2004) (quoting *United States v. Gresham,* 118 F.3d 258, 267 (5th Cir. 1997)); *United States v. McRae,* 702 F.3d 806, 841 (5th Cir. 2012).

interest of justice so requires," including, in some circumstances, because of newly-discovered evidence. Fed. R. Crim. P. 33.

Of course, in this motion, other grounds for a new trial resting on fundamental due process are urged. Thus, the matter is not as simple as a motion for new trial based on "newly-discovered evidence" in the traditional sense. Significantly, in *Brecht v. Abrahamson,* 507 U.S. 619, 638, n. 9, (1993), the Supreme Court, albeit on application for habeas relief, recognized and identified additional grounds for relief based upon prosecutorial misconduct:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

One need only review the facts set forth herein, and in the Court's November 26, 2012 Order and Reasons (Rec. Doc. 1070), to discern that this is a most unusual case, involving "error" (or, more alarmingly, intentional conduct) that surely consists of a "deliberate and especially egregious" pattern of prosecutorial misconduct.

Further, the Court has found only three pertinent cases involving actual violations of 28 C.F.R. § 50.2.[40] In two of them, convictions were vacated – one on motion for new trial and the

---

[40] In a fourth case, *United States v. Stanford,* 589 F.2d 285 (7th Cir. 1978), *cert. denied,* 440 U.S. 983 (1979), the Court found a violation of 28 C.F.R. § 50.2; however, because the defendants elected a bench trial with no jury, failed to seek a change of venue or continuance of the trial (unlike the defendants here, who moved for both and were denied) despite knowledge of the purported adverse publicity, and thus failed to show prejudice dismissal of the indictments was denied. A few other cases relating to 28 C.F.R. § 50.2 involve defendants seeking prospective relief (*In re Grand Jury Investigation,* No. 87-163, 1987 WL 8073, *1 (E.D.N.Y. February 23, 1987), or involve an allegation but no finding that § 50.2 was violated. See *United States v. Civella,* 648 F.2d 1167, 1174 (8th Cir.), *cert. denied,* 454 U.S. 867 (1981); *United States v. Rosado,* 728 F.2d 89 (2nd Cir. 1984)(wherein defendants were fully aware of pre-trial publicity and participated in voir dire); and *United States v. Flemmi,* 233 F.Supp.2d 75 (D. Mass. 2000)(wherein the court ordered the government to show cause why certain sanctions should not be imposed based upon a *prima facie* showing of misconduct).

other on habeas application. And, even in the third, although relief to the defendants was denied, the Court strongly condemned the government's actions.

The first of these cases is *Sheppard v. Maxwell,* 384 U.S. 333 (1966), in which the Supreme Court reversed the denial of the defendant's habeas petition, and remanded the case to the district court with instructions to issue the writ and order that Sheppard be released from custody, subject to further charges. Of particular importance, the Supreme Court found "the totality of the circumstances" approach should be taken when a defendant may have been deprived of due process because of ongoing prejudicial publicity saturating the community. *Sheppard,* 384 U.S. at 352-53. Citing 28 C.F.R. § 50.2, the Court further stated:

> Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Sheppard, 384 U.S. at 363.

The second case, *United States v. Capra,* 372 F.Supp. 609 (S.D.N.Y. 1974), decided long before the creation of "blogs," "chat rooms," "tweets," and various other internet posting/social media, was based upon publicity afforded by the government before and during trial. In *Capra*, the court denied the requested relief,[41] but stated: "At the same time, it seems fitting to underscore that the mere gnashing of judicial teeth should not remain the sole response to such law enforcement

---

[41] In *Capra*, defendants' complaint related to "massive and lurid publicity" by law enforcement officers, describing their activities in conducting a "round-up" resulting in numerous arrests, including that of the defendants. The sensational detailed "publicity extravaganza" (*Capra,* 372 F.Supp. at 615) occurred months earlier, and obviously was known to defendants and the court prior to trial; thus it was, most crucially, subject to voir dire. Though the court set forth a scathing criticism of the government, and particularly the response of the U.S. Attorney to questions propounded by the court, the district judge found the relief (outright dismissal of the charges) sought by the defendants to be "excessive and unjustifiable", in light of the clear guilt of the defendants.

behavior." 372 F. Supp. at 615. In the next paragraph, the court continued: "The United States Attorney scarcely embraces the whole of the matter when he concludes in this case that this particular trial has not been demonstrated to have been vitiated by sordid publicity." *Id.*, at 616. Most importantly, the *Capra* court addressed 28 C.F.R. § 50.2:

> The question of the integrity of the Department's [DOJ's] own functioning might have been supposed to cause concern in that quarter, quite apart from **the now familiar principle that an agency may deny due process if it fails to obey its own regulations.** *E.g., United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 266-268, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Service v. Dulles,* 354 U.S. 363, 388-389, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *Yellin v. United States,* 374 U.S. 109, 120-121, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963). As for the court itself, our 'supervisory power,' if it means something, must entail an alert sensitivity to indications that the federal prosecutor and/or federal law enforcement officers have participated in, or quietly condoned, transgressions against court rules, executive rules, and commands of the Constitution.

Capra, at 611-612. [emphasis added].[42]

---

[42] This Court's review of the cited cases, *Accardi*, *Service,* and *Yellin,* reveals that each involved a governmental agency's violation of regulations set forth in the Code of Federal Regulations, United States Code, or House Committee Rule, the violation of which yielded deprivations of due process resulting in grants of relief to the aggrieved persons.

In *Accardi,* the Supreme Court (Justice Clark) stated: "We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision." 347 U.S. at 267.

In *Service*, the Supreme Court (Justice Harlan) stated: "It being clear that § 393.1 was not complied with by the Secretary in this instance, it follows that under the Accardi doctrine petitioner's dismissal [from his position] cannot stand, regardless of whether the 1951, rather than the 1949, Regulations are deemed applicable in his case." 354 U.S. at 388.

In granting relief in *Yellin*, the Supreme Court (Chief Justice Warren) stated: ". . . the witness' reasonable expectation is that the Committee actually does what it purports to do, adhere to its own rules.

* * *

The Committee prepared the groundwork for prosecution in Yellin's case meticulously. It is not too exacting to require that the Committee be equally meticulous in obeying its own rules." 374 U.S. at 123-24.

In the third case relating to 28 C.F.R. § 50.2, *United States v. Narciso,* 446 F.Supp. 252 (E.D. Mich. 1977), the court also exercised its inherent supervisory authority to consider the "cumulative impact" of governmental misconduct in granting a new trial. *Narciso,* 446 F.Supp. at 301. The court explained:

> The standard to turn to in determining whether the court should exercise its supervisory powers is not so clear. Numerous rationales have been advanced to explain the nature and scope of the somewhat sparingly used supervisory authority, but it is generally conceded (as defendants' brief argues) that the courts are primarily concerned with protecting "the judicial process from the stigma of illegal or unfair" government conduct. Note, The Supervisory Power of the Federal Courts, 76 Harv. L.Rev. 1656, 1663 (1963). *See McNabb v. U.S.*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943).FN8 The Supreme Court has not announced a general rule requiring the application of the Court's supervisory authority to a wide variety of cases, preferring instead to treat each case on its particular facts. *Marshall v. U.S.*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Grunewald v. U.S.*, 353 U.S. 391, 424, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957).
>
> > FN8. The Court said: "We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement." 318 U.S. at 347, 63 S.Ct. at 616. It is significant that *McNabb's* narrow holding was that an improperly obtained confession cannot be used at trial. The Supreme Court did not dismiss the indictment.
>
> While it is true that an indictment may be dismissed without regard to considerations of prejudice, prejudice to the defendants is one factor which the Court should take into account in its determination. *U.S. v. McCord*, 166 U.S.App.D.C. 1, 509 F.2d 334, 350 (1974) (en banc), *cert. denied,* 421 U.S. 930, 95 St.Ct. 1656, 44 L.Ed.2d 87 (1975). *U.S. v. Crow Dog*, 399 F. Supp. 228, 238 (N.D. Iowa 1975), aff'd, 532 F.2d 1182 (8th Cir. 1976). The Court has an obligation to tailor any remedy to the nature of the misconduct in the particular case. The more serious the violation, the more severe the remedy must be.

Narciso, 446 F.Supp. at 302. The court continued:

> Federal trial judges are not, however, limited in deciding motions under Rule 33, to weighing the evidence. On the contrary, the very words of the rule "interest of justice" mandate the broadest inquiry into the nature of the challenged proceeding.
>
> As the Supreme Court said in *U.S. v. Gainey*, 380 U.S. 63, 68, 85 S.Ct. 754, 758, 13 L.Ed.2d 658 (1965), "Our Constitution places in the hands of the trial judge

> the responsibility for safeguarding the integrity of the jury trial . . ." In the context of motions for new trial the courts have discharged this obligation by determining whether there has been a "miscarriage of justice."
>
> * * *
>
> The fact that in ruling upon a motion for new trial the Court has broad powers as to the type of errors it may consider as well as the manner in which it may weigh the evidence testifies to the great significance the law attaches to fairness in our criminal justice system.

Narciso, 446 F.Supp. at 304. Before reviewing the cumulative effect of a plethora of government misdeeds, including improper remarks by the prosecution and purported misconduct by the FBI, the court added:

> Faith in the courts and in the jury system must be maintained and it is proper that on questions such as we have here the rule should be such as to support the faith of all litigants in our judicial system and, as part thereof, trial by jury. That faith can be sustained only by keeping our judicial proceedings free from the suspicion of wrong. The question is, not whether any actual wrong resulted . . . but whether (there was) created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice." *Stone v. U.S.,* 113 F.2d 70, 77 (6th Cir. 1940).

Narciso, 446 F.Supp. at 306. The *Narciso* court concluded:

> In assessing whether the conduct of the prosecution requires the Court to set aside the convictions here and grant a new trial, it must be kept in mind that the government is held to a high standard in the conduct of its criminal cases.
>
> * * *
>
> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Narciso, 446 F. Supp. at 325 (citing and quoting *Berger v. United States*, 295 U.S. 78, (1935)). The court found that the prosecution's comments violated 28 C.F.R. § 50.2 and the Rules of the Department of Justice, as well as the Code of Professional Responsibility. *Narciso,* 446 F.Supp. at 319. The motion for a new trial was granted.

VI. THE MISCONDUCT

With these standards firmly in hand, the Court must, regretfully, recount and then analyze identified instances of government misconduct that are brought to bear in considering the defendants' motion. This evidence consists of: (a) the long-time online postings of then USAO Senior Litigation Counsel Sal Perricone; (b) the actions of "Dipsos;" (c) the online carnival type atmosphere fostered by at least two government attorneys; (d) the assertions of then First AUSA Jan Mann and the possible knowledge/complicity of others in the USAO and/or DOJ; and (e) other trial and pretrial concerns that emerged earlier in the case, but which must be considered anew, as part of the totality of the circumstances, and to evaluate the cumulative effect on the proceedings. As will be further discussed in the upcoming "Analysis" portion of this Order and Reasons, although any of these pieces of evidence, considered alone, might be of arguable legal import, the contrary is true when all of it, along with what remains unknown, is considered together. It is axiomatic that candor, credibility and transparency are the "coin of the realm" in circumstances such as these, and are foremost in the Court's consideration of the government's submissions.

A. Former USAO Senior Litigation Counsel Sal Perricone

As a familiar refrain starting in 2008 (and perhaps even earlier),[43] Perricone, under his several monikers, habitually posted comments[44] portraying the NOPD, its superintendent Warren Riley, and its officers and personnel in the most negative and vitriolic way. Specifically, during the long period of time in which this matter was being investigated by federal law enforcement, Perricone anonymously asserted online that the NOPD is "corrupt" and "ineffectual,"[45] "totally disfunctional,"[46] "an indolent agency,"[47] "a joke for a long time,"[48] and suffers from "cultural" problems.[49] Indeed,

---

[43] The earliest known and confirmed public posting on Nola.com by Perricone is on November 22, 2007, under the user ID "campstblue." As "campstblue," Perricone's earliest attacks on the NOPD, in particular, appear to be in June 2008. During that time (and since at least November 2006), the DOJ, through federal prosecutors Mark Blumberg and Bobbi Bernstein, and with the frequent consultation of DOJ attorney Karla Dobinski, monitored the state investigation of the events of September 4, 2005, that are the subject of this proceeding. "Active federal involvement" in the investigation of the September 4, 2005 shootings began in September 2008. (See Dobinski Declaration, Rec. Doc. 277-1, ¶¶ 21-31.) Following the commencement of DOJ's active investigation, Perricone's anonymous posting of public comments and criticisms increased in frequency and malice, as described herein. Perricone has stated that he does not recall at least one other of his user IDs, when it may have been used, and what he may have posted using it.

[44] All Nola.com comments in this Order and Reasons are set forth precisely as they were posted, without corrections of typographical errors, spelling, grammar, punctuation, etc. Bold face and italicized additions are by the Court for emphasis, and omitted portions are so indicated.

[45] campstblue, March 4, 2009, 8:57 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 64.

[46] campstblue, July 17, 2008, 12:23 p.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 31.

[47] campstblue, November 28, 2008, 9:12 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 44: "The NOPD is an indolent agency -- plain and simple. It's entire command structure in only concerned with their own aggrandizement and enrichment." [sic]

[48] legacyusa, February 27, 2011, 9:20 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, p. 129. Perricone assumed this other persona, "legacyusa," in or around April 2009.

[49] campstblue, July 18, 2008, 8:34 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 32; campstblue, January 18, 2009, 10:21 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 50.

not many NOPD news stories on Nola.com went unscathed by Perricone's anonymously-administered invectives. For example, on June 7, 2008, Perricone/campstblue posted:

> At no time did anyone EVER take an inventory of the NOPD's assests??? Riley has to GO and GO now!! Is it any wonder why they are having recruiting problems? Who in their right mind wants to work for [then-mayor] Nagin and Riley? WHO?? And look at the rest of the Command (hahah) structure. All the deputies are idiots or have their own "issues". THis department is dead. Put the sheet over it....[50]

The very next day, under an article about the suspension of an NOPD officer who engaged in an altercation with a Mississippi River bridge officer, he commented: "The sad thing is that the NOPD is full of officers like this."[51] And under the same article, Perricone published a very memorable phrase: ***"There is an old Italian proverb: the fish rots from the head down."***[52]

Perricone also labeled (future defense witness) NOPD Superintendent Warren Riley a "racist,"[53] "inept,"[54] and "delusional"[55] and proclaimed generally that NOPD officers are "crap." Perricone/campstblue continued to rail: "[Riley] and his ENTIRE commad staff needs to GO and NOW. Our lives and safety hang in the balance and he and his 'men' are just out for their own

---

[50] campstblue, June 7, 2008, 8:05 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, pp. 18-19.

[51] campstblue, July 8, 2008, 7:42 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 27.

[52] campstblue, July 8, 2008, 8:26 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 27.

[53] campstblue, July 11, 2008, 10:01 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 28; legacyusa, June 11, 2009, 8:47 p.m.; Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, p. 9.

[54] campstblue, November 28, 2008, 9:12 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 44.

[55] legacyusa, January 10, 2010, 10:50 a.m.; Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, p. 31.

enrichment."[56] In July 2009, Perricone again called for Riley's resignation: "If this newspaper [Times-Picayune] genuinely had the city's interest at heart, they would immediately call for Riley's resignation, as well as the top brass of the police department. None of them have the people's interest at heart. NONE."[57] In that regard, Perricone posted that "the Feds [DOJ] have zero confidence in Riley or the NOPD,"[58] and further that "The Government [DOJ] needs to take over the police department..NOW!!!!!"[59] As for NOPD leadership, Perricone twice on the same day offered a suggestion to the new mayor, Mitch Landrieu: "GET LETTEN OR ONE OF HIS BOYS[60] OR GIRLS TO BE THE NEXT CHIEF!!!!!" That would scare the beeejeeeezuuuus out of the corrupt cops and excite the honest ones."[61] Similarly, on July 10, 2009, 9:27 a.m., as legacyusa:

---

[56] campstblue, May 16, 2009, 12:45 p.m.; Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 117.

[57] campstblue, July 15, 2009, 8:29 a.m., Kaufman Memorandum in Support (Rec. Doc. 963-20), Exh. 19, p. 142.

[58] legacyusa, February 25, 2010 (day after the Lohman plea), 5:53 p.m.; Kaufman Memorandum In Support (Rec. Doc. 963-21), Exh. 20, p. 43.

[59] legacyusa, February 25, 2010 (day after the Lohman plea), 5:47 p.m.; Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, p. 43 and Kaufman Memorandum in Support, Rec. Doc. 963-1, p. 15.

[60] Notwithstanding his (then) unknown public criticisms of the NOPD, Perricone played a significant role on behalf of the DOJ in negotiating a Consent Decree between DOJ and the City of New Orleans, which was eventually filed on July 24, 2012, in proceedings entitled *United States of America v. City of New Orleans*, No. 12-1924, to govern/reform the NOPD. Additionally, in May 2013, the City of New Orleans disclosed, in pleadings filed in the Consent Decree litigation, that in 2010, Perricone himself had applied unsuccessfully for the NOPD Superintendent position that went to Ronal Serpas. See 12-1924, Rec. Doc. 175-1, pp. 2, 17; *United States of America v. City of New Orleans,* 13-30161 (5th Cir.), Docket No. 512288882, filed June 26, 2013, pp. 14-15. For Perricone's online discussion of other candidates for the NOPD superintendent's job, see Part One, Rec. Doc. 1070, pp. 28-29.

[61] legacyusa, March 9, 2010, 4:13 p.m. and 4:17 p.m.; Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, pp. 48-49.

> Hey, can we get Letten or one of his people to take over the NOPD??? Darn, this is our safety, afterall and the current management of the NOPD doesn't care...[62]

As "legacyusa," former AUSA Perricone continued his campaign against the NOPD into 2010 and up into July 2011, as this case was being tried. On January 10, 2010 (six weeks before former NOPD lieutenant and cooperating defendant Lohman entered his guilty plea), at 10:50 a.m., he posted:

> Riley is delusional.
>
> * * *
>
> Riley, you are the racist and the sooner you and the other idiots ont he 5th floor [of NOPD headquarters] go, the better the Police Department will be. I can only hope, as others here, that the new mayor [Landrieu] will clean house and fumigate 715 South Broad [NOPD headquarters] the day he is elected. Perhaps we can get Letten to take a hard look at the position or one of his assistants. We need change there and the quicker the better.[63]

Then, on December 3, 2010 (six months before this trial), at 6:53 a.m., Perricone offered a comment about the ongoing trial in *United States v. Warren,*[64] No. 10-154, also concerning post-Katrina police activity:

> This case, no matter how it turns out, has revealed the NOPD to be a collection of self-centered, self-interested, self-promoting, insular, arrogant, overweening, prevaricating, libidinous fools and that the entire agency should be re-engineered from the bottom up. This case has ripped the veil of respectibilty away from the police department. The facts, as reported here--and if they are correct--shows a group of people who, when not having sex with each other, or beating, burning and abusing the citizens. Thank God for the Feds [DOJ]---can you imagine New Orleans without a Federal presence?[65]

---

62 Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, p. 10.

63 Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, pp. 31-32.

64 In *Warren* (also commonly referred to sometimes as "the *Glover* case"), No. 10-154, five NOPD officers and personnel were charged with various civil rights violations and obstruction of justice counts. Two officers were acquitted by the jury; U.S. District Judge Lance Africk granted a third (defendant McCabe) a new trial; the U.S. Fifth Circuit vacated defendant Warren's conviction and remanded for a new trial; and the conviction of the fifth was maintained. See *United States v. McRae, et al.,* 702 F.3d 806 (5th Cir. 2012), *cert. denied,* 133 S.Ct. 2037 (2013).

65 Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, p. 113.

He added on February 27, 2011 (four months before this trial, and only three days after the Lohman plea), at 9:20 a.m.:

> The NOPD has been a joke for a long time.[66]

And on May 15, 2011 (only five weeks before the start of this trial), at 10:22 a.m.:

> Both [former mayors Ernest and Marc] Morials, Barthelemy and Nagin are to blame **for allowing criminals on the police force today.** Now, it seems, **we are weeding them out one by one,** but until they wrought ineffiable damage on our citizenry. [bold face added.][67]

Nor are the Court's concerns regarding Perricone's conduct limited to his posts about the NOPD. In its November 26, 2012 Order, the Court discussed in detail the testimony Perricone gave on October 10, 2012, following his 2012 resignation precipitated by his online postings, and the USAO's awareness, if any, of that activity prior to March 2012. At that time, the Court expressed its considerable doubt as to the truth of certain material assertions made by Perricone on October 10, 2012. (See Part One, Rec. Doc. 1070, pp. 27-32.) That sentiment has not changed. For example, because a critical feature of that inquiry related to the treatment of confidential and protected grand jury information, in accordance with Federal Rule of Criminal Procedure Rule 6(e), the Court allowed questions to be propounded to Perricone about his posting activity concerning former New Orleans District C City Councilman James Carter. (See Part One, Rec. Doc. 1070, pp. 29-31.) In particular, Perricone's explanation of his posts regarding a DOJ grand jury investigation of "the failed Algiers Landing project" garnered the Court's interest, as his explanation did not appear to make sense at the time.

---

[66] Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, p. 129.

[67] Kaufman Memorandum in Support (Rec. Doc. 963-21), Exh. 20, pp. 157-158.

Further demonstrating the infirmity of Perricone's proffered explanation of the posts is its factual falsity. That is, Perricone testified that, "before Katrina," he spoke to two NOPD officers in a coffee shop about the "downgrading" of criminal activity at the Algiers Point ferry landing. According to him, he recommended the officers "talk to the city councilman, [James] Carter," to which one NOPD officer purportedly responded, "are you kidding me? He's involved in it." Thus, with that explanation, Perricone purported to put to rest the Court's concern about a leak of the grand jury investigation into "the failed Algiers Landing project." Unfortunately, however, Perricone's explanation cannot possibly be true, as James Carter was not elected to the New Orleans City Council until the spring of 2006 (obviously ***after*** Hurricane Katrina, which occurred on August 29, 2005), and did not take office until June 2006. Along with the other passages the Court previously cited, in its November 2012 Order, this discrepancy cannot be considered minor, as it relates to a grand jury proceeding that was subsequently confirmed to be under way at the time of Perricone's posts.

Furthermore, even today the Court is left to wonder what other user IDs Perricone might have employed to post additional critical information, personal criticisms, and vituperative comments, about the NOPD and possibly other DOJ-related matters. Although Perricone denies use of specific user IDs[68] about which he was asked, he admits, as previously stated, that he does not remember at least one other name he used to post online in the past.[69] Thus, were the Court to hold an evidentiary

---

[68] Perhaps foreshadowing the future, "campstblue" asked on March 20, 2008, 8:21 a.m.: "ps: Where is H.L Mencken when we sorely need him?" (Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 14.

[69] Sometimes utilizing his user IDs simultaneously, Perricone occasionally responded to his own posts. See campstblue, May 16, 2009, 12:45 p.m. and legacyusa, May 16, 2009, 12:48 p.m., commenting negatively on NOPD Superintendent Riley (Kaufman Memorandum in Support, Rec. Doc. 963-

hearing, Perricone undoubtedly would be summoned to provide supplemental testimony regarding various areas/matters not previously even considered on October 10, 2012, as they were not then known.

B. "Dipsos"

As previously explained, the Horn Reports revealed, for the first time, that a DOJ attorney, working in Washington D.C., had posted on Nola.com during the trial using the name "Dipsos." See, *supra*, pp. 16-17, 20, 23, and 27. To the Court's shock and dismay, "Dipsos" eventually was identified, on May 15, 2013, as Karla Dobinski, a trial attorney in the Criminal Section of DOJ's Civil Rights Division.[70] To fully understand the significance of this revelation, additional information regarding certain pre-trial proceedings in this matter is necessary.

a. The "Taint Team" Leader

On occasion, during the course of certain investigations, particularly in police misconduct cases, officers are compelled to testify over the assertion of their Constitutional right not to do so. See *Garrity v. New Jersey,* 385 U.S. 493 (1967), and *Kastigar v. United States,* 406 U.S. 441 (1972).

---

21), Exh. 20, p. 5; see legacyusa, May 17, 2009, 9:15 p.m. agreeing with campstblue, May 17, 2009, 8:43 p.m. ("Campst is correct.")(Kaufman Memorandum in Support, Rec. Doc. 963-21), Exh. 20, p. 5; see legacyusa, May 22, 2009, 9:16 p.m. and campstblue, May 22, 2009, 9:40 p.m. (Kaufman Memorandum in Support, Rec. Doc. 963-21), Exh. 20, pp. 5-6; see legacyusa, May 23, 2009, 12:07 p.m. agreeing with campstblue, May 23, 2009, 11:13 a.m. ("Harvey, I agree with Campst, you are an idiot!!!!")(Kaufman Memorandum in Support, Rec. Doc. 963-21), Exh. 20, p. 6; see campstblue, May 28, 2009, 8:29 a.m. agreeing with legacyusa, May 28, 2009, 9:28 a.m. (Kaufman Memorandum in Support, Rec. Doc. 963-21), Exh. 20, p. 7; see campstblue, May 31, 2009, 2:18 p.m. agreeing with legacyusa, multiple posts under the same article ("Well, I must admit I am with Legacy and if that makes me a wingnut, so be it. * * * Keep the fight alive, Legacy. I'm your wingman. Semper fi.")(Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 123.

[70] In response to the Court's direct inquiry, the Second Supplemental Horn Report states: "The full name and title of the Civil Rights Division employee referenced ... is Trial Attorney Karla Dobinski." On information and belief, however, Dobinski has, in the past, held the title and position of "Senior Deputy Chief" of the Criminal Section of the DOJ's Civil Rights Division. It is not known whether she held that position at the time of the 'Dipsos' posts in the last week of July 2011.

In those situations, a critical function of the government is to engage in a long established standard practice to insure that no immunized statement of a subject officer is used against that officer in a federal criminal prosecution. In fact, the Criminal Section of the DOJ's Civil Rights Division is charged with insuring the protection of those officers' rights under *Garrity* and *Kastigar*. (See Dobinski Declaration, Rec. Doc. 277-1, ¶¶ 4 and 10.)

This critical responsibility is assigned to a "taint team," which is charged with reviewing all of the evidence (including the immunized statements previously compelled) and then segregating and purging materials reflecting, or which might disclose, the immunized statements, in order to provide an untainted and sanitized body of evidence to DOJ prosecutors for their consideration. This standard practice might also warrant interviewing and screening witnesses by the taint team in order to verify and insure that no contents from an immunized statement reaches prosecutors in violation of the officer defendant's Constitutional rights. Thus, the function of the taint team, and its leader, is of obvious grave importance, and must be discharged with the utmost of care and prudence, to ensure that evidence turned over to DOJ prosecutors is filtered and pristine relative to the omission of immunized testimony and materials reflecting such testimony.

In this instance, the responsibility for this task was placed with Karla Dobinski, a Washington, D.C. trial attorney, working in the Criminal Section of the Civil Rights Division, U.S. Department of Justice, who was chosen to serve as the leader of the "taint team." (Dobinski Declaration, Rec. Doc. 277-1, ¶¶ 11-13; Dobinski Transcript, p. 82, l. 23.) With regard to this case, this crucial responsibility was Dobinski's professed single mission: to protect a defendant from use of his compelled testimony by the government. Indeed, her duties expressly *excluded* assisting the prosecution's investigation or trial strategy. (Dobinski Declaration, Rec. Doc. 277-1, ¶ 14.)

The Court first became acquainted with Dobinski at an April 18, 2011 pre-trial hearing held, pursuant to *Kastigar,* in response to a motion filed by Defendant Bowen concerning his prior compelled immunized testimony. At the hearing, the government relied almost exclusively on the testimony of Dobinski. (Dobinski Declaration, Rec. Doc. 277-1, ¶ 1; Dobinski Transcript, p. 82, l. 23.) Dobinski testified that she "headed the 'taint team'" that was formed at the beginning of the active federal investigation, which she believed was in September of 2008. (Dobinski Declaration, Rec. Doc. 277-1, ¶ 1; Dobinski Transcript, p. 15.) Dobinski assured the Court that she, assisted only by a paralegal, did all of the screening herself. (Dobinski Transcript, p. 16, l. 1-2.)[71] She further testified that she was entrusted with "boxes of documents" that were carefully Bates numbered and scanned into a database by litigation support personnel in the DOJ Civil Rights Division. (Dobinski Transcript, p. 17.) According to Dobinski, the taint team's purpose and mission was to "***ensure the officers' rights*** under *Garrity* and *Kastigar*, i.e., to prevent the use of a compelled or immunized statement of such officer in a prosecution against him." (emphasis added) (Dobinski Transcript, p. 18.) In short, Dobinski was charged with using her considerable experience, judgment, and prudence as a meticulous "gate keeper" to prevent federal prosecutors' exposure to and use of immunized testimony previously compelled over a defendant's assertion of his Constitutional rights. As she

---

[71] The title "Taint Team" might be a bit of a confusing misnomer: According to the Supplemental Horn Report (p. 3), Dobinski "is not a supervisor, and the attorney's [her] direct supervisor had no involvement in the case except to oversee the *Garrity* work. The attorney [Dobinski] does not supervise others." One might now query whom the term "team" might include, other than a single paralegal, to accomplish such a meticulous, sensitive task involving compelled testimony. In any event, the Supplemental Horn Report's portrayal of Dobinski as being isolated, with no supervisory duties, appears at odds with ¶ 33 of her Declaration (Rec. Doc. 277-1), filed with this Court on April 8, 2011:

> ". . . I was assigned to lead the taint team, which was also staffed by Dorothy Manning Taylor, an Assistant United States Attorney from the United States Attorney's Office [for the Eastern District of Louisiana], and John Wood and Jose Guillen, agents from the Federal Bureau of Investigation. Taint-team paralegals also participated in the screening process."

herself testified, her admitted obligation was to protect the defendant (in this case, Bowen) from a violation of his Constitutional rights.

Significantly, Dobinski was no novice to her position as taint team leader in this matter, or lacking knowledge or expertise. To the contrary, Dobinski has been employed in the Criminal Section of the DOJ Civil Rights Division since April 1985[72] and has investigated and prosecuted police misconduct, racial violence and human trafficking cases since then. (Dobinski Declaration,

---

[72] During her questioning of Dobinski, lead federal prosecutor Bobbi Bernstein brought out the fact that Dobinski and Bernstein have long known each other since even before Bernstein attended law school, when she [Bernstein] was hired as a paralegal in the Criminal Section of the Civil Rights Division in 1989. Bernstein further elicited testimony from Dobinski regarding her awareness of Bernstein's knowledge and careful approach to the issue and required exercise at hand. See Dobinski Transcript of April 18, 2011, pp. 78-79:

> Q. [Bernstein] You were asked some questions about our relationship, how long we have known each other. I've been a prosecutor in the criminal section since 1996, correct?
> A. [Dobinski] Yes.
> Q. When I was first hired into the criminal section, I actually worked for you; is that right?
> A. That's right.
> Q. That was with the National Church Arson Task Force?
> A. Yes.
> Q. We have actually known each other longer than that, haven't we?
> A. Yes.
> Q. You knew me before I even went to law school?
> A. Yes.
> Q. How did you know me before I went to law school?
> A. You were a paralegal in the section.
> Q. I was a paralegal in the criminal section of the Civil Rights Division?
> A. Yes.
> * * *
> Q. How confident are you that I understand *Kastigar*?
> A. I'm very confident.
> Q. How confident are you that I understand *Garrity*?
> A. Very confident.
> Q. How confident are you that I know and understand the procedures that we use in our office?
> A. Very confident.

Rec. Doc. 277-1, ¶ 3.) She also has participated on several "taint teams" in the past, including the one formed for *United States v. Koon,* 34 F.2d 1416 (9th Cir. 1994), "provided advice and consultation to numerous federal and state law enforcement authorities, and provided training on the *Garrity/Kastigar* best practices." (Dobinski Declaration, Rec. Doc. 277-1, ¶¶ 5, 6 and 28.) She has been involved in this case since February 2007 (Dobinski Declaration, Rec. Doc. 277-1, ¶ 28), interacting as a "consultant" for both state and federal prosecutors. For reasons that should be obvious, the Court considers her role essential to the proper functioning to the dual federal and state criminal systems, and one which the Court could, without question, look to for complete trustworthiness, confidence and reliability.

Unfortunately, during the April 18, 2011 hearing, it was established that, despite Dobinski's expertise and described efforts, former NOPD officers and cooperating defendants Ignatius Hills, Michael Lohman and Michael Hunter had each viewed at least some portions of the transcript of compelled immunized testimony of defendant Bowen. (See Transcript, pp. 57-58; 64-65; 95-98 - Hills; 98-100 - Lohman; and 100-101 - Hunter; Rec. Doc. 277-1, ¶ 49.) (See also Attachment G to Dobinski Declaration, Rec. Doc. 277-1, p. 25 of 26.)[73] Dobinski also admitted on cross-examination that, on at least one occasion, a "mistake" was made when a duplicate copy of a document (Hearing Exhibit AA, Bates numbered MAD008414, etc.) somehow was turned over to the DOJ trial team unredacted, when it should not have been. (Sealed Transcript, Rec. Doc. 713, p. 118, l. 21-24.) (See Dobinski Declaration, Rec. Doc. 277-1, ¶ 47, which is contra.) Given these disclosures, Dobinski

---

[73] It also was established that two other NOPD officers, Marchant Paxton and Raymond Young, were also compelled to give testimony in spite of the invocation of their constitutional right not to do so, in exchange for a grant of immunity. (Dobinski Transcript, pp. 76-77, pp. 84-85; Sealed Transcript, Rec. Doc. 713, p. 22) The testimony of Paxton and Young was provided to federal prosecutors; neither has been the subject of a prosecution.

further testified that she had prepared a chart purporting to demonstrate that Bowen's compelled immunized testimony before the state grand jury could be sourced elsewhere in legally permissible ways. (Sealed Rec. Doc. 379, Exhibit 12.) Although Dobinski's chart cites the 54-page Kaufman report (Trial Exhibit 27) for certain pieces of information provided by Bowen's immunized testimony, there are discrepancies. (Sealed Transcript, Rec. Doc. 713, pp. 123-126.)

b. The *Kastigar* Rulings

As previously stated, Dobinski's assigned role is an important one. Indeed, on June 17, 2011, the Court, in ruling on defendant Bowen's first Motion to Quash the indictment against him (Rec. Doc. 262),[74] relied exclusively on the testimony of Karla Dobinski, the only witness called, setting forth, both in her Declaration and April 18th live testimony, the careful "laborious process employed by the government's 'taint team' . . ." (See Rec. Doc. 500, pp. 4-6.) Specifically, the Court denied Bowen's motion "on the showings made, and considering the information available at this stage of the proceeding." (Rec. Doc 500, p. 4, 7.) The Court also denied defendant Bowen's post-trial motion, seeking relief pursuant to *Kastigar* (Rec. Doc. 693), "on the showing made," (Rec. Doc. 840, p. 2), and referred back to its June 21, 2011 denial. (Rec. Doc. 500.) In so ruling, the Court again relied heavily on the Declaration and testimony of Dobinski wherein she claimed she assiduously

---

[74] In particular, Bowen's motion points to: (1) various meetings held by state and federal prosecutors; (2) the Government's failure to disclose the federal grand jury witness and exhibit lists to Bowen and/or the Court; (3) the provision of a copy of the immunized testimony to counsel for several of Bowen's state co-defendants; (4) the reading of Bowen's immunized testimony by Michael Lohman and Ignatius Hills; (5) the taint team's screening of only four of the more than one hundred grand jury witnesses; (6) the taint team's failure to question federal grand jurors, as well as all grand jury witnesses, to ascertain any exposure to unredacted public documents, including any news accounts of Bowen's immunized testimony, and/or to provide them with special "*Kastigar*" instructions; and (7) the taint team's failure to redact one of the copies of the state court's dismissal ruling that was provided to the federal prosecution team, as well as Bowen's state court indictment. Additionally asserting various differences between Bowen's immunized testimony and other evidence, Bowen maintains that any taint of the case would not be harmless. (Rec. Doc. 500, pp. 3-4.)

went through each scintilla of evidence supplied to federal prosecutors. (Rec. Doc. 840, p. 2, fn. 3 & 4.)

c. "Dipsos" on Nola.com: "Taint Team" Leader Dobinski

As previously explained, the January 25, 2013 Horn Report, in discussing the posts of "Dipsos," initially characterized the person as "an employee" of DOJ; the March 29, 2013 First Supplemental Horn Report adds only that the employee is an attorney. Ultimately, on May 15, 2013, much to the shock and dismay of the Court, Mr. Horn and Ms. Alexander disclosed that Dipsos actually was not just any "employee," or just any "attorney," but instead was Dobinski, the person charged with defending the Constitutional rights of defendant Bowen by filtering his compelled testimony from the prosecution team.

Regarding Dobinski's posts and the proffered rationale for them, the First Supplemental Horn Report provides:

> The attorney [Dobinski/Dipsos] said under oath that the attorney was in Washington during the trial and followed the progress of the trial in the Times-Picayune because the prosecution team was busy and there was not a good flow of information back about the trial events.

(Supplemental Horn Report, p. 3.) The Court finds this explanation tenuous and unconvincing, for several reasons.

First, Dobinski obviously followed the progress of this matter through trial. Putting aside the question of whether reports in the Times-Picayune newspaper were "not a good flow of information back about the trial events," Dobinski surely had access to various other media reports, as this trial was well-publicized each day in a number of electronic and print media venues. In fact, the Court even arranged for daily media access to a separate courtroom across the hall from the trial,

wherein credentialed members of the media could monitor the trial, see the evidence on screen as it was displayed to the jury, and contemporaneously "tweet" or "blog," in real time, on their free news websites, which several of them did. (See Standing Order, Rec. Doc. 499, ¶ 4; and p. 76, fn. 87.) In addition, Dobinski knew at least one EDLA AUSA (Taylor),[75] whom she led on the "taint team," and whom she could have contacted for updates. Furthermore, Dobinski and lead DOJ prosecutor Bernstein shared a longstanding relationship as co-workers in the DOJ Civil Rights Division, extending over two decades before this trial, suggesting that updates from Bernstein, or someone else on the trial team,[76] would be easily accessible with a mere phone call or simple email.

Moreover, even had Dobinski been truly dissatisfied with the "flow of information back" about the trial, an internet blog of anonymous cyber-characters on Nola.com hardly seems the best place to obtain a "good flow" of accurate unbiased reporting. Indeed, the "comments" section on Nola.com is merely a vehicle for the expression of anonymous opinions, well-founded or not, about the particular story published by the journalist. Surely upon reviewing the "comments" under articles about this trial, Dobinski, ever the meticulous analyst of evidence and data, realized that the Nola.com "comments" hardly substituted for reliable reporting, or provided "a good flow of information."

Finally, and most critically, the nature and content of Dobinski's posts belie her claim that she posted on Nola.com merely to gain information about the trial. Assuming the name "Dipsos,"

---

[75] See Dobinski Declaration, Rec. Doc. 277-1, ¶ 33. It is not known if FBI Agents Wood or Guillen were also in New Orleans during the trial, and whether they too could have been a source for Dobinski to obtain further information about the trial.

[76] In addition to trial attorneys Bernstein, Chung and Carter, see fn. 9, the trial team also included paralegal DOJ Steven Harrell, who usually was in the courtroom and, in any event, obviously was in close contact with the trial team attorneys.

Dobinski posted *six* times during the last week of the trial, repeatedly urging others to keep posting. She also specifically identified two of her fellow posters, "123ac" (whom she addressed five times) and "crawdaddy" (whom she addressed twice), for special approbation and encouragement, when those two commenters repeatedly posted vigorous pro-prosecution statements strongly condemning the defendants, their witnesses, and their entire defense. Expressing her appreciation for their posts, she proclaimed: "You are performing a valuable public service!" As "Dipsos," Dobinski additionally asked "123ac" if he/she would "cover the closings [closing arguments] as well;" and even answered a factual question from a third poster regarding where on the Danziger Bridge the Bartholomew family was shot. Thus, when the totality of known dialogue between Dobinski as "Dipsos," "123ac" and "crawdaddy"[77] (among others), along with Perricone's posts regarding this case, is considered,[78] Dobinski's defensive assertion that, for her own edification, she was merely seeking information otherwise unavailable from the prosecution team, the EDLA USAO, or even all regular media outlets,[79] simply does not stand up to scrutiny.

In short, it is difficult to accept the story that an experienced trial attorney in the Criminal Section of the DOJ's Civil Rights Division, sitting in Washington, D.C. during this trial, with privity of knowledge of Bowen's compelled testimony, and charged with ensuring "that the officers'

---

[77] The identities of "123ac" and "crawdaddy" are not known to the Court, and except for providing the "Dipsos" posts, neither is mentioned at all (nor are their relevant posted comments reproduced) in any of the Horn Reports. Nonetheless, their identities are not material to the Court's disposition in this Order. Their selection by Dobinski for approbation and encouragement **is** of significance, given what they posted before and in response to Dobinski's expressions of support. Not all of their posts are included here; only those material to this issue, both in time and content, are provided.

[78] The totality of these posts, are set forth chronologically in section VI. C., *infra*.

[79] Also inconsistent with her stated purpose is her consistent use of plural/collective terms: "keep letting **us** know . . .", "give **us** more real information . . .", "let **the rest of us** know . . ."

[constitutional] rights under *Garrity* and *Kastigar* are protected," would embark upon such a wanton reckless course of action, involving herself with two highly-opinionated trial observers, simply to obtain "a good flow of information back about the trial events." Less than 65 days before the start of this trial, Dobinski took the stand to explain in detail all of her extensive efforts to protect defendant Bowen's constitutional rights; yet before the jury even got the case for decision, she *personally* fanned the flames of those burning to see him convicted. Such gravely poor judgment surely calls into question the careful and meticulous effort she claims she exerted in protecting Bowen's rights. Moreover, such conduct significantly undercuts the government's original position that Perricone was a solitary government rogue[80] in his posting activity about DOJ prosecutions, and substantially supports defendants' argument to the contrary.

C. An On-Line 21st Century "Carnival Atmosphere"[81]

With the additional activity of "Dipsos," and her two selected posters "covering" the trial, the chronological relevant anonymous posting activity by or related to the government,[82] at least currently known to the Court, is as follows:[83]

---

[80] In its original June 2012 Memorandum in Opposition to this motion, the government states, "the defendants attempt to cloak the entire Department of Justice with any alleged misconduct attributed to former-AUSA Perricone." (Rec. Doc. 1007, p. 27.)

[81] *See Sheppard,* 384 U.S. at 358.

[82] At the current time, the posts of First AUSA Mann as "eweman" appear to have begun in November 2011, after the completion of trial herein. As stated previously, however, the Court is now aware that First AUSA Mann did indeed have a prior user name, which she used on Nola.com, approximately one year before her first "eweman" post, and six months before this trial commenced. Although she now cannot recall that user ID, she assures that those posts "did not relate to DOJ matters"; she admitted under oath on November 15, 2012 that some of those posts may have been directed toward Louisiana Attorney General Buddy Caldwell.

[83] The following posts are quoted as they appeared online, with the same spelling, punctuation, spacing, etc. The boldface and italic type, however, are emphasis added.

On February 20, 2010 (only four days before the Lohman plea), at 8:23 a.m., under an article concerning the grand jury's investigation of this matter, Senior Litigation Counsel Perricone, as "legacyusa," posted:

> [Kaufman defense attorney Steve] **London just hung his client.** Dumbutt statements. My God, anyone who knows anything about Federal investigations know that invitations to the Grand Jury are perfunctory. They must invite targets,London, lest your client take the stand at trial and cry. " they didn't give me a chance to explain." Dumb London, very Dumb.

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 40.) On February 23, 2010, the article prematurely announcing NOPD Lieutenant Michael Lohman's plea in possible violation of Rule 6(e) was first posted on the Nola.com webpage. Only nine and a half minutes after the original story was posted, at 6:17:30 p.m., Perricone provided advice and warning to those under investigation, including the defendants herein:

> **Despite defense attorneys protestations to the contrary, It would be prudent for those involve to consider the track record of the US Attorney's Office.** Letten's people are not to be trifled with.

(legacyusa, Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 42.) Later that very evening (February 23, 2010), at 10:44 p.m. (on the eve of Lohman's guilty plea, and over four months before the grand jury returned the indictment in this case), Perricone addressed then-Sergeant Kaufman by name:

> The cover up is always worse than the crime. **Archie** [Kaufman, London's client], **your time is up.**

(legacyusa, Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 41.) Two days later, on February 26, 2010 at 7:04 a.m., Perricone added:

> I am afraid that the NOPD has inoperable cancer. It must be completely and comprehensively rebuilt, including a culturing change which will kill the current patient. But that is good. For too long, way too long, the NOPD has enjoyed an insular existence, separated from reality and control. The current events are revelatory, but not curative. The government MUST step in and take over this agency now. We can not allow this police department to exist in the world it now exist. It must be stopped and stopped now. Too many officers' loyalty and devotion to duty is not to the citizens but to themselves and their own self-interest. **Indeed, the fish has rotten from the head down.**

(legacyusa, Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 43.)

On May 20, 2010, at 9:27 p.m. (updated at 10:16 p.m.), almost two months before the grand jury returned its indictment, an article entitled "New Orleans Police Officer Resigns, May Enter Plea In Danziger Bridge Case," concerning cooperating defendant/government witness Ignatius Hills, was posted on the Nola.com website. At 10:41 p.m., only 75 minutes later, Perricone/legacyusa encouraged defendants to plead guilty, posting:

> The Feds never forget.....**this officer is doing the right thing....wish the others would**, then IT would be over.

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 86.)

On August 13, 2010, under an article concerning the attorneys representing the defendants in the case of *United States v. Warren,* No. 10-154 (commonly referred to as "the *Glover* case," also involving post-Katrina police misconduct), Perricone/legacyusa commented negatively on the attorneys representing those five NOPD officers:

> These cops are being led down the road to perdition by their attorney. They need to get competent INDEPENDENT representation and stop dining on a diet of cop-cooked soup of self-justification served to them on paper plates by attorney who just wants to mug for the cameras. I hope the judge can keep this under control. Something's not right here---can't put my finger on it---but somethings not right.

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 98.) Then, on November 19, 2010, at 7:49 a.m., during the *Glover* trial, legacyusa/Perricone offered:

> Let me see if I understand this: The cops, throught their attorneys, admitted that they shot Glover and then burned the body in a car that belonged to another man, who was not arrested for anything...RIGHT??? **Guilty!! Now, let's get on to Danzinger.**

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 110.) As the *Glover* trial progressed, Perricone/legacyusa, on December 3, 2010, at 6:53 a.m., attacked NOPD yet again:

> This case, no matter how it turns out, has revealed the NOPD to be a collection of self-centered, self-interested, self-promoting, insular, arrogant, overweening, prevaricating, libidinous fools and that the entire agency should be re-engineered from the bottom up. This case has ripped the veil of respectibilty away from the police department. The facts, as reported here--and if they are correct--shows a group of people who, when not having sex with each other, or beating, burning and abusing the citizens. Thank God for the Feds---can you imagine New Orleans without a Federal presence?

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 113.) On December 12, 2010, at 10:34 a.m. (six months before this trial), after the split verdict in the *Glover* trial, Perricone/legacyusa previewed, criticized and debunked the defense he expected from Bowen, Gisevius, Villavaso, Faulcon, Kaufman and Dugue:

> **There is no Katrina defense.** The jury responded in the Warren [*Glover*] matter, not by the stress of Katrina, but by split-second decision of Warren to what he percieved was a threat. The writers of this article don't understand that; I thought the lawyers quoted herein would, but they don't. **Danzinger is totally different. I am sure the attorneys will proffer this defense, but it will fail.** The facts and circumstances are totally different. What was in Mr. Warren's sight picture and mind, was totally different in what was in the minds of the **gang of thugs (NOPD) on the bridge** that day. They bailed out the rental truck, guns ablazing. Officer Hunter, recently sentence, shot in the air. (??????) WTF!! The others should have done the same, but they, like their brothers in Algiers, thought they were the law and no one would ever question them. WRONG!!

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, pp. 115-116.) On June 22, 2011, promptly at 8:30 a.m., this Court and counsel began jury selection herein. Only ten minutes before Court was called to order, at 8:19 a.m., Perricone/legacyusa posted criticism of the defendants:

> **NONE of these guys should had have ever been given a badge.** We should research how they got on the police department, who trained them, who supervised them and why were they ever been promoted. **You put crap in--you get crap out!!!**

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, p. 169.) On Wednesday, July 13, 2011, 11:45 a.m., as the prosecution put on its case, "crawdaddy" wrote:

> **These cops are murders, throw them all in angola w/ the prison population the max time allowed by law and then some. These cops are guity(even Ray Charles can see this)** but the defense keep trying to poke giant holes in their testimonies. I have sit in on 50% of the trial and the **testimonies for the feds are very very convincing. Defense attorneys are so confused that they have the whole court room shaking their heads in this belief with their stupid cross examination.** I know their job is to create reasonable doubt but they are not during it from my stand point. **It is very dishearthing to listen to this BS. Stop the trial, Guity! Guity! Guity!.** I pray for the victims and their families. May God bless them!

On Thursday, July 14, 2011, 12:15 p.m., "crawdaddy" added:

> agnes powell, spot on. I was there and u are exactly correct. The expert did his job base on what was given to him to give an opinion. **These thugs should get the death penalty. They all should die.**

On Saturday, July 23, 2011, 2:10 p.m., "123ac" weighed in with a strangely familiar critical analysis of NOPD, and a haunting echo of an old expression:[84]

---

[84] See Perricone's "legacyusa" and "dramatis personae" posts of February 26, 2010 (pp. 66-67) and later on August 5, 2011 (p. 84), set forth herein. Perricone also used the "Italian proverb" euphemism on several other occasions before and during the investigation of this matter, in addition to during the weeks of trial. (a) campstblue, July 8, 2008, 8:26 a.m., under an article about the suspension of an NOPD officer: "**There is an old Italian proverb: the fish rots from the head down.**" (Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 27; (b) July 17, 2008, 11:47 a.m., in a post describing the NOPD as "crap": "**Fish rot from the head down.**" (Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 31; (c) September 6, 2009, 10:18 a.m., under an article entitled "Federal Probe Digs Deeper Into NOPD's Actions After Hurricane Katrina": "Can you imagine New Orleans without a Federal presence? Corruption would reign! **There is an old Italian expression which applies here...the fish rots from the head down....**" (Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 146; and (d) Perricone as "legacyusa" posted the following, on February 26, 2010, at 7:04 a.m., under an article concerning the Lohman plea: "We can not allow this police department to exist in the world it now exist. It must be stopped and stopped now. Too many officers' loyalty and devotion to duty is not to the citizens but to themselves and their own self-interest. **Indeed, the fish has rotten from the head down.**" (Kaufman Memorandum in Support, Rec. Doc. 963-21), Exh. 20, p. 43. This phrase is not mentioned in any information provided to the Court by the government, either in the Horn Reports or otherwise.

A search of all posts on Nola.com revealed only four other uses of the euphemism "the fish rots from the head down." Two of particular interest:

(1) Under an article entitled "DA Eddie Jordan Resigns" published on Tuesday, October 30, 2007, discussing Orleans Parish District Attorney Eddie Jordan's resignation and subsequent attempts to replace him, along with his relationship with the U.S. Attorney's Office and the troubling crime rate in the City of New Orleans at the time, "**swordoftruth**" posted the following on Wednesday, October 31, 2007, at 11:31:57 p.m., attacking NOPD Superintendents Eddie Compass and Warren Riley, along with Mayor Ray Nagin:

> The crime rate with its attendant murders will continue to increase until a real police superintendent is found to run the department. You can keep giving pay raises and overtime, but the murder rate will continue because the police department does not have a true leader at the helm. The reforms of the Pennington years were trashed by Compass and Riley, and the murder rates will continue to rise. Impeach C Ra(z)y Nagin and save the soul of New Orleans. **As the saying goes "The fish stinks from the head"**, and the fish has continued to rot under fence sitting Nagin who can only decide on what suit to wear, and what area of Dallas to buy his retirement home.

(2) On Saturday, August 8, 2009, an opinion column entitled "New Orleans Police Monitor Choice Looks Like A Set-Up", a person donning the user ID "**uptownman123**" posted:

> A good article about a bad problem. Whatever shred of creditability this office had when

> **Someone once told me that "when the fish rots, it rots from the head."** The involvement of supervisors in the cover-ups of the Glover and Danziger Bridge travesties says to me that 1) the corruption is deeply-rooted and goes up the chain. 2) The fact that higher-ups helped cover-up says that's the way they came up in the department and so they train new members to lie, cover-up, look the other way, and if you get caught, retire as soon as possible sit back and collect a big pension.
>
> It also says to me 3) that the NOPD has gotten away with these cover-ups before, which is why they kept doing it. The same names keep popping up - Kaufman, Dugue, DeFillo in case after case. I shudder to think of what other citizens have been murdered, falsely charged, or battered--only to have truth crushed to the ground. It's beyond the NOPD, however, since neither the PIB nor the local DA's office brought these crimes to light. It took the Justice Dep't to step in and uncover this filth.

On July 25, 2011, at 11:32 a.m., as the defense case was underway, Perricone/dramatis personae took a critical shot at the trial testimony of defense witness Warren Riley, former NOPD Superintendent:

> **He can't remember which deputy chief he instructed to conduct investigations of police shootings????** Thank God he's not chief anymore. Looks like he's reached his capacity for competence at Southern [University].

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 3.)

– WEDNESDAY, JULY 27, 2011:

Defendant Robert Faulcon was the only defendant to testify at trial, and he did so on Wednesday, July 27, 2011. That evening, at 7:43 p.m., "123ac" continued with what "Dipsos"/Dobinski would later call "real information from the trial", by attacking the media coverage in addition to the defense:

> Cerasoli left is now gone. It is a shame that the leadership of this office cannot see the damage that has been done with the purchase of brand new and expensive cars and now this hiring setup. **There is an old expression that a fish rots from the head,** and this situation with the police monitor smells badly. Clearly, a lack of good judgment is lacking with this hiring process.
>
> I also find it troubling that the ethics review board's representative decided to vote for Mr. Nealy while at the same time admitting that the process was not right. It is ashame this person did not have the courage to stand up for what is right. Isn't that what the ethics review board is suppose to do?

> this is my first opportunity to actually sit in on a trial and it's amazing to me how the news coverage is reported. TV news reporters said this p.m. that Faulcon's testimony helped both sides -- I didn't see that at all. He insisted that he saw 2 civilians with guns, but 1) no such guns were recovered and 2) the only gun that was recovered was planted by the police. He also testified that he never saw either Madison brother with a gun, fire a gun, or aim a gun. He testified that he shot Ronald Madison in the back, but never id'd himself as police or warned him to stop, raise his hands, etc. He said he knew police rules for shooting, but called them "textbook" rules -- in the field, they didn't follow these rules. Some other courtroom attendees defined this as a "rogue cop." He said he fired at the Bartholemews and the others because when he jumped out of the truck, another officer was firing in their direction and he "assumed"
> that he was returning fire. He didn't get out of the truck and assess the situation -- he jumped out and started firing in the direction other cops were firing in. He said he shot Mr. Madison in the back b/c he "knew his brother was waiting around the corner to ambush him". Wonder how he "knew" this? Ronald was running, turned around and looked at him, ran some more, turned around again to look at him, ran some more and turned around a 3rd time. Faulcon had all this time to identify himself and warn Madison, but he did neither. Ronald was not warned, Faulcon didn't see any weapon, and Ronald was running away -- no perceived threat at all. Yet, Faulcon shot him ... in the back. I don't see how the defense was helped by any of his testimony as the media reported.

In a separate post, at 7:59 p.m., "123ac" provided some legal analysis, and again turned his/her attention to news reports that were not pro-prosecution, and criticized more zealously:

> WWL news just did it again -- they half-reported the news. News anchor said NOPD Officer Haynes told the federal grand jury he saw civilians shooting at the police. What Haynes actually told the federal grand jury was that 1) he did not see civilians with guns, 2) he did not see civilians firing at police and that 3) he lied when he told the local grand jury that he saw civilians with guns shooting at police. He told the federal GJ that he lied to the local GJ to cover for the cops. The media inaccurately reported news during the storm and continue to do so. They're a big part of the problem. The question is why? I thought journalists had an ethical duty to verify and fact-check before reporting. Sloppy, pitiful reporting!

At 8:24 p.m., "123ac" responded to other comments:

> He [Faulcon] admitted on the stand today that he killed Ronald Masison.

In a separate post, at 8:36 p.m., "123ac" reported and explained his/her interpretation of the evidence:

> Madison had no gun; the police were HEAVILY armed. Madison shot no one; the police killed 2 and shot 5 others -- all unarmed. Madison had no training on when to shoot; the police had weeks of police academy. Madison didn't lie on the police; they lied on him. Madison didn't invent "fake" witnesses or plant guns; the police did. The police panicked when they THOUGHT they had guns pointed at them; Madison panicked because he KNEW he had guns pointed at him.

Shortly thereafter, at 9:21 p.m., "123ac" again attacked the defense:

> If Youngman existed, the defense would call him b/c police reports said he witnessed the shooting and saw people shooting at the police. He supports their story -- which is why the police invented him. If this "fake" witness existed, he would have been the defense's first witness.

Later that evening at 9:31:54 p.m. (approximately four hours later), "Dipsos"/Dobinski chummed the Nola.com waters by encouraging "123ac," with approval:

> *123ac, please keep letting us know what you observe in the courtroom.* ***Many people appreciate it!***

And again, twenty minutes later at 9:51:34 p.m., "Dipsos" reiterated:

> *123ac, please keep letting us know what you observe in the courtroom. Many people appreciate it!*

Soon (at 10:23 p.m.), "crawdaddy" seconded the criticism leveled at WWL by 123ac and bashed the defense:

> 123ac is exactly right, the news media is not accurate at all. I was in the courtroom today and we must not be watching the same trial. 123ac put it where the goats can get it, per the black eagle (Joe Madison of satellite radio). I am going to be brief because he's done. He said that"s textbook rules if you use deadly force when you not suppose to. He is a rogue cop. How can you shoot a human being in the back and say you perceive that your life is in danger? Textbook says that you suppose to holler "Police, Stop, Show Me Your Hands"! I can go on and on about this cop but I do not understand how the news media can report these half-truth. The defense was not help at all. There is rumors that the other four defendants got to testify now to plug up the holes that Mr Faulcon created. **Stick a fork in him, he's done! ! 123ac, keep up the good work.**

– THURSDAY, JULY 28, 2011:

The next morning, at 8:16 a.m., Perricone/dramatis personae could not resist posting another of his opinions publicly, taunted defendant Faulcon, and urged the jury to reject his testimony:

> **Where is Madison's gun? Come on officer, tell us.** You shot because you wanted be part of something,you thought, was bigger than you. You let your ego control your emotions. You wanted to be viewed as a big man among the other officers. **That's the creed of the NOPD and I hope the jury ignores your lame explanation and renders justice for Mr. Madison. To do less, is to sanction any cop who decides it is in his best interest to put a load of buckshot in the back of a disabled american in broad daylight.**

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, pp. 5-6.) That afternoon, "crawdaddy" continued:

> I would run too if no one holler police stop show me your hands. No one ever found a gun the civilians had. The only gun found was a "ham sandwich". These cops came out of the truck firing their weapons to kill anyone in sight.

At 5:48 p.m., Perricone/dramatis personae persisted in his long-enduring campaign against defense counsel:

> **Always a loser.** [*commenting on Kaufman's attorney, Stephen London*].

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 6.) That afternoon at 6:38 p.m., "crawdaddy" took on an important defense witness:

> It doesn't matter what [defense witness] Nurse Issemann heard Jose Holmes say in his hospital bed after being severely wounded by police or what she thinks she heard him say; bottom line, THERE WERE NO GUNS FOUND IN AREA OF THE DEAD OR WOUNDED CITIZENS!!! If there had been guns in the vicinity, this trial would not be happening. Sgt. Kaufmann would not have had to pull out his "ham sandwich", no falsifying police reports, no guilty pleas, etc. I believe a nurse's duty is to care for the sick and injured. This nurse/modern day Sherlock Holmes should stick to her job. Seems like she was working with these crooked cops.

And at the same time, as the evidentiary portion of the trial was nearing its conclusion, "123ac," at 7:13 p.m., continued his/her keen pro-prosecution analysis of the evidence:

> The transcript[85] of the 1st cop's grand jury testimony didn't help the defense at all -- his story just didn't add up. He said Lance Madison confessed that a group of people below him on the bridge was shooting up at him and his brother and that they fired back at them. Then the police pulled up at the very bottom of the bridge and were fired upon. If this were true, the group firing at the Madisons would have been nearest the police and directly in the line of fire -- surely, anyone shooting at the police would have been
>
> killed. The Bartholomews were nearly all killed. His story made no sense - first, where were the guns? Then, there's no evidence that the police were fired upon. Third, if that's what Lance Madison said, why were charges against him dropped? Plus he said he never told anyone about Lance Madison's supposed confession. Even after his buddies were indicted, he still never told any supervisors about the supposed confession. He said he told "lots and lots" of other people, but when asked to name one -- just one, he couldn't. Just another version of the NOPD's untrue story. This transcript didn't help the defense at all -- it more likely helped the prosecution. Many of us who heard the entire transcript wondered why the defense presented it.

That evening, at 8:44:47 p.m., "Dipsos" again further encouraged "123ac" and "crawdaddy", among others, to continue their vituperative posts, to help not just her, but "the public," and even provided a factual answer to the question of another poster ("willyouplease"):

> *123ac, thanks so much - you and crawdaddy and anyone else able to attend do help the public[86] to get a better understanding of what happened in court. willyouplease, to answer your question - the portion of the bridge where the family was shot is over land.*

---

[85] The transcript referenced is one read at the trial, in light of the witness' refusal to appear live. See pp. 106-07, 119-20.

[86] This phrase – "help the public" – again belies Dobinski's later explanation in the Supplemental Horn Report that she was merely personally attempting to find out more about the trial.

– FRIDAY, JULY 29, 2011:

At 10:50:14 a.m. (during work day hours), "Dipsos"/Dobinski urged even more posts from "123ac," "crawdaddy" and others:

> ***hey 123ac, crawdaddy, speaking truthfully***[87] *-- whoever else is attending - please post what you see in court!*

Demonstrating some insight into criminal law (particularly the Fifth Amendment), a peculiarly specific and esoteric recollection of a recent prosecution in EDLA, and a persistent attempt to discredit the defense, 123ac responded, on July 29, 2011, at 10:57 a.m.

> Catfish2 asks why the 3 unindicted NOPD officers' transcripts were read into evidence vs their being present to testify personally. The only reason a person's sworn testimony at a previous hearing is read vs their being present is that, for some reason, they CAN'T be present -- serious illness (like a Jefferson niece in the 2nd Gill Pratt trial), they're dead, etc., or they've pled the 5th Amendment to avoid incriminating themselves. Since these 3 officers don't fit into the first 2 categories and since 1 of the 3 actually admitted in his transcript at the fed'l grand jury that he lied at the 1st GJ, the most likely reason is that Heather Gore and the other officer knew if they gave the same testimony, they'd be opening themselves up to a possible perjury charge. Their GJ transcripts were FULL of lies -- many of which were obvious, and they wisely took the Fifth, rather than repeat or try to defend their earlier lives.

Soon thereafter, at 11:36 a.m., 123ac provided a lawyer-like outline of rebuttal witness Lakeisha Smith's testimony, and proclaimed defendant Kaufman's guilt:

> Will the REAL Lakeisha Smith please stand up? Today she did --in the flesh, and said 1) she never lived 3 blocks of the Friendly Inn, 2) she wasn't in NO the day of the shooting because she evacuated to Miss days before the storm and never returned to NO, 3) she was in

---

[87] That day, "SpeakingTruthfully" responded, suggesting where Dobinski could find "a good flow of information": "Hey Dipsos, I'm sorry...I haven't been attending, I was following a couple of reporters from WWL & WVUE on Twitter. They were much more detailed than what we were getting here."

> Miss the day of the shooting, 4) she never gave NOPD a statement, 5) no NOPD officer ever asked her for a statement, 5) she didn't move to Texas to live with a sister because she doesn't have a sister, and 6) none of the defense attorneys tried to find her to ask her to testify at the trial. Kaufmann's attorney didn't cross-examine her, or any other defense attorney. You could call her the nail in Kaufmann's coffin.

Less than an hour later, at 12:26 p.m., 123ac provided further insightful legal analysis of defense witness Heather Gore's testimony by transcript, another lesson on witness unavailability and praise for the government's rebuttal case. Interestingly, 123ac also took the opportunity to make a full-throated attack on the NOPD generally, and again referenced the two specific occasions (during the trial of *U.S. v. Gill Pratt*) where witnesses were not available:

> Rebuttal witnesses! Wow! All of us should find some time to exercise our civic right to sit in on trials, whether we're retired, unemployed, off on stay-cation, or what. 8th grade civics classes should sit in -- it's real life civics. The last rebuttal witness was a La State trooper who showed up on the bridge to assist the NOPD. He arrived after all the shooting and said they were only asked to help locate one fleeing suspect armed with a handgun-- not 2, like Heather Gore told the local grand jury; not armed with long guns, like the 2 men Heather Gore said she saw. Officer Gore also swore to the grand jury that the 2 men got aware and that a couple at the Friendly Inn told her where they fled -- she never told anyone else this, but that's what she said she saw. So when the state trooper said NOPD asked them to look for only 1 suspect who was actually captured (Lance Madison), he just blew Officer Gore's sworn testimony to bits.
>
> We were never told why Officer Gore and the other officers whose GJ transcripts were read into evidence didn't appear at trial, but I think now we know. Sworn testimonhy is only read into evidence when the person in unavailable to appear personally -- due to illness (like the Jefferson niece in the Gill Pratt trial),

> death (Mose Jefferson[88]), or some other similar reason. if it's one of these reasons, their absence is explained, like it was in the Gill Pratt trial. None of these reasons apply to these 3 officers and their absence wasn't explained. One officer admitted tom the fed'l GJ that he lied under oath to the local GJ -- the other 2 didn't. Based on the state trooper's testimony today, we know Gore lied under oath about seeing 2 black males pointing long guns at the police, that they got away, and that 2 witnesses saw them fleeing. It's not rocket science to conclude that these 3 NOPD officers didn't testify because they'd be committing perjury if they did. Also explains why the Feds didn't subpoena them -- no one can be made to testify if it would incriminate them. They took "the Fifth."
>
> NOPD lying under oath -- not one, but more than we can count. Falsely charging innocent people. Planting guns. Putting lies in victims' mouths. Inventing witnesses -- all with the help of supervisors. And to cover up killing innocent, unarmed victims who posed no threat. The tentacles of corruption go very deep in the NOPD. They know the law and are sworn to uphold the law and then this! Wow!

That afternoon, at 2:25:46 p.m.(again, during normal work day hours), begging for even more posts, "Dipsos" encouraged "123ac" to "cover the closings" after requesting that "123ac" post "more real information":

> *123ac - thanks so much for the details in courtroom -- reach back in your memory and give **us** more real information from the trial... much appreciated!! will you cover the closings as well???? **we hope so!***[89]

At 9:08 p.m., "crawdaddy" commented:

---

[88] Perricone was a signatory for the government on the indictment of Mose Jefferson, and served on the prosecution team at Jefferson's trial. *See United States v. Mose Jefferson,* No. 08-85. Mose Jefferson was also a co-defendant in the matter of *United States v. Renee Gill Pratt,* No. 08-140, however, Perricone was not on the trial team in the *Gill Pratt* matter.

[89] It is significant that the plural "us" and "we" are used, and that perhaps others in addition to Karla Dobinski were "hoping" for further "coverage" from 123ac.

> 31eeeth, I agree, [defense witness/NOPD officer] Gore should be fire or made to resign & charged with perjury.[90]

– SATURDAY, JULY 30, 2011 and SUNDAY, JULY 31, 2011:

In the wee hours of the morning, at 1:02:12 a.m., "Dipsos" returned to Nola.com to aid and abet further posting by her two favorite posters, in addition to all others (which obviously would include Perricone masking as "dramatis personae") as "a valuable public service":

> *crawdaddy, 123ac, all of you - get to court early on Wednesday and then let* ***the rest of us***[91] *know as much as you can remember about the closing arguments - what was said, what your impressions are..... and if you have any more recollections of events during the trial please add them to the comments.* ***You are performing a valuable public service!***[92]

---

[90] Through her attorney, NOPD Officer Heather Gore declined to testify. Her grand jury transcript was read.

[91] Again, the use of the term "the rest of us" is significant.

[92] It is clear that the "valuable public service" of posting opinions on Nola.com to sway public opinion was fully appreciated by Perricone too. Just over three years prior, Perricone/campstblue, on July 18, 2008, 1:19 p.m., also praised online Nola.com "citizen involvement" in his attacks on the NOPD:

> Hey folks, **we on this blog accomplish something** which I haven't seen in my 57 years of life in this state**---citizen involvement in government-extra-electorally.** By that I mean when the greedy legislators attempt to give themselves a 300% raise, we stopped it. **That's right WE did it. Everyone on this blog should be proud of themselves and their fellow bloggers.**
>
> But now we face a different challenge. **The NOPD has historically been corrupt, at worst, and mismanaged at best. It does not respond (double entendre) to the needs of its citizens on a daily basis. Worst yet, we have rogue cops who are just on the job for their own benefit--financial and power.**
>
> The city is horribly mismanaged and has been for years because we have tolerated it for so long. We expect it therefore we tolerate it. **It's a vicious circle we must stop.** We can't rely on the politicians anymore. They are useless.
>
> Therefore, we must DEMAND the resignation of Riley NOW! We must march if he doesn't. Then demand the city (mayor and council) to search for someone who will LEAD the Department out of the morass it is in now, and has been for years. **We can do it. Only we can do it.**

Later that morning, on July 30, 2011, at 8:44 a.m., Perricone/dramatis personae obliged the request of "Dipsos" by predicting Kaufman's conviction with another taunt:

> **Bye- Bye Archie** [Kaufman]....

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 9.) At 11:19 a.m., "crawdaddy" responded:

> sit in on the trial daily. Lehrmann testified that Kaufmann said he needed a witness. Lehrmann said, "How about Lakeisha." Kaufmann included Lakeisha in his report. My theory is that Lehrmann pulled "Lakeisha" from their database and looked for any Lakeisha living near the Friendly Inn motel. Well, they located a Lakeisha Smith whose address was less than a half mile from the motel; never contacted nor interviewed her. Kaufmann described Lakeisha as a well-dressed, good looking black woman who possibly coulld have been a stripper. Said Lakeisha witnessed Ronald Madison reach into his waistband, turn toward police when Faulcon shot him. She waded in waist-deep water over to Kaufman at the foot of the bridge to report what she had witnessed to Kaufman. Really? First of all: Who was well-dressed after being stuck in the city w/o food and water 3 to 4 days after Katrina? Well, according to Kaufman, Lakeisha was. I guess he threw in the stripper part for good measure. Well, the Government located Lakeisha Smith who lived near the Friendly Inn as a rebuttal witness and called her to the stand today. She testified that she evacuated to Mississippi a couple of days before Katrina hit and was NOT in No.O. 9/4/05 when this massacre occurred. Her mother also testified and supported her daughter's testimony. Lakeisha testified she was never interviewed by Kaufman as indicated in the report he wrote. The Gov. also called a state trooper on rebuttal who arrived on the scene after the shooting. NOPD told him to help look for a lone gunman who ran into the Friendly Inn Motel. He said a helicopter was called to circle the motel with a sharp shooter (allegedly Lance Madison). This is unbelievable. Did this really happen in America? How do these people sleep at night? What these two families have gone through is unconscionable.

"Crawdaddy" revised, at 11:31 a.m.:

> typo, s/b "I sit in on the trial daily"; Also the sentence that says "NOPD told him to help look for a lone gunman who ran into the Friendly Inn Motel", should say, "NOPD told him to help look for a lone gunman who ran into the Friendly Inn Motel (allegedly Lance Madison)".

Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 32.

In a separate post, at 6:29 p.m., "crawdaddy" focused on defendant Villavaso, proactively proclaiming his guilt over any notion of reasonable doubt:

> Lets clear up this notion that several of you bloggers said that officer Anthony Villavaso maybe the only one acquitted. Lets look at the facts. The forensic pathologists testified that Mr James Brissett was struck by six projectiles that killed him. Some of the casing & bullets(taken from Brissett's body) was fired by a AK-47 said the experts.[93]
>
> Villavaso carried a AK-47 & he was seen spraying the victims with bullets with a sweeping motion who were trying to hide behide the concrete barrier on the walk-way.
>
> Villavaso called the two black females "them b-----es had guns" on tape which was played at the trial several days ago.
>
> Putting it where the goats can get it, he is as guilty as anyone of the dependants of this terrible massacre. Even Ray Charles can see this.
>
> So those who said that he could be found not guilty, explain to me & the public how did you came to this assumption?

Upon a discussion of the strange coincidence that a person with the same name ("Lakeisha Smith") as that fabricated by Lehrmann and Kaufman actually did reside only a few blocks from the Danziger Bridge, 123ac, at 11:38 p.m., sought to remove any doubt as to the guilt of defendant Kaufman:

> Her looking like a stripper, her wading thru waist-deep water, her being an eye-witness to the shooting, her giving NOPD a statement --all of this is 100% made up. Fabricated. A lie. Ms Smith didn't look like a stripper to me, she didn't wade in the water, she didn't witness the shooting, didn't give a statement, etc.

– TUESDAY, AUGUST 2, 2011:

At 2:53 a.m., "crawdaddy" demanded guilty verdicts:

---

[93] At the sentencing hearing on April 4, 2012, the government (prosecutor Bernstein) admitted, in response to the Court's question, that despite extensive expert forensic firearm/ballistic examination and testimony, no bullet or fragment fired on the bridge was traced to defendant Villavaso's weapon. Sentencing Hearing Transcript, Rec. Doc. 885, pp. 116-117.

> **These rogue cops should never see the light of day again, never!** These cops see their love ones daily, the victims will never see theirs. **GUILTY AS CHARGED!** GO TO JAIL, GO DIRECTLY TO JAIL! DO NOT COLLECT ANOTHER PAY CHECK, NEVER!

At 10:27 a.m., as closing arguments began in this matter, Perricone/dramatis personae again focused on NOPD corruption:

> This is a well-reasoned opinion, but it's to facile to leave unremaked. [NOPD Captain] **DeFillo, as someone opined, is and of the corrupt culture of the NOPD. It's been there for years and will be until the DOJ leashes it to a Consent Decree.** That being said, DeFillo should not slip away without some penalty or sanction. His purposeful, dilatory and yes, corrupt silence only embolded those actually involved in Glover case to pursue a pattern of concealment and lies. A federal jury had to untie the conspiratorial knot. But how did it get to this. As the DOJ acutely noticed in their letter to the mayor last March, the detail system at the NOPD is at the heart of the corrupt pratices of the police department. Seems to simple, huh? But consider this. DeFillo, by all indications, ran and coordinated a bunch of lucrative details at the NOPD. These details created alliances and allegiances which don't appear on any orgainizational chart on Broad Street. These alliances and allegiances, over the years, have made subordinates superiors off-duty, while superiors became subornidates all for the sake of securing details. Many knew what DeFillo was doing and he knew they knew. So, when Mr. Glover appeared at the Habans school bleeding his guts out in the back of Mr. Tanner's car, who was the superior? Who was the subordinate? Why would DeFillo go after his subordinates,like Wynn for example, if he,DeFillo, knew that his little game at NOPD HQ would be exposed. Remember the alliances and allegiances -- they survived Katrina-- Mr. Glover didn't. ps: isn't it curious that the first major scandal to hit Serpas had to do with a paid detail?

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 13.) At the end of the closing arguments, 3:17 p.m., "crawdaddy" again demanded a guilty verdict:

> Right-no RB, **guilty as charged!**

– WEDNESDAY, AUGUST 3, 2011:

At 11:54 a.m., apparently febrile with anticipation, "crawdaddy" repeated:

> **Guilty, Guilty, Guilty!** Right on @ xilla 02,keep up the excellant.

On the morning of the first day of the jury's deliberations, Perricone/dramatis personae weighed in, at 7:06 a.m., and also demanded a guilty verdict:

> I agree with [nola.com poster] Cauane. The same hurricane that hit Orleans Parish, hit Jefferson, St. Bernard, Plaquemine,and St Tammany. Yet, the only police force to use deadly force throughout the city was the venerable NOPD. Perhpas we would be safer if the NOPD would leave next hurricans and let the National Guard assume all law enforcement duties. **GUILTY AS CHARGED**. [caps as published; bold added].

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 13.) At 8:57 a.m., he (Perricone/dramatis personae) further "explained":

> Agree. **With all the shots fired on the bridge that day, how many hit an ARMED subject? Listen to the video.**

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 13.)

– THURSDAY, AUGUST 4, 2011:

On the next day, the jury's deliberations continued. At 5:53 p.m., as the second day of deliberations concluded, Perricone/dramatis personae expressed his expectations of the jury:

> **I don't think the jury will leave the dead and wounded on the bridge.**

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 31.)

– FRIDAY, AUGUST 5, 2011:

The jury returned its verdict. Only hours after the guilty verdicts in this case were rendered, Perricone/dramatis personae, concerned that praise for the verdicts did not extend to the Eastern District U.S. Attorney's Office, posted:

> RED, for your edification, if that's possible, [prosecution team member] Theodore Carter is an Assistant U.S. Attorney and works for Letten. DOJ and US Attorney staff particpated in the prosecution. Thought you should know, as you go about merrily running your mouth and convincing us you are a fool.

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, pp. 19-20.) A couple of hours later, at 3:09 p.m. that very day, Perricone/dramatis personae directed a threatening post to the subject of another grand jury investigation and indictment, Dominick Fazzio,[94] who happened to then be represented by Kaufman defense attorney Steve London:

> Well, Mr. Fazzio, I hope you have room in your scrap book for your conviction and mug shot. London didn't too well with Archie Kaufman. You're next.

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 19.) At 11 p.m. that evening, Perricone/dramatis personae yet again opined about NOPD with a now familiar refrain:

> **There's an old Italian proverb that goes something like this: the fish rots from the head down.**[95] And the proverb applies to the New Orleans Police Department. Of all the law enforcement agencies in the metropolitan area the NOPD was the ONLY one to kill people after Katrina--on BOTH sides of the river. Now, we, as a society, must ask why.
>
> Abiding by the proverb, the only unassailable answer is the paucity of leadership at the NOPD before,during and after Katrina slammed New Orleans. In fact, I submit there was no leadership and that which existed, was woefully unqualified to occupy those positions. And as events unfolded, we now see that that was the case.
>
> What a failure [former NOPD Superintendent and predecessor of Warren Riley] Eddie Compass prove to be! And his underlings were/are no better.
>
> Where was the leadership before Katrina? Where the officers prepared for adverse conditions? Where they trained to handle a society shattered by the storm? Where they reminded and lead to serve a public unders stress? Where the commanders reminded to watch their men to see if they're were about to bust? What paradigm did they operate under? It appears to be Lord of the Flies.

---

[94] River Birch, Inc. executive Dominick Fazzio was indicted by an EDLA grand jury in June 2011 (around the start of this trial). On March 12, 2013, all charges against him were suddenly dismissed with prejudice. The government's motion to dismiss cited only "evidentiary concerns and in the interests of justice." See *United States v. Fazzio*, No. 11-157, Rec. Doc. 293.

[95] See 123ac post of July 23, 2011, at 2:10 p.m., and footnote to it, on pp. 70-71.

> The NOPD is a failed organization. No one can dispute that. We all can only hope that the ONLY police department in this city has enough bits and pieces left to put a reliable, trustworthy, ethical, and legally efficient agency together--one with the right leadership, even when the weather is bad.
>
> The DOJ can not get here fast enough. Without their help and supervision the NOPD will not be remediated or redeemed.

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 19.) The next morning (August 6, 2011), at 7:32 a.m., Perricone/dramatis personae continued his analysis:

> You've made my point--partly. No one was shot at Oakwood. Why only the NOPD? Why? Dig deep for the answers and they will appear. Then again, perhaps the answers are very apparent. The NOPD will not change until the present command structure of that department is either 1) Replaced by qualified personnel, 2) has an ephany that the way they were taught and trained is no longer the way to operate, 3) cease being so damn arrogant and remember the oath of office you took the day you graduated from the police academy, 4) prepare your staff for storms and remind them that they are there to protect the city, while all others abandon their homes and buisniness. Some one has to stand strong and restore law and order, not create chaos.
>
> I am not encouraged by what I see at the higher levels of that department. And as I wrote last night, it will never change if the NOPD is allowed to change itself. It needs outside intervention and NOW.

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, pp. 18-19. And on August 9, 2011, at 7:59 a.m., Perricone/dramatis personae added:

> "Correction: Sunday's column described convicted officer Kenneth Bowen as stomping on the lifeless body of Ronald Madison. In fact, testimony indicated Madison was alive at the time."
>
> ..
>
> A distinction devoid of a difference. While I'm sure Mr. Bowen–now inmate Bowen–appreciates the correction, I'm sure Mr. Madison is insentient of the good will of the sentiment.
>
> **The entire weft of the NOPD's culture was on trial in this horrid episode. The DOJ assembled a great team which had institutional support beyond the TP's comprehension. We can only imagine what this city would be like without the DOJ. Some NOPD officers, I would assert, are musing the same thing.**

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, p. 24.) And less than four hours later, on August 9, 2011, at 11:43 a.m.:

> **Danzinger is a result of a failed command structure at the NOPD.** Indeed, not long after this event, Chief Compass was ingnomaniously relieved of his command. But closer to the point, there was no command structure at the bridge--only rage and errant undisciplined fire. If one cool head had been there, perhaps the police would not have fired, people would be alive, and the population of the Federal prison system would not be increasing by a factor of five.
>
> Yes, poor or ineffectual police control contributed to Danzinger. Rage and contagious fire caused these officers to abandon their training and resort to base instincts. Something they will regret for the rest of their lives. Sadly, those who could have stopped it, are free to allow it again--God Forbid.

(Kaufman Memorandum in Support, Rec. Doc. 963-22, Exh. 21, pp. 24-25.) Not yet finished with Kaufman's defense counsel Steve London, Perricone (now as "Henry L. Mencken1951") posted on September 21, 2011, at 6:26 a.m.:

> **..and** [London] **does a very poor job of pretending to be an attorney....ask Kaufmann.**

(Kaufman Memorandum in Support, Rec. Doc. 963-23, Exh. 22, p. 35.) And on November 5, 2011, three whole months after this trial ended, at 8:23 a.m., Perricone/"Henry L. Mencken1951")[96] persisted:

> **London doesn't know what day it is...ask Archie Kaufman.** You must be with the NOPD.

(Kaufman Memorandum in Support, Rec. Doc. 963-23, Exh. 22, p. 49.)

---

[96] In assuming various user IDs on Nola.com, Perricone registered them with characteristics far different than reality in an effort, presumably, to further preserve anonymity. For instance, "campstblue" was registered on Nola.com as "female attorney who lives in warehouse district who is fedup [sic] with corruption in this city", and shows a zip code of 70130, which includes the French Quarter, Lower Garden District, and the Central Business District in downtown New Orleans. Perricone did and does not reside in the Warehouse District, nor in the 70130 zip code (which happens to be the zip code of the USAO as well as this Court). Henry L. Mencken1951 described himself, in one of his many posts, as an old retired lawyer who graduated from law school in 1951, which in reality is the year of Perricone's birth.

D. Sworn Testimony of Former First AUSA Jan Mann

As set forth in the Court's prior Orders, former First AUSA Jan Mann's direct in-court involvement on behalf of the USAO in this matter began with her appearance on June 13, 2012 at the hearing of this motion. Her role ended on November 5, 2012, when the undersigned was advised by former USA Letten that she too had posted on Nola.com.[97] Additional information obtained during the course of Mr. Horn's investigation, such as Jan Mann's testimony discussed herein, substantially increases the Court's concerns that Nola.com posting activity about this case, and others, by government attorneys and personnel, was far more extensive than previously suggested, and even presently known.

Attorneys from OPR took the sworn testimony of former First AUSA Jan Mann on November 15, 2012, less than two weeks after her exposure as "eweman." Her November 15th testimony, particularly in the context of the transcript of her August 8, 2012 interview,[98] also is critical to the Court's ruling today. Jan Mann had "supervisory responsibilities" on a number of cases[99] about which she posted (See Jan Mann November 15, 2012 Transcript, pp. 26, 69, 71 and

---

[97] Jan Mann testified that, as of March 2012, when Perricone was exposed as "Henry L. Mencken1951," she had posted perhaps ten times in a month, describing it as "no big deal" and "my little downtime thing." (Jan Mann November 15, 2012 Transcript, p. 110.)

[98] Jan Mann also submitted to an unsworn interview by OPR personnel, which is reflected in the transcript of August 8, 2012, and submitted to an unsworn interview with Mr. Horn and Ms. Alexander, in the telephonic presence of an OIG special agent, on December 21, 2012.

[99] Perricone, as legacyusa, on August 22, 2009, at 8:43 a.m., described Mann's role:

> The lady speaking is Jan Mann, and she is the one who really runs the US Attorneys office. She is a great person and the guys who work for her, love her. You are right the guys should be applauded but they work for a great lady and they respect her. All ouf us in New Orleans should be proud of that office and the men and women who work there.

Similarly, on September 4, 2011, at 10:45 a.m. (one month after this trial ended), Perricone, as

75), and as First Assistant U.S. Attorney, supervised the work of AUSA Ted Carter (and AUSA Julia Evans, during her involvement), members of the prosecution team in this case. In her November 15, 2012 testimony, Jan Mann related the events surrounding the March 2012 exposure of Perricone as "Henry L. Mencken1951." She further asserted, quite definitively, that in the days between the filing of the *Heebe* lawsuit against Perricone, and USA Letten's March 15, 2012 press conference acknowledging Perricone as "Henry L. Mencken1951," she advised Letten that she, too, had posted on Nola.com. See Jan Mann November 15, 2012 Transcript, pp. 114, 117, 120-121, 124, 168, 205, 210, 211-213, 216, 229, 235, 239-241, 243-244. She stated, "He didn't have a big reaction" (p. 117, l. 13), and admitted that, on the occasion she told him, "I was definitely trying to downplay it," and "I didn't want him to get too upset yet." (*Id.*, pp. 122-123.) She added that the fact of her posting came up only obliquely on a few occasions between March and November 2012:

> A. He [Letten] asked me no more questions, but we did discuss it a couple of times. He'd say, you know, "These cowardly commenters." And I'd say, "Well, I'm not a coward," you know, things like that. "I'm not" -- "you know, I'm not a coward. That's not why people do it anonymously," you know.
>
> So I would make references to it, maybe, you know, less than a handful of times.
>
> Q. When did those occur?
>
> A. Between March and November, you know. He'd say, "God, those commenters, they're just nothing but graffiti."
>
> And I'd say, "I have nothing against graffiti." You know, things like that like -- meaning, obviously, I'm a commenter, you know.

HenryL.Mencken1951, commented:

> You are correct about one thing --- the brains of that operation of Poydras [USAO] is Jan Mann. Don't ever underestimate her. Even Letten listens to her.....

Q. Well, were they specific statements to Mr. Letten reminding --

A. Yeah.

Q. - - him that you had been a poster?

A. I never said, like, "Let me remind you, I'm one of those posters." But when he would say, "I just think they're cowards, people who use anonymity are cowards"; and I'd say, "So you think I'm a coward?" things like that. I didn't say, "Remember, I told you I'm a commentator." But I just accepted that he remembered.

(Jan Mann November 15, 2012 Transcript, p. 143, l. 3 - p. 144, l. 9. See also pp. 207-208, 285-286.)

As to whether others at DOJ were advised of her "eweman" posting activity, Jan Mann responded:

Q. Did you consider at all your obligation to tell department [DOJ] officials, given the decisions that they needed to make about the removal -- the civil removal or any other recusal issue?

A. I left that up to Jim [Letten]. And I kind of thought he did. I kind of thought he did.

Q. In what way?

A. Because, first of all, he was talking to them [DOJ personnel] without me, which was a little unusual. Normally I would be in there.

Q. Had he told you to leave the office?

A. No, he never said leave, but like I'd come back in or something, and he'd be on the phone with somebody, I don't know, like a Scott Schools[100] or something. I don't know who, but different people. He talked to a bunch of different people.

So I kind of thought he did.

---

[100] See p. 30. Associate Deputy Attorney General Scott N. Schools retired on February 22, 2013. It is the Court's understanding that, prior to his retirement, he had supervisory responsibilities for the Executive Office for United States Attorneys, the Office of Professional Responsibility, the Office of Attorney Recruitment and Management and the Criminal Section of the Civil Rights Division. See "Scott Schools, a Power in DOJ Bureaucracy, Is Leaving After Two Decades", by David Stout, *Main Justice*, February 11, 2013.

Q. Did you ever ask him?

A. No.

(Jan Mann November 15, 2012 Transcript, p. 140, l. 7 - p. 141, l. 5.) Even more telling regarding the possibility of then USA Letten's knowledge, and regarding the possible knowledge of others "up the chain" at DOJ, is this passage:

Q. On -- back just a little bit, on March 13th, you had a couple of conversations that you said about -- to Mr. Letten concerning your postings?
A. Yes. Yes.

Q. Did you and Mr. Letten have any discussion about whether they should be -- your postings should be reported up the chain?

A. No.

Q. Did you ask him that question?

A. No.

Q. Did you ask him whether he thought, like, it should be reported to OPR?

A. No.

Q. Did he make any comments to you?

A. No. We didn't discuss that. I probably thought in my mind he probably did say something, but he didn't tell me any -- again, I know how he is. He didn't want to -- he wasn't -- he didn't want to -- me to have done anything wrong, you know. Not that I think he'd cover for me, because I don't think he'd cover for anybody.

But I just thought, you know, he's not going to put it back up in my face. I thought that was him being nice; he's not going to put it back up in my face. I thought he probably said it to somebody, one of the people he was talking to, probably said, you know, "Jan said she" -- and they all know me. "Jan said she's commented a few times, but just on innocuous subjects and things."

And they probably said, "Well, let's deal with this, and then we'll worry about that." That's kind of –

And then the worrying about that never came. You know, it was like we were still -- I kept thinking, if we finally -- and we were almost at the end of it. We had a positive ruling from every judge. You know, it was like they filed four or five

different things. We won, we won, we won, we won.

I thought, when we get to the end, then maybe they're going to deal with anything else, other repercussions, but we never got to that point.

(Jan Mann November 15, 2012 Transcript, p. 168, l. 5 - p. 170, l. 5.)

Former First AUSA Jan Mann drew support for this belief from the fact that DOJ, and specifically OPR, initially did not ask seemingly the obvious question[101] of whether any other USAO personnel commented online [emphasis added]:

Q. Well, wasn't there a concern that other people in the office were doing the same type of -- **whether there was a concerted activity or not, the damage is very much the same if there's a bunch of independent activity --**

A. **We weren't going to investigate that. If somebody thought -- I -- I thought people in Washington decided not to ask that. When your survey came out and you didn't say, have you ever commented, I thought, they decided they're not going to cross that line.**

I don't know why you didn't ask that. I thought you were going to ask it in the survey. I really did. I said, my jig is going to be up. I'm going to have to tell her [OPR counsel].

Q. There was a long time between March 13th and the survey.

A. And the survey, yeah, August.

Q. During any of that time, did you consider that you should be telling people, besides Mr. Letten?

A. No. No. I -- I thought DOJ had made a concerted decision, decided, that we can't ask all our employees about this because they have a right to do this.

So then what are you going to say? Well, only thing we can ask you, if you did it in your personal capacity, but did you ever comment about cases? What, are they going to get on everybody's computer and search? I mean, at what point are they going to stop? I said, they mustn't want to do that. They must realize that may be just going too far.

---

[101] See First Supplemental Horn Report, p. 9 (in responding to the Court's question No. 8), discussed *supra* at p. 21; and Part One, Rec. Doc. 1070, p. 34, fn. 30.

(Jan Mann November 15, 2012 Transcript, p. 163, l. 20 - p. 165, l. 6.)[102] During the course of her November 2012 testimony, Mann specifically recalled the careful wording of the press release regarding Perricone's activities in light of her belief that USAO personnel other than Perricone and herself were similarly posting online:

> A. -- I kept telling him [USA Letten], "You know there's going to be other bloggers probably. There's going to be other commenters in the office." I mean, I would not ever say there's none. I don't know.
>
> I don't know to this day if there are, I couldn't tell you who they are, but I believe in my heart that there are, you know. Now that I realize that I did it, Sal did it, are we the only two? Probably not. Probably in every U.S. Attorney's Office there's a handful of people commenting. I just believe that now, in retrospect.
>
> So I said, "Jim, we can't ever say he's the only one." So that's why everything was crafted the way it was. That he was -- we stuck to the issue, the lawsuit against Sal. The -- the allegations not in the lawsuit, as you pointed out, but the allegations that were coming to us. Nobody cares whether Sal was commenting. They -- everybody is saying that you-all were all doing this as a team, like making it an official strategy.
>
> That's what we were defending against. That's what we were saying to Washington. This is not part of any official work of the office to have a propaganda campaign or something like that. That's what we were saying. It wasn't that there's nobody else blogging.

---

[102] Regarding the occasion of her August 8, 2012 interview by the same OPR attorneys, Jan Mann recalled, on November 15, 2012:

> A. I thought about telling you, but I kept saying, they're going to ask me if any -- if I ever blogged, and you never did so. . .
>
> Q. Well, we asked you about the events of March 13th, right?
>
> A. I know you did. Look, I'm not -- I'm not disputing your questions. I'm just saying, I had made up my mind that if you asked me if I blogged, I was going to tell you, and if you didn't, I wasn't. That's why I didn't tell you.

(Jan Mann November 15, 2012 Transcript, p. 133, l. 1-12.)

> When we -- if we said that, it was in terms of together, knowledge of Sal, doing it as a team. That's what we were trying to say. That didn't happen. I was completely comfortable with that, because that was the truth.

(Jan Mann November 15, 2012 Transcript, p. 136, l. 21 - p. 138, l. 9.)

Jan Mann further described two meetings USA Letten held regarding the Perricone situation: one with supervisory personnel, and the other with the all the USAO's staff. On both occasions, Jan Mann recalls Letten stating: "if anybody has anything they want to tell me, you know, come see me right after this, because I'm going to, you know, let the public know that this is not some widespread thing, that this was Sal, and we believe it's just Sal." (Jan Mann November 15, 2012 Transcript, p. 154, l. 18-24.) Letten advised the staff that he did not want to be "blindsided" and "embarrassed" in having a press conference making such representations, only to find that they were not true.[103] Mann recalled: "He wasn't ever asking has anybody ever blogged, because we had discussed that. He didn't want to ask people that. Washington didn't want us to ask that. It was all about sitting with

---

[103] On March 21, 2012, about a week after Perricone was unmasked, an unknown Nola.com poster, using the alias "alafbi" – one of the user IDs that was the subject of the DOJ's subpoena (see p. 18 posted the following:

> The only positive is that someone may examine how this USAs office has operated over that past 10 years. It's doubtful that any real investigation will occur. There is no doubt that Sal, Jim Mann and Jim Letten sat round Letten's office laughing at Sal's posts. If ever interviewed, I would suspect that numerous employees would confirm that not only Sal, but others in that office, routinely post to the TP [Times-Picayune].
>
> * * *
>
> There are and have been over the years career prosecutors in that office. Most have represented the taxpayers well. Letten and his thugs have abused the office. The majority of the federal criminal defense attoreys have experience with dealing with the Perricone/Mann/Letten group. This would bbe a good time to document the abuses of authority they have experienced with Letten's group.
> So far, few have chosen to complain due to retaliation against future clients. There has been corruption in New Orleans at every level and this is the best opportunity to examine it at the federal level.

The following day, March 22, 2012, one EDLA AUSA emailed the copied comment to another, stating: "This was posted yesterday by 'alafbi.' Seems to know a bit, yes?"

Sal and commenting or putting our stamp of approval on Sal's comment." (Jan Mann November 15, 2012 Transcript, p. 157, l. 15-21.) Jan Mann further recalled:

> A. He was never trying to say to the press, and he never said to the press, and he was careful not to say to the press in the press release, that nobody else was blogging. Because I kept saying, "You can't say that, Jim." And he was like, "Yeah, I can't say that."
>
> We knew we couldn't say that, because we hadn't even asked anybody else if they blogging, and never have to this day unless he's done it since, you know, November 2nd. We couldn't say that. It was what he wanted to be able to say, which is exactly what he said, which is Sal was the blogger, and nobody else was working with him or knew what he was doing. That was it. Because we knew that we couldn't go broader than that. We couldn't.

(Jan Mann November 15, 2012 Transcript, p. 158, l. 12 - p. 159, l. 4.) Jan Mann further stated, "I've never lied to him. I have never lied to him about anything and I never would. And I tell him everything. I tell him everything." (Jan Mann November 15, 2012 Transcript, p. 126, l. 8-11.)

The Court does not have former USA Letten's description of the events of March 13, 2012 and thereafter. Suffice it to say, if it coincides with his First Assistant's recollection, and concealed knowledge of internet posting extending beyond those who have, at least up to this point, admitted their activities, the defendants' suspicions would seem to have been borne out as truth, regardless of whether the posting activity was purposefully orchestrated or not. In the event that former USA Letten were to dispute Jan Mann's testimony, an evidentiary hearing would certainly be in order, at which credibility could be measured in a pitched internecine battle between various prosecutors, both from EDLA and DOJ, as well as other agency personnel. At present, however, the Court does not believe such an exercise necessary or, for that matter, productive. Rather, the Court leaves to the various bar associations and other attorney regulatory bodies the question of who knew what, when they knew it, and whether they discharged ethical and professional responsibilities to report/disclose

it. For purposes of disposing of the defendants' present motion, it is sufficient for the Court to glean from Jan Mann's sworn testimony: (1) USA Letten was, according to his First Assistant, aware of her posting activity in March 2012; (2) the First Assistant USA suspected and believed the USA reported this up to other supervisors at DOJ; (3) the First Assistant USA "believe(d) in her heart" that other AUSA's were likewise posting comments on Nola.com; and (4) the First Assistant USA believes the USA and DOJ purposefully avoided such a portentous inquisition, instead maintaining the denial of an organized "propaganda campaign."

E. Pre-Trial and Trial Concerns

The Court's record for this matter reflects that concerns about misconduct, and disregard of legal and ethical obligations, surfaced early in the proceeding. Indeed, on more than one occasion, the Court has expressed that it was "disappointed and troubled" by the government's handling of particular matters herein. Now considered together with the aforementioned government misconduct discussed herein, discovered only after the defendants were convicted, these matters form part of the totality of circumstances convincing the Court that the defendants' motion should be granted.

1. <u>The Government's Pre-Trial Timeline</u>

For instance, on April 18, 2011, the Court held an evidentiary hearing on a motion filed by defendants Gisevius and Villavaso seeking to suppress statements purportedly obtained in violation of the Sixth Amendment. (Rec. Doc. 255.) That motion involved, in part, allegedly improper contact between the FBI and defendant Villavaso the very day after Villavaso and his counsel met with DOJ prosecutor Bobbi Bernstein and FBI Special Agent Bill Bezak wherein all agreed that any further contact with Villavaso would be done through counsel. The Court considered this allegation to be a serious one, and *ex proprio motu* ordered the pre-hearing submission of a detailed timeline

from the government reflecting the chronology of material events relative to this issue. Prior to the hearing, in response to the Court's Order, the government submitted a timeline clearly showing that, in fact, on March 25, 2010, Bernstein and Bezak met with Villavaso's counsel (Mr. Kitchens and Mr. Kearney), and that on the very next day, March 26, 2010, Bezak, with Bernstein's approval,[104] "wired" and sent cooperating defendant Robert Barrios (Villavaso's former NOPD partner) to engage in a taped (unbeknownst to Villavaso) conversation. Further, at the April 18, 2011 hearing, Bezak gave sworn testimony confirming that these events indeed did occur as represented on the government's timeline submitted pre-hearing. (See Transcript of April 18, 2011, Testimony of FBI Agent Bezak, pp. 195, l. 21 – p. 198, l. 10.) Under questioning from prosecutor Bernstein, Bezak testified [emphasis added]:

> Q. Did someone on the government team then reach out to Robert Kitchens, whose number was on whatever piece of paper he gave you?
>
> A. Yes.
>
> Q. One of the next steps was somebody from the government team reached out to them, and **we set up an interview that happened later in March**, correct, at the U.S. Attorney's Office?
>
> A. That's correct.
>
> Q. During that conversation, they told us that -- "they" being Mr. Kearney and Mr. Kitchens – they were representing Villavaso, correct?
>
> A. Correct.
>
> Q. We already knew that because that's why they were there meeting with us, right?
>
> A. That's correct.

---

[104] Transcript of April 18, 2011, Testimony of FBI Agent Bezak, p. 193, l. 10-15 – p. 198, l. 4-10.

Q. They told us that if we wanted to interview their client, that we should go through them, correct?

A. Correct.

Q. We agreed to that?

A. Correct.

Q. Have you honored that?

A. Yes.

Q. Have you ever reached out to their client since then without -- have you or as far as you know has anybody from the government team reached out to their client without going through them?

A. No.

(See Transcript of April 18, 2011, Testimony of FBI agent Bezak, pp. 202, l. 8 – p. 203, l. 10.) However, to the contrary, Bezak admitted that defendant Barrios was in fact a cooperating defendant on March 26, 2010, and the FBI had "wired" Barrios before directing him to covertly get a statement from defendant Villavaso not 24 hours later. (Transcript of April 18, 2011, Testimony of FBI agent Bezak, p. 197, l. 8-25.) Bezak expressed no reservations or hesitation about this chronology.

The Court, however, was quite concerned about this turn of events, and, as a result, the Court ordered post-hearing supplemental briefs. Several days later, prosecutor Bernstein advised the Court that, in fact, the timeline (as well as her questioning and Bezak's testimony) was in error, and the taped Barrios-Villavaso conversation actually had occurred approximately ten days *before* the meeting between Villavaso's counsel, Bernstein, and Bezak, which was held on April 6, 2010, rather than March 25, 2010, as originally reported. In its May 20, 2011 Order denying the defendant's motion (Rec. Doc. 396), the Court strongly expressed its dissatisfaction over such an important error:

> Given that the timeline was created only upon the Court's instruction, given well before the April 18th hearing date, counsel knew or should have known that the Court sought confirmation of the timing of relevant events and believed such information to be important. Indeed, the Court devoted a significant amount of preparation time and resources relative to this motion prior to the April 18th hearing, as did the Court and counsel during the course of the hearing, based on the March 25th meeting date reflected in the Government's timeline. Accordingly, given that the actual date of the meeting between the Government and Villavaso's counsel apparently was discernable simply by checking the FBI case agent's and Mr. Kearney's calendars, as well as Ms. Bernstein's archived emails, and the Justice Department's substantial investigatory skill and resources, the Court is disappointed and troubled by the Government's initial sloppiness in preparing a document that the Court ordered in an attempt to facilitate the proper and efficient disposition of the parties' motions.

See Order of May 20, 2011, p. 2, fn. 2. It was then hoped that Bezak's lack of precision and inattention to detail would not foreshadow other difficulties in such a high-stakes prosecution.

2. <u>FBI Agent Bezak's Explanation of the Credibility of NOPD Witnesses</u>

Unfortunately, the Court's concerns regarding FBI Special Agent Bezak continued. Specifically, at trial, when pressed on the witness stand to explain material differences between the testimonies of cooperating defendants (and others who were not charged), particularly the divergence of Michael Lohman's testimony from that of other government witnesses, Bezak paused and offered only a very disconcerting characterization of Lieutenant Lohman's testimony: "It's Mike Lohman's truth." (July 21, 2011 Transcript, p. 21, lines 2-14; see also p. 17, line 20 through p. 18, line 9; p. 23, line 22 through p. 24, line 5; and p. 36, line 13 through p. 37, line 6.) Agent Bezak tried to further explain away the materially inconsistent testimony of his cooperating defendants: When then asked, "How many different truths can there be?", Bezak delicately responded, "Every person has their own memory, recollection, interpretation of events." (p. 21, lines 16-17.) As this Court has previously stated, there cannot be individualized "truths", excused as "interpretations" when the witness' testimony is favorable to the prosecution, but threatened with perjury when the

"interpretation" is not.

3. Perricone's View of the FBI and the Potential Source of Rule 6(e) Leaks

At this juncture it is worth noting that Perricone himself, who spent a career in law enforcement as a NOPD detective, FBI Special Agent, and then Assistant U.S. Attorney, frequently expressed prior critical opinions of the local FBI generally and the shortcomings he perceived. In addition to his remarks referring to FBI Supervisor Charles McGinty as one who may have leaked information (See Part One, Rec. Doc. 1070, p. 16, fn. 20), Perricone occasionally blasted former Special Agent-in-Charge James Bernazzani.[105] He also explained, generally:

> As a former FBI agent let me say one thing that should put this debate to sleep. SAC's [special agents in charge] have nothing to do with the investigation or development of cases. Bernazzani was an agent with very little criminal background, if any. . . .

(campstblue, May 4, 2008, 6:29 p.m.)(Kaufman Memorandum in Support, Rec. Doc. 963-20, Exh. 19, p. 15.)

> As someone who has some acquaintance with this process, I can confident inform you mentally encumbered posters herein that Letten's office is in control of all Federal investigations,as is all US Attorneys in the this country. The "investigative" agencies, which the FBI is part of, must go to the the US Attorney's office for authority to act, especiallly if in impacts ANYTHING which will affect the proscution of an individual. [Reprinted as posted.]

(campstblue, April 25, 2009, 9:50 a.m.)(Kaufman Memorandum in Support, Rec. Doc. 963-20, Exh. 19, p. 101.)

With further regard to the FBI, in his October 10, 2012 testimony, Perricone indicated that he suspected "multiple leakers" of sensitive DOJ information, including grand jury information,

---

[105] campstblue, May 4, 2008, 6:29 p.m. and 6:32 p.m. (Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, pp. 15-15; April 18, 2009, 10:46 p.m. (Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 90; July 18, 2009, 10:59 a.m. and 1:03 p.m. (Kaufman Memorandum in Support, Rec. Doc. 963-20), Exh. 19, p. 142.

sourced at the FBI. (See October 10, 2012 Testimony of Perricone, p. 89, l. 22 – p. 90, l. 1; p. 93, l. 15-20), confirming that he "always suspected that the FBI had loose lips . . ." (See October 10, 2012 Testimony of Perricone, p. 94, l. 7-9.) At times material to the investigation and prosecution of this case, David W. Welker was Special Agent-in-Charge (SAC) of the FBI's New Orleans Division, having been named as such, upon Bernazzani's departure, on June 9, 2008. On April 18, 2009, under an article about Welker, while the government's investigation into this matter was well under way, campstblue/Perricone posted:

> Here's some facts. Folks in the Federal law enforcement community are glad Bernazzani is gone. No more puffing, No more embellishments. No more self-serving BS.
>
> Welker is a breath of fresh air. I only hope he can get his agents to do the work and not just think they are FBI agents.
>
> Some folks thing the FBI is responsible for all the corruption cases. Not exactly. Jim Letten's folks are some of the best in the country. They compliment the agents, but the prosecutors have a firm grip on the laboring oar.
>
> * * *
>
> Contratualations to Mr. Welker. Welcome to New Orleans. But you have your work cut out for you. This is a pit of vipers. The people you think are your friends will bite you on your butt.

(campstblue, April 18, 2009, 10:46 p.m.)(Kaufman Memorandum in Support, Rec. Doc. 963-20, Exh. 19, p. 90.) A few months later, on September 27, 2009, at 10:53 a.m., Perricone/legacyusa further opined:

> IF anyone cares about the truth here and how things really work, here's the inside scoop. The FBI of legend and lore is DEAD. Today, cases are made by the Assistant US Attorneys, who I have met around this country. The ones in VA [Virginia] are an incredible group of men and women dedicated to bring [Congressman William]

Jefferson to justice.

> Here in New Orleans, and I know a few of them here, they are equally dedicated. They take cases from the FBI (chicken poop and make chicken salad) and do remarkable things--within the law. We are lucky we have attorneys who are willing to do this work, especially in New Orleans. I've always say, can you imagine New Orleans without the US Attorney's Office? It would be shocking to have to rely on the NOPD and the Orleans DA's office to bing corruption to justice.
>
> We, the citizens should applaud our local Assistant US Attorneys and understand what they have to do to make a case, especially when their partners [the FBI] may be off doing things which can undermine their hard work.
>
> I am very proud to know some of these men and women...we all should be too. We can only hope the FBI -- nationwide--gets it act together because we need them more now than ever.

(Kaufman Memorandum in Support, Rec. Doc. 963-21, Exh. 20, pp. 13-14.)

4. Testimony of Cooperating Government Witnesses, and the Refusal of Defense Witnesses to Testify

Insofar as the trial itself is concerned, the Court has also, in the past, commented on the highly questionable credibility of certain witnesses who appeared at trial, and why a few did not, as well as seemingly coercive[106] tactics by the government. (See, *e.g.,* Rec. Doc. 593, pp. 6-8 and Rec. Doc. 794, p.17, n.23, pp. 39-52). A cavalier attitude toward the truth cannot be indulged at any juncture or level.

---

[106] The Court also has already commented extensively expressing serious concerns, on the government's use of drastically reduced statutory maximums for cooperating witnesses, versus the use of lengthy 18 U.S.C. § 924(c) mandatory statutory minimum sentences for those who chose to go to trial, as set forth in this Court's Order and Reasons dated April 11, 2012 (Rec. Doc. 794, pp. 38-52). See also United States Sentencing Commission's Report to Congress entitled "Mandatory Minimum Penalties in the Federal Criminal Justice System," dated October 2011, which can be accessed at the Sentencing Commission's website at www.ussc.gov.

(a) Hunter

Officer Michael Hunter pled guilty to conspiracy to obstruct justice and misprision of a felony, exposing him to a maximum sentence of eight years. Disregarding the calculated sentencing guidelines, U.S. District Judge Sarah Vance sentenced Hunter to the full eight years in prison. At the time he was sentenced, Chief Judge Vance stated that she found that Hunter's cooperation "was the product of cold calculation", and that his trial testimony was "inconsistent" and "self-serving", particularly when compared to the Factual Basis he signed in connection with his guilty plea and the video shown at trial. Judge Vance expressly questioned how much Hunter truly accepted responsibility for his actions, and pointed out that Hunter got the benefit of his bargain up front under what she described as "a highly generous plea agreement." (See *United States v. Hunter,* No. 10-86.)

This Court also evaluated Hunter's testimony when considering earlier motions for judgment of aquittal and for new trial (Rec. Doc. 575, 576, 577, 578, and 579.) Those motions were directed, in part, to Count X, in which the government alleged that defendant Bowen "kicked and stomped Ronald Madison while Madison was on the ground, alive but mortally wounded . . ." The charge set forth in Count X was directed only at defendant Bowen, and was supported only by Hunter's uncorroborated testimony. (See Rec. Doc. 593, "Order and Reasons" wherein the Court discusses Hunter's testimony.) In opposing the earlier defense post trial motions, the government abandoned Count X, failing to even mention it in its 28-page memorandum. In granting Bowen's motion directed to Count X, the Court noted that Hunter's credibility was so grievously called into question at trial that the Court had taken the unprecedented (for the undersigned) step of ordering the production of FBI Agent Bezak's handwritten notes of interviews he conducted with Hunter. Hunter's trial testimony was significantly and quite materially at odds with Agent Bezak's, and

directly contradicted many of the written Form 302 notes expressly (and contemporaneously) made by Agent Bezak while interviewing Hunter. Indeed, Hunter's repeated departures from these previous statements given by him to the FBI made his testimony practically useless in the government's efforts to meet its burden of proof, as more extensively explained in the Court's October 20, 2011 ruling (Rec. Doc. 593).

(b) Hills

Questions and uncertainty likewise surround the testimony of another cooperating witness who entered a plea, Officer Ignatius Hills. Hills rode in the back of the Budget rental truck from the Crystal Palace to the Danziger Bridge, but he did not exit the truck with the other officers. From the back of the truck, Hills saw 14-year-old Leonard Bartholomew, III, running down the bridge, away from Hills. Hills' response was to fire his side arm twice at the fleeing teenager, albeit missing both times. As part of his plea agreement with the government, Hills pled guilty to obstruction of justice and misprision of a felony, for a statutory maximum exposure of eight years in prison, but received a sentence of only six and a half years imprisonment, which was the top of the sentencing guideline range applicable to the charged offenses. (See *United States v. Hills,* No. 10-142.) He had allegedly disavowed his guilt when speaking to his supervisor (NOPD Lieutenant Troy Savage) at the time of his resignation:

> Q. [Bernstein, cross-examining]: You said during this conversation with Officer Hills [when Hills advised of his resignation], he rattled off a litany of charges that he was pleading guilty to?
>
> A. Yeah. It was -- I don't remember that exact charges. I want to say misprision of a felony was one. This is all -- I'm recalling from memory, ma'am.
>
> Q. And you asked him whether he was, in fact, guilty; is that right?

A. Yes. I believe the exact quote I used was, "Did you do it?" And his response was, "No, I did not. It was the best deal I could get. I have to take it."

(See July 28, 2011 Testimony of NOPD Lieutenant Troy Savage, Rec. Doc. 691, at p. 242, l. 22 – p. 243, l. 6.)

(c) Barrios

Officer Barrios was charged with and pled guilty to obstruction of justice, exposing him to a maximum five year sentence in exchange for his cooperation. (See *United States v. Barrios,* No. 10-103.) With the other officers, Barrios exited the Budget truck and was present and armed during the shooting. Yet the government did not call him as a witness at trial in its case-in-chief. According to Agent Bezak, Barrios initially volunteered that he had fired his weapon (a shotgun) which apparently struck victim James Brissette, who (according to Barrios) spun around when hit. Upon learning of the federal investigation, Barrios conferred with Mr. Glen Madison, an NOPD ballistics officer, to learn that ammunition from a shotgun blast could not be traced to a particular shotgun, whereupon he then denied he fired his weapon at all. At trial, testimony was elicited that Rakesha Barrios, the spouse of cooperating defendant Robert Barrios, initially claimed that her husband had been forced to admit guilt and to cooperate despite the fact that he was innocent.[107] (See July 25, 2011 testimony of Robert Barrios, Rec. Doc. 676, at pp.157-165). Before the jury, Robert Barrios denied such was the case, however, he was the only cooperating defendant with a plea agreement who, conspicuously, was not called as a witness by the government. (*Id.* at pp. 164-65, 270-71, 275-76; July 27, 2011 testimony of Robert Barrios, Rec. Doc. 683, at pp.25-30, 48-49).

---

[107] Rakesha Barrios complained to USA Letten, which was overheard by Agent Bezak, who neither investigated further nor referred the complaint to "public integrity." (July 21, 2011 Testimony of William Bezak, p. 246, l. 1-22.)

(d) Lehrmann

Just as disturbing was the DOJ's treatment of cooperating witness Jeffrey Lehrmann, who pled guilty to misprision of a felony, and received the maximum three year sentence. (See *United States v. Lehrmann*, No. 10-51.) On July 29, 2009, Lehrmann provided false testimony to the federal grand jury. (See *id.*, "Factual Basis," Rec. Doc. 22, p. 12.) At that time or shortly thereafter, the government determined that Lehrmann lied, and he was brought back before the grand jury on February 3, 2010, this time as a cooperating witness/defendant, plea deal in hand.

At trial in this matter, Lehrmann testified that he participated in the creation of fictitious names (suggesting the name "Lakeisha Smith" out of thin air, when in need of a witness), falsified evidence, and other criminal acts while working side-by-side with defendant Kaufman, in an effort to justify the events occurring on the Danziger Bridge, on September 4, 2005, and participated in the filing of false charges thereafter against Lance Madison. For Lehrmann's cooperation, the government charged, and Lehrmann pled guilty, only to the grossly lesser crime of misprision of a felony, as opposed to the multiple charges defendant Kaufman faced. Further, in September 2006 (a full year after the shootings), Lehrmann was hired by DOJ with employment in *federal* law enforcement, as an agent with Immigrations and Customs Enforcement ("ICE"), where he worked from approximately September 2006 until June 2010,[108] although he pled guilty on March 11, 2010, and had reached an agreement to cooperate and enter the plea some time before. However, within only two months of Lehrmann becoming employed by the federal government in federal law enforcement, the DOJ, in November 2006, began monitoring the State of Louisiana's Danziger

---

[108] At the time of his cooperation and guilty plea, Lehrmann was paid a salary of $2,275.00 every two weeks. (See *United States v. Lehrmann,* No. 10-51, Pre-Sentence Report, p. 18.)

Bridge prosecution. ((See Declaration of Karla Dobinski, Rec. Doc. 277-1, p. 5, ¶ 21, *et seq.*) "Active federal involvement in the investigation" began in September 2008 (*Id.*, at p. 6, ¶ 31)). It was with some astonishment that the Court learned at trial that Lehrmann, having falsified official police records and attempted to frame an innocent man, matriculated into federal law enforcement, seemingly the worst place to put a man guilty of such transgressions so offensive to the administration of justice. Moreover, he stayed there on the payroll for years until three months *after* his guilty plea, and at least several months after the government knew of his admitted criminal acts.....and likely a much longer period since the time he was deemed a serious target of this federal investigation beginning in 2008.

(e) <u>Haynes, Tollefson, and Gore</u>

In addition, the Court notes at least one instance of shockingly coercive tactics employed against one potential witness (NOPD Officer Heather Gore) by FBI Special Agent William Bezak.[109] (See, *e.g.*, July 21, 2011 testimony of William Bezak, Rec. Doc. 674, at pp. 52-57.) Further, at least three persons called by Defendants as witnesses at trial refused to appear under threats from DOJ that they would be prosecuted for perjury as a result of their earlier grand jury testimony, and thus asserted their Fifth Amendment privilege so as to deprive Defendants of live witnesses. On July 27, 2011, as the defense commenced presenting its witnesses and evidence, the DOJ, through trial attorney Bernstein, advised the Court that two of the three witnesses "have both been informed that they are targets." (Sealed July 27, 2011 Transcript, p. 5, l. 24-25.) With regard to one of these witnesses, Bernstein advised that the indictment was ready to be presented to the grand jury, but was

---

[109] On cross, Bezak stated that he did not believe Officer Gore's testimony. He first sought to visit her at her home, but later found her at the NOPD 2nd District station. He mentioned to her that she had "a nice house," inquired about her kids (triplet girls), and advised she would be deprived of them as a result of her lying. (See July 21, 2011 Testimony of William Bezak, Rec. Doc. 673, p. 246, l. 23 – p. 247, l. 20.) Nonetheless, as of today, she has never been charged at all, to the best of the undersigned's knowledge.

held back so as to avoid pretrial publicity. As to the third, he stood orally accused of lying to a state grand jury, and thus declined to testify for the defendants at this trial. Because of this, the Court allowed Defendants to present such testimony via reading a transcript; nonetheless, as is well-established, live testimony before a jury is always preferable and more convincing than reading from a cold transcript, as was done at this trial for these three witnesses. Still, to the best of the Court's information, as of the date of this Order some twenty-six months later, not one of these three defense witnesses has been charged with any crime whatsoever.

VII. ANALYSIS

A. Timeliness

As previously stated, the government, in its initial opposition to Defendants' motion for new trial, contends the motion is untimely because the posts of Perricone "are not newly discovered." (Rec. Doc. 1007, p. 6.) In particular, the government argues that because the articles were published well before the Rule 33 deadline for any motion not based on newly discovered evidence,[110] and the comments under such articles were also posted long ago, defendants' motion is not timely. The government asserts that only the source of the posts recently became known, which, according to it, does not constitute "newly discovered evidence" for purposes of Rule 33. (Rec. Doc. 1007, p. 8.)

The Court rejects this contention, for seemingly obvious reasons. First, some of the evidence supporting the defendants' argument is clearly new, was submitted ex parte by Mr. Horn under the Court's Order, and is being made known to defense counsel for the first time in this Order. See, for example, the entire discussion regarding "Dipsos" herein. Secondly, the material fact about the Perricone posts (and any others by DOJ employees) is *who* made the posts, which was not revealed

[110] See Rule 33(b)(2) (within 14 days after verdict).

until many months post trial.[111] Furthermore, to argue that serious violations of the Code of Federal Regulations, the DOJ's U.S. Attorneys Manual, and various other ethical rules designed to ensure the fundamental fairness and integrity of liberty depriving criminal proceedings, can be committed in anonymity and thus concealed, without consequences, based upon timeliness, merely invites more of such conduct. Similarly, the government's position[112] that because the "anonymous" posts were available to defendants should have alerted them to the government's improper activities, is nonsensical, particularly since those DOJ employees who posted did so under pseudonyms chosen specifically for the very purpose of avoiding detection.

Additionally, *United States v. Ugalde,* 861 F.2d 802 (5th Cir. 1988), a case cited by the government, is easily distinguishable. In *Ugalde,* the defendant observed all the grounds for his motion during the trial itself, unlike in this case, wherein the prosecutorial misconduct occurred surreptitiously and covertly, and with every intent for it to remain so, as the poster's "little secret" or "little downtime thing." Thus, the Court finds that the identity of the commentators, revealed to be DOJ attorneys, constitutes "newly discovered evidence" for purposes of Rule 33(b)(1).

Moreover, even were the Court willing to consider this evidence as not "newly discovered", the government's timeliness argument would still fail, because the government employees involved have taken great pains to conceal their activities to prevent its discovery. In assuming the sobriquets

---

[111] On March 15, 2012, it was first publicly admitted that Perricone was, in fact, posting as "Henry L. Mencken1951." Some of the other user IDs he used in the past were not admitted until the October 10, 2012 status conference at which time Perricone was questioned about them. As previously discussed, moreover, even today other user IDs of both Perricone and Jan Mann cannot be recalled.

[112] Government's Response to Defendants' Motion for New Trial, Rec. Doc. 1007, pp. 10 & 15.

they did as user IDs, Perricone,[113] Mann,[114] and Dobinski,[115] all realized the impropriety of posting online under their real names. None thought they would ever be discovered, and all knew they otherwise should not be conducting such prejudicial activity. Further, even after Perricone's activities had been discovered, former First AUSA Jan Mann became personally involved in purportedly protecting the government's interests by responding to the Court's inquiries on June 13, 2012, and thereafter, some of which conduct is recounted in Part One (Order and Reasons dated November 26, 2012, Rec. Doc. 1070). Significantly, despite her awareness of the Court's concerns about Perricone's postings, she did not publicly admit to her own postings until November 2012.

---

[113] Perricone Transcript, October 10, 2012, p. 18, l. 21-25:

> The Court: Did you think when you joined NOLA.com, under whatever name you initially used, that it was okay if people knew that an Assistant U.S. Attorney, particularly senior litigation counsel, was a poster?
>
> The Witness: No, no, negative.

[114] Jan Mann Transcript, November 15, 2012, p. 93: "I couldn't say that [regarding her Nola.com posts] with my name and my title. But, again, I thought I had anonymity."; p. 136: "I never thought it was going to get out. I never thought about it getting out in public."; and p. 284:

> Q. Sitting at the computer and starting to type, why did you decide not to use your own name?
>
> A. Because I happen to have a cloak of authority. If I used my own name, I mean, my name is not that well-known, but it's known well enough that people might know that it was an assistant U.S. attorney saying it. So I couldn't -- I couldn't go there. I knew that.
>
> * * *
>
> Q. Is it fair to say that you chose to post anonymously because you thought you could say things anonymously that you couldn't say using your own name?
>
> A. Definitely.

[115] Dobinski's posting activity was disclosed in December 2012, at which time she described herself as being "chagrined" over the revelation.

Likewise, it was not until May 15, 2013 – more than a year after Perricone admitted to at least some of his postings and OPR began its apparently ongoing investigation – that the Court was advised that it was Civil Rights Division trial attorney and "taint team" leader, Karla Dobinski, who posted about this case, during the course of Defendants' trial, as "Dipsos," not just any DOJ "employee." Surprisingly, the first two Horn Reports, dated January 25, 2013 and March 29, 2013, essentially gloss over the unidentified "employee from the Civil Rights Division," minimizing her involvement as posting a mere six comments, described as not being "inflammatory, critical or prejudicial," and as such "of a different category than those posted by Mr. Perricone and Ms. Mann." Thus, according to the government, Dobinski's postings "do not constitute a basis to support Defendants' Motion for New Trial." (See Horn Report dated January 25, 2013, pp. 20-21.) Though it may have been the government's hope that the Court would accept this assertion and simply "move on," such advocacy surely warranted further scrutiny.[116] Indeed, having become suspicious that the Horn Reports might have been edited by a supervisor so as to coyly provide less information, rather than more, it took the undersigned two rounds of response questioning to finally obtain the important true identity of "Dipsos."[117]

In short, the government's argument (Rec. Doc. 1007) that "the defendants find themselves in a Catch-22 created by the Rule 33 deadlines" is but an expedient attempt to exploit and benefit

---

[116] To be sure, Mr. Horn and Ms. Alexander might well have been unaware of Karla Dobinski's pre-trial role in this case, but other DOJ personnel who viewed the drafts of the Horn Reports prior to submission, including the prosecution team, knew exactly who she is and her importance in this case. Lest there be any doubt whatsoever, the Court gives the benefit of that doubt to Mr. Horn and Ms. Alexander, in their attempt to be accurate and complete, based on their specific limited assignment and what they knew (and didn't know) of the pre-trial history of this case.

[117] It also took a second round of response questioning for the Court to obtain the specific identity of DOJ agency employee "A", who is not discussed further in this Order.

from certain government counsel's own lack of transparency and deception. Thus, the Court cannot deprive, on grounds of untimeliness, the defendants an opportunity to argue this grievance simply because Perricone, Jan Mann, Dobinski, and possibly others "kept mum" long enough for the defendants to lose their right to bring before the Court such a gravely serious matter impacting their convictions. Accordingly, the Court finds the defendants' motion to be timely.

B. Due Process

In every criminal trial, a defendant is entitled to a fair trial before an impartial jury, at which time the government must prove his or her guilt, for each count charged, with admissible evidence, and beyond a reasonable doubt. This sacrosanct principle ensures that no defendant is deprived of his or her liberty as a result of an unfair, biased, or slanted proceeding skewed to achieve a conviction, as opposed to finding the truth with requisite certainty. In this instance, it is difficult to conceive, much less accept, that this time-honored constitutional procedure successfully withstood an attack of the ferocity seen here, a campaign extending back to the commencement of the DOJ's active investigation of this case in 2008, and continuing through the acceptance of related plea agreements, the indictment, and the trial itself. To conclude that such misconduct was only a little unfair, but not enough to be harmful, turns the fundamental principle of due process on its head.

The government attempts to minimize the early disclosure of the Lohman plea by stating that "the public's exposure to this information was less than one day before the information was properly to be publicized." The internal emails[118] of the prosecution, however, clearly recognize its undeniable impropriety. Although the Court still does not know with certainty the identity of the source of the leak to the AP and the Times-Picayune (and both news agencies steadfastly refuse to

---

[118] See Part One, Rec. Doc. 1070, p. 7, particularly Footnote 9.

disclose this information), Perricone's testimony sheds some light on who it may be. Further, the affidavits gathered by Mr. Horn under *Lance* are, of course, wholly contingent on the credibility of those who signed them.

With respect to Perricone's postings, which are the only ones discussed in the government's June 5, 2012 memorandum, the government endeavors to safely isolate the "prosecution team" (much like the attempts to contain and limit Karla Dobinski's role in the Horn Reports), stating: "Perhaps recognizing that they have no evidence to support their allegations of misconduct by members of the prosecution team, the defendants attempt to cloak the entire Department of Justice with any alleged misconduct attributed to former-AUSA Perricone." (Rec. Doc. 1007, p. 27.) The fallacy of this argument should be obvious. Of course, the "prosecution team" IS the DOJ – it IS "the government" – in this case, as it repeatedly referenced during this trial. The "prosecution team" is not some distant independent satellite of DOJ. The government further describes Perricone's postings (as Henry L. Mencken1951, or any other pseudonym) as

> not known or suspected by anyone associated with the case (including the prosecution team, the Court, the jurors, or the defense attorneys) to be a government employee, let alone a supervisor of the trial team. Additionally, Perricone's comments were neither front-page headlines nor breaking news stories; rather, they were remarkably low-profile musings of an unrecognizable citizen not known to be associated with the government, commenting beneath articles that related directly to the ongoing trial and were therefore expressly off limits to the jurors.

(Rec. Doc. 1007, pp. 28-29.) Thus, the government sought to minimize Perricone's activities, without commenting whatsoever[119] on his and First AUSA Jan Mann's, and Karla Dobinski's, and perhaps others' earlier pre-trial posts, or violations of 28 C.F.R. § 50.2, Chapter 1-7.000 of the

---

[119] The government might contend it was unaware of other posting activity when it filed its opposition memorandum. The sworn testimony of former First AUSA Jan Mann suggests the contrary. Regardless, the Court's decision today would remain unchanged.

United States Attorney's Manual, Local Criminal Rule 53 of this Court, the Louisiana Rules of Professional Conduct, and Rule 8.4 of the District of Columbia Rules of Professional Conduct.[120]

---

[120] The government will likely posit that the appropriate remedy for the conduct reflected in Part One and this Order is attorney discipline, both via the relevant bar associations and the DOJ's internal disciplinary arm, OPR. While this might be a logical place to start, having a division of the DOJ, such as OPR, investigate members of the DOJ wherein the validity of a DOJ conviction may be at risk clearly demonstrates an obvious conflict of interest. In other words, because the DOJ has argued vigorously for the conviction of the defendants, has zealously prosecuted them, and seeks to maintain their convictions, it is unlikely to view *any* transgression by government counsel as impacting, in even any small way, the validity of these convictions. Relegating prosecutorial misconduct to attorney disciplinary bodies is also insufficient in this case for some very specific reasons: (1) as late as April 10, 2013, in an email letter attributed to Perricone, he still reiterates, "I did nothing wrong. Yes I commented on a myriad of things, including the corrupt state of affairs of this metropolitan region." Despite his sensitive former position as AUSA Senior Litigation Counsel, Perricone maintained: "The right to comment anonymously and the right to allow people to comment anonymously are consubstantial constitutional rights, which are enshrined in our basic law." See email communication from Salvador Perricone, Wednesday, April 10, 2013, at 10:37 a.m., to Sandy Rosenthal, published on May 21, 2013, by reporter Lee Zurik, WVUE TV, New Orleans, Louisiana. This is consistent with Perricone's statement in the article "Sal Perricone's Next Chapter", which the Court discussed in Part One. (2) Former First AUSA Jan Mann adopted a similar pertinacious position, further developing a theory that she had dual capacities, a "personal" capacity which permitted her to comment online at will, and an "official" capacity which did not. (See Jan Mann Transcript, November 15, 2012, pp. 37, 41, 42, 60-61, 107.) Even after Perricone's "little secret" became public in March 2012, Jan Mann did not flinch or become uncomfortable when considering the consequences of her "downtime" postings:

> Q. [question propounded by one of two OPR attorneys] Were you concerned that there was an investigation going on of you?
>
> A. No. Because I really didn't think it was even something I had to report to you. I hadn't been alleged to have done anything wrong. I didn't think I was under any obligation to -- to of- -- to volunteer it. But that's not who I am. I should have told you.
>
> But I wasn't really too worried about adverse consequences, 'cause I sort of feel like I can retire. That -- that's like a load. You know, I don't know if either of y'all can retire, but when you get there, it's like there's really kind of not anything they can do to you, 'cause I can at least retire. I don't want to retire with a bad record or anything because I never had did anything wrong.
>
> But -- so it's not like I'm flaunting it, but I wasn't worried about the ad- -- I really wasn't. I really wasn't. Because I said, I'll retire.

(Jan Mann Transcript, November 15, 2012, p. 134, l. 17 – p. 135, l. 12.) And that is exactly what she did. With such recusant attitudes, Perricone and Jan Mann both undercut the notion that disciplinary actions, reprimands, or even loss of their important positions at EDLA DOJ are any incentive for others to conform future conduct to the Code of Federal Regulations, Local Rules, and other guidelines set forth herein. In any event, for purposes of the instant motion, the Court's focus is on ensuring the defendants receive a fair trial, as required by the United States Constitution, not merely that proper attorney discipline is rendered.

As should be clear by now, these arguments quickly fade and wither in light of the facts learned by this Court since the government's opposition memorandum was filed over a year ago.

The government additionally asserts that the defendants' motion "lacks any substantive merit" (Rec. Doc. 1007, p. 10), claiming that no juror or potential juror was actually prejudiced by any pretrial publicity, while at the same time recognizing, as it must that the law provides exceptions to the requirement of such a showing of prejudice.[121] (Rec. Doc. 1007, p. 12.) As previously discussed (See pp. 43-44), one such exception is where the integrity of the proceeding is so infected with a pattern of deliberate and especially egregious prosecutorial misconduct, such that due process may be denied by the government's failure to obey its own regulations, and/or where a miscarriage of justice occurs.

Under circumstances as extraordinary and offensive as these, jurisprudence indicates that a showing of prejudice is not necessary. *Narciso,* 446 F.Supp. at 306; *Stone v. United States,* 113 F.2d 70, 77 (6th Cir. 1940). The Court finds that this case fits squarely within Footnote 9 of the U.S. Supreme Court's opinion in *Brecht v. Abrahamson, supra.* Moreover, as was the case in *Narciso, supra,* at 320, even an inquiry of the jury[122] and witnesses (both those who testified and those who might have but did not) can hardly cure such a grave appearance of unfairness nor insure complete candor, even if these comments were "not actually conveyed to the jury." See also *Narciso, supra,* at 306, and 320; *Stone,* 113 F.2d at 77.

---

[121] In its opposition (Rec. Doc. 1007, p. 11), the government recognized (and argued distinguishment of) the Fifth Circuit cases of *United States v. Capo*, 595 F.2d 1086 (5th Cir. 1979), and *United States v. Chagra*, 669 F.2d 241 (5th Cir. 1982), *cert. denied*, 459 U.S. 846 (1982), overruled on other grounds, *Garnett v. United States*, 471 U.S. 773 (1985). Considering the revelations learned since the June 13, 2012 hearing, the Court finds that both cases provide useful guidance for the disposition of this motion.

[122] See discussion of the jury, pp. 117 through 119.

C. Prejudice

Even were a showing of actual prejudice required here, this record is sufficient in that regard as well.

a. Government Pressure

First of all, both Perricone and Dobinski viewed posting of highly-opinionated comments as a "public service." That is, the comments Perricone provided,[123] and those Dobinski encouraged and praised, were viewed, at least by them, as accomplishing a larger public goal. Moreover, though the Court initially was unimpressed with the defendants' citation of FBI Agent Bezak's frank trial testimony regarding DOJ's use of the media, it now seems, at a minimum, rather unfortunate and coincidental:

Q. All right. So I want to focus you back. Now all of a sudden you have a splash of media when you do this search. How did you try to deal with that media for purposes of your investigation, or how did you try to deal with that fact?

A. Well, I hoped that it would create more pressure on the subjects of the investigation, that they would know that we're still investigating the case and that we're making progress in the case.

Q. And what do you mean by pressure? Why is pressure a good thing?

A. Pressure is a good thing because, in my experience, to flip a subject, to get a subject to admit that they've committed a crime, it's not like the movies where you go into a room and three hours later you come out with a confession. In my experience, the only time I've been able to get somebody to admit what they've done is to back them into a corner; to have, you know, a case that

---

[123] In particular, the Court recalls Perricone's posts directed to NOPD officers on February 23, 2010, calling on them to seek "guilty" pleas and forego their right to trial: ("Despite defense attorney protestations to the contrary, It would be prudent for those involve to consider the track record of the US Attorney's Office. Letten's people are not to be trifled with." and "Archie, your time is up."); May 20, 2010 ("The Feds never forget.....this officer [Hills] is doing the right thing....wish the others would, then IT would be over."); and August 13, 2010 ("These cops are being led down the road to perdition by their attorney. They need to get competent INDEPENDENT representation and stop dining on a diet of cop-cooked soup of self-justification served to them on paper plates by attorney who just wants to mug for the cameras. I hope the judge can keep this under control. Something's not right here—can't put my finger on it --- but somethings not right.").

is so strong that they have nowhere to go except to admit the truth. And that usually occurs, and in this case it did occur, when their attorney is present with them.

(See Transcript of April 18, 2011, Testimony of FBI Agent Bezak, p. 75, l. 5-16; see also Rec. Doc. 1019-1, p. 6.) While this testimony regarding the "pressure" the government brought to bear through intentional and purposeful use of the media might not have extended, in Bezak's mind, to anonymous online commenting, it surely depicts the government's purposeful cultivation of media as a tool to ultimately obtain favorable testimony and cooperation in exchange for convictions on far lesser charges.

Everyone should recognize, as did First AUSA Jan Mann (Jan Mann November 15, 2012 Transcript, p. 138, l. 1), that a "propaganda campaign" by the USAO or the DOJ would be improper, and the USAO/DOJ proceeded to deny (and continues to deny) that such an effort existed. Prejudice, however, can occur in many forms, and can now undermine judicial proceedings without being as overt as that described in existing case law. Whether coordinated as a "propaganda campaign," or simply the culmination of independent, but nonetheless quite improper, posting activities by government employees, a prejudicial, poisonous atmosphere can be created sufficient to impair the fundamental constitutional right to a fair trial by an impartial jury. In this case, the Court has already learned of more online posters employed, or encouraged by, USAO and DOJ attorneys, all of whom rain vociferous condemnation on the defendants, their employer NOPD, their attorneys, their defenses, their witnesses, their evidence, and the testimony of the one defendant who took the stand. Through the cited provision of the Code of Federal Regulations, as well as the U.S. Attorneys Manual, the government clearly recognizes that the use of the media, in ways that might very well prejudice defendants, and create an overriding tenor of guilt in the community long before trial, must

be avoided. The known postings of Perricone, in particular, clearly establish this general criteria of creating such prejudice.

b. Influence on Jurors

Though the Court has found that, under these egregious circumstances, prejudice need not be shown, the undersigned reviewed the pre-trial questionnaires filled out by the twelve jurors who deliberated in this case.[124] In the months before trial in 2011, recognizing that Nola.com was a rather popular source of local news and information, the Court, by agreement of all counsel, expressly and separately included a written question regarding it (Question 87c) on the questionnaire. Specifically, when asked whether they visited the Nola.com website, seven of the twelve responded in the affirmative; three of those seven also indicated that they did not receive a hard copy of a newspaper. The Court then not knowing and never suspecting posting activity by DOJ attorneys and employees, AUSA's, or any other counsel, no further questions were asked of those who answered "Yes." Had counsel and the Court been aware of such improper activity, jurors surely would have been subject to further inquisitive voir dire, particularly about Perricone's long-time campaign of negative NOPD posts, including those discussing the defendants and the defense of this case. But, because the posting of prejudicial comments was kept a "secret," neither trial counsel nor the Court had the inclination or need to explore it further, and thus, in hindsight, the voir dire process, given these unique circumstances, was flawed and insufficient.

Also pertinent are Questions 49, 54, 77(f) and 77(h), which specifically relate to impressions

---

[124] The questionnaires were completed by all prospective jurors a few weeks prior to jury selection in this matter.

of NOPD.[125] Although the Court did not discern a material difference between the responses of the seven jurors who looked at the Nola.com website, versus those who did not, on these particularly relevant questions, there was one noticeable disparity of arguable significance. That is, in responding to Question 77(h) ("NOPD officers tend to be honest."), the seven Nola.com readers responded [on a scale of 1 ("disagree strongly") to 7 ("agree strongly")] with four 4's, one 2, and one 6, for an average of 4.[126] The jurors who indicated that they do not look at Nola.com responded with two 6's, one 2, one 5, and one 7, for an average of 5.2. Though the many answers to the questionnaires could be interpreted in different ways, these responses to this particular question seem to demonstrate that those jurors who **did not** view the Nola.com website tended to view NOPD officers as being more honest than the seven who **did** view the website; to state it conversely, those who read Nola.com were more likely to view NOPD officers as dishonest.

Of course, there are undoubtedly many reasons why each juror thought the way he/she did, and on which he/she based each opinion. More importantly, were an evidentiary hearing held on this issue, it is highly unlikely that any juror, questioned years later, could recall, with any reliability or certainty, which news articles he/she viewed on Nola.com, and which comments he/she read, since Perricone started posting in late 2007/early 2008. Moreover, even today, neither the Court, the government, nor defense counsel know the full extent of posts by AUSA's, other DOJ employees, and/or other government employees to this day, since the previous Perricone and Jan Mann user IDs

---

[125] With regard to answers provided to questions about the NOPD on the questionnaire, there are a few inconsistencies. For instance, on a scale of 1 to 7 (1 is "disagree strongly" and 7 is "agree strongly"), one juror answered with a numeric "2" ranking to both statements 77(f) ("NOPD officers tend to be corrupt.") and 77(h) ("NOPD officers tend to be honest.").

[126] One juror answered "don't know," and circled "4."

cannot be recalled or recovered, the DOJ has decided not to pursue a subpoena for the ten other user IDs sought earlier this year, and there may well be others still unknown who posted comments. (See Jan Mann November 15, 2012 Transcript, p. 138, l. 23-24: "There's going to be other commenters in the office.")

Finally, it might not be discernable whether a juror's opinion about NOPD officers' honesty is a result of conversation/influence of other family members, friends, and/or coworkers who were unknowingly impacted by the surreptitious "public service" of Nola.com posting by government personnel. Thus, the contamination of the illicit prejudicial comments over the preceding years is ineradicable, like a bell which cannot be unrung. Suffice it to say, however, the only dependable answer in the questionnaire, not subject to interpretation and argument based upon analysis of trends, or later vague recollections, is that seven jurors indicated before trial that they visited and viewed the Nola.com website with varying frequencies. And, of course, none of those jurors were immune to the extensive pre-trial posting activity of Perricone (and perhaps others) in the years leading up to trial. Rather, during this multi-week trial, the jury was not sequestered, and jurors resumed normal activities on the days they were not in trial. Even if they followed the Court's instructions precisely, they still would have been exposed to the general zeitgeist of the community, which was being purposefully influenced by Perricone and, later during trial, Dobinski. Under these circumstances, the Court cannot afford the government a presumption of innocuous benignity.

c. Potential Influence on Witnesses

In addition, as the Court has already pointed out, Officer Hills (and perhaps others, like Officer Barrios) denied his guilt, but took "the best deal I could get. I have to take it." On the flipside, attorneys for three defense-subpoenaed witnesses reported to the Court during the trial that

their respective clients declined to testify, on Constitutional grounds, because they had been threatened with federal or state prosecution based upon prior conduct. (See Part One, Rec. Doc. 1070, p. 45, fn. 35.) Prosecutor Bernstein herself advised the Court that two of these three witnesses "have been informed that they are targets", and that DOJ was "ready to present the indictment and the reason we held back was specifically in deference to this Court's Order and to be sure not to generate publicity." (Sealed Transcript of Bench Conference, July 27, 2011, p. 6.) Then USA Letten similarly stated: "There are legitimate pending matters against them that we could, in fact, press." (Sealed Transcript of Bench Conference, July 27, 2011, p. 6.) With regard to the third witness who had faced state charges, moreover, USA Letten reportedly advised Orleans Parish District Attorney Leon Cannizaro that, "we have no intention of immunizing these individuals . . ." (Sealed Transcript of Bench Conference, July 27, 2011, p. 5.) Though transcripts of these witnesses' grand jury testimony were read to the jury by a paralegal or law clerk, the defendants were deprived of live testimony subject to cross examination, which is always significantly better from the jury's perspective, though the Court makes no evaluation (and simply cannot make such an evaluation) of whether such testimony would have ultimately impacted the verdict herein.

D. Evidentiary Hearing

The defendants originally requested an evidentiary hearing. (Rec. Doc. 963-1, pp. 18-20.) In cases alleging prosecutorial misconduct, courts should hold an evidentiary hearing when the motion, as is this one, is based on evidence outside the trial record. *Richardson v. United States,* 360 F.2d 366, 369 (5th Cir. 1966) (remanding for the district court to conduct a hearing on potential witness misconduct); *United States v. Chagra,* 735 F.2d 870, 874 (5th Cir. 1984) ("the alleged governmental misconduct could not be shown except by an evidentiary hearing, because it was (as

alleged) extraneous to and outside of the trial record.") In this case, however, the Court believes it has obtained sufficient information from the government via the Horn Reports to meet the threshold for deciding the defendants' motion, without the need to pursue an evidentiary hearing.

Initially skeptical about the need for such a hearing, the Court ordered further investigation and information from the government, and also ordered the defendants to submit ex parte a specific description and plan for the evidentiary hearing they sought. (Rec. Doc. 1070, pp. 6-7.) In the intervening 15 months between that Order (June 13, 2012) and today, the Court has seen the initial suspicions of government misconduct mushroom into more than it could possibly have imagined in June 2012. Indeed, developments in the interim seem to show this misconduct has metastasized.

The undisputed facts as set forth in Part One and in this Order are sufficient for the Court to rule as it does today, although they may just scratch the surface. In fact, a reader of both Orders will note quite conspicuously that pivotal questions abound and remain unanswered.[127] In addition, one can only wonder what other unanticipated revelations might be in store along the lines of those

---

[127] As Henry L. Mencken1951, Perricone made two very correct statements: "There are NO secrets in New Orleans....." (October 12, 2011, 7:24 a.m.)(Kaufman Memorandum in Support, Rec. Doc. 963-23), Exh. 22, p. 38, and "Perhaps the truth will surface. God knows, we need more truth in this city." (August 27, 2011, 10:16 a.m.)(Kaufman Memorandum in Support, Rec. Doc. 963-23), Exh. 22, p. 10. Yet the Court, even with the capable assistance of Mr. Horn and Ms. Alexander, remains unaware of: the identity of the source of the "leak" of the Lohman plea, in possible violation of Rule 6(e); the earlier user IDs of Perricone and Jan Mann, and how many other user IDs might be involved; the identities of ten of the eleven user IDs that were the subject of the DOJ administrative subpoena (see p. 17); the information which could have been obtained from a forensic recovery of computer data for years 2010 and 2011 (prior to December 19, 2011) by the DOJ; whether USA Letten agrees with his former First Assistant that she disclosed her online posting activity in March 2012, and whether that information was conveyed to others in DOJ over six months prior to its public disclosure in early November 2012; whether Karla Dobinski's posting was known to others at DOJ; whether "123ac" is an AUSA; whether other government agency employees posted comments on this case, as did government agency employee "A;" and whether any of the three defense witnesses who refused to testify at trial will ever be charged with the crimes for which they were threatened prior to this trial. These are but a few of the outstanding issues which would be the subject of an evidentiary hearing. It is anticipated that surely others would surface upon learning further information at such a hearing.

suggested herein. Secrets such as these are not given up easily, and have not been. For instance, the shock of learning of "taint team" leader Dobinski's posting activities leads the undersigned think that nothing would surprise the Court at this point. In Part One, the Court said it would follow the evidence, and it has done so sufficiently to arrive at its ruling.

Moreover, the only practical way an evidentiary hearing can be held in this case, given the prior lack of complete transparency and slow drip of information, would be to schedule it in sessions, much the way a grand jury operates. In other words, each day of testimony and document return and review would lead to further inquiry, resulting in another evidentiary session as follow up to that which was learned in the one before. Proceeding seriatim, the Court would likely ferret out much more information regarding the government's activities, both anonymous and not, at great cost to all involved, with no small amount of collateral damage. Based on the record as it exists today, the Court believes this motion can be disposed of without the need to further test the veracity and reliability of many more prosecutors and federal law enforcement personnel. Furthermore, given additional information within the Court's knowledge from the Horn Reports but not reported herein, it is highly unlikely an evidentiary hearing would improve the government's position, or absolve it of its admitted transgressions. Considering the already-known and established facts, the Court has already been led to a dark benthic place of prosecutorial misconduct.

E. Disposition

The Court expects that all criminal proceedings will be conducted by all counsel properly, professionally, ethically, and with dignity. In that regard, the Court is charged with "safeguarding the integrity of the jury trial." (See *Narciso,* 446 F.Supp. at 304 (quoting *United States v. Gainey,* 380 U.S. 63, 68 (1965)). Thus, the Court's primary concern, in light of all of the government's

activities set forth herein, is whether this verdict can be honored as a fair product of our criminal justice system. The Court finds that it cannot. The Court determines that, in this instance, prejudice need not be shown; and even so, sufficient prejudice exists. The critical mass - the "totality of the circumstances" or "cumulative effect" - of these actions is more than this Court can bear, and warrants the relief granted herein. At the conclusion of Part One (Rec. Doc. 1070), the Court indicated that the possibility of prosecutorial misconduct "ripening into grounds for relief remains somewhat distant." (Rec. Doc. 1070, p. 48.) As set forth herein, that distance has closed, and the government's misconduct has surpassed the Court's tolerance under the relevant law and jurisprudence. While it may be difficult to pinpoint exactly which government act is the proverbial "straw that broke the camel's back," the undersigned is certain that it is indeed surely broken with the revelation of Dobinski's posting activity, given the "public service" encouraged of specific posters thirsting for convictions.

The Court initially posed the question of whether the government could do indirectly, with anonymity, that which it is strictly prohibited from doing under all other circumstances. One need only review the clear unequivocal provisions of 28 C.F.R. § 50.2, 28 C.F.R. § 1626, the DOJ U.S. Attorneys Manual, Local Criminal Rule 53 of this Court, and the various Rules of Professional Responsibility, to realize that the government's conduct in this case cannot be considered merely "my little secret" "to relieve stress,"[128] or "my little downtime thing," "no big deal."[129] A review of the entire body of information provided to the Court since the subject motion has been filed leaves one

---

[128] Perricone October 10, 2012 Transcript, pp. 23-24.

[129] Jan Mann November 15, 2012 Transcript, p. 110.

with the distinct impression that an online "carnival atmosphere"[130] existed, wherein justice was distorted and perverted in ways that are directly and strictly prohibited, without exception. Nor was such misconduct confined to a single low-level government employee who committed such acts infrequently and over a short period of time; to the contrary, they were committed by those with significant authority who act in the name of "the United States of America" when they enter court and at all other times, and who have now left a fractured public trust.

The government, through DOJ, is instilled by the United States Constitution and statutory authority with great investigatory and prosecutorial powers: the power to initiate investigations, empanel grand juries, call and subpoena witnesses and the production of documents before grand juries. The government likewise is equipped with a vast network of law enforcement officers, including federal agencies such as the FBI, ATF, DEA and other various arms of agency law enforcement, as well as cooperating state and local law enforcement authorities. Importantly, the DOJ is empowered to determine who gets prosecuted, and for what crimes, and has discretion in crafting an indictment to be presented before a grand jury, including the various counts featured in such indictment, so as to establish mandatory statutory minimum and maximum sentences for each defendant, and to select the strategic timing for handing down such an indictment. The same is true relative to bills of information issued by the government. Much to the Court's consternation, however, this apparently is not enough to some, as evidenced here. Try as it might, the Court cannot fathom why at least three (four, counting government agency employee "A") highly intelligent, experienced and respected officials of DOJ thought posting comments publicly online was a good idea, other than to have their corrosive opinions on public display for all to see, read, and accept as correct.

---

[130] See *Sheppard*, 384 U.S. at 358 (1966).

The publication by DOJ employees of inflammatory invectives, accusatory screeds, and vitriolic condemnations, both directly and by the express encouragement of others to do the same, should confound and alarm any reasonable observer of the criminal justice process. Indeed, the very purpose of 28 C.F.R. § 50.2 is to avoid "the particular danger of prejudice resulting from statements in the period approaching and during trial . . .", and DOJ personnel are ordered to "strenuously avoid furnishing any statement or information during that period which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial." (See 28 C.F.R. § 50.2(b)(2)(5); U.S. Attorney Manual, § 1-7.500.) Clearly, the campaign of Senior Litigation Counsel AUSA Perricone, along with the online aiding and abetting of Washington, D.C. DOJ attorney Dobinski, violates this regulation and the other rules set forth herein.

In its opposition memorandum, the government seems to take solace in the fact that this conduct was conducted anonymously such that these "remarkably low profile musings of an unrecognizable citizen (Perricone)" were "not known or suspected by anyone associated with the case (including the prosecution team, the Court, the jurors, or the defense attorneys) to be a government employee let alone a supervisor of the trial team." (Government Memorandum in Opposition, Rec. Doc. 1007, p. 28.) In the Court's view, however, the fact that the government's actions were conducted in anonymity makes it all the *more* egregious, and forces the Court, the defendants, and the public into an indecent game of "catch-me-if-you-can." This warps the very meaning of 28 C.F.R. § 50.2 and the other rules and regulations cited herein, and casts them and the protections of the criminal justice system to the side of the road to securing convictions. This Court

is unwilling to rummage through debris and "graffiti"[131] in search of unexpected unethical conduct. The government's argument, when reduced to its most fundamental sentiment, is that it can "pull a fast one" on the Court, the defendants, defense counsel, the jury, and the public, and relief from such transgressions is now barred as untimely under Rule 33. Nowhere in the law is the Court condemned to suffer a "fool me once" fate, deprived of the ability of granting relief, and taking no action other than "gnashing of judicial teeth."[132]

The Court remains troubled that, despite the best efforts of Mr. Horn and Ms. Alexander, much is still not known about the nature and extent of government activities similar to those reflected herein. Although a battery of preprinted affidavits were signed, the Court has, unfortunately, already seen the government omit pertinent facts, conceal material information, threaten but not charge at least three witnesses the defense identified (resulting in their failure to appear at trial), present cooperating witnesses testifying to their own separate but dissonant "truths," or "interpretations," and attempt to mitigate internet conduct that any reasonably responsible prosecutor would know is forbidden.

On July 12, 2010, the indictment in this case was announced with much fanfare, a major press conference presided over by U.S. Attorney General Eric Holder, and widespread media attention. On that occasion, a DOJ representative said that the indictments "are a reminder that the Constitution and the rule of law do not take a holiday -- even after a hurricane." While quite true in every respect, the Court must remind the DOJ that the Code of Federal Regulations, and various Rules of Professional Responsibility, and ethics likewise do not take a holiday -- even in a high-

---

131 Jan Mann November 15, 2012 Transcript, p. 143, l. 15-21.

132 See *Capra, supra,* at 615.

stakes criminal prosecution, and even in the anonymity of cyberspace. While fully appreciating the horrific events of September 4, 2005, and those who tragically suffered as a result, the Court simply cannot allow the integrity of the justice system to become a casualty in a mere prosecutorial game of *qualsiasi mezzo*.

Some may consider the undersigned's view of the cited rules and regulations as atavistic; but courts can ignore this online "secret" social media misconduct at their own peril. Indeed the time may soon come when, some day, some court may overlook, minimize, accept, or deem such prosecutorial misconduct harmless "fun."[133] Today is not that day, and Section N of the United States District Court for the Eastern District of Louisiana is not that court.

The public must have absolute trust and confidence in this process. Re-trying this case is a very small price to pay in order to protect the validity of the verdict in this case, the institutional integrity of this Court, and the criminal justice system as a whole. In an abundance of caution, the motion must be granted.

VIII. CONCLUSION

In this Order and in Part One (Rec. Doc. 1070), the Court has cited only some of the testimony upon which it relies in ruling on the defendants' motion. This testimony and other recited information illustrates the diseased root that unfortunately casts an ineradicable taint on these convictions. The government's actions, and initial lack of candor and credibility thereafter, is like scar tissue that will long evidence infidelity to the principles of ethics, professionalism, and basic fairness and common sense necessary to every criminal prosecution, wherever it should occur in this country. In fact, many of the charges included by the DOJ in the indictment filed against these

---

[133] Jan Mann November 15, 2012 Transcript, p. 264, l. 1.

defendants are designed to serve the purpose of maintaining honesty, integrity, professionalism, and the protection of the public from those who abuse their authority in the criminal justice system. Those purposes likewise must be served in the prosecution of those accused of violating them.

Though the Court would otherwise be inclined to have an evidentiary hearing of the type described herein, the already-established facts, in the opinion of the undersigned, establish sufficient grounds to grant the defendants' instant motion for new trial. Given the time, effort and energy invested by the Court in this matter from the beginning, this is indeed a bitter pill to swallow. With full realization of the implications and gravity of granting the defendants' motion, the Court does not take such action lightly, but only after deep and intense consideration of the admitted facts, applicable law, and the consequences of doing otherwise. For the reasons extensively stated in Part One (Rec. Doc. 1070) and in this Order, there can be no doubt that the highly unusual, extensive, and truly bizarre actions of government counsel have placed the Court and all counsel, as well as their clients and the victims, in the unacceptably awkward position of maintaining multiple convictions and de facto life sentences in the face of such actions. No comfort level for this can be reached. Accordingly, for these reasons,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed herein on behalf of defendant Arthur Kaufman (Rec. Doc. 963), and joined in by defendants Kenneth Bowen, Robert Gisevius, Robert Faulcon and Anthony Villavaso, be and is hereby **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that counsel are to confer within the next thirty (30) days to determine scheduling needs, and then request the Court to set a

status conference once this has been accomplished. The Court will promptly schedule such a status conference, and will post haste select a trial date to be docketed on the calendar of this Court.

New Orleans, Louisiana, this 17th day of September, 2013.

KURT D. ENGELHARDT
United States District Judge

SPEECH TO THE LOYOLA UNIVERSITY CHAPTER OF THE FEDERALIST SOCIETY
NEW ORLEANS, LA
MARCH 2, 2010

ON DECEMBER 14, 2001, I RAISED MY RIGHT HAND AND TOOK THE FOLLOWING OATH:

> **I, KURT D. ENGELHARDT, DO SOLEMNLY SWEAR THAT I WILL ADMINISTER JUSTICE WITHOUT RESPECT TO PERSONS, AND DO EQUAL RIGHT TO THE POOR AND TO THE RICH, AND THAT I WILL FAITHFULLY AND IMPARTIALLY DISCHARGE AND PERFORM ALL THE DUTIES INCUMBENT UPON ME AS UNITED STATES DISTRICT JUDGE UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES; AND THAT I WILL SUPPORT AND DEFEND THE CONSTITUTION OF THE UNITED STATES AGAINST ALL ENEMIES, FOREIGN AND DOMESTIC; THAT I WILL BEAR TRUE FAITH AND ALLEGIANCE TO THE SAME; THAT I TAKE THIS OBLIGATION FREELY, WITHOUT ANY MENTAL RESERVATION OR PURPOSE OF EVASION; AND THAT I WILL WELL AND FAITHFULLY DISCHARGE THE DUTIES OF THE OFFICE ON WHICH I AM ABOUT TO ENTER. SO HELP ME GOD.**

WITH THOSE STRONG AND HUMBLING WORDS, I BEGAN MY

JUDICIAL CAREER. AND WITH THOSE WORDS, I ASSUMED A GLORIOUS BURDEN IN WHICH I HOPEFULLY HAVE BEEN ABLE TO FULFILL THE MANDATES OF OUR FOREFATHERS, AS THEY SET THEM FORTH IN ARTICLE III OF THAT VERY CONSTITUTION.

THE JUDICIAL OATH REFERS TO "ALL THE DUTIES INCUMBENT UPON ME AS UNITED STATES DISTRICT JUDGE UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES." IT ALSO REQUIRES ME TO "FAITHFULLY AND IMPARTIALLY DISCHARGE" THOSE DUTIES. THIS IS A RESPONSIBILITY I TAKE SERIOUSLY, AND THE IMPORT OF THESE WORDS IS CERTAINLY WORTH PONDERING. WHAT ARE THESE "DUTIES"? AND HOW CAN I, A MERE MORTAL, PERFORM THEM "IMPARTIALLY", PUTTING ASIDE PERSONAL PREDILECTIONS, PHILOSOPHICAL AND POLITICAL TENDENCIES, AND THE SIMPLE EMOTIONS THAT AFFECT ALL OF US AS HUMAN BEINGS BY NATURE? AND HOW

CAN A JUDGE "BEAR TRUE FAITH AND ALLEGIANCE" TO THE CONSTITUTION – WHAT DOES THAT REQUIRE A JUDGE TO DO? – AND REFRAIN FROM DOING? AND LET'S NOT FORGET THAT, ALONG WITH THE WORD "DUTIES", THE WORD "FAITHFULLY" IS USED TWICE IN THIS OATH. PRETTY WEIGHTY AND SOBERING LANGUAGE, I'D SAY!

YOU WILL RECALL FROM YOUR GRAMMAR SCHOOL STUDIES THAT A COURAGEOUS GROUP OF MEN AND WOMEN, WHO HAD EVERYTHING TO LOSE AND ONLY ONE THING TO GAIN – THEIR LIBERTY – BEGAN THE WORLD ANEW IN 1776. IN THE COMING YEARS, A NEW NATION WAS BORN, AND THE ARTICLES OF CONFEDERATION WERE IMPLEMENTED AS A MEANS FOR GOVERNING THE FLEDGLING REPUBLIC. IT WAS NOT UNTIL THE SUMMER OF 1787 THAT THE TASK OF GOVERNING OVER THE LONG TERM INTO THE FUTURE GENERATIONS AND AGES WAS

FINALLY RECONSIDERED. AND KEEP IN MIND THAT, AT THAT TIME, MOST LEARNED PEOPLE IN THE UNITED STATES CONSIDERED THAT A MERE AMENDMENT OR TWEAKING OF THE ARTICLES OF CONFEDERATION WAS IN ORDER.

IN THAT REGARD, THE STORY OF OUR CONSTITUTION, AS THE COMMENCEMENT OF ITS CREATION BEGAN IN MAY OF 1787, IS TRULY ONE OF THE GREAT SUSPENSE SAGAS KNOWN TO MAN. FOR AS MANY DELEGATES (OF WHICH THERE WERE 39), THERE WERE POSITIONS ON THE PRESSING ISSUES OF THE DAY; AND FOR AS MANY STATES THAT PARTICIPATED, 13, THERE WERE DIVERGENCES AND COMMUNITIES OF INTEREST. THAT WE WOULD EVEN HAVE A CONSTITUTION WAS NOT A FOREGONE CONCLUSION. IN FACT, EVEN AFTER THE FINAL DRAFT OF THE CONSTITUTION WAS COMPLETED AND THE CONVENTION ADJOURNED ON SEPTEMBER 17, 1787, OUR CONSTITUTIONAL

DEMOCRACY WAS STILL VERY MUCH UNCERTAIN AND IN GREAT DOUBT.

TO FULLY ILLUMINATE WHAT WAS AT STAKE, JAMES MADISON, ALEXANDER HAMILTON, AND, TO A LESSER EXTENT, JOHN JAY, COMPILED THEIR SERIES OF ESSAYS WHICH NOW CONSTITUTE THE FEDERALIST PAPERS. IN THE FIRST OF THESE, DATED OCTOBER 27, 1787, HAMILTON MAKES CLEAR THE CRITICAL NATURE OF THE DEBATE WHEN HE SAID: "IT SEEMS TO HAVE BEEN RESERVED TO THE PEOPLE OF THIS COUNTRY, BY THEIR CONDUCT AND EXAMPLE, TO DECIDE THE IMPORTANT QUESTION, WHETHER SOCIETIES OF MEN ARE REALLY CAPABLE OR NOT, OF ESTABLISHING GOOD GOVERNMENT FROM REFLECTION AND CHOICE, OR WHETHER THEY ARE FOREVER DESTINED TO DEPEND, FOR THEIR POLITICAL CONSTITUTIONS, ON ACCIDENT AND FORCE."

IN FACT, THOUGH THE CONSTITUTION BECAME EFFECTIVE UPON NEW HAMPSHIRE'S RATIFICATION ON JUNE 21, 1788, THE DEBATE CONTINUED. ON SEPTEMBER 25, 1789, THE CONGRESS TRANSMITTED TO THE STATE LEGISLATURES TWELVE PROPOSED AMENDMENTS. THE FIRST TWO DEALT WITH CONGRESSIONAL REPRESENTATION AND CONGRESSIONAL PAY. NUMBERS THREE THROUGH TWELVE WERE ACTUALLY ADOPTED BY THE STATES TO BECOME THE BILL OF RIGHTS IN 1791. AS AN ASIDE, THE THIRD PROPOSED AMENDMENT BECAME WHAT WE COMMONLY REFER TO TODAY AS THE FIRST AMENDMENT, AND THE PROPOSED FOURTH BECAME OUR SECOND, AND SO ON. I MIGHT ALSO ADD THAT, ALTHOUGH THERE IS NORMALLY A SEVEN YEAR TIME LIMIT FOR AN AMENDMENT TO BE APPROVED BY THREE-FOURTHS OF THE STATE LEGISLATURES, THERE WAS NO TIME LIMIT FOR THE FIRST TWELVE PROPOSED AMENDMENTS, AND

THE SECOND PROPOSED AMENDMENT, RELATING TO CONGRESSIONAL RAISES, WAS ADOPTED ON MAY 7, 1992, SOME 203 YEARS AFTER IT WAS INTRODUCED, AND NOW CAN BE FOUND AS OUR MOST RECENT AND 27TH AMENDMENT. OTHER UNSUCCESSFUL AMENDMENTS INCLUDED ONE TO ABOLISH THE UNITED STATES SENATE IN 1876; TO RENAME THIS COUNTRY THE "UNITED STATES OF THE EARTH" IN 1893; AND TO PROVIDE THE CONSTITUTIONAL RIGHT TO AN ENVIRONMENT FREE OF POLLUTION IN 1971.

MUCH OF THE DEBATE IN 1787, AND ALMOST ALL OF THE "HEAVY LIFTING" IN THE TASK BEFORE THE CONVENTION, WAS THE ESTABLISHMENT OF THE BRANCHES OF GOVERNMENT, OF WHAT THEY WOULD CONSIST, HOW THEY WOULD INTERACT WITH EACH OTHER, AND WHAT ROLES THEY WOULD PLAY IN THE LIVES OF THE AMERICAN PEOPLE. THROUGH DEBATE AND

COMPROMISE, IT WAS ESTABLISHED THAT THERE WOULD BE TWO HOUSES IN THE LEGISLATIVE BRANCH, ONE DESIGNED TO ACCOUNT FOR THE VARIOUS POPULATIONS OF THE RESPECTIVE STATES, THE OTHER ALLOWING EACH STATE THE SAME NUMBER OF PARTICIPANTS. AND THEN, IN LIGHT OF OUR EXPERIENCES UNDER THE ENGLISH CROWN, AND LIKEWISE OUR LARGELY UNKNOWN AND IMPOTENT HEAD OF THE GOVERNMENT UNDER THE ARTICLES OF CONFEDERATION, IT WAS DETERMINED TO HAVE A PRESIDENT WHOSE RESPONSIBILITIES, MEANS OF SELECTION, AND TERM OF OFFICE WERE EVENTUALLY (AND NOT WITHOUT VIGOROUS DISSENT) AGREED UPON IN ARTICLE II.

IT IS THE THIRD ARTICLE, BY FAR THE SHORTEST OF THE THREE, WHICH PERHAPS HAS REMAINED THE MOST MYSTERIOUS AND, DARE I SAY, THUSLY ABUSED ARTICLE OF THE THREE. ARTICLE III STATES:

> **THE JUDICIAL POWER OF THE UNITED STATES, SHALL BE VESTED IN ONE SUPREME COURT, AND IN SUCH INFERIOR COURTS AS THE CONGRESS MAY FROM TIME TO TIME ORDAIN AND ESTABLISH. THE JUDGES, BOTH OF THE SUPREME AND INFERIOR COURTS, SHALL HOLD THEIR OFFICES DURING GOOD BEHAVIOUR, AND SHALL, AT STATED TIMES, RECEIVE FOR THEIR SERVICES, A COMPENSATION, WHICH SHALL NOT BE DIMINISHED DURING THEIR CONTINUANCE IN OFFICE.**

SECTION 2 OF ARTICLE III PROVIDES FOR FEDERAL JURISDICTION, AND THE REMAINING SECTION 3 ADDRESSES TREASON. AND THAT IS IT.

ARTICLE III THUS HAS LEFT MANY IN THE DECADES AND CENTURIES THAT HAVE FOLLOWED WITH THE NOTION THAT IT IS A BLANK CHECK. I SUBMIT THAT TWO THINGS HOWEVER SHOULD BE CLEAR FROM EVEN THE MOST CURSORY READING OF ARTICLE III: (1) JUDICIAL INDEPENDENCE FROM THE OTHER TWO BRANCHES OF GOVERNMENT WAS INTENDED, AND THE INSURANCE FOR THAT PROSPECT COMES IN THE FORM OF A

LIFETIME APPOINTMENT AND THE FORBIDDING OF A REDUCTION IN COMPENSATION; AND (2) THAT FEDERAL COURTS SHALL BE COURTS OF LIMITED JURISDICTION, WHICH HAS BECOME AXIOMATIC IN THE LAW. SECTION 2 OF ARTICLE III MAKES PLAIN THAT THE LIST OF MATTERS OVER WHICH FEDERAL COURTS SHALL HAVE JURISDICTION, AS OPPOSED TO STATE COURTS OF GENERAL JURISDICTION, IS EXHAUSTIVE. OF COURSE, IN COMPLIANCE WITH ARTICLE III, CONGRESS HAS CREATED FEDERAL JURISDICTION, AND INDEED DENIED FEDERAL JURISDICTION, ON ANY NUMBER OF ISSUES OVER THE YEARS, AND HAS ATTEMPTED TO DO SO QUITE RECENTLY. TO RECAP AND RESTATE THESE TWO POINTS, FEDERAL COURTS SHOULD NOT BE INFLUENCED BY THE POLITICS OF THE DAY OR SOMEHOW BE FORCED TO DO THE BIDDING OF THE LEGISLATIVE OR EXECUTIVE BRANCH, BUT RATHER ARE CHARGED WITH UPHOLDING THE

CONSTITUTION IN A NEUTRAL FASHION, DESPITE CONTROVERSIES WHICH MAY RESULT. AND, FEDERAL COURTS ARE CONSTITUTIONALLY CONSTRAINED FROM HANDLING MATTERS OUTSIDE OF THEIR JURISDICTION.

THE PURPOSE OF THE CONSTITUTION WAS TO ESTABLISH THE RULE OF LAW, AND NOT MEN, AND TO COMMIT THIS CONCEPT TO WRITING SUCH THAT ITS INTENDED MEANING AT THE TIME OF ADOPTION SHOULD BE CONSTRUED, AND NOT SOME GENERAL ETHEREAL NOTIONS WHICH TRANSCEND OR IGNORE THE WRITTEN DOCUMENT. CONSTITUTIONAL PRINCIPLES MEMORIALIZED IN WRITING WERE RECORDED NOT JUST TO BENEFIT THE PERSONS DOING THE WRITING, BUT RATHER FOR THE SAKE OF POSTERITY AND TO AVOID A CONFLICTING ACCOUNT AT A MUCH LATER DATE OF PRECISELY WHAT WAS AGREED UPON. AND SO THE LEGITIMACY OF JUDICIAL POWER

NECESSARILY RESTS ON THE PRINCIPLE THAT JUDGES SHOULD ONLY IMPOSE CONSTRAINTS UPON THE DEMOCRATIC MAJORITIES BASED UPON THE LIMITATIONS FOUND IN THE WRITTEN CONSTITUTION. IN THIS, WE MUST PRESERVE THE MADISONIAN BALANCE BETWEEN THE NEED FOR MAJORITIES TO EXERCISE ENUMERATED GOVERNMENT POWERS VERSUS THE FREEDOMS OF MINORITIES AS GUARANTEED IN THE SAME DOCUMENT AND, OF COURSE, ITS AMENDMENTS.

AS THOMAS PAINE CORRECTLY STATED, "AMERICA HAS NO MONARCH: HERE THE LAW IS KING." AS "FAITHFUL GUARDIANS OF THE CONSTITUTION", JUDGES WERE EXPECTED TO RESIST ANY POLITICAL EFFORT TO DEPART FROM THE LITERAL PROVISIONS OF THE CONSTITUTION AS WELL AS STATUTORY LAW. LIKEWISE, THE TEXT OF THE DOCUMENT ITSELF WAS CONSIDERED TO BE THE JUDICIAL "GOLD STANDARD" BY THOSE

WHO FRAMED IT. THE FRAMERS CHOSE THEIR WORDS QUITE CAREFULLY AFTER GREAT DEBATE, SOMETIMES ON VERY MINUTE POINTS AND PARTICULAR WORDS. AND WORDS HAVE MEANING, JUST AS SIGNATURES ON DOCUMENTS ARE NOT MERE ORNAMENTS. READING, UNDERSTANDING AND APPLYING THOSE WORDS, WHETHER IN A CONSTITUTIONAL PROVISION OR UNDER CONGRESSIONALLY-ENACTED STATUTORY LAW, IS NOT A NEW AND EXOTIC EXERCISE. IT IS CORRECT TO ASSUME THAT THE CONSTITUTION IS, IN FACT, A LIMITATION ON JUDICIAL POWER, JUST AS IT IS ON EXECUTIVE AND LEGISLATIVE POWER. THIS IS MADE CLEAR IN JUSTICE MARSHALL'S OPINION IN *MCCULLOCH V. MARYLAND* WHEN HE CAUTIONED JUDGES NEVER TO FORGET IT IS A CONSTITUTION THEY ARE EXPOUNDING.

LET US KEEP IN MIND THAT IN PERHAPS THE MOST VIGOROUS PHILOSOPHICAL DEBATE OF THE TIME, BETWEEN

ALEXANDER HAMILTON AND THOMAS JEFFERSON, THERE WAS DISAGREEMENT BETWEEN THEM ON MOST OF THE GREAT ISSUES OF THEIR DAY JUST AS MANY DISAGREE IN OURS. THEY BEGAN THE LONG DEMOCRATIC TRADITION OF LOYAL OPPOSITION, OF STANDING ON OPPOSITE SIDES OF ALMOST EVERY QUESTION OF CONSEQUENCE WHILE STILL WORKING TOGETHER FOR THE GOOD OF THE COUNTRY. AND YET, GIVEN THE TREMENDOUS DIVERGENCE OF THEIR HEARTFELT OPINIONS, THEY BOTH AGREED, AS THEY SHOULD, ON THE IMPORTANCE OF JUDICIAL RESTRAINT. "OUR PECULIAR SECURITY", JEFFERSON WARNED, "IS IN POSSESSION OF A WRITTEN CONSTITUTION. LET US NOT MAKE IT A BLANK PAPER BY CONSTRUCTION", HE IMPLORES US FROM THE PAST. FOR HAMILTON AND JEFFERSON AND THE OTHER GREAT THINKERS OF THE DAY, THE ISSUE OF JUDICIAL RESTRAINT WAS NEVER COUCHED IN THE TERMS OF WHETHER WE WILL HAVE LIBERAL OR CONSERVATIVE COURTS. THEY

KNEW THAT THE COURTS, AND THE CONSTITUTION ITSELF, MUST BE NEITHER LIBERAL NOR CONSERVATIVE, BUT MUST HAVE THE CONFIDENCE OF ALL. TO PUT IT IN EVEN STARKER TERMS, THE QUESTION WAS, AND HAS ALWAYS BEEN, WILL WE HAVE GOVERNMENT BY THE PEOPLE? AND THIS IS WHY THE PRINCIPLE OF JUDICIAL RESTRAINT HAS NOT ONLY BEEN AN ESSENTIAL BUT AN HONORED MECHANISM IN OUR DEMOCRATIC GOVERNMENT.

AMERICAN HISTORY HAS, AT CRITICAL TIMES, TURNED ON THE ENGAGEMENT OF CONSTITUTIONAL DEBATE. YOU NEED ONLY REVIEW THE WELL-DOCUMENTED BATTLES BETWEEN THE FEDERALISTS AND THE ANTI-FEDERALISTS, WEBSTER AND CALHOUN, LINCOLN AND DOUGLAS, THE NEW DEAL PROPOSALS OF FDR, WATERGATE, ALL THE WAY UP THROUGH DISCUSSIONS OF OUR DAY INVOLVING PRIVACY ISSUES AND THE TRENCH

WARFARE WHICH OCCURS EVERY TIME A HIGH PROFILE JUDICIAL NOMINATION IS MADE. IT SHOULD BE NOTED THAT JUSTICE MARSHALL'S OPINION IN *MCCULLOCH* HAS BEEN ARGUED BY SOME AS SUPPORT FOR THE NOTION THAT THE CONSTITUTION IS CHAMELEON-LIKE AND MORPHS INTO WHATEVER POPULAR PRINCIPLE OF THE DAY EXISTS, THUS STANDING HISTORY ON ITS HEAD. MARSHALL, HOWEVER, CLEARLY REMAINED ENAMORED WITH THE ORIGINAL INTENTION THAT CONGRESS BE FREE TO ELABORATE AND APPLY CONSTITUTIONAL POWERS AND PRINCIPLES. RATHER THAN INDICATING THAT THE COURT MUST INVENT SOME NEW CONSTITUTIONAL VALUES IN ORDER TO KEEP PACE WITH THE TIMES, MARSHALL KNEW AND SAID THAT THE *LEGISLATIVE POWERS* GRANTED BY THE CONSTITUTION ARE QUITE ADAPTABLE TO MEET THE HUMAN AFFAIRS OF THE DAY, NO

MATTER HOW FAR INTO THE FUTURE.

IT IS IMPORTANT TO REMEMBER THAT THE FRAMERS OF THE CONSTITUTION WERE NOT TRYING TO ANTICIPATE EVERY ANSWER TO EVERY QUESTION AMERICAN SOCIETY WOULD ENCOUNTER INTO THE FUTURE; THEY WERE TRYING TO CREATE A THREE BRANCH NATIONAL GOVERNMENT, WITHIN A FEDERAL SYSTEM IN COMITY WITH STATE GOVERNMENT, THAT WOULD HAVE THE FLEXIBILITY TO ADAPT AND FACE NEW UNFORESEEN CIRCUMSTANCES. THEIR GREAT INTEREST WAS IN THE DISTRIBUTION OF POWER AND RESPONSIBILITY DEEMED NECESSARY TO SECURE THE GREAT AND PERMANENT GOAL OF LIBERTY FOR ALL. JUSTICE FELIX FRANKFURTER HIMSELF ONCE WROTE, IN *BAKER V. CARR* IN 1962: "THERE IS NOT UNDER OUR CONSTITUTION A JUDICIAL REMEDY FOR EVERY POLITICAL MISCHIEF, FOR EVERY UNDESIRABLE EXERCISE OF LEGISLATIVE

POWER. THE FRAMERS CAREFULLY AND WITH DELIBERATE FORETHOUGHT REFUSED SO TO ENTHRONE THE JUDICIARY. IN THIS SITUATION, AS IN OTHERS OF LIKE NATURE, APPEAL FOR RELIEF DOES NOT BELONG HERE. APPEAL MUST BE TO AN INFORMED, CIVICALLY-MILITANT ELECTORATE."

SO, SHOULD JUDGES GOVERN IN AREAS NOT COMMITTED TO THEM BY SPECIFIC CLAUSES OF THE CONSTITUTION OR STATUTORY AUTHORITY? I SUBMIT TO YOU THAT IF THIS WERE SO, THERE QUICKLY WOULD BE NO LAW OTHER THAN THE WILL OF THE PARTICULAR JUDGE. AND THAT EXERCISE OF RAW JUDICIAL POWER IS NOT LEGITIMATE IN A DEMOCRACY. TO QUOTE JUSTICE FRANKFURTER AGAIN, "THE HIGHEST EXERCISE OF JUDICIAL DUTY IS TO SUBORDINATE ONE'S PERSONAL PULLS AND ONE'S PRIVATE VIEWS TO THE LAW." JUSTICE BRENNAN STATED: "JUSTICES ARE NOT PLATONIC GUARDIANS APPOINTED

TO WIELD AUTHORITY ACCORDING TO THEIR PERSONAL MORAL PREDILECTIONS." LIKEWISE, JUDGE ROBERT BORK SAID, "THE TRUTH IS THAT THE JUDGE WHO LOOKS OUTSIDE OF THE CONSTITUTION ALWAYS LOOKS INSIDE HIMSELF AND NOWHERE ELSE." THIS MEANS THAT, QUITE SIMPLY, ANY DEFENSIBLE THEORY OF CONSTITUTIONAL AND STATUTORY INTERPRETATION MUST DEMONSTRATE THAT IT HAS THE CAPACITY TO CONTROL JUDGES, THAT IS TO SAY THAT THE RESULTS OF THE JUDGES' WORK FOLLOWS FAIRLY FROM THE PREMISES OFFERED, AND IS NOT MERELY A QUESTION OF TASTE OR OPINION ... OR AS LAWYERS OFTEN SAY, "IT DEPENDS ON WHAT THE JUDGE HAD FOR BREAKFAST."

A RECENT EXAMPLE OF ONE MAN'S SUBMISSION OF PERSONAL PREFERENCE IN FAVOR OF ADHERENCE TO CONSTITUTIONAL PRINCIPLE IS THAT OF JUSTICE CLARENCE

THOMAS, IN THE CASE OF *LAWRENCE V. TEXAS*. YOU WILL RECALL THIS AS THE CONTROVERSY OVER THE TEXAS ANTI-SODOMY LAW. JUSTICE THOMAS STATED:

> **"I WRITE SEPARATELY TO NOTE THAT THE LAW BEFORE THE COURT TODAY 'IS UNCOMMONLY SILLY.' IF I WERE A MEMBER OF THE TEXAS LEGISLATURE, I WOULD VOTE TO REPEAL IT. PUNISHING SOMEONE FOR EXPRESSING HIS SEXUAL PREFERENCE THROUGH NONCOMMERCIAL CONSENSUAL CONDUCT WITH ANOTHER ADULT DOES NOT APPEAR TO BE A WORTHY WAY TO EXPEND VALUABLE LAW ENFORCEMENT RESOURCES. NOTWITHSTANDING THIS, I RECOGNIZE THAT AS A MEMBER OF THIS COURT I AM NOT EMPOWERED TO HELP PETITIONERS AND OTHERS SIMILARLY SITUATED. MY DUTY, RATHER, IS TO 'DECIDE CASES AGREEABLY TO THE CONSTITUTION AND LAWS OF THE UNITED STATES.'"**

WHILE YOU MAY NOT ULTIMATELY AGREE WITH JUSTICE THOMAS' DISSENT IN THAT CASE, I CITE IT TO ILLUSTRATE THE CONSCIOUSNESS OF SUPREME COURT JUSTICES OF THE BOUNDARY LINES WHEN DEALING WITH SUCH CONTROVERSIES OF THE DAY.

REST ASSURED THAT THIS GREAT DISCUSSION AND DEBATE SHOULD NOT BE POLITICAL WARFARE, A CLASH OF PERSONALITIES, OR SOME BITTER COMPETITION FULL OF EXCHANGED INSULTS. TO DEVALUE OUR DISCUSSION ALONG SUCH LINES IS TO ENTIRELY OVERLOOK THE UNDERPINNINGS OF THE DEBATE, WHICH IS CONCERNED WITH HOW WE FUNCTION AS A DEMOCRACY; THAT IS, WHETHER WE WILL BE GOVERNED BY AN INFORMED MAJORITY AND PROTECT THE RIGHTS OF INDIVIDUALS, OR WHETHER WE SUBMIT OURSELVES TO SOMETHING UNKNOWN AND FAR AFIELD OF THAT WHICH THE DELEGATES TO THE CONSTITUTIONAL CONVENTION EVER ENVISIONED. I CHALLENGE YOU TO BEGIN YOUR PARTICIPATION IN THIS DEBATE WITH A CAREFUL EXAMINATION OF THE FEDERALIST PAPERS.

THESE PRINCIPLES ARE IMPORTANT TO KEEP IN MIND

BECAUSE TODAY, JUDGES ARE CONSTANTLY FACED WITH ISSUES, BEGINNING WITH WHETHER OR NOT A TRUE CASE OR CONTROVERSY EXISTS IN WHICH THE JUDICIAL BRANCH SHOULD BE INVOLVED; WHETHER SUCH CONTROVERSY, IF THERE IS ONE, IS OF A CONSTITUTIONAL NATURE, A STATUTORY CONCERN, OR SIMPLY AN EQUITABLE NOTION OF RIGHT VERSUS WRONG; AND IF A CONSTITUTIONAL PROVISION OR STATUTORY LANGUAGE IS INVOLVED, APPLYING THOSE PROVISIONS LITERALLY AND PRACTICALLY IN A NON-POLITICAL WAY THAT BEST UPHOLDS THE MEANING OF THE WORDS AND THE INTENT OF THOSE WHO CHOSE THEM. AND LAST BUT NOT LEAST, THE ROLE OF THE JUDGE TODAY ALSO MUST NECESSARILY CONCERN ITSELF WITH THE REMEDY AVAILABLE UNDER LAW TO ADDRESS GRIEVANCES. WHILE THE PLENARY POWER OF THE COURT IS BROAD AND THE DISCRETION GREAT, JUDGES MUST BE EVER MINDFUL OF WHICH

REMEDIES ARE MADE AVAILABLE IN THE LAW, AND ATTEMPT TO AWARD AND ADMINISTER THOSE REMEDIES CAREFULLY, WHETHER THEY BE MINIMUM SENTENCING PROVISIONS IN CRIMINAL CASES OR CATEGORIES OF MONETARY OR NON-MONETARY RELIEF IN CIVIL CASES. THE COURT, OF COURSE, MUST ADMINISTER ITS DOCKET IN ORDER TO UPHOLD THE PROCESSING OF CRIMINAL MATTERS PURSUANT TO THE SPEEDY TRIAL ACT, AND TO AFFORD EFFICIENT AND PROMPT RESOLUTION OF CIVIL DISPUTES. THIS ENTAILS HANDLING SOMETIMES EXTENSIVE MOTION PRACTICE TO NARROW THE ISSUES, CRITICAL DISCOVERY PRACTICE ESPECIALLY IN CIVIL CASES, CONFERENCES WITH THE ATTORNEYS TO DISCUSS THE DISPUTED ISSUES, AND OBVIOUSLY RESOLUTION OF CIVIL DISPUTES AND CRIMINAL ACCUSATIONS SHORT OF TRIAL, ALL OF WHICH, BY DESIGN, IS DONE IN A NON-VIOLENT MANNER

WITHOUT RESORT TO SELF-HELP OR UNILATERAL RETRIBUTION.

AS YOU EMBARK UPON YOUR LEGAL CAREERS, YOU SHOULD KEEP IN MIND THAT OUR CONSTITUTIONAL SYSTEM, WITH ITS MARVELOUS ESTABLISHMENT OF FEDERAL COURTS AND STATE COURTS, IS IMPERFECT BUT CLEARLY THE FINEST SYSTEM OF JUSTICE EVER DEVISED BY MAN, AND YOU WILL HAVE THE HONOR AND PRIVILEGE OF PLAYING A ROLE IN IT, REGARDLESS OF WHERE YOUR CAREER TAKES YOU. I REMIND JURORS WHO SIT IN CASES IN MY COURT THAT THEY ARE LIVING, WALKING, BREATHING MONUMENTS TO THE AMERICAN JUSTICE SYSTEM, AND OF THAT THEY SHOULD BE QUITE PROUD. I ALSO REMIND THEM THAT THEY SHOULD WATCH THEIR WORLD NEWS EVERY EVENING, AND WHEN THEY SEE CIVIL STRIFE AND VIOLENCE IN THE STREETS OF OTHER COUNTRIES ALL OVER THE WORLD, THEY SHOULD REALIZE THAT THE ONLY THING PREVENTING OUR

POPULATION FROM LIVING IN FEAR OF THE SAME IS THE ABILITY OF AGGRIEVED PERSONS TO COME TO COURT, BEFORE A JUDGE AND JURY, IN SEARCH OF THE TRUTH AND IN HOPE OF A REMEDY.

I CLOSE IN HOPES THAT YOU CAN TRULY APPRECIATE A SOMEWHAT HUMOROUS STORY, WHICH MANY OF YOU HAVE HEARD, I AM SURE, OCCURRING ON SEPTEMBER 15, 1787. AS THE DELEGATES TO THE CONSTITUTIONAL CONVENTION BEGAN TO DISBAND, AN INTERESTED AND CURIOUS PHILADELPHIA WOMAN STOPPED BENJAMIN FRANKLIN AT THE DOOR OF THE CONVENTION HALL. "DR. FRANKLIN, WHAT HAVE YOU GIVEN US?", WAS HER INQUIRY. FRANKLIN APTLY REPLIED: "A REPUBLIC, IF YOU CAN KEEP IT." WE MUST ASK OURSELVES TODAY IF WE ARE DOING ALL WE CAN TO LIVE UP TO FRANKLIN'S CHALLENGE.

THANK YOU AND GOOD LUCK.

COMMENCEMENT SPEECH FOR THE LOUISIANA STATE UNIVERSITY COLLEGE OF ARTS AND SCIENCES BATON ROUGE, LOUISIANA MAY 20, 2005

THANK YOU AND GOOD AFTERNOON ! DEAN FERREYRA, ASSOCIATE DEANS PARENT AND ROBERTS, MEMBERS OF THE FACULTY, FAMILIES AND DISTINGUISHED GUESTS AND MEMBERS OF THE LOUISIANA STATE UNIVERSITY COLLEGE OF ARTS & SCIENCES CLASS OF MAY, 2005, I WISH TO EXTEND TO YOU A WARM WELCOME ON THE OCCASION OF THIS EXCITING MILESTONE. IT IS INDEED MY PLEASURE TO BE BACK ON THIS WONDERFUL CAMPUS, AND I'M HONORED AND PRIVILEGED TO BE WITH YOU ON GRADUATION DAY AS YOU BECOME PROUD ALUMNI OF LOUISIANA STATE UNIVERSITY. I SEE MORE THAN A FEW PROUD PARENTS GRINNING BROADLY, NO DOUBT, WITH THE ADDED NOTION THAT THE LAST CHECKS FOR TUITION AND BOOKS HAVE BEEN WRITTEN!

I HAVE TWO DEGREES FROM LSU, FIRST A LAW DEGREE, BUT BEFORE THAT, A BACHELORS IN HISTORY. AND THESE ARE INDEED HISTORIC TIMES IN WHICH WE LIVE. ON A WORLD SCALE, WE ASK: WILL THIS GENERATION BE KNOWN AS ONE THAT ADVANCED THE CAUSE OF LIBERTY AND FREEDOM? WE ARE ANSWERABLE FOR THAT LEGACY. HERE AT HOME IN AMERICA, WE ARE CHALLENGED NOT ONLY

TO COMMIT OURSELVES TO THE SERVICE OF OTHERS AND SHOW MERCY ON THE WEAK, WE ALSO MUST STRIKE A BALANCE BETWEEN ADVANCED SCIENCES AND BIO-ETHICS, CONSTITUTIONAL RIGHTS AND MORALITY, AND STATUTORY LEGALITY VERSUS SOUND PROFESSIONAL BUSINESS PRACTICES. FOR IT IS TRUE THAT, ALTHOUGH WE HAVE THE LIBERTY TO PURSUE OUR OWN INDIVIDUAL HAPPINESS, WE MUST DO SO WITH A SENSE OF OBLIGATION TO SOCIETY TO BECOME NOT ONLY RESPONSIBLE CITIZENS, BUT TOLERANT NEIGHBORS AND OPEN-MINDED CO-WORKERS. FOR LIKE THE MISSISSIPPI RIVER, HISTORY HAS AN EBB AND FLOW, BUT ALSO A VISIBLE LINEAR DIRECTION, ONE TO WHICH YOU MUST COMMIT YOURSELF AS YOU PREPARE TO FACE THE WORLD OUTSIDE OF THE LOVING EMBRACE OF THIS FINE INSTITUTION.

THE CLASS OF 2005 IS ESPECIALLY UNIQUE. I NOTE THAT MANY OF YOU STARTED YOUR COLLEGE CAREERS IN AUGUST OR SEPTEMBER OF 2001. AT THAT TIME, WE WATCHED THE TRAGIC AND HORRIFIC EVENTS OF SEPTEMBER 11TH WITH GREAT SADNESS AND DISMAY. IN THE COURSE OF FOUR SHORT YEARS, HOWEVER, WE TOGETHER SPENT A JOYOUS JANUARY NIGHT IN NEW ORLEANS WATCHING OUR TIGERS IN THE SUGAR BOWL; WE SAID GOODBYE TO CHANCELLOR MARK EMMERT AND WELCOMED CHANCELLOR SEAN O'KEEFE; AND YOU, THROUGH YOUR EFFORTS

IN THE CLASSROOM AND IN THIS FRIENDLY COMMUNITY OF BATON ROUGE, HELPED MAKE L.S.U. A SUPERIOR FLAGSHIP UNIVERSITY ON PAR WITH FEW OTHERS.

YOU NOW GO INTO THE CLASSROOM OF LIFE AND WILL LEARN PRACTICAL LESSONS. MANY OF YOU HAVE JOBS LINED UP AND WILL JOIN THE WORK FORCE OF A GROWING ECONOMY. BUT SOME PEOPLE QUIT LOOKING FOR WORK ONCE THEY FIND A JOB. THERE IS A REAL NEED FOR DILIGENCE, EFFORT, INTEREST AND ATTENTION TO DETAIL IN WHATEVER FIELD YOU HAVE CHOSEN. REMEMBER THE OLD SAYING THAT SAYS, FOR EVERY ACTION THERE IS AN EQUAL AND OPPOSITE CRITICISM. NONETHELESS, DON'T BE AFRAID TO TAKE THE INITIATIVE TO ACT BOLDLY WHEN CIRCUMSTANCES REQUIRE IT, AND NEVER LET FEAR OF A MISTAKE PARALYZE YOU IF YOU ARE ACTING IN GOOD FAITH.

SINCE MY DAYS AT L.S.U., I'VE ALSO LEARNED THAT OPPORTUNITIES ARE NEVER LOST - SOMEONE WILL TAKE THE ONES YOU MISS. IT IS A COMPETITIVE WORLD AND YOU MUST, QUITE SIMPLY, STRIVE TO BE BETTER. IT IS NOT TRUE THAT EVERYONE IS AS GOOD AS ANYBODY ELSE. ALTHOUGH WE ARE CREATED EQUAL, SOME PEOPLE LEARN TO BE INDUSTRIOUS; OTHERS ARE LAZY. SOME PEOPLE ARE KIND AND OTHERS ARE MEAN. SOME PEOPLE ARE RUDE AND

BOORISH, AND OTHERS HAVE LEARNED THE POWER OF GOOD MANNERS. SO YOU MUST HAVE THE ABILITY TO DISTINGUISH BETWEEN GOOD AND BAD, VIRTUE AND VICE, INTEGRITY VERSUS MENDACITY, COMPETENCE VERSUS INEPTITUDE, MORALITY VERSUS IMMORALITY, AND INDEED GOOD VERSUS EVIL. YOUR HANDSHAKE AND SMILE SHOULD BE RESERVED FOR THOSE PEOPLE WHOSE VIRTUE EARNS IT, AND LIKEWISE YOU SHOULD ATTEMPT TO EARN THE CONFIDENCE OF THOSE PEOPLE WHO POSSESS SUCH QUALITIES.

AS A JUDGE, I HAVE ALSO LEARNED THAT FAIRNESS IS GIVING ALL PEOPLE THE TREATMENT THEY EARN AND DESERVE AND ARE ENTITLED. IT DOESN'T MEAN TREATING EVERYONE ALIKE. EVERYONE DOESN'T EARN THE SAME TREATMENT. IN THAT REGARD, COACH POKEY CHATMAN MADE A VERY INSIGHTFUL, VERY MATURE REMARK AFTER THE LADY TIGERS FELL SHORT IN THE FINAL FOUR. SHE SAID: "SOMETIMES YOU DON'T GET WHAT YOU WANT; YOU ACTUALLY GET WHAT YOU EARN." I THOUGHT: HOW TRUE THAT IS. AND EARNING THE TRUST AND RESPECT OF YOUR PEERS IN YOUR CHOSEN PROFESSION IS ONE OF THE GREATEST REWARDS IN LIFE.

AND WHAT A GREAT WAY TO START YOUR CAREER BY STATING WITH PRIDE TO YOUR EMPLOYER AND CO-WORKERS, OR A PROSPECTIVE EMPLOYER, THAT "I

AM A GRADUATE OF L.S.U." I KNOW YOU ARE EXCITED AND ANXIOUS TO MOVE THE PROGRAM ALONG, SO WELCOME AGAIN, AND CONGRATULATIONS TO MY SOON-TO-BE FELLOW ALUMNI AND THEIR FAMILIES HERE TODAY.

United States Court Reporters Association
Annual Meeting
New Orleans, Louisiana
October 7-9, 2016

Good Morning - Welcome to the United States District Dourt for the Eastern District of Louisiana. On behalf of the court, we are thrilled that you have chosen New Orleans for your meeting, and have the occasion to visit our courthouse. I sincerely hope you enjoy the hospitality of our court and this great city.

Just over eleven years ago, this meeting would not have been possible. Much of this city was uninhabitable, having been flooded to rooftop levels. At that time, no small amount of doubt existed as to whether this city was even viable, or whether it would continue to exist as a much smaller enclave a fraction of the size it was on August 28, 2005. City services

were not only disrupted - they were non-existent. Basic utilities, such as electricity, street lighting, and even traffic signals were a luxury. Restaurants and grocery stores were scarce. Schools remained closed until the spring semester, some reopening by January. And, of course, local, state and federal government efforts continued with not only the extensive clean-up, but also the eventual rebuilding of parts of the city.

Of course, the legal community and the court system were also rocked to their core. Local lawyers were spread out over several states; many opened offices elsewhere. When courts could reopen, they encountered difficulties with getting not only attorneys, but also litigants, criminal defendants, witnesses and court staff, especially essential personnel like court reporters, to appear and participate in the operation of

both civil and criminal justice. The federal courthouse was fortunate, in that it was undamaged and opened in October 2005, but again, housing employees and having counsel, parties and witnesses appear were difficult propositions at best.

Today, I wish to talk about the impact of the Hurricane Katrina disaster on the most valuable commodity in our justice system: the jury. (Thought I was going to say "the court reporter", didn't you? Well, you are a close second!) As I say at the end of every jury trial, our system of justice could not operate without everyday citizens from all walks of life responding to the jury summons, appearing for the voir dire, and actually sitting in a jury box to take evidence, deliberate and render a just verdict. This constitutional function is indispensable. But when the jury pool becomes a diaspora, and the demographics of a jurisdiction are significantly and irreparably altered, where does justice lie? How is the fabric

of our society protected? Before I discuss this, I would like to provide some valuable (and interesting, I hope) history about juries, the right to trial by jury, and its unique role in our society.

How many people here have ever been to Boston? Boston was the capital of the province of Massachusetts Bay, and because (like New Orleans) it was an important shipping town, was a major center of resistence to unpopular acts of taxation by the British parliament. Bostonians, who (unlike New Orleanians) were then colonists of Britain, objected that these taxes were a violation of the natural, charter and constitutional rights of British subjects in the colonies. They petitioned King George III seeking repeal of the Townshend Revenue Act. Of course, in Great Britain, Lord Hillsborough pushed back, sending a letter to the colonial governors in America,

instructing them to dissolve their colonial assemblies if they joined in the effort. Because the situation in Boston had become heated, Boston's Chief Customs Officer Charles Paxton wrote to Lord Hillsborough, asking for military support. In May 1768, the fifty-gun warship HMS Romney sailed into Boston Harbor. Lord Hillsborough instructed General Thomas Gage to send "such force as you shall think necessary to Boston." In October 1768, four British army regiments began disembarking in Boston. From that time forward, a series of clashes between civilians and soldiers occurred, escalating tensions.

On March 5, 1770, things came to a head: a British solder, by the name of Private Hugh White, was on guard duty outside the Custom House on King Street - known today as State Street. When a young apprentice named Edward

Garrick accused a British officer, Captain Lieutenant John Goldfinch, of not paying a bill that had become due, Private White demanded respect for Captain Lieutenant Goldfinch. After an exchange of insults, Private White left his post, challenged the young man, and struck him on the side of the head with his musket. Needless to say, other young men, companions of Garrick, gathered and the argument festered. The crowd gathered around Private White and became more boisterous, throwing objects at the sentry and challenging him to fire his weapon. The nearby barracks were alerted, and Captain Thomas Preston dispatched an officer and six privates of the 29th regiment of foot, with fixed bayonets, to aid Private White. As they pushed their way through the crowd, one of the protesting young men, Henry Knox (who would later become a general in the continental army), tried to reduce tensions by

warning Captain Preston: "For God's sake, take care of your men. If they fire, they die." Captain Preston responded: "I am aware of it." Upon arriving at Private White's location on the Custom House stairs, the soldiers loaded their muskets, arranged themselves in semi-circular formation, and Captain Preston urged the crowd, now estimated to number between three and four hundred, to disperse.

The crowd refused, only taunting the soldiers more and throwing snowballs at them. When a thrown object struck one of the British soldiers, knocking him down and causing him to drop his musket, he is believed to have said "damn you, fire," then discharged the musket into the crowd although no command from Captain Preston had been given. The other soldiers then fired into the crowd as well, hitting eleven men. Three Americans, Samuel Gray, James Caldwell, and Crispus

Attucks, who was a mixed race runaway slave, died instantly. Two others died later of wounds sustained as a result of the fatal shots; others were severely wounded by the gunfire.

After an investigation, Captain Preston and the soldiers were arrested. On March 27th, Captain Preston and eight soldiers, along with four civilians who were in the Customs House and were also alleged to have fired shots, were all indicted for murder. Of course, Bostonians continued to be hostile to the troops. This brings us to the issue of a fair trial, and the blessings of a jury.

The government in Boston was determined to give the British solders a fair trial so there could be no grounds for retaliation from Britain and so that moderates would not be alienated from the cause of the patriots. One of the finest lawyers in Boston at the time was none other than a young

lawyer by the name of John Adams. Captain Preston urged John Adams to provide a defense. Along with Josiah Quincy, he did. Of course, this was an unpopular assignment, one that could well have adversely affected the fine reputations enjoyed by both Adams and Quincy, not to mention future income if they chose to continue to live and practice law in Boston. Even in hindsight, over 245 years later, it is difficult to understand the reasons for acceptance of the representation, except for one factor: Adams and Quincy strongly believed, with every fiber of their bodies, that all men were entitled to a fair trial by jury and that they deserved equal justice. They believed in the jury. They both knew of the dangers to their livelihood, of the violence that the mob was capable of perpetrating, and that their safety and that of their families were at risk. But, they put the law above their personal interests, beliefs and fears,

because the matter would be in the hands of a jury.

On October 24, 1770, trial of Captain Preston commenced. Through a painstaking voir dire selection process, a jury of Bostonians was seated. After a six day trial, during which this jury was sequestered to keep them away from family and friends in the heated environment of the day, the jury found that reasonable doubt existed as to whether Captain Preston had ordered his soldiers to fire. In fact, history records that it was at this trial when a judge in the United States first used the term "reasonable doubt", which we now take for granted. How do we know all this? Because there was present a court reporter – maybe not real time, but a court reporter nonetheless!

Of course, this created problems for the other soldiers, since the acquittal of Captain Preston inferred that the soldiers acted on their own, and not pursuant to the captain's orders.

The soldiers' trial started on November 27th, and another jury was chosen, again with John Adams and Josiah Quincy defending. Believe it or not, four of the soldiers were found not guilty by the jury; two others were found not guilty of murder but guilty of manslaughter, escaping the death penalty. The case is especially noted for John Adams' masterful closing argument, known as *Rex v. Wemms* (a court reporter transcribed it, and over 247 years later, you can google it), in which he very carefully chose not to antagonize those jurors who sympathized with the sons of liberty, who surely would not believe that they bore any responsibility for the tragedy. Adams instead shifted responsibility to London, arguing that it was the king's authorities there who provocatively sent troops resulting in the shootings.

Although the Boston Massacre trials elevated John

Adams' reputation as one of the very best lawyers in Massachusetts, and indeed in all of the colonies, I will submit to you that it is a testament to the two juries themselves, which would soon become enshrined in the later drafted Constitution of the United States. It is upon the shoulders of those two juries that our system of justice rests today, and every juror chosen since then has emulated.

You will recall from your grammar school studies that a courageous group of men and women, who had everything to lose and only one thing to gain – their liberty – began the world anew in 1776. In the coming years, a new nation was born, and the articles of confederation were implemented as a means for governing the fledgling republic. It was not until the summer of 1787 that the task of governing over the long term into the future generations and ages was finally reconsidered. And

keep in mind that, at that time, most learned people in the United States considered that a mere amendment or tweaking of the Articles of Confederation was in order. So there is a great deal of surprise and drama when the idea of a constitution surfaces.

In that regard, the story of our Constitution, as the commencement of its creation began in May of 1787, is truly one of the great suspense sagas known to man. For as many delegates (of which there were 39), there were positions on the pressing issues of the day; and for as many states that participated, 13, there were divergences and communities of interest. That we would even have a Constitution was not a foregone conclusion. In fact, even after the final draft of the Constitution was completed and the convention adjourned on September 17, 1787, our Constitutional Republic was still very

much uncertain and in great doubt.

In fact, though the Constitution became effective upon New Hampshire's ratification on June 21, 1788, the debate continued. On September 25, 1789, the congress transmitted to the state legislatures twelve proposed amendments. It might surprise you to hear that the first two dealt with congressional representation and congressional pay. Numbers three through twelve were actually adopted by the states to become the Bill of Rights in 1791. As an aside, the third proposed amendment became what we commonly refer to today as the first amendment, and the proposed fourth became our second, and so on. I might also add that, although there is normally a seven year time limit for an amendment to be approved by three-fourths of the state legislatures, there was no time limit for the first twelve proposed amendments, and the second

proposed amendment, relating to congressional pay raises, was adopted on May 7, 1992, some 203 years after it was introduced, and now can be found as our most recent and 27th Amendment. Other unsuccessful later amendments included one to abolish the United States Senate in 1876; to rename this country the "United States of the Earth" in 1893; and to provide the constitutional right to an environment free of pollution in 1971. It is the third article, by far the shortest of the three, which perhaps has remained the most mysterious and, dare I say, thusly abused article of the three. Article III states:

> **The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.**

Section 2 of Article III provides for federal jurisdiction, and the remaining Section 3 addresses treason. And that is it.

Ask most people today what is the most direct way they participate in government and they will probably say by voting. Yes, the right to vote is in the constitutional text although it is somewhat of a latecomer in various forms set forth in the Fourteenth, Fifteenth, Nineteenth, Twenty-Third and Twenty-Sixth Amendments. But 81 years before the right to vote made its very first appearance in the Constitution, the right to a jury in criminal cases was already included in the original unamended Constitution in Article III Section 2 Paragraph 3, as it came from the Philadelphia Convention. But the convention declined to extend this right to civil cases. This alone lost the Constitution the votes of such luminaries as George Mason and Elbridge Gerry, and provided the impetus

for a Bill of Rights. And so a guarantee of a jury trial in civil cases became the Seventh Amendment in December of 1791. In fact, three of the first ten amendments mention juries: we have grand juries in the fifth, criminal petit juries in the sixth, and civil juries in the seventh. To compare, the right to vote is nowhere mentioned in the Bill of Rights.

And to whom did this right to a jury belong? The criminal suspect, the civil plaintiff and defendant? Yes, of course - but also to the U.S. citizen who would take a turn as a juror. This essential element of self government allowed citizens to not only have a role in making laws (by voting for their representatives), but in enforcing and interpreting them as well. Today, 90 per cent of jury trials on this planet take place in the United States of America. No country uses juries, the direct democracy of the people, more than we do. It is a right for which has been fought and lives lost. And why?

First, jurors are constitutional officers, the equal of any article III judge or any other constitutional position. To illustrate, consider the symmetry of our federal constitution: it has six types of constitutional office, with each branch getting two. The legislative branch has senators and representatives; the executive branch, which is charged with enforcing the law, has of course the president, and given our inevitable mortality, a vice president. So that's four. And by the way, everybody else in the executive branch - the cabinet, secretaries, under-secretaries, generals, admirals, joint chiefs, boards and commissions are not constitutional officers, and quite honestly we could do without many of them. The judicial branch of the government, in Article III, provides for constitutional officers, whether district judges, circuit judges or supreme court justices, so that's number five. Last - and of

critical importance, and you don't even need the Bill of Rights to understand this: article III states: "The trial of all crimes, except in cases of impeachment, shall be by jury." So a juror is a constitutional officer - the sixth. And if that were not enough, the juror is enshrined again in the sixth amendment right to a criminal jury and the seventh amendment, the civil jury. And so that is the constitutional American jury, which Thomas Jefferson called the greatest anchor ever devised for humankind for holding a government to the principles of its constitution.

And so these constitutional officers also have constitutional rights. Although we speak of a right to a jury as being the right of the accused in a criminal case, the constitutional right is also the right to *serve* in the jury box. Nationwide, every citizen - because we are talking about a

direct democracy, the people themselves ruling direct - have an equal statistical right to serve as one of the nation's jurors, in courtrooms all across this country. And these jurors - not the accused, not the plaintiff or defendant in a civil case - have the right to be selected for service free from discrimination, whether racial, gender-based, ethnicity, or other protected class. In fact, in the Supreme Court case of *Batson v. Kentucky*, the court stated that if there is an improper challenge and the judge disallows the challenge, the remedy is to seat the challenged juror. It is his or her constitutional right to be seated, his or her right to sit as a juror in judgment in the case. This person cannot be denied that right by counsel or any party solely on the basis of race, gender or ethnic heritage. And the jury has the absolute right to be accurately instructed as to the law. The judge must instruct the jury as to what the

law actually is, and the system simply won't work if he or she does not. Jurors have the right to adjudicate, the right to decide a case, and the right to do so with proper instructions. That's why some cases are reversed on appeal because of an improper jury instruction.

One other thing about the constitutional rights of jurors: a few years ago, when our court system, like the rest of the government, was threatened with budget cuts and sequestration, the one vital service the court provides - jury trials - could not be constitutionally impacted. Why? Because when a case is ripe for trial, jurors have a right to decide the controversy. By not appropriating money to pay for jury trials, congress and the president could extinguish that right. Indeed, it would be quite a constitutional crisis if the right of the jury to adjudicate cases was deprived based on budgetary concerns.

Keep this in mind as well: the American jury has emerged unchanged, or with as little changes as any aspect of our government, over the last 229 years. If John Adams walked into this courtroom, he might be stunned to see things like electricity, smart phones, and air conditioning, and "real time" court reporting, but once he saw the bench and the jury box, the witness stand, and the podium where the lawyers work, he would know exactly what this room is for, and be just as comfortable trying a case today as he was back in Boston over two centuries ago.

Let me give you another example: in the days after 9/11, amidst the horrific terrorist attacks, the morose atmosphere which took over the country, and the apprehension we all felt about how such a thing could happen on our shores, something truly amazing also happened. Courthouses across the country

noticed that jurors - prospective jurors who had been summoned - turned out for jury service as never before in our history. They came to support our judicial institutions. And most magnificently in the year following 9/11, the conviction rate, based upon comprehensive studies, remained absolutely constant. It did not go up in favor of the prosecution or defense, or the plaintiff or defendant; it did not increase convictions as a result of anger or frustration, it did not decrease them out of despair and hopelessness. The allegiance of jurors to our governmental institutions was an allegiance to justice. And justice they did, in record numbers.

A third example: I previously mentioned that, in the days and weeks following Hurricane Katrina, the ability for attorneys, litigants, and witnesses to appear at the courthouse was impaired. But more important than that was the ability of

jurors from around the Eastern District of Louisiana to show up for court and participate in deciding the disputes that existed before Katrina, and the new ones that arose in the aftermath. The court could not operate without jurors. And likewise, those who sought to return to the New Orleans area truly wished to participate in its governance, including dispute resolution. Hurricane Katrina became a great divider of sorts: it separated those who enjoyed living here, but could easily be happy elsewhere from those whose roots were so ingrained, whose love for the city and the surrounding area was so strong, whose dedication to rebuilding the city physically, culturally and politically, drew them back and afforded them the opportunity – yes it was an opportunity, not an obligation – to participate in the legal affairs of the Eastern District of Louisiana. And they did so with the same dedication as before, if not more so.

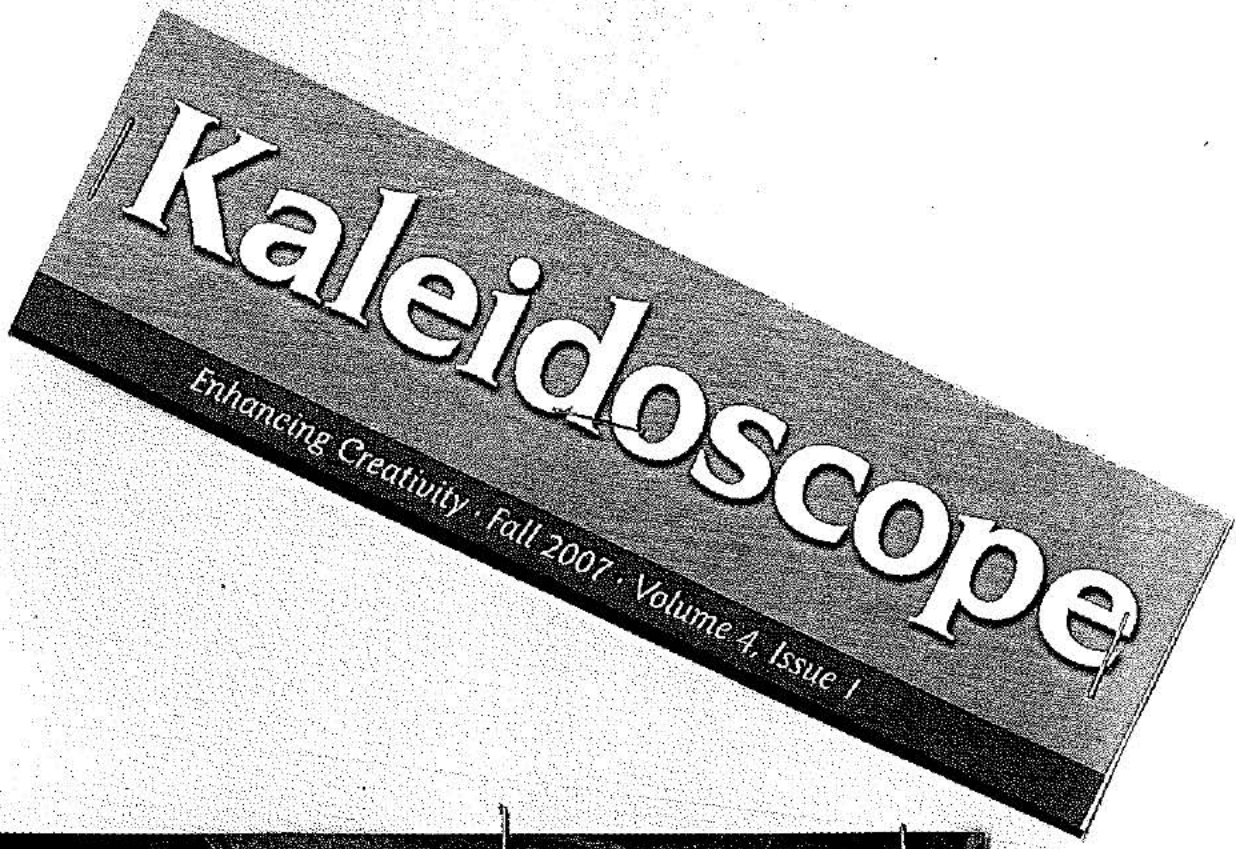
Quite simply, the jury trial is the fairest mechanism to resolve disputes, both criminal and civil. I believe in it wholeheartedly. I believe that Americans have a solid and deep sense of fairness and decency. Plus, they serve with gravity and have an overwhelming sense of duty. Jurors have the capacity to govern, and they do it betty than anyone in any other system. Every single jury trial in which you participate is a monument to free people everywhere governing themselves. As President Reagan said of freedom, the same applies here: the jury trial "is a fragile thing, never more than one generation away from extinction. It must be fought for and defended in every generation for it comes but once to a people."

In conclusion, I welcome you again to this great city. I will freely admit that, like most urban areas, it has its problems.

But it is a joyous colorful town of great culture and accomplishment. From these streets rose authors such as Tennessee Williams and Truman Capote; musicians such as Louis Armstrong, Pete Fountain, Aaron Neville, Harry Connick, Jr. and Allen Toussaint; culinary greats like Paul Prudhomme and Emeril Lagasse; and industrialists and inventors like Andrew Higgins, the self-made man who designed and built beach-landing craft, allowing U.S. troops to make amphibious landings in Normandy and elsewhere during World War II. (And if you get a chance, go to the World War II Museum up the street, it's well worth the time and the low price.)

I sincerely hope your meeting is an informative and successful gathering of court reporting professionals, and that you leave here with the benefit you expected to gain, and more.

If there is anything we at the courthouse for the Eastern District of Louisiana can do to make your stay more comfortable, please call on us. Thank you again for allowing me to be with you here this morning.



The magazine of the **LSU College of Arts & Sciences**

Kaleidoscope Magazine

Engelhardt; 0200

Alumnus Judge Kurt D. Engelhardt, U. S. District Court, Eastern District of Louisiana

Kaleidoscope: *What was your experience as an undergraduate in* LSU's *Arts & Sciences like? What was your major? In what organizations, etc., were you involved?*

Judge Engelhardt: I found undergraduate studies in the College of Arts & Sciences very stimulating. I originally began with an interest in communications and journalism, but quickly gravitated towards the history department. The wide variety of courses offered made each semester a new adventure, and being on campus was so much fun, even between classes. I guess you could say an extraordinary comfort level quickly set in for me, and my years at LSU were very conducive to studying, learning, and enjoying the various extra curriculars the university had to offer. I ultimately majored in history, and received my Bachelor of Arts in 1982. I knew at that time that I either wanted to continue and obtain a graduate degree in history, or attend law school.

While an undergrad, I was a member of the Mu Sigma Rho Honor Fraternity, and also the Golden Band from Tiger Land, which was perhaps my most memorable experience, in terms of pure fun!

K: *How do you feel that your education in the College of Arts & Sciences prepared you for life after college?*

KE: For one thing, the variety of subjects to which I was exposed as an undergrad benefits me to this day, particularly in my career on the bench. We hear cases (both civil and criminal) arising from a great cross section of society and in the business world, and my time in the College of Arts & Sciences has only benefited me in appreciating the complexities of the factual circumstances which pop up in cases that come before the Court. Moreover, the practical application of the various fields offered by the College of Arts & Sciences has been extremely helpful. For instance, foreign language can come into play in understanding centuries-old legal doctrine, especially in Louisiana, with its strong French influence; science is always important, both for cases involving medical issues as well as cases involving property damages, where an appreciation of physics is helpful. So I think it would be fair to say that, in almost every circumstance, the exposure to the various disciplines in the College of Arts & Sciences is of great benefit.

K: *How did you choose your career in law?*

KE: As an undergrad, I quickly invested myself heavily in the various history courses offered. To this day, I read a great deal of history in my spare time. As part of those studies, naturally American history involves many crossroads wherein our Constitution and various legal precedents dictated the course of events that followed. So I became interested in law from an academic and historical point of view, but also thought graduate studies in history would be quite satisfying and rewarding as well. Once I went to law school and determined to complete my law degree, the job market in the mid 1980s dictated to me a career in litigation, which I also enjoyed much more than I ever thought I would.

K: *How long have you been on the bench? What prompted you to become a judge?*

KE: Since December of 2001. I have always been fascinated with the role of our court system, both state and federal, in the preservation of a civil society. I don't think that most of the American public truly appreciates the indispensability and institutional necessity of our justice system. It is rare, almost unique, in affording all persons, no matter their station in life, access to fair, unbiased, non-violent dispute resolution. So I have always found the task of being a judge intriguing and inspiring, weighty though the decisions may be. I became interested in serving as a judge after serving four years on the Louisiana Judiciary Commission, and there became intensely interested in what judges do, the restrictions by which they must abide, and the importance of functioning in a role of public trust.

K: *What case(s), events, or issues in your career have been most memorable? Why?*

KE: I have to say that the people I have dealt with in my career are more memorable than the particular cases, events, or issues. By people, I mean clients, witnesses, other lawyers, judges... I really remember the personalities and characters with whom my profession has brought me into contact. And those people come from small cases all the way up to the biggest, and individual clients all the way up to publicly-traded corporate clients. Of course, I especially remember my first jury trial, which was in federal court in New Orleans (the court on which I now sit). Any trial is all-consuming, as far as emotion, energy, and intellectual capacity. The investment of yourself in a trial, including as a judge, is considerable. The events that are memorable would include, of course, my interview at the White House in order to become a judge, along with appearing before the Senate Judiciary

Committee prior to Senate confirmation. Both events were quite a thrill for me—to have those opportunities is very humbling.

K: *What qualities do you think make a good judge? Are they the same as those needed to be a good lawyer?*

KE: Aside from a desire to work hard and carefully examine the arguments and authorities offered by the parties, I would have to say that a good judge should have a good temperament and demeanor, and by that I mean patience with litigants. We must always remember that the court system is here for the benefit of our citizens, both individual and corporate. We basically provide a service to the public. I think litigants, and their lawyers, are accepting of results, even when unsuccessful in court, when they feel as though they have had their say, presented their case, and have been treated fairly. I would say that the qualities that make a good judge are not necessarily those that make a good lawyer. While good lawyers are, naturally, bright and hardworking, they must strategize in the adversarial context. In other words, they must perform at a high skill level when someone, perhaps of equal or greater competence, is trying to undo that which the lawyer is trying to accomplish. In addition, the lawyer must not only meet the demands of the court, but also be responsive to opposing counsel as well as his or her client ... and successfully run the every-day and long-term business of the law office on top of all that. I admire lawyers greatly, and find it fascinating and exciting to see a well-prepared lawyer handle his or her case in court.

K: *What do you look for in a good clerk?*

KE: Well, surely, impressive academic credentials, to begin with, but being a good law clerk goes well beyond that. I also look for personal skills, especially good communication skills. Law clerks are required to work very closely with the judge, and a very bright person who cannot impart his or her knowledge to me, or cannot discuss openly and defend his or her ideas with me, is of much less value as a law clerk than one who can. Communication skills, both verbal and written, are crucial. So my interview process is designed to go well beyond a sterling academic reputation as set forth in the applicant's resume.

K: *What types of academic backgrounds or degrees are good to prepare for a career in law?*

KE: The great thing about a career in law is that almost anything can serve as a good background, depending on what type of legal career you choose. For instance, if you have a degree in engineering, you might use your law degree in the areas of patent law or construction litigation. Any area of the practice involving intellectual property law would probably relate to and cause you to utilize your engineering degree. Those who concentrate in Constitutional law surely benefit from a course of undergraduate studies concentrating on American history. For a legal career not involving litigation, such as serving as in-house counsel or government service, a business degree would be a definite advantage. Attorneys who are involved in personal injury litigation might find their practice enhanced with an undergraduate degree in science, specifically the medical and nursing professions. Likewise accounting is a real asset in tax law. A law degree can be beneficial in any number of non-litigation occupations, such as a typical "office practice" based on transactional or contractual work, in-house counsel for a business, regulatory work, labor law, government service, or even as a consultant. My LSU law degree was, by all accounts, a bargain, given the benefits I have reaped professionally since graduating from LSU.

The New Orleans chapter of LSU College of Arts & Sciences Alumni resumed its meetings for the first time since Hurricane Katrina on April 19, 2007. Those attending included New Orleans attorney James Brown, Scott Simmons, Judge Kurt Engelhardt, Dean Guillermo Ferreyra, and Stephen Resor, also a New Orleans attorney.

The second meeting of the New Orleans chapter of LSU College of Arts & Sciences Alumni was held on September 13, 2007. Those attending included, from left to right, Judge Kurt Engelhardt, Roselyn B. Bonerio, Brother Neal Golden, Lorrie Leftwich, and Professor and Director of Public Policy Research R. Kirby Goidel, who holds a joint appointment with the Manship School of Mass Communication and the Department of Political Science.

THE Advocate

FALL EDITION 2011 VOL. 21, No. 1

MESSAGE FROM THE PRESIDENT

BY: HON. KURT D. ENGELHARDT

When I was five, I dreamed of being a football player; my father wanted me to be a lawyer. When I was ten, I aspired to be an astronaut; my father suggested I become a lawyer. When I was sixteen, I had decided I would become a veterinarian; my father told me I should become a lawyer. When I was twenty, I had finally settled on the idea of becoming a college history professor; my father urged me to become a lawyer. Ultimately, we compromised – and I became a lawyer. My father was not a lawyer – in fact he never went to college – but he knew a few things very well, and he was right: I should have become a lawyer, and I'm glad I did. More importantly, I became a fan and an admirer of my lawyer colleagues.

I have learned many things from my fellow lawyers. While I was in practice, I've had the luxury of being around some outstanding lawyers, all expert practitioners of the law. But I learned so much more from them. First, in addition to being a good lawyer, you must also have excellent business acumen, in order to run a law firm, handle employees, supervise bookkeeping, perform all of the administrative tasks that go with leasing and maintaining office space, and, of course, watch the bottom line in order to make certain that a profit can be made.

Lawyers have also taught me a lot about analytical thinking. Let's face it, this is not a job where emotion will carry you in each and every case; in fact emotion will carry you through very few cases. Thus, the ability to analyze facts and research and apply the law is not only critical, it is essential.

Good lawyers have also taught me a lot about psychology and human motivation. This applies not only to your own clients, but also, more importantly, to the opposing client. Whether you are attempting to settle a case, or to litigate it in the courtroom, you must be able to see the case through the eyes, and with the mind, of your opponents. You must also understand what motivates people. Excellent lawyers also have demonstrated to me the value of patience (a very short commodity these days) and the ability to anticipate and seize opportunities. Of course, both of these factors are based upon the fundamental concept of thorough preparation. Contrary to some of the anecdotal stories you may have heard in your law firms, no fine lawyer has ever waltzed through a career "winging it." Every excellent lawyer I have had the pleasure of working with or against (or seen from the bench) exhibited both patience and the ability to capitalize on each opportunity presented during the course of a case.

Preparation brings me to the issue of diligence and hard work. In order to be fully prepared, there quite simply is no substitute for the hard work you do at your desk, with your clients, in preparing your written submissions, and in your presentations in court. There's no doubt: this profession requires a work ethic like no other, given the adversarial process in which we toil. Frequently, someone is attempting to undo what you are trying to do!

Most important, all of the finest lawyers I have ever been around have consistently taught me that there is no substitute for honesty and integrity. Now, as a judge, I have seen the best lawyers candidly concede important facts, discard good arguments, and reluctantly but fairly settle cases, because their honesty and integrity in their communications with opposing counsel and the court dictated as much. Trust me: the small losses you may incur as a result of your honesty will return to you as profit tenfold. There is great value having credibility with the court and credibility with your fellow lawyers – and it takes a long time to develop such a reputation, but only a

cont'd on page 2

MESSAGE FROM THE PRESIDENT (CONT'D)

single day to lose it. Honesty and integrity are, quite simply, the gold standard in this profession. All of these you should aspire to be. As the English writer Douglas Jerrold once said: "The sharp employ the sharp; verily a man may be known by his lawyer."

Now, since I have been a judge, I've had the great honor to come into contact with not only some of the finest lawyers but also some very bright young lawyers, whom I enjoy tremendously. First of all, although it is sometimes popular to criticize new lawyers for being motivated solely by money, let me remind you that, after his graduation from the College of William and Mary, future Chief Justice John Marshall became a successful young lawyer in Richmond, Virginia, handling trials, wills, contracts, appeals, and any other business that walked through the front door. "A client is just come in," Marshall wrote a friend in 1789, "pray heaven he may have money." Thus, there is no shame in seeking to make a living practicing law.

But more than the money is the altruistic purpose: to help people. Looking back on my years in practice, I found that the best, most satisfying cases I handled are the disputes that were resolved without a lawsuit ever being filed. And the satisfied client, who paid a small fee, often thereafter sent other clients with bigger cases. It is my hope that young lawyers learn fast that practicing law requires the ability to respect one another while being adversarial, and zealously so – all to serve the cause of resolving conflict.

I frequently tell my wife and others that, as a judge, I have the best seat in the house to watch great lawyering take place. It is like having fifty yardline seats for the Super Bowl. But always, when I see lawyers practice their trade during trial, I am reminded of Teddy Roosevelt's description of the man – or woman – in the arena, "who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly so that his place shall never be with those cold and timid souls who neither know victory nor defeat." Indeed, there is nothing quite as gallant as the well-prepared lawyer who loses his or her case, as did Atticus Finch in "To Kill a Mockingbird."

Those who have been in my courtroom during Eastern District admissions know how much I enjoy saying that this is the largest FBA Chapter in the country, a fact which constantly amazes me, and which is a credit to you, the membership. This is a great organization: members of it exemplify the professionalism of federal practitioners locally and nationally, and enhance the role of dispute resolution, including through trial, in America today. It is my hope to continue the fine tradition of exciting CLE programs, perhaps with a few new twists, and to follow in the footsteps of the many former Chapter presidents who have made this organization as great as it is today. I hope to be able to uphold the fine standards they have set.

Before concluding, I wish to state a few words about my predecessor, Barry Ashe. I have had the pleasure of working with Barry for many years on FBA and other matters. His remarkable organizational skills, imagination, integrity and dedication have made many things possible that otherwise would not have occurred. I specifically cite to all of his hard work in bringing the FBA National Convention to New Orleans last September, and making it a grand slam success. Barry is a true leader – he leads from the top by creating the vision; he leads from the bottom in his willingness to do virtually any of the hard "grunt" work required; and he leads from the middle, in the sense that he is sensitive to the needs of the membership, regardless of length of practice, age of lawyer, or area of practice. His year at the helm of this organization will surely be a hard act to follow, and if I can even come close to fit the role he did, I'll be surprised and satisfied.

I am humble to serve as President for the next year. Thank you again.

SAVE THE DATES FOR UPCOMING EVENTS

Federal Judges' Reception
November 8, 2011
Great Hall of the U.S. Fifth Circuit Court of Appeals
600 Camp Street – 5:00 - 8:00 p.m.

Malcolm W. Monroe Federal Practice Seminar
November 16, 2011
W Hotel
1:00 – 5:15 p.m.

Last Chance CLE
December 7, 2011
Judge Lemelle's Courtroom

Lunch with Judge Helen Berrigan
November 16, 2011
Noon

YLD Holiday Party
November 16, 2011
W Hotel – 5:30 p.m.

Lunch with Judge Stanwood Duval
December 15, 2011–Noon

Be sure to check future issues of the *Advocate* and monitor our website, www.nofba.org, for exact dates.

THE Advocate

Spring Edition 2012

Vol. 21, No. 3

MESSAGE FROM THE PRESIDENT

BY: HON. KURT D. ENGELHARDT

A frequent question: Why is the New Orleans chapter the largest in the country? Or here's another: Why is FBA membership important to the New Orleans practitioner? The answer is the same.

As most of you know, I take great delight in pointing out with pride that in the Big Easy resides the largest chapter in the Federal Bar Association nationwide. In fact, at the recent local investiture ceremonies (Judges Brown, Milazzo and Higginson), I had the privilege and honor of bragging on our chapter again, pointing out this amazing accomplishment.

The reasons for this are many. First of all, this chapter is extremely active. During any given week or month, there will be FBA programs from which a practitioner can choose to obtain CLE credits, find out interesting new legal developments, and meet other practitioners, as well as court personnel, on an individualized basis. The CLE programs the chapter offers are always high quality, well-prepared events that address, first and foremost, the membership's interests. In recent weeks, the FBA has participated in the immensely successful bicentennial of the Eastern District of Louisiana entitled "Tracking Louisiana's Legal Heritage: Celebrating 200 Years of the Federal Courts In Louisiana", and a special CLE program entitled "Who Dats, Blue Dogs, and all dat Jazz: Intellectual Property in the Big Easy"; and looks forward to presenting the annual Rubin Symposium, a premier event on everyone's CLE calendar. The chapter board of directors seems always to gauge the needs of the local legal community, and to anticipate those matters which capture the membership's interest. In fact, we welcome ideas and suggestions from membership, and look to implement them as promptly as possible.

Another reason why the New Orleans chapter is successful is its relationship with the judiciary and court personnel of the Eastern District of Louisiana. The judges, magistrates, and other court personnel are interested in the success of the New Orleans chapter, and are quite willing to assist in chapter activities that improve the practice of law in the Eastern District. Thus, at any given function, members will have the opportunity to interact with judicial and other court personnel, instead of practitioners seeing judges only in a courtroom or in chambers. Rest assured that our court enjoys interaction with the chapter on a professional level.

Finally, and perhaps the best reason our chapter is successful, is because of the people who choose to get involved in it. The quality of the individuals who operate the chapter and participate in its various activities cannot be beat! The energy and interest they bring to the chapter is what really "makes it go." Since becoming involved in the New Orleans chapter, I have always been impressed with the initiative and enthusiasm with which each task

cont'd on page 2

MESSAGE FROM THE PRESIDENT (CONT'D)

is tackled, which not only generates a positive final result, but also allows chapter members to interact with other excellent lawyers – and very nice people, too!

So, although I will continue to proudly brag that our chapter is the largest in the country, I also wish to issue a clarion call to all members to keep up the outstanding work, increase your participation . . . and, of course, tell other practitioners of the benefits of becoming a new member of the New Orleans chapter of the FBA.

FEDERAL BAR ASSOCIATION HOSTS INDIAN LAW CLE

On February 3, 2012, the New Orleans Chapter of the Federal Bar Association hosted a 2-hour CLE entitled "Federal Indian Law 101, Including Indian Gaming." The seminar was held in the United States District Court, Eastern District of Louisiana and was put on by Elizabeth Kronk, Assistant Professor, Texas Tech University School of Law. Professor Kronk put on an informative and entertaining presentation that included an overview of Indian Law and a discussion of political identity, tribal sovereign immunity, public law 280, the Marshall Trilogy, civil jurisdiction, criminal jurisdiction, and Indian gaming. Those in attendance were impressed with Professor Kronk's vast knowledge of this unique subject matter, of which she is a leading expert.

SAVE THE DATES FOR UPCOMING EVENTS

20th Annual Judge Alvin B. Rubin Symposium
May 24, 2012

Lunch with Judge Martin L. C. Feldman
May 31, 2012

2nd Annual Bankruptcy Seminar/CLE
May 31, 2012

A Morning at the Federal Courthouse
June 20, 2012

Lunch with Judge Ivan Lemelle
June 28, 2012

Lunch with Judge Mary Ann Vial Lemmon
July 19, 2012

Be sure to check future issues of the *Advocate* and monitor our website, www.nofba.org, for exact dates.

THE Advocate

Summer Edition 2012

Vol. 21, No. 4

MESSAGE FROM THE PRESIDENT

BY: HON. KURT D. ENGELHARDT

One of the great features of FBA membership is reduced registration fees for the many outstanding CLE programs offered by the New Orleans chapter of the FBA. While I suppose there will always be a need for the "procrastinator's special" CLE programs between Christmas and New Years, those who wait until then can certainly have no beef about the quality and quantity of CLE programs offered throughout the year by the FBA. Over the past few months, our chapter has put on several unique, interesting, and varied CLE programs touching upon a variety of topics:

First, the annual Rubin Symposium was held on May 24th, and as usual the ceremonial courtroom at United States District Court was completely full. The program featured reminiscences from Circuit Judges Eugene Davis, Patrick Higginbotham, and Carolyn Dineen King regarding their service with Judge Rubin, and the many examples of his standards of professionalism and ethics in discharging his judicial duties. Thereafter, a panel featuring Bobby Harges, United States Magistrate Judge Karen Wells Roby, and attorney/board member Harold J. Flanagan discussed ethics and professionalism in the mediation process. Needless to say, the Rubin Symposium was another big hit, and raised the bar for that event even further. Special thanks to the committee who organized and put on this program: attorneys Donna Currault, Kelly Legier and Kathryn Knight and Judge Carl Barbier, and special thanks to Judge Ivan Lemelle for use of the ceremonial courtroom as the venue.

Also, on April 19th, the FBA put on a truly unique program entitled "Who Dats, Blue Dogs, & All Dat Jazz: Basics of Intellectual Property in the Big Easy." This program provided all practitioners with great insight into intellectual property law, both on the registration/protection side as well as the litigation side. Lecturers/panelists for this program were Chief Judge Sarah Vance, John T. "Jack" Culotta, Lesli D. Harris, Thomas McEachin and James H. Napper. The FBA committee members responsible for this successful CLE are John Balhoff, Eric Nowak, Jack Culotta and Kelly Legier; and special thanks, yet again, to Judge Lemelle for providing the ceremonial courtroom as the venue.

Our FBA chapter has also recently provided high quality CLE programs - one in the bankruptcy law field - entitled "Bankruptcy Tips for the Non-Bankruptcy Lawyer" held on May 31st (appreciation to Tara Richard, Erin Arnold, and Bankruptcy Court Clerk Marla Hamilton), and an intriguing criminal law CLE program entitled "Federal Sentencing Variances and Departures", held on June 12th (thanks to Virginia Schlueter, and board members Walter Becker and Brian Capitelli). These follow the very successful (and truly fun and different!) "Nazi Looted Art in the Federal Courts: Recent Developments

cont'd on page 2

MESSAGE FROM THE PRESIDENT (CONT'D)

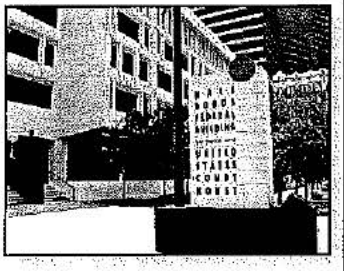
and the Case of Schiele's Dead City" and "Federal Indian Law 101, Including Indian Gaming" CLE programs. Our New Orleans chapter also co-sponsored a discussion of the proposed local rule changes in Bankruptcy Court, held on June 7th.

Coverage of the most recent of these events is featured in this issue of "*The Advocate*."

Perhaps the most remarkable program in which our local FBA chapter was involved was the ceremonial event celebrating the 200 year anniversary and history of litigation in various federal courts in Louisiana, particularly the Eastern District of Louisiana. The CLE program, entitled "Tracking Louisiana's Legal Heritage: Celebrating 200 Years of the Federal Courts in Louisiana", highlighted the colorful history of cases arising in federal courts in Louisiana, and focused on not only such high profile cases, but also judges, historical events, and even the location of federal courts over the past 200 years. Members of the CLE panel were Professor Warren M. Billings, Ph.D., Distinguished Professor of History, *Emeritus*, UNO and Visiting Professor of Law, The College of William and Mary Law School; Professor Richard Campanella, M.S., Geographer/Senior Professor of Practice, Tulane University School of Architecture; Mr. John Magill, M.A. Curator/Historian, The Historic New Orleans Collection; Mr. Jason Wiese, M.L.I.S., Assistant Director, Williams Research Center, The Historic New Orleans Collection; Professor Mark F. Fernandez, Ph.D., Professor of History, Loyola University New Orleans; Professor Raphael Cassimere, Jr., Ph.D., Seraphia D. Leyda University Teaching Professor, *Emeritus*, University of New Orleans; Professor John Randall Trahan, J.D., Louis B. Porterie Professor of Law, Paul M. Hebert Law Center, Louisiana State University. The seminar also featured a skit performed by International High School of New Orleans students featuring the debate among our forebears about whether Louisiana would be admitted to the union as a civil law or a common law state. The skit was written by local attorney (and immediate past-President of our Chapter) Barry Ashe. This event was co-sponsored by the New Orleans Chapter of the FBA, along with the New Orleans Bar Association, the Louisiana Bar Foundation and the Louisiana Center for Law and Civic Education. Special thanks and congratulations are owed to Judge (and FBA board member) Mary Ann Vial Lemmon, who chaired the program; United States Magistrate Judge Joseph C. Wilkinson, Jr.; EDLA Clerk of Court (and FBA board member) Loretta G. Whyte; Louisiana Supreme Court Justice Harry T. Lemmon (retired); UNO Professor Dr. Warren M. Billings; Dr. Alfred Lemmon of the Historic New Orleans Collection; attorney Ashley Belleau (immediate past-national President of the FBA); FBA board members Larry J. Centola, III, Matthew Moreland, and Tara Richard; attorneys Megan Dupuy, Harvey C. Koch, Brian P. Quirk, and Peter J. Wanek; and Erin Laine, EDLA Systems Analyst Programmer.

So if you ever wonder about the benefits of FBA membership, or the use of your dues, or the activities of the organization, I have described only a few. Indeed, it is programs such as these that afford our members the opportunity to learn so much more about topics of interest, while also receiving CLE credit, and while enjoying the company of their colleagues, court personnel and new friends in such an interesting and stimulating setting.

NOTICE FROM THE COURT:



Given the long lines for entry into the United States District Courthouse (EDLA) on Poydras Street, please be advised that much easier, less crowded entry may be made on the Lafayette Street side entrance instead of the Poydras Street entrance. Counsel are encouraged to use the Lafayette Street entrance to alleviate congestion at the Poydras Street entrance.

Engelhardt; 0208

THE Advocate

Winter Edition 2012

Vol. 21, No. 2

MESSAGE FROM THE PRESIDENT

BY: HON. KURT D. ENGELHARDT

Happy New Year to All !

The beginning of a new year is always cause for excitement and optimism, knowing that the next twelve months will bring opportunities and surprises. Of course, we pray that no misfortune will befall us before the next year begins (see, e.g., 2005), and always pledge, through our new year's resolutions, to enjoy improvement and even better times over the next twelve months.

For the legal community and the federal courts, I am optimistic. Recently, our legal community has experienced roller coaster-like gyrations. It would seem that we are finally in a position to experience consistently steady growth: the post-Katrina litigation bubble has almost disappeared, the litigation uptick related to the Gulf oil spill has now been absorbed, and hopefully the resumption of oil and gas activities soon will signal the growth of those industries upon which our legal community thrives. Moreover, construction in the City (including the new medical complex) shows no sign of abating; and the hotel, restaurant and tourism industries should all experience an uptick as a result of the many exciting events between the Sugar Bowl and Jazz Fest '12. All of this means that lawyers and their staffs should soon become very busy, if they are not already so.

This is also an exciting new year for our local federal courts. In the Eastern District of Louisiana, two new judges, Judge Nannette Jolivette Brown and Judge Jane Triche Milazzo, have joined the court and are already working full dockets. Another will no doubt join the court in the coming months. Also, Judge Stephen Higginson of New Orleans has recently joined the Fifth Circuit and is quickly becoming acclimated to the important workload that Court does here in New Orleans. The FBA enthusiastically welcomes them.

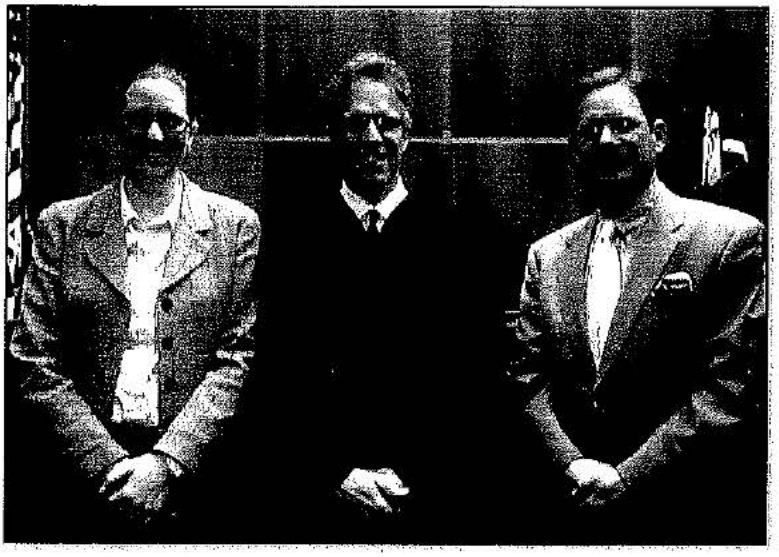
The United States District Court for the Eastern District of Louisiana also has a very active docket, including no less than three large and active multi-district litigation (MDL) matters – the Gulf oil spill, Chinese drywall, and the FEMA trailer/formaldehyde proceedings. It is hoped that another high profile MDL will be assigned to EDLA in 2012. In addition, the Court's docket remains active with the normal variety of interesting cases, both civil and criminal, all of which show no sign of abating.

Likewise, the New Orleans Chapter of the Federal Bar Association embarks on a new year with great hope and, of course, a very active and broad membership. Several exciting events are on the horizon, including the always-fascinating annual Rubin Symposium, several other interesting and worthwhile CLE programs, and

cont'd on page 2

MESSAGE FROM THE PRESIDENT (CONT'D)

the Annual Luncheon this summer. I ask that, most importantly, you advise the officers and the board of our FBA chapter of any needs or desires you have for FBA activities. This chapter caters to its membership, and no inquiry or request is too small or insignificant. In fact, our board would love to hear from you if you have ideas, suggestions, and/or complaints and criticisms (yes, we welcome those too!).



FBA chapter Treasurer Wendy Hickok Robinson and President Judge Kurt Engelhardt deliver to Fifth Circuit Judge Steve Higginson his new robe, provided courtesy of the FBA. Judge Higginson's formal Investiture ceremony will be in March.

In a more general sense, however, we should be excited about this new year: the City is experiencing an upswing in large events (in which we specialize), including the annual Sugar Bowl, the NCAA BCS Championship, the NCAA Final Four Basketball Tournament, French Quarter Festival, Jazz Fest, and, of course, Mardi Gras. Like the rest of New Orleans, the legal community should put its best face on, its best foot forward, and embrace these events as opportunities to showcase all that New Orleans has to offer.

So let's not just say "happy new year," let's actually go out and have a very happy, healthy and prosperous 2012!

SAVE THE DATES FOR UPCOMING EVENTS

Lunch with Judge Jane Triche Milazzo
Thursday, February 16, 2012
Noon

Lunch with Judge Kurt Engelhardt
Thursday, March 22, 2012
Noon

CLE: "Tracking Louisiana's Legal Heritage: Celebrating 200 Years of the Federal District Courts in Louisiana"
April 13, 2012

Lunch with Judge Eldon E. Fallon
Thursday, April 19, 2012 (Tentative)
Noon

CLE: "Who Dats, Blue Dogs, and All Dat Jazz: Basics of Intellectual Property in New Orleans"
April 19, 2012

Be sure to check future issues of the *Advocate* and monitor our website, www.nofba.org, for exact dates.

Federal Bar Association

Advocate

Summer Edition | New Orleans Chapter | Vol. 12, No. 7

EDITORIAL BOARD JAMES M. GARNER AND VIRGINIA LAUGHLIN SCHLUETER

MESSAGE FROM THE PRESIDENT

BY DON K. HAYCRAFT

Why do you belong to the Federal Bar Association? The FBA is the sole bar association that is devoted exclusively to the federal judiciary and to the federal practitioner, whether a civil, criminal, governmental, or private practice attorney. The New Orleans Chapter provides its members with small-group lunch sessions with district judges, magistrate judges and Fifth Circuit judges. Annually, we host the Malcolm Monroe Federal Practice Seminar, introducing new lawyers to the federal courts in our state. Also annually, we provide the Judge Alvin Rubin Symposium on topics of professionalism in federal court practice. We recognize the federal judges at our Judges Reception held each Fall. We assist new federal judges in defraying the expenses of investiture. Less well-known are our efforts to support other local community-oriented endeavors, such as financial support for the Justice for All Ball and the Down with Delinquincy Program, support for Teach for America, the bench-bar Habitat for Humanity homebuilding project and Judge Berrigan's program to provide at-risk youth with legal-education opportunities. The Chapter's Rules Committee reviews and comments on proposed federal local rule changes. Judges and lawyers alike find useful the conference rooms and other comfortable facilities at the Michaelle Pitard Wynne Attorney Conference Center located at the federal courthouse. In short, the New Orleans Chapter gives us the opportunity to serve our profession and community and provides us with ample opportunity to broaden our range of professional contacts.

Nationally, your Federal Bar Association pushes a legislative agenda and lobbies for increased pay for federal lawyers, fair judicial compensation, improved judicial confirmation procedure, increased bankruptcy judgeships and improvement of the Social Security adjudicatory process, among other important issues now pending before the Congress. The Federal Bar Association to which you belong stands as a strong advocate for the interests of the federal practitioner and the federal judiciary.

I have been proud to serve as President of the New Orleans FBA Chapter these twelve months. Following the example of recent Chapter presidents Andy Lee, Mike Ellis, Ashley Belleau, Gerald Meunier, Jim Irvin, and Mimi Koch, I hope that I have left the Chapter at least as strong as when I picked up the gavel. On July 17, I will turn over the gavel to Greg Grimsal and wish him well.

USAGE OF THE INTERNET IN THE EASTERN DISTRICT

Eldon E. Fallon, U.S. District Judge, Eastern District of Louisiana

In 2000, the Panel for Multi-district Litigation designated my Court as the transferee court for MDL-1355, In re Propulsid Products Liability Litigation. For those not familiar with multi-district litigation, a brief explanation is in order. Congress created the Judicial Panel on Multi-district Litigation to oversee pretrial proceedings of federal district court cases having common issues of fact. The panel is comprised of seven judges appointed by the Chief Justice. Cases filed in various district courts involving common issues of fact are eligible for multi-district designation either on the motion of a court or on the panel's own motion. After a hearing, the panel designates one district court as the transferee court. That court is then charged with overseeing and managing pretrial discovery. When the transferee court determines that discovery is complete, the court then remands the case back to the district from which it was transferred.

Propulsid litigation concerns the manufacture and use of Propulsid, a drug used to treat heartburn. The case currently consists of a number of class actions, as well as numerous individual lawsuits from across the country. To date, such discovery has produced more than 7 million pages of documents. This has led the Court to set up various

Continued on page 9

What to Do When You Have Oral Argument

Kurt D. Engelhardt, U.S. District Judge, Eastern District of Louisiana

Making an oral presentation before the judge on a particular motion presents vast opportunities for success. Unfortunately, most of the guidance offered to lawyers explains what not to do at oral argument. I believe it might be beneficial to highlight what a good lawyer should do when contemplating an oral argument. The following considerations are offered with regard to oral argument in federal court, recognizing that each case is different and that each judge may have individual preferences.

1. When To Request It, And When To Waive It?

The threshold consideration for counsel is whether to have oral argument. In tackling this strategic decision, counsel must ask themselves several hard questions: Are the legal issues raised in this motion so unsettled, complex, or novel that oral argument will assist the court in determining them? Must the court consider a departure from existing jurisprudence? Is a constitutional issue involved? What about an evidentiary hearing? Are the facts of this case so byzantine or subtle that an oral presentation will greatly enhance the written brief from a factual standpoint? And, of course, the most fundamental question: after oral argument, will I have advanced my client's cause with the court, or will I have lost ground?

Purely legal issues may not need oral argument. For example, where other courts have disagreed on an issue of statutory interpretation, written briefs provide a superior vehicle for urging a favored interpretation. Likewise, basic motions for summary judgment, wherein all of the Rule 56 materials have been submitted to the court, do not lend themselves readily to oral argument; the materials either present a genuine issue of material fact or they do not. You should ask yourself: "What additional information can I impart to the court at oral argument that has not been clearly set forth in my motion and memorandum?" If you have nothing further to offer the court, perhaps oral argument is not necessary.

Finally, it is important to seek input from your client in deciding whether to request or waive oral argument. Your time is not cheap. If you are working on an hourly basis, you should review with your client the cost of your preparing for oral argument, traveling to and from court, waiting for your case to be called, actually appearing before the Court, and the expense of demonstrative evidence to make the argument effective. You should ask not only whether your client will pay for this time, but also whether your client would like to attend. Always invite your client to attend oral argument. After all, it is your client's case you will be presenting to the Court.

2. Who Should Argue Before The Court?

Once you and your client have determined that oral argument is desirable and the presiding Judge has set it for hearing, you must then decide which counsel of record will handle the oral argument. If you are handling the case alone, the answer is simple. In many cases, however, counsel of record may consist of two, three, or even four lawyers, or perhaps local and out-of-state counsel, or even separate counsel for multiple parties advancing the same issue on a particular motion. Hence, an inquiry should be made amongst counsel as to who is best suited to handle the issues before the Court.

Before accepting the laboring oar, ask yourself some important questions. For example, how well versed are you in the memoranda? How well versed are you in the jurisprudence cited in the memoranda? If the Court asks a factual question, or a question about a case cited in the memoranda, will you be able to answer promptly and completely, or will you be looking to the associate who conducted the research and prepared the briefs? If the associate or partner who wrote your client's memoranda knows the evidence and case law well, perhaps he or she should handle the oral argument in furtherance of the client's best interests.

You might also consider breaking the oral argument up into sections to be handled by different attorneys. This plan, however, should be reserved for complex matters with issues that can be separated clearly. It is indeed not desirable to have multiple attorneys popping up and down in response to various questions, and thus you should be cognizant of making a streamlined presentation, even if more than one attorney participates in your argument.

3. Know Your Judge.

As you well know, various judges have different styles. You should know from past experience (or inquiries directed to a partner/associate or other attorney friend) what tendencies or preferences your judge might have. Does the judge ask a lot of questions during oral argument? Is the judge quite likely to take the matter under submission, or will he or she often rule from the bench at the close of oral argument? Is the judge known for poring over the memoranda and doing independent research? Also consider whether the judge has expressed himself/herself at status conferences, hearings, or other events held during the course of the particular case in which you are involved. Has the judge indicated a favorable or unfavorable opinion with regard to a particular witness, on a particular issue, or regarding a strategy being employed in the case? You should be aware if the judge has previously rendered an opinion in another case on the same or a similar issue. Just as important is the judge's prior expertise as an attorney, *i.e.*, his or her area of expertise before joining the bench. As you want your argument to be favorably received, knowing the "audience" for your presentation is very important.

4. Prepare And Organize Your Argument.

Like most everything else, the saying that "failing to prepare is preparing to

Continued from Page 2

What to Do When You Have Oral Argument

Kurt D. Engelhardt, U.S. District Judge, Eastern District of Louisiana

fail" is true of oral argument. Like brief writing, oral argument is an exercise in communication —communicating not only established facts and controlling law, but also your client's position and a desired result.

First, always assume that the judge has read the memoranda and is familiar with the material contained in them. When organizing, ask yourself, "What is important that is not in my memorandum?"

Second, isolate your strongest argument and flesh it out orally. You might consider advancing your strongest or best argument first, in order to ensure its presentation to the Court orally prior to a potential barrage of questions, or the expiration of time, which might derail a build-up to your best argument. Understand that not every point made in a brief merits further discussion orally beyond what has already been written. Quite often, issues have been exhaustively briefed and the Court needs no further exposure to those issues.

Third, stick to the rule or statute at issue. If you are moving under Rule 12, argue under Rule 12. Far too often attorneys find a familiar tangent and lose focus by immersing themselves into irrelevant details, future issues not part of the subject motion, ongoing controversies with opposing counsel that do not bear on the subject motion, or an entirely different motion that he or she either plans to file in the future or (worse yet) is already subject to a court ruling. That brings us to the fourth point in organizing, which is to stay focused. Make your point succinctly and move on to the next. Try to avoid a "stream of consciousness" approach that will require the Court to decipher later what exactly it was that you were trying to communicate.

Lastly, tell the Court what relief you desire for your client. While this is sometimes obvious, there are often occasions in which several forms of relief might be available. An obvious example: if you are moving under Rule 12(b)(6), should the plaintiff be allowed to amend? If so, how much time do you believe is fair under the circumstances? If not, why not? Likewise, if you are defending a Rule 12(b)(6) motion at oral argument, don't forget that you might lose the motion, but still have an opportunity to amend. Thus, you should certainly advise the court of your desire to do so in the event you are unsuccessful. Another example: if you seek injunctive relief, how should the injunction be fashioned? What about the bond? These are just a few examples of the types of considerations you should make when attempting to organize for an oral presentation to the court.

The best way to check your preparation and organization is to practice with another attorney, either in your office or with another firm. This suggestion does not mean to prepare a speech and recite it to another. This recommendation merely involves exposing the other attorney to the issues and then asking what questions he or she might have if he or she were the judge. It is often amazing to see attorneys either overlook the obvious issue or blindly hammer away with argument that is of no moment or that is predicated on a threshold determination that counsel is completely unprepared to discuss. By practicing with another attorney you might be surprised at how quickly that attorney can pinpoint factual inquiries, legal issues, and other matters in which most assuredly the court will also be interested.

5. Demeanor And Attitude Count.

These traits are a function of professionalism. Some lawyers come to court expecting to "blow the doors off" the courtroom or literally run their opponents out of the courtroom. From the time they stand up to make a presentation, they appear angry, unduly aggressive, and terribly arrogant. Oral argument is an opportunity to communicate, not one-up your opponent with an invective. Sometimes, during the course of oral argument, tempers escalate and accusations fly before the argument is finished. This behavior is unacceptable and counter-productive. I have often found that bad attitude and demeanor sometime betray weakness in the client's position, either factually or legally. Thus, as a tactic, overly-aggressive or obnoxious behavior does not intimidate anyone (surely not the judge) and might even create suspicion that your position is unsound. Likewise, I have seen the lawyers distract the court with such tactics from what is otherwise a firm and correct position.

Oral argument, in a nutshell, affords you the opportunity to explain to the Court, quite simply, why your client should prevail at this juncture. It is not an invitation to continue a grudge match from a deposition meeting or to tattletale to the court about opposing counsel's conduct (unless that conduct is the subject of the motion). Be respectful of your opponent's time and don't interrupt your opponent. And, of course, it should go without saying (but unfortunately needs to be said): Do not for any reason interrupt the judge while he/she is asking a question or making a statement. Never be disagreeable just because you disagree.

6. Give The Court A Brief Overview Of Your Outline At The Outset, But Be Flexible!

This suggestion is perhaps the trickiest part of oral argument. Having prepared to make your points before the court, you might be faced with a direction from the bench that the judge wants to hear about issue D, when you had planned to talk about A, B, C and D. Or you may find that the judge starts propounding questions at the outset of your argument in an order that differs from what you have prepared. Therefore, I believe it best that you tell the Court in the first few seconds what you intend to cover in oral argument: "Your Honor, in addition to the information contained in my brief, I would like to present to the Court argument on the issues of A, B, C and D."

Continued from Page 3

What to Do When You Have Oral Argument

Kurt D. Engelhardt, U.S. District Judge, Eastern District of Louisiana

The judge is aware then that you intend to discuss issue D. Of course, this statement will not always prevent her or him from getting straight to D, but at least you have put the Court on notice that those are the issues you intend to cover at oral argument.

It could well be that the judge does not want to hear about A, B, C or D, but rather is concerned about issues X, Y and Z. Hence, you should be flexible. Your preparations should be all-encompassing, but should also include the entirety of the motion before the court. During the course of my research, I have sometimes become very interested in an issue that received little attention in the memoranda. Often times, the motion may turn on points that you believed were insignificant at the time you wrote your memorandum. To analogize, you must be able to turn to any page in the sheet music and play the tune on that page. You may want to return to your outline in some fashion or another, but it is obviously better if you can establish a logical flow between the court's inquiry and your pre-determined presentation. Far too often, the court wants to hear about D, but the attorney wants to talk about B, so the attorney continues to talk about B. Such lack of flexibility can give the impression that the party's position on D is weak or otherwise unfavorable. So use your outline, but be flexible.

7. Read The Pertinent Cases.

While not every case cited in a memorandum is controlling and dispositive of the issues before the Court, you should be completely familiar with cases that are cited – not only by you, but also (and perhaps more importantly) by your opponent. You should be at least generally familiar with the facts, the rationale, and the holding of each cited case. If you are going to distinguish your opponent's cited cases, you must know the facts of those cases in order to do so. Although this may sometimes require a significant amount of time spent preparing for oral argument, it can often make the difference in court.

Moreover, it is embarrassing to the attorney, and speaks volumes to the court, when the attorney is unable to discuss with any specificity a case cited in his or her own memorandum. Likewise, if you are not fluent in your opponent's cited cases, the Court may assume that your entire position, including the written submission, has not been adequately researched to be dependable. In that sense, oral argument requires the additional commitment to learn with great familiarity the cases you cite in your written material, such that you can address questions about those cases without having to pull them out and review them on the spot.

8. Know The Case Record.

When was the last time you checked the record at the courthouse or on the net? Has anything been filed recently that either supports or undermines your motion? You can rest assured that the judge and his or her staff are quite familiar with the contents of the record and have spent some time reviewing, at a minimum, the case history (*i.e.*, when the suit was filed, what allegations were made, what relief was requested, what affirmative defenses have been lodged, what motions have been filed as well as rulings on such motions, and what future events have been placed on the court's calendar, such as the trial date, pretrial conference date, and other deadlines). You should, therefore, be completely familiar with the record yourself and also be cognizant of future deadlines and how they will be impacted by the issues you are arguing before the court. Will this motion, if granted, impact expert reports and deadlines for expert reports? Will this motion impact the trial date or the existing discovery deadline? The judge may well be concerned about such effects.

9. Use Demonstrative Aids, If Appropriate.

Consider whether the motion involves complex facts or critical documents. Would an oral presentation be enhanced with a blow-up of a key document? Is there a schematic involving the relationships between corporate entities that might be illustrative? What about a time line or a graph? If you are making an argument based upon prescription or peremption, perhaps you should establish a time line of events to illustrate why prescription or peremption has or has not run. On the other hand, be careful that your demonstrative aid does not become a distraction or otherwise hinder your communication skills. While every motion does not lend itself to this technique, you should always remember that oral argument is about communication, and an aid to communication is certainly fair game.

10. Listen To Your Opponent.

Perhaps the most overlooked item of a good oral argument has nothing to do with speaking: what you can gain from your opponent at oral argument. You will, of course, have to counter your opponent's arguments, but what else is opposing counsel saying? If an allusion is made to certain "facts," is it possible that a witness exists who might testify as to such facts? Is counsel talking about a witness whom you have not deposed? Does she know about a bank of documents that you have not yet requested? Is opposing counsel tipping his hand on trial strategy? Quite often attorneys concentrate on their own presentation to the court and lose the opportunity to find out more about their opponent's case. Don't simply plan to reply to your opponent's arguments; listen in detail for what existing evidence might support your opponent's belief that his or her arguments are good ones.

11. Deal With Precedent.

In the Eastern District, the judges are concerned first and foremost with Fifth Circuit jurisprudence, and you should begin your review of cases there. If you can find a case which is dispositive of the motion and has precisely the same facts as your case, feel free to argue as

Continued from Page 4

What to Do When You Have Oral Argument

Kurt D. Engelhardt, U.S. District Judge, Eastern District of Louisiana

much. However, be prepared for questions which, if answered candidly, might create distinctions between your case and the existing jurisprudence. If the judge does not ask these questions, a well-prepared opponent surely will highlight such distinctions.

If you find yourself on the unfavorable side of precedent, your goal will be to distinguish your case. Are there particular facts which make your case different? Do you have a new theory of law which might govern the factual circumstances? Obviously, if controlling jurisprudence is on all fours and adverse to your position, you have no choice but to try to distinguish your case. The Court may have more latitude if it considers your case factually unique.

12. Be Prepared To Reply.

Review your opponent's memorandum carefully. The court might ask you questions about points raised by your opponent. Also, there is a good chance that the arguments your opponent will offer will be contained in his or her pleadings. Knowing your opponent's memorandum will help you prepare rebuttal points. But again, be flexible, as your opponent might have a novel approach to oral argument that you will have to counter. Your opponent's witnesses, documents, arguments, and cited cases won't go away, so be prepared to parry each thrust.

13. Candor To The Court And Your Opponent.

We are all familiar with the attorney's duty of candor to the Court. This duty particularly comes into play at oral argument. When reviewing your opponent's brief, discern which facts you might concede if pressed by the court. You will be expected to answer the judge's questions succinctly and to the point. Thus, if the judge asks, "isn't it true that . . . ," you will be called upon to admit or deny that fact. "Dancing" around such a question might suggest to the judge that the fact is both true and detrimental to your argument. A better tactic might be to candidly concede facts established by your opponent and then explain why such facts should not result in an adverse ruling in your case. So you should also review your opponent's pleadings and supporting materials and determine which facts or points of law you can concede if asked directly by the judge. As to legal authority, never misquote a case or misrepresent the holding of a case. You should maintain your credibility with the court by acknowledging case law contrary to your position; you can always distinguish your case from such jurisprudence in good faith, assuming such grounds for distinction exist.

Earning a good reputation with the Court and the bar may take years, but getting a bad reputation only takes a day. Being overly contentious about clearly-incontrovertible facts, or attempting to have the court overlook unfavorable but clearly applicable case law, are the types of things the judge and his or her staff will remember. Candor to the court in such matters will never be mistaken for weakness or lack of zeal in advancing your client's interests.

14. Use Your Time Wisely And Efficiently.

There is an old maxim that queries why the person with the least to say usually takes the longest to say it. Maybe this truism is not necessarily so with oral argument before the Court, but to quote legendary basketball coach John Wooden, "Do not mistake activity for achievement." If you are given twenty minutes to argue your client's position, ask yourself whether you really need the full twenty minutes to be effective. If your position is firmly established, well thought out, and well-briefed, perhaps you should only use half that time and then advise the Court that you will rely on the strength of the written material submitted on your client's behalf. Such an approach conveys two points: (1) you are confident your brief is well written and complete, and (2) you are prepared to answer the court's questions about any point contained in the brief or raised at oral argument. You should always leave at least a few minutes to entertain questions from the court. Some judges will ask questions throughout oral argument, some will wait until the end, and sometimes, there will be no questions at all. Nonetheless, seeking out the court's inquiries indicates you have complete command over the subject matter and are fully prepared. Just because the court does not ask questions of you does not mean that you will prevail on the motion, but rather indicates that you have indeed prevailed in establishing the court's understanding of your position. Likewise, a plethora of questions does not necessarily portend bad news for your position. Rather, you should welcome questions as an opportunity to demonstrate the firmness of your arguments and your excellent preparation for oral argument.

Conclusion: I have often felt that lawyering, to a large degree, is communicating. Whether in writing or verbally, you must be able to express not only your client's predicament, but also the outcome you desire for your client and reasons why such an outcome is legally proper. In that sense, oral argument is so much more than simply "face time" with the judge or rehashing what you have already communicated to the court in your memorandum. Well prepared and presented oral argument can often times move the court from a belief formulated after reviewing the memoranda and conducting its own research. Accordingly, it should be undertaken seriously and with great deliberation. A seamless and flawless oral argument is indeed a thing of beauty, if not a common occurrence. Such a successful oral presentation communicates the logic supporting the result you desire for your client and the reasons why such result is ultimately correct.

The Federal Lawyer

March/April 2010 Volume 57 Number Three

The Federal Lawyer

March/April 2010 Volume 57 Number Three

35th Annual
Federal Bar Association
Indian Law Conference
April 8-9, 2010

Reflecting Back, Looking Forward

JUSTIN TORRES

Hon. Kurt D. Engelhardt
U.S. District Judge, Eastern District of Louisiana

FOR HON. KURT D. ENGELHARDT, running marathons and judging share one common characteristic: both are primarily a mental game. "You can handle the physical part of a marathon. It's the mental part of slowly building up your stamina" that counts, says Engelhardt. "In running, as in judging, faster isn't necessarily better. There's discipline in not wanting something too quickly."

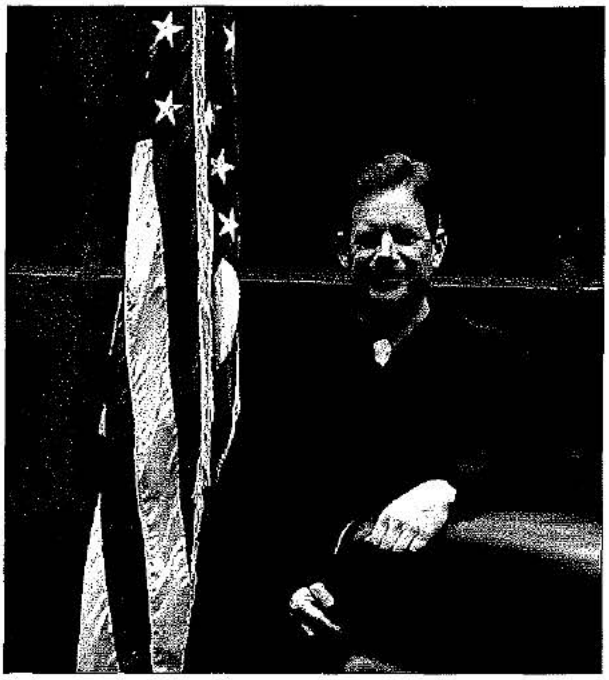


Photo by K. Morgan Sasser.

Engelhardt, a federal district judge for the Eastern District of Louisiana since 2001, knows what he's talking about. A runner as a young man, he didn't have time for the sport once he began practicing law in New Orleans in the late 1980s. Twenty years later, in the aftermath of Hurricane Katrina, he took up running again with a vengeance. Adopting a 20-week training program, he entered his first marathon—the Mardi Gras Marathon—in 2008. His second marathon took place this winter, and another is coming up in the spring. "Fifteen minutes into my first marathon, I knew I wanted to do it again," says Engelhardt. "It's addictive."

A local boy who grew up in the eastern part of New Orleans, the path leading Judge Engelhardt toward the federal bench began at Louisiana State University, where he was a Double Tiger—a graduate of LSU undergraduate and law school. He entered law school because, he jokes, his father "told me, you like to argue, you should go be a lawyer." More seriously, he explains that he came to the law through a love of history. "I was fascinated by the idea of the Constitution and how we govern ourselves through law." After graduating from LSU in 1985, he clerked for two years for a state appellate judge, Charles Grisbaum, whom Judge Engelhardt credits with teaching him legal writing. "He was a no-frills guy. He liked bare bones facts, analysis, and a conclusion," Judge Engelhardt recalls. "He worked on the KISS principle: keep it simple, stupid. I need what I need to decide the case and not anything else."

After his clerkship, Judge Engelhardt joined a small civil litigation firm in New Orleans—a job that quickly gave him the chance to test his skills in the courtroom as lead counsel in a weeklong civil jury trial, at which one of the largest firms in the city was representing the other side. "The learning curve on that one was straight up, let me tell you," Engelhardt says with a smile. "I was successful in the limited sense that the settlement was on the low side of fair and the client was satisfied. But by the end of it I had lost so much weight my suits didn't fit well."

Nevertheless, the experience taught him the most valuable lesson of his 15-year career as a litigator working mostly in insurance defense and contract cases: the importance of extensive, meticulous preparation. "You win cases at your desk, by knowing the case better than your opponent does," says Engelhardt. "I was hardly at the top of my class [in law school] but I was able to hold my own because I worked hard to consider each case on its own, from every angle." His trial-by-fire experience also convinced him that law firms should do more to get young associates into court quickly. According to the judge, "until you have responsibility for something you won't know how to do it. ... Firms pay big bucks to get the best academic records out there and then put these kids in the library. Let these young lawyers get in there and try cases."

Since becoming a federal judge, Engelhardt has pre-

ENGELHARDT *continued on page 18*

ENGELHARDT *continued from page 17*

sided over some of the most high-profile cases in the district, including a suit the state filed against the federal government to halt Gulf Coast oil leases without a more extensive environmental impact analysis as well as a 45-year-old desegregation case in Jefferson Parish, La. Along with the rest of the district judges in southeastern Louisiana, he also lived through the disruption of the court's operations in the aftermath of Hurricane Katrina. Engelhardt's own home was flooded, and he had to evacuate his office and move it to Baton Rouge. Congress would eventually pass emergency legislation allowing the Eastern District of Louisiana to sit outside of its territorial jurisdiction in the aftermath of the storm—the first time in American history a federal district court was given such latitude.

The devastation of the city and surrounding parishes caused a massive spike in cases filed in the Eastern District just as the court was trying to reopen chambers and reassemble its staff. From 2005 to 2006, the civil caseload of the Eastern District jumped 112 percent and another 58 percent the following year, temporarily giving the district the largest caseload of any district court in the country. More daunting than the skyrocketing caseload, however, were the real-world implications of the work.

"The decisions over things like policy exclusions in insurance contracts, concurrent cause clauses—the decisions were so far reaching," recalls Judge Engelhardt. "Every judge knew that the decisions would have enormous impact on people's lives and their ability to rebuild. It was very humbling." One small bright spot to emerge as a result of Katrina, says the judge, was the increased cooperation among the diaspora of attorneys, witnesses, and defendants from New Orleans. "We had lawyers copying their files for opposing counsel, because whole offices were destroyed. Cooperation became the mindset." The court also enacted a far-reaching disaster response plan that Judge Engelhardt hopes will become a model for other courts.

Katrina also gave rise to Judge Engelhardt's most prominent case—a mass joinder action in which hundreds of plaintiffs sued the manufacturers of trailers that FEMA has provided to residents of the Gulf Coast after the hurricane. The plaintiffs alleged that the ubiquitous white trailers caused widespread exposure to formaldehyde, which is an irritant and carcinogen. After months of discovery and motion practice—including a far-reaching ruling denying the government's motion to be removed from the case on sovereign immunity grounds—Judge Engelhardt presided over the first of several bellwether trials in September 2009, which resulted in a judgment of no liability against the defendants.

As a judge, Engelhardt says that his greatest frustration is the occasional paucity of reliable facts provided by attorneys. "Whether in motion practice or in trial, attorneys control the flow of facts to the court. Oftentimes, we rule and attorneys come back to say, wait, those aren't the facts! Well, we only know what you tell us." Especially in the cases related to Hurricane Katrina, Judge Engelhardt believed that it was important that "people feel like they've been heard, that they had their day in court and someone listened to them." Ensuring that all relevant and reliable facts come forward, he says, helps litigants "have confidence that the case wasn't decided on [some issue] unknown to them."

Running remains Judge Engelhardt's curative for the pressures of judging as well as his connection to a world outside the law. He often runs with a local club, with dozens of members from all walks of life ranging from their teens to their 70s. Among this group, he's just one more runner—not a judge who needs to be convinced, cajoled, or kissed up to. "The people that I run with, some know I'm a judge and some don't, and none of them care. I'm just another runner to them," he says. "We're all just trying to make our miles." **TFL**

Justin Torres previously clerked for Judge Engelhardt. He now clerks for Judge Edith Brown Clement on the Fifth Circuit Court of Appeals.

OLP CANDIDATE DATA FORM

Work Address: **500 Poydras Street, Room C367**
New Orleans, LA 70130

Work Phone: **(504) 589-7645**

Home Addres (b) (6)

Home Phone (if any): (b) (6)

Cell Phone: (b) (6)

Preferred E-mail Address: (b)(6) - Kurt Engelhardt Email Address

Preferred Phone Number: ____ Work **__X__Cell** ____Home

Birth date: (b) (6)

Please specify how you would like your name listed on any formal document, including on nomination paperwork and a Presidential Commission (full middle name, just middle initial, etc.—including any suffix to the name, and placement of commas).

Kurt D. Engelhardt

The Department of Justice specifies ethnicity on biographical paperwork circulated to nominations staff and placed in permanent files at the time of nomination; the Federal Judicial Center uses this as its source for demographic information. Please indicate how your ethnicity should be reported if you are nominated by the President.

(b) (6)

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Tuesday, August 22, 2017 9:41 AM
To: Lola.A.King@usdoj.gov; Day, Sean (OLP)
Cc: Talley, Brett (OLP); (b)(6) - Susan Adams Email Address
Subject: Senate Judiciary Questionnaire (SJQ); OLP Data Form
Attachments: Senate Questionnaire 8-21-17.doc; Senate Questionnaire Affidavit Signed and Notarized.pdf; OLP Data Form.8-21-17.pdf; Item 12 - Senate Questionnaire - The Advocate - Summer 2003 - Oral Argument Column.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Fall Edition 2011.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Winter Edition 2012.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Spring Edition 2012.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Summer Edition - 2012.pdf; Item 12 - Senate Questionnaire - 5-20-05 LSU A&S Commencement Speech.pdf; (b) (5) ; Item 12 - Senate Questionnaire - 3-2-10 Speech to Loyola Chapter of The Federalist Society.pdf; Item 12 - Senate Questionnaire - Kaleidoscope Interview 2007.pdf; Item 12 - Senate Questionnaire - The Federal Lawyer Interview 2010 - Torres.pdf; Item 12 - Senate Questionnaire - Court Reporter Speech.pdf; 9-17-13 Order & Reasons - USDC-EDLA No. 10-204.pdf; Item 19 - Senate Questionnaire - Bulgarian Lecture Outline - 2012.pdf

Dear Ms. King and Mr. Day:

Attached please find Judge Kurt D. Engelhardt's SJQ, along with attachments referenced therein, the Questionnaire Affidavit which has been signed and notarized, and the OLP Data Form.

Should you have any questions or need anything further at this time, please advise.

Thank you.

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(See attached file: Senate Questionnaire 8-21-17.doc) (See attached file: Senate Questionnaire Affidavit Signed and Notarized.pdf)

(See attached file: OLP Data Form.8-21-17.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Summer 2003 - Oral Argument Column.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Fall Edition 2011.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Winter Edition 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Spring Edition 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Summer Edition - 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - 5-20-05 LSU A&S Commencement Speech.pdf)

(See attached file: [redacted] (b) (5) [redacted])

(See attached file: Item 12 - Senate Questionnaire - 3-2-10 Speech to Loyola Chapter of The Federalist Society.pdf)

(See attached file: Item 12 - Senate Questionnaire - Kaleidoscope Interview 2007.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Federal Lawyer Interview 2010 - Torres.pdf)

(See attached file: Item 12 - Senate Questionnaire - Court Reporter Speech.pdf)

(See attached file: 9-17-13 Order & Reasons - USDC-EDLA No. 10-204.pdf)

(See attached file: Item 19 - Senate Questionnaire - Bulgarian Lecture Outline - 2012.pdf)

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Tuesday, August 22, 2017 10:31 AM
To: Kingo, Lola A. (OLP)
Subject: Senate Judiciary Questionnaire (SJQ); OLP Data Form
Attachments: Senate Questionnaire 8-21-17.doc; Senate Questionnaire Affidavit Signed and Notarized.pdf; OLP Data Form.8-21-17.pdf; Item 12 - Senate Questionnaire - The Advocate - Summer 2003 - Oral Argument Column.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Fall Edition 2011.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Winter Edition 2012.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Spring Edition 2012.pdf; Item 12 - Senate Questionnaire - The Advocate - Message From The President - Summer Edition - 2012.pdf; Item 12 - Senate Questionnaire - 5-20-05 LSU A&S Commencement Speech.pdf; (b) (5) Item 12 - Senate Questionnaire - 3-2-10 Speech to Loyola Chapter of The Federalist Society.pdf; Item 12 - Senate Questionnaire - Kaleidoscope Interview 2007.pdf; Item 12 - Senate Questionnaire - The Federal Lawyer Interview 2010 - Torres.pdf; Item 12 - Senate Questionnaire - Court Reporter Speech.pdf; 9-17-13 Order & Reasons - USDC-EDLA No. 10-204.pdf; Item 19 - Senate Questionnaire - Bulgarian Lecture Outline - 2012.pdf

Dear Ms. Kingo:

I have to apologize for having just realized in my haste to get the email out yesterday, I incorrectly have your name as "King" and not Kingo. I am going to try this again and hopefully, finally, have it correct. Sean Day and Brett Talley have received yesterday's email and attachments, so I have not copied them again on this email.

Attached please find Judge Kurt D. Engelhardt's SJQ, along with attachments referenced therein, the Questionnaire Affidavit which has been signed and notarized, and the OLP Data Form.

Should you have any questions or need anything further at this time, please advise.

Thank you.

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(See attached file: Senate Questionnaire 8-21-17.doc) (See attached file: Senate Questionnaire Affidavit Signed and Notarized.pdf)

(See attached file: OLP Data Form.8-21-17.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Summer 2003 - Oral Argument Column.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Fall Edition 2011.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Winter Edition 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Spring Edition 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Advocate - Message From The President - Summer Edition - 2012.pdf)

(See attached file: Item 12 - Senate Questionnaire - 5-20-05 LSU A&S Commencement Speech.pdf)

(See attached file: [redacted] (b) (5) [redacted]

(See attached file: Item 12 - Senate Questionnaire - 3-2-10 Speech to Loyola Chapter of The Federalist Society.pdf)

(See attached file: Item 12 - Senate Questionnaire - Kaleidoscope Interview 2007.pdf)

(See attached file: Item 12 - Senate Questionnaire - The Federal Lawyer Interview 2010 - Torres.pdf)

(See attached file: Item 12 - Senate Questionnaire - Court Reporter Speech.pdf)

(See attached file: 9-17-13 Order & Reasons - USDC-EDLA No. 10-204.pdf)

(See attached file: Item 19 - Senate Questionnaire - Bulgarian Lecture Outline - 2012.pdf)

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Saturday, August 26, 2017 11:58 AM
To: Day, Sean (OLP)
Subject: Re: CAGNO

Hi, Sean -

(b) (5)

(b) (5)

Thank you. Have a nice weekend.

Kurt

On Aug 25, 2017, at 8:55 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:

> Judge Engelhardt –
>
> (b) (5)
>
> Thanks
>
> Sean C. Day
> Office of Legal Policy
> US Department of Justice
> 950 Pennsylvania Avenue, NW - Room 4260
> Washington, DC 20530
> sean.day@usdoj.gov
> (202) 532-4465

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Saturday, August 26, 2017 3:56 PM
To: Day, Sean (OLP)
Subject: Re: References

Hi, Sean -

This list is a bit longer than you requested, but it should give you a variety of people - a good cross-section - from which to choose. I believe all phone numbers are correct and current.

(b) (5), (b) (6)

(b) (5), (b) (6)

(b) (5)

As for a time to receive your call, I am willing to alter my schedule for your convenience. Otherwise, here are some two-hour windows of time (Central):
Thursday, August 31 - 9:30 a.m.-11:30 a.m.; 1:30 p.m.-3:30 p.m.
Friday, September 1 (three hour block) - 8:30 a.m.- 11:30 a.m.
(I am also available on the afternoons of Tuesday the 29th and Wednesday the 30th, after 1:30 p.m. and before 4 p.m.)

Thank you again for your assistance.

With kindest regards -

Kurt D. Engelhardt

On Aug 25, 2017, at 8:18 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:

> Judge Engelhardt –
>
> A couple of items.
>
> 1 – Could you please provide me with a list of 5-7 professional references with phone numbers? (b) (5)
>
> 2 – Are you available in a two hour block of time next Thursday or Friday for a phone call? Or any time the following week? Please let me know your availability.
>
> Thank you and have a good weekend.
>
> Sean

Sean C. Day
Office of Legal Policy
US Department of Justice
950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 532-4465

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Sunday, August 27, 2017 10:10 AM
To: Day, Sean (OLP)
Subject: Re: LSU Advisory Council

Hi, Sean -

(b) (5)
Please let me know if you need further information.

Thanks again.

Kurt

PS: "The College of Arts & Sciences" was recently renamed "The College of Humanities and Social Sciences". All the same except the name.

> On Aug 26, 2017, at 2:56 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:
>
> Thanks. (b) (5)
>
> -----Original Message-----
> From: (b)(6) - Kurt Engelhardt Email Address
> [mailto (b)(6) - Kurt Engelhardt Email Address
> Sent: Saturday, August 26, 2017 3:52 PM
> To: Day, Sean (OLP) <seday@jmd.usdoj.gov>
> Subject: Re: LSU Advisory Council
>
>
> (b) (5)
>
> Thanks, Sean.
>
>> On Aug 26, 2017, at 2:41 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:
>>
>> Judge ---
>>

>>
>> [redacted] (b) (5)
[redacted]
>>
>> Sean
>>
>> Sean C. Day
>> Office of Legal Policy
>> US Department of Justice
>> 950 Pennsylvania Avenue, NW - Room 4260 Washington, DC 20530 >> sean.day@usdoj.gov<mailto:sean.day@usdoj.gov> >> (202) 532-4465
>>
>>
>> <LSU Kaleidoscope.pdf>
>

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Monday, August 28, 2017 9:45 AM
To: Day, Sean (OLP)
Cc: (b)(6) - Susan Adams Email Address
Subject: Re: CAGNO

Hi, Sean -

(b) (5)

Please let me know when you'll be calling this week, and I will make certain I am available to take your call.

Thank you again.

Kurt

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Date: 08/25/2017 08:55 PM
Subject: CAGNO

Duplicative Material

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Monday, August 28, 2017 2:18 PM
To: Day, Sean (OLP)
Subject: Fw: 17-30089 Elizabeth Sewell, et al v. Sewerage & Water Board of N.O. "Unpublished Opinion" (2:15-CV-3117)

Hi, Sean -

FYI: I just received this Fifth Circuit opinion, affirming my ruling (b) (5) if necessary.

Kurt

----- Forwarded by Kurt Engelhardt/LAED/05/USCOURTS on 08/28/2017 01:16 PM -----

From: cmecf_caseprocessing@ca5.uscourts.gov
To:
Date: 08/28/2017 01:05 PM
Subject: 17-30089 Elizabeth Sewell, et al v. Sewerage & Water Board of N.O. "Unpublished Opinion" (2:15-CV-3117)

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer.
PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

United States Court of Appeals for the Fifth Circuit

Notice of Docket Activity

The following transaction was entered on 08/28/2017 at 12:56:22 PM CDT and filed on 08/28/2017

Case Name: Elizabeth Sewell, et al v. Sewerage & Water Board of N.O.

Case Number: 17-30089

Document(s): Document(s)

Docket Text:
UNPUBLISHED OPINION FILED. [17-30089 Affirmed] Judge: TMR , Judge: ECP , Judge: JEG Mandate pull date is 09/18/2017 [17-30089] (Joseph M. Armato)

Notice will be electronically mailed to:

Ms. Mary Nell Bennett: mnbennett@smithfawer.com Mr. Michael Ethan Botnick: mbotnick@gamb.law Mr. Craig W. Brewer: cwb@staines-eppling.com, kleblanc@staines-eppling.com, rhonda@staines-eppling.com
Mr. James Thomas Busenlener: jbusenlener@mwl-law.com, ngray@mwl-law.com Ms. Alexis Anne Butler: lexybutler@whitakerlaw.net Mr. Thomas Alcade Casey, Jr.: tcaseyjr@joneswalker.com, thamric@joneswalker.com
Mr. Thomas Joseph Eppling: tommy@staines-eppling.com, karen@staines-eppling.com, aimee@staines-eppling.com Mr. George Davidson Fagan: gfagan@leakeandersson.com, bburst@leakeandersson.com
Mr. Ernest Paul Gieger, Jr.: egieger@glllaw.com, duli@glllaw.com Mr. Arthur Gregory Grimsal: ggrimsal@gamb.law, wdorsey@gamb.law Mr. Hunter Peter Harris, IV: hharris@jacobssarrat.com Mr. Anton L. Hasenkampf: ahasenkampf@leakeandersson.com, ahasenkampf@leakeandersson.com, rbeck@leakeandersson.com Ms. Laura Tiffany Hawkins: ltiffanyhawkins@smithfawer.com Ms. Darleen M. Jacobs: dollyno@aol.com Mr. Wade A. Langlois, III: wlanglois@grhg.net Ms. Sarah A. Lowman: salowman@smithfawer.com, salowman@smithfawer.com Mr. Craig Bernard Mitchell: cbmitchell@mitchellaplc.com Mr. Michael James Remondet, Jr.: miker@jeanrem.com, rhondab@jeanrem.com, danag@jeanrem.com, nancyf@jeanrem.com Mr. James Douglas Rhorer: jrhorer@gordonarata.com Mr. Michael Robert Carson Riess: mriess@kingsmillriess.com, lbarre@kingsmillriess.com
Mr. Alex Benjamin Rothenberg: arothenberg@gamb.law, sbonnet@gamb.law Ms. Sara Peters Scurlock: sara@staines-eppling.com, karen@staines-eppling.com, aimee@staines-eppling.com Mr. Randall Alan Smith: rasmith@smithfawer.com Mr. John Elliott Unsworth, III: john.unsworth@cna.com, Deborah.Deshotel@cna.com, jodi.bodden@cna.com Mr. Scott T. Winstead: swinstead@thompsoncoe.com

NOTICE WILL BE DELIVERED BY OTHER MEANS TO:

Ms. Shannon Howard-Eldridge
McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, L.L.C.
Suite 200
195 Greenbriar Boulevard
Covington, LA 70433

Mr. David Moragas
Galloway, Johnson, Tompkins, Burr & Smith Suite 4040 701 Poydras Street 1 Shell Square New Orleans, LA 70139

The following document(s) are associated with this transaction:
Document Description: Unpublished Opinion Original Filename: 17-30089.0.pdf Electronic Document Stamp:
[STAMP acecfStamp_ID=1105048708 [Date=08/28/2017] [FileNumber=8577617-0]
[1d5ebd8064848e584fde625a157ea1ff980512cb9df0163e8641d40976b8ea24bc9c7c91f644e6e3dd6
707f23af80bf72567e9b53c470f450aea624b5a6c3be3]]

Document Description: Appellee's Bill of Costs Original Filename: /opt/ACECF/live/forms/Bill Of Costs500.pdf Electronic Document Stamp:
[STAMP acecfStamp_ID=1105048708 [Date=08/28/2017] [FileNumber=8577617-1]
[a94de9aff58ffe7bf690dfeb74cbb25f95a9fcd2f1ae744a9318d267baba1ba20b01c65c0fbbcd52a5746582
4206a652b5ed6d09b8b9ebd84e213107a2b4249d]]

Recipients:
- Ms. Mary Nell Bennett
- Mr. Michael Ethan Botnick
- Mr. Craig W. Brewer
- Mr. James Thomas Busenlener
- Ms. Alexis Anne Butler
- Mr. Thomas Alcade Casey, Jr.
- Mr. Thomas Joseph Eppling
- Mr. George Davidson Fagan
- Mr. Ernest Paul Gieger, Jr.
- Mr. Arthur Gregory Grimsal
- Mr. Hunter Peter Harris, IV
- Mr. Anton L. Hasenkampf
- Ms. Laura Tiffany Hawkins
- Ms. Shannon Howard-Eldridge
- Ms. Darleen M. Jacobs
- Mr. Wade A. Langlois, III
- Ms. Sarah A. Lowman
- Mr. Craig Bernard Mitchell
- Mr. David Moragas
- Mr. Michael James Remondet, Jr.
- Mr. James Douglas Rhorer
- Mr. Michael Robert Carson Riess
- Mr. Alex Benjamin Rothenberg
- Ms. Sara Peters Scurlock
- Mr. Randall Alan Smith
- Mr. John Elliott Unsworth, III
- Mr. Scott T. Winstead

Document Description: OPJDT-2 Letter
Original Filename:
/opt/ACECF/live/forms/jarmato_1730089_8577617_MemoRePetforReh-OPJDT2_404.pdf

Electronic Document Stamp:
[STAMP acecfStamp_ID=1105048708 [Date=08/28/2017] [FileNumber=8577617-2]
[8f6d5b7223089ec15faf0565599d8d7e71e6b80dbf7c7a4e44e2b5c7399669b81bf5183aa73c44f0e36
c433be1d8b142c008d827220388c49d0763eec33d99db1]

c455be1d8b142c008d827220588c49d0703eec33d99dbjj

Recipients:

Ms. Mary Nell Bennett
Mr. Michael Ethan Botnick
Mr. Craig W. Brewer
Mr. James Thomas Busenlener
Ms. Alexis Anne Butler
Mr. Thomas Alcade Casey, Jr.
Mr. Thomas Joseph Eppling
Mr. George Davidson Fagan
Mr. Ernest Paul Gieger, Jr.
Mr. Arthur Gregory Grimsal
Mr. Hunter Peter Harris, IV
Mr. Anton L. Hasenkampf
Ms. Laura Tiffany Hawkins
Ms. Shannon Howard-Eldridge
Ms. Darleen M. Jacobs
Mr. Wade A. Langlois, III
Ms. Sarah A. Lowman
Mr. Craig Bernard Mitchell
Mr. David Moragas
Mr. Michael James Remondet, Jr.
Mr. James Douglas Rhorer
Mr. Michael Robert Carson Riess
Mr. Alex Benjamin Rothenberg
Ms. Sara Peters Scurlock
Mr. Randall Alan Smith
Mr. John Elliott Unsworth, III
Mr. Scott T. Winstead

The following information is for the use of court personnel:

DOCKET ENTRY ID: 8577617
RELIEF(S) DOCKETED:
dispositive
DOCKET PART(S) ADDED: 10107151, 10107152

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Friday, September 01, 2017 1:58 PM
To: Day, Sean (OLP)
Subject: Re: A few questions

Hi, Sean -

Likewise, thank YOU for your time yesterday. I very much appreciate your insight and advice.

(b) (5), (b) (6)

(b) (5), (b) (6)

Have a great weekend!

Kurt

On Sep 1, 2017, at 12:44 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:

> Judge Engelhardt – thank you for taking the time to talk with me yesterday. I have a few small questions (my notes were not as a good as I hoped on these points). There may be a few more of these as I review my notes.
>
> 1 – (b) (5) ?
>
> 2 – (b) (5)
>
> Sean C. Day
> Office of Legal Policy
> US Department of Justice
> 950 Pennsylvania Avenue, NW - Room 4260
> Washington, DC 20530
> sean.day@usdoj.gov
> (202) 532-4465

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Friday, September 1, 2017 2:00 PM
To: Day, Sean (OLP)
Subject: Re: Another question

(b) (5), (b) (6)

On Sep 1, 2017, at 12:54 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:

(b) (5)

Sean C. Day
Office of Legal Policy
US Department of Justice
950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 532-4465

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Thursday, September 14, 2017 2:23 PM
To: (b)(6) - AOUSC Email Address
Cc: King, Kara (OLP); Kingo, Lola A. (OLP)
Subject: RE: Financials
Attachments: FDR_NOM_Engelhardt-K-D.PDF; Net Worth Statement.Sept.2017.pdf

Kristina,

Per your request, attached is the PDF of the Nomination Financial Disclosure Report. Also attached is the Net Worth Financial Statement for review by Kara and Lola.

If any of you need anything further at this time, please advise.

Thanks much!

Susan

(See attached file: FDR_NOM_Engelhardt-K-D.PDF)

(See attached file: Net Worth Statement.Sept.2017.pdf)

From: Kristina Usry/DCA/AO/USCOURTS
To: Susan Adams/LAED/05/USCOURTS@USCOURTS
Cc: "King, Kara (OLP)" <Kara.King2@usdoj.gov>, "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>
Date: 09/14/2017 09:39 AM
Subject: RE: Financials

Hi Susan:

Please email me the Pdf copy of the Nomination Financial Disclosure Report.
I will "pre examine" the report.

Thanks

Kristina

Kristina Usry
Financial Disclosure Examiner
Committee on Financial Disclosure
202-502-1850

From: Susan Adams/LAED/05/USCOURTS
To: "King, Kara (OLP)" <Kara.King2@usdoj.gov>
Cc: [redacted]"
[redacted]>, "Kingo, Lola A. (OLP)"
<Lola.A.Kingo@usdoj.gov>
Date: 09/13/2017 04:33 PM
Subject: RE: Financials

Thank you, Kara. I am working on the judge's net worth statement and updating the FDR and will email drafts of each of these to all of you by Friday.

Have a great evening!

Susan

From: "King, Kara (OLP)" <Kara.King2@usdoj.gov>
To: [redacted] [redacted]
Cc: "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>,
[redacted] [redacted]
Date: 09/13/2017 03:23 PM
Subject: RE: Financials

Hello Susan,

Thanks for the email. If Judge Engelhardt already is registered with FiDO, he will not need to register again. It's fine to use the 2016 Financial Disclosure report and update it to the current date. Please do send us a draft of the PDF along with the net worth statement before filing. If there's any issues with it, Kristina will contact you before you file.

Thank you!

Kara

-----Original Message-----
From: [redacted] [mailto:[redacted]]
Sent: Wednesday, September 13, 2017 2:30 PM
To: King, Kara (OLP) <kking@jmd.usdoj.gov>
Cc: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>;
[redacted]
Subject: Financials

Hi Kara, Lola and Kristina,

I am writing in response to the email sent to Judge Engelhardt regarding his financial information.

I have a question with regard to the registration form which you indicate will enable Judge Engelhardt to register for electronic filing of the Financial Disclosure Report. He is already registered in the FIDO system as a District Judge (he has a User ID and Password), so that he can file his annual Financial Disclosure Reports. Does he need to establish another User ID and Password for this process? Since you indicate that the registration form needs to reference the court for which he is a candidate at this time, I am assuming you would like an updated registration form indicating the Title, Circuit and Court for which he is a nominee? Is this correct?

As far as Judge Engelhardt's Financial Disclosure Report for this nominating process, is it okay to use his 2016 Financial Disclosure Report and update it to the present time - September 2017? And, once that is done, I should not file it into the FIDO system, but email a draft of it, along with the Net Worth Statement to all of you for review?

Thank you for your help!

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Thursday, September 21, 2017 3:37 PM
To: King, Kara (OLP)
Cc: Kingo, Lola A. (OLP)
Subject: Re: ABA Forms and JEFS Registration
Attachments: 20170921143301645.pdf

Hi, Kara -

Attached are both the ABA and JEFS pages (single attachment), which I signed as requested. I believe my assistant, Susan Adams, did previously set up a Box account using this email address. She is on vacation at the present time, but I am fairly certain she did a few weeks ago.

Please let me know if you need anything else. Thank you very much for your assistance.

With kindest regards -

Judge Kurt Engelhardt

From: "King, Kara (OLP)" <Kara.King2@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address "
(b)(6) - Kurt Engelhardt Email Address
Cc: "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>
Date: 09/21/2017 02:16 PM
Subject: ABA Forms and JEFS Registration

Dear Judge Engelhardt,

Prior to your hearing before the Senate Judiciary Committee, the American Bar Association's Standing Committee on the Federal Judiciary will provide the Senate with an evaluation of your professional qualifications. To begin its evaluation, the ABA's Standing Committee requires the attached waiver. We ask that you please complete and sign the attached waiver, which we will submit to the ABA's Standing Committee on your behalf, along with a draft of the public portion of your Senate Questionnaire. Please email us back the signed copy of the waiver (we do not need the original).

In the event you would like additional information about the ABA's evaluation process, please visit the

following:
http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf
.

Additionally, under DOJ security policies, we need to register judicial nominees with the DOJ online file-sharing system ("JEFS") in order to exchange files larger than 10 MB (including our sending you the final assembled version of the Attachments to your Senate Questionnaire). On the attached form, please confirm your email address is listed correctly on the first page, and then sign the final page of the User Agreement. Please physically sign in hard copy (do not e-sign). You should leave "Component and Sub-Component" blank. The User Agreement contains the Rules of Behavior for handling/receiving files securely from DOJ.

One final note: if you already have a Box account associated with the email address listed for you on page 1 of the attached, please let me know. We will need either to deactivate your account and re-register you, or use an alternate email address when registering you through DOJ.

Please email me back a scanned pdf of the last page of the JEFS containing your signature and the signed ABA waiver by close of business on Monday, September 25th. If you are able to get the paperwork to us earlier, that would be much appreciated.

Let me know if you have any questions!

Best,

Kara

Kara King
Nominations Researcher
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607
Cell: (b) (6)
[attachment "Engelhardt ABA Waiver.docx" deleted by Kurt Engelhardt/LAED/05/USCOURTS]
[attachment "Engelhardt JEFS Account Request.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS]

you meet required security controls.[9]

66. Disclose PII in accordance with appropriate legal authorities and the Privacy Act of 1974.

67. Dispose of and retain records in accordance with applicable record schedules, National Archives and Records Administration guidelines and Department Policies.[10]

68. Do not perform unauthorized querying, review, inspection, or disclosure of Federal Taxpayer Information.[11]

III. Statement of Acknowledgement

I acknowledge receipt and understand my responsibilities as identified above. Additionally, this acknowledgment accepts my responsibility to ensure the protection of PII that I may handle. I will comply with the DOJ IT Security ROB for General Users, Version 9, dated January 1, 2016.

Signature

9/21/17
Date

Printed Name

Component and Sub-Component

Note: Statement of acknowledgement may be made by signature if the ROB for General Users is reviewed in hard copy or by electronic acknowledgement if reviewed online. All users are required to review and provide their signature or electronic verification acknowledging compliance with these rules. Users with privileged accesses and permissions shall also agree to and sign the ROB for Privileged Users. If you have questions related to this ROB, please contact your Help Desk, Security Manager, or Supervisor.

The Department has the right, reserved or otherwise, to update the ROB to ensure it remains compliant with all applicable laws, regulations, and DOJ Standards. Updates to the ROB will be communicated through the Department's ISES Team Lead and Component Training Coordinators.

JEFS is Strictly for DOJ Authorized Use Only.

Clear Form Print Form

[9] For additional guidance on PII, please refer to *Information Technology Security, DOJ Order 2640.2F* (https://portal.doj.gov/sites/dm/dm/Directives/2640.2F.pdf).

[10] For disposal guidance, please refer to *Records Management, DOJ Order 2710.11* (http://dojnet.doj.gov/directives/canceled-orders/doj-2710-11.pdf).

[11] For additional information on disclosure of federal taxpayer information, please refer to *Internal Revenue Code Sec. 7213 and 7213A* (http://www.irs.gov/irm/part11/irm_11-003-001.html#d0e176).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON THE FEDERAL JUDICIARY
WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with or in the possession of any governmental, judicial, disciplinary, investigative or other official agency, the Louisiana Bar's Office of Disciplinary Counsel, or any educational institution, or employer, and I hereby authorize a representative of the American Bar Association Standing Committee on the Federal Judiciary to request and to receive any such information.

Kurt D. Engelhardt
Typed or Printed Name

Signature

Dated: Sept 21, 2017

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Monday, October 02, 2017 3:39 PM
To: Day, Sean (OLP)
Subject: RE: Info on possible help:

(b) (5)

(b) (5)

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Date: 10/02/2017 02:34 PM
Subject: RE: Info on possible help:

Thanks for the heads up! I will put this to the group.

Sean

-----Original Message-----
From: (b)(6) - Kurt Engelhardt Email Address [
mailto (b)(6) - Kurt Engelhardt Email Address
Sent: Monday, October 2, 2017 3:32 PM
To: Day, Sean (OLP) <seday@jmd.usdoj.gov>
Subject: Info on possible help:

Hi, Sean -

(b) (5)

(b) (5)

[redacted] (b) (5) [redacted]

(b) (5) [redacted]

Let me know if I should take any action in this regard.

Thanks!

Kurt

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Monday, October 02, 2017 7:14 PM
To: Day, Sean (OLP)
Cc: (b)(6) - Kurt Engelhardt Email Address
Subject: 12d
Attachments: 20171002181123282.pdf

Mr. Day,

Attached please find (b) (5) . If you need anything further at this time, please advise.

Thank you.

Susan

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Wednesday, October 4, 2017 5:42 PM
To: Day, Sean (OLP)
Cc: (b)(6) - Kurt Engelhardt Email Address
Subject: 12d
Attachments: 2002.#2.pdf; 2003.#2.pdf; 2004.#2.pdf; 2005.#2.pdf; 2006.#2.pdf; 2008.#2.pdf; 2009.#2.pdf; 2010.#2.pdf; 2011.#2.pdf; 2014.#2.pdf; 2015.#2.pdf

Mr. Day,

(b) (5) . They are highlighted in red and are attached hereto by year. (b) (5)

(b) (5)

If you need anything further, please advise.

Thank you.

Susan

(See attached file: 2002.#2.pdf)(See attached file: 2003.#2.pdf)(See attached file: 2004.#2.pdf)(See attached file: 2005.#2.pdf)(See attached file: 2006.#2.pdf)(See attached file: 2008.#2.pdf)(See attached file: 2009.#2.pdf)(See attached file: 2010.#2.pdf)(See attached file: 2011.#2.pdf)(See attached file: 2014.#2.pdf)(See attached file: 2015.#2.pdf)

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Tuesday, October 10, 2017 11:02 AM
To: King, Kara (OLP)
Cc: (b)(6) - AOUSC Email Address; Kingo, Lola A. (OLP)
Subject: RE: ABA Forms and JEFS Registration
Attachments: FDR_NOM_Engelhardt-K-D.PDF

Kara,

Attached is a PDR of the report. I'll wait to hear back from you on the JEFS account.

If you need anything further, please let me know!

Thanks!

Susan

(See attached file: FDR_NOM_Engelhardt-K-D.PDF)

From: "King, Kara (OLP)" <Kara.King2@usdoj.gov>
To: (b)(6) - Susan Adams Email Address <(b)(6) - Susan Adams Email Address
Cc: (b)(6) - AOUSC Email Address
(b)(6) - AOUSC Email Address>, "Kingo, Lola A. (OLP)"
<Lola.A.Kingo@usdoj.gov>
Date: 10/10/2017 09:52 AM
Subject: RE: ABA Forms and JEFS Registration

Hi Susan,

Great, thank you! Do you have a PDF copy of the report that you could send to us? I'll speak to our JEFS technician regarding the issue with the email and get back to you on that.

Best,

Kara

-----Original Message-----
From: (b)(6) - Susan Adams Email Address [mailto:(b)(6) - Susan Adams Email Address
Sent: Tuesday, October 10, 2017 10:07 AM
To: King, Kara (OLP) <kking@jmd.usdoj.gov>
Cc (b)(6) - AOUSC Email Address Kingo, Lola A. (OLP)

<lakingo@jmd.usdoj.gov>
Subject: RE: ABA Forms and JEFS Registration

Hi Kara,

Thanks for the info regarding Judge Engelhardt's FDR report. It was filed on Friday.

I spoke with Judge Engelhardt and he does not have an alternative email address, only the (b) (6) address.

Thank you.

Susan

From: "King, Kara (OLP)" <Kara.King2@usdoj.gov>
To: (b)(6) - Susan Adams Email Address
(b)(6) - Susan Adams Email Address
Cc: "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>,
(b)(6) - AOUSC Email Address (b)(6) - AOUSC Email Address
Date: 10/06/2017 01:37 PM
Subject: RE: ABA Forms and JEFS Registration

Hello Susan,

Apologies on getting back to you late! Please file Judge Engelhardt's FDR report, just make sure that the nomination date and the date of report is updated. Since you completed this form with Kristina within 30 days, there's no need to update the reporting period. The Net Worth Statement does not need to be filed in FiDO.

As for JEFS, does Judge Engelhardt have an alternative email addresses?
We've been having some issues with uscourt.gov email addresses in JEFS.

Thank you!

Kara

-----Original Message-----
From: (b)(6) - Susan Adams Email Address [mailto (b)(6) - Susan Adams Email Address]
Sent: Thursday, October 5, 2017 4:58 PM
To: King, Kara (OLP) <kking@jmd.usdoj.gov>
Cc: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>;
(b)(6) - AOUSC Email Address
Subject: RE: ABA Forms and JEFS Registration

He has not received anything, confirmation, etc. for his JEFS account. Is this something I should set up for him? If so, can you send me the instructions/information to do so.

Also, I just received notification from FIDO that the nomination FDR is due within five days of nomination. Kristina and I worked on that last month so we are good to go with it. Should I go ahead and file it? Also, is the Net Worth Statement something that needs filing in FIDO as well?

Thanks again!

From: "King, Kara (OLP)" <Kara.King2@usdoj.gov>
To: "(b)(6) - Susan Adams Email Address"
(b)(6) - Susan Adams Email Address >
Cc: "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>
Date: 10/05/2017 03:09 PM
Subject: RE: ABA Forms and JEFS Registration

Hi Susan,

We received all the forms we needed from Judge Englehardt! Do you know if he's received an account confirmation email for his JEFS account? It is separate than FiDO, it's a way to send large attachments to Judge Engelhardt's vetter, since we have a limit on the size of items we can receive over email.

Thanks,

Kara

-----Original Message-----
From: (b)(6) - Susan Adams Email Address [mailto:(b)(6) - Susan Adams Email Address]
Sent: Thursday, October 5, 2017 3:49 PM
To: King, Kara (OLP) <kking@jmd.usdoj.gov>
Cc: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Subject: ABA Forms and JEFS Registration

Hi Kara,

I've just returned to chambers and have been going through my emails. I see where you corresponded with Judge Engelhardt regarding the ABA forms and JEFS Registration. Hopefully the attachment he sent you was what you needed.

I don't know what a Box account is so I haven't registered Judge Engelhardt. Unless you are talking about FIDO, but I don't think so.

Anyway, if there is anything I should be brought into the loop about, or anything I need to do at this time, please let me know.

As always, thank you for all your help!!

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Tuesday, October 24, 2017 11:11 AM
To: Day, Sean (OLP)
Cc: (b)(6) - Susan Adams Email Address
Subject: Re: SJQ for your review

Hi, Sean -

I am going through the draft now, and hope to complete my review this week.

As to your questions, (b) (5)

(b) (5)

(b) (5)

I'll get back with you as soon as I can with regard to any other blanks.

Thank you again!

Kurt

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Date: 10/23/2017 03:11 PM
Subject: SJQ for your review

Judge -

Please see the attached. (b) (5)
(b) (5)

(b) (5)

(b) (5)
(b) (5)

(b) (5)

* (b) (5)

* (b) (5)

(b) (5)

* (b) (5)

* (b) (5)

(b) (5)

Sean C. Day
Office of Legal Policy
US Department of Justice
950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 532-4465

[attachment "Engelhardt -- SDAY Master 10-23.docx" deleted by Kurt Engelhardt/LAED/05/USCOURTS]

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Thursday, October 26, 2017 2:21 PM
To: Day, Sean (OLP)
Cc: (b)(6) - Kurt Engelhardt Email Address
Subject: SJQ for your review
Attachments: 20171026131253627.pdf

Mr. Day,

Attached please find Judge Engelhardt's response to your 10-23-17 email regarding the SJQ.

He also asked that I advise you he will be out of town at the 2017 Transferee Judges' Conference in Palm Beach, FL from Sunday, October 29th until Wednesday, November 1st. However, he can still be reached either by email (b)(6) - Kurt Engelhardt Email Address cell phone (b) (6) or text.

If you need anything further, please advise.

Thank you.

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street, Chambers 367
New Orleans, Louisiana 70130

Kurt D. Engelhardt
Chief Judge

October 26, 2017

Sean C. Day
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, NW – Room 4260
Washington, DC 20530

Dear Sean:

I have had the opportunity to review the latest draft of the SJQ, which you provided via email on October 23rd. Please note the following:

1. (b) (5) [redacted]

2. (b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

3. (b) (5) [redacted]

4. (b) (5) [redacted]

5. (b) (5) [redacted]

6. (b) (5) [redacted]

7. (b) (5) [redacted]

8. (b) (5) [redacted]

9. (b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

10. (b) (5) [redacted]

11. (b) (5) [redacted]

Please advise if you need further information, Sean. [redacted] (b) (5)

With kindest regards, I remain

Very truly yours,

KURT D. ENGELHARDT
Chief Judge

KDE/sa

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Friday, November 17, 2017 8:31 AM
To: Day, Sean (OLP)
Subject: Update

Hi, Sean -

Just checking in. This past Monday, Mr. Tarpley of the ABA met with me for approximately 3.5 hours. (b) (5) He indicated that my ABA review will be complete and submitted by early next week.

Question: I noticed that, of the four Fifth Circuit nominees who were announced on September 28th, the two from Texas had their Senate Judiciary Committee hearing together this past Wednesday. Also, it was announced yesterday that Kyle Duncan (my fellow nominee from Louisiana) has been scheduled for his hearing on November 29th. Have you heard anything about when my appearance might be scheduled? (b) (5)

(b) (5)

Hope all is well with you and your family.

Thanks!

Kurt

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Wednesday, December 6, 2017 10:41 AM
To: Day, Sean (OLP)
Cc: (b)(6) - Kurt Engelhardt Email Address
Subject: Re: 12d
Attachments: 12d INSERT for Sean Day. 12-5-17.docx; 20171103140500271.pdf

Mr. Day,

Attached is the insert that Judge Engelhardt and I reviewed. I have lined through the text that is being edited. The edits and additions are in red.

(b) (5)

(b) (5)

If you have any questions or need anything further, please let us know.

Thank you.

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(See attached file: 12d INSERT for Sean Day. 12-5-17.docx)

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
(b)(6) - Susan Adams Email Address" <(b)(6) - Susan Adams Email Address>
Date: 12/04/2017 03:36 PM
Subject: 12d

Judge Engelhardt - Disregard the e-mail I just sent you.

Attached is an insert I would like you and Susan to review.

(b) (5)

I need you (with Susan's help) to the do the following:

1 -- (b) (5)

2 - (b) (5)

3 - (b) (5)

4 - (b) (5)

5 - (b) (5) .

Thanks!

Sean

Sean C. Day
Office of Legal Policy
US Department of Justice
950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 353-7206
(b) (5) (Mobile)

[attachment "12d INSERT.docx" deleted by Susan Adams/LAED/05/USCOURTS]

UNITED STATES ATTORNEY'S OFFICE

NOVEMBER 6, 2017

CONTINUING LEGAL EDUCATION PROGRAM

HONORABLE KURT D. ENGELHARDT
CHIEF JUDGE,
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

A. Fundamental Guiding Principles

"[F]air play . . . is the essence of due process." *Galvan v. Press*, 347 U.S. 522, 530 (1954). Such fair play includes "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-21 (1959). This deep-rooted feeling extends even deeper where prosecutors are concerned, given their status as officers of the court bound to special rules of professional conduct. *See, e.g.*, La. Rules of Professional Conduct, Rule 3.8 (Special Responsibilities of a Prosecutor).

Addressing the special obligations owed by federal prosecutors, in *United States v. Lopez-Avila,* 678 F.3d 955 (9th Cir. 2012), the Ninth Circuit Court of Appeals recently explained:

> The Department of Justice has an obligation to its lawyers and to the public to prevent prosecutorial misconduct. Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; they must serve truth and justice first. *United States v. Kojayan,* 8 F.3d 1315, 1323 (9th Cir. 1993). Their job is not just to win, but to win fairly, staying within the rules. *Berger,* 295 U.S. at 88, 55 S.Ct. 629.
>
> * * *
>
> When a prosecutor steps over the boundaries of proper conduct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again.

Id. at 964-65. Having found prosecutorial misconduct committed by one AUSA, the Court of Appeals remanded the case to the district court to consider "two different courses of action that would deter future misconduct like this since 'quite as important as assuring a fair trial . . . is assuring that the circumstances that gave rise to the misconduct won't be repeated in other cases.' *Kojayan,* 8 F.3d at 1324." *Lopez-Avila,* 678 F.3d at 965-66. The two remedial options set forth by the Ninth Circuit are (1) retrial, or dismissal with prejudice, pursuant to the district court's

supervisory powers over the attorneys who practice before it, and (2) discipline of the prosecutor(s) directly pursuant to a show cause order. *Lopez-Avila,* 678 F.3d at 966.[1]

B. Laws Governing Conduct of Prosecutors

The conduct of prosecutors and other personnel of the DOJ is governed in several respects.. The Code of Federal Regulations, 28 C.F.R. § 50.2, states, in pertinent part:

> **§ 50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.**
>
> (a) *General.*
>
> * * *
>
> (2) While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the law. The task of striking a fair balance between the protection of individuals accused of crime or involved in civil proceedings with the Government and public understandings of the problems of controlling crime and administering government depends largely on the exercise of sound judgment by those responsible for administering the law and by representatives of the press and other media.
>
> * * *
>
> (b) *Guidelines to criminal actions.*
>
> (1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.
>
> **(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement**

---

[1] In *Lopez-Avila,* upon the initial release of the original opinion, the government filed a motion requesting that the Circuit remove the prosecutor's name (AUSA Jerry Albert) from the opinion and replace it with references to simply "the prosecutor", arguing that naming Albert publicly was inappropriate. The Circuit rejected the government's request, stating: "If federal prosecutors receive public credit for their good works - as they should - they should not be able to hide behind the shield of anonymity when they make serious mistakes." 678 F.3d at 965.

or information, which could reasonably be expected to be disseminated by means of public communication, ***if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.***[2]

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. **Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include** ***only information which is clearly not prejudicial.***

---

[2] Significantly, this regulation sets forth an objective standard: ". . . could reasonably be expected . . ." and ". . . may reasonably be expected to influence the outcome of a pending or future trial." Thus, a violation is **not** measured subjectively, i.e., whether it *actually* influenced a pending or future trial. In other words, actual "influence" is not required for a violation of this regulation.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

* * *

(9) Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. **If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.**

* * *

[italic and bold face emphasis added.][3] Moreover, much the same legal directive is contained in the DOJ's United States Attorneys Manual, Chapter 1-7.000, entitled "Media Relations." Those provisions state, in pertinent part [italics and bold face emphasis added]:

> **1-7.110 Interests Must Be Balanced**
>
> These guidelines recognize three principal interests that must be balanced: the right of the public to know; an individual's right to a fair trial; and, the government's ability to effectively enforce the administration of justice.
>
> * * *
>
> **1-7.112 Need for Free Press and Public Trial**
>
> Likewise, careful weight must be given in each case to the constitutional requirements of a free press and public trials as well as the right of the people in a constitutional democracy to have access to information about the conduct of law

---

[3] See also 28 C.F.R. § 16.26, which governs production or disclosure of information pursuant to a demand:

> (a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:
>
> (1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and
>
> (2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.
>
> (b) Among the demands in response to which disclosure will **not** be made by any Department official are those demands with respect to which any of the following factors exist:
>
> (1) Disclosure would violate a statute, . . . or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),
>
> (2) **Disclosure would violate a specific regulation;**
>
> * * *

enforcement officers, prosecutors and courts, consistent with the individual rights of the accused.

* * *

1-7.401 Guidance for Press Conferences and Other Media Contacts

The following guidance should be followed when Department of Justice components or investigative agencies consider conducting a press conference or other media contact:

* * *

D. There are also circumstances involving substantial public interest when it may be appropriate to have media contact about matters after indictment or other formal charge but before conviction. In such cases, any communications with press or media representatives should be limited to the information contained in an indictment or other charging instrument, other public pleadings or proceedings, and any other related non-criminal information, within the limits of USAM [United States Attorneys Manual] 1-7.520, .540, .550, .500 and 28 C.F.R. 50.2.

E. **Any public communication by any Department component or investigative agency or their employees about pending matters or investigations that may result in a case, or about pending cases or final dispositions, must be approved by the appropriate Assistant Attorney General, the United States Attorney, or other designate responsible for the case.**

* * *

G. All Department personnel must avoid any public oral or written statements or presentations that may violate any Department guideline or regulation, or any legal requirement or prohibitions, including case law and local court rules.

H. Particular care must be taken to avoid any statement or presentation that would prejudice the fairness of any subsequent legal proceeding. See also 28 C.F.R. 16.26(b).

* * *

1-7.500 Release of Information in Criminal and Civil Matters—Non-Disclosure

At no time shall any component or personnel of the Department of Justice furnish any statement or information that he or she knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[4]

* * *

1-7.550 Concerns of Prejudice

Because the release of certain types of information could tend to prejudice an adjudicative proceeding, Department personnel should refrain from making available the following:

A. Observations about a defendant's character;

B. Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement;

C. Reference to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or forensic services, including DNA testing, or to the refusal by the defendant to submit to such tests or examinations;

D. Statements concerning the identity, testimony, or credibility of prospective witnesses;

E. Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial;

F. Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea of a lesser offense.

* * *

---

[4] Importantly, this express prohibition also carries an objective standard ("knows or reasonably should know" and "substantial likelihood"), rather than requiring actual "material prejudice" for a violation to occur.

[italics and bold face emphasis added.]

In addition, the United States District Court for the Eastern District of Louisiana has also enacted Local Criminal Rules, which state the following [italics and bold face emphasis added]:

> **LCrR53.1 Dissemination of Information Concerning Pending or Imminent Criminal Litigation by Lawyer Prohibited**
>
> **It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he or she is associated, if there is a *reasonable likelihood* that such dissemination will interfere with a fair trial *or otherwise prejudice the due administration of justice.***
>
> * * *
>
> **LCrR53.3 Extrajudicial Statements Concerning Specific Matters**
>
> From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, **a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by means of public communication relating to that matter and concerning:**
>
> * * *
>
> (B) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
>
> * * *
>
> **(D) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;**
>
> **(E) The possibility of a plea of guilty to the offense charged or a lesser offense;**
>
> **(F) *Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.***

* * *

LCrR53.5 Extrajudicial Statements During Trial

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

LCrR53.6 Extrajudicial Statements After Trial and Prior to Sentence

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

* * *

[italics and bold face emphasis added.]

Finally, at all times, of course, the conduct of attorneys licensed to practice in the State of Louisiana also were and are governed by the Louisiana Rules of Professional Conduct. Rule 3.8 singles out those serving as prosecutors in the State of Louisiana with a clear and direct special obligation [italics and bold face emphasis added]:

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

* * *

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, **refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.**

In a case relating to 28 C.F.R. § 50.2, *United States v. Narciso,* 446 F.Supp. 252 (E.D. Mich. 1977), the court also exercised its inherent supervisory authority to consider the "cumulative impact" of governmental misconduct in granting a new trial. Before reviewing the cumulative effect of a plethora of government misdeeds, including improper remarks by the prosecution and purported misconduct by the FBI, the court added:

> Faith in the courts and in the jury system must be maintained and it is proper that on questions such as we have here the rule should be such as to support the faith of all litigants in our judicial system and, as part thereof, trial by jury. That faith can be sustained only by keeping our judicial proceedings free from the suspicion of wrong. The question is, not whether any actual wrong resulted . . . but whether (there was) created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice." *Stone v. U.S.,* 113 F.2d 70, 77 (6th Cir. 1940).

Narciso, 446 F.Supp. at 306. The *Narciso* court concluded:

> In assessing whether the conduct of the prosecution requires the Court to set aside the convictions here and grant a new trial, it must be kept in mind that the government is held to a high standard in the conduct of its criminal cases.
>
> * * *
>
> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Narciso, 446 F. Supp. at 325 (citing and quoting *Berger v. United States,* 295 U.S. 78, (1935)). The court found that the prosecution's comments violated 28 C.F.R. § 50.2 and the Rules of the

Department of Justice, as well as the Code of Professional Responsibility. *Narciso,* 446 F.Supp. at 319. The motion for a new trial was granted.

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Thursday, December 07, 2017 11:40 AM
To: Day, Sean (OLP)
Cc: (b)(6) - Susan Adams Email Address
Subject: Re: Brothers of the Sacred Heart Alumni Association'

Hi, Sean -

(b) (5)

(b) (5)

Thanks!

Kurt

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Cc: (b)(6) - Susan Adams Email Address < (b)(6) - Susan Adams Email Address
Date: 12/07/2017 10:31 AM
Subject: Brothers of the Sacred Heart Alumni Association'

Judge Englehardt -

(b) (5)

Sean C. Day
Office of Legal Policy
US Department of Justice

950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 353-7206
(b) (6) Mobile)

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Monday, December 11, 2017 2:45 PM
To: King, Kara (OLP)
Cc: Day, Sean (OLP); (b)(6) - Kurt Engelhardt Email Address
Subject: Affidavit of Kurt D. Engelhardt
Attachments: 20171211133949216.pdf

Hi Kara,

Attached is the signed and notarized Affidavit of Judge Engelhardt, which Sean Day asked that I email to you. He also asked that I Fed Ex to you the original signed Affidavit, which I will do today as well.

If you need anything further, please advise.

Thank you.

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

AFFIDAVIT

I, **Kurt D. Engelhardt**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

12/11/2017

Kurt D. Engelhardt

NOTARY
LA Bar Roll No. 25226

Jennifer D. Rogers
Notary Public
State of Louisiana
Louisiana Bar Roll # 25226
Commission is issued for life.

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Monday, December 11, 2017 2:56 PM
To: Day, Sean (OLP)
Cc: King, Kara (OLP); (b)(6) - Susan Adams Email Address
Subject: RE: SJQ for your review

Hi Sean & Kara -

I've signed the form and it will go out today. Kara, please let us know if you do not receive it timely.

Susan and I have also independently gone over the draft SJQ, (b) (5) . She will put them in to a single email and send them later today. (b) (5)

Please let me know if you need any further information. I appreciate all your efforts and assistance in this process.

Sincerely -

Kurt

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Cc: (b)(6) - Susan Adams Email Address
<(b)(6) - Susan Adams Email Address>, "King, Kara (OLP)" <Kara.King2@usdoj.gov>
Date: 12/11/2017 09:49 AM
Subject: RE: SJQ for your review

Oh yes. Thank you! I blanked after I sent you the first one. Sorry about that.

Please complete and have notarized the attached. Do not worry that will be dated today. We have them signed and ready to go prior to the filing date.

Please send to Kara King (I've cc'ed her) via e-mail, a PDF version today.

Please also Fed Ex to Kara today the ink original.

Her address is:

Kara King
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Room 4234
Office: (202) 514-1607

-----Original Message-----
From: (b)(6) - Kurt Engelhardt Email Address
mailto (b)(6) - Kurt Engelhardt Email Address]
Sent: Monday, December 11, 2017 10:30 AM
To: Day, Sean (OLP) <seday@jmd.usdoj.gov>
Cc: (b)(6) - Susan Adams Email Address
Subject: Re: SJQ for your review

Hi, Sean -

Going through this now. You mentioned a second email, but I only received this one (with two attachments). Was there another?

Thanks.

Kurt

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Cc: (b)(6) - Susan Adams Email Address
(b)(6) - Susan Adams Email Address
Date: 12/09/2017 02:11 PM
Subject: SJQ for your review

Judge Engelhardt -

This is the first of two e-mails.

Attached here are two documents.

First - the latest - and near final version of the SJQ.

Second - a comparison showing the document compared against the last version you reviewed.

(b) (5)

(b) (5)

(b) (5)

I am cc'ing Susan and encourage you to have her review this as well.

(b) (5)

Please do not hesitate to contact me with any questions.

Thanks

Sean

Sean C. Day
Office of Legal Policy
US Department of Justice
950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 353-7206
(b) (6) (Mobile)

[attachment "Compare Result 4.docx" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Engelhardt SJQ SDAY MASTER 12-9.docx" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Affidavit (Unsigned).docx" deleted by Kurt Engelhardt/LAED/05/USCOURTS]

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Monday, December 11, 2017 3:07 PM
To: Day, Sean (OLP)
Subject: Re: SJQ for your review

Also, forgot to mention (though you are probably already aware): Last week, the ABA Committee on Judicial Nominations submitted a unanimous "Well Qualified" evaluation of my nomination, for which I am grateful. (b) (5)

Thanks, Sean.

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Cc: "(b)(6) - Susan Adams Email Address" <(b)(6) - Susan Adams Email Address>
Date: 12/09/2017 02:11 PM
Subject: SJQ for your review

Duplicative Material

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Monday, December 11, 2017 5:24 PM
To: Day, Sean (OLP)
Cc: (b)(6) - Kurt Engelhardt Email Address
Subject: Re: SJQ for your review

Sean,

Judge Engelhardt and I have reviewed the SJQ. Here are the revisions/edits:

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5):

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

I have Fed Ex'd the original Affidavit. You should receive it tomorrow afternoon. Kara has indicated that she received the emailed PDF version.

Let us know if you need anything further at this time.

Thanks!

Susan

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address

Cc: (b)(6) - Susan Adams Email Address" < (b)(6) - Susan Adams Email Address
Date: 12/09/2017 02:11 PM
Subject: SJQ for your review

Duplicative Material

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Tuesday, December 12, 2017 11:54 AM
To: Day, Sean (OLP)
Cc: King, Kara (OLP); (b)(6) - Susan Adams Email Address
Subject: RE: SJQ for your review

Hi, Sean -

(b) (5)

Thank you again!

Kurt

From: Kurt Engelhardt/LAED/05/USCOURTS
To: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
Cc: "King, Kara (OLP)" <Kara.King2@usdoj.gov>,
"(b)(6) - Susan Adams Email Address (b)(6) - Susan Adams Email Address >
Date: 12/11/2017 01:55 PM
Subject: RE: SJQ for your review

Duplicative Material

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Tuesday, December 12, 2017 4:47 PM
To: Day, Sean (OLP)
Cc: King, Kara (OLP); Kingo, Lola A. (OLP); (b)(6) - Susan Adams Email Address
Subject: Re: Engelhardt FINAL FOR KDE SIGN OFF

Hi, Sean -

(b) (5)

(b) (5), (b) (6)

(b) (5)

(b) (5)

Please let me know if you need anything further (b) (5)

Thanks!

Kurt

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
(b)(6) - Susan Adams Email Address " <(b)(6) - Susan Adams Email Address
Cc: "King, Kara (OLP)" <Kara.King2@usdoj.gov>, "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>

Date: 12/12/2017 12:56 PM
Subject: Engelhardt FINAL FOR KDE SIGN OFF

Judge -

Please do the following:

1 - [redacted]

a. [redacted].
b. [redacted].

2 - [redacted].

3 - If you approve of everything, please send a return e-mail to me, Kara King, and Lola Kingo (Lola and Kara are cc'ed on this e-mail) stating the following:

"I approve the final version of my SJQ and hereby authorize OLP to file it on my behalf." /s/ Kurt Engelhardt

[attachment "Engelhardt FINAL FOR KDE SIGN OFF.docx" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Engelhardt 13i COMBINED.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Engelhardt 13e COMBINED.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Engelhardt 13b COMBINED.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Engelhardt 12e COMBINED.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Engelhardt 12d COMBINED.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS] [attachment "Engelhard 12a COMBINED.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS]

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Tuesday, December 12, 2017 4:49 PM
To: Day, Sean (OLP)
Cc: King, Kara (OLP); Kingo, Lola A. (OLP); (b)(6) - Susan Adams Email Address
Subject: Re: Engelhardt FINAL FOR KDE SIGN OFF

Dear Sean, Lola and Kara -

Subject to my last email of a minute or two ago, I approve the final version of my SJQ, and authorize OLP to file it on my behalf.

Judge Kurt D. Engelhardt

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
"(b)(6) - Susan Adams Email Address" <(b)(6) - Susan Adams Email Address
Cc: "King, Kara (OLP)" <Kara.King2@usdoj.gov>, "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>
Date: 12/12/2017 12:56 PM
Subject: Engelhardt FINAL FOR KDE SIGN OFF

Duplicative Material

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Tuesday, January 02, 2018 2:29 PM
To: Day, Sean (OLP)
Cc: (b)(6) - Susan Adams Email Address
Subject: Re: Renomination

Hi, Sean -

(b) (5)

My assistant Susan can get you the details on that.

Let me know when and how to handle the updated Financial Disclosure form.
There are no changes on that from the prior submission.

I have no updates on any of the other questions and subparts of questions.

Thanks!

Kurt

P.S. I do not see where Lola was copied on your email. You might want to check that.

From: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>
To: (b)(6) - Kurt Engelhardt Email Address
(b)(6) - Kurt Engelhardt Email Address
Date: 01/02/2018 11:48 AM
Subject: Renomination

Judge -

Consistent with our call, for your renomination, we have two areas to focus on:

First - Once your renomination has occurred you will, within 5 days, need to re-file a financial disclosure report. Lola Kingo (cc'ed here) will work with you on that.

Second - As to your SJQ, we need to account for any updates. Please review your SJQ answers in their entirety and look for any updates.

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5) I have attached 3 samples of what that letter will look like.

Sean

Sean C. Day
Office of Legal Policy
US Department of Justice
950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 353-7206
(b) (6) (Mobile)

[attachment "Bennett Renomination Letter.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS]
[attachment "Hanks Renomination Letter.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS]
[attachment "Parrish Renomination Letter.pdf" deleted by Kurt Engelhardt/LAED/05/USCOURTS]

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Thursday, January 04, 2018 1:00 PM
To: King, Kara (OLP)
Cc: Talley, Brett (OLP); Kingo, Lola A. (OLP); Day, Sean (OLP)
Subject: Guest List for Nomination Hearing

Kara,

Here is Judge Engelhardt's "reserved seating" guest list for the nomination hearing on January 10, 2018:

(b) (6)

(b) (6)

Thank you.

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Thursday, January 4, 2018 3:59 PM
To: Kingo, Lola A. (OLP)
Cc: King, Kara (OLP); (b)(6) - AOUSC Email Address
Subject: RE: Renomination/Financial Disclosure Report of Judge Engelhardt
Attachments: FDR_RENOM_Engelhardt-K-D.1-4-18.pdf

Hi Lola,

I've attached a draft of the Renomination FDR of Judge Engelhardt. Nothing has changed since the last FDR submitted in October. I have changed the dates as you indicated, put today's date as the date of the report, however, I know that will change when you tell us to file it, and left the nomination date marked WAITING!

Since the judge is already registered into the FIDO system, I think we should be good to go when the word comes down and I've gotten the okay from you that the FDR is correct.

Thanks to you, Kara and Kristina for all your help throughout this process.

Susan

(See attached file: FDR_RENOM_Engelhardt-K-D.1-4-18.pdf)

From: "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>
To: (b)(6) - Susan Adams Email Address" < (b)(6) - Susan Adams Email Address
Cc: "King, Kara (OLP)" <Kara.King2@usdoj.gov>,
(b)(6) - AOUSC Email Address (b)(6) - AOUSC Email Address
Date: 01/03/2018 02:54 PM
Subject: RE: Renomination/Financial Disclosure Report of Judge Engelhardt

Hi Susan,

Once Judge Engelhardt is renominated, he will be required to file a Financial Disclosure Report (FDR) within five calendar days of your renomination. You can access the software needed to generate the FDR, as well as related documents, at https://fd-docs.uscourts.gov. Please use the following credentials to log-in to the website where you may download the software: User ID: (b) (6) ; Password: (b) (6) (the credentials are both case sensitive).

I have attached Filing Instructions for completing the FDR. (b) (5)

(b) (5)

If you have any questions about completing the FDR, please contact Kristina Usry (copied) at (b) (6) and me. Otherwise, once you and Judge Engelhardt have completed a draft of the renomination FDR, please email it to Kara (copied), Kristina, and me so we may review the paperwork before it is required to be filed. Once we complete our review and the FDR is finalized, we will be in touch with you and Judge Engelhardt again when it is time to file the nomination report.

Best,
Lola

-----Original Message-----
From: (b)(6) - Susan Adams Email Address [mailto:(b)(6) - Susan Adams Email Address]
Sent: Wednesday, January 03, 2018 1:39 PM
To: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Cc: King, Kara (OLP) <kking@jmd.usdoj.gov>; (b)(6) - AOUSC Email Address
Subject: Renomination/Financial Disclosure Report of Judge Engelhardt

Hi Lola,

I understand from Sean Day that Judge Engelhardt's FDR will need to be re-filed within 5 days once his renomination has occurred. Are you going to advise me when this occurs so that I can re-file his FDR in FIDO? Also, nothing has changed on this report from the date of the last filing, but will you let me know if I need to change anything, i.e., type of report, date of report, reporting period?

Thanks!!

Susan

[attachment "filing-instructions.pdf" deleted by Susan Adams/LAED/05/USCOURTS]

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Tuesday, January 09, 2018 10:31 AM
To: Kingo, Lola A. (OLP)
Cc: King, Kara (OLP); (b)(6) - AOUSC Email Address Day, Sean (OLP)
Subject: Nomination FDR and other Documents
Attachments: FDR_RENOM_Engelhardt-K-D.1-9-18.pdf; 20180109092559576.pdf

Lola,

Attached is the updated FDR [which I have filed into FIDO today (Rec. Doc. 47), although it indicates that it is an Annual Report for Calendar year 2017].

Also attached is the update letter, with attachment.

Let me know if you need anything further.

Thank you.

Susan

(See attached file: FDR_RENOM_Engelhardt-K-D.1-9-18.pdf)

UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street, Chambers 367
New Orleans, Louisiana 70130

Kurt D. Engelhardt
Chief Judge

January 5, 2018

The Honorable Charles Grassley
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6050

Dear Mr. Chairman:

I have reviewed the questionnaire submitted to the Senate Judiciary Committee on December 12, 2017, in connection with my nomination to the Fifth Circuit Court of Appeals. Incorporating the additional information listed below, I certify that the information contained in these documents is, to the best of my knowledge, true and accurate.

Question 12(d):

Since my previously submitted questionnaire, I have participated on the following panel:

December 14, 2017: Panelist, "Evidentiary Issues Related to (1) Emails and (2) Expert Testimony, New Orleans Bar Association - Masters of the Courtroom. The address of the New Orleans Bar Association is 650 Poydras Street, Suite 1505, New Orleans, Louisiana 70130. An outline of the presentation is attached; however, there were no prepared remarks nor any handouts given to the attendees.

With kind regards, I remain

Very truly yours,

KURT D. ENGELHARDT
Chief Judge

KDE/sa

cc: The Honorable Dianne Feinstein
Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6050

EVIDENTIARY ISSUES RELATED TO (1) EMAILS AND (2) EXPERT TESTIMONY

NOBA Masters of the Courtroom
December 14, 2017

Panel:
Chief Judge Kurt D. Engelhardt
Brittany Reed
Gerald E. Meunier

EMAILS OFFERED AS EVIDENCE

I) THE HEARSAY RULE AS APPLIED TO EMAILS AND OTHER FORMS OF COMMUNICATION IN ELECTRONICALLY-STORED FILES

(a) If offered for the truth of something asserted by an out-of-court individual, electronically-transmitted and stored communications constitute inadmissible hearsay unless one or more exclusions/exceptions apply

i. Where there is "hearsay within hearsay" in the material, each part of the combined statement must be scrutinized for admissibility. *See In re Oil Spill by the "Deepwater Horizon"* MDL, 2012 WL 85447 (E.D. La.1/11/12), at p. 4; FRE 805.

II) THE "BUSINESS RECORDS" EXCEPTION

(a) The hearsay inadmissibility rule does not apply under the "business records" exception. *See* FRE 803(6). The rationale of the exception is based on matters such as "systematic checking, [the] regularity and continuity which produce habits of precision, [the] actual experience of business in relying upon [the records], or [the] duty to make an accurate record as part of a continuing job or occupation." *See* Advisory Committee's Notes for FRE 803(6), 56 FRED 183, 308 (1973).

i. The latter "job duty" rationale is often emphasized. Courts have long held that a showing that an employee regularly compiled correspondence as part of his official duties is sufficient for purposes of the "business records" exception. *See, e.g., United States v. Robinson*, 700 F.2d 205, 209-10 (5th Cir. 1983).

(b) But there is no categorical treatment of all electronically-stored emails or text messages as automatically falling under the "business records" exception. Each email must be scrutinized to see if the exception applies. *See In re Oil Spill by the "Deepwater Horizon"* MDL, *supra,* at p. 2. Since many emails are "essentially substitutes for telephone calls," the exception should not serve to

render admissible "all emails found on a [company's] computer serve." *Id.* at p. 3.

(c) Under the provisions of FRE 803(6) and applicable case law, a five-part inquiry is used to determine if a given email is admissible under the "business records" exception:

i. Was the email sent or received at or near the time of the event(s) discussed?

ii. Was the email sent by someone with knowledge of the event(s) or matter(s) discussed?

iii. Was the email sent or received in the course of a regular business activity?

- This "course and scope" requirement in turn depends on proof that the company or entity storing the email imposed a "business duty" on the email's custodian to record or report the information within the email.

iv. Was it the regular practice of the producing entity to send or receive emails recording the type of event(s) or matter(s) reflected in the email at issue?

v. Is there a custodian or other qualified witness to attest that all of the above conditions are satisfied?

- Presumably this could be accomplished by stipulation.

See In re Oil Spill by the "Deepwater Horizon" MDL, *supra,* at pp. 2-3 and *fn. 3.*

vi. Even with all these conditions satisfied, an objecting party still can argue that as to a particular email, there is a "lack of trustworthiness" as to the truth of the contents which justifies inadmissibility as hearsay. *See id.* at p. 3.

III) THE "OPPOSING PARTY STATEMENT" EXCLUSION

(a) A statement is excluded from the definition of hearsay if made by an opposing party's authorized agent or employee during the existence and within the scope of that individual's relationship

with the party, and is shown to be "adopted" or believed by the party to be true. *See FRE* 801(d)(2). *See, e.g., Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.,* 2009 WL 2382787 (E.D. La. July 31, 2009), at p. 3.

(b) As with the "business records" exception, a case-by-case analysis of each email within a stored "string" of emails must be conducted to determine whether a particular statement qualifies under the "opposing party statement" exclusion. *See In Re Oil Spill by the "Deepwater Horizon"* MDL, *supra,* at p. 4.

(c) Where a party's agent/employee is by email forwarding a statement originating from someone outside the party's employment, this "outside" statement will be viewed as adopted by the party only "if it is clear that the forwarder adopted the content." *See id.*

EXPERT WITNESS TESTIMONY OFFERED AS EVIDENCE

I) THE COMBINED ADMISSIBILITY REQUIREMENTS OF DAUBERT AND FRE 702

(a) Following the Supreme Court's 1993 decision in *Daubert,* the Federal Rule of Evidence addressing experts was amended to reflect the importance of a proferred expert opinion's reliability as the key criteria for admissibility: To be admissible under the Rule, the opinion must (1) have sufficient supporting data, (2) utilize reliable methodology, and (3) reliably apply that methodology to the facts of the case. *See* FRE 702.

(b) The non-exclusive factors for admissibility set forth in *Daubert* also serve as criteria, although tailored more to scientific rather than non-scientific experts:

i. Has the expert's technique method been tested?
ii. Has it been published in peer-reviewed literature?
iii. Is there a known rate of error?

iv. Is the technique or method generally accepted in the practice field of expertise?

See In Re: Mirena IUD, 169 F.Supp.3d 396, 480 (S.D. N.Y. 2016), and cases cited therein.

- An additional factor considered in some *Daubert* jurisprudence is whether the proffered expert opinion was one developed solely for purposes of litigation. *See id.* at pp. 31 and 52 [suggesting that judges at least "should pause and take a hard look" when this is the case].
- Query whether this disfavors any effort in litigation to present a "breaking ground" expert theory, and/or operates unfairly if confidentiality either by Court order or consent in the production of company documents makes pre-litigation development or publication of an expert opinion impossible.

(c) Rulings on the admissibility of expert opinions are critical at the trial court level. A District Judge's "gatekeeper" decision-making under FRE 702/*Daubert* is given such broad latitude that appellate reversal should be viewed as unlikely in most cases. Therefore, a sufficient record for the district court's analysis should be a primary objective for litigants.

i. Is an evidentiary hearing preferred to oral argument with submission of reports/depositions? Such evidentiary hearings are "not required," but "may help a district court conduct an adequate *Daubert* analysis." *See In Re Nexium MDL,* 2014 WL 5313871 (C.D. Calif. September 30, 2014) at p. 1.

ii. Should district judges more often employ, or be asked to consider, Court-appointed experts under FRE 706?

- According to one survey, only 7.6% of district judges have appointed independent experts to help them address issues of expert opinion reliability and admissibility. *See* Jurs,

"Gatekeeper with a Gavel: A Survey..." 83 Miss. L.J. 325, 367 (2014).

iii. When should the district judge allow (or even call for) a supplementation of the record to assure that key issues are addressed?

- Over the opposing party's "strenuous objection," one MDL district judge found that important dosing issues had not been addressed at a *Daubert* hearing by the challenged experts, and directed these experts to supplement their opinions, but only based on already-identified reliance materials. *See In re: Lipitor MDL,* 174 F.Supp.3d 911, 932 (D. So. Car. 2016).

iv. How, if at all, can evolving science be accounted for in extended litigation where a Rule 702/*Daubert* analysis at one point in time may be seen as a "snapshot" (*e.g.*, in pharmaceutical cases where the drug is still on the market and being studied)?

(d) In "toxic tort" cases, experts address both general and specific causation, i.e., not only whether the exposure is capable of causing the injuries alleged, but whether it likely did so in the case of a specific claimant.

i. A case-specific causation opinion by a proffered expert will not be admissible where that expert fails to offer, or rely upon, an admissible opinion on general causation. *See In re: Mirena IUD, supra,* at pp. 36 and 53.

(e) Should the analyses of district courts under FRE 702/*Daubert* be viewed not as truly limited to methodology assessments, but actually as preliminary determinations as to the sufficiency of evidence? *See* Green & Sanders, "Admissibility vs. Sufficiency: Controlling the Quality of Expert Witness Testimony," 50 Wake Forest L. Rev. 1057 (2015). *See, e.g., In re: Zoloft MDL*, 2015 WL 7776911 (E.D. Pa. December 2, 2015), at pp. 6 *ff* [where Court inquired as to the reliability of the epidemiology studies on which the expert relied was proper]

- Does the increased role of judges as *Daubert* gatekeepers align with the diminished number of jury trials, as expressed by one commentator as follows: "Although the purported goal of *Daubert* is to liberalize the admissibility of expert evidence, it also deputizes federal judges as amateur scientist gatekeepers. Justice Rehnquist, who concurred and dissented in part, questioned this aspect of the Court's holding: 'I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role.' In their role as amateur scientists, judges examine a theory, gather opposing facts about it, and then attempt to make a 'reasoned judgment' about which set of facts are correct. Traditionally, this has been a role for American juries, not judges. In this sense *Daubert* might very well be said to undermine the Seventh Amendment's right to a jury trial."

Kanner and Casey, "Daubert and the Disappearing Jury Trial," 69 U. Pitt. L. Revb. 281, 291-92 (2007).

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Tuesday, January 09, 2018 10:48 AM
To: Kingo, Lola A. (OLP)
Subject: RE: Nomination FDR and other Documents

Lola,

Nothing has changed on Judge Engelhardt's NWS. Please submit the one you have attached.

Thanks!

Susan

From: "Kingo, Lola A. (OLP)" <Lola.A.Kingo@usdoj.gov>
To: " (b)(6) - Susan Adams Email Address
<(b)(6) - Susan Adams Email Address >
Cc: "Day, Sean (OLP)" <Sean.Day@usdoj.gov>, "King, Kara (OLP)"
<Kara.King2@usdoj.gov>
Date: 01/09/2018 09:44 AM
Subject: RE: Nomination FDR and other Documents

Susan,

Are there any updates to Judge Engelhardt's NWS since he last filed his SJQ? I am attaching what appears to be the last update that we have on file. It seems we didn't receive an update, but if I missed something in the back and forth, and it's not too much trouble on your end, would you please forward the updated NWS?

Thanks a million.

All the best,
Lola

-----Original Message-----
From: Kingo, Lola A. (OLP)
Sent: Tuesday, January 09, 2018 10:35 AM
To: (b)(6) - Susan Adams Email Address (b)(6) - Susan Adams Email Address
Cc: King, Kara (OLP) <kking@jmd.usdoj.gov>; (b)(6) - AOUSC Email Address
Day, Sean (OLP) <seday@jmd.usdoj.gov>
Subject: RE: Nomination FDR and other Documents

Thanks very much, Susan!

-----Original Message-----
From: (b)(6) - Susan Adams Email Address [mailto:(b)(6) - Susan Adams Email Address]
Sent: Tuesday, January 09, 2018 10:31 AM
To: Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
Cc: King, Kara (OLP) <kking@jmd.usdoj.gov>; (b)(6) - AOUSC Email Address
Day, Sean (OLP) <seday@jmd.usdoj.gov>
Subject: Nomination FDR and other Documents

Duplicative Material

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Wednesday, January 10, 2018 6:20 AM
To: Day, Sean (OLP)
Subject: Re: AFJ Report

(b) (5) .

On Jan 9, 2018, at 9:36 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:

(b) (5)

(b) (5)

From: (b)(6) - Kurt Engelhardt Email Address mailto(b)(6) - Kurt Engelhardt Email Address
Sent: Tuesday, January 9, 2018 9:19 PM
To: Day, Sean (OLP) <seday@jmd.usdoj.gov>
Subject: Re: AFJ Report

Okay,good. Thanks,Sean. (b) (5)

On Jan 9, 2018, at 9:12 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

Sean C. Day
Office of Legal Policy
US Department of Justice
950 Pennsylvania Avenue, NW - Room 4260

Washington, DC 20530
sean.day@usdoj.gov
(202) 353-7206
(b) (6) (Mobile)

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Friday, January 12, 2018 9:20 AM
To: Day, Sean (OLP)
Subject: Fw: confirmation hearing question - FYI

Hi, Sean -

This is from (b) (6), whose practice is in labor law:

Subject: confirmation hearing

I still can't believe the judge was asked for authority to support the notion that the Court should consider whether the conduct at issue was physically threatening. That is absolutely part of the totality of circumstances that scores of cases cite when performing the proper analysis, and it comes from Supreme Court decisions (Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993), and Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)). In fact, that language is actually set forth in the Fifth Circuit Pattern Jury Instruction, at §11.2.

Couldn't be any more clear. (b) (6)

Thank you again -

Kurt

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Friday, January 12, 2018 2:44 PM
To: Day, Sean (OLP)
Subject: Letter from Judge Engelhardt
Attachments: 20180112132452830.pdf

Sean,

Judge Engelhardt asked that I email the attached letter to you.

Thank you.

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(See attached file: 20180112132452830.pdf)

UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street, Chambers 367
New Orleans, Louisiana 70130

Kurt D. Engelhardt
Chief Judge

January 12, 2018

Via Email: sean.day@usdoj.gov
Mr. Sean Day
Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, NW
Room 4260
Washington, DC 20530

Dear Sean,

Upon arriving back in my chambers this morning, the first thing I want to do is express my sincere gratitude for all of your assistance and hard work in connection with my hearing this past Wednesday. It was obvious to me that you and your colleagues spent considerable time preparing for my appearance before the Senate Judiciary Committee, and in anticipation of our meetings (b (b) (5)

Needless to say, I was extremely impressed with the dedication and diligence of you and your colleagues. It gives great comfort to know that the hearings of judicial nominees are handled in the way I experienced. I ask that you please share my thoughts, and my thanks, with all involved at those two meetings.

Sincerely, and with kindest regards, I remain

Very truly yours,

KURT D. ENGELHARDT
Chief Judge

KDE/sa

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Friday, January 12, 2018 2:45 PM
To: Talley, Brett (OLP)
Subject: Letter from Judge Engelhardt
Attachments: 20180112132433143.pdf

Mr. Talley,

Judge Engelhardt asked that I email the attached letter to you.

Thank you.

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(See attached file: 20180112132433143.pdf)

UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street, Chambers 367
New Orleans, Louisiana 70130

Kurt D. Engelhardt
Chief Judge

January 12, 2018

Via Email: brett.talley@usdoj.gov
Mr. Brett Talley
Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, NW
Room 4260
Washington, DC 20530

Dear Brett,

Upon arriving back in my chambers this morning, the first thing I want to do is express my sincere gratitude for all of your assistance and hard work in connection with my hearing this past Wednesday. It was obvious to me that you and your colleagues spent considerable time preparing for my appearance before the Senate Judiciary Committee, and in anticipation of our meetings [redacted] (b) (5)

Needless to say, I was extremely impressed with the dedication and diligence of you and your colleagues. It gives great comfort to know that the hearings of judicial nominees are handled in the way I experienced. I ask that you please share my thoughts, and my thanks, with all involved at those two meetings.

Sincerely, and with kindest regards, I remain

Very truly yours,

KURT D. ENGELHARDT
Chief Judge

KDE/sa

(b)(6) - Susan Adams Email Address

From: (b)(6) - Susan Adams Email Address
Sent: Friday, January 19, 2018 5:42 PM
To: King, Kara (OLP)
Cc: Talley, Brett (OLP); Kingo, Lola A. (OLP); Day, Sean (OLP)
Subject: QFRs
Attachments: Feinstein QFRs for Engelhardt.docx; Attachment.to.Feinstein.QFR.Rec.Doc.138.(b) (5) Durbin QFRs for Engelhardt.docx; Whitehouse QFRs for Englehardt.docx; Coons QFRs for Engelhardt.docx; Hirono QFRs for Engelhardt.docx

Hi Kara,

Attached are the answers to the QFRs from Ranking Member Feinstein and Senators Durbin, Whitehouse, Coons and Hirono. The answers have been put in the documents you attached and formatting has been retained.

If you need anything further, please advise.

Thank you.

Susan

Susan Adams
Judicial Assistant to Chief Judge Kurt D. Engelhardt United States District Court Eastern District of Louisiana 500 Poydras Street, Room C-367 New Orleans, LA 70130 (504) 589-7645

(See attached file: Feinstein QFRs for Engelhardt.docx)(See attached file: Attachment.to.Feinstein.QFR.Rec.Doc.138.Dandridge.64-14801.pdf)

(See attached file: Durbin QFRs for Engelhardt.docx)(See attached file: Whitehouse QFRs for Englehardt.docx)(See attached file: Coons QFRs for Engelhardt.docx)(See attached file: Hirono QFRs for Engelhardt.docx)

(b)(6) - Kurt Engelhardt Email Address

From: (b)(6) - Kurt Engelhardt Email Address
Sent: Sunday, January 21, 2018 9:55 PM
To: Dickey, Jennifer (OLP)
Cc: Day, Sean (OLP); Talley, Brett (OLP); King, Kara (OLP); Kingo, Lola A. (OLP); (b)(6) - Susan Adams Email Address
Subject: Re: QFRs

Yes, maybe so. Otherwise it is fine with me, Jenn.

On Jan 21, 2018, at 8:52 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:

(b) (5)

Sent from my iPhone

On Jan 21, 2018, at 9:16 PM, (b)(6) - Kurt Engelhardt Email Address (b)(6) - Kurt Engelhardt Email Address :

Thank you, Jenn. (b) (5) Please check it and let me know about that one.

I appreciate your fine work!

Kurt

On Jan 21, 2018, at 7:50 PM, Dickey, Jennifer (OLP) <Jennifer.B.Dickey@usdoj.gov> wrote:

Hi Judge Engelhardt,

I thought you did a nice job on these. (b) (5) Please let me know if you agree or have any further changes. We can get the documents cleaned up and submitted once we have your approval.

Best,

Jenn

From: (b)(6) - Kurt Engelhardt Email

(b)(6) - Kurt Engelhardt Email Address

Sent: Sunday, January 21, 2018 5:14 PM
To: Day, Sean (OLP) <seday@jmd.usdoj.gov>
Cc: Talley, Brett (OLP) <btalley@jmd.usdoj.gov>; Dickey, Jennifer (OLP) <jdickey@jmd.usdoj.gov>; King, Kara (OLP) <kking@jmd.usdoj.gov>; Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>; (b)(6) - Susan Adams Email Address
Subject: Re: QFRs

Hi, Sean -

It does not appear that the red line versions are attached, (b) (5)

As always, I appreciate your assistance.

Kurt

On Jan 21, 2018, at 3:42 PM, Day, Sean (OLP) <Sean.Day@usdoj.gov> wrote:

> Judge Engelhardt –
>
> Attached are:
>
> 1 – Revised versions of your QFRs.
>
> 2 – Redlines showing changes from what you forwarded to us on Friday.
>
> (b) (5)
>
> (b) (5)
>
> (b) (5)
>
> Thank you for your understanding.
>
> Sean
>
> Sean C. Day
> Office of Legal Policy
> US Department of Justice

950 Pennsylvania Avenue, NW - Room 4260
Washington, DC 20530
sean.day@usdoj.gov
(202) 353-7206
(b) (6) (Mobile)

<Feinstein Redline.docx>

<Hirono QFRs for Engelhardt -- SDAY Draft.docx>

<Coons QFRs for Engelhardt -- SDAY DRAFT.docx>

<Whitehouse QFRs for Englehardt -- SDAY DRAFT.docx>

<Durbin QFRs for Engelhardt -- SDAY Draft 1-21.docx>

<Feinstein QFRs for Engelhardt -- SDAY Draft 1-21.docx>

<Durbin Redline.docx>

<Hirono Redline.docx>

<Coons Redline.docx>

<Whitehouse Redline.docx>

<Coons QFRs for Engelhardt.v3.docx>

<Durbin QFRs for Engelhardt.v3.docx>

<Feinstein QFRs for Engelhardt.v3.docx>

<Hirono QFRs for Engelhardt.v3.docx>