JUDICIAL COUNCIL APPENDIX
№ 01-16-90036 – 01-16-90041

This document, **"JCApx",** is the Appendix to the document Judicial Council's Opinion(/Order), Annotated **("JCOpAnn"),** both being filed in support of appeal to the Judicial Council Opinion(/Order) **"JCOp"** entered on Jan. 27, 2017 (the original version of JCApx is reproduced at Exh.EE, *infra*).

This cover page is followed by an Index, which is then followed by the Appendix contents proper.

The documents marked *"separate"* in the Index have previously been provided to the Judicial Council (as part of, or supplements to, the original Complaints of Judicial Misconduct). They are separate and apart from this JCApx itself (not included here), but are listed in the Index for convenience and emphasis only.

The documents contained in this JCApx (including those marked as "separate" in the Index) include the totality of *ALL* communications between Complainant and the Judicial Council (prior to the present filing of appeal). (And, the JCApx additionally contains some few third-party items not previously presented to the Judicial Council, though available to it, such as the law review article in Exh.NN, and the USAM-CRM excerpts in Exh.OO.)

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Exhibit A

Email to M. Carter, Sep. 4, 2016.

The “Margaret Court” in this email is a typographical error (should be “Margaret Carter”), uncorrected here.

Subject: Questions about Complaint of Misconduct
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 09/04/16 09:32
To: Margaret Carter <Margaret_Carter@ca1.uscourts.gov>

To Margaret Court, Clerk of 1st Cir. Court of Appeals -

Hello.

I am planning to file Complaints of Misconduct, of two types: (i) one against the District Judge; (ii) one against the Appeals Judges (five of them; the same Complaint applies to all five). I am working from the information available at http://www.ca1.uscourts.gov/judicial-conduct-disability. I understand that information for the most part. However, I'm not entirely clear about two of the instructions, so I'm asking you to clarify them for me.

- How many copies of the Complaints (of each type) should I file?
- Is it required to enclose each individual copy of the Complaints in its own individual envelope?

Thank you for your assistance.

- Walter Tuvell

Exhibit B

Emails with F. Pagano, Sep. 4–15, 2016.

The "4 items" mentioned in the email of Sep. 12, sent by U.S. Mail (not "attachments" to the email), are:

- **Petition for Writ of Certiorari with Required Appendix (hardcopy)** — Filed with Supreme Court (Sep. 12, 2016). Filed with Judicial Council. Omitted in this JCApx (available as separate submission).
- **Optional Appendix to Accompany Pet. for Writ of Cert. (PDF, on USB) —** Filed with Judicial Council (Sep. 12, 2016). Not filed with Supreme Court (no provision for doing so). Omitted in this JCApx (available as separate submission).
- **District Court Complaint (hardcopy) —** Filed with Judicial Council (Sep. 12, 2016). Included in this JCApx at Exhibit B.a, *infra.* Later re-formatted (with corrections) and filed with Supreme Court (and with Judicial Council), in Supplement to Petition of Writ of Certiorari (Sep. 30, 2016), first Appendix (available separately, omitted in this JCApx).
- **Appeals Court Complaint (hardcopy) —** Filed with Judicial Council (Sep. 12, 2016). Included in this JCApx at Exhibit B.b, *infra.* Later re-formatted (with corrections) and filed with Supreme Court (and with Judicial), in Supplement to Petition of Writ of Certiorari (Sep. 30, 2016), second Appendix (available separately, omitted in this JCApx).

Subject: Re: Misconduct Complaints
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 09/15/16 08:34
To: Florence_Pagano@ca1.uscourts.gov

Florence -

Please be advised I have discovered a typographical error in my District Court Complaint: In page 6 footnote 6, "my myself" should read "me myself". This is corrected in the attached updated PDF (no other changes have been made).

This is a trivial error, but I assume you will inform the investigator(s) as appropriate.

Thank you.

- Walt Tuvell

On 09/12/16 11:05, Walt Tuvell wrote:

> Florence -
>
> As a follow-up from our early communications, this note lets you know that I have indeed mailed my complaints to you this morning. There are 4 items (each in its own individual envelope, all bundled inside one Priority Mail cardboard envelope):
>
> 1. District Court Complaint (2-page cover-form + 7-page complaint).
> 2. Appeals Court Complaint (2-page cover-form + 5-page complaint).
> 3. Booklet, Petition for Writ of Certiorari (with Required Appendix), also filed today to the Supreme Court.
> 4. USB drive containing PDF versions of the above 3 documents, plus one additional document ("Optional Appendix", containing additional material to aid the investigation). [I don't expect the USB to be returned to me.]
>
> Please let me know when you receive these, and whether they're defective in any way.
>
> Thank you.
>
> - Walt Tuvell
>
> On 09/04/16 12:27, Walt Tuvell wrote:
>
> > Florence, thank you very much! I didn't expect to receive an answer until after the holiday tomorrow.

My Complaints are not voluminous: in addition to the 2-page form for each one, I have only 6 pages for the District Complaint, and 4 pages for the Appeals Complaint. So I'll send you just one copy of each.

I will address the Complaints as you suggest, but I won't be mailing them until Mon, Sep 12 (for other reasons).

Thank you again!

- Walt Tuvell

On 09/04/16 12:21, Florence_Pagano@ca1.uscourts.gov wrote:

> Mr. Tuvell,
>
> Your email to Clerk Carter was forwarded to my attention. If the complaint(s) is not exceedingly voluminous, one copy is sufficient. Please be sure the complaint(s) clearly identifies the judge(s) against whom they are filed and the facts on which they're based in accordance with the Rules of Judicial Conduct. You do not need a separate envelope for each complaint. Please submit the complaint(s) to my attention in the Circuit Executives Office of the Moakley Courthouse, Suite 3700. Let me know if you have any additional questions.
>
> Thank you,
>
> Florence Pagano
> Assistant Circuit Executive for Legal Affairs
> 617-748-9376

Attachments:

JudicialMisconduct=Complaint,District.pdf 622 KB

Exhibit B.a

District Court Complaint (№ 01-16-90036), Sep. 12, 2016.

See Exhibit B, supra. Filed with Judicial Council (Sep. 12, 2016). Later re-formatted (with corrections) and filed with Supreme Court (and with Judicial Council), in Supplement to Petition of Writ of Certiorari (Sep. 30, 2016), first appendix (omitted in this JCApx, available separately).

Judicial Council of the First Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 4 (below). The Rules for Judicial-Conduct and Judicial-Disability Proceedings, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The Rules are available in federal court clerks' offices, on individual federal courts' websites, and on www.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. For the number of copies to file, consult the local rules or clerk's office of the court in which your complaint is required to be filed. Enclose each copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope**.

1. Name of Complainant: Walter Tuvell

   Contact Address: 836 Main St.
   Reading, Mass. 01867

   Daytime telephone: (781) 475-7254

2. Name(s) of Judge(s): Casper

   Court: United States District Court, D.Mass.

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

   [✔] Yes [ ] No

   If "yes," give the following information about each lawsuit:

   Court: United States District Court, D.Mass.

   Case Number: Tuvell v. IBM, 13-11292-DJC

   Docket number of any appeal to the 1st Circuit: 15-1914

   Are (were) you a party or lawyer in the lawsuit?

   [✔] Party [ ] Lawyer [ ] Neither

If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

Robert S. Mantell, BBO# 559715
111 Devonshire St., 4th Floor
Boston, MA 02109
(617)742-7010; RMantell@TheEmploymentLawyers.com

4. **Brief Statement of Facts**. Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

5. **Declaration and signature:**
I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature)  (Date) September 12, 2016

STATEMENT OF FACTS

What Happened, Where, And When

I hereby accuse Judge Casper of **Judicial Misconduct,** concerning the case *Tuvell v. IBM,* in which I am Plaintiff. Specifically: she wrongfully ***lied***[1] ***(falsifying all the "facts of the case"),*** substantively adversely to me (by dismissing the case at summary judgment) on the basis of her lies.

The complained-of behavior occurred in Casper's **falsified opinion ("Op"),** issued for *Tuvell v. IBM* (July 6, 2015).

Grounds For Complaint

This section summarizes this Complaint ***only briefly/summarily*** (per instructions for filing this Complaint). For reference to ***complete details fully elaborated,*** see the section *Further Information To Aid Investigation, infra.*

A

In her opinion (Op ℘1–2 §II),[2] Judge Casper correctly identified/stated her **Standard of Review** at summary judgment — proving she was *fully aware* of what she was ***bound/promised by oath*** (28 USC §453) to observe. Namely, Casper expressly wrote (Op ℘2): "The Court 'view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor.'" (Tuvell was nonmovant.)

But then she immediately turned around and lied — namely, she refused to do what she just promised to do.

For, Casper then vouchsafed (Op ℘2 §III 1st ¶, referring to case documents by their docket sheet/"D." numbers):

> The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted.

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1 • "Lie" = "known falsehood intended to harm" ~ **"abuse of judicial power."**

2 • Notation used throughout: § = section(s); ¶ = paragraph(s); ℘ = page(s); ℓ = line(s); ƒ = footnote(s); ℮ = endnote(s); ι = inline-note(s) (embedded in footnotes/endnotes).

And this is indeed how she then proceeded to act.

The **problem** is that "D.74" is *Defendant's Statement of Facts* ("**DSOF**") (and "D.82" is *Plaintiff's Response to DSOF* ("RespDSOF")). **THAT WAS FALSE (i.e., Casper lied about her duty/promise to uphold/observe her Standard of Review, *supra*)!** For, in order to "view the record in the light most favorable to the nonmovant," Casper was bound by law to **credit,** not the DSOF (nor RespDSOF) at all, but **instead** *Plaintiff's Statement of Facts* ("**PSOF**"), "D.83."[3] Yet, the **PSOF** is ***nowhere mentioned/credited*** in Casper's Op. By thus

strenuously excluding (*a fortiori* not crediting) the PSOF

from her "deliberations," Casper committed an *egregious* ***bald-faced-lie***(-of-omission), thereby rendering a ***false opinion.*** This is ***MISCONDUCT.***[4] (Period.)

This proves our contention (Judicial Misconduct by Casper). QED.

B

To further emphasize the perversity of Casper's now-proven perfidious **"PSOF-Exclusion"** ploy, we recall that the DSOF and PSOF (and *not* any *other* document, such as RespDSOF[5]) are ***the only** two documents required to be submitted* by the parties at a proceeding for summary judgment, according to **FRCP LR 56.1** (relevant part, emphasis added):

> **Motions for summary judgment** *shall* include a concise statement of the material facts of record [**DSOF**] as to which the moving party contends there is no genuine issue to be tried[.] … A party opposing the motion *shall* include a concise statement of the material facts of record [**PSOF**] as to which it is contended that there exists a genuine issue to be tried[.] … Material facts of record set forth in the *statement required* [**DSOF**] to be served by the moving party will be deemed for

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3 • And, the PSOF *does indeed* defeat the motion for summary judgment, as the merest cursory perusal trivially reveals.

4 • **More, it is manifestly unconscionable, grave miscarriage of justice, corruption of the judicatory process, subversion of judicial integrity, fraud upon the judicial system (by a judge), etc.**

5 • Noting, however, that the RespDSOF (which Casper's Op *pretends* to rely upon) references to the PSOF fully nineteen (19) times — yet Casper **refused to follow any of those nineteen pointers into the PSOF itself, not even once**!

> purposes of the motion to be admitted by opposing parties *unless* [and *only* unless] *controverted* by the *statement required* [**PSOF**] to be served by opposing parties.

And in fact, **both** (i) the PSOF itself, as well as (ii) the official district court docket sheet, *prominently advertise* **LR 56.1** using "inescapable blazing lights" within their respective "four corners" — thereby ***guaranteeing*** that Casper was ***positively/affirmatively notified*** of the PSOF's signal importance. Thusly (emphasis added):

- **Pursuant to LR 56.1,** Plaintiff hereby submits his Statement of Facts in Material Dispute [**PSOF**], which is being filed to support his Opposition to Defendant's Motion for Summary Judgment. — *PSOF ℘1, unnumbered ¶ preceding ¶1 (the very first substantive words of the PSOF itself).*
- 02/12/2015 | 83 | **Statement of Material Facts L.R. 56.1** re 73 MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015) — *Docket sheet, entry for D.83 (= PSOF).*

Finally, to well-and-truly "seal the deal" (of assuring the PSOF received the court's attention it demanded/deserved), Tuvell's counsel (and Tuvell himself, who was present in the courtroom) received this reciprocal solemn assurance from Casper at oral argument:

> I'm going to have to cutoff argument there, counsel, but **I assure you that I will go back and *look at your papers* carefully** [*obviously* referring to **PSOF,** because *that's the only* "paper" that really "matters" (**by Rule, LR 56.1**)] — *Transcript ℘20ℓ9–11 (emphasis added).*

So: despite every conceivable precaution being thus taken — *none of which Casper could possibly have been "accidentally mistaken" about* — Casper **blithely ignored the PSOF wholly.** Thus: Casper *affirmatively refused to even review/consider* (much less "weigh" [though "weighing" would have been improper, according to the tenets of summary judgment review], or *credit*) the **one-and-only** document (**PSOF**) Plaintiff was **actually required** to submit to her summary judgment proceeding! That is: not only did Casper (i) abridge the duties charged to her **by law** (Standard of Review), but she (ii) doubly abridged her duties by **ignoring judicial Rule** (**LR 56.1**).

It is ***MISCONDUCT*** for *any* judge, in *any* jurisdiction, to *"dis" (disregard)* basic Rules of Court. (Period.)

C

The only remaining issue for us to address here is the extent to which Casper's actions(/inactions) do, indeed, satisfy the criteria for "Judicial Misconduct," in the sense of this Complaint.

This Complaint is governed by two authorities:

- **Judicial Conduct & Disability Act ("JCDA") —** *Judicial Councils Reform and Judicial Conduct and Disability Act* (28 USC §332(d)(1),351–364, 1980).
- **Judicial Conduct & Disability Rules ("JCDR") —** *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (Judicial Conference of the United States, March 11, 2008).

The JCDA itself *nowhere formally defines* the term "misconduct." Rather, its definition (or, "meaning") is imputed, by the JCDR §3(h)(1), from a certain *phrase* in the leading provision of the JCDA:

> Any person alleging that a judge has engaged in *conduct prejudicial to the effective and expeditious administration of the business of the courts* [**misconduct**] … may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. — *JCDA §351(a), relevant part, emphasis added.*

The JCDR (*Commentary on Rule 3,* "**CommR3**") acknowledges that the phrase *(supra)* used by the JCDA to deduce the meaning of "misconduct" "is not subject to precise definition," and for that reason the JCDR provides various examples and dialectic to adumbrate it. For our purposes here, we cite to the following points (emphasis added throughout) — **these listed items are, individually and jointly, sufficient to support our proposition that Casper's actions do indeed satisfy the meaning of Judicial Misconduct:**

- CommR3 states: "[T]he *Code of Conduct for United States Judges* ['**CodCon**,' a.k.a. '**Judicial Ethics**'] may be informative …". And, the CodCon reciprocally affirms (CodCon *Commentary to Canon 1*): "Th[is] Code … may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 USC §§ 332(d)(1),

351-364).” Anent, the CodCon specifically provides:

- A judge should uphold the **integrity** and independence of the judiciary. An independent and **honorable** judiciary is *indispensable to justice* in our society. — *CodCon Canon 1.*
- ***Respect for Law [Including Judicial Rules].*** A judge should … act at all times in a manner that promotes *public confidence* in the *integrity and impartiality* of the judiciary. … An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s *honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.* **Public confidence** in the judiciary is eroded by irresponsible or improper conduct by judges. A judge **must** avoid all [actual] impropriety and [even] appearance of impropriety. This prohibition applies to both **professional** and personal conduct. — *CodCon Canon 2A and its Commentary.*
- A Judge Should **Perform the Duties of the Office [Which Includes Judicial Rules] Fairly, Impartially and Diligently** … A judge should be **faithful to, and maintain professional competence in, the law** and should not be swayed by partisan interests, public clamor, or fear of criticism. … A judge should accord to *every* person who has a legal interest in a proceeding, and that person’s lawyer, **the full right to be heard according to law.** — *CodCon Canons 3,3A(1,4).*

- The JCDR (§3(h)(3)(A); CommR3) excludes from the definition of misconduct allegations which are “*[d]irectly related to the merits* of a decision or procedural ruling. … Any allegation that calls into question the correctness of an official action of a judge — ***without more*** — is merits-related.” But the JCDR then helpfully proceeds to explore the boundaries of “official actions” that **“*are* ‘more’;”** i.e., that *“are not* merit-related*;”* i.e., that *are* eligible for a finding of misconduct:
  - An allegation that a judge ruled against the complainant because the complainant is a **member of a particular … group**[6] … is … not merits-related. Such an allegation at-

6 • **I do allege** that Casper’s PSOF-Exclusion scheme was informed by her animus

tacks the propriety of arriving at rulings with an ***illicit or improper motive*** [e.g., *ignoring Rules*]. — *CommR3.*

- An allegation that a judge treated litigants or attorneys in a *demonstrably egregious and hostile manner* while *on the bench*[7] is also not merits-related. — *CommR3.*

- *Note:* My contemporaneous Petition to the Supreme Court (PetWritCert, cf. section *Further Information To Aid Investigation, infra*) is "orthogonal" *(not germane)* to the instant Complaint:
  - The *existence of a[] [potential] appellate remedy* is …[in an instance like this one]… *irrelevant* to whether an allegation is merits-related. — *CommR3.*

Further Information To Aid Investigation

I have filed a *Petition for Writ of Certiorari* ("**Petition**"), with *Required Appendix* ("**ReqApx**") — together referred to as "**PetWritCert**" — with the Supreme Court. That PetWritCert contains a **full treatment** of the behavior complained-of *supra*. Accordingly, PetWritCert is **hereby incorporated in its entirety by reference,** and it **must be consulted** to truly comprehend this Complaint.

For the aid/convenience of the investigator, the following further materials accompany this Complaint:

- Hard-copy (booklet) of PetWritCert.[8,9]
- Soft-copy of PetWritCert (file *PetWritCert+Apx.pdf* on USB

(and that of other elements of the federal judiciary) towards the class nature of my case (namely, *employment discrimination/retaliation*), and hence of me myself (namely, an employment case litigant). This allegation is expressed quite vociferously in my Petition for Writ of Certiorari (see section *Further Information To Aid Investigation, infra*), esp. Petition ℘xiƒ7, ℘15ƒ21.

7 • "On the bench" means "acting in the official capacity of a judge" (not necessarily "behavior inside the courtroom"). The treatment charged herein — **PSOF-Exclusion** — is obviously "demonstrably egregious and hostile" (namely, undisguised improper/illicit motive of "overlooking" the PSOF), and is "in official capacity."

8 • **Notice of typographical errors:** Three typos have been hand-corrected in all extant copies of the booklets (including the forty copies sent to the Supreme Court). They occur on pages "Petition ⟨11/41⟩," "ReqApx [4/123]," and "ReqApx [120/123]."

9 • The hard-copy booklet is just a "courtesy" — there's no real necessity to include it herewith, because the *same information* is contained in the soft-copy (ƒ10 *infra*).

drive).[10]

- Soft-copy of an *Optional Appendix*, "**OptApx**" (file *PetOptApx.pdf* on USB drive).[11]
- Soft-copies of this District Complaint, as well as the accompanying Appeals Complaint, on the USB drive.

Not accompanying this Complaint are the totality of *all Tuvell v. IBM* case documents (though the *most important* ones for our purposes are indeed included in ReqApx and OptApx). All such documents are relevant in some degree, of course; it is *assumed* the investigator has access to them, and *will(/must)* consult them.

Reminder #1 (*Implementation of the Judicial Conduct and Disability Act of 1980, "Breyer Committee Report,"* September 2006, ℘45, screenshot, emphasis added):

> Of the 20 dispositions we found problematic:
>
> - 11 involved dismissals in which the sole problem was the chief judge's failure to undertake an adequate limited inquiry before dismissing the complaint, usually as "frivolous";
> - two involved dismissals in which the main or sole problem was the chief judge's mistakenly regarding the complained-of behavior as "directly related to the merits of a decision or procedural ruling";

Reminder #2: "High-visibility" cases (such as this one, potentially) are of particular interest, universally. *Implementation of the Judicial Conduct and Disability Act of 1980, "Breyer Committee Report,"* September 2006, ℘67*ff*.

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10 • The soft-copy of PetWritCert of course consists of precisely the same contents as the hard-copy booklet (including the corrections noted in ƒ8 *supra*).[†] {† Noting, though, that the PDF contains color images, while the booklet production process changes that to desaturated black-and-white (per Supreme Court Rule).}

11 • The OptApx was prepared as an adjunct to PetWritCert, but has not been submitted to the Supreme Court (because there is no provision for doing so — in the posture of a Petition for Writ of Certiorari, only the Petition itself and its ReqApx are permitted to be filed). The OptApx includes (along with other information) *copies* of certain *original* documents filed in *Tuvell v. IBM* — as opposed to the same documents, which are also included in the ReqApx, but which have there been *reformatted* (per Supreme Court Rule).

Exhibit B.b

Appeals Court Complaint (№ 01-16-90037 – 01-16-90041), Sep. 12, 2016.

See Exhibit B, supra. Filed with Judicial Council (Sep. 12, 2016). Later re-formatted (with corrections) and filed with Supreme Court (and with Judicial), in Supplement to Petition of Writ of Certiorari (Sep. 30, 2016), second appendix (omitted in this JCApx, available separately).

On ℘4 = JCApx ℘22, the typographical error has been corrected: "℘vf10" ➡ "℘vf‡".

Judicial Council of the First Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 4 (below). The Rules for Judicial-Conduct and Judicial-Disability Proceedings, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The Rules are available in federal court clerks' offices, on individual federal courts' websites, and on www.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. For the number of copies to file, consult the local rules or clerk's office of the court in which your complaint is required to be filed. Enclose each copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope**.

1. Name of Complainant: Walter Tuvell

   Contact Address: 836 Main St.
   Reading, Mass. 01867

   Daytime telephone: (781) 475-7254

2. Name(s) of Judge(s): Torruella, Lynch, Thompson; Howard, Kayatta

   Court: United States Court of Appeals, First Cir.

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

   [✔] Yes [ ] No

   If "yes," give the following information about each lawsuit:

   Court: United States District Court, D.Mass.

   Case Number: Tuvell v. IBM, 13-11292-DJC

   Docket number of any appeal to the 1st Circuit: 15-1914

   Are (were) you a party or lawyer in the lawsuit?

   [✔] Party [ ] Lawyer [ ] Neither

If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

Andrew P. Hanson, BBO# 672696
One Boston Place, Suite 2600
Boston, MA 02108
(617)933-7243; AndrewPHanson@gmail.com

4. **Brief Statement of Facts**. Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

5. **Declaration and signature:**
I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature) WETuoll (Date) September 12, 2016

STATEMENT OF FACTS

What Happened, Where, And When

I hereby accuse Judges (I)(panel) Torruella, Lynch, Thompson, and (II)(*en banc*) Torruella, Lynch, Thompson, Howard, Kayatta, of **Judicial Misconduct,** concerning the case *Tuvell v. IBM,* in which I am Appellant/Plaintiff. Specifically: they wrongfully ***lied***[1] ***(falsely supporting District Judge's falsification of all the "facts of the case"),*** substantively adversely to me ((I)(panel) by affirming summary judgment dismissal of the case, and (II)(*en banc*) by denying rehearing), on the basis of their lies.

The complained-of behavior occurred in (I)(panel) the panel's **falsified opinion ("PanOp"),** issued for *Tuvell v. IBM* (May 13, 2016), and in (II)(*en banc*) the *en banc* court's subsequent **falsified denial ("DenReh") of petition for rehearing ("PetReh")** (June 15, 2016).

Grounds For Complaint

This section summarizes this Complaint ***only briefly/summarily*** (per instructions for filing this Complaint). For reference to ***complete details fully elaborated,*** see the section *Further Information To Aid Investigation, infra.*

A

We first address the (I)(panel) Affirmation of Summary Judgment Dismissal portion of this Complaint.

In their opinion (PanOp ℘4),[2] the panel judges correctly identified/stated their **Standard of Review** for *review* of a summary judgment decision — proving they were *fully aware* of what they were ***bound/promised by oath*** (28 USC §453) to observe. Namely, the panel expressly wrote (PanOp ℘4): "Under the plenary [more commonly called *'de novo'*] standard of review [hence, bound by **FRCP LR 56.1**] …"

But then they immediately turned around and lied — namely, the panel judges refused to do what they just promised

1 • "Lie" = "known falsehood intended to harm" ~ **"abuse of judicial power."**

2 • Notation used throughout: § = section(s); ¶ = paragraph(s); ℘ = page(s); ℓ = line(s); ƒ = footnote(s); ℮ = endnote(s); ι = inline-note(s) (embedded in footnotes/endnotes).

to do (recalling the **LR 56.1** argumentation already presented in the accompanying District Complaint, cf. section *Further Information To Aid Investigation, infra*).

For, the panel then vouchsafed (PanOp ℘4, emphasis added):

> [W]e **perceive no genuine issue of material fact** and agree with the district court that IBM is entitled to judgment as a matter of law. … Simply said, [(i)] **the district court got it right.** [(ii)] **It closely considered each of Tuvell's arguments** and, in clear terms and for persuasive reasons, rejected them.

And this is indeed how the panel then proceeded to act.

The **problems** are that the relied-upon district court ***neither*** [(i)] "got it right," ***nor*** [(ii)] "considered ['closely' or otherwise] each of Tuvell's arguments." **THOSE WERE FALSE (i.e., the panel judges lied about their duty/promise to uphold/observe their plenary/*de novo* Standard of Review, *supra*)!** For, both [(i)] and [(ii)] are *obviously false,* as the merest cursory ***(de novo)*** perusal trivially reveals.[3] By thus **whole-heartedly (= unreservedly, unquestioningly, blindly, hook-line-and-sinker) swallowing the district judge's (false) "conclusions"** — after *de novo* review, no less — the panel judges committed an *egregious* ***cover-up bald-faced lie***(-of-commission), thereby rendering a **false opinion.** This is ***MISCONDUCT.***[4] (Period.)

This proves our contention (Judicial Misconduct by the panel judges). QED.

B

But there's more. Not only did the appellate panel judges render a false opinion, *supra,* but then they *additionally* took the further *gratuitous* step to falsely "*rub it in,*" by flaunting the following *superflu-*

---

3 • Cf. the District Complaint accompanying the instant Appellate Complaint, boxed paragraph on ℘2 (esp. ƒ3), which introduces the hyper-critical role of Plaintiff's Statement of Facts, "**PSOF**". Noting that, *of course,* all relevant case materials were indeed properly forwarded to the appellate panel, including (i) the **PSOF** (Appellate Joint Appendix ℘151–178), and (ii) oral argument **transcript.**

4 • **More, it is manifestly unconscionable, grave miscarriage of justice, corruption of the judicatory process, subversion of judicial integrity, fraud upon the judicial system (by a judge), etc.**

ously abusive/snide language (PanOp ℘4–5):

> We have made it abundantly clear that "when lower courts have supportably found the facts, applied the appropriate legal standards, articulated their reasoning clearly, and reached a correct result, a reviewing court ought not to write at length merely to hear its own words resonate." … This is one of those cases.

Since *all* these assertions were *lies* (based on their plainly false *de novo* review/opinion, *supra*), this abusive language is hereby ***challenged.*** That is, we hereby accuse the panel judges of further ***MISCONDUCT,*** by abridging JCDR CommR3:[5]

> [Concerning] a non-frivolous allegation that a **judge's language** in a ruling reflected an improper motive[:] If the judge's language was relevant to the case at hand … then the judge's choice of language is presumptively merits-related and excluded, **absent evidence apart from the ruling itself suggesting an improper motive.** If, on the other hand [i.e., if *"an improper motive" is implicated,* as here], the ***challenged language*** [*supra*] does not seem relevant on its face, then an additional inquiry under Rule 11 is necessary.

C

We turn now to the (II)(*en banc*) Denial of Rehearing portion of this Complaint.

The **Standard of Review** for reviewing (I) a summary judgment decision (already discussed, *supra*), is *different* from that for reviewing (II) a petition for rehearing (discussed now). The former (I) is concerned with Appellant/Plaintiff's "case-in-chief," as presented to both the district and appellate courts; while the latter (II) is concerned with "issues of mistake" made by the appellate court.[6] The distinction between the two different Standards of Review was **expressly** rehearsed

---

5 • The reference to "JCDR CommR3," is defined in the accompanying District Complaint of Judicial Misconduct ℘4; cf. section *Further Information To Aid Investigation, infra.*

6 • This latter item (II) reasonably *presumes* that mistakes made at district-level are identified/corrected at appellate-level, under *de novo* review *(supra);* but in the instant case, since the appellate panel *whole-heartedly adopted* the district judge's reasoning, hence district-level mistakes are *equivalent* to appellate-level mistakes here.

in Petitioner/Appellant/Plaintiff's PetReh ℘vf‡. *Viz.* (lightly edited in conformity with the present context):

> The (I) *panel's review* of the district court's opinion is *de novo:* the panel looks at appellant's case-in-chief with fresh eyes, and comes to its own independent determination, owing no deference to the district court's opinion; raising issues of *mistake* by the district court would be out-of-bounds for that inquiry. By Rule, it is only **here,** (II) at **rehearing level,** that **issues of mistake** are in order (FRAP 35,40). Since the appellate panel adopted the district's opinion, any **mistakes** at the district level are equally attributable to the appellate level, so are also appropriate here.

Thus, as required by Rule (FRAP 35,40), the PetReh did in fact expressly exhibit the panel's (and district's) "mistakes"[7] — very *politely* (it being expected the *en banc* court would easily "see through" the panel's "smokescreen"(/"mistakes"/lies)). Yet despite that "silver-platter presentation," the *en banc* judges insisted on: (i) ignoring the "inconvenient" facts placed under their noses; (ii) unquestioningly/blindly accepting the panel's "decision;" and (iii) mindlessly/senselessly denying rehearing.[8]

By thus **whole-heartedly swallowing the panel's (and district's) obviously falsified "conclusions,"** the *en banc* judges committed an *egregious* ***double-down all-in cover-up bald-faced lie*** (**contrary to oath,** 28 USC §453), thereby rendering a **false denial of rehearing.** This is ***MISCONDUCT.***[9] (Period.)

This proves our contention (Judicial Misconduct by both panel and en banc judges). QED.

D

Based upon the many reasons presented herein *(supra)* — and, since *both* (I) the panel judges *and* (II) the *en banc* judges **whole-**

---

7 • Indeed, so well-thought-out was the PetReh, that it comprises the *foundational model* upon which our PetWritCert submitted to the Supreme Court was constructed.

8 • The *en banc* order to deny rehearing only mumbled something vague about a "lack of sufficient number of votes" (paraphrase) — not exactly a "mindful" rationale.

9 • Repeat ƒ4 *supra* here.

heartedly swallowed the original district judge's faithless infidelities — I hereby charge the panel and *en banc* judges with ***all the exact same charges***[10] I have leveled against the district judge, in the accompanying District Complaint of Misconduct (cf. its subsection *Further Information To Aid Investigation (C)*).

Further Information To Aid Investigation

Accompanying the instant "**Appeals Complaint**" I am **concurrently** filing a separate-but-related *Complaint of Misconduct* ("**District Complaint**"), against the associated district judge for this case.

That District Complaint contains, in its ***totality*** (especially in its section *Further Information To Aid Investigation*), and references therein (particularly to **PetWritCert**), contains a much fuller treatment of the behavior complained-of herein *supra* (especially, the district court's contribution, which was **whole-heartedly swallowed** at appellate level). Hence, ***all*** of that material is **hereby incorporated in its entirety by reference,** and it **must be consulted** to truly comprehend *this* Appeals Complaint too.

Reminder #1 (*Implementation of the Judicial Conduct and Disability Act of 1980, "Breyer Committee Report,"* September 2006, ℘45, screenshot, emphasis added):

> Of the 20 dispositions we found problematic:
>
> - 11 involved dismissals in which the sole problem was the chief judge's failure to undertake an adequate limited inquiry before dismissing the complaint, usually as "frivolous";
> - two involved dismissals in which the main or sole problem was the chief judge's mistakenly regarding the complained-of behavior as "directly related to the merits of a decision or procedural ruling";

Reminder #2: "High-visibility" cases (such as this one, potentially) are of particular interest, universally. *Implementation of the Judicial Conduct and Disability Act of 1980, "Breyer Committee Report,"* September 2006, ℘67*ff.*

---

10 • Recalling that the panel judges are *additionally* charged with abusive language (cf. *supra*); and hence so are the *en banc* judges (since they whole-heartedly swallowed the panel's writing).

Exhibit C

Receipt of filing Judicial Misconduct Complaints, Sep. 15, 2016.

It was *never explained to me,* but I'm *hereby guessing in hindsight,*[†] that the assigned Judicial Misconduct docket numbers mean:

- **Complaint № 01-16-90036 —** Complaint against District Judge Casper (Exhibit B.a, *supra*).
- **Complaint № 01-16-90037 – 01-16-90041 —** Complaints against Appellate Judges Torruella, Lynch, Thompson, Howard, Kayatta (in some order) (Exhibit B.b, *supra*).

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† · This "*guess*" is contemporaneous with writing the instant JCApx (Judicial Council Appendix). That is, I didn't formulate this "guess" until an editing session on Feb. 3, 2017 (prior to that,, I thought only two numbers were involved, № 01-16-90037 and № 01-16-90041, for the two Complaints filed). So, references to these Judicial Misconduct docket numbers made throughout this JCApx don't take this guess/realization into account.

UNITED STATES COURTS FOR THE FIRST CIRCUIT
OFFICE OF THE CIRCUIT EXECUTIVE
JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE
1 COURTHOUSE WAY - SUITE 3700
BOSTON, MA 02210

SUSAN J. GOLDBERG
CIRCUIT EXECUTIVE
617-748-9614

September 15, 2016

Walter Tuvell
836 Main Street
Reading, MA 01867

Re: Complaint Nos. 01-16-90036 - 01-16-90041

Dear Mr. Tuvell:

Your complaints of judicial misconduct against Judge Casper, Judge Torruella, Judge Lynch, Judge Thompson, Chief Judge Howard, and Judge Kayatta have been received and shall be processed in accordance with the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Sincerely,

Anastasia A. Dubrovsky
Administrative Attorney

Exhibit D

Emails with F. Pagano, Sep. 4–16, 2016 (first).

- **Attachment Errata.pdf —** Included in this JCApx at Exhibit D.a, *infra*.

Subject: Re: Misconduct Complaints
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 09/16/16 07:36
To: Florence_Pagano@ca1.uscourts.gov

Florence -

In addition to the typo I notified you of yesterday, I'm attaching hereto the errata sheet I sent to the Sup Ct yesterday.

- Walt Tuvell

On 09/15/16 08:34, Walt Tuvell wrote:

> Florence -
>
> Please be advised I have discovered a typographical error in my District Court Complaint: In page 6 footnote 6, "my myself" should read "me myself". This is corrected in the attached updated PDF (no other changes have been made).
>
> This is a trivial error, but I assume you will inform the investigator(s) as appropriate.
>
> Thank you.
>
> - Walt Tuvell
>
> On 09/12/16 11:05, Walt Tuvell wrote:
>
> > Florence -
> >
> > As a follow-up from our early communications, this note lets you know that I have indeed mailed my complaints to you this morning. There are 4 items (each in its own individual envelope, all bundled inside one Priority Mail cardboard envelope):
> >
> > 1. District Court Complaint (2-page cover-form + 7-page complaint).
> > 2. Appeals Court Complaint (2-page cover-form + 5-page complaint).
> > 3. Booklet, Petition for Writ of Certiorari (with Required Appendix), also filed today to the Supreme Court.
> > 4. USB drive containing PDF versions of the above 3 documents, plus one additional document ("Optional Appendix", containing additional material to aid the investigation). [I don't expect the USB to be returned to me.]
> >
> > Please let me know when you receive these, and whether they're defective in any way.

Thank you.

- Walt Tuvell

On 09/04/16 12:27, Walt Tuvell wrote:

> Florence, thank you very much! I didn't expect to receive an answer until after the holiday tomorrow.
>
> My Complaints are not voluminous: in addition to the 2-page form for each one, I have only 6 pages for the District Complaint, and 4 pages for the Appeals Complaint. So I'll send you just one copy of each.
>
> I will address the Complaints as you suggest, but I won't be mailing them until Mon, Sep 12 (for other reasons).
>
> Thank you again!
>
> - Walt Tuvell
>
> On 09/04/16 12:21, Florence_Pagano@ca1.uscourts.gov wrote:
>
> > Mr. Tuvell,
> >
> > Your email to Clerk Carter was forwarded to my attention. If the complaint(s) is not exceedingly voluminous, one copy is sufficient. Please be sure the complaint(s) clearly identifies the judge(s) against whom they are filed and the facts on which they're based in accordance with the Rules of Judicial Conduct. You do not need a separate envelope for each complaint. Please submit the complaint(s) to my attention in the Circuit Executives Office of the Moakley Courthouse, Suite 3700. Let me know if you have any additional questions.
> >
> > Thank you,
> >
> > Florence Pagano
> > Assistant Circuit Executive for Legal Affairs
> > 617-748-9376

Attachments:

Errata.pdf 336 KB

Exhibit D.a

Attachment Errata.pdf to email of Sep. 16, 2016 (Exhibit D, *supra*).

In the Supreme Court of the United States

WALTER TUVELL

Petitioner

v.

INTERNATIONAL BUSINESS MACHINES (IBM)

Respondent

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

PETITION FOR WRIT OF CERTIORARI, ERRATA

WALTER E. TUVELL, PHD, *Pro Se*[1]
836 Main Street
Reading, Massachusetts 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

1 • Tuvell is not "really" *pro se* — see the main Petition ℘vi*f*6.

ERRATA

The following error-corrections have been discovered in the PetWritCert, and should be corrected:

- Errors that were *discovered and hand-corrected* already in all original hard-copy booklets:
  - ℘Petition⟨11/41⟩: “he was treated him” ➡ “he was treated”.
  - ℘ReqApx[4/123]: “July 6, 2016” ➡ “July 6, 2015”.
  - ℘ReqApx[120/123]: “℘m *e*46” ➡ “℘m*e*46”.
- Errors that have been discovered/corrected *after* the original booklets were distributed:
  - ℘Petition⟨22/41⟩*f*37: “is now even” ➡ “is not even”.
  - ℘ReqApx[61/123]: “Aff..” ➡ “Aff.*{,}*”. (The double-period was erroneously present in the original un-reformatted version of the document, intended to be corrected as indicated in the reformatted version).

Exhibit E

Emails with F. Pagano, Sep. 4–16, 2016 (second).

Subject: Re: Misconduct Complaints
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 09/16/16 12:57
To: Florence_Pagano@ca1.uscourts.gov

I found another typo, in the District Complaint, p. 2: "foritori" → "fortiori".

On 09/16/16 07:36, Walt Tuvell wrote:

> Florence -
>
> In addition to the typo I notified you of yesterday, I'm attaching hereto the errata sheet I sent to the Sup Ct yesterday.
>
> - Walt Tuvell
>
> On 09/15/16 08:34, Walt Tuvell wrote:
>
> > Florence -
> >
> > Please be advised I have discovered a typographical error in my District Court Complaint: In page 6 footnote 6, "my myself" should read "me myself". This is corrected in the attached updated PDF (no other changes have been made).
> >
> > This is a trivial error, but I assume you will inform the investigator(s) as appropriate.
> >
> > Thank you.
> >
> > - Walt Tuvell
> >
> > On 09/12/16 11:05, Walt Tuvell wrote:
> >
> > > Florence -
> > >
> > > As a follow-up from our early communications, this note lets you know that I have indeed mailed my complaints to you this morning. There are 4 items (each in its own individual envelope, all bundled inside one Priority Mail cardboard envelope):
> > >
> > > 1. District Court Complaint (2-page cover-form + 7-page complaint).
> > > 2. Appeals Court Complaint (2-page cover-form + 5-page complaint).
> > > 3. Booklet, Petition for Writ of Certiorari (with Required Appendix), also filed today to the Supreme Court.

4. USB drive containing PDF versions of the above 3 documents, plus one additional document ("Optional Appendix", containing additional material to aid the investigation). [I don't expect the USB to be returned to me.]

Please let me know when you receive these, and whether they're defective in any way.

Thank you.

- Walt Tuvell

On 09/04/16 12:27, Walt Tuvell wrote:

> Florence, thank you very much! I didn't expect to receive an answer until after the holiday tomorrow.
>
> My Complaints are not voluminous: in addition to the 2-page form for each one, I have only 6 pages for the District Complaint, and 4 pages for the Appeals Complaint. So I'll send you just one copy of each.
>
> I will address the Complaints as you suggest, but I won't be mailing them until Mon, Sep 12 (for other reasons).
>
> Thank you again!
>
> - Walt Tuvell
>
> On 09/04/16 12:21, Florence_Pagano@ca1.uscourts.gov wrote:
>
> > Mr. Tuvell,
> >
> > Your email to Clerk Carter was forwarded to my attention. If the complaint(s) is not exceedingly voluminous, one copy is sufficient. Please be sure the complaint(s) clearly identifies the judge(s) against whom they are filed and the facts on which they're based in accordance with the Rules of Judicial Conduct. You do not need a separate envelope for each complaint. Please submit the complaint(s) to my attention in the Circuit Executives Office of the Moakley Courthouse, Suite 3700. Let me know if you have any additional questions.
> >
> > Thank you,
> >
> > Florence Pagano
> > Assistant Circuit Executive for Legal Affairs

617-748-9376

Exhibit F

Email to F. Pagano, Sep. 30, 2016.

- **Attachment PaganoLetter.pdf — Included in this JCApx at Exhibit F.a, *infra*.**
- **Attachment PetWritCert+Apx.pdf —** Filed with Supreme Court (hardcopy, Sep. 12, 2016). Filed with Judicial Council (hardcopy and PDF, Sep. 12, 2016). Omitted in this JCApx (available as separate submission).
- **Attachment SuppBrief*[1]*+Apx.pdf —** Filed with Supreme Court (hardcopy, Sep. 30, 2016). Filed with Judicial Council (hardcopy and PDF, Sep. 12, 2016). Omitted in this JCApx (available as separate submission); originals are at Exhibit B, Exhibit B.a, Exhibit B.b.

Subject: Notice of service
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 09/30/16 08:43
To: Florence_Pagano@ca1.uscourts.gov

Dear Ms. Pagano -

This is to advise you that I am today filing a Supplemental Brief ("SuppBrief") to my Petition for Writ of Certiorari. I am sending you a "courtesy" copy by U.S. mail; a PDF copy is also attached hereto.

The SuppBrief contains (in its Appendix) copies of the Complaints of Judicial Misconduct that I have filed with you. As you know, there were some (minor/trivial) errors in the original copies of the Complaint I filed with you. Those have been corrected in the SuppBrief; a list of the errors/corrections is given in a letter included in the U.S. Mail I'm sending you (and a PDF of that letter is also attached hereto).

Finally, a list of errors/corrections to my original PetWritCert is given in the SuppBrief. A PDF of the corrected PetWritCert is also attached hereto.

I trust you'll distribute these materials to the Judicial Council appropriately.

Thank you.

- Walt Tuvell

Attachments:

SuppBrief+Apx.pdf	331 KB
PetWritCert+Apx.pdf	1.3 MB
PaganoLetter.pdf	224 KB

Exhibit F.a

Attachment PaganoLetter.pdf to email of Sep. 30, 2016 (Exhibit F, *supra*).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:
Florence Pagano
Asst. Cir. Exec for Legal Affairs
Circuit Executive Office
Moakley Courthouse, Suite 3700
1 Courthouse Way
Boston, MA 02110

September 30, 2016

Dear Ms. Pagano:

Please find included herewith a ("courtesy") hard-copy of the Supplemental Brief ("SuppBrief") that I am filing today with the Supreme Court, in support of my Petition for Writ of Certiorari. Separately, I am also sending you the PDF version of the SuppBrief via email.

The SuppBrief Appendix ("SuppApx") contains copies of the two Complaints of Judicial Misconduct I have filed with your office. In the Appendix, the complaints have been reformatted, in conformance with Supreme Court Rules.

The purpose of this letter is to inform you of certain corrections that have been incorporated into the SuppApx reformatted versions, modifying the originals I filed with you on Sep. 12. (Notice of these corrections is also memorialized in SuppBrief itself, at ℘if3.)

All the changes are minor ("typos" and the like), and they do not alter the substance of the Complaints in any way. The list of changes follows (page references are to the new page-numbering in the SuppApx, not to the old/original page-numbers of the Complaints):

- ℘SuppApx[2/28] *et passim:* The "numero" character ("№") has been prepended to case-numbers.
- ℘SuppApx[3/28] *et passim:* The notation "/s/" has been used to indicate signature, instead of hand-writing.
- ℘SuppApx[6/28] *et passim:* "**PSOF**" ➡ "**PSOF**".
- ℘SuppApx[6/28]: "*a foritori*" ➡ "*a fortiori*".
- ℘SuppApx[6/28] *et passim:* "**FRCP LR**" ➡ "**FRCP-LR**".

- ℘SuppApx[9/28]: "*'dis' (disregard)*" ➡ "*'dis' (disregard/dismiss/disagree/disrespect/dissemble)*" (because further research turned up multiple explanations of the abbreviation "dis" [and there are yet others, such as "discharge" and "disestablish"]).
- ℘SuppApx[12/28]: "merit-related" ➡ "merits-related".
- ℘SuppApx[12/28]: "**I do allege**" ➡ "I **do allege**".
- ℘SuppApx[12/28]: "my myself" ➡ "me myself".
- ℘SuppApx[15/28], ℘SuppApx[27/28]: "*'Breyer Committee Report,'*" ➡ "**'Breyer Committee Report,'**" (boldface).
- ℘SuppApx[16/28], ℘SuppApx[28/28]: "*Implementation of the Judicial Conduct and Disability Act of 1980, 'Breyer Committee Report,' September 2006,*" ➡ "**Breyer Committee Report,**". [This correction itself constituted another error (but discovered too late to be incorporated into the SuppBrief hard-copies): instead of bold-face, the correction should have been italics.]
- ℘SuppApx[18/28]: "United States District Court, D.Mass." (first occurrence) ➡ "United States Court of Appeals, First Cir.".
- ℘SuppApx[23/28]: "**(by a judge)**" ➡ "**(by judges)**".
- ℘SuppApx[26/28]: "*Investigation (C)*" ➡ "*Investigation*".

Sincerely yours,

Walter E. Tuvell

Exhibit G

Email to F. Pagano, Oct. 2, 2016 (first).

- **Attachment PaganoLetter.pdf —** Included in this JCApx at Exhibit G.a, *infra*.
- **Attachment Casper=Shervin-v-PartnersHealth.pdf —** Included in this JCApx at Exhibit G.b, *infra.*
- **Attachment Casper=Fiske-v-MeYouHealth.pdf —** Included in this JCApx at Exhibit G.c, *infra.*

Subject: New/additional material relevant to Complaints of Judicial Misconduct
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 10/02/16 09:25
To: Florence_Pagano@ca1.uscourts.gov

Ms. Pagano -

Please see the following three PDF documents, attached hereto:

- Letter to you, explaining new material relevant to my two Complaints of Judicial Misconduct. (As noted in the PDF fn. 1, I am also sending you a hard-copy of the letter via U.S. mail.)
- Casper's opinion in the case of Shervin v. Partners HealthCare.
- Casper's opinion in the case of Fiske v. MeYou Health.

Thank you.

- Walt Tuvell

Attachments:

Casper=Fiske-v-MeYouHealth.pdf	74.1 KB
Casper=Shervin-v-PartnersHealth.pdf	260 KB
PaganoLetter.pdf	364 KB

Exhibit G.a

Attachment PaganoLetter.pdf to email of Oct. 2, 2016 (first) (Exhibit G, *supra*).

Corrected version is at Exhibit H.a.

Filed with Supreme Court in Supplement to Petition for Writ of Certiorari (Oct. 13, 2016).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:
Florence Pagano
Asst. Cir. Exec for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

October 2, 2016

Dear Ms. Pagano:

This letter[1] is to inform you (Judicial Council of the First Circuit) of two pieces of **new/additional material** I have discovered this morning, relevant to the two Complaints of Judicial Misconduct that I have filed with your office (September 12, 2016).[2] *Both* pieces of this new material apply to *both* of the Complaints (District and Appellate) I have filed.[3] This new material is important, and should be distributed immediately to all appropriate members of the Judicial Council.

It will be recalled that my two complaints, as filed, have at their core the fact that the judges (both district and appellate) **refused to consider Plaintiff's Statement of Material Facts (PSOF)** that was filed to the district court in my case at summary judgment stage. (I am the plaintiff.) The new material I am transmitting here **proves that Casper <u>does indeed consider PSOFs in other cases</u>** she adjudicates at summary judgment. This **proves,** therefore, that Casper did indeed *knowingly target* my case differentially/discriminately/falsely — exactly as alleged in my complaint(s) — thereby supplying **new/additional <u>irrefutable proof</u> of judicial miscon-**

---

1 • Delivered by both email and U.S. mail.

2 • And which, as you know, has been forwarded to the U.S. Supreme Court, in the Supplemental Brief to my Petition for Writ of Certiorari №16-343.

3 • *Both* pieces of additional material presented here are excerpts from opinions of Judge Casper, illuminating her complained-of behavior in my case (District Docket №13-11292-DJC). However, since the Appellate Courts (*both* panel and *en banc*) in my case (Appellate Docket №15-1914) whole-heartedly *adopted* Casper's opinion, and/all complaints lodged against the district judge apply equally as complaints against the appellate judges too. (I am certain that I could additionally find similar material relating directly to the appellate judges I have accused of judicial misconduct, but that is an exercise I have not attempted.)

duct (by both Casper and the appellate judges, as explained in ƒ3 *supra*).

The new material presented here consists of the following two excerpts from two other opinions Casper has issued at summary judgment stage. As presented here, the new material is formatted straightforwardly (not reformatted) as screenshots-with-comments/emphasis/highlighting from the two published PDF opinions. As a convenience to you, I am also forwarding to you (as email attachments) full copies of the two published PDF opinions.

- *Shervin v. Partners HealthCare System (№10-cv-10601, March 7, 2014), ℘2:*

II. Facts

As discussed in the Court's legal analysis, a number of the material facts in this case remain disputed. To the extent a material fact is undisputed, the Court refers to either Harvard's DSOF Statement of Material Facts, D. 153, or the remaining Defendants' Amended Joint Statement of Material Facts, D. 172, and Dr. Shervin's responses to same, D. 230 and D. 229, respectively. To the extent Dr. Shervin raises additional allegations, (i.e., disputed facts) the Court refers only to her additional PSOF Statement of Material Facts, D. 217, or her responses (RespDSOF) to the Defendants' Statements of Material Facts, again D. 229 and D. 230.

- *Fiske v. MeYou Health, Inc. (№13-10478-DJC, June 20, 2014), ℘3:*

III. Factual Background

The Court draws the facts of this case from the parties' statements of facts (DSOF & PSOF) and their responses (RespDSOF & RespPSOF) to same. D. 29-2, 33 (collectively "SOF").[1] MYH was founded in 2009 and is a

[1] Defendants have not responded to Plaintiffs' "further statement of material facts," (FurtherPSOF) SOF ¶¶ 32-84, instead moving her supporting affidavit, D. 38.

Sincerely yours,

Walter E. Tuvell

Exhibit G.b

Attachment Casper=Shervin-v-PartnersHealth.pdf to email of Oct. 2, 2016 (first) (Exhibit G, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NINA SHERVIN, M.D.,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 10-cv-10601**
PARTNERS HEALTHCARE SYSTEM, INC. et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

CASPER, J. **March 7, 2014**

I. Introduction

Plaintiff Nina Shervin, M.D. ("Dr. Shervin") has brought suit against the several Defendants based on alleged gender discrimination. D. 38. Dr. Shervin's complaint alleges: gender discrimination in violation of Mass. Gen. L. c. 151B ("c. 151B") against Defendants Partners Healthcare System, Inc. ("Partners"), Massachusetts General Physicians Organization ("MGPO"), the President and Fellows of Harvard College/Harvard Medical School ("Harvard"), Harry Rubash, M.D. ("Dr. Rubash") and James Herndon, M.D. ("Dr. Herndon") (Counts 1–5); gender discrimination in violation of c. 151C against Partners and Harvard (Counts 6–7); gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000 *et seq.*, against Partners, MGPO and Harvard (Counts 8–10); retaliation in violation of c.

151B against Partners, MGPO, Harvard, Dr. Rubash and Dr. Herndon (Counts 11–15); retaliation in violation of Title VII against Partners, MGPO and Harvard (Counts 16–18); and tortious interference with advantageous and/or contractual relations against Partners, Dr. Rubash and Dr. Herndon (Counts 19–21).[1] D. 38. The Defendants have moved for summary judgment on a number of grounds. D. 144, D. 145, D. 148, D. 149. For the reasons discussed below, the Court DENIES IN PART and ALLOWS IN PART Dr. Rubash's motion, D. 144; DENIES IN PART and ALLOWS IN PART Dr. Herndon's motion, D. 145; DENIES IN PART and ALLOWS IN PART Harvard's motion, D. 148; and DENIES IN PART and ALLOWS IN PART Partners' motion, D. 149.[2] The upshot of these rulings is that the timely claims of discrimination and retaliation brought by Dr. Shervin as well as the interference claims will go forward to trial.

II. Facts

As discussed in the Court's legal analysis, a number of the material facts in this case remain disputed. To the extent a material fact is undisputed, the Court refers to either Harvard's Statement of Material Facts, D. 153, or the remaining Defendants' Amended Joint Statement of Material Facts, D. 172, and Dr. Shervin's responses to same, D. 230 and D. 229, respectively. To the extent Dr. Shervin raises additional allegations, the Court refers only to her additional Statement of Material Facts, D. 217, or her responses to the Defendants' Statements of Material Facts, again D. 229 and D. 230.

A. Background

Dr. Shervin, an orthopaedic surgeon, was a medical resident in the Harvard Combined Orthopedic Residency Program ("HCORP"), a five-year, post-graduate medical residency

[1]The Court has since dismissed Count 7. D. 40 at 2. Partners has also represented to the Court that Dr. Shervin has agreed to dismiss Count 6. D. 149 at 1.

[2]Partners and MGPO filed a joint motion for summary judgment. See D. 149.

program. D. 172 ¶¶ 1, 6; D. 229 ¶¶ 1, 6. HCORP residents are taught at four Boston hospitals: Massachusetts General Hospital ("MGH"), Brigham and Women's Hospital ("Brigham"), the Children's Hospital of Boston and the Beth Israel Deaconess Medical Center ("Beth Israel"). D. 172 ¶ 6; D. 229 ¶ 6. Each HCORP class has twelve residents. D. 172 ¶ 9; D. 229 ¶ 9.

The HCORP Executive Committee ("the Executive Committee") is HCORP's governing body. D. 172 ¶ 11; D. 229 ¶ 11. It is comprised of the chiefs of each HCORP hospital's department of orthopaedic surgery as well as the HCORP Program Director. Id.

Partners, a non-profit, charitable organization, is an integrated healthcare system that includes several hospitals, including MGH and Brigham, a physician network and other health-related entities. D. 172 ¶ 2; D. 229 ¶ 2. MGPO is a private corporation and it is undisputed that MGPO employs at least some MGH physicians. D. 172 ¶ 3; D. 229 ¶ 3.

Dr. Herndon is a Professor of Orthopaedic Surgery at Harvard Medical School ("HMS") and served as the HCORP Program Director from 1998 to 2008. D. 172 ¶ 4; D. 229 ¶ 4. The Program Director has at least some oversight over HCORP and the Program Director's responsibilities include overseeing and organizing residents' educational programs, including resident evaluations. D. 172 ¶ 10; D. 229 ¶ 10.

Dr. Rubash remains the Chief of the Department of Orthopaedic Surgery at MGH and a Professor of Orthopaedic Surgery at HMS. D. 172 ¶ 5; D. 229 ¶ 5. He also served on the Executive Committee. D. 172 ¶ 12; D. 229 ¶ 12.

B. Dr. Shervin's HCORP Residency and Probation

1. Dr. Herndon Imposes Probation on Dr. Shervin

Dr. Shervin entered her HCORP residency in 2003. D. 172 ¶ 14; D. 229 ¶ 14. Dr. Shervin contends that she performed well at the beginning of her residency.[3] D. 217 ¶¶ 91–100, 132–138. However, on January 30, 2007, while Dr. Shervin was in her fourth year of residency, Dr. Herndon met with Dr. Hari Parvataneni ("Dr. Parvataneni"), an arthroplasty fellow at MGH. D. 172 ¶ 16; D. 229 ¶ 16; Deposition of Dr. Herndon (D. 157-4 at 19). The parties do not dispute that during that meeting, Dr. Parvataneni made complaints to Dr. Herndon about Dr. Shervin. Id.

On February 2, 2007, Dr. Herndon and Dr. Shervin met. D. 172 ¶ 18; D. 229 ¶ 18; D. 157-4 at 21. At this meeting, Dr. Herndon informed Dr. Shervin that he was placing her on probation. Id. Dr. Shervin asserts that during the meeting, Dr. Herndon threatened her ability to complete HCORP and her post-graduate fellowship. D. 172 ¶ 19; D. 229 ¶ 19; Deposition of Dr. Shervin (D. 157-1 at 63). She further asserts that Dr. Herndon told her during the meeting that the effects of probation could affect her medical license, board certification, fellowship and employment opportunities. Id. Dr. Shervin also contends that Dr. Herndon did not allow her the opportunity during the meeting to address the allegations he raised. D. 172 ¶ 21; D. 229 ¶ 21.

In a letter dated March 7, 2007, Dr. Herndon provided Dr. Shervin with written notice of her three-month probation. D. 172 ¶ 22; D. 229 ¶ 22; Letter from Dr. Herndon (D. 157-11). Dr. Herndon's letter cited as reasons for the probation her clinical performance, low exams scores, tardiness and negative feedback from other residents and fellows. Id.

In March 2007, Dr. Shervin met with Dr. Rubash to express her concerns that Dr. Herndon's decision to place her on probation was fueled by gender discrimination. D. 172 ¶ 27;

[3]Dr. Shervin has presented an affidavit from Dr. Burke stating that he was very impressed with Dr. Shervin, whom he described as a "rising star." D. 221-8 at 2.

D. 229 ¶ 27; D. 157-1 at 65. Around the same time, Dr. Dennis Burke ("Dr. Burke"), an MGH orthopaedic surgeon who worked with Dr. Shervin, D. 172 ¶ 13; D. 229 ¶ 13; Deposition of Dr. Burke (D. 157-9 at 41), also expressed to Dr. Rubash that Dr. Shervin felt that she was placed on probation because of gender bias. D. 172 ¶ 30; D. 229 ¶ 30; Deposition of Dr. Rubash (D. 157-5 at 34). Dr. Shervin alleges that during the meeting with Dr. Rubash, he discouraged her from taking any legal action and questioned her regarding her desire to graduate. D. 172 ¶ 40; D. 229 ¶ 40; D. 157-1 at 65.

2. Dr. Shervin Requests Review of Probation Decision

Each year of her residency, Dr. Shervin entered into a residency contract, titled "Graduate Trainee Benefits and Responsibilities." D. 153 ¶ 53; D. 230 ¶ 53; Deposition of Dr. Shervin (D. 153-20 at 8). Each residency contract provides that a copy of the "Graduate Trainee Adverse Action Process" and "Graduate Trainee Redress of Grievance" policies was to be attached to the residency contract. D. 153 ¶ 63; D. 230 ¶ 63; Dr. Shervin's Residency Contracts (D. 153-23; D. 153-24; D. 153-25). On March 27, 2007, Dr. Shervin wrote to Dr. James Kasser ("Dr. Kasser"), the Executive Committee Chairman, seeking an Executive Committee review of her probation and citing the Partners Graduate Trainee Adverse Action Process as evidence that the proper procedures were not followed in placing her on probation. D. 172 ¶ 36; D. 229 ¶ 36; D. 153 ¶ 94; D. 230 ¶ 94; March 27, 2007 Letter to Dr. Kasser (D. 157-15). She also requested that the probation be expunged from her records. D. 172 ¶ 36; D. 229 ¶ 36; D. 157-15. On April 6, 2007, Dr. Burke wrote to Dr. Kasser requesting that Dr. Shervin be afforded a fair hearing. D. 172 ¶ 37; D. 229 ¶ 37; April 6, 2007 Letter from Dr. Burke to Dr. Kasser (D. 157-16).

The parties do not dispute that once the Executive Committee's investigation into Dr. Shervin's probation began, Dr. Rubash discussed Dr. Shervin with other residents and fellows.

D. 172 ¶ 42; D. 229 ¶ 42; Dr. Rubash's Answers to Interrogatories (D. 157-17 at 5–6). Dr. Michael Fehm ("Dr. Fehm") has stated that he had one such discussion with Dr. Rubash. D. 172 ¶ 43; D. 229 ¶ 43; Deposition of Dr. Fehm (D. 157-18 at 9). Dr. Fehm stated that although Dr. Rubash expressed concern for Dr. Shervin, he also felt that toward the end of the discussion, Dr. Rubash attempted to elicit negative comments about Dr. Shervin. Id. Dr. Fehm said that he "saw this conversation as an effort to build armor against [Dr. Shervin]." Id.

On April 10, 2007, Dr. Herndon met with the Executive Committee regarding Dr. Shervin's probation. D. 172 ¶¶ 46–47; D. 229 ¶¶ 46–47; 157-4 at 27. Dr. Shervin also met with the Executive Committee in April 2007 and expressed her belief that she was being targeted and subjected to an atmosphere of retaliation. D. 172 ¶ 49; D. 229 ¶ 49; 157-1 at 67–68. Dr. Shervin asserts that in the spring and early summer of 2007, residents were being asked to find fault with her and that unfounded allegations were being raised against her. D. 172 ¶ 51; D. 229 ¶ 51; see D. 157-2 at 90–91.

Shortly after the Executive Committee meeting and, in April 2007, Dr. Shervin met with Dr. Ellice Lieberman ("Dr. Lieberman"), HMS's Dean for Faculty Affairs at the time, expressing her concerns about retaliation. D. 172 ¶ 50; D. 229 ¶ 50; D. 157-2 at 66–67. Dr. Shervin expressed to Dr. Lieberman that she felt she was being treated differently because she did not behave in ways in which women are stereotypically expected to behave and that she felt she was being punished for raising such concerns. Id.

On June 6, 2007, Dr. Kasser sent Dr. Shervin a letter informing her that the Executive Committee had decided that she would remain on probation. D. 172 ¶ 53; D. 229 ¶ 53; Letter from Dr. Kasser (D. 157-19). Shortly thereafter, on June 19, 2007, Dr. Herndon informed Dr. Shervin that her probation would be extended for three months. D. 172 ¶ 56; D. 229 ¶ 56; see D.

157-4 at 29–30. On June 29, 2007, Dr. Herndon sent Dr. Shervin a letter providing written notice of her probation extension. D. 172 ¶ 58; D. 229 ¶ 58; Letter from Dr. Herndon (D. 157-21). In the letter, Dr. Herndon notified Dr. Shervin that he and Dr. Jo Shapiro ("Dr. Shapiro"), the Associate Director for Graduate Medical Education for Partners at the time, would meet with Dr. Shervin in September when Dr. Herndon returned from medical leave. D. 172 ¶¶ 56, 58; D. 229 ¶¶ 56, 58; D. 157-21.

On June 29, 2007, Dr. Burke wrote a letter to Dr. Nancy Tarbell ("Dr. Tarbell"), Director of the Office for Women's Careers at MGH, stating that he thought Dr. Shervin was being treated unfairly. D. 172 ¶ 60; D. 229 ¶ 60; Letter from Dr. Burke to Dr. Tarbell (D. 157-22). Dr. Shervin met with Dr. Tarbell on July 2, 2007 and also wrote Dr. Tarbell a letter expressing that she believed that Dr. Herndon was retaliating against her for questioning his probation decision. D. 172 ¶ 61; D. 229 ¶ 61; Letter from Dr. Shervin to Dr. Tarbell (D. 157-23).

3. Dr. Shervin's Probation Ends

During Dr. Herndon's medical leave during the summer of 2007, D. 172 ¶ 62; D. 229 ¶ 62; D. 157-4 at 16, Dr. Kasser was assigned to oversee Dr. Shervin's residency. D. 172 ¶ 58; D. 229 ¶ 58; D. 157-21. While on medical leave, Dr. Herndon received emails from two doctors reporting incidents concerning Dr. Shervin, one such incident being that Dr. Shervin was absent from an anatomy lecture. D. 172 ¶¶ 63, 65; D. 229 ¶¶ 63, 65; email from Dr. Scott to Dr. Herndon (D. 157-28). In late August 2007, Dr. Shervin wrote to Drs. Tarbell and Kasser stating that she felt Dr. Herndon was harassing and targeting her by trying to find fault with her performance. D. 172 ¶¶ 67–68; D. 229 ¶¶ 67–68; August 27, 2007 Email from Dr. Shervin (D. 157-29).

During a meeting on September 6, 2007, the Executive Committee decided to end Dr. Shervin's probation. D. 172 ¶ 71; D. 229 ¶ 71; Executive Committee Meeting Minutes (D. 157-31 at 3). As of the end of Dr. Shervin's probation, and consistent with Dr. Shervin's request, Dr. Herndon was no longer Dr. Shervin's residency director and was replaced by Dr. Kasser. D. 172 ¶¶ 74–75; D. 229 ¶¶ 74–75; D. 157-4 at 9–10.

4. Conclusion of Residency and Applying for a Medical Board License

In or around March to April 2008, Dr. Shervin sought information from at least Drs. Weinstein and Shapiro of the Partners Graduate Medical Education Office ("GME") regarding the effect of her earlier probation on her application for a medical license. D. 153 ¶ 112; D. 230 ¶ 112; April 7, 2008 email to Dr. Shervin (D. 153-40). According to Dr. Shervin, Drs. Weinstein and Shapiro of the GME told Dr. Shervin that probation was not an adverse action that needed to be reported to the Board of Registration in Medicine. D. 217 ¶ 327; April 7, 2008 email from Drs. Weinstein and Shapiro (D. 153-40 at 2); Deposition of Dr. Shapiro (D. 223-1). Dr. Shervin contends that she submitted her application for a license on April 11, 2008, reporting that she had never received a disciplinary action. D. 217 ¶ 333; Supplement Form to Board (D. 226-4). On June 13, 2008, Dr. Shervin asserts, the Board informed Dr. Shervin that her prior probation was considered disciplinary action, id. ¶ 337; Notice from Board (D. 226-7), and as a result, Dr. Shervin had to resubmit her application, causing a delay in her obtaining her medical license; as result of probation, Dr. Shervin was issued was a "limited license" that would require her to be monitored and/or supervised during her fellowship, unlike other fellows. Id. ¶¶ 339–340, 344; Letter from Board (D. 226-16).

On June 20, 2008, residents, including Dr. Shervin, presented their theses. D. 172 ¶ 88; D. 229 ¶ 88; Deposition of Dr. Sanaz Hariri (D. 157-37 at 9–10). Some residents walked out of

the room during or prior to Dr. Shervin's thesis presentation.[4] D. 172 ¶ 89; D. 229 ¶ 89; D. 157-37 at 9–10. Dr. Shervin contends that Dr. Herndon and other members of the Executive Committee were aware this would occur and took no action to prevent it from happening. D. 172 ¶¶ 351, 354–358; D. 229 ¶¶ 351, 354–358.

Dr. Shervin graduated from HCORP on June 30, 2008. D. 172 ¶ 96; D. 229 ¶ 96.

C. Dr. Shervin's Post-Residency Fellowship and Commencement of Grievance and Legal Proceedings

Starting around August or September 2008, Dr. Shervin worked as a one-year fellow at MGH. D. 172 ¶¶ 1, 98; D. 229 ¶¶ 1, 98; D. 157-1 at 46–47; Engagement Letter (D. 157-42). Around August 8, 2008, Dr. Shervin, through counsel, informed Partners that she planned to proceed with a grievance before the Partners Graduate Education Committee ("Partners Education Committee"). D. 172 ¶ 99; D. 229 ¶ 99; August 7, 2008 email from Paul Cirel to Joan Stoddard (D. 157-43).

On March 25, 2009, Dr. Shervin submitted a grievance statement through counsel, in which she alleged that Dr. Herndon's February 2007 probation decision "lacked any reasonable foundation in fact and was wholly deficient procedurally." D. 172 ¶ 102; D. 229 ¶ 102; Grievance Statement (D. 157-46 at 2). In the statement, she again raised her concern that Dr. Herndon had engaged in gender bias. D. 157-46 at 7. The statement also alleged that the Executive Committee extended her probation on "pretextual grounds." Id. at 3. The statement requested that "the decisions regarding probation be reversed and records relating to those decisions be expunged." Id. A Partners Education Committee Grievance Subcommittee ("the

[4] It is not entirely clear from the record who, if anyone, organized the "walkout." There is at least some suggestion that this action may have been a response to Dr. Shervin's lack of courtesy to fellow residents during their respective thesis presentations. D. 172 ¶ 89; Deposition of Dr. Coleen Sabatini, D. 157-38 at 7.

Grievance Subcommittee") was assembled to investigate and make a recommendation to the Partners Education Committee. D. 172 ¶ 103; D. 229 ¶ 103, 111; D. 153 ¶ 125; D. 230 ¶ 125; Deposition of Dr. Jonathan Borus (D. 157-47).

On April 1, 2009, Partners and Dr. Shervin engaged a mediator to "attempt to resolve the disputes between them." D. 172 ¶ 108; D. 229 ¶ 108; Letter from Mediator to MCAD (D. 157-54). The same day, Dr. Shervin and Partners entered into a Tolling Agreement ("the Tolling Agreement") providing that were Dr. Shervin to file a complaint with the Massachusetts Commission Against Discrimination ("MCAD") by a certain agreed-upon date, her MCAD complaint would be treated as having been filed on April 1, 2009 for statute of limitations purposes. D. 172 ¶ 109; D. 229 ¶ 109; Letter from Joan Stoddard to Ellen Zucker (D. 157-55).

Dr. Shervin completed her fellowship in the summer of 2009. D. 172 ¶ 110; D. 229 ¶ 110; D. 157-1 at 46–47. On October 14, 2009, the Grievance Subcommittee recommended that the Partners Education Committee affirm the initial probation decision by Dr. Herndon, the ratification of same by the Executive Committee and the extension of the initial probation for three months, Grievance Subcommittee Report (D. 157-48 at 4-11); the parties do not dispute that the Partners Education Committee adopted the subcommittee's recommendation. D. 172 ¶ 111; D. 229 ¶ 111.

On October 26, 2009, Dr. Shervin filed a discrimination complaint with MCAD and the U.S. Equal Employment Opportunity Commission ("EEOC") against Partners, Harvard, Dr. Herndon and Dr. Rubash. D. 172 ¶ 113; D. 229 ¶ 113; MCAD Complaint (D. 157-56). Dr. Shervin filed her complaint in this Court on April 9, 2010. D. 1.

D. Post-Fellowship Employment (2009-2010)

The parties do not dispute that in 2005, while Dr. Shervin was in the third year of her residency, she had discussions with Drs. Burke, Rubash and others concerning the possibility of a post-fellowship staff position at MGH, which would include privileges at Newton-Wellesley Hospital ("Newton-Wellesley"). D. 172 ¶¶ 119–120, 124; D. 229 ¶¶ 119–120, 124; D. 157-1 at 4; D. 157-5 at 12. Upon Dr. Burke's suggestion, Dr. Shervin met with Dr. Rubash on November 30, 2005. D. 157-12; see also D. 172 ¶¶ 132–133; D. 229 ¶¶ 132–133. The parties do not dispute that Dr. Rubash recommended that Dr. Shervin meet with Dr. Andrew Freiberg ("Dr. Freiberg"), MGH's Chief of Arthroplasty service, to discuss fellowships. D. 172 ¶ 136; D. 229 ¶ 136; D. 157-1 at 14–15. Dr. Rubash also explained in the meeting the differences between academia and private practice. D. 172 ¶ 138; D. 229 ¶ 138; D. 157-5 at 13–14. Following the meeting, Dr. Rubash sent Dr. Burke an email stating that he was "very optimistic that we can do something for [Dr. Shervin] here." D. 172 ¶ 150; D. 229 ¶ 150; November 30, 2005 email from Rubash to Dr. Burke (D. 157-64).

In December 2005, Dr. Shervin met with Dr. Freiberg and, according to Dr. Shervin, they discussed his recommendations for fellowships and "coming on staff" at MGH and Newton-Wellesley. D. 172 ¶ 155; D. 229 ¶ 155; D. 157-1 at 12–13. Although the parties do not dispute that there were conversations in and around 2005 about the possibility of a post-fellowship staff position at MGH for Dr. Shervin, the Defendants deny that any agreement or employment offer regarding the same was made. See D. 229 ¶¶ 143–147. Dr. Shervin contends that the Defendants later interfered with her purported hiring at Newton-Wellesley and MGH in the spring of 2009. Dr. Shervin relies upon the fact that Dr. Rubash told a recommender that no staff positions were available, June 14, 2009 email from Dr. Rubash to Dr. Sunder (D. 227-14 at 2),

which she contends was pretext for a retaliatory withdrawal of her contemplated employment offer. D. 229 ¶ 152.

E. Post-Complaint Employment Prospects

Dr. Shervin also contends that retaliation for her earlier complaints of gender discrimination continued after she initiated this lawsuit. According to Dr. Shervin, she received an offer letter in or around the Spring 2012 from Cooley Dickinson Hospital ("Cooley"); see Draft Recruitment Letter (D. 228-2); D. 157-2 at 39. Affidavit of Dr. Henry Drinker (D. 227-24 at 3). At the time, Cooley was in negotiations with MGH about an affiliation. There is evidence in the affidavit of Dr. Henry Drinker, Director of Joints Replacement Services at Cooley who recruited Dr. Shervin, that after the hospital had tendered her a contract and after contact between Cooley management and MGH management, the offer was withdrawn in or around late 2012. Id. at 3–4.

Dr. Shervin also alleges that around June 2012, Dr. Mark Gebhardt, chief of the orthopaedic service at Beth Israel Deaconess Medical Center-Milton Hospital ("Milton"), not a party to this lawsuit, contributed to her being deprived of the opportunity to join the Beth-Israel Deaconess Physicians Organization. D. 172 ¶ 183–185; D. 229 ¶ 183–185; D. 153 ¶ 142; D. 230 ¶ 142; Deposition of Dr. Joseph Morrissey (D. 228-6 at 11–12); D. 157-2 at 25–34, 44–45.

III. Procedural History

Dr. Shervin initiated this action on April 9, 2010. D. 1. Dr. Shervin filed an amended complaint on July 13, 2010, in which the present Defendants are named. D. 38. On June 14, 2010, Harvard moved to dismiss Dr. Shervin's state and federal discrimination and retaliation claims. D. 10; D. 11. On December 15, 2010, the Court allowed Harvard's motion to dismiss in

part, only as to Count 7, the c. 151C claim. D. 40. On June 30, 2010, Dr. Rubash moved to dismiss the tortious interference claim, D. 31, which the Court denied. D. 40.[5]

The parties have now engaged in extensive discovery, which has prompted numerous discovery disputes by and between the parties and various third parties. See D. 66; D. 71; D. 73; D. 91; D. 97; D. 99; D. 112; D. 114; D. 125; D. 127; D. D. 169; D. 182; D. 214. The Defendants moved for summary judgment on November 22, 2013. D. 144; D. 145; D. 148; D. 149. After extensive briefing and a hearing on February 6, 2014, the Court took these matters under advisement. D. 254.

IV. Standard of Review

A. Summary Judgment

The Court may grant summary judgment when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law based on the undisputed facts. Fed. R. Civ. P. 56(a). "An issue is genuine if the evidence of record permits a rational factfinder to resolve it in favor of either party." Borges ex. rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 4 (1st Cir. 2010) (citation and quotations omitted). "A fact is material if its existence or nonexistence has the potential to change the outcome of the suit." Id. at 5.

Once the moving party meets its burden of showing that there are no genuine issues of material fact, "the burden shifts to the nonmoving party, who must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor," Borges, 605 F.3d at 5 (citation omitted), by

[5] The Court's order on the motions to dismiss also ruled that certain portions of the Defendants' motions were mooted by the filing of the amended complaint. D. 40.

presenting specific admissible facts. Id. "If the nonmovant fails to make this showing, then summary judgment is appropriate." Id.

"[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party "need only show that there is an absence of evidence in support of at least one element of [its] case in[] order to succeed on summary judgment." Cellco P'ship v. Town of Grafton, Mass., 336 F. Supp. 2d 71, 82 (D. Mass. 2004). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in [her] favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009). However, "conclusory allegations, improbable inferences, and unsupported speculation" are not sufficient to overcome summary judgment. Sullivan v. City of Springfield, 561 F.3d 7, 14 (1st Cir. 2009) (citation omitted).

B. Statement of Material Facts

The Defendants urge the Court to strike Dr. Shervin's statement of material facts, response to their statements of material facts and consolidated memorandum of law in opposition to their motions for summary judgment. D. 236. They contend that Dr. Shervin failed to comply with D. Mass. R. 56.1 and cite cases where courts have struck or otherwise rejected oppositions to summary judgment motions deemed noncompliant with this local rule for lack of conciseness and/or inclusion of immaterial statements of fact. D. 237 at 7–8.

A party opposing a motion for summary judgment "shall include a concise statement of material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation." D. Mass. R. 56.1. The Court does not disagree that an excessive amount of ink has been expended on the pending

summary judgment motions and opposition to same. Moreover, the Court does not disagree that many of the papers includes statements, arguments and suggestions that are not material to the issues of law that the Court must resolve in addressing the pending motions. It is, however, not only Dr. Shervin's papers that suffer from this problem. See, e.g., Dr. Rubash's Memorandum in Support of Summary Judgment, D. 144-1 at 3 n.3 ("In one of the most curious aspects of this case Dr. Burke provided Dr. Shervin with approximately $375,000 from his personal account").

For this reason, and, significantly because of the Court's reluctance to initiate yet another round of briefing, the Court declines to grant the motion to strike and accordingly, D. 236 is DENIED. That having been said, the Court, however, has not relied upon any claims or facts that were not supported by specific references to the record or any alleged facts that were not material to deciding the Defendants' motions for summary judgment. See Brown v. Armstrong, 957 F. Supp. 1293, 1297 (D. Mass. 1997); Caban Hernandez v. Phillip Morris USA, Inc., 486 F.3d 1, 7–8 (1st Cir. 2007).

To the extent the Defendants argue that the Court should allow them an additional time to respond to Dr. Shervin's opposition papers, D. 237 at 9, the Court DENIES such request as moot as the Defendants have already filed responses, which the Court considered in deciding their motions for summary judgment. See D. 243; D. 246; D. 247; D. 253.

V. Discussion

Dr. Shervin alleges gender discrimination in violation of Title VII against Partners, MGPO and Harvard, as well as gender discrimination in violation of c. 151B against all the Defendants. D. 38. Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex . . . " 42 U.S.C. §

2000e–2(a)(1). Likewise, Mass. Gen. Laws c. 151B, § 4(1) makes it unlawful "[f]or an employer . . . because of . . . sex . . . to . . . discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." The statute also makes it unlawful for "any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter." Mass. Gen. Laws c. 151B, § 4(4A).

To prove gender discrimination under either statute, Dr. Shervin must show that "she is a member of a protected group who has been denied an employment opportunity for which she was otherwise qualified." Dichner v. Liberty Travel, 141 F.3d 24, 29–30 (1st Cir. 1998). "Such a showing gives rise to an inference that the employer discriminated due to the plaintiff's [protected status] and places upon the employer the burden of articulating "a legitimate, nondiscriminatory reason for the adverse employment decision." Id. at 30; see also Tate v. Dep't of Mental Health, 419 Mass. 356, 361 (1995) (applying the same burden-shifting standards for c. 151B discrimination claim). This burden-shifting to the Defendants "entails only a burden of production, not a burden of persuasion; the task of proving discrimination remains the plaintiff's at all times. Dichner, 141 F.3d at 30. If the Defendants meet such burden, Dr. Shervin must then prove that the Defendants' explanation is a pretext for unlawful discrimination. Id.

Dr. Shervin further alleges retaliation in violation of Title VII against Partners and Harvard, as well as retaliation in violation of c. 151B, § 4(4) against all the Defendants. D. 38. Title VII provides that it is an "unlawful employment practice for an employer to discriminate against any of his employees . . . because [s]he has opposed any practice made an unlawful

employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3. Similarly, c. 151B, § 4(4) makes it unlawful "[f]or any person [or] employer . . . to . . . discriminate against any person because [s]he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." To prove *prima facie* retaliation, Dr. Shervin must show that she "engaged in protected conduct," "suffered an adverse employment action" and that the "adverse action was causally connected to the protected activity." Fantini v. Salem State Coll., 557 F.3d 22, 32 (1st Cir. 2009) (citations and quotations omitted); Mole v. University of Massachusetts, 442 Mass. 582, 591-92 (2004). To show participation in a protected activity, Dr. Shervin need not prove that discrimination actually occurred, id. (citations and quotations omitted), but must show that she "reasonably and in good faith believed that the [defendant] was engaged in wrongful discrimination, that she acted reasonably in response to her belief, and that the [defendant's] desire to retaliate against her was a determinative factor in its decision to [engage in adverse action]." Tate, 419 Mass. at 364.

Dr. Shervin also brings aiding and abetting claims against the Defendants, pursuant to Mass. Gen. L. c. 151B, § 4(5), which provides that it is unlawful for "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so." As to these claims, a defendant must still have "the requisite intent to discriminate [or retaliate] in order to be liable for aiding and abetting." Beaupre v. Cliff Smith & Associates, 50 Mass. App. Ct. 480, 495 n.23, (2000).

All the Defendants seek summary judgment on the claims for gender discrimination and retaliation under both Title VII and c. 151B on the basis that there is no genuine dispute of

material fact that would foreclose the Court from granting summary judgment as to Dr. Shervin's timely claims. Specifically, Dr. Rubash, Dr. Herndon, Partners and MGPO argue that because of the Tolling Agreement, all of Dr. Shervin's discrimination and retaliation claims that occurred prior to June 5, 2008 – 300 days before April 1, 2009 – are time-barred. D. 144-1 at 10; D. 152 at 9; D. 150 at 2. They further argue that there is insufficient timely evidence that they engaged in gender discrimination or retaliation, D. 144-1 at 16–19; D. 152 at 10; D. 150 at 8, and that Dr. Shervin has failed to present sufficient evidence of a tortious interference with a contract or advantageous business relationship. D. 144-1 at 19; D. 152 at 19; D. 150 at 18. Partners also argues that it qualifies for charitable immunity for the interference claim pursuant to Mass. Gen. L. c. 231, § 85K. D. 150 at 19.

Harvard asserts that it was not party to the Tolling Agreement, and that therefore, the statute of limitations date for claims against Harvard is December 30, 2008 – 300 days prior to the filing of Dr. Shervin's MCAD complaint on October 26, 2009. D. 151 at 28. Like the other Defendants, Harvard argues that neither the "continuing violation" doctrine nor the so-called grievance exception to the statute of limitations applies. D. 151 at 28. Harvard also seeks summary judgment on all counts on the grounds that even in considering Dr. Shervin's timely claims, Harvard was not Dr. Shervin's employer, and therefore cannot be held liable under Title VII or c. 151B, and on the grounds that there is no evidence that Harvard possessed discriminatory animus, necessary for aiding and abetting discrimination or retaliation, since it is not the employer of Dr. Herndon or Dr. Rubash. D. 151 at 1–2.

The Court will address each of the Defendants' arguments.

A. The Grievance Exception Does Not Apply to Dr. Shervin's c. 151B Claims

The Court first addresses Dr. Shervin's argument that regardless of the Tolling Agreement, the statute of limitations does not apply to her c. 151B claims because of the so-called "grievance exception" to the statute of limitations. The Court concludes that the grievance exception does not apply because Dr. Shervin did not invoke any grievance proceedings pursuant to a collective bargaining agreement.

Under c. 151B (as well as Title VII), a claim of unlawful discrimination or retaliation must be filed with MCAD within 300 days of alleged illegal conduct. Mass. Gen. L. c. 151B, § 5; 42 U.S.C. § 2000e-5(1); Ryan v. Holie Donut, Inc., 82 Mass. App. Ct. 633, 641 (2012). Massachusetts regulations provide, however:

> [The] 300 day requirement shall not be a bar to filing in those instances where . . . an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within 300 days of the conduct complained of and subsequently files a complaint within 300 days of the outcome of such proceeding(s).

804 C.M.R. § 1.10(2); see also D. 231 at 64.

As Dr. Shervin notes in her papers in opposition to summary judgment, D. 231 at 64, the Massachusetts Supreme Judicial Court has "consistently granted deference to MCAD's decisions and policies" when interpreting c. 151B. Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 534 (2001). While the Court notes that 804 C.M.R. § 1.10(2) makes no explicit reference to collective bargaining agreements and only references "grievance proceedings," the MCAD has stated that it "has interpreted [the grievance] exception to apply only to formal grievance proceedings set forth in a collective bargaining agreement." Hall v. Fidelity Investments, Inc., No. 06-BEM-02514 (MCAD Aug. 24, 2007). Deferring to MCAD's own interpretation of this regulation, the court in Hall v. FMR Corp., 559 F. Supp. 2d 120, 125–26 (D. Mass. 2008),

adopted the MCAD's position, holding that the plaintiff in that case could not benefit from the grievance exception because she did "not allege that she was covered by a collective bargaining agreement or that she pursued a formal grievance under the terms of such an agreement."

While Dr. Shervin directs the Court to cases concerning the application of 804 C.M.R. § 1.10(2), none of them stand for the broad proposition that 804 C.M.R. § 1.10(2) applies to non-union-bargained grievance proceedings or that the MCAD has taken the position that it does. See Silvestris v. Tantasqua Reg'l Sch. Dist., 446 Mass. 756 (2006); Martins v. Univ. of Mass. Med. Sch., 75 Mass. App. Ct. 623 (2009); Leitao v. State Street Corp., 74 Mass. App. Ct. 1101 (2009). In first two cases where the grievance exception was analyzed, the plaintiff was either party to a collective bargaining agreement or a union agreement was otherwise at-play. See Silvestris, 446 Mass. at 764 (grievance procedure set forth in plaintiff's collective bargaining agreement); Martins, 75 Mass. App. Ct. at 628 (referencing the UMMS's grievance procedure) Pl.'s Br., Martins v. Univ. of Mass. Med. Sch., No. 08-P-1343, 2008 WL 5009146, at *3 (Mass. App. Ct. Oct. 17, 2008) (noting that while plaintiff "did not belong to Union, [he] was transferred with the terms and conditions of the Union employees").[6] Dr. Shervin has not cited other decisions in which a plaintiff who was not party to a collective bargaining agreement was permitted to use the grievance exception to the statute of limitations. That this exception is

[6]Addressing the cases cited in Dr. Shervin's surreply, the Court first notes that in Leitao, the court found that the plaintiff had not even entered into any grievance proceedings. 74 Mass. App. Ct., at *3. Dr. Shervin also relies upon Tunnell v. Smith College, No. 85-SEM-0081, 8 MDLR 1189 (MCAD 1986). See D. 263-1 at 14. Tunnell, however, does not save Dr. Shervin's argument where it turned on whether the complaint before the grievance committee needed to allege sex discrimination or only the same underlying facts to invoke the grievance exception. Id. at 5. The decision does not address, however, whether the proceeding was in the collective bargaining context. Moreover, to the extent that Dr. Shervin relies upon the case to suggest MCAD's position about the scope of the grievance exception, certainly the same is superseded by MCAD's later pronouncement about the collective bargaining requirement in Hall in 2007.

confined to grievance proceedings arising out of collective bargaining process, a process that "promo[tes] stability in collective bargaining relationships without impairing the free choice of employees," N.L.R.B. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 794 (1990) (citation omitted), is consistent with the MCAD's position regarding application of the regulation (as noted above in Hall) and as reflected in other MCAD rulings. See, e.g., Randall v. Whittier Reg'l Vocational Technical High Sch., No 97-BEM-0497, 2002 WL 31318576, at *5, 9 (MCAD Aug. 28, 2002) (reflecting collective bargaining agreement in place and relying upon 804 C.M.R. § 1.10(2)).

For these reasons, the Court finds that the grievance exception articulated in 804 C.M.R. § 1.10(2) does not apply here, and therefore, the statute of limitations did not toll during the pendency of Dr. Shervin's grievance proceedings.

B. The Continuing Violations Doctrine Does Not Save Dr. Shervin's Time-Barred Claims

1. Continuing Violation Doctrine Under Title VII

Dr. Shervin also argues that another exception to the statute of limitations, the "continuing violation" doctrine, allows her to base the Defendants' liability for discrimination and retaliation on conduct that occurred outside the limitations period.

Under both Title VII and c. 151B, plaintiffs may rely on conduct that occurred when the conduct amounts to a "continuing violation." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); 804 C.M.R. § 1.10(2). The United States Supreme Court clarified the reach of the Title VII continuing violation doctrine in Morgan, where the court held that while the continuing violation doctrine may provide an exception to the statute of limitations for claims which by "[t]heir very nature involve[] repeated conduct," id. at 114, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id.

at 113. "Discrete acts" include such acts as "termination, failure to promote, denial of transfer, or refusal to hire," id. at 114, and, accordingly, a plaintiff "can only file a charge to cover discrete acts that 'occurred' [i.e., the day that the discrete discriminatory or retaliatory act 'happened'] within the appropriate time period." Id. The Morgan court, in differentiating "hostile environment claims" from such discrete acts, held that a defendant may be liable for discriminatory or retaliatory conduct that falls outside of the limitations period when "all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." Id. at 122.

i. "Anchoring Events" that Fall Within the Limitations Period

Dr. Shervin argues that four timely events "anchor" her claims (i.e., fall within the requisite time period), and, therefore, all of the allegedly discriminatory and retaliatory conduct, including conduct occurring before June 5, 2008, is actionable. D. 231 at 67. Although the nature and circumstances of these events are disputed by the Defendants, Dr. Shervin contends that there is specific, admissible evidence from which a reasonable jury could find that these events were discriminatory and/or retaliatory. D. 231 at 67–68. These events, occurring between June 5, 2008 and October 26, 2009, include:

(1) Dr. Shervin asserts that Dr. Herndon aided and abetted the June 20, 2008 thesis presentation "walkout" by taking no action in response to residents walking out of the room during her thesis presentation. D. 231 at 67; D. 217 ¶¶ 354–355. While Dr. Shervin has not presented specific, admissible evidence that Dr. Herndon had prior knowledge that the walkout would occur,[7] Dr. Herndon testified at his deposition that

[7]Dr. Herndon testified at his deposition that he had no prior knowledge the walkout would occur. D. 157-4 at 41–42. The only evidence Dr. Shervin offers in support of her

although he was present when the residents walked out during Dr. Shervin's presentation, he did not respond to Dr. Shervin's concern or investigate the incident. D. 157-4 at 41-42.

(2) Dr. Shervin contends that Drs. Rubash and Herndon urged two residents to present unfounded complaints about Dr. Shervin, which they knew to be untrue, to the Executive Committee in July 2008. D. 231 at 67. Dr. Shervin has provided evidence that at an Executive Committee meeting on July 22, 2008, Dr. Brett Shore reported to the Committee that while on call, Dr. Shervin failed to respond to pages and that in other circumstances, Dr. Shervin improperly left cases for other residents to handle. D. 217 ¶ 347 (citing Executive Committee Meeting Minutes from July 22, 2008, D. 226-17). Dr. Shervin has also offered evidence that while Drs. Rubash and Herndon were both aware that Dr. Shervin had previously requested to be removed from the on-call schedule that weekend, D. 225-5,[8] the meeting minutes reflect that neither of them indicated such at the meeting of the Executive Committee. D. 226-17. While the meeting minutes do not reflect that Dr. Herndon was present at the meeting, Dr. Herndon also testified at his deposition that he urged Dr. Shore to come forward to talk to him about Dr. Shervin. D. 219-4.

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argument that Dr. Herndon knew the walkout would occur is inadmissible hearsay. First, she offers a resident self-evaluation stating: "Recently, I heard rumors that many or some of my class would like to boycott graduation in response of the failure of the program to reprimand the student in question," referring to Dr. Shervin. The resident continues: "Not going to graduation is an insult not only to each other, but to the attendings we know, love and respect." D. 226-20. Dr. Shervin also offers Dr. Burke's testimony that the "Executive Committee knew or should've known, about the walkout on Dr. Shervin and did nothing to stop it" and that if Dr. Kasser knew the walk out would occur, Dr. Herndon also must have known. D. 219-20 at 37.

[8]D. 225-5 is an email from Dr. Rubash to Dr. Herndon asking to "seek an alternate solution" to Dr. Shervin being on call during graduation weekend.

(3) Dr. Shervin posits that the Defendants interfered with her purported hiring at Newton-Wellesley and MGH in the spring of 2009. While the question of whether Dr. Shervin was ever offered a staff position remains highly contested, see D. 229 ¶ 152, Dr. Shervin cites in support of her position that Dr. Rubash withdrew her job offer evidence that Dr. Rubash told a recommender that no staff positions were available. June 14, 2009 email from Dr. Rubash to Dr. Sunder, D. 227-14 at 2 ("Thank you for your email regarding Dr. Nina Shervin. At the moment, there are no positions open in the Orthopaedic Department for which we are hiring").

(4) Dr. Shervin argues that the Grievance Committee's investigation in 2009 into her probation was conducted in an unfair manner. She relies upon testimony of Dr. Borus, a member of the Grievance Subcommittee, who testified in a deposition that he did not know during the course of the Subcommittee's investigation that Dr. Shervin had alleged gender discrimination, D. 220-1 at 15, finding out about those allegations during the grievance hearing, which a jury could reasonably find means that the Subcommittee's process was not as searching as it should have been. D. 220-1 at 24. Dr. Borus also testified that he did not "have an understanding about how one demonstrates that actions are the product of impermissible gender bias." D. 220-1 at 24. Dr. Borus further testified that Dr. Shervin's counsel sent him an email on or around June 27, 2009 requesting that the subcommittee speak with Drs. Briggs and Hornicek as part of their investigation. D. 220-1 at 74. The Grievance Committee wrote in its Grievance Report, however, that "[n]either party responded to the Committee's request to submit a list of additional individuals for the Committee to interview." D. 157-48 at 3. Although Dr. Herndon cited a case involving a patient with a shoulder injury ("the shoulder case") in support of

his decision to impose probation, D. 220-1 at 57-58, Dr. Borus testified that Dr. Herndon never indicated to him that his description of events surrounding the shoulder dislocation patient in his March 7, 2007 probation letter to Dr. Shervin, was written in error.[9] D. 220-1 at 57–58. Dr. Borus testified that at the hearing, Dr. Herndon also stated that Dr. Shervin "didn't do the right thing with the shoulder." D. 220-1 at 120. Dr. Borus testified that the Committee never spoke to Dr. Holovacs and that the Committee did not receive the letter Dr. Holovacs wrote. D. 220-1 at 121.

ii. Probation was a Discrete Act

Even if the above conduct is in itself actionable, however, the Court concludes that Dr. Shervin cannot rely on these events to anchor a time-barred discriminatory or retaliatory acts to such timely acts as a continuing violation, where those time-barred acts, namely Dr. Herndon's February 2007 initial imposition of probation, the subsequent ratification of same by the Executive Committee the extension of that probation, were discrete acts. As previously noted, the Morgan court held:

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice."

Id. at 114. The First Circuit has since applied Morgan in a number of cases, focusing on whether the alleged discrimination or retaliation requires "repeated conduct to establish an actionable claim." Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 130–31 (1st Cir. 2009). Here, the Court finds instructive the First Circuit's analysis in Miller v. New Hampshire Dep't of Corr., 296 F.3d

[9]On April 10, 2007, Dr. Holovacs, the attending surgeon, wrote an email to Dr. Kasser stating that he believed the only mistake Dr. Shervin made was failing to keep a hard copy x-ray after the operation; he did not believe, however, that this mistake rose "to the level of seriousness to which it seems to have risen." D. 222-15; D 157 at 3.

18, 22 (1st Cir. 2002), a case decided after Morgan. There, the court rejected the plaintiff's argument that although he received a letter of warning and performance evaluation from his employer, he did not understand the "tangible effects" of the letter until three years later, when he was denied a promotion. Id. The court found that the continuing violation doctrine did not apply because the plaintiff understood the warning letter and evaluation – a discrete act – to be formal discipline, appealing such discipline through the internal review procedures. Id. In his appeal, the plaintiff stated that he felt "abused and retaliated against," demanding that the letter be removed from his file. Id. The court found that the plaintiff's "recognition [of the discriminatory and retaliatory nature of the disciplinary action taken against him] eliminate[d] any argument that the warning and evaluation did not have any crystallized implications or apparent tangible effects at the time they were issued." Id. (quotations omitted).

Dr. Shervin denounced the untimely discrete acts of discrimination and retaliation as such almost as soon as they occurred. In fact, the record in this regard is largely undisputed. Dr. Shervin, shortly after the February 2, 2007 meeting with Dr. Herndon, felt she was being treating disparately because of her gender. D. 172 ¶ 20; D. 229 ¶ 20; D. 157-2 at 88. As early as March 2007, Dr. Shervin told Dr. Rubash that she felt Dr. Herndon was treated her differently because of her gender. D. 229 ¶ 27; D. 157-1 at 65. Dr. Shervin claims that after she complained to Dr. Rubash, "reprisals began immediately." D. 229 ¶ 28. In fact, Dr. Shervin has asserted that the statements Dr. Rubash made to her during that meeting were retaliatory in nature. D. 229 ¶ 32. As did the plaintiff in Miller, Dr. Shervin expressed that she was "not being treated fairly" in the letter she addressed to Dr. Kasser dated March 27, 2007, in which she requested an Executive Committee review and expungement of her probation. Letter to Dr. Kasser (D. 157-15 at 2). In the letter, Dr. Shervin states her belief that "proper procedures were not followed" and that she

was "fully prepared to go forward with a full hearing on the merits." Id. She notes Dr. Herndon's "inappropriate references" to her weight loss. Id. During her presentation to Executive Committee on April 10, 2007, Dr. Shervin asserts that she told the Executive Committee that she was concerned about gender bias. D. 229 ¶ 54; 157-1 at 67–68. Despite Dr. Shervin's claims, the Executive Committee notified Dr. Shervin in June 2007 that it was upholding Dr. Herndon's probation decision. D. 229 ¶ 55; June 6, 2007 Letter from Dr. Kasser (D. 157-19). The letter stated that the Executive Committee felt that Dr. Herndon "made an appropriate decision" based on Dr. Shervin's clinical and professional performance and did not address gender bias. D. 157-19. After the Executive Committee's decision, Dr. Shervin informed Dr. Lieberman that she suspected that new, unsubstantiated allegations about her alteration of medical records may have surfaced because she had raised her concerns about gender bias. D. 229 ¶ 55. As the Morgan court articulated, "related discrete acts" cannot be converted into a "single unlawful practice for the purposes of timely filing." Morgan, 536 U.S. at 111. The most that can said here is that the earlier discrete discriminatory acts related to the later timely charged claims, but that does not aid Dr. Shervin since "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Morgan, 536 U.S. at 113. Accordingly, as much of Dr. Shervin's discrimination and retaliation claims that occurred before June 5, 2008 (and before December 30, 2008 as to Harvard for reasons stated below) is not actionable.

To the extent that Dr. Shervin contends that the Defendants' conduct rose to the level of a "hostile work environment"—i.e., discriminatory conduct based on gender "sufficiently severe or pervasive that it altered the conditions of [Dr. Shervin's] employment and created an abusive working environment," where "the offending conduct was both objectively and subjectively

offensive," Tuli v. Brigham & Women's Hospital, 656 F.3d 33, 39 (1st Cir. 2011) (citations and quotations omitted), such contention does not aid Dr. Shervin on this record. In hostile work environment cases, acts which may not be actionable on their own, occur over a period of time, eventually culminating into the plaintiff's realization that she has been subject to discrimination. Tuli, 656 F.3d at 39–40, upon which Dr. Shervin relies, illustrates this paradigm. In Tuli, over the course of over two years, a female neurosurgeon observed and endured sexual innuendo, sexually charged suggestions and degrading insinuations about her skills as a spine surgeon because she was a woman, many of them committed by her supervisor. Id. Although she complained internally about his behavior and it continued, it was not until after the supervisor's adverse presentation about her to the credentialing board that resulted in her qualified reappointment (affirmed, after review, by an internal committee) that she filed a MCAD complaint. The Tuli court held that it was the "accumulated effect of incidents of humiliating, offensive comments directed at women and work-sabotaging pranks, taken together" that constituted the hostile work environment, id. (quoting O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001)), and was the "classic example of a continuing violation" from the earlier 2005 to 2007 incidents to the 2007 adverse employment decision Id. at 40 (quoting Tobin, 553 F.3d at 130); Johnson v. Univ. of Puerto Rico, 714 F.3d 48, 53 (1st Cir. 2013) (noting that "[d]iscrete acts and hostile work environment claims are different in kind . . . because hostile work environment claims by their nature involve repeated conduct and a single act of harassment may not be actionable on its own").

Not so here. Even drawing every reasonable inference in Dr. Shervin's favor to the extent that the material facts on this point are disputed, it remains the case that the untimely claims—the initial probation decision by Dr. Herndon, the failure to reverse such decision by Dr.

Herndon, Dr. Rubash or the Executive Committee, the extension of probation—were all discrete acts, all of which Dr. Shervin contemporaneously denounced as discriminatory and/or retaliatory and complained about to various of the Defendants as such. See D. 172 ¶ 27; D. 229 ¶ 27 (undisputed fact that in March 2007, Dr. Shervin met with Dr. Rubash to express her concerns that Dr. Herndon's decision to place her on probation was fueled by gender discrimination). That is, unlike the paradigm in which plaintiff suffers a number of indignities, the discriminatory animus of which is not clear until a series of such events continue over time or culminate in a discriminatory or retaliatory act for which the plaintiff then seeks relief, the opposite is true here. It is undisputed that Dr. Shervin complained about the probation (and the failure to reverse the decision or not allow its extension as discrimination) in 2007 and understood by June 6, 2007 that the Executive Committee would not provide her the relief she sought. This is not a circumstance which, by virtue of the continuing violation doctrine, "victims of discrimination [are not penalized] for reporting misconduct as it occurs and attempting to work with their employers to remedy the situation." Tuli, 656 F.3d at 41 (comparing the "Massachusetts' parallel analysis" under Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 541 (2001)). Nor is this case the paradigm in Tuli where "[a]lthough in 2005 and 2006, prior to the 300-day window, Tuli was subject to 'pinpricks,' . . . [her supervisor's] presentation to the [credentials] committee in October 2007 could be viewed as making clear that the situation was hopeless, triggering the clock for the sum of prior acts comprising the continuing violation." Id. The Court agrees with Dr. Shervin that Tuli is instructive, but it is instructive and distinguishable where she did not suffer "pinpricks," but a discrete punch in the form of the probation that, upon her contemporaneous complaints about it as gender bias, did not lead to the relief she sought, as in Miller, 296 F.3d at 22.

For all of these reasons, the Court finds that Dr. Shervin's claims do not fall under Title VII's continuing violation exception.

2. Continuing Violation Doctrine Under c. 151B

Similar to Title VII, Massachusetts law provides that "the 300 day requirement shall not be a bar to filing in those instances where facts are alleged which indicate that the unlawful conduct complained of is of a continuing nature." 804 C.M.R. § 1.10(2); see Tuli, 656 F.3d (comparing the analysis under Morgan to the analysis under Massachusetts law). "[A] person [may] seek damages for alleged discrimination occurring outside the usual statute of limitations period if the alleged events are part of an ongoing pattern of discrimination, and there is a discrete violation within the statute of limitations period to anchor the earlier claims." Pelletier v. Town of Somerset, 458 Mass. 504, 520 (2010) (citing Cuddyer, 434 Mass. at 541 (2001)).

Like the Title VII rule, Massachusetts's continuing violation doctrine "recognizes that some claims of discrimination involve a series of related events that have to be viewed in their totality in order to assess adequately their discriminatory nature and impact." Cuddyer, 434 Mass. at 531. Similarly, the doctrine applies to retaliation claims. Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 616-17 (2005) ("Although unlawful retaliation, typically, may involve a discrete and identifiable [action], it may also consist of a continuing pattern of behavior that is, by its insidious nature, linked to the very acts that make up a claim of hostile work environment . . . . In sum, it is the nature of the unlawful conduct alleged by the plaintiff, independent of the precise formulation of his claim, that allows a plaintiff to invoke an exception to the limitations period for a continuing violation").

Cuddyer, decided in 2001, "decline[d] to adopt the Federal precedent [at the time]. . . with respect to the application of the continuing violation doctrine to claims of hostile work

environment sexual harassment under G.L. c. 151B." 434 Mass. at 521. Citing the First Circuit's decision in O'Rourke, 235 F.3d, the Supreme Judicial Court held that federal law "fail[ed] to recognize fully that an employee who suffers from recurring acts of abusive sexual verbal or physical conduct that, over time, rise to the level of a hostile work environment, may be unable to appreciate the true character and enormity of the discriminatory environment until after it has continued for an appreciable length of time." Cuddyer, 434 Mass. at 538. The court held that the continuing violation doctrine could therefore apply to c. 151B claims when "[i]ncidents of sexual harassment serious enough to create a work environment permeated by abuse typically accumulate over time, and many incidents in isolation may not be serious enough for complaint." Cuddyer, 434 Mass. at 532–33.

However, after the Supreme Court's decision in Morgan in 2002, the federal and state standards are closer to each other or at least co-extensive. See Clifton, 445 Mass. at 619 n.8 (citing Morgan for the conclusion that the "United States Supreme Court has agreed, in substance, with our reasoning in the Cuddyer case"). Since Morgan, in Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, 441 Mass. 632 (2004), the Supreme Judicial Court articulated a three-part test: "a complainant must ordinarily prove that (1) at least one discriminatory act occurred within the six month limitations period; (2) the alleged timely discriminatory acts have a substantial relationship to the alleged untimely discriminatory acts . . . and (3) earlier violations outside the six-month limitations period did not trigger [the plaintiff's] 'awareness and duty' to assert [her] rights, i.e., that [the plaintiff] could not have formed a reasonable belief at the time the employment actions occurred that they were discriminatory." Id. at 642–43 (citations and quotations omitted). In recognizing this standard, the court held that MCAD erred in finding that a new violation occurred each time an employer rejected the

plaintiff's same reasonable accommodation request, focusing, like the post-Morgan federal courts, on whether a "discrete discriminatory act" triggered the statute of limitations:

> Looked at from another perspective, if the commission's "each day" theory is a viable way of identifying continuing acts of discrimination, nothing in principle distinguishes any discrete act of discrimination from a continuing violation. For example, the "act of discrimination" that occurs when an employer improperly denies an employee a promotion could be characterized as the refusal, every day after the denial, to give the employee the additional responsibilities and benefits that would have accompanied the promotion. Similarly, a refusal to hire or a decision to terminate could also be recharacterized as unlawfully denying the employee a job "each day" thereafter. This would eviscerate the purpose of a statutory limitations period, and permit what should be a limited exception to such a stricture to swallow it whole. When an employer refuses an employee's request for a reasonable accommodation, the refusal is a discrete discriminatory act triggering the statutory limitations period.

Id. at 643–45. The court in that case did, however, carve out an exception when an employer takes equivocal action or inaction: "when an employer responds to a request . . . with equivocal action or inaction, the limitations period . . . begins to run at the point thereafter when the employee knew or reasonably should have been aware that the employer was unlikely to afford him [relief]." Id. at 645. Likewise, in Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611 (2005), the court again emphasized the plaintiff's "pervasively hostile" work environment. Id. at 621. The court noted that "[a] hostile work environment may be manifested by a series of harassing acts that have been described as "pinpricks [that] only slowly add up to a wound. . . . One pinprick may not be actionable in itself, and its abusive nature may not be apparent except in retrospect, until the pain becomes intolerable." Id. at 617 n.5; see Butler v. Wellington Mgmt. Co., LLP, 79 Mass. App. Ct. 1126, 2011 WL 2463446, at *3 (2011) (unpublished) (citing Morgan, found that "continuing violations are 'different in kind from discrete acts. Their very nature involve repeated conduct'" and quoting Morrison v. Northern Essex Community College, 56 Mass. App. Ct. 784, 794 (2002)). That is, even under state law, this doctrine concerns the hostile work environment claims, see Pelletier, 458 Mass. at 523–24 (workplace "pervaded by

harassment or abuse . . . and that the resulting intimidation, humiliation, and stigmatization posed a formidable barrier to [her] full participation in the workplace"), and not discrete acts, to which later acts may be related but are not continuing violations.

The general rule is and, "[b]y the plain language of the statute, the limitations period begins to run at the time of the 'act of discrimination.'" Ocean Spray Cranberries, Inc., 441 Mass. at 265; Mass. Gen. L. c. 151B, §5. As with Supreme Court's recognition in Morgan of the distinction between discrete acts and continuing violations, the Supreme Judicial Court distinguished between acts for which the precise moment of the act of discrimination "is easy to calculate: plainly, if an employee is denied a promotion on an improper basis, the date of the 'act of discrimination' is the date of that denial" and those instances in which "improper conduct continues or evolves over a course of time, the date of the 'act of discrimination' is more difficult to determine" and for which the MCAD has adopted the 'continuing violations' exception to the statute of limitations." Ocean Spray Cranberries, Inc., 441 Mass. at 641-42 & n. 12 (citing application MCAD regulation, now 804 C.M.R. § 1.10(2)); see Pelletier, 458 Mass. at 520 (citing Cuddyer and noting that "[c]hapter 151B discrimination complaints must be brought within these prescribed periods, but where alleged misconduct forms a pattern of behavior, the continuing violation doctrine applies"). That is, the continuing violation doctrine under Massachusetts law no more aids Dr. Shervin here than it did under federal law for the reasons discussed above. Accordingly, the Court cannot find that the continuing violation doctrine applies to Dr. Shervin's c. 151B claims for the reasons discussed above in regard to the Title VII analysis. Rather, the probation-related decisions were discrete acts of which Dr. Shervin denounced as discriminatory and/or retaliatory and for which she did not contemporaneously receive the relief she sought. See Ocean Spray Cranberries, Inc., 441 Mass. at 646-47

(concluding that claim regarding the employer's failure to make reasonable accommodation was time-barred where "there is no basis in the record to support the conclusion that [the claimant] did not know or should not have been reasonably aware that his request was not going to be accommodated").[10]

Therefore, the Court finds that Dr. Shervin cannot benefit from the continuing violation doctrine for liability for her c. 151B claims.

3. The Operative Limitations Date for Harvard is December 30, 2008 and June 5, 2008 for the Remaining Defendants

In light of the Court's ruling about the statute of limitations,[11] the Court turns to assessing the appropriate operative statute of limitations dates.

The parties do not dispute that Dr. Shervin and Partners entered into a Tolling Agreement on April 1, 2009 stating that "any discrimination or retaliation claims filed by Dr. Shervin on or before October 26, 2009 shall be treated as having been filed on April 1, 2009 for statute of

[10]Since Dr. Shervin has not met the continuing violation standard, she is not entitled to a Cuddyer instruction, but, she may still be able to introduce time-barred events at trial, even if she cannot recover damages for them. Pelletier, 458 Mass. at 521 & n.33. That is, while the Defendants may not be found liable for conduct outside the limitations period, a jury may still be permitted to consider untimely "background evidence" in assessing the viability of the actionable discrimination and retaliation claims. O'Rourke, 235 F.3d at 726; Clifton, 445 Mass. at 613.

[11]Dr. Shervin also argues that equitable principles militate in favor of tolling the statute of limitations on the c. 151B claims because a jury could find that the Defendants engaged in discriminatory and retaliatory behavior to "try and wait out the clock." D. 231 at 71. Equitable tolling, however, is applied "sparingly in employment discrimination cases" and is used "[w]here an employer affirmatively misleads an employee, or encourages or cajoles her into inaction." Cole v. Mount Ida Coll., 71 Mass. App. Ct. 1121 (2008) (citations and quotations omitted). The Supreme Judicial Court has further held that equitable tolling applies only when "the prospective plaintiff did not have, and could not have had with due diligence, the information essential to bringing suit." Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 63 (1997). As discussed throughout this decision, the Executive Committee informed Dr. Shervin shortly after she asked for review that it was affirming Dr. Herndon's probation even though Dr. Shervin expressed from the beginning that the probation was a result of gender bias. See D. 229 ¶¶ 53, 56. A couple of weeks later, in fact, her probation was extended. D. 229 ¶ 56.

limitations purposes." D. 217 ¶ 413. The Tolling Agreement, the existence of which the parties do not dispute, provides that "in a dispute between Dr. Nina Shervin and Partners HealthCare System, Inc., its representatives, agents, successors, assigns, affiliates, parents, officers, partners, employees and insurers . . . the parties entered into a tolling agreement to attempt to resolve the disputes between them . . . ." D. 153-46 at 2. Therefore, consistent with the Court's rulings above, in determining any liability on the part of Partners, MGPO, Dr. Rubash or Dr. Herndon, the jury will be permitted to consider events occurring after June 5, 2008, which is 300 days before April 1, 2009.

The Court cannot find, however, that Harvard was party to the Tolling Agreement. While Dr. Shervin argues that Harvard was involved in "on-going efforts to resolve this matter" in the spring of 2009, D. 217 ¶ 415, by the face of the agreement itself, Harvard is not a party. While, as Dr. Shervin argues, the agreement binds Partners' "affiliates," Harvard is correct in asserting that it cannot be bound by a tolling agreement that it did not give Partners the legal authority to which to bind it. See Williams v. Ely, 423 Mass. 467, 479-80 (1996). In an affidavit, Joan Stoddard, counsel for Partners, stated that she signed the Tolling Agreement on behalf of Partners and that Harvard did not authorize her to sign the Tolling Agreement on its behalf. D. 153-47 ¶¶ 8, 10–11. She further attests that she did not intend to bind Harvard and did not tell Dr. Shervin's counsel or otherwise suggest to her that she had the authority to bind Harvard. Id. ¶¶ 12–13. Dr. Shervin has offered no specific, admissible evidence on this record supporting the contention that Harvard gave Partners the authority to bind it to the Tolling Agreement. Therefore, the controlling date for statute of limitations purposes for claims against Harvard is December 30, 2008 – 300 days before Dr. Shervin filed her MCAD complaint on October 26, 2009. D. 1.

C. The Court Denies Summary Judgment as to the Timely Gender Discrimination and Retaliation Claims

1. Claims Against Dr. Rubash

i. Discrimination

As noted above, to prove gender discrimination Dr. Shervin must show that "she is a member of a protected group who has been denied an employment opportunity for which she was otherwise qualified." Dichner, 141 F.3d at 29–30. "Such a showing gives rise to an inference that the employer discriminated due to plaintiff's [protected status] and places upon the employer the burden of articulating a "legitimate, nondiscriminatory reason for the adverse employment decision." Id.; see also Tate v. Dep't of Mental Health, 419 Mass. 356, 361 (1995) (applying same burden-shifting standards for c. 151B discrimination claim). "This entails only a burden of production, not a burden of persuasion; the task of proving discrimination remains the plaintiff's at all times." Dichner, 141 F.3d at 30. If the Defendants meet such burden, Dr. Shervin must then prove that the Defendants' "explanation is a pretext for unlawful discrimination." Id. Dr. Rubash argues that Dr. Shervin cannot make a *prima facie* showing that he engaged in gender discrimination. D. 144-1 at 16–17. The Court disagrees. As discussed above, Dr. Shervin has at least provided admissible evidence suggesting that Dr. Rubash may have foreclosed an employment opportunity at Newton-Wellesley and MGH in the spring of 2009—citing, in support of her argument that Dr. Rubash withdrew her job offer—evidence that Dr. Rubash told a recommender that no staff positions were available. D. 227-14 at 2.

Dr. Rubash also argues that there is no evidence "to substantiate that [Dr. Shervin's] status as a woman had any bearing on Dr. Rubash's actions in the aftermath of the probation." D. 144-1 at 17. However, the Court cannot conclude on the record that a reasonable jury could

not surmise from the sequence of the events above that Dr. Rubash had a discriminatory animus, where Dr. Shervin contends that at least a contemplated offer of employment was later made not available to her.

ii. Retaliation

To prove *prima facie* retaliation, Dr. Shervin must show that she "engaged in protected conduct," "suffered an adverse employment action" and that the "adverse action was causally connected to the protected activity." Fantini v. Salem State Coll., 557 F.3d 22, 32 (1st Cir. 2009) (citations and quotations omitted); Mole v. University of Massachusetts, 442 Mass. 582, 591–92 (2004). To show participation in a protected activity, Dr. Shervin need not prove that discrimination actually occurred, id. (citations and quotations omitted), but must show that she "reasonably and in good faith believed that the [defendant] was engaged in wrongful discrimination, that she acted reasonably in response to her belief, and that the [defendant's] desire to retaliate against her was a determinative factor in its decision to [engage in adverse action]." Tate, 419 Mass. at 364.

Dr. Rubash argues that Dr. Shervin has failed to present evidence that he retaliated against her because she cannot prove that any adverse action taken against her was causally connected to any protected conduct. D. 144-1 at 18. The parties do not dispute that Dr. Shervin engaged in a protected activity in disputing her probation and a jury could find that Dr. Rubash's alleged role at least in foreclosing a staff position at Newton Wellesley and MGH in 2009 was causally connected to her protected conduct.[12] Hotly disputed in this case is whether it was ever suggested that Dr. Shervin would be given a staff position at Newton-Wellesley. Dr. Shervin

[12]To extent that Dr. Rubash challenges the aiding and abetting claim, Dr. Shervin's claims that Dr. Rubash's failure to act on Dr. Herndon's actions also support this claim.

contends that both she and Dr. Burke were under the impression that Dr. Shervin had been offered a post-fellowship staff position. D. 229 ¶ 157 (citing D. 157-9 at 47–48). A jury could find that if any such job offer did exist, Dr. Rubash ensured that the purported opportunity she had to work at Newton-Wellesley was not available because Dr. Shervin chose to pursue her claims and make allegations of discrimination against various people, including him.

2. Claims Against Dr. Herndon

Dr. Herndon likewise argues that there is "no factual basis for any claim that Dr. Herndon engaged in discriminatory or retaliatory conduct after June 5, 2008." D. 152 at 16.

i. Discrimination

A jury could find that Dr. Herndon's alleged post-June 5, 2008 efforts to have the Grievance Committee affirm an allegedly improper disciplinary action against Dr. Shervin reflected discriminatory animus and/or retaliation. For instance, Dr. Shervin has provided evidence that during the Grievance Committee's 2009 hearing, Dr. Herndon stated that Dr. Shervin "didn't do the right thing with the shoulder," referring to the shoulder case, D. 220-1 at 120, even though the Executive Committee had been informed, by a letter to Dr. Kasser from the attending surgeon, that Dr. Shervin's mistake did not rise "to the level of seriousness to which it seems to have risen." D. 222-15.

ii. Retaliation

"Prohibited retaliatory actions are those that constitute a change in working conditions that 'create a material disadvantage in the plaintiff's employment.'" Ritchie v. Dep't Of State Police, 60 Mass. App. Ct. 655, 665 (2004) (quoting Flanagan–Uusitalo v. D.T. Indus., Inc., 190 F. Supp. 2d 105, 116 (D. Mass. 2001)). As discussed above, Dr. Shervin has provided admissible evidence that Dr. Herndon contributed to the allegedly faulty Grievance Committee

investigation by failing to notify the Grievance Subcommittee at least as to the potentially overstated description of events surrounding the shoulder case. A jury could find, at the least, that Dr. Herndon took this action as retaliation for Dr. Shervin's decision to dispute his probation decision.

The Court finds that Dr. Shervin has presented sufficient evidence suggesting that there exists a material question of fact as to whether Drs. Rubash and Herndon engaged in discriminatory and/or retaliatory conduct.

3. Retaliation Claim Against Partners and MGPO

The Court notes that Partners does not dispute that Dr. Rubash and Dr. Herndon were employees of Partners, making Partners liable for the actions they took in the scope of their employment. See D. 172 ¶¶ 2–5; see also Dias, 438 Mass. at 322. Partners nonetheless argues that Dr. Shervin's retaliation claims are not legally cognizable because she had no reasonable and good faith belief that Dr. Herndon placed her on probation out of gender bias, D. 150 at 8, and "has adduced no evidence to challenge Dr. Herndon's proffered non-discriminatory reason for imposing probation." D. 150 at 11.

The Court cannot so conclude on this record. Even though the pre-June 5, 2008 conduct may not be the basis of liability under Title VII and c. 151B for the reasons previously stated, the circumstances surrounding the 2007 probation do bear upon, and will be admissible at trial, as to the question of whether Dr. Shervin reasonably and in good faith believed that the Defendants were engaged in discrimination as to her timely retaliatory claims based upon the Defendants' post-June 5, 2008 allegedly retaliatory claims. Accordingly, the Court notes that Dr. Shervin testified during her deposition that Dr. Herndon "made comments about the fact that I did not behave in the way that women behave when they are disciplined by him." D. 157-1 at 63-64.

She has also submitted admissible evidence that Dr. Herndon said that he "had never disciplined a wom[a]n resident who didn't cry and [Dr. Shervin] didn't cry." Deposition of Dr. Burke, D. 221-8 at 4; see Lipchitz v. Raytheon Co., 434 Mass. 493, 503 (2001) ("Employment decisions that are made because of stereotypical thinking about a protected characteristic or members of a protected class, whether conscious or unconscious, are actionable under G.L. c. 151B"). Dr. Shervin has also provided evidence suggesting that when male residents faced problems, they were not immediately placed on probation. See D. 217 ¶ 200–203. For instance, Dr. Manish Sethi testified during his deposition that when his clinical ability and knowledge were brought into question by an attending surgeon, he was "asked to demonstrate [his] clinical ability and knowledge in different settings, which [he] did successfully." D. 220-10 at 12; see Dartt v. Browning-Ferris Indus., Inc. (Mass.), 427 Mass. 1, 17 (1998) (finding that deviation for standard procedures could support a reasonable inference of discrimination). That is, on this record, a reasonable jury could find that, at a minimum, Dr. Shervin had a reasonable and good faith basis for believing that the probationary decision was discriminatory for the purposes of her timely retaliatory claims.[13]

In light of the present record, a jury could find that Dr. Shervin reasonably believed that Dr. Herndon engaged in retaliatory conduct, not time-barred, in response to her earlier complaints about her probation being based on gender bias. As discussed above in regard to Dr. Rubash, the Court also finds that Dr. Shervin has shown that, when looking at the facts in the

[13]Dr. Shervin also offers Dr. Burke's deposition testimony, where he stated that Dr. Hornicek told him that Dr. Herndon told Dr. Hornicek that he extended probation because Dr. Shervin challenged his decision to place her on probation. D. 217 ¶ 266 (citing D. 219-20 at 35). The cited deposition testimony does not indicate when this conversation took place, and Dr. Shervin does not, in any event, demonstrate to the Court why this statement would not be considered inadmissible hearsay.

light most favorable to Dr. Shervin, there is a genuine issue of material fact as to whether the non-time barred actions Dr. Rubash took in response to Dr. Shervin's complaints about probation were retaliatory.

D. The Court Cannot Find on this Record that the Conduct of Drs. Rubash and Herndon Is Not Also Attributable to Harvard

Both Harvard and Dr. Shervin expend significant briefing on who was employed by Harvard. Dr. Shervin argues that the actions of faculty members, including Drs. Herndon and Rubash, were taken on Harvard's behalf, making Harvard liable for the actions of these individuals and also argues that Harvard was her employer for the purposes of Title VII and c. 151B § 4(4).

Harvard counters that the "notion that HCORP faculty members were agents of HMS when conducting HCORP functions flies in the face of the evidence in this case," D. 151 at 20, and cites Chapin v. Univ. of Mass. at Lowell, 977 F. Supp. 72, 80 (D. Mass. 1997) for the proposition that "a charging party must show that the alleged defendant supervised or controlled the conduct of the person who was alleged to have committed the unlawful act." D. 151 at 23. The parties do not dispute that if the faculty members were acting within the scope of any employment relationship, the institutional defendants would be liable for the faculty members' conduct. See Dias v. Brigham Med. Associates, Inc., 438 Mass. 317, 322 (2002) (stating that under "traditional agency law . . . an employer is liable for torts committed by employees acting in the scope of their employment") (citations, quotations and alterations omitted); Rivera-Vega v. ConAgra, Inc., 70 F.3d 153, 163 (1st Cir. 1995) ("A joint employer relationship exists where two or more employers exert significant control over the same employees and share or co-determine those matters governing essential terms and conditions of employment").

The First Circuit has "construed Supreme Court decisions as establishing the proposition that the terms 'employer' and 'employee' under Title VII are to be defined with reference to [ ] common law agency principles." DeLia v. Verizon Commc'ns Inc., 656 F.3d 1, 4 (1st Cir. 2011) (quoting Lopez v. Massachusetts, 588 F.3d 69, 83 (1st Cir. 2009) (quotations omitted)). Under federal law, "the common-law element of control [by the putative employer over the putative employee] is the principal guidepost that should be followed." DeLia, 656 F.3d at 4 (citation and quotations omitted). "Similarly . . . Massachusetts cases have determined that an employer can be defined as one "'who has direction and control of the employee and to whom . . . [the employee] owe[s] obedience in respect of the performance of his work.'" Id. (quoting Fleming v. Shaheen Bros., Inc., 71 Mass. App. Ct. 223 (2008)); see Wheatley v. Am. Tel. & Tel. Co., 418 Mass. 394, 397 (1994) ("It is our practice to apply Federal case law construing the Federal anti-discrimination statutes in interpreting G.L. c. 151B"). While the First Circuit has set forth a number of factors for courts to consider, see Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 7 (1st Cir. 2004) (citation and quotations omitted), "[t]he test provides no shorthand formula or magic phrase that can be applied to find the answer[] . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." Id. (citation and quotations omitted). "A court must tailor these factors to the relationship at issue. Often certain factors will not be relevant to a particular case, and a court should not consider them as favoring either side." Id. at 7 n.7. "However, in most situations, the extent to which the hiring party controls the manner and means by which the worker completes her tasks will be the most important factor in the analysis." Id. at 7 (citation and quotations omitted). Therefore, while "a court may decide the employee/independent contractor question as

a matter of law," it may only do so when "the factors point so favorably in one direction that a fact finder could not reasonably reach the opposite conclusion." Id.

The Court agrees with Harvard that most of the evidence Dr. Shervin offers does not assist the Court in determining whether there is a disputed question of material fact as to whether Harvard controlled the day-to-day activities of the faculty members on staff at the hospital, or the day-to-day activities of residents. The Court also agrees that Dr. Shervin has, at a minimum, overstated the relevance of some of the evidence she cites. For instance, while Dr. Shervin provides evidence that the Residency Director is approved by the Harvard dean, see D. 217 ¶ 36, there is still no evidence cited from this record that after such appointment, Harvard has any control over the Residency Director's activities. While the Affiliation Agreement Harvard has with its affiliated hospitals states that research experts working in the hospitals are responsible for instruction of medical students, as they "share the responsibility for all the duties and objectives of these departments as defined by the Medical School and the Hospital," D. 219-5 at 9, Dr. Shervin has directed the Court to no evidence on this record suggesting that this provision actually applies to any of the doctors accused of acting unlawfully in this case.

Still, the Court cannot find that on this record that the "factors point so favorably" to Harvard such that a jury could not find that the faculty members working at the hospitals were not under Harvard's day-to-day control. For one example, the former president and CEO of Beth-Israel suggested in an affidavit that Harvard and its affiliated hospitals are "closely intertwined," such that Harvard may inform the hospitals' compensation decisions, promotion criteria, faculty standards and removal rules and procedures. Affidavit of Paul Levy (D. 219-11). Also, Harvard's own policies state that the university takes "institutional responsibility" for any activity for which the Harvard name is used. Harvard Policy on Use of Harvard Names and

Insignias (D. 220-4 at 2) ("the activity must be one for which the University takes institutional responsibility"*)*. Given facts such as these, a jury could determine that Harvard's control over the doctors' everyday functions was pervasive enough such that Harvard should also be considered their employer, in addition to Partners.

If a jury finds that the faculty members were employed by Harvard and acting under the scope of that employment,[14] then it will be necessary to determine whether Harvard was Dr. Shervin's employer, as only a plaintiff's employer may be held liable for discrimination and retaliation under both Title VII and c. 151B. Likewise, the Court cannot say on this record that Harvard was not Dr. Shervin's employer.[15] On this point, the Court notes that Dr. Shervin has set forth evidence that a resident may be subject to adverse action that could lead to termination from HCORP if she violates Harvard Medical School bylaws, policies or procedures. D. 220-7

[14]Harvard further argues that Dr. Shervin cannot show that it aided and abetted any discriminatory or retaliatory conduct pursuant to c. 151B, § 4(5) because Harvard had no intent to discriminate or retaliate against her and there is no evidence that Harvard committed any wrongful acts not attributable to Partners. D. 151 at 22. As discussed above, the Court cannot find, as a matter of summary judgment, that Harvard was not responsible for the actions taken by Drs. Rubash and Herndon.

[15]Harvard is correct in asserting that the Court, on a motion to compel, has previously stated that "[a]s HMS was not Shervin's employer, HMS has indicated in its opposition that it does not maintain personnel records (and is not required to do so since it was not an "employer" [] under c. 149, § 52C) for Shervin or the other HCORP residents." D. 246 at 4 (citing D. 162). That prior statement does not foreclose the decision that the Court makes here. In deciding the motion to compel, the Court utilized a statutory definition of "employer" for the specific purpose of determining whether Dr. Shervin was entitled to personnel records. See Mass. Gen. L. c. 149, § 52C (""Personnel record[,"] a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action"). The Court makes its ruling here on a fuller record and under the legal standards articulated above.

at 2. A jury could well find that this type of disciplinary policy could affect the day-to-day practices of a resident.[16]

The Court recognizes the abundance of evidence Harvard has presented that could very well lead a jury to find that Harvard did not control any of the day-to-day actions of any of the doctors in this case. However, given that "[w]hether joint employer status exists is essentially a factual question," Rivera-Vega, 70 F.3d at 163, the Court finds that at the least, Dr. Rubash's 2009 actions, if attributable to Harvard, regarding the purported Newton-Wellesley job offer could form a timely basis for liability against Harvard, taking into account that Dr. Shervin must show that Harvard engaged in discriminatory or retaliatory conduct after December 30, 2008.

E. The Court Denies the Defendants' Motions for Summary Judgment as to the Tortious Interference Claims

1. As to Dr. Rubash, There are Material Factual Disputes as to the Existence of a Contemplated Contract

Dr. Rubash argues that Dr. Shervin has not presented any evidence that he tortiously interfered with an advantageous business relationship or contemplated contract. D. 144-1 at 19. To show tortious interference with advantageous business relations, Dr. Shervin must prove: "(1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's interference with it through improper motive or means; and (4) [Dr. Shervin's] loss of advantage directly resulting from the defendant's

[16]The Court takes note of Harvard's reliance on Loewen v. Grand Rapids Med. Educ. Partners, No. 1:10-CV-1284, 2012 WL 1190145 (W.D. Mich. Apr. 9, 2012) (holding that the medical school was not the medical resident's joint employer for Title VII and state law discrimination claim purposes) for the proposition that a medical resident is not employed by a medical school for Title VII purposes. D. 151 at 14. Still, based on the standards articulated by the First Circuit and Massachusetts courts discussed above, the Court finds that Loewen, while persuasive to some extent, is not controlling.

conduct." Am. Private Line Servs., Inc. v. E. Microwave, Inc., 980 F. 2d 33, 36 (1st Cir. 1992) (citing United Truck Leasing Corp. v. Geltman, 406 Mass. 811 (1990)).

Dr. Rubash argues that he could not interfere with any business relationship in regard to Dr. Shervin's purported position with MGH because "she never had a contract with this institution or its professional organization for an attending position." D 144-1 at 20. While Dr. Shervin's opposition does not address these arguments (she argues only that "Dr. Rubash surely interfered with Dr. Shervin's ability to be hired at the Newton-Wellesley"), D. 231 at 78, the Court finds that the record provides sufficient admissible evidence such that a jury could find that there was at least a contemplated contract of future employment with MGH/Newton-Wellesley. As discussed above, Dr. Shervin asserts that at the beginning of her third year of residency, Dr. Burke suggested to Dr. Rubash that Dr. Shervin be brought onto the MGH and Newton-Wellesley staffs as an attending physician, employed full-time by MGPO. D. 217 ¶ 109-110, 112, 117. The parties do not dispute that Dr. Rubash met with Dr. Shervin in November 2005 to discuss Dr. Shervin's potential post-fellowship employment at MGH and Newton-Wellesley. Where the parties disagree, however, is as to the nature of the conversation – while Dr. Rubash claims that he never offered Dr. Shervin employment, Dr. Shervin has presented evidence that Dr. Rubash orally assured Dr. Burke of a "firm job offer." D. 217 ¶ 115; D. 229 ¶ 157 (citing D. 157-9 at 47–48).[17]

[17]Dr. Rubash has argued that even if he or any of the Defendants had made an oral agreement promising Dr. Shervin a position with MGH, the statute of frauds prevents any such oral agreement from being enforced. D. 144-1 at 15. While the Supreme Judicial Court has held that the statute of frauds bars enforcement of any oral employment agreement "which by [its] terms cannot be performed within the year," Boothby v. Texon, Inc., 414 Mass. 468, 479 (1993), as discussed above, the Court finds that Dr. Shervin has set forth specific admissible facts for a claim of interference with at least a contemplated contract, not necessarily with an existing and enforceable contract.

Further, to the extent Dr. Rubash argues "he has definitely indicated that he has taken no steps to interfere with employment opportunities at [Newton-Wellesley] . . ." and that others have corroborated such, D. 144-1 at 20, there is evidence in the record that Dr. Rubash told Dr. Shervin's recommenders that no open positions were available. Assuming the evidence at trial bears out Dr. Shervin's contentions about a staff position at Newton-Wellesley, a jury could reasonably find that Dr. Rubash tortiously interfered with that opportunity.

2. The Tortious Interference Claim Against Dr. Herndon Survives

Dr. Herndon first argues that because Dr. Shervin's intentional interference claim "turns upon the premise that [the] initial probation decision – an event that occurred on February 2, 2007 – impacted her present and potential future employment" and that because she did not file her suit until April 9, 2010, the three-year statute of limitations on intentional interference claims has run pursuant to Mass. Gen. L. c. 260, § 2A. D. 152 at 19. Dr. Herndon further argues that Dr. Shervin cannot establish that he "knowingly induced HCORP to break its contractual relationship with her."[18] Id. Dr. Herndon further contends that he "has never communicated with Dr. Shervin's prospective employers and she did not have a business relationship inuring to her economic benefit with which he interfered." D. 152 at 20.

Dr. Shervin does not specifically address any of Dr. Herndon's arguments in her opposition. See D. 231 at 77–78. Even if this claim is time-barred as to the 2007 probation decision, the Court finds that a jury could conclude that Dr. Herndon tortiously interfered with

[18]To show an intentional interference with contractual relations, Dr. Shervin "must prove that: (1) [she] had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) [she] was harmed by the defendant's actions." G.S. Enters., Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 272 (1991).

Dr. Shervin's relationship with Partners as well as her HCORP contract by continuing, for discriminatory reasons, to seek to have the initial 2007 probation affirmed.

3. The Tortious Interference Claim Against Partners Survives, But Charitable Immunity Applies

As discussed above, the tortious interference claims against Drs. Herndon and Rubash shall proceed to trial. Accordingly, the tortious interference claim against Partners (Count 19) shall also proceed to trial.

The Court finds, however, that Partners qualifies for charitable immunity under Mass. Gen. L. c. 231, § 85K as to this claim. D. 150 at 19. The statute provides, in relevant part:

> It shall not constitute a defense to any cause of action based on tort brought against a corporation, trustees of a trust, or members of an association that said corporation, trust, or association is or at the time the cause of action arose was a charity; provided, that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs . . . . Notwithstanding any other provision of this section, the liability of charitable corporations, the trustees of charitable trusts, and the members of charitable associations shall not be subject to the limitations set forth in this section if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes.

Mass. Gen. L. c. 231, § 85K. A defendant has the burden of proving "both that it is a charitable organization and that the tort complained of fell within the range of activities covered by the cap." Conners v. Ne. Hosp. Corp., 439 Mass. 469, 470 (2003).

Partners has asserted that it is a charitable organization recognized by state and federal governments. D. 150 at 19; D. 172 ¶ 2. Partners also asserts that Dr. Shervin's claims "directly concern her performance as a medical resident and fellow at several hospitals within the Partners system." Id.; D. 149 ¶ 6. Given that Dr. Shervin has not disputed the relevant facts and has not

argued in her opposition that § 85K does not apply,[19] the Court finds that Partners falls under the charitable immunity cap for tort damages for the tortious interference claim as articulated in Mass. Gen. L. c. 231, § 85K. See Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 240 (2003) (affirming application of the statutory cap for a hospital when it was "undisputed that the defendant is a charitable corporation and that it was acting in the performance of its charitable purposes when the harm occurred").[20]

Accordingly, the Court DENIES Drs. Rubash and Herndon's motions for summary judgment as to the tortious interference claims and DENIES IN PART Partners' insofar as the Court finds that Partners is entitled to charitable immunity.

VI. Conclusion

For the reasons discussed above, the Court DENIES IN PART Dr. Rubash's motion, D. 144, but ALLOWS it IN PART to the extent that Dr. Shervin cannot rely on conduct that occurred prior to June 5, 2008 for Dr. Rubash's liability; DENIES IN PART Dr. Herndon's motion, D. 145, but ALLOWS it IN PART to the extent that Dr. Shervin cannot rely on conduct that occurred prior to June 5, 2008 for Dr. Herndon's liability; DENIES IN PART Harvard's motion, D. 148, but ALLOWS it IN PART to the extent that Dr. Shervin cannot rely on conduct that occurred prior to December 30, 2008 for Harvard's liability; and DENIES IN PART Partners' motion, D. 149, but ALLOWS it IN PART to the extent that Dr. Shervin cannot rely on

[19] See D. 229 ¶¶ 2, 6; Affidavit of Joan Stoddard (D. 157-3 ¶ 4).

[20] The Court notes, however, that § 85K does not apply to the discrimination and retaliation claims against Partners. Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 390 (2005) (ruling that "§ 85K does not apply to limit damages awarded pursuant to a successful claim of unlawful retaliation under G.L. c. 151B"); McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 307 (1st Cir. 1998) (same).

conduct that occurred prior to June 5, 2008 for Partners' liability and Partners is entitled to qualified immunity for the tortious interference claim.

The Defendants' motion to strike, D. 236, is DENIED. The Defendants' motion for additional time to respond to Dr. Shervin's opposition papers, D. 237 at 9, is also DENIED as moot. Dr. Shervin's motion for leave to file a surreply to the Defendants' reply briefs, D. 263, which the Court considered in resolving the instant motions, is ALLOWED *nunc pro tunc*.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit G.c

Attachment Casper=Fiske-v-MeYouHealth.pdf to email of Oct. 2, 2016 (first) (Exhibit G, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHRISTINE FISKE,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 13-10478-DJC**
MEYOU HEALTH, INC. et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

CASPER, J. **June 20, 2014**

I. Introduction

Plaintiff Christine Fiske ("Fiske") has filed this lawsuit against her former employer, MeYou Health, Inc., ("MYH"), its parent corporation, Healthways, Inc. ("Healthways"), Insperity PEO Services, L.P. ("Insperity") and Chris Cartter ("Cartter,") (collectively "Defendants") alleging discrimination on the basis of pregnancy in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), the Pregnancy Discrimination Act ("PDA")'s amendment to Title VII and Mass. Gen. L. c. 151B; and a violation of her rights under the Family Medical Leave Act ("FMLA") and Massachusetts Medical Leave Act ("MMLA"). D. 16. Defendants have moved for summary judgment, D. 29, to strike an affidavit Fiske submitted in opposition to summary judgment, D. 38, and to quash two subpoenas, D. 40. Fiske has moved to increase the limit for depositions, D. 45, and to extend the deadline for fact discovery, D. 44. For the following reasons, the Court DENIES the motion for summary judgment, ALLOWS the motion to strike in part, ALLOWS the motion to extend the deadline

for fact discovery, ALLOWS the motion to quash in part and ALLOWS the motion to increase the deposition limit in part.

II. Standard of Review

The Court grants a motion for summary judgment when there is no genuine dispute of material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In doing so, the Court "must scrutinize the record in the light most favorable to the summary judgment [opponent] and draw all reasonable inferences . . . to that party's behoof." Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 34 (1st Cir. 2005) (citation omitted).

The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000). If the movant meets its burden, the non-moving party may not rest on the allegations in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but must come forward with specific admissible facts that demonstrate a triable issue. Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 5 (1st Cir. 2010). Although the Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor," Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009), "conclusory allegations, improbable inferences, and unsupported speculation" proffered by the non-movant are insufficient to create a genuine issue of material fact to survive summary judgment. Sullivan v. City of Springfield, 561 F.3d 7, 14 (1st Cir. 2009) (citation omitted).

III. Factual Background

The Court draws the facts of this case from the parties' statements of facts and their responses to same. D. 29-2, 33 (collectively "SOF").[1] MYH was founded in 2009 and is a wholly-owned subsidiary of Healthways. SOF ¶¶ 2-3. Cartter is MYH's General Manager. Id. ¶ 4. Defendants assert that Insperity is a "Professional Employer Organization that provides outsourced human resources services and other functions to MYH," but Fiske argues that Insperity was Fiske's "co-employer." Id. ¶ 5. Fiske began working at MYH as its Online Marketing Director on October 19, 2010. Id. ¶ 6. Her salary was $130,000. Id. ¶ 52. MYH has a flexible hours policy and characterizes itself as "family friendly." Id. ¶ 8. Indeed, prior to Fiske's termination, MYH never refused her requests to accommodate family issues and Fiske would leave MYH's office around 2:30 p.m. at least once per week to pick up her children from school. Id. ¶¶ 9-10.

In September 2011, Fiske informed Cartter that she was pregnant. Id. ¶ 11. Upon hearing the news, Cartter congratulated Fiske, but expressed concern that he would have to plan for different circumstances because Fiske's pregnancy may impact her decision to come back to work. Id. ¶ 15. Cartter explained that when his partner had their third child, she opted not to return to work. Id. Afterwards, Fiske's conditions of employed changed at least to the extent that Cartter became more "nitpicky" regarding Fiske's work product, but Fiske also asserts that her meetings became less frequent with Cartter. Id. ¶ 13. No other MYH employee has ever taken maternity leave. Id. ¶ 35.

As Online Director of Marketing, Fiske was part of MYH's leadership team and steering committee and took part in at least some regular meetings to discuss company issues. Id. ¶ 18.

[1] Defendants have not responded to Plaintiffs' "further statement of material facts," SOF ¶¶ 32-84, instead moving her supporting affidavit, D. 38.

Toward the end of 2011, MYH was planning on conducting clinical trials of its "core product," the Daily Challenge. Id. ¶ 19. The parties agree that at this time, the clinical trial budget was under-allocated. Id. ¶ 20. MYH contends that at least some of its marketing dollars for 2012 were repurposed to fund the clinical trial, though some of these resources were used for marketing the clinical trial itself. Id. ¶ 23. Defendants claim to have attempted to save MYH's marketing department and Fiske's job. Id. ¶¶ 24-25. As part of its cost-cutting efforts, MYH terminated its contract with its outside public relations firm at the end of 2011. Id. ¶ 26.

Against this backdrop, Fiske was terminated from her employment on January 27, 2012. Id. ¶ 7. The position of Online Marketing Director was eliminated. Id. ¶ 28. Fiske was told that budgetary constraints prompted the elimination of her position. Id. ¶ 29. Some of Fiske's job duties were shifted to other employees and to Healthways. Id. ¶¶ 64-69. Although Cartter asserted at his deposition that Fiske's salary was not the only reason she was terminated, MYH's Seth Lawton received a $10,000 pay increase in 2012 after taking some of Fiske's other duties. Id. ¶¶ 49, 54. In their position statement before the Massachusetts Commission Against Discrimination ("MCAD"), Defendants asserted that Fiske was terminated due to cuts to the marketing budget rendering Fiske's services unnecessary. Id. ¶ 56.

During the relevant time, there was a three or four to one male to female ratio at MYH. Id. ¶ 36. Of the three employees terminated from MYH since 2010, two were female and neither was terminated for performance reasons. Id. ¶ 37.

IV. Procedural History

Fiske commenced this action in Suffolk Superior Court on December 31, 2013. D. 16 at 1. Defendants removed this action to this Court on March 4, 2013. D. 1. Defendants subsequently moved for summary judgment, D. 29, and to strike Fiske's affidavit filed in

opposition to summary judgment on January 15, 2014. D. 38. Healthways moved to quash deposition subpoenas on January 16, 2014. D. 40. On January 24, 2014, Fiske moved to extend the discovery deadline and to increase the deposition limit from the presumptive limit of ten to fourteen. The Court heard oral argument on these matters on March 5, 2014, D. 52, taking them under advisement.

V. Discussion

A. Defendants' Motion to Strike

To decide Defendants' motion for summary judgment, the Court must determine what evidence it can consider. See Fed. R. Civ. P. 56(c). Defendants have moved to strike Fiske's affidavit submitted in opposition to the motion for summary judgment, arguing that "[a] party opposing summary judgment may not manufacture a dispute of fact by contradicting earlier sworn deposition testimony. D. 38 at 1 (citing Torrech-Hernandez v. General Electric Co., 519 F.3d 41, 47 (1st Cir. 2008)).

That is, under Torrech-Hernandez, a court, when considering the evidence in deciding summary judgment, may disregard the non-moving party's self-serving affidavit where it conflicts with its own sworn deposition testimony. Id. at 47. It is also true that "[h]earsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment." Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). Nor can the Court consider sworn allegations that are not based upon personal knowledge. Cadle Co. v. Hayes, 116 F.3d 957, 961 (1st Cir. 1997) (noting that "[s]tatements made upon information and belief, as opposed to personal knowledge, are not entitled to weight in the summary judgment balance"). Here, Fiske has made certain attestations that are based upon hearsay. Paragraph 26 states what a "female contractor to MYH" told Fiske. In addition, there are statements that the Court concludes are not

based upon personal knowledge. For example, Fiske makes numerous attestations regarding the responsibilities and salary of her subordinates after MYH terminated her and she was no longer working there. D. 33-3 ¶¶ 16, 18, 20, 21, 28, 31. In addition, she made an attestation regarding MYH's denial of another employee's vacation pay. Id. ¶ 25. The Court therefore STRIKES paragraphs 16, 18, 20, 21, 25, 26 and 31 *in toto* and 28[2] to the extent it purports to provide information outside of Fiske's personal knowledge.[3] Fiske's affidavit otherwise stands and the Court has considered the remainder of same in resolving the pending motion for summary judgment.

B. Defendants' Motion for Summary Judgment

1. Defendants Have Not Demonstrated an Absence of Any Genuine Issue of Fact Precluding Summary Judgment on Fiske's Discrimination Claims

a. Standards for Liability Under the PDA, Title VII and Mass. Gen. L. c. 151B

The PDA prohibits discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k). Where, as here, a plaintiff does not suggest the existence of direct evidence explicitly showing intentional discrimination, i.e., a "smoking gun," Smith v. F. W. Morse & Co., Inc., 76 F.3d 413, 421 (1st Cir. 1996), the analytic framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) governs claims under the PDA. Martinez-Burgos v. Guayama Corp., 656 F.3d 7, 12 (1st Cir. 2011) (applying McDonnell Douglas to PDA claims).

[2] At oral argument, there was some suggestion that Defendants' motion was limited to these paragraphs. This does not compel a different result here.

[3] The Court does not credit facts in Fiske's statement of facts to the extent that they rely on these paragraphs. As Defendants has not responded to the other facts asserted in Fiske's statement of facts, any remaining facts asserted by Fiske are "deemed admitted." D. Mass. L.R. 56.1.

The three stages of the McDonnell Douglas analysis as applied to pregnancy discrimination cases are "well documented." Weston-Smith v. Cooley Dickinson Hosp., Inc., 153 F. Supp. 2d 62, 70 (D. Mass. 2001). First, a plaintiff must establish by a preponderance of the evidence a prima facie case that "(1) she is pregnant (or has indicated an intention to become pregnant), (2) her job performance has been satisfactory, but (3) the employer nonetheless dismissed her from her position (or took some other adverse employment action against her) while (4) continuing to have her duties performed by a comparably qualified person." Smith, 76 F.3d at 421 (1st Cir. 1996). The burden of establishing a prima facie case creates a rebuttable presumption "that the employer unlawfully discriminated against the employee." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

At the second stage, the burden shifts to the employer to produce "an explanation to rebut the prima facie case–that the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason,'" and "'[t]he defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993) (quoting Burdine, 450 U.S. at 254-55 & n.8). At this stage, the Court must determine whether the employer has met merely its burden of production and not necessarily its burden of persuasion. Id. at 509. If an employer carries its burden at this stage, "the presumption of unlawful discrimination disappears." Weston-Smith, 153 F. Supp. 2d at 70 (citation omitted).

Finally, at the third and final stage of the McDonnell Douglas analysis, the burden shifts back to plaintiff, who has the ultimate burden of persuasion to establish by a preponderance of the evidence "that the legitimate reasons offered by the defendant were not its true reasons, but

were a pretext for discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (internal quotations omitted). In the context of PDA claims, federal law "mandates that an employer must put an employee's pregnancy (including her departure on maternity leave) to one side in making its employment decisions" but "does not command that an employer bury its head in the sand and struthiously refrain from implementing business judgments" simply because they affect a pregnant employee, since federal law "requires a causal nexus between the employer's state of mind and the protected trait (here, pregnancy)," Smith, 76 F.3d at 424-425. The plaintiff must persuade the trier of fact that the employer was motivated by discriminatory animus and that the employer's assertions are pretextual. "The mere coincidence between [the plaintiff's pregnancy] and the employment decision may give rise to an inference of discriminatory animus." Id. at 425 (citing St. Mary's Honor Ctr., 509 U.S. at 507-08). "To survive summary judgment, of course, the plaintiff need not carry that burden entirely; she needs to show merely that after viewing the undisputed facts in the light most favorable to her position, one or more genuine issues of material fact remain that, if resolved in her favor, a reasonable jury could find that the plaintiff had carried her ultimate burden." Gervais v. Franklin Pub. Sch., No. 09-10719-DJC, 2012 WL 988026, at *10 (D. Mass. Mar. 23, 2012) (citing St. Mary's Honor Ctr., 509 U.S. at 507-08).

Fiske has also invoked the "mixed-motive" theory of liability. D. 32 at 2. Although the First Circuit has not "definitively disentangled or reconciled" the mixed-motive approach from McDonnell Douglas, Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 n. 8 (1st Cir. 2009), the two analyses are separate avenues of recovery. Seetharaman v. Stone & Webster, Inc., No. 05-11105-RWZ, 2009 WL 1364706, at *4 (D. Mass. May 11, 2009); see also White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008) (holding that "the McDonnell

Douglas/Burdine burden-shifting framework does not apply to the summary judgment analysis of Title VII mixed-motive claims") (emphasis in original). Under this framework, codified at 42 U.S.C. § 2000e–2(m), where there is evidence of both discriminatory and non-discriminatory animus, a "plaintiff's burden is tempered so that she need prove only that the discriminatory action was a motivating factor in an adverse employment decision." Patten v. Wal–Mart Stores East, Inc., 300 F.3d 21, 25 (1st Cir. 2002). "[T]he employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff." Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003). To avail itself of the affirmative defense, the employer must "demonstrate that it would have taken the same action in the absence of the impermissible motivating factor." Desert Palace, 539 U.S. at 94 (citation and alterations omitted0)

Massachusetts law prohibits employers from discriminating on the basis of sex, Mass. Gen. L. c. 151B, § 4(1). Wheelock Coll. v. Mass. Comm'n Against Discrimination, 371 Mass. 130, 138 (1976) (adopting the McDonnell Douglas framework with respect to claims arising under chapter 151B); see also Chief Justice for Admin. & Mgmt. of the Trial Court v. Mass. Comm'n Against Discrimination, 439 Mass. 729, 732 (2003); but see Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 45 (2005) (noting that a difference between the state and federal applications of the McDonnell Douglas framework is that the fourth element of the state law framework "in a reduction in force case" does not require the plaintiff to show that the employer continued to have her duties performed by a comparably qualified person; instead, the plaintiff can satisfy the fourth element "by producing some evidence that her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination").

Courts interpreting chapter 151B "may look to" but "are not, however, bound by interpretations of [Title VII] statute in construing [c. 151B]." College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination, 400 Mass. 156, 163 (1987). In many respects, the framework for resolving chapter 151B pregnancy discrimination claims is very similar to the federal framework for resolving claims brought under the PDA:

> With respect to summary judgment, it follows that, if a plaintiff has produced evidence sufficient to support a prima facie case of discrimination, and has further offered evidence sufficient to support a determination either that the employer's reason was a pretext or that the actual reason for the adverse hiring decision was discrimination, summary judgment for a defendant is inappropriate. The ultimate issue of discrimination, raised by the plaintiff's and defendants' conflicting evidence as to the defendants' motive, is not for a court to decide on the basis of affidavits, but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses.

Blare v. Husky Injection Molding Sys. Bos., Inc., 419 Mass. 437, 445 (1995). In addition, Massachusetts courts have adopted the "mixed-motive" doctrine codified in Title VII. See Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 112-13 (2009) (citations omitted).

b. Fiske Has Identified Some Evidence that MYH's Motives Were at Least Discriminatory in Part

There is no dispute that Fiske meets the first, second and third prongs of the McDonnell Douglas prima facie case. She was pregnant at the time of her termination, SOF ¶ 7, 11, she was performing her job satisfactorily, id. ¶ 59, and she was nonetheless terminated, id. ¶ 7. As to the fourth element, however, whether Fiske's position "remained open or was filled by someone else with similar qualifications," Prescott v. Higgins, 538 F.3d 32, 40 (1st Cir. 2008), Fiske has conceded that "the position of Online Marketing Director was eliminated." SOF ¶ 28.

Fiske does not argue to the contrary in her opposition, D. 32, but instead focuses on the ways in which MYH's marketing operations continued after MYH terminated her, arguing that the responsibilities were not eliminated, but merely shifted elsewhere to Seth Lawton, Eugenie

Olson and Alicia Benjamin. Id. ¶ 49. "Yet, a position elimination defense is not defeated merely because another employee, already on the payroll, is designated to carry out some or all of the fired employee's duties in addition to his own, or because those duties are otherwise reallocated within the existing work force." Smith, 76 F.3d at 423.

Fiske cites Kiesling v. SER-Jobs for Progress, Inc., 19 F.3d 755 (1st Cir. 1994) to support her argument that where other employees assume the terminated employee's responsibilities, this is sufficient to establish the fourth prong of the McDonnell Douglas prima facie case. Id. at 760. Although this may be true as a general matter, "[t]here is little doubt that an employer, consistent with its business judgment, may eliminate positions during the course of a downsizing without violating Title VII even though those positions are held by members of protected groups (pregnant women included)." Smith, 76 F.3d at 422. The only caveat to this principle is that "an employer who selectively cleans house cannot hide behind convenient euphemisms such as 'downsizing' or 'streamlining.'" Id.

Ultimately, this is not a conflict that the Court must resolve here, for as discussed above, Fiske has also invoked the mixed-motive theory of liability. A Title VII plaintiff can establish a violation of Title VII under this theory by showing that discrimination on the basis of sex – and by extension pregnancy – played a role in the plaintiff's termination. Desert Palace, 539 U.S. at 101 (citing 42 U.S.C. § 2000e-2(m)). Few cases have analyzed the implications of Desert Palace and the statutory language it interprets in cases where the employer has presented evidence at summary judgment that it eliminated the plaintiff's position. Some courts have found that mixed-motive claims rise and fall with traditional disparate treatment claims brought under the McDonnell Douglas framework. See Robertson v. Alltel Info. Servs., 373 F.3d 647, 652 (5th Cir. 2004) (noting that where the plaintiff offers no evidence from which a fact finder can infer

discriminatory intent, the result of the mixed motives inquiry established in Desert Palace is the same as the result under the McDonnell Douglas pretext inquiry); Gonzalez v. Temple University, No. 11-7758, 2013 WL 1482623, at *7 n.6 (E.D. Pa. Apr. 11, 2013) (discrediting plaintiff's argument that "his position was eliminated as part of a 'faux' restructuring"); Miller v. Cleveland Cnty., No. 10-620-C, 2011 WL 2634190, at *3-4 (W.D. Okla. July 5, 2011) (allowing summary judgment both on McDonnell Douglas and Desert Palace claims where Plaintiff presented no evidence of discrimination other than his allegation that his performance was satisfactory and subject to a reduction in force). Where a plaintiff presents some evidence that the employer's motivations for eliminating the plaintiff's position was mixed, however, courts have denied summary judgment. See, e.g., Pucci v. Nineteenth Dist. Court, 565 F. Supp. 2d 792, 811 (E.D. Mich. 2008), aff'd in part, rev'd in part on other grounds, 628 F.3d 752 (6th Cir. 2010).

Fiske has at least raised a genuine issue of fact regarding MYH's motivations in terminating her. Had Fiske only raised Cartter's comment about whether Fiske would return to work after her maternity leave, SOF ¶ 15, this might be a case where an employer's "stray remarks in the workplace . . . [are] insufficient to prove [an] employer's discriminatory animus." Shorette v. Rite Aid of Maine, Inc., 155 F.3d 8, 13 (1st Cir. 1998) (citation and internal quotation marks omitted). Even so, such a remark can be indicative of discriminatory intent. Eslinger v. U.S. Cent. Credit Union, 866 F. Supp. 491, 497-98 (D. Kan. 1994) (considering employer's remark expressing doubt that pregnant women return to work after giving birth as evidence of discriminatory intent).

Here, however, Fiske has shown more than one isolated "stray remark." There is at least arguably some evidence that Fiske's pregnancy played at least some role in her termination.

Cartter voiced concerns about Fiske's ability to continue to serve and the company terminated her while she was pregnant. SOF ¶¶ 7, 15. Accordingly to Fiske, Cartter also became more critical of her work after her announcement. SOF ¶ 34. Although Defendants assert that the entire marketing division was repurposed to pay for MYH's clinical trial, id. ¶ 23, Fiske has presented at least some evidence that Fiske's former subordinates continued to perform duties related to marketing after MYH terminated her. For example, MYH conducted its efforts to recruit users to the clinical trial through Facebook advertising, which was at the heart of Fiske's job duties prior to her termination. Id. ¶ 47. Lawton, Benjamin and Olson also conducted other marketing work after MYH terminated Fiske. Id. ¶ 49. Lawton conducted Facebook advertising, id. ¶ 64, and Olson attended a conference for marketing purposes. Id. ¶ 66. MYH never terminated any of these non-pregnant employees. Id. ¶ 55. In fact, Lawton a received a salary increase after MYH terminated Fiske. Id. ¶ 54. As "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination," St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993) (alterations omitted), this lends support to Fiske's position that her pregnancy at least played a part in her termination. See 42 U.S.C. § 2000e-2(m).

In their reply, Defendants argue that Lawton and Benjamin performed different job functions than Fiske did during her tenure. D. 37 at 6. Certainly if true, this would undercut Fiske's claim that her job was not eliminated. But Fiske has presented some evidence to the contrary, and "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

Defendants argue that this Court's prior decision in Gervais controls the outcome here. In that case, however, there was a complete absence of evidence offered by the plaintiff for her contention that "her position was not dissolved, but was subsequently filled with an individual for whom no serious claim has been made was more or better qualified," Gervais, 2012 WL 988026, at *12, and the employee there did not raise the mixed-motive challenge. Moreover, unlike Fiske, Gervais was a year-to-year employee who had not been performing adequately and whose contract her employer simply chose not to renew. Id. at *6-7. Accordingly, the Court finds that Fiske has raised sufficient evidence to defeat summary judgment here on both her state and federal claims. The Court DENIES the motion for summary judgment to the extent Defendants seek dismissal of Fiske's claims under Title VII, the PDA and c. 151B.

2. Defendants Are Also Not Entitled to Summary Judgment on Fiske's FMLA Claim

a. Standards for Liability Under FMLA

The FMLA entitles eligible employees to twelve weeks of leave because of the birth of a child. 29 U.S.C. § 2612. The FMLA also prohibits employers from interfering with the exercise of this entitlement and from retaliating against any employee who exercises rights under the FMLA. 29 U.S.C. § 2615. Department of Labor regulations require that eligible employees "[be] employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite." 29 C.F.R. § 825.110(a)(3). Similarly, a "covered employer" is "any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 C.F.R. § 825.104(a).

b. Summary Judgment is Inappropriate on Plaintiff's FMLA Claim

Defendants argue that they are entitled to summary judgment on Fiske's FMLA claim because it terminated her prior to her maternity leave and therefore did not deny Fiske her benefits. D. 29-1 at 12-13. Although the First Circuit has not decided whether the fact that an employee was not eligible for leave at the time she requested it precludes her from stating a FMLA claim, the Eleventh Circuit recently decided that failure to hold otherwise would frustrate the purpose of the statute. Pereda v. Brookdale Senior Living Cmty., Inc., 666 F.3d 1269, 1274 (11th Cir. 2012) (holding that "because the FMLA requires notice in advance of future leave, employees are protected from interference prior to the occurrence of a triggering event, such as the birth of a child"). This Court finds this reasoning persuasive and declines to grant the motion as to the merits of this claim. Accordingly, Defendants' argument as to the merits of Fiske's FMLA claim fails.

Defendants' primary argument with respect to Fiske's FMLA claim, however, is that none of the defendants are covered employers under the FMLA. D. 29-1 at 12. Fiske correctly notes, however, that Defendants' assertion that MYH has never had more than 50 employees has no evidentiary support. This alone warrants a finding that Defendants have not met their burden on summary judgment on this claim.

Even if Defendants had met their burden, Fiske asserts that Defendants MYH, its parent company Healthways and its contractor Insperity are "co-employers." D. 32 at 14. As between a parent company and a subsidiary, the employees of both entities may be considered a single employer for FMLA purposes under the "integrated employer" test. Engelhardt v. S.P. Richards Co., Inc., 472 F.3d 1, 4-5 (1st Cir. 2006) (discussing Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965) and 29 C.F.R. § 825.104(c)(1) and (2) which delineate common management, interrelation between operations,

centralized control of labor relations and common ownership as factors to consider in determining whether there is an "integrated employer"). As of the date of Fiske's opposition to the motion for summary judgment, Plaintiff had not deposed any representatives or employees of Insperity or Healthways. This additional discovery may bear on Fiske's contention that Insperity and/or Healthways were Fiske's co-employer(s). Accordingly, a decision on summary judgment on this ground is premature. The Court therefore ALLOWS the relief sought by Fiske under Fed. R. Civ. P. 56(d) and DENIES summary judgment on Fiske's FMLA claim without prejudice.

3. Defendants Are Also Not Entitled to Summary Judgment on Fiske's MMLA and Retaliation Claims

Defendants similarly argue that they are entitled to summary judgment on Fiske's MMLA and retaliation claims because she had not yet taken maternity leave at the time she was terminated. D. 29-1 at 12-13. Just as Massachusetts courts "have often applied Federal case law interpreting cognate Federal antidiscrimination statutes when looking to interpret [Mass. Gen. L.] c. 151B," the Supreme Judicial Court has followed federal courts in their application of the FMLA when deciding issues related to the MMLA. Global NAPs, Inc. v. Awizus, 457 Mass. 489, 507-08 (2010). Just as it would frustrate the purpose of the FMLA to allow employers safe harbor by firing employees who have stated their intent to engage in protected conduct, but who have not yet engaged in the protected conduct, so too would it frustrate the MMLA's purposes to grant summary judgment to Defendants here. Accordingly, to the extent that Defendants have moved for summary judgment on Fiske's MMLA and related c. 151B, §4(4) retaliation claim, that motion is DENIED.

C. Discovery Motions

1. The Motion to Quash Is Granted in Part

Fiske has subpoenaed Healthways' President and CEO Ben Leedle and its Executive Vice President and CFO, Alfred Lumsdaine. Healthways has moved to quash these subpoenas, arguing that their testimony would have limited evidentiary value, would be cumulative of other discovery in this case and would be an undue burden on the deponents. D. 40 at 2. The Court notes that Fiske "could have noticed the deposition of the defendant . . . pursuant to Rule 30(b)(1), [because the deponents are] officer[s], director[s] or managing agent of the defendant[, here, Healthways]." Contardo v. Merrill Lynch, Pierce, Fenner & Smith, 119 F.R.D. 622, 623 (D. Mass. 1988) (citing GTE Products Corp. v. Gee, 115 F.R.D. 67 (D. Mass. 1987)). For this reason, the Court dispenses with Fiske's argument that Healthways lacks standing to quash subpoenas directed to its officers, see D. 43 at 1.

In either case, both Rule 26 and Rule 45 permit the Court to limit discovery when it is unduly burdensome or cumulative. Fed R. Civ. P. 26(b)(2)(C), 45(c)(3)(A). Healthways argues that such limitation is appropriate here because Leedle and Lumsdaine's only knowledge pertaining to this case is that "the decision to terminate Ms. Fiske was made by its subsidiary MeYou Health and Mr. Cartter, a fact that has already been established ad nauseam in discovery." D. 40 at 2. Fiske counters that, during his deposition, Cartter testified that he discussed with Leedle the elimination of the marketing department. D. 43 at 3. The reasons for eliminating the department – and Fiske's position along with it – are central to this case. Accordingly, the Court finds that Leedle has relevant testimony to offer here and that the purpose of this deposition does not appear to amount to, as Healthways suggest, mere harassment.

In addition, as discussed above, the common management of MYH and Healthways, interrelation between their operations, the centralized control of their labor relations and the nature of their common ownership is relevant to Fiske's claim that Healthways was Fiske's "co-

employer" for the purposes of her FMLA claim. See 29 C.F.R. § 825.104. Presumably, Healthways' chief executive officer would be in a good position to testify as to these issues.

As to Lumsdaine, unlike Leedle, Fiske has made no such particularized showing as to the relevance of his testimony to this case and there has been no demonstration that the topics of Lumsdaine's deposition would differ from those in Leedle's. In light of this circumstance and the fact that Fiske has already anticipated deposing more than ten individuals, D. 45; see Fed. R. Civ. P. 30(a)(2)(A)(i) (requiring leave of the Court to conduct more than ten depositions), the Court will grant the relief that Healthways seeks and quash the subpoena as to Lumsdaine.

2. The Court Grants the Motion to Increase Deposition Limit to Fourteen in Part

Fiske has moved to increase the limit on depositions to a total of fourteen. Although the presumptive limit of depositions is ten, courts may grant parties leave to conduct more than ten depositions. Id. Courts generally grant such requests upon a showing of a demonstrable need to do so. See United States ex rel. Banigan v. Organon USA Inc., No. 07-12153-RWZ, 2013 WL 4736844, at *2-3 (D. Mass. Aug. 30, 2013); Coach, Inc. v. Gata Corp., No. 10-CV-141-LM, 2011 WL 198015, at *2-3 (D.N.H. Jan. 20, 2011); cf. San Francisco Health Plan v. McKesson Corp., 264 F.R.D. 20, 21 (D. Mass. 2010) (denying motion in part because party seeking leave made no showing as to necessity).

Here, Fiske has conducted six depositions as of the date of her motion. D. 45 at 1. In addition, Fiske had noticed the following depositions: (1) Josee Poirier, Director of Program Design and Research, MeYou Health; (2) Ben R. Leedle, Jr., Chief Executive Officer of Healthways; (3) Alfred Lumsdaine, Chief Financial Officer of Healthways; (4) Alicia Benjamin, former MeYou Health employee; (5) Seth Lawton, former MeYou Health employee; (6) Defendant Healthways, Inc. (pursuant to F.R.C.P. 30(b)(6)); (7) Defendant MeYou Health, Inc.

(pursuant to F.R.C.P. 30(b)(6)); and (8) Defendant Insperity PEO Services, L.P. (pursuant to F.R.C.P. 30(b)(6)). By the date of Defendants' opposition, Fiske had deposed Insperity's corporate representative and had scheduled a deposition for Healthways' representative. D. 48 at 2.

The Court has already determined that Fiske's deposition of Lumsdaine is unnecessary and that a deposition of Ben Leedle is appropriate in this case. The depositions of Lawton and Benjamin are reasonably calculated to lead to discoverable evidence here for two reasons: first, as Fiske's former subordinates at MYH, they may have information regarding the nature of Fiske's performance; and second, Fiske alleges that these two employees took on at least some of Fiske's responsibilities after her termination, undercutting Defendants' assertion that Fiske's position was truly eliminated. As for Poirier, Fiske asserts that as the head of research, Poirier has knowledge regarding MYH's clinical trial, which Fiske alleges was a pretext for her termination. D. 44 at 3. However, Fiske has made no showing that Poirier has knowledge regarding the funding of the clinical trial and already has had occasion to depose Cartter and Erin-McGarry Sullivan, who by all accounts were the ones responsible for allocating the funds for the trial themselves. SOF ¶¶ 18-27. Accordingly, the Court finds that Poirier's deposition would be cumulative. Finally, Fiske asks to depose representatives of MYH's corporate representative. Although Defendants suggest that MYH would designate Cartter, whom Fiske has already deposed, "[j]ust because [a party] may choose to designate certain individuals as its corporate designees whose fact depositions have already occurred does not insulate [the party] from the requirements of Rule 30(b)(6). Such a finding would eviscerate Rule 30(b)(6)." Ice Corp. v. Hamilton Sundstrand Corp., No. 05-4135-JAR, 2007 WL 1500311 (D. Kan. May 21, 2007). Fiske may take MYH's 30(b)(6) deposition.

Defendants suggest that Fiske has squandered her depositions by electing to depose former co-workers who did not supervise her. D. 48 at 2. They simultaneously acknowledge the purpose of these depositions, which was to address Fiske's contention that the marketing department was not eliminated and that the purported elimination was a pretext for her termination. Id. That these individuals might have testimony which would be relevant to this issue undercuts any suggestion of the impropriety of same. Accordingly, the Court ALLOWS Fiske's request in part only to the extent she wishes to depose any of the Rule 30(b)(6) designees, Leedle, Benjamin and Lawton.[4]

3. The Court Allows the Motion to Extend the Discovery Deadline

In light of the foregoing, the Court will ALLOW the motion to extend the discovery deadline, but only to the extent to address outstanding discovery consistent with this Order. Said discovery must be completed within 30 days of this Order.

VI. Conclusion

For the aforementioned reasons, the Court ALLOWS the motion to strike, D. 38, in part; DENIES the motion for summary judgment, D. 29; ALLOWS the motion to increase the deposition limit to 14, D. 45, in part and DENIES it in part; ALLOWS the motion in quash, D. 40, in part and DENIES it in part; and ALLOWS the motion to extend the deadline for fact discovery, D. 44.

So Ordered.

/s/ Denise J. Casper
United States District Judge

[4] To extent that any depositions have been taken since the date of the parties' briefing of this matter, nothing in this Memorandum and Order should be construed as limiting Fiske from deposing any of the Rule 30(b)(6) designees, Lawton, Benjamin or Leedle.

Exhibit H

Email to F. Pagano, Oct. 2, 2016 (second).

- **Attachment PaganoLetter.pdf —** Included in this JCApx at Exhibit H.a, *infra*.

Subject: Re: New/additional material relevant to Complaints of Judicial Misconduct
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 10/02/16 22:47
To: Florence_Pagano@ca1.uscourts.gov

In the letter I emailed you (and also the hard-copy I put in the mailbox) this morning, the following typos should be corrected:

- p. 1: "(District and Appellate)" --> "(District and Appeals)".
- p. 1, fn. 3: "and/all" --> "any/all".

A corrected version of the PDF is attached hereto.

On 10/02/16 09:25, Walt Tuvell wrote:

> Ms. Pagano -
>
> Please see the following three PDF documents, attached hereto:
>
> - Letter to you, explaining new material relevant to my two Complaints of Judicial Misconduct. (As noted in the PDF fn. 1, I am also sending you a hard-copy of the letter via U.S. mail.)
> - Casper's opinion in the case of Shervin v. Partners HealthCare.
> - Casper's opinion in the case of Fiske v. MeYou Health.
>
> Thank you.
>
> - Walt Tuvell

Attachments:

PaganoLetter.pdf 364 KB

Exhibit H.a

Attachment PaganoLetter.pdf to email of Oct. 2, 2016 (second) (Exhibit H, *supra*).

Corrected version of Exhibit G.a.

Filed with Supreme Court in Supplement to Petition for Writ of Certiorari (Oct. 13, 2016).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

October 2, 2016

Dear Ms. Pagano:

This letter[1] is to inform you (Judicial Council of the First Circuit) of two pieces of **new/additional material** I have discovered this morning, relevant to the two Complaints of Judicial Misconduct that I have filed with your office (September 12, 2016).[2] *Both* pieces of this new material apply to *both* of the Complaints (District and Appeals) I have filed.[3] This new material is important, and should be distributed immediately to all appropriate members of the Judicial Council.

It will be recalled that my two complaints, as filed, have at their core the fact that the judges (both district and appellate) **refused to consider Plaintiff's Statement of Material Facts (PSOF)** that was filed to the district court in my case at summary judgment stage. (I am the plaintiff.) The new material I am transmitting here **proves that Casper <u>does indeed consider PSOFs in other cases</u>** she adjudicates at summary judgment. This **proves,** therefore, that Casper did indeed *knowingly target* my case differentially/discriminately/falsely — exactly as alleged in my complaint(s) — thereby supplying **new/additional <u>irrefutable proof</u> of judicial miscon-**

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1 • Delivered by both email and U.S. mail.

2 • And which, as you know, has been forwarded to the U.S. Supreme Court, in the Supplemental Brief to my Petition for Writ of Certiorari №16-343.

3 • *Both* pieces of additional material presented here are excerpts from opinions of Judge Casper, illuminating her complained-of behavior in my case (District Docket №13-11292-DJC). However, since the Appellate Courts (*both* panel and *en banc*) in my case (Appellate Docket №15-1914) whole-heartedly *adopted* Casper's opinion, any/all complaints lodged against the district judge apply equally as complaints against the appellate judges too. (I am certain that I could additionally find similar material relating directly to the appellate judges I have accused of judicial misconduct, but that is an exercise I have not attempted.)

duct (by both Casper and the appellate judges, as explained in ƒ3 *supra*).

The new material presented here consists of the following two excerpts from two other opinions Casper has issued at summary judgment stage. As presented here, the new material is formatted straightforwardly (not reformatted) as screenshots-with-comments/emphasis/highlighting from the two published PDF opinions. As a convenience to you, I am also forwarding to you (as email attachments) full copies of the two published PDF opinions.

- *Shervin v. Partners HealthCare System (№10-cv-10601, March 7, 2014), ℘2:*

II. Facts

As discussed in the Court's legal analysis, a number of the material facts in this case remain disputed. To the extent a material fact is undisputed, the Court refers to either Harvard's DSOF Statement of Material Facts, D. 153, or the remaining Defendants' Amended Joint Statement of Material Facts, D. 172, and Dr. Shervin's responses to same, D. 230 and D. 229, respectively. To the extent Dr. Shervin raises additional allegations, (i.e., disputed facts) the Court refers only to her additional PSOF Statement of Material Facts, D. 217, or her responses (RespDSOF) to the Defendants' Statements of Material Facts, again D. 229 and D. 230.

- *Fiske v. MeYou Health, Inc. (№13-10478-DJC, June 20, 2014), ℘3:*

III. Factual Background

The Court draws the facts of this case from the parties' statements of facts (DSOF & PSOF) and their responses (RespDSOF & RespPSOF) to same. D. 29-2, 33 (collectively "SOF").[1] MYH was founded in 2009 and is a

[1] Defendants have not responded to Plaintiffs' "further statement of material facts," (FurtherPSOF) SOF ¶¶ 32-84, instead moving her supporting affidavit, D. 38.

Sincerely yours,

Walter E. Tuvell

Exhibit I

Email to F. Pagano, Oct. 3, 2016 (first).

- **Attachment PaganoLetter2.pdf —** Included in this JCApx at Exhibit I.a, *infra.*
- **Attachment Casper=Breda-v-McDonald.pdf —** Included in this JCApx at Exhibit I.b, *infra.*
- **Attachment Casper=Griffin-v-AdamsAssoc.pdf —** Included in this JCApx at Exhibit I.c, *infra.*
- **Attachment Casper=Sanchez-v-NECCO.pdf —** Included in this JCApx at Exhibit I.d, *infra.*
- **Attachment Casper=Bailey-v-PWC,Docket.pdf —** Included in this JCApx at Exhibit I.e, *infra.*
- **Attachment Casper=Bailey-v-PWC.pdf —** Included in this JCApx at Exhibit I.f, *infra.*
- **Attachment Casper=Boone-v-OldColonyYMCA,Docket.pdf —** Included in this JCApx at Exhibit I.g, *infra.*
- **Attachment Casper=Boone-v-OldColonyYMCA.pdf —** Included in this JCApx at Exhibit I.h, *infra.*
- **Attachment Casper=Marchinuk-v-Lew.pdf —** Included in this JCApx at Exhibit I.i, *infra.*
- **Attachment Casper=Joyce-v-TheUpperCrust.pdf —** Included in this JCApx at Exhibit I.j, *infra.*

Subject: More material relevant to Complaints of Judicial Misconduct
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 10/03/16 13:56
To: Florence_Pagano@ca1.uscourts.gov

Ms. Pagano -

Please see the attached letter (PaganoLetter2.pdf) for explanation of this email and its attachments.

- Walt Tuvell

Attachments:

PaganoLetter2.pdf	620 KB
Casper=Boone-v-OldColonyYMCA,Docket.pdf	49.1 KB
Casper=Bailey-v-PWC,Docket.pdf	87.3 KB
Casper=Joyce-v-TheUpperCrust.pdf	45.8 KB
Casper=Marchinuk-v-Lew.pdf	38.4 KB
Casper=Boone-v-OldColonyYMCA.pdf	38.0 KB
Casper=Bailey-v-PWC.pdf	56.1 KB
Casper=Sanchez-v-NECCO.pdf	42.2 KB
Casper=Griffin-v-AdamsAssoc.pdf	63.2 KB
Casper=Breda-v-McDonald.pdf	47.0 KB

Exhibit I.a

Attachment PaganoLetter2.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

October 3, 2016

Dear Ms. Pagano:

This letter[1] is a *follow-up* to the previous letter I sent you (yesterday).

After a little more (non-exhaustive) research, I have discovered some **additional examples** of *other* cases adjudicated by Judge Casper, of the same general nature as mine (employment/labor, discrimination/retaliation, summary judgment, etc.) — which involve Casper ***correctly* citing to plaintiff/nonmovant's Statement of Material Facts (PSOF)** (as is required by law/rule, FRCP-LR 56.1).[2] These examples therefore provide additional instances contrasting with her *wrongful* actions in **my** case (where she ***falsely* refused to cite to *my* PSOF**) — thereby additionally supporting my complaint(s) of **Judicial Misconduct** (both District and Appeals) in **my** case.

The formatting of the listed items, *infra* (in no particular order), follows that of my previous letter. Also as previously, I am providing you with full PDF copies of Casper's opinions (via email), for your convenience.

- *Griffin v. Adams & Assoc. (№14-12668-DJC, June 28, 2016), ℘3:*

III. Factual Background

DSOF & PSOF

The following facts are drawn from the parties' statements of material facts, D. 47, D. 53, and, unless otherwise noted, are undisputed.

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1 • Delivered by both email and U.S. mail.

2 • Interestingly, I have *also* found **motion to dismiss** (*parallel* to **summary judgment**) employment cases by Casper, where she *correctly* cites to non-movant's **Complaint** (*parallel* to **PSOF**); e.g., *Breda v. McDonald (№15-13263-DJC, Dec. 23, 2015).*

- *Sanchez v. NECCO (№14-11353-DJC, August 14, 2015), ℘2:*

III. Factual Allegations

Unless otherwise noted, all facts are drawn from Sanchez's statement of material facts, D. 57, and Local 348's statement of material facts, D. 52.

PSOF

DSOF

- *Bailey v. PWC (№14-10141-DJC, November 18, 2015), ℘2:*

III. Factual Background

A. Independent Foreclosure Review Projects

Bailey was hired by PwC as a switchboard operator in 1995. D. 53 ¶ 15. During her first ten years at PwC, she worked as a hotel administrator, receptionist and executive assistant. Id. ¶¶ 16-18. In 2005, Bailey became an associate in the Capital Markets group supervised by PwC principal Scott Dillman. Id. ¶¶ 22-23.

PSOF = D.53 (DSOF = D.35)

- *Boone v. Old Colony YMCA (№13-13131-DJC, November 17, 2015), ℘3:*

During her employment at YouthBuild, Boone received reports from students that McHugh, a YouthBuild teacher, had made racially offensive comments. An African-American student reported that McHugh told her: "There are more African American people on Welfare than Whites; you should be ashamed of yourself. I know you all feel bad and might want to donate to the kids in Africa but I could give a damn. I change the channel and keep eating my food." D. 36-1 at 2. A student from Cape Verde said that McHugh said "he could care less about the kids in Africa . . . and there are enough people like that on welfare anyway." D. 36-2 at 2. A white student reported that McHugh told the class that he did "not know why people get so mad about slavery, sorry to break it to you guys but you guys were the ones selling your own fucking kind first."[1] D. 36-3 at 2. Boone and a coworker approached Barakat in early 2013 to

PSOF = D.36 (DSOF = D.30)

- *Marchinuk v. Lew (№13-cv-12722, January 11, 2016), ℘2:*

> **III. Factual Background**
>
> DSOF & PSOF
>
> The following facts are drawn from the parties' statements of material facts, D. 61, D. 64, and unless otherwise noted, are undisputed.

- *Joyce v. The Upper Crust (№10-12204-DJC, July 21, 2015), ℘4 — **illustrating Casper's familiarity with (mastery of) FRCP-LR 56.1**:*

> **IV. Factual Background[2]**
>
> PSOF
>
> The following facts are as described in Joyce's statement of material facts, D. 85. Tobins did not file a statement of material facts in support of his motion for partial summary judgment.[3]
>
> [3] At oral argument, Joyce argued that Tobins's motion for partial summary judgment should be dismissed as Tobins did not submit a concise statement of material facts in support of his motion in accordance with Local Rule 56.1. See Mass. L. R. 56.1 (noting that "[m]otions for summary judgment shall include a concise statement of the material facts. . ." and that "[f]ailure to include such a statement constitutes grounds for denial of the motion"). Tobins indicated, however, that for the purposes of summary judgment, he did not dispute the facts as presented by Joyce. Accordingly, the Court will not dismiss Tobins's motion due to this procedural flaw, but will rely upon Joyce's statement of facts with all reasonable inferences drawn in Joyce's favor.

Naturally, I expect this information to be immediately conveyed to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

Exhibit I.b

Attachment Casper=Breda-v-McDonald.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN BREDA, **Plaintiff,** **v.** **ROBERT A. McDONALD, Secretary, United States Department of Veterans Affairs; WILFREDO CURIOSO, M.D.; SHARON ROUNDS, M.D., and SATISH SHARMA, M.D.,** **Defendants.**	**Civil Action No. 15-13263-DJC**

MEMORANDUM AND ORDER

CASPER, J. **December 23, 2015**

I. Introduction

Plaintiff John Breda, M.D., ("Dr. Breda") has sued Robert A. McDonald, Secretary of the U.S. Department of Veterans Affairs ("VA"), in his official capacity, Wilfredo Curioso, M.D. ("Dr. Curioso"), Sharon Rounds, M.D. ("Dr. Rounds"), and Satish Sharma, M.D. ("Dr. Sharma") (collectively, "Defendants"), asserting claims relating to his termination. D. 11. The VA has moved to dismiss certain claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). D. 7. For the reasons stated below, the Court ALLOWS the motion.

II. Standard of Review

On a motion to dismiss under Rule 12(b)(6), the Court must determine if the facts alleged "plausibly narrate a claim for relief." Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012). Reading the complaint "as a whole," the Court must conduct a two-step,

context-specific inquiry. García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013). First, the Court must distinguish the factual allegations from the conclusory legal allegations. Id. Factual allegations are accepted as true, while conclusory legal allegations are not. Id. Second, the Court must determine whether the factual allegations support "the reasonable inference that the defendant is liable for the conduct alleged." Id. (quoting Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011)) (internal quotation marks omitted). In deciding the motion, the Court may consider "documents the authenticity of which are not disputed by the parties," "official public records" and "documents central to plaintiffs' claim . . . or sufficiently referred to in the complaint." Town of Barnstable v. O'Connor, 786 F.3d 130, 141 n.12 (1st Cir. 2015) (quoting Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993)) (internal quotation mark omitted).

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction "is subject to the same standard of review" as a motion to dismiss under Rule 12(b)(6). Castino v. Town of Great Barrington, No. 13-cv-30057-KPN, 2013 WL 6383020, at *1 (D. Mass. Dec. 4, 2013). Courts, however, may consider materials outside the pleadings to resolve jurisdiction. Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002).

III. Factual Background

This summary of facts is based upon the allegations in the amended complaint which the Court must accept as true for the purpose of resolving the motion to dismiss. Dr. Breda is a Massachusetts resident licensed to practice medicine in the Commonwealth. D. 11 ¶ 4. From March 2010 until February 2015, Dr. Breda worked as a part-time emergency room physician at the VA's medical center ("Medical Center") in Providence, Rhode Island. Id. ¶ 12. For the first four years, Dr. Breda received annual evaluations that found his performance to be satisfactory or better. Id. ¶ 16.

In or about May 2014, one or more nurses complained to the VA about Dr. Breda's performance. Id. ¶ 23. Dr. Breda alleges that the complaints were meritless and raised out of personal hostility. Id. ¶ 24. In response to the complaints, Dr. Curioso reviewed a few of Dr. Breda's cases and found fifteen alleged instances of practice shortcomings. Id. ¶¶ 29-30.

In or about November 2014, Dr. Breda met with Drs. Curioso and Rounds and told them that the shortcomings were insubstantial and that some had been corrected immediately. Id. ¶ 37. In or about December 2014, Dr. Breda proposed that the parties resolve the matter in an alternative dispute process. Id. ¶ 38. He also told Defendants that unless they amicably resolved the issues, he intended to resign. Id. ¶ 42. Defendants initially agreed to an alternative dispute process, but it never took place because the VA moved to terminate Dr. Breda. Id. ¶¶ 43-44.

On January 7, 2015, Dr. Rounds sent a memorandum to Dr. MacKenzie recommending that the VA terminate Dr. Breda for deficient patient care, medical knowledge and interpersonal and communication skills. D. 13 ¶ 14, D. 13-5. Dr. MacKenzie agreed with the recommendation and sent Dr. Breda a letter dated February 3, 2015 stating that his employment would terminate effective February 13, 2015. D. 11 ¶ 49, D. 15 ¶ 3, D. 15-1. This letter was delivered on the morning of February 6, 2015. D. 15 ¶ 3, D. 15-1. One day later, Dr. Breda emailed Dr. Sharma a resignation letter dated February 1, 2015. D. 15 ¶ 4, D. 15-2. Dr. Breda stated that a signed copy of the resignation letter had been mailed. D. 15 ¶ 4, D. 15-2.

On February 9, 2015, the Medical Center's medical executive committee decided that Dr. Breda demonstrated substandard care, professional misconduct and professional incompetence and voted to revoke his staff privileges. D. 13 ¶ 15. A day later, a VA human resources employee told Dr. Breda that the VA could not back date his resignation. D. 15 ¶ 5, D. 15-3. The VA documented Dr. Breda's separation as a resignation in lieu of involuntary action,

effective February 7, 2015. D. 15 ¶ 6, D. 15-4. In late October 2015, the VA reported Dr. Breda's resignation to the National Practitioner Data Bank ("NPDB"). D. 15 ¶ 17, D. 15-15, D. 16 ¶ 10, D. 16-6.

IV. Procedural History

Dr. Breda filed this lawsuit on September 1, 2015. D. 1. On October 23, 2015, the VA moved to dismiss some of the claims. D. 7. In response to the motion to dismiss, on November 6, 2015, Dr. Breda filed an amended complaint that asserts the following claims: failure to afford due process under the U.S. Constitution (Count I); failure to afford due process under the Administrative Procedure Act ("APA") (Count II); age discrimination in violation of the Age Discrimination in Employment Act (Count III); disability discrimination in violation of the Rehabilitation Act of 1973 (Count IV); retaliation in violation of Title VII of the Civil Rights Act of 1964 (Count V); tortious interference (Count VI); breach of contract (Counts VII and VIII); defamation (Count IX); and intentional and/or negligent infliction of emotional distress (Count X). D. 11. Counts VI and X are against Drs. Sharma, Curioso and Rounds while all other claims are against the VA. Id. Count IX is against all Defendants. Id. The VA asks the Court to consider its motion to dismiss in regard to the amended complaint, D. 11. D. 19 at 2.

On October 23, 2015, the VA filed a notice of substitution under 28 U.S.C. § 2679(d)(1), replacing Drs. Sharma, Curioso and Rounds with the United States as the defendant for Counts VI and IX because the U.S. Attorney certified that those doctors were acting within the scope of their employment as federal employees. D. 6, D. 6-1. On October 28, 2015, Breda sought a temporary restraining order and/or preliminary injunction, D. 9, which the Court later denied. D. 22. The Court heard the parties on the motion to dismiss on November 12, 2015, and took the matter under advisement. D. 18.

V. Discussion

A. Dr. Breda Fails to State a Claim for Due Process Regarding His Termination (Count I)

Count I alleges that Dr. Breda had a property interest in his job and that the VA deprived him of that property interest without due process because the VA "afforded him no meaningful opportunity to be heard" before his termination and "provided limited information concerning the reasons for his termination, no opportunity to question witnesses involved in the reasons for his termination, no opportunity to present arguments against his termination, nor any other elements of due process relating to his deprivation of his position."[1] D. 11 ¶ 88.

The Civil Service Reform Act ("CSRA") provides "a comprehensive system for reviewing personnel action taken against federal employees." Elgin v. Dep't of Treasury, __ U.S. __, 132 S. Ct. 2126, 2130 (2012) ("Elgin II") (quoting United States v. Fausto, 484 U.S. 439, 455 (1988)) (internal quotation marks omitted). It prescribes "in great detail the protections and remedies applicable to" adverse personnel actions against federal employees, "including the availability of administrative and judicial review." Fausto, 484 U.S. at 443. Because of its framework, the CSRA "preempts federal employees' court claims alleging that personnel actions, including termination, violate the federal Constitution or state law." Burns v. Johnson, 18 F. Supp. 3d 67, 76 (D. Mass. 2014). Under First Circuit precedent, the CSRA preempts constitutional claims whether they seek damages or equitable relief. Elgin v. U.S. Dep't of Treasury, 641 F.3d 6, 11 (1st Cir. 2011), aff'd sub nom. Elgin II, 132 S. Ct. 2126 (2012).

[1] Although Dr. Breda alleges that the VA violated only his federal due process rights, D. 11 ¶ 89, he also cites the Massachusetts and Rhode Island constitutions. Id. ¶ 85. In any case, the analysis is the same. See, e.g., Wyrostek v. Nash, 984 F. Supp. 2d 22, 27 (D.R.I. 2013) (stating that due process analysis under the federal and Rhode Island constitutions is identical); Pollard v. Georgetown Sch. Dist., No. 14-cv-14043-DJC, 2015 WL 5545061, at *6 (D. Mass. Sept. 17, 2015) (stating that "[a]s a general proposition, the federal and Massachusetts standards for a procedural due process analysis are identical") (internal quotation marks and citation omitted).

Dr. Breda argues that because the VA appointed him under 38 U.S.C. § 7405 as a part-time physician, he is less protected under the CSRA than other federal employees and thus should be entitled to seek immediate judicial review. D. 14 at 10. Courts, however, have found that where a part-time VA physician like Dr. Breda brings claims related to personnel actions prohibited under the CSRA, "the CSRA remedial scheme—including preemption of other remedies—applies." Mangano v. United States, 529 F.3d 1243, 1247 (9th Cir. 2008); see Yu v. U.S. Dep't of Veterans Affairs, 528 F. App'x 181, 184 (3d Cir. 2013) (noting that because "[t]he VA's decision to terminate Yu falls within the [CSRA's] definition of personnel actions," Yu's claims "ought to have been brought" under the CSRA, "which exclude federal court jurisdiction under the causes of action asserted in this case"); Graves v. Dep't of Veterans Affairs, No. 13-cv-14140, 2014 WL 4145403, at *5 (E.D. Mich. Aug. 20, 2014) (stating that "[i]f Plaintiffs' claims relate to acts that fall within § 2302's prohibited personnel practices, Plaintiffs are covered by the CSRA").

Dr. Breda's claim "that he was unfairly terminated falls squarely within the definition" of prohibited personnel actions under the CSRA. Mangano, 529 F.3d at 1247. Count I thus must be dismissed. Berrios v. Dep't of Army, 884 F.2d 28, 30-31 (1st Cir. 1989) (concluding that the CSRA preempted the plaintiff's "entire district court action" in which he asserted that the defendants' failure to conduct a hearing before his removal violated his due process rights); Burns, 18 F. Supp. 3d at 76 (concluding that because of CSRA preemption, the plaintiff's claim that she was constructively discharged without due process of law in violation of the Massachusetts Declaration of Rights must be dismissed). That Dr. Breda may lack a remedy after the administrative process works its course "is not an uninformative consequence of the [CSRA], but rather manifestation of a considered congressional judgment" that his claims should

have limited additional statutory and judicial review. Fausto, 484 U.S. at 448; Roth v. United States, 952 F.2d 611, 615 (1st Cir. 1991) (stating that the plaintiff's "lamentations about the inadequacies of administrative relief under the CSRA to be an exercise in irrelevancy").

Even if the Court assumes that some form of judicial review may exist for Dr. Breda's constitutional claim despite the CSRA's bar, Irizarry v. United States, 427 F.3d 76, 78 & n.2 (1st Cir. 2005), the Court need not reach that question because Dr. Breda's due process claim is "not even colorable." Pathak v. Dep't of Veterans Affairs, 274 F.3d 28, 33 (1st Cir. 2001). For a procedural due process claim to succeed, the plaintiff "must identify a protected property or liberty interest." Redondo-Borges v. U.S. Dep't of Hous. & Urban Dev., 421 F.3d 1, 7 (1st Cir. 2005). Dr. Breda alleges that he had a property interest in his job as a government employee. D. 11 ¶ 84. But at-will VA physicians appointed under 38 U.S.C. § 7405, like Dr. Breda, have no property interest in their medical privileges. Tie Qian v. Shinseki, 747 F. Supp. 2d 1362, 1367-70 (S.D. Fla. 2010), aff'd sub nom. Tie Qian v. Sec'y, Dep't of Veterans Affairs, 432 F. App'x 808 (11th Cir. 2011); Woods v. Milner, 955 F.2d 436, 440 (6th Cir. 1992) (stating because "Woods has no property interest in a temporary appointment, her due process claim was properly dismissed"). Count I thus fails on its merits even if the CSRA is not Dr. Breda's exclusive remedy.

B. Dr. Breda Fails to State a Claim for Due Process under the APA (Count II)

Count II alleges that Dr. Breda was entitled to due process under the APA before Defendants could submit a report about him to the NPDB. D. 11 ¶¶ 91-96. Dr. Breda seeks injunctive relief. Id.

Congress enacted the Healthcare Quality Improvement Act "to address the rising problem of medical malpractice and the ability of incompetent doctors to move between states without

having their prior practice records follow them." Ming Wei Liu v. Bd. of Trustees of Univ. of Alabama, 330 F. App'x 775, 779 (11th Cir. 2009). To that end, Congress created the NPDB, a national registry that "requires health care entities to report the following information upon accepting a physician's surrender of clinical privileges while under an investigation: the name of the physician involved; a description of the acts or omissions or other reasons for the action or, if known, for the surrender; and such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate." Id. at 779 n.4 (quoting 42 U.S.C. § 11133(a)(3)) (internal quotation marks omitted). Congress also directed the U.S. Secretary of Health and Human Services ("HHS") to issue regulations on how parties may dispute the accuracy of information disclosed to the NPDB. 42 U.S.C. § 11136.

Under the applicable regulations, a party like Dr. Breda must first attempt to resolve the dispute with the reporting entity. 45 C.F.R. § 60.21(b)(3). If the reporting entity does not revise its report or does not respond within sixty days, the party may request that HHS review the report for accuracy. Id. After reviewing the report, HHS has several options. First, it may conclude that the report is accurate. Id. § 60.21(c)(2)(i). Second, it may conclude that the report is inaccurate and direct NPDB or the reporting entity to revise the report. Id. § 60.21(c)(2)(ii). Third, it may determine that the disputed issues are outside the scope of HHS's review. Id. § 60.21(c)(2)(iii). Under any of these options, HHS must include a brief statement and describe its decision. Id. Finally, HHS may conclude that the adverse action was not reportable and direct NPDB to void the report and issue appropriate notices. Id. § 60.21(c)(2)(iv).

"Under the APA, a party must obtain a 'final agency decision' prior to seeking judicial review of an agency action." Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 69 (1st Cir. 2007) (quoting 5 U.S.C. § 704). Here, Dr. Breda has only just begun the administrative

process because the VA told Dr. Breda of its decision to report him to the NPDB in October 2015. D. 8 at 6-7, D. 8-1.

Dr. Breda argues that he is entitled to pursue judicial review now because his appeal within the VA's internal system is futile. D. 14 at 11-13, D. 21 at 4-5. But Dr. Breda makes no argument why continuing the administrative process through to HHS is futile. Instead, in analogous situations, courts have held that a party's failure to exhaust administrative remedies requires dismissing its APA claim. See, e.g., Reynolds v. U.S. Dep't of Justice, 10 F. Supp. 3d 134, 143 (D.D.C. 2014) (dismissing the plaintiff's APA claims because HHS was in the midst of reviewing the propriety of the NPDB reports submitted by the Bureau of Prisons, the plaintiff's employer); Suleman v. Shinseki, No. 5:10-cv-355-FL, 2011 WL 1868941, at *2 (E.D.N.C. May 16, 2011) (adopting report and recommendation dismissing the lawsuit for lack of subject matter jurisdiction because the plaintiff had not exhausted administrative remedies before seeking an order enjoining the VA from sending a report to the NPDB); Menchaca v. Shineki, No. 10-cv-7, 2010 WL 252263, at *1 (E.D. Wis. Jan. 14, 2010) (denying a preliminary injunction restraining reporting information to the NPDB because a final agency decision had not yet occurred); Anbar v. Leahan, No. 97-cv-1138, 1998 WL 314691, at *8 (E.D. Pa. June 11, 1998) (stating that "because plaintiff has not exhausted his administrative remedies, this court lacks jurisdiction to provide injunctive relief" ordering the defendants to correct information they submitted to the NPDB). Because Dr. Breda is currently pursuing his administrative remedies, the Court dismisses Count II without prejudice.

C. Dr. Breda Fails to State Breach of Contract Claims (Counts VII and VIII)

Count VII alleges that the VA breached its "contractual obligation to enforce [its] policies and regulations prohibiting hostile environments and harassment in workplaces [it]

control[s]" by "permitting, and/or failing to prevent or correct, an environment . . . that was hostile" to Dr. Breda's practice. D. 11 ¶ 145. Count VIII alleges that the VA breached his employment contract by "failing to implement and carry out [its] established procedures and policies for addressing the possible performance shortcomings" alleged against him. Id. ¶ 151.

Dr. Breda seeks $150,000 in damages. D. 11 at 39; see D. 1-2. These claims must be dismissed because under 28 U.S.C. § 1491, the U.S. Court of Federal Claims has exclusive jurisdiction for breach of contract claims against the United States for over $10,000. Charles v. Rice, 28 F.3d 1312, 1321 (1st Cir. 1994).

D. Dr. Breda Fails to State a Claim for Tortious Interference (Count VI) and Defamation (Count IX)

Count VI alleges that Drs. Sharma, Curioso and Rounds tortuously interfered with his employment relationship with the Medical Center by "uttering spurious and meritless allegations against [him] to representatives of the [VA], thereby inducing the [VA] to terminate [his] contract of employment without sufficient or proper cause." D. 11 ¶ 138. Count IX alleges that Defendants defamed him because they "caused to be published . . . reports alleging numerous errors of medical practice." Id. ¶ 156. The U.S. Attorney for the District of Massachusetts has certified that the three doctors were acting within the scope of their employment at the time these claims arose. D. 6-1. The Court thus deems these claims to be against the United States, which "shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1); see Véléz-Diaz v. Vega-Irizarry, 421 F.3d 71, 76 (1st Cir. 2005) (noting that under § 2679(d)(1), even though "the government's certification is subject to judicial review such that the individual agents might be later re-instated as defendants in this case," district courts must in the first instance substitute the United States as the defendant).

Because § 2679(d)(1) grants absolute immunity to federal employees for torts committed

within the scope of employment, Aversa v. United States, 99 F.3d 1200, 1207 (1st Cir. 1996), Dr. Breda challenges the government's certification. D. 14 at 4-7. Dr. Breda bears the burden to show that Drs. Sharma, Curioso and Rounds acted outside the scope of their employment, including "any facts needed to contradict the government's characterization of the conduct in dispute." Lyons v. Brown, 158 F.3d 605, 610 (1st Cir. 1998). "Where the movant contends that, even accepting the allegations of the complaint as true, the defendant acted within the scope of employment, the motion to substitute may be decided on the face of the complaint (akin to a motion to dismiss)." Davric Maine Corp. v. U.S. Postal Serv., 238 F.3d 58, 66 (1st Cir. 2001).

State law where the conduct occurred controls whether an employee was acting within the scope of his employment. Kelly v. United States, 924 F.2d 355, 357 (1st Cir. 1991); Nasuti v. Scannell, 792 F.2d 264, 266 n.3 (1st Cir. 1986). Rhode Island looks to the Restatement (Second) of Agency § 228 (1958). See Favorito v. Pannell, 27 F.3d 716, 722 (1st Cir. 1994) (citing the Restatement while deciding *respondeat superior* liability under Rhode Island law); Vargas Mfg. Co. v. Friedman, 661 A.2d 48, 53 (R.I. 1995) (citing the Restatement). Section 228 provides in part that conduct of a servant is within the scope of employment if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master." Massachusetts also looks to Restatement (Second) of Agency § 228, so its cases are persuasive here. Lev v. Beverly Enterprises-Massachusetts, Inc., 457 Mass. 234, 238 (2010).

Even assuming Dr. Breda's allegations to be true, i.e., that Drs. Sharma, Curioso and Rounds disregarded proper evaluation procedures before deciding to terminate him, the Court agrees with the VA that his allegations do not show that his supervisors acted outside the scope of their employment. Their conduct was still of a kind that they are employed to perform, there

is no allegation that their conduct occurred at some other place and time other than at the VA during work hours and they acted at least in part to serve the VA because complaints about Dr. Breda's competence initiated the termination process. That Drs. Sharma, Curioso and Rounds "may have acted loutishly and/or overzealously" in pursuit of their desire to protect the VA's interests, by "allegedly defaming," "inflicting emotional distress" and "attempting improperly to procure his . . . termination" does not matter. Chase v. U.S. Postal Serv., No. 12-cv-11182-DPW, 2013 WL 5948373, at *16 (D. Mass. Nov. 4, 2013); see Meyer v. Runyon, 869 F. Supp. 70, 80 (D. Mass. 1994) (holding that although the employee's conduct was "perhaps overzealous or one sided," he was immune because his conduct "were motivated, at least in part, to assist" the government). Because Dr. Breda fails to carry his burden, the Court accepts the U.S. Attorney's certification and the United States replaces Drs. Sharma, Curioso and Rounds as the defendant for Counts VI and IX.

The Federal Tort Claim Act specifically bars claims for "libel, slander" and "interference with contract rights" against the United States. 28 U.S.C. § 2680(h). Courts have interpreted these provisions to include defamation and tortious inference claims, so Counts VI and IX must be dismissed. See, e.g., Davric, 238 F.3d at 64 (dismissing defamation and tortious interference claims); Strunk v. Odyssey Consulting Grp., Ltd., No. 10-cv-12174-DJC, 2011 WL 3567025, at *6 (D. Mass. Aug. 11, 2011) (dismissing tortious interference with advantageous relationships and contractual relations claim).

Counts VI and IX also must be dismissed for another reason. "It is now beyond serious question that the CSRA preempts state-law challenges to prohibited personnel practices in the federal workplace." Roth, 952 F.2d at 614. Because these claims challenge his termination, the

CSRA dictates their dismissal. Berrios, 884 F.2d at 32 (defamation claims preempted by the CSRA).

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Defendants' motion to dismiss, D. 7. Counts I, VI and IX are dismissed with prejudice. Count II is dismissed without prejudice. Counts VII and VIII are dismissed without prejudice so Dr. Breda may file them in the Federal Court of Claims.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit I.c

Attachment Casper=Griffin-v-AdamsAssoc.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM GRIFFIN,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 14-12668-DJC**
ADAMS AND ASSOCIATES OF NEVADA, ADAMS AND ASSOCIATES, INC., SHRIVER JOB CORPS CENTER and JAMIE WILSON,	)	
Defendants.	)	

MEMORANDUM AND ORDER

CASPER, J. **June 28, 2016**

I. Introduction

Plaintiff William Griffin has filed this lawsuit against Defendants Adams and Associates of Nevada, Adams and Associates, Inc., Shriver Job Corps Center ("Shriver") and Jamie Wilson ("Wilson") (collectively, "Defendants") asserting discrimination, harassment and retaliation claims arising from Griffin's employment and termination at Shriver. D. 11 at 10. Griffin asserted claims for gender and sexual orientation discrimination, harassment and retaliation pursuant to Mass. Gen. L. c. 151B and 42 U.S.C. § 1983 against Adams and Associates of Nevada, Adams and Associates, Inc. and Shriver (Counts I, II, III, IV, V & VI) and Wilson

(Counts VII, VIII, IX, X, XI & XII). D. 11 at 10-25.[1] The Court previously granted the Defendants' motion to dismiss the Section 1983 claims in light of no opposition from Griffin. D. 15. Defendants have now moved for summary judgment on all remaining counts, those arising under Mass. Gen. L. c. 151B, against them. D. 45. For the reasons discussed below, the Court ALLOWS IN PART and DENIES IN PART the motion for summary judgment.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute regarding any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A material fact is one that "carries with it the potential to affect the outcome of the suit under the applicable law." García-González v. Puig-Morales, 761 F.3d 81, 87 (1st Cir. 2014) (quoting Newman v. Advanced Tech. Innovation Corp., 749 F.3d 33, 36 (1st Cir. 2014)) (internal quotation mark omitted). The moving party "bears the burden of demonstrating the absence of a genuine issue of material fact." Rosciti v. Ins. Co. of Pa., 659 F.3d 92, 96 (1st Cir. 2011) (citation omitted). Once that burden is met, the non-moving party may not rest on the allegations or denials in his pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but, "with respect to each issue on which [he] would bear the burden of proof at trial," must "demonstrate that a trier of fact could reasonably resolve that issue in [his] favor." Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 5 (1st Cir. 2010) (citations omitted). The Court views the record in the light most favorable to the non-moving party, "drawing reasonable inferences" in his favor. Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009) (citation omitted). "Conclusory allegations, improbable inferences, and unsupported

[1] Although Griffin's Opposition references violations of Title VII, D. 52 at 22, 24, he did not bring claims under that title, D. 11 at 10-25 and his counsel conceded at the summary judgment hearing that these references were inadvertent, Hrg. Tr. at 14.

speculation," however, are "insufficient to establish a genuine dispute of fact." Travers v. Flight Servs. & Sys., Inc., 737 F.3d 144, 146 (1st Cir. 2013) (citation and internal quotation mark omitted).

III. Factual Background

The following facts are drawn from the parties' statements of material facts, D. 47, D. 53, and, unless otherwise noted, are undisputed.

From November 2008 to his termination on or about May 21, 2013, Griffin was employed as an "Overnight Center Shift Manager" at Shriver in Devens, Massachusetts. D. 47 ¶¶ 1-2; D. 53 ¶¶ 1-2. At all relevant times, Shriver was owned and operated by Adams and Associates, Inc. D. 47 ¶ 2; D. 53 ¶ 2. On February 12, 2012, Wilson joined Shriver as Social Development Manager and served as Griffin's supervisor. D. 47 ¶¶ 30, 90; D. 53 ¶¶ 30, 90. It was at this time Griffin started noticing a pattern of Wilson's treatment towards him, making him feel uncomfortable. D. 47 ¶ 31; D. 53 ¶ 31. From February 2012 through April 2012, Wilson purportedly made certain discriminatory statements at or regarding Griffin, a gay man. D. 47 ¶¶ 32-50; D. 53 ¶¶ 32-50 (disputing the Defendants' characterization of some of these comments).

On April 9, 2012, Griffin wrote a letter to Walter Carino ("Carino"), the human resources director at Shriver, D. 47 ¶ 138; D. 53 ¶ 138, describing some of the incidents, D. 47 ¶¶ 50, 53; D. 53 ¶¶ 50, 53. In response, an investigation was launched and Carino called a meeting between Griffin and Wilson. D. 47 ¶ 55; D. 53 ¶ 55. Griffin and Wilson attended the meeting with Carino to mediate the matter. Id. Leon Parker, Griffin's other supervisor, and Jen O'Neal, Shriver's Deputy Director at the time, also joined the meeting. Id. At the meeting, Carino instructed Griffin and Wilson to treat each other with respect and they both agreed to be more sensitive to each other in conversation. D. 47 ¶ 56; D. 47 ¶ 56. At the request of Griffin, he and Carino had a follow-up meeting. D. 47 ¶ 59; D. 53 ¶ 59.

About four months after the April 2012 meetings, Griffin received written discipline on August 18, 2012 for not being in the area to which he was assigned, but claims he also received verbal discipline for other matters. Id. ¶¶ 63-65; D. 53 ¶¶ 63-65. Shortly thereafter, on August 28, 2012, Griffin wrote a letter to Adams' management outlining the issues he was encountering at Shriver. D. 47 ¶ 68; D. 53 ¶ 68. Griffin felt that his treatment rose to the level of a valid gender and sexual orientation claim and thus the ability to file a claim with the "Massachusetts Commissioner [sic] Against Discrimination." D. 47 ¶ 70; D. 53 ¶ 70. Adams assigned Ross Peterson ("Peterson"), the Executive Director of New England Operations, to investigate Griffin's complaints. D. 47 ¶ 76; D. 53 ¶ 76. As a part of the investigation, Peterson met with Griffin and the individuals implicated by Griffin's complaints. Id. Following the investigation, Griffin met with Peterson, Carino, Barbra Smith, the property manager and EEO Officer at Shriver at the time, D. 53 ¶ 200, and Wilson to discuss the results of the investigation, D. 47 ¶ 79; D. 53 ¶ 79. At that meeting, Peterson informed Griffin that Adams found no evidence of discrimination and closed Griffin's complaint. D. 47 ¶ 80; D. 53 ¶ 80. Following the meeting, Griffin alleges that Wilson was angry and that she stated to him that she was "protected" and will see that "everything that needs to happen to [him] happens to [him]." D. 47 ¶ 83; D. 53 ¶ 83. After the meeting, Griffin felt that the Defendants were not going to do anything to alleviate his situation and he began to seek other employment. D. 47 ¶ 85; D. 53 ¶ 85.

Griffin alleges that on or about September 28, 2012, Wilson made purportedly discriminatory and graphic comments to him regarding his conduct in the bathroom and with other gay men. D. 47 ¶ 91; D. 53 ¶ 91. On October 22, 2012, Griffin went on FMLA leave and did not return until January 13, 2013. D. 47 ¶ 86; D. 53 ¶ 86. At some point before Griffin returned from FMLA leave, a restructuring took place and Wilson ceased being Griffin's

supervisor and became his peer. D. 47 ¶ 90; D. 53 ¶ 90. Griffin alleges that once he returned from leave, he found a photograph of him and his boyfriend damaged and in the trash. D. 47 ¶ 94; D. 53 ¶ 94.

The parties dispute whether Griffin was having job performance issues in February 2013. D. 47 ¶ 95; D. 53 ¶ 95. It is undisputed, however, that on March 4, 2013, Adams evaluated Griffin's performance as "Below Acceptable Standards"—the parties dispute the issues identified in the review—and on March 11, 2013, placed him on a ninety-day Corrective Action Plan ("CAP"), which identified certain areas for improvement. D. 47 ¶¶ 96, 98, 101, 104. The plan indicated that if "Performance Progress does not occur, or if performance in other required areas outside those specified in the CAP falls below the required levels, you may be considered for termination prior to the completion of the 90-day CAP period." Id. ¶ 103. Following alleged complaints by staff members, Griffin was issued a final writing warning on May 11, 2013 due to his alleged failure to give staff breaks and leaving dorm areas unattended by staff. Id. ¶¶ 107, 113, 115.

On May 20, 2013 at approximately 11:30 p.m., Griffin attended a staff training conducted by LeniRae Martyn-Seidl ("Martyn-Seidl"). D. 47 ¶ 119; D. 53 ¶ 119. Shortly after the training, Martyn-Seidl believed Griffin's behavior at the meeting suggested he was intoxicated and she began trying to contact various Shriver employees. D. 47 ¶¶ 122-124; D. 53 ¶¶ 122-124. In the early morning of the next day, Tamer Koheil ("Koheil"), the Shriver Director since November 2012, D. 47 ¶ 87; D. 53 ¶ 87, and Thomas Hammond ("Hammond"), another Shriver employee, headed to Carlin's Tavern at approximately 1:30 a.m., upon the belief that Griffin was there, D. 47 ¶¶ 129, 131; D. 53 ¶¶ 129, 131. The parties contest whether Griffin was at the bar with an alcoholic drink. D. 47 ¶ 131; D. 53 ¶ 131. Upon confronting Griffin, Koheil and Hammond

believed that Griffin was intoxicated. D. 47 ¶ 132. Shortly thereafter, Shriver personnel conducted an investigation regarding the events transpiring on May 20-21, 2013. D. 47 ¶¶ 135, 138. On May 21, 2013, Carino submitted a recommendation to Adams Human Resources that Griffin be terminated. D. 47 ¶ 137; D. 53 D. 47 ¶ 137. On May 23, 2013, Koheil sent Griffin a letter indicating he was being terminated for, among other things, being under the influence of alcohol at work. D. 47 ¶¶ 139.

IV. Procedural History

Griffin filed this lawsuit against Defendants in Middlesex Superior Court on April 14, 2014. D. 11 at 27. Defendants removed the case to federal court on June 26, 2014. D. 1. Prior to removal, Griffin had filed an amended complaint. D. 11 at 10-25. On July 3, 2014, Defendants moved to dismiss the § 1983 claims for failure to state a claim. D. 6. Griffin did not oppose, D. 12 at 1, and the Court dismissed those claims, D. 15.[2] Defendants has now moved for summary judgment on the remaining counts, those arising under Chapter 151B, D. 45, and Griffin opposed, D. 52. The Court heard Defendants on their pending motion and took these matters under advisement. D. 56.

V. Discussion

A. Timeliness of Claims

Defendants argue that Griffin's claims for violations of Chapter 151B for discriminatory acts on or before September 22, 2012 are untimely. D. 46 at 9-12. Massachusetts law requires that a charge be filed with the Massachusetts Commission Against Discrimination ("MCAD")

[2] The Court notes that Count X against Wilson is a Chapter 151B claim for retaliation whereas Count XII is a claim brought under § 1983. It appears Defendants intended previously to move for dismissal of Count XII and not Count X. D. 15. Accordingly, the Court has considered Count X, not Count XII, as part of the claims for which Defendants now seeks summary judgment.

within 300 days of the alleged discriminatory act. See Tuli v. Brigham & Women's Hosp., 656 F.3d 33, 40 (1st Cir. 2011) (citing Mass. Gen. L. c. 151B, § 5). As recognized by Defendants, D. 46 at 9 n.5, Griffin's MCAD charge lists a filing date of Friday, July 19, 2013, but appears to bear an obscured MCAD stamp indicating Monday, July 22, 2013, D. 47-7 at 108. The parties have not otherwise clarified this ambiguity and the Court assumes, for the purposes of this motion only, that July 19, 2013, the earlier date that would be more favorable to Griffin, is the operative date. Measuring 300 days back from July 19, 2013, Griffin's claims for discriminatory acts occurring before September 22, 2012 are untimely. See, e.g., Shervin v. Partners Healthcare Sys., Inc., 2 F. Supp. 3d 50, 64 (D. Mass. 2014) (recognizing that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges" (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)) (internal quotation marks omitted)), aff'd, 804 F.3d 23 (1st Cir. 2015).

Contrary to Griffin's assertion, D. 52 at 20-21, the "continuing violation doctrine" under Chapter 151B does not save his otherwise untimely claims. As explained by the First Circuit, three elements must be satisfied for this doctrine to apply:

> First, the claim must be one that arises from "a series of related events that have to be viewed in their totality in order to assess adequately their discriminatory nature and impact." Second, the claim must be "anchored" by at least one incident of discrimination or retaliation transpiring within the limitations period. This anchoring event must be "substantially relate[d]" to earlier instances of discrimination or retaliation and must contribute to the continuation of the pattern of conduct that forms the basis of the claim. Third, the plaintiff must show that a reasonable person in [his] circumstances would have refrained from filing a complaint within the limitations period.

Shervin, 804 F.3d at 34-35 (first alteration in original) (citations omitted) (quoting Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 531, 533 (2001) and Noviello v. City of Boston,

398 F.3d 76, 86 (1st Cir. 2005)). A plaintiff seeking to benefit from the doctrine bears the burden to establish all three elements. Id. at 34 (citations omitted).

Griffin and Defendants focus on the third element, where the inquiry is "whether the plaintiff knew or reasonably should have known within the limitations period both that [his] work environment was discriminatory and that the problems [he] attributed to that discriminatory environment were unlikely to cease." Id. at 35 (citing Cuddyer, 434 Mass. at 541). Summary judgment as to this inquiry is appropriate "where a pattern of harassment, considered from the viewpoint of a reasonable person in the plaintiff's position, is so sufficiently known, pervasive, and uncorrectable that it would be unreasonable to delay filing suit." Id. (quoting Cuddyer, 434 Mass. at 539) (internal quotation marks omitted).

Based upon the record before the Court, a reasonable factfinder could not conclude that Griffin was not put on notice of the purportedly discriminatory environment at Shriver prior to September 22, 2013, that the issues attributed to that environment would not cease and that it was unreasonable for Griffin not to file a charge at that point.

On August 27, 2012, Griffin sent a fifteen-page letter to management listing several incidents of mistreatment which he stated "surmounted to a valid gender/sexual orientation discrimination claim leaving [him] with the ability to file a claim with the Massachusetts Commissioner [sic] Against Discrimination." D. 47 ¶ 70 (second alteration in original); D. 53 ¶ 70. Following Adams' investigation of the issues Griffin outlined in his letter, he did not feel that the investigation was adequate. D. 47 ¶ 78; D. 53 ¶ 78. On September 17, 2012, Griffin met with certain Adams employees to discuss the result of the investigation. D. 47 ¶ 79; D. 53 ¶ 79. At the meeting, he was informed that the investigation found no evidence of discrimination. D. 47 ¶ 80; D. 53 ¶ 80. At his deposition, Griffin testified that, once he was notified of the

results of the investigation, he felt that this was "my kiss of death," that "[he] had exhausted [his] options" and "if anything, [ ] just really exacerbated all the issues." D. 47 ¶¶ 82-83; D. 53 ¶¶ 82-83. Furthermore, Griffin also felt that he was in an environment where he "fear[ed] for [his] safety a bit" and felt that "[t]here was nobody for [him] to lean on." D. 47 ¶ 84; D. 53 ¶ 84. Where Griffin felt that the Defendants were not going to do anything to alleviate his situation, he began searching for a new job. D. 47 ¶ 85; D. 53 ¶ 85.

There is no evidence that, following the September 17, 2012 meeting, Griffin had "good reason to believe" that the issues he encountered would cease during the limitations period. See Shervin, 804 F.3d at 35 (citation omitted). Prior to the meeting, Griffin asserted in his August 27, 2012 letter that he believed the issues he was experiencing rose to the level of gender and sexual orientation discrimination, should be reported to MCAD and, following the September 17, 2012 meeting, he felt that he had exhausted all avenues of relief with Adams. Griffin also felt that his complaints made things worse, prompting him to search for new employment. See Shervin, 804 F.3d at 36-37; see also Diaugustino v. New Penn Motor Express, Inc., No. 12-cv-30159-KPN, 2014 WL 5494918, at *1-2 (D. Mass. Oct. 30, 2014) (concluding on summary judgment that a reasonable person in plaintiff's position would have filed an MCAD charge before the statute of limitations ran where her complaints were essentially ignored). For the first time, in his opposition, Griffin asserts that he "was hopeful that those incidents would be resolved," but does not otherwise cite to anything in the record in support of this contention. D. 52 at 20-21.

Accordingly, the Court concludes that the continuing violation doctrine does not save Griffin's claims for discriminatory acts occurring prior to September 22, 2012, 300 days before Griffin filed his charge with MCAD. In addressing the remaining bases of Defendants' motion

for summary judgment, the Court only considers the conduct occurring within the 300-day period. See Diaugustino, 2014 WL 5494918, at *2 (citing Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 641 (2004)). [3]

B. Hostile Work Environment

Massachusetts law protects employees who are members of certain classes from hostile work environments, as a form of discrimination. Pursuant to Mass. Gen. L. c. 151B, § 4(1) & (16A), it is unlawful:

> 1. For an employer, by himself or his agent, because of the . . . sex, gender identity, sexual orientation . . . of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.
>
> and
>
> 16A. For an employer, personally or through its agents, to sexually harass any employee.

Under Chapter 151B, "sexual harassment" is defined as:

> sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.

Id. § 1(18)(b). To bring a hostile work environment claim under Chapter 151B for harassment based upon gender or sexual orientation, Griffin must establish that: (1) he is a member of a protected class; (2) he was subjected to unwelcome sexual harassment or hostility; (3) the harassment was based upon his status in a protected class; (4) the harassment was sufficiently

[3] The Court notes that, although Defendants may not be found liable for conduct outside the applicable limitations period, untimely "background evidence" can still be considered in assessing the viability of the actionable discrimination and retaliation claims. See Shervin, 804 F.3d at 47-48 (citations omitted).

severe or pervasive so as to alter the conditions of his employment and create an abusive work environment; (5) the sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) some basis for employer liability has been established. See Lightbody v. Wal-Mart Stores E., L.P., No. 13-cv-10984-DJC, 2014 WL 5313873, at *3 (D. Mass. Oct. 17, 2014) (quoting Ponte v. Steelcase Inc., 741 F.3d 310, 320 & n.9 (1st Cir. 2014)).

A hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization." Cuddyer, 434 Mass. at 532 (quoting College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987)) (internal quotation mark omitted). There is no precise test, however, to determine whether a plaintiff has presented sufficient evidence that he was subjected to severe or pervasive harassment. See Kosereis v. Rhode Island, 331 F.3d 207, 216 (1st Cir. 2003) (citations omitted). A court must "examine all the attendant circumstances including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with an employee's work performance." Pomales v. Celulares Telefónica, Inc., 447 F.3d 79, 83 (1st Cir. 2006) (citation omitted); accord Harris v. Forklift Sys. Inc., 510 U.S. 17, 23 (1993). In doing so, the First Circuit has warned against applying these considerations and its precedent "too rigid[ly]" where "the hostility *vel non* of a workplace does not depend on any particular kind of conduct." See Billings v. Town of Grafton, 515 F.3d 39, 48 (1st Cir. 2008). As such, evaluating a potentially hostile work environment is a fact-intensive inquiry "often reserved for a factfinder, but summary judgment is an appropriate vehicle for polic[ing] the baseline" for such claims. See Pomales, 447 F.3d at 83 (alteration in original)

(citations and internal quotation marks omitted). The essence of this inquiry is "to distinguish between the ordinary, if occasionally unpleasant, vicissitudes of the workplace and actual harassment." Rosemond v. Stop & Shop Supermarket Co., 456 F. Supp. 2d 204, 212 (D. Mass. 2006) (citation omitted).

The Court notes that where Griffin brings claims against Wilson, his former coworker, and Adams, his former employer, Adams can be liable for the discriminatory harassment of its employees where its "acquiescence . . . effectively communicates to the victim of harassment that [his] employer does not care about the hostile environment in which [he] must work . . . . [A]n employer who is not part of the solution inevitably becomes part of the problem." Ryan v. Holie Donut, Inc., 82 Mass. App. Ct. 633, 638 (2012) (alteration in original) (quoting Salvi, 67 Mass. App. Ct. at 603-08 (concluding that employer's tolerance of employees' homophobic abuse of coworker creates actionable hostile work environment)).

Defendants argue that Griffin's claims fail as a matter of law because the conduct he was subjected to was not "of a sexual nature" and thus, the second and third elements of a hostile work environment claim are not satisfied. D. 46 at 15-16. Said differently, Defendants argue that the conduct allegedly experienced by Griffin was not because of his gender or sexual orientation. Defendants point out that Chapter 151B is not a "clean language act" and rely upon Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 620 (1996) to argue that the statements Wilson and other Shriver employees directed at Griffin were essentially profanity, D. 46 at 15. In contrast to Prader, 39 Mass. App. Ct. at 619, however, where the court was addressing "garden-variety expletives" which were not "lurid innuendos," even just considering the alleged statements after September 22, 2012, in which Wilson allegedly asked Griffin upon returning from the bathroom if he had "just loosened it" and if that "how gays do it" and "heard

they gape it when you go to the bathroom" and if "in the gape scenes, is that how it all happens" and the damage to the photograph of him and his male partner that had been displayed to his office, D. 47 ¶¶ 91, 94 is more than garden-variety expletives or annoyances, but could suggest discriminatory animus to a reasonable factfinder. This is particularly when viewed against the background of statements that pre-dated September 22, 2012 including statements about the characterization of his attire, mannerisms and choice of fragrance as "feminine," his choice of a bulletin board in his office as too "flamboyant" and the use of the words "fag" or faggot." See, e.g., D. 47 ¶¶ 32, 34, 36-37, 41, 43-45, 48, 50. Such statements are not simply "tinged with offensive sexual connotations," Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998), but, to a reasonable factfinder, could constitute discrimination because of gender stereotypes and Griffin's sexual orientation, id.; see Salvi, 67 Mass. App. Ct. at 603-06 (holding as admissible evidence of a hostile work environment statements by plaintiff's coworkers that he would become aroused if touched by employees of the same sex and homophobic slurs including variations of "fag"). The nature of the alleged conduct as relating to Griffin's masculinity or sexual orientation raises a triable inference that he was harassed in violation of Chapter 151B because of gender stereotypes and his status as a gay man.

Defendants also argue, as the fourth element of a hostile work environment claim, that Griffin's claims fail because as a matter of law because he was not subjected to sufficiently severe or pervasive conduct. D. 46 at 16-19. In consideration of summary judgment, however, it is the Court's role to distinguish, as a baseline, conduct amounting to harassment from occasional unpleasant workplace interactions. See, e.g., Rosemond, 456 F. Supp. 2d at 212. Considering the record before the Court, and resolving factual disputes in Griffin's favor, a reasonable trier of fact could find that the purported conduct Griffin experienced created a hostile

work environment.[4] See Billings, 515 F.3d at 48 (discussing how there are no particular types of behavior necessary to constitute hostile work environment and reversing district court's entry of summary judgment in employer's favor); Lightbody, 2014 WL 5313873, at *4 (denying summary judgment in employer's favor where a reasonably jury could find that the unwanted touching of plaintiff was frequent, threatening and humiliating). Considering that a factfinder may still be permitted to consider "untimely" evidence prior to September 22, 2012 as background evidence in assessing Griffin's timely discrimination claims, see *supra* note 3, a reasonable factfinder could determine that such conduct was more than mere occasional unpleasantries in the workplace. While Defendants assert that, in response to this conduct, Griffin's performance did not suffer, D. 46 at 18, "that is not the sole indicator of whether [Griffin] was subjected to a pervasively hostile work environment," Lightbody, 2014 WL 5313873, at *4; accord Pomales, 447 F.3d at 83. Notably, Griffin asserts that he was emotionally affected by the conduct, feared for his safety and filed complaints with Shriver and Adams to stop the conduct. See D. 53 ¶¶ 50, 68, 84, 152. Even then, Griffin's ability to perform at work, despite this conduct, does not doom his claims. See Billings, 515 F.3d at 51 (citation omitted).

Accordingly, the Court denies Defendants' motion for summary judgment as to Griffin's hostile work environment claims (Counts II, III, VIII and IX).[5]

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[4] Defendants urge the Court to rule in their favor, in large part, due to Griffin's purportedly inconsistent account of certain events in 2012 and 2013, see, e.g., D. 46 at 17-18; D. 55 at 4-7; Hrg. Tr. at 10-12, 15. Any such inconsistencies, however, go to credibility rather than an undisputed or insufficient factual record to present to a trier of fact. See Billings, 515 F.3d at 51-52 (vacating district court's entry of summary judgment in favor of employer where a reasonable view of the facts could differ and the facts, in their entirety, did not foreclose sexual harassment claim).

[5] The Court notes that Griffin, in all remaining Counts, alleges that Defendants failed to adequately investigate and remedy the discriminatory conduct he experienced. See D. 11 ¶¶ 25,

C. Retaliation

Chapter 151B also protects employees from retaliation when raising concerns regarding discriminatory treatment. The burden shifting framework applies to Griffin's Chapter 151B retaliation claims. At the first stage, Griffin must demonstrate a *prima facie* case of retaliation by providing evidence that: (1) he engaged in protected conduct; (2) he experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action. See Noviello, 398 F.3d at 88; see also Calero–Cerezo v. United States Dept. of Justice, 355 F.3d 6, 25-26 (1st Cir. 2004) (noting that the burden to establish a *prima facie* case in the context of retaliation in not "an onerous one" (citation omitted)). If Griffin satisfies his burden at stage one, the burden shifts to Defendants at the second stage to articulate legitimate, nondiscriminatory reasons for the adverse action. Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 683 (2016). Assuming Defendants satisfy their burden, the burden shifts back to Griffin, at the third and final stage, to show that Defendants' articulated reasons are pretextual. Bulwer, 473 Mass. at 681 (explaining that "Massachusetts is a pretext only jurisdiction" (citations omitted)). At the summary judgment stage for a Chapter 151B claim, a "plaintiff need only present evidence from which a reasonable jury could infer that 'the [defendant]'s facially proper reasons given for its action against him were not the real reasons for that action.'" Bulwer, 473 Mass. at 682 (citation omitted).

The parties do not contest that Griffin engaged in protected activity by reporting the allegedly discriminatory conduct to Adams on, at the very least, April 9, 2012 and August 27, 2012 and that he suffered an adverse employment action by being terminated on or about May

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29, 33, 37, 55, 59, 63, 67. As argued by Griffin, D. 52 at 21-22, and based on the record, the Court concludes that the allegations regarding a hostile work environment raise a triable issue as to if Adams took reasonable steps to rectify acts of harassment following Griffin's complaints, see, e.g., Lightbody, 2014 WL 5313873, at *4-5.

21, 2013. D. 46 at 21-22; D. 52 at 23. Defendants argue, however, that Griffin fails to make out a *prima facie* case where the period of about nine months between Griffin's August 2012 complaint and his termination severs any casual connection. D. 46 at 21-23. Generally, one event following another, by itself, is insufficient evidence of causality to establish a *prima facie* case, especially where the two events are separated by months. See Dube v. Middlesex Corp., 59 Mass. App. Ct. 734, 741 n.3 (2003) (collecting cases). A review of the case law indicates that the First Circuit has found periods of time as short as two months, Ramírez Rodríguez v. Boehringer Ingelheim Pharm., Inc., 425 F.3d 67, 85 (1st Cir. 2005), and as long as eight or more months, Morón-Barradas v. Dep't of Educ. of Commonwealth of P.R., 488 F.3d 472, 481 (1st Cir. 2007), to be insufficient to establish such causality. In response, Griffin points to his March 3, 2013 review—in which he was unjustifiably cited for dress code violations and for failing to participate in evening activities—and the resulting March 11, 2013 CAP as further evidence of disparate treatment which provides context for establishing a causal link between his earlier complaints of discrimination in August 2012 and his May 2013 termination. D. 52 at 23-25; D. 47 ¶ 104. Although the Court recognizes that "[c]hronological proximity does not by itself establish causality, particularly if '[t]he larger picture undercuts any claim of causation,'" Ponte, 741 F.3d at 322 (second alteration in original) (citation omitted), even if the time span here does not raise an inference of retaliation, "retaliatory conduct may be demonstrated by evidence other than closeness in time." Liu v. Whitehead Inst., 2007 WL 809798, at *2 (Mass. Super. February 27, 2007) (citing Che v. Massachusetts Bay Transp. Auth'y, 342 F.3d 31, 38 (1st Cir. 2003). Such is the case here where Griffin relies not just on the time between his (protected) complaints about discrimination in August 2012 and his May 2013 termination but also on the alleged discriminatory conduct he was subject to after his complaints and the allegedly unjustified

citations for poor performance in the aftermath of his complaints. Accordingly, the Court concludes that Griffin has met his *prima facie* burden.

Turning to the burden shifting framework, at stage two, Defendants primarily point to the events on the night and early morning of May 20-21, 2013—when Griffin was purportedly intoxicated at work and then left the workplace without authorization to go to a bar where he was believed to be drinking—as the legitimate, nondiscriminatory reason for his termination. D. 46 at 23-25. Defendants highlight numerous statements from witnesses of Griffin's actions that night which purportedly served as the basis of his termination. D. 47 ¶ 119. Griffin does not contest that those statements were made, D. 53 ¶ 119, but hotly contests their accuracy. See D. 52 at 25; D. 53 ¶¶ 122-124, 131-133. Thus, at the third stage, the burden shifts back to Griffin to point to evidence from which a reasonable jury could infer that this was pretext; i.e., not Defendants' real reason for his termination.

As recently discussed in the Supreme Judicial Court's decision in Bulwer, a plaintiff may point to certain categories of evidence from which a factfinder might infer that the stated reasons for termination were not the real reasons. Relevant here, one category of evidence is a defendant's failure to follow their procedures in deciding to terminate a plaintiff's employment. Bulwer, 473 Mass. at 687 (citation omitted). As recognized in Bulwer, "[a] failure to follow established procedures or criteria . . . [may] support a reasonable inference of intentional discrimination." Id. (second alteration in original) (citations and internal quotation marks omitted). The parties do not dispute that "the normal protocol for staff persons drinking is that we ask them to go to the hospital. We take them to the hospital and ask them to take a drug or alcohol test." Hammond Dep. Tr. 34:1-10, D. 53-3. Griffin, however, was never administered such a test and was refused one even at his own alleged request, D. 53 ¶ 195. Considering this

part of the record, the Court cannot conclude that no reasonable factfinder could infer Defendants' legitimate reason for Griffin's termination were false. See Bulwer, 473 Mass. at 687.

While Defendants argue that those involved in the decision to terminate Griffin did not know of his prior complaints and thus their decision could not be pretextual, Carino, who had previously addressed Griffin's complaints, recommended Griffin's termination and Wilson, following Griffin's complaint in April 2012, allegedly threatened that she was "going to see that everything that needs to happen to [Griffin] happens to [him]." D. 47 ¶ 83. These facts, combined with Adams failing to follow the usual protocol of having a drug or alcohol test administered when it suspected Griffin of being intoxicated, are sufficient to raise a reasonable inference of pretext.

For the foregoing reasons, Defendants' motion for summary judgment on Griffin's retaliation claims (Counts I, IV, VII and X) is denied.

VI. Conclusion

For the reasons discussed above, the Court ALLOWS IN PART and DENIES IN PART the motion for summary judgment, D. 45. The motion is ALLOWED as to any claims for liability regarding discriminatory acts occurring prior to September 22, 2012 and is otherwise DENIED.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit I.d

Attachment Casper=Sanchez-v-NECCO.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ISAIAS SANCHEZ, **Plaintiff,** **v.** **NEW ENGLAND CONFECTIONERY COMPANY, INC. d/b/a NECCO, and BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILNERS INTERNATIONAL UNION, AFL-CIO LOCAL NO. 348,** **Defendants.**	**Civil Action No. 14-11353-DJC**

MEMORANDUM AND ORDER

CASPER, J. **August 14, 2015**

I. Introduction

Plaintiff Isaias Sanchez ("Sanchez") brings this hybrid action under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. D. 1. Sanchez alleges that defendant Bakery, Confectionery, Tobacco Workers and Grain Milners International Union, AFL-CIO Local No. 348 ("Local 348") breached its duty of fair representation and defendant New England Confectionary Company ("NECCO") breached the collective bargaining agreement. Id. at 1. Local 348 has moved for summary judgment. D. 50. For the reasons stated below, the Court ALLOWS the motion.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute on any material

fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)) (internal quotation mark omitted). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). "[C]onclusory allegations, improbable inferences, and unsupported speculation" do not satisfy the non-moving party's burden. Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences" in her favor. Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Allegations

Unless otherwise noted, all facts are drawn from Sanchez's statement of material facts, D. 57, and Local 348's statement of material facts, D. 52.

Since 1997, Sanchez was a NECCO employee represented by Local 348. D. 52 ¶ 3. Local 348 is a labor union representing approximately 330 employees at NECCO's facility in Revere, Massachusetts. Id. ¶ 5. Juan Figueroa ("Figueroa") is Local 348's Financial Secretary and Business Agent. Id. ¶ 6.

On April 12, 2013, Figueroa attended a meeting at NECCO with NECCO Human Resource Manager Brian Benoit ("Benoit"), Sanchez's supervisor Luis Centeio ("Centeio") and Sanchez to address a workplace incident. Id. ¶ 7. Benoit told Figueroa that (1) Sanchez had refused to go to another department at Centeio's request and (2) Sanchez had allegedly threatened Centeio. Id. At the end of the meeting, no discipline action was taken and everyone returned to work. Id. ¶ 8. Later that day, NECCO management met with Sanchez again and gave him a three-day suspension. Id. ¶ 9. On April 18, NECCO notified Sanchez by letter that it was terminating him for violating NECCO's Workplace Violence Policy and Shop Rules. Id. ¶ 11; D. 52-1 (NECCO letter).

On April 24, 2013, a union steward filed a grievance that Figueroa had drafted protesting Sanchez's termination. D. 52 ¶ 12. NECCO denied the grievance five days later. Id. On May 6, Local 348 submitted the grievance again and NECCO denied it a second time on May 13. Id. Sometime around May 18, Figueroa presented Sanchez's case to Local 348's Executive Board at its monthly meeting. Id. ¶ 13. Local 348 directed Figueroa to have Anne Sills ("Sills"), a partner at Segal Roitman LLP and Local 348's attorney, review Sanchez's case to determine whether it should go to arbitration. Id.; D. 57 ¶¶ 13, 33. The collective bargaining agreement required that any demand for arbitration be filed within thirty days of NECCO's second denial. D. 57 ¶ 35.

On May 21, 2013, Figueroa brought Sanchez to meet with Sills. D. 52 ¶ 14. Sills informed them that she believed the case should go to arbitration because it was a "he says-he says" case and Local 348 had a "50/50 chance" of prevailing. Id.; D. 57 ¶ 14. At some point after the meeting, Figueroa obtained approval from Local 348's Executive Board to arbitrate Sanchez's termination. D. 52 ¶ 15. Figueroa believes he communicated the Executive Board's decision to Sills, but he has no specific recollection or record of doing so. Id. ¶ 16; D. 57 ¶ 15.

Sills believes that she and Figueroa spoke around June 4, 2013 and she has a "sticky" note that she wrote and placed in the case file after their conversation. D. 52 ¶ 17; Sills Aff., D. 53 ¶ 8. She understood from the call that Local 348 was postponing filing for arbitration while Sanchez's personal attorney attempted to settle the case. D. 52 ¶ 17; D. 53 ¶ 8.

On June 27, 2013, Sills contacted Figueroa and asked for an update on Sanchez's case. D. 52 ¶ 19; D. 53 ¶ 9. Figueroa was surprised to learn that she had not yet filed for arbitration. D. 52 ¶ 19; D. 57 ¶ 31. Sills was also surprised about the miscommunication. D. 52 ¶ 19. After the call, Sills filed a demand for arbitration on Sanchez's behalf with the American Arbitration Association. D. 52 ¶ 20; D. 57 ¶ 31. Sills also attempted to reach an attorney who had represented NECCO in a previous matter to inform him of the late filing, but she was told that the attorney no longer worked at the firm. D. 52 ¶ 20.

The arbitration hearing took place over two days in Boston. Id. ¶ 23; Arb. Award, D. 1-4 at 1. The parties presented two issues to the arbitrator: (1) whether the grievance was arbitrable because the demand for arbitration was untimely and (2) whether NECCO had just cause to discharge Sanchez. D. 1-4 at 1. The parties had "full opportunity to offer evidence and argument and to examine and cross-examine witnesses." D. 1-4 at 1. The parties also submitted post-hearing briefs, which were "fully considered." Id. at 2. Sills testified that she spent "a lot of time working and building a case on the merits." Sills Dep., D. 55-2 at 45. The first issue had no effect on her ability to argue the merits of Sanchez's termination. Id. at 45-46. Sills cross-examined NECCO witnesses, prepared Sanchez to testify and presented both Sanchez and his co-worker to testify on Sanchez's behalf. D. 52 ¶ 22.

On March 3, 2014, the arbitrator issued a 22-page, single-spaced decision. D. 1-4. The arbitrator found that the grievance was not timely filed. Id. at 19. Nevertheless, the arbitrator

stated he gave "full consideration" to the second issue and concluded that NECCO had just cause to fire Sanchez. Id.

IV. Procedural History

On March 25, 2014, Sanchez filed this lawsuit. D. 1. Local 348 and NECCO moved to dismiss on April 23 and May 1, respectively. D. 10, 15. On May 20, Sanchez moved to disqualify Local 348's counsel. D. 21. The Court denied Sanchez's motion, both motions to dismiss and NECCO's oral motion to stay further proceedings against it. D. 27 at 12. On December 29, NECCO filed a motion to reconsider the denial of its oral motion to stay. D. 35. On January 13, 2015, the Court allowed NECCO's motion and stayed all further proceedings against NECCO pending the outcome of the proceedings against Local 348 because Sanchez's hybrid claim required proving that both Local 348 and NECCO breached its respective obligations. D. 44. On March 30, 2015, Local 348 moved for summary judgment. D. 50. The Court heard the parties on the pending motion on July 23, 2015 and took the matter under advisement. D. 60.

V. Discussion

As the exclusive bargaining representative of the employees, a union has a duty of fair representation to represent its members in collective bargaining and in the enforcement of any collective bargaining agreement. Emmanuel v. Int'l Bhd. of Teamsters, Local Union No. 25, 426 F.3d 416, 419-20 (1st Cir. 2005). A union breaches this duty "only when [its] conduct . . . is arbitrary, discriminatory, or in bad faith." Miller v. United States Postal Serv., 985 F.2d 9, 12 (1st Cir. 1993) (quoting Vaca v. Sipes, 386 U.S. 171, 190 (1967)). A union may not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." Newbanks v. Cent. Gulf Lines, Inc., 64 F. Supp. 2d 1, 4 (D. Mass. 1999) (citations omitted). But "mere negligence or

erroneous judgment will not constitute a breach of the duty of fair representation." Miller, 985 F.2d at 12.

A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." Id. (citing Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67 (1991)) (internal quotation marks omitted). "This standard requires the court to examine objectively the competence of [Local 348's] representation." Emmanuel, 426 F.3d at 420. The Court, however, "may not substitute [its] own views for those of the union." Miller, 985 F.2d at 12. "[A]ny substantial examination of a union's performance . . . must be highly deferential" because of "the well-recognized need to allow unions ample latitude in the performance of their representative duties." Id. (citations and internal quotation marks omitted).

Here, Sanchez does not argue that Local 348 breached its duty out of discriminatory animus. D. 54. Nor does Sanchez argue that Local 348 acted in bad faith because he concedes that "admittedly, there is little in the way of bad faith." Id. at 7; see id. at 2 (stating that Local 348's actions were "not necessarily motivated by bad faith"). Instead, Sanchez's sole argument on summary judgment is that Local 348 breached its duty of fair representation because it "fail[ed] to file a request for arbitration" of Sanchez's grievance within thirty days of the deadline under the collective bargaining agreement. D. 54 at 1.

For support, Sanchez relies on De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F. 2d 281 (1st Cir. 1970), and Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291 (1st Cir. 1978). D. 54 at 7. Both cases, however, are distinguishable. They involved unions that made no effort to advocate for their members. In De Arroyo, the First Circuit affirmed a jury's finding that the union had breached its duty of fair representation because "[t]here was no evidence . . . that the Union ever investigated or made any judgment concerning the merits" of all but one of

the plaintiffs' cases. 425 F.2d at 284. Instead, the union devoted its "entire attention" during this period on a National Labor Relations Board proceeding, one that the union president "inexplicably" believed would adequately protect the plaintiffs even though the proceeding had been confined to issues irrelevant to their grievances. Id. In Soto Segarra, the First Circuit affirmed a district court's ruling that the union had breached its duty because even though the plaintiff's "six-month letter writing campaign provided the union with many adequate opportunities" to proceed with the grievance process, the union's "initial silence and continuing inaction necessarily confirmed [the] suspicion that the union would be less than vigorous in his defense." 581 F.2d at 296. "No evidence even remotely indicated that the union's failure to process the grievance was based on an investigation and evaluation of the merits." Id. at 295. The First Circuit also noted that the union had an interest in treating the plaintiff poorly because the union had expelled him and he had since become its "most outspoken critic." Id. at 296.

Here, unlike the unions in De Arroyo and Soto Segarra, Local 348 and Sills did not ignore Sanchez's grievance. Nor did they fail to investigate whether his grievance had merit. Local 348 properly filed his grievance with NECCO twice, conducted a meeting with Sills to discuss his case and the likelihood of success, and approved advancing his case to arbitration. D. 52 ¶¶ 10-15. Sills argued Sanchez's grievance at the arbitration, id. ¶ 22, and Sanchez makes no argument that her performance was lacking in this regard. D. 51 at 10 n.1; D. 54. Thus, neither De Arroyo nor Soto Segarra requires the Court to find for Sanchez.

Sanchez also relies on Zuniga v. United Can Co., 812 F.2d 443, 451 (9th Cir. 1987). D. 54 at 6. In Zuniga, the Ninth Circuit affirmed a jury finding that the union had breached its duty of fair representation. Under Ninth Circuit case law, "[w]here the union fails to perform a ministerial act not requiring the exercise of judgment and there is no rational and proper basis for the conduct," "such an omission can constitute arbitrary conduct" if the union's failure to act

"prejudice[s] a strong interest" of the employee. Zuniga, 812 F.2d at 451. The Ninth Circuit held that the plaintiff offered "substantial evidence" that his union had "failed to perform ministerial acts without reasonable basis to the detriment of plaintiff's strong interest." Id. For example, union officials in Zuniga (1) "failed to timely advise plaintiff regarding [a] medical arbitration [option]," which the plaintiff would have accepted had he been informed; (2) "refused to contact [his] workers' compensation attorney regarding the possible impact of medical arbitration on [his] then-pending workers' compensation case without any reason" despite his request; (3) "failed to timely apprise" other union officials of the existence of status of his grievance when the plaintiff's union merged into another union and (4) "consistently refused to timely pursue plaintiff's meritorious grievance." Id.

Zuniga is also unavailing. First, it is unclear whether Sanchez's interpretation of the Ninth Circuit's standard is consistent with First Circuit case law. Plumley v. S. Container, Inc., No. 00-140-P-C, 2001 WL 1188469, at *16 (D. Me. Oct. 9, 2001) (granting summary judgment and concluding that "[u]nder the First Circuit's standard," that a reasonable factfinder could not take the "evidentiary leap" to infer a breach of the duty of fair representation "merely from the fact that the Union did not present a timely request for arbitration of his grievance") aff'd, 303 F.3d 364 (1st Cir. 2002).

Second, the evidence establishes that Local 348's failure to file Sanchez's grievance by the deadline was due only to negligence. Figueroa believes he told Sills that Local 348 wanted to arbitrate Sanchez's grievance. D. 52 ¶ 16; D. 57 ¶ 15. On the other hand, Sills recalls learning that Local 348 was postponing arbitration while Sanchez's own attorney attempted to settle the case. D. 52 ¶ 17; D. 53 ¶ 8. At bottom, a miscommunication occurred. Both parties were surprised that they had misunderstood each other and worked immediately to fix it. D. 52 ¶ 19; D. 57 ¶ 31. Based on the record here, especially where no evidence exists that either

Figueroa or Sills acted intentionally or in bad faith, a factfinder cannot reasonably conclude that Local 348's lapse was "so far outside a wide range of reasonableness as to be irrational." Emmanuel, 426 F.3d at 420 (quoting Miller, 985 F.2d at 11-12) (internal quotation mark omitted). "Mere negligence or error is not enough." MacKnight v. Leonard Morse Hosp., 828 F.2d 48, 51 (1st Cir. 1987). Moreover, other courts agree that a negligent failure to file is not a breach of the duty of fair representation, especially when the union's failure can be explained. See, e.g., Ahmad v. United Parcel Serv., 281 F. App'x 102, 105 (3d Cir. 2008) (stating that although the plaintiff "argues that the Union breached its duty of fair representation due to [its] failure to timely file the Step Three appeal . . . . this Court has stated that mere negligence is not enough to support a claim of unfair representation"); Shufford v. Truck Drivers, Helpers, Taxicab Drivers, Garage Emps. & Airport Emps. Local Union No. 355, 954 F. Supp. 1080, 1090 (D. Md. 1996) (concluding that the union's untimely filing based on past practice between the union and the company and a mistaken belief that the grievances would be held in abeyance was "at most negligent," not irrational); Giordano v. Local 804, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 634 F. Supp. 953, 957 (S.D.N.Y. 1986) (holding that a union's reliance on past practice and its consideration of costs to save expenses, which resulted in an arbitral decision without a decision on the merits because the arbitrator found that the grievance was time barred, was not arbitrary and perfunctory conduct that went beyond mere negligence); Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.) & Raymond Jones, 360 NLRB No. 96, at *2 (Apr. 30, 2014) (holding that "a union that negligently misses a filing deadline for an arbitration, even if it results in the matter being time barred, does not violate its duty of fair representation" because "[s]omething more than ineptitude or mismanagement is required").

Finally, even if the Zuniga standard applied here, Sanchez has not met it because there is no evidence in the record that a "strong interest" of Sanchez was prejudiced. Zuniga, 812 F.2d at 451. Newby v. Potter, 480 F. Supp. 2d 991 (N.D. Ohio 2007), is instructive. In Newby, the plaintiff argued that the union breached its duty of fair representation in part because the union had "failed to timely appeal his grievance to Step Three arbitration." 480 F. Supp. 2d at 998. Although the union's filing was over five months late, the parties conducted a one-day arbitration on whether the grievance was arbitrable and whether just cause existed to terminate the plaintiff. Id. at 996. The arbitrator issued a "seven-page discussion" on why the grievance was not arbitrable due to the untimely filing. Id. "In the last sentence of her discussion," the arbitrator stated: "I feel obliged to note, in passing, that since the parties fully litigated the merits of this case, it is my assessment that the grievance, even if timely, would not have been successful in overturning grievant's removal on either due process grounds or on the merits." Id. The court granted summary judgment for the union. The court explained that while "[u]nexplained failure to timely file a grievance may constitute arbitrary conduct," "to constitute a breach of the duty of fair representation, the union's inaction must bar access to the labor-management grievance resolution apparatus." Id. at 998. Because the union obtained a "full and fair hearing on the merits of the grievance" despite the untimely appeal, the union's conduct did not substantially prejudice the plaintiff. Id. at 999.

Here, like in Newby, the arbitrator considered arguments on both arbitrability and the merits of Sanchez's discharge. D. 1-4 at 1. The arbitrator gave the parties "full opportunity" to present their case, and the arbitration lasted two days. Id. At least four witnesses testified and the parties submitted post-hearing briefs. Id. at 2-9. The arbitrator issued a 22-page decision after the hearing. Id. at 22. Although the arbitrator found that the grievance was untimely, he analyzed the merits of the parties' dispute in detail and concluded that after a "full

consideration," Sanchez's conduct was "serious and provided the Employer with justification to terminate his employment." Id. at 19, 21. Because Sanchez obtained a "full and fair hearing" of his grievance and he cannot show otherwise, the Court concludes that Local 348 is entitled to summary judgment. Newby, 480 F. Supp. 2d at 999.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Local 348's motion for summary judgment. D. 50. Because Sanchez's hybrid claim requires proving wrongdoing by both NECCO and Local 348, the Court dismisses his claim against NECCO as well. Balser v. Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers (IUE) Local 201, 661 F.3d 109, 118 (1st Cir. 2011) (noting that to prevail on a hybrid claim, "the plaintiff must prove both that the employer broke the [collective bargaining agreement] and that the union breached its duty of fair representation" to recover against either defendant). Judgment shall be entered in favor of both defendants.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit I.e

Attachment Casper=Bailey-v-PWC,Docket.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

APPEAL

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:14–cv–10141–DJC

Bailey v. Pricewaterhousecoopers, LLP et al
Assigned to: Judge Denise J. Casper
Demand: $500,000
Case in other court: USCA – First Circuit, 15–02556
Cause: 28:1331 Fed. Question: Employment Discrimination

Date Filed: 01/20/2014
Date Terminated: 11/18/2015
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Plaintiff

Nancy Lee Bailey

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V.

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TERMINATED: 06/08/2015
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Defendant

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TERMINATED: 01/05/2016
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/20/2014	1	COMPLAINT against All Defendants Filing fee: $ 400, receipt number 0101−4822214 (Fee Status: Filing Fee paid), filed by Nancy Lee Bailey. (Attachments: # 1 Civil Cover Sheet, # 2 Civil Cover Sheet)(Trombetta, Christopher) (Entered: 01/20/2014)
01/21/2014	2	ELECTRONIC NOTICE of Case Assignment. Judge Denise J. Casper assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Chief Magistrate Judge Leo T. Sorokin. (Abaid, Kimberly) (Entered: 01/21/2014)
01/21/2014	3	Summons Issued as to Sean Angles, Pricewaterhousecoopers, LLP. **Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service.** (Danieli, Chris) (Entered: 01/21/2014)
02/21/2014	4	ANSWER to 1 Complaint by Pricewaterhousecoopers, LLP.(Batten, Mark) (Entered: 02/21/2014)
02/21/2014	5	CORPORATE DISCLOSURE STATEMENT by Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 02/21/2014)
02/21/2014	6	NOTICE of Appearance by Laura E. Deck on behalf of Pricewaterhousecoopers, LLP (Deck, Laura) (Entered: 02/21/2014)
02/28/2014	7	NOTICE of Change of Address or Firm Name by Christopher J. Trombetta (Trombetta, Christopher) (Entered: 02/28/2014)
05/09/2014	8	ANSWER to 1 Complaint by Sean Angles.(Batten, Mark) (Entered: 05/09/2014)
05/12/2014	9	NOTICE of Scheduling Conference Scheduling Conference set for 6/23/2014 03:15 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 05/12/2014)
05/12/2014	10	Judge Denise J. Casper: ORDER entered. Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys(Hourihan, Lisa) (Entered: 05/12/2014)
06/16/2014	11	JOINT STATEMENT re scheduling conference . (Trombetta, Christopher) (Entered: 06/16/2014)
06/16/2014	12	CERTIFICATION pursuant to Local Rule 16.1 *On Behalf of Defendant PricewaterhouseCoopers, LLP*. (Batten, Mark) (Entered: 06/16/2014)
06/23/2014	13	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Scheduling Conference held on 6/23/2014. Counesl to file a notice with the Court by 7/7/14 if they seek recusal for reasons stated on the record. Initial disclosures due by 6/30/14. Amended Pleadings due by 9/8/2014. Fact discovery due by 11/30/14. Plaintiff's expert disclosures due by 1/30/15. Defendant's expert disclosures due by 2/28/15. Expert dDiscovery to be completed by 3/30/2015. Summary Judgment Motions due by 5/1/2015. Status Conference set for 12/8/2014 03:00 PM in Courtroom 11 before Judge Denise J. Casper.(Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Christopher Trombetta for the plaintiff. Mark Batten for the defendants.) (Hourihan, Lisa) (Entered: 06/26/2014)

06/26/2014	14	Judge Denise J. Casper: ORDER entered. SCHEDULING ORDER.(Hourihan, Lisa) (Entered: 06/26/2014)
10/10/2014	16	Joint MOTION for Protective Order by Sean Angles, Pricewaterhousecoopers, LLP. (Attachments: # 1 Exhibit A – Stipulated Protective Order)(Batten, Mark) (Entered: 10/10/2014)
11/18/2014	17	Assented to MOTION for Extension of Time to 01/29/2015 to Complete Discovery by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 11/18/2014)
11/21/2014	18	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 17 Motion for Extension of Time to Complete Fact Discovery to 1/29/15. (Hourihan, Lisa) (Entered: 11/21/2014)
11/24/2014	19	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 16 Motion for Protective Order (Maynard, Timothy) (Entered: 11/24/2014)
11/24/2014	20	Judge Denise J. Casper: ORDER entered. PROTECTIVE ORDER (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Maynard, Timothy) (Entered: 11/24/2014)
12/08/2014	21	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Status Conference held on 12/8/2014. Defense counsel reports on the status of the case. Court extends expert disclosures but all other dates remain the same. Plaintiff's expert disclosures due by 2/17/15. Defendant's expert disclosures due by 3/2/15. Expert discovery due by 3/30/15. Summary Judgment Motions due by 5/1/15. Initial Pretrial Conference or hearing on summary judgment motion set for 6/25/2015 03:00 PM in Courtroom 11 before Judge Denise J. Casper. The parties shall confer regarding the topics identified under Local Rule 16.5(d) and shall prepare and submit a joint pretrial memorandum in accordance with Local Rule 16.5(d) no later than five (5) business days prior to the pretrial conference. The pretrial memorandum shall also propose deadlines for the filing of motions in limine, proposed jury instructions, proposed jury voir dire and a proposed trial date. (Court Reporter: Valerie OHara at vaohara@gmail.com.)(Attorneys present: Laura Deck for the defendants.) (Hourihan, Lisa) (Entered: 12/09/2014)
12/09/2014	22	ELECTRONIC NOTICE Setting Hearing on Motion Motion Hearing set for 6/25/2015 03:00 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 12/09/2014)
01/09/2015	23	Assented to MOTION for Extension of Time to 02/28/2015 to Complete Discovery by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 01/09/2015)
01/12/2015	24	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 23 Motion for Extension of Time to Complete Fact Discovery to 2/28/15. (Hourihan, Lisa) (Entered: 01/12/2015)
02/06/2015	25	Joint MOTION for Extension of Time to March 28, 2015 to Complete Discovery *and Other Scheduled Events* by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 02/06/2015)
02/13/2015	26	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 25 Motion for Extension of Time to Complete Discovery to this extent; expert and fact discovery to be completed by 3/30/2015. Interim deadlines to be determined by counsel. Motion for Summary Judgment due by 5/14/15. Oppositon to Summary Judgment due by 6/4/15. Hearing on summary judgment set for 6/25/15 will remain the same. (Hourihan, Lisa) (Entered: 02/13/2015)
03/23/2015	27	Assented to MOTION for Extension of Time to April 30, 2015 to Complete Discovery by Sean Angles, Pricewaterhousecoopers, LLP.(Batten, Mark) (Entered: 03/23/2015)
04/13/2015	28	NOTICE of Appearance by Joshua M. Davis on behalf of Sean Angles (Davis, Joshua) (Entered: 04/13/2015)
04/13/2015	29	NOTICE of Appearance by Keerthi Sugumaran on behalf of Sean Angles (Sugumaran, Keerthi) (Entered: 04/13/2015)
04/16/2015	30	Joint MOTION for Extension of Time to Beyond Summary Judgment Disposition Date to Provide Expert Disclosures *by PriceWaterhouseCoopers, LLP, Sean Angles, and* by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 04/16/2015)

04/27/2015	31	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 27 Motion for Extension of Time to Complete Discovery to this extent; fact discovery to be completed by 4/30/15. The portion of the motion that seeks to continue the hearing on summary judgment is denied. (Hourihan, Lisa) (Entered: 04/27/2015)
04/27/2015	32	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 30 Motion for Extension of Time to Complete Expert Discovery. Plaintiff's expert disclosures due 30 days after ruling on summary judgment motion. Defendant's expert disclosures 30 days from plaintiff's disclosures. Expert discovery to be completed 30 days after defendant's expert disclosures. (Hourihan, Lisa) (Entered: 04/27/2015)
05/14/2015	33	Joint MOTION for Summary Judgment by Sean Angles, Pricewaterhousecoopers, LLP.(Batten, Mark) (Entered: 05/14/2015)
05/14/2015	34	MEMORANDUM in Support re 33 Joint MOTION for Summary Judgment filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 05/14/2015)
05/14/2015	35	Statement of Material Facts L.R. 56.1 re 33 Joint MOTION for Summary Judgment filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 05/14/2015)
05/14/2015	36	DECLARATION re 33 Joint MOTION for Summary Judgment *of Mark W. Batten* by Sean Angles, Pricewaterhousecoopers, LLP. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X)(Batten, Mark) (Entered: 05/14/2015)
05/14/2015	37	DECLARATION re 33 Joint MOTION for Summary Judgment *of Kristen Cheek* by Sean Angles, Pricewaterhousecoopers, LLP. (Attachments: # 1 Exhibit 1)(Batten, Mark) (Entered: 05/14/2015)
05/14/2015	38	DECLARATION re 33 Joint MOTION for Summary Judgment *of Stephen Malloy* by Sean Angles, Pricewaterhousecoopers, LLP. (Attachments: # 1 Exhibit 1)(Batten, Mark) (Entered: 05/14/2015)
05/14/2015	39	DECLARATION re 33 Joint MOTION for Summary Judgment *of Dharmaraj Khot* by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 05/14/2015)
05/14/2015	40	DECLARATION re 33 Joint MOTION for Summary Judgment *of Brandon Salese* by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 05/14/2015)
05/14/2015	41	DECLARATION re 33 Joint MOTION for Summary Judgment *of Erica Green* by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 05/14/2015)
05/14/2015	42	DECLARATION re 33 Joint MOTION for Summary Judgment *of Donna Tassone* by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 05/14/2015)
05/14/2015	43	DECLARATION re 33 Joint MOTION for Summary Judgment *of Gae Barbano−Grinder* by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 05/14/2015)
05/26/2015	44	Assented to MOTION for Extension of Time to 06/11/2015 to File Response/Reply as to 33 Joint MOTION for Summary Judgment by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 05/26/2015)
05/27/2015	45	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 44 Motion for Extension of Time to File Response/Reply re 33 Joint MOTION for Summary Judgment Responses due by 6/11/2015. NO FURTHER EXTENSIONS ANTICIPATED. The hearing date of 6/25/15 will remain the same. (Hourihan, Lisa) (Entered: 05/27/2015)
06/05/2015	46	NOTICE of Withdrawal of Appearance by Laura E. Deck (Deck, Laura) (Entered: 06/05/2015)
06/11/2015	47	AFFIDAVIT in Opposition re 33 Joint MOTION for Summary Judgment filed by Nancy Lee Bailey. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Trombetta, Christopher) (Entered: 06/11/2015)

06/11/2015	48	MOTION to Strike *Paragraph of Cheek Affidavit* by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	49	MOTION to Strike 33 Joint MOTION for Summary Judgment by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	50	MOTION to Strike 33 Joint MOTION for Summary Judgment by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	51	MOTION to Strike 33 Joint MOTION for Summary Judgment by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	52	Opposition re 33 Joint MOTION for Summary Judgment filed by Nancy Lee Bailey. (Trombetta, Christopher) (Main Document 52 replaced on 6/16/2015) (Maynard, Timothy). (Entered: 06/12/2015)
06/12/2015	53	Statement of Material Facts L.R. 56.1 re 33 Joint MOTION for Summary Judgment filed by Nancy Lee Bailey. (Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	54	AFFIDAVIT in Opposition re 33 Joint MOTION for Summary Judgment filed by Nancy Lee Bailey. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	55	MOTION to Strike 33 Joint MOTION for Summary Judgment *Supporting Affidavit* by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	56	MOTION to Strike 33 Joint MOTION for Summary Judgment *Supporting Affidavit Exhibits* by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 06/12/2015)
06/12/2015	57	AFFIDAVIT of Christopher J. Trombetta in Opposition re 33 Joint MOTION for Summary Judgment filed by Nancy Lee Bailey. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Trombetta, Christopher) (Entered: 06/12/2015)
06/22/2015	58	ELECTRONIC NOTICE Resetting Hearing on Motion 50 MOTION to Strike 33 Joint MOTION for Summary Judgment , 51 MOTION to Strike 33 Joint MOTION for Summary Judgment , 49 MOTION to Strike 33 Joint MOTION for Summary Judgment , 55 MOTION to Strike 33 Joint MOTION for Summary Judgment *Supporting Affidavit*, 48 MOTION to Strike *Paragraph of Cheek Affidavit*, 56 MOTION to Strike 33 Joint MOTION for Summary Judgment *Supporting Affidavit Exhibits*, 33 Joint MOTION for Summary Judgment : Motion Hearing set for 6/25/2015 11:00 AM in Courtroom 11 before Judge Denise J. Casper. (NOTE TIME CHANGE ONLY)(Hourihan, Lisa) (Entered: 06/22/2015)
06/22/2015	59	Opposition re 56 MOTION to Strike 33 Joint MOTION for Summary Judgment *Supporting Affidavit Exhibits (Motion to Strike Certain Batten Declaration Exhibits)* filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 06/22/2015)
06/22/2015	60	Opposition re 48 MOTION to Strike *Paragraph of Cheek Affidavit* filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 06/22/2015)
06/22/2015	61	Opposition re 55 MOTION to Strike 33 Joint MOTION for Summary Judgment *Supporting Affidavit (Motion to Strike References to Errors)* filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 06/22/2015)
06/22/2015	62	Opposition re 50 MOTION to Strike 33 Joint MOTION for Summary Judgment *(Motion to Strike Portions of Barbano−Grinder Declaration)* filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 06/22/2015)
06/22/2015	63	Opposition re 49 MOTION to Strike 33 Joint MOTION for Summary Judgment *(Motion to Strike Paragraph of Green Declaration)* filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 06/22/2015)
06/22/2015	64	Opposition re 51 MOTION to Strike 33 Joint MOTION for Summary Judgment *(Motion to Strike Portions of Tassone Declaration)* filed by Sean Angles, Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 06/22/2015)

06/22/2015	65	Assented to MOTION for Leave to File *Reply Brief in Support of Summary Judgment* by Sean Angles, Pricewaterhousecoopers, LLP. (Attachments: # 1 Exhibit – Proposed Reply Brief)(Batten, Mark) (Entered: 06/22/2015)
06/23/2015	66	Joint MOTION to Strike 54 Affidavit in Opposition to Motion *for Summary Judgment* by Sean Angles, Pricewaterhousecoopers, LLP. (Attachments: # 1 Supplement Blackline Affidavit, # 2 Supplement Deposition Excerpts)(Sugumaran, Keerthi) (Entered: 06/23/2015)
06/23/2015	67	Joint MOTION to Strike 47 Affidavit in Opposition to Motion *for Summary Judgment* by Sean Angles, Pricewaterhousecoopers, LLP. (Attachments: # 1 Supplement Blackline Affidavit)(Sugumaran, Keerthi) (Entered: 06/23/2015)
06/25/2015	68	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Motion Hearing held on 6/25/2015 re 33 Joint MOTION for Summary Judgment filed by Pricewaterhousecoopers, LLP, Sean Angles. Arguments. Court takes under advisement 33 Motion for Summary Judgment. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Christopher Trombetta for the plaintiff. Mark Batten and Joshua Davis for the defendants.) (Hourihan, Lisa) (Entered: 06/25/2015)
07/02/2015	69	Assented to MOTION for Extension of Time to File Response/Reply as to 67 Joint MOTION to Strike 47 Affidavit in Opposition to Motion *for Summary Judgment*, 66 Joint MOTION to Strike 54 Affidavit in Opposition to Motion *for Summary Judgment* by Nancy Lee Bailey.(Trombetta, Christopher) (Entered: 07/02/2015)
07/08/2015	70	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 69 Motion for Extension of Time to File Response/Reply re 55 MOTION to Strike 33 Joint MOTION for Summary Judgment *Supporting Affidavit*, 48 MOTION to Strike *Paragraph of Cheek Affidavit* Responses due by 7/14/2015 (Hourihan, Lisa) (Entered: 07/08/2015)
07/14/2015	71	MEMORANDUM in Opposition re 66 Joint MOTION to Strike 54 Affidavit in Opposition to Motion *for Summary Judgment* filed by Nancy Lee Bailey. (Trombetta, Christopher) (Entered: 07/14/2015)
07/14/2015	72	MEMORANDUM in Opposition re 67 Joint MOTION to Strike 47 Affidavit in Opposition to Motion *for Summary Judgment* filed by Nancy Lee Bailey. (Trombetta, Christopher) (Entered: 07/14/2015)
07/31/2015	73	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 65 Motion for Leave to File Reply Brief in Support of Summary Judgment by Sean Angles, Pricewaterhousecoopers, LLP; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include – Leave to file granted on (date of order)– in the caption of the document. (Hourihan, Lisa) (Entered: 07/31/2015)
07/31/2015	74	Joint REPLY to Response to 33 Joint MOTION for Summary Judgment filed by Pricewaterhousecoopers, LLP. (Batten, Mark) (Entered: 07/31/2015)
11/18/2015	75	Judge Denise J. Casper: ORDER entered. MEMORANDUM AND ORDER – The Court ALLOWS Defendants' motion for summary judgment, D. 33, and DENIES Bailey's motions to strike, D. 48, D. 49, D. 50, D. 51, D. 55, D. 56. Defendants' motions to strike portions of Bailey's and Aries's affidavits are DENIED as moot, D. 66, D. 67. (Hourihan, Lisa) (Entered: 11/18/2015)
11/18/2015	76	Judge Denise J. Casper: ORDER entered. JUDGMENT (Hourihan, Lisa) (Entered: 11/18/2015)
12/17/2015	77	NOTICE OF APPEAL re 75 Memorandum and Order, 76 Judge Denise J. Casper: ORDER entered. JUDGMENT (Hourihan, Lisa) (Entered: 11/18/2015) Judgment by Nancy Lee Bailey Filing fee: $ 505, receipt number 0101–5894834 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official**

		record to Court of Appeals by 1/6/2016. (Trombetta, Christopher) (Modified on 12/18/2015 to Correct Docekt Text and CM/ECF Document Link) (Paine, Matthew). (Entered: 12/17/2015)
12/18/2015	78	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 77 Notice of Appeal. (Paine, Matthew) (Entered: 12/18/2015)
12/18/2015	79	USCA Case Number 15−2556 for 77 Notice of Appeal filed by Nancy Lee Bailey. (Paine, Matthew) (Entered: 12/18/2015)
01/05/2016	80	NOTICE of Withdrawal of Appearance by Keerthi Sugumaran (Sugumaran, Keerthi) (Entered: 01/05/2016)
09/19/2016	81	OPINION of USCA as to 77 Notice of Appeal filed by Nancy Lee Bailey. (Paine, Matthew) (Entered: 09/20/2016)
09/19/2016	82	USCA Judgment as to 77 Notice of Appeal filed by Nancy Lee Bailey. AFFIRMED... (Paine, Matthew) (Entered: 09/20/2016)

Exhibit I.f

Attachment Casper=Bailey-v-PWC.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY LEE BAILEY, **Plaintiff,** **v.** **PRICEWATERHOUSECOOPERS, LLP and SEAN ANGLES,** **Defendants.**	**Civil Action No. 14-10141-DJC**

MEMORANDUM AND ORDER

CASPER, J. **November 18, 2015**

I. Introduction

Plaintiff Nancy Lee Bailey ("Bailey") has filed this lawsuit against Defendants PricewaterhouseCoopers LLP ("PwC") and Sean Angles (collectively, "Defendants") alleging that Bailey was fired from PwC in retaliation for her report of sexual harassment of a co-worker by a manager in violation of 42 U.S.C. § 2000e-2(a)(1) *et seq.* and Mass. Gen. L. c. 151B § 4 and because of her age in violation of 29 U.S.C. § 623(a) and Mass. Gen. L. c. 151B § 4. D. 1. Defendants have moved for summary judgment. D. 33. For the reasons stated below, the Court **ALLOWS** the motion.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect

the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

A. Independent Foreclosure Review Projects

Bailey was hired by PwC as a switchboard operator in 1995. D. 53 ¶ 15. During her first ten years at PwC, she worked as a hotel administrator, receptionist and executive assistant. Id. ¶¶ 16-18. In 2005, Bailey became an associate in the Capital Markets group supervised by PwC principal Scott Dillman. Id. ¶¶ 22-23.

PwC employees who are not assigned to a billable project are considered "on the bench." Id. ¶ 4. It is not uncommon for PwC employees to be on the bench between assignments. D. 54 ¶ 31. In 2010, Bailey was on the bench after she completed a project for Wells Fargo. Id. ¶ 28.

When Bailey reported to her PwC "coach" Regina Aries that she did not have a project, Aries told her that the PwC Human Resources department and the employee's coach find the employee a new work assignment. Id. ¶¶ 29-30. During her time on the bench in 2010, Bailey performed work for various PwC partners but did not bill for any hours she worked. Id. ¶¶ 33-35.

Bailey was rated "Below Expectations" in a 2010 mid-year review and was given the lowest Annual Review Committee ("ARC") rating of 4 or "Less Than Expected" for the full year. D. 53 ¶¶ 26-27. She received this rating because she had lower than expected billable hours and not as a reflection of the quality of her work. D. 54 ¶¶ 38-41.

In 2011, Bailey was trained for an Independent Foreclosure Review ("IFR") project for which PwC had been retained to review banks' mortgage foreclosure files. D. 53 ¶¶ 28-29. The review teams were generally composed of three layers. "Preparers," the most junior employees, would review the banks' files, identify key documents and insert responses into a form questionnaire, and "reviewers" would review the preparers' work, either returning the file to the preparer for corrections or passing it on to the third level of review, the "approvers." Id. ¶ 30. At least when working with supervisor James Dunn, Bailey was assigned to the middle level of this process as a "reviewer." Id. ¶¶ 30-31.

Bailey's first IFR project in 2011 was based in Minnesota, where Dunn rated her as "meeting expectations." Id. ¶ 32. Dunn noted that Bailey's team was less productive than others and recommended that Bailey improve by communicating productivity problems to her manager. Id. Dunn also noted that he was impressed by Bailey's mastery of the foreclosure and file review process. D. 36-9 at 2.

Bailey next moved to an IFR project in North Carolina that required review of foreclosure files for compliance with certain state laws. D. 53 ¶ 34. She was initially supervised

by Karen Brown who rated Bailey as having "met expectations." Id. ¶ 35. Starting in the fall of 2011, Bailey began reporting to Donna Tassone on the same IFR project. Id. ¶ 37. In March 2012, Tassone rated Bailey as meeting expectations. Id. ¶ 38. Tassone noted in her review that Bailey could improve her work by preventing the need for frantic and stressful work before deadlines, improving her skills with spreadsheets and soliciting input from her supervisors. Id.

The preparers who worked under Bailey on this IFR project noted concerns with her performance. Erica Green, a preparer, observed that Bailey did not have the skills expected of a reviewer. D. 41 ¶¶ 7-9. According to Green, Bailey was not able to respond to questions from attorneys at meetings, so Green attended attorney meetings with Bailey and took responsibility for answering questions.[1] Id. ¶ 8. When confronted with time-sensitive information requests from Tassone, Bailey would simply pass the requests along to the preparers. Id. ¶ 9. Brandon Salese, another preparer, found that Bailey often could not answer his questions about the review and that Bailey returned files with fewer substantive corrections than other reviewers. D. 40 ¶¶ 7-11.

In March 2012, while Bailey was on vacation for two weeks, Tassone performed Bailey's work as a reviewer. D. 54 ¶ 80. After performing this work herself and communicating directly with the preparers, Tassone concluded that Bailey's work was not meeting expectations.[2] D. 42

[1] Bailey has moved to strike as conclusory the paragraph of Green's declaration that discusses Bailey's performance at attorney meetings, which both attended, on the grounds that Green fails to specify the number of attorney meetings that occurred or the nature of the questions Bailey failed to answer. D. 49 at 1. The motion is denied as this challenge goes to the weight, not admissibility, of such evidence at trial and the Court may consider admissible evidence in resolving this motion.

[2] Bailey has moved to strike as conclusory the paragraphs of Tassone's declaration that address Bailey's failure to provide guidance to preparers, Tassone's verbal coaching and constructive feedback to Bailey and Bailey's inability to respond to questions posed by Tassone about loans. D. 51 at 1-2. Bailey objects to the lack of detail provided by Tassone as to exactly what guidance Bailey failed to give preparers, what feedback Tassone gave to Bailey and what

¶ 8. Tassone gave Bailey constructive feedback on her work, but Tassone reported that Bailey's performance did not improve and Bailey's preparers were not receiving sufficient instruction and direction. Id. ¶¶ 9-11. Bailey's engagement on the project was scheduled to end on June 22, 2012, and Tassone gave Bailey the choice of leaving the project or continuing as a preparer. D. 53 ¶¶ 43-44. Bailey elected to leave the project. Id. ¶ 45.

On July 7, 2012, Bailey was assigned to an IFR project in Florida. Id. ¶ 48. Due to Bailey's continued performance issues, at the end of the summer Aaron Peloquin, who oversaw the project, assigned Bailey to work with Angles as her approver because Angles was known as an effective trainer for underperformers. Id. ¶¶ 51, 53. As a reviewer, Bailey supervised three preparers, including Jonathan Recor. Id. ¶ 54.

B. Bailey Reports Recor's Allegation of Sexual Harassment

As later discussed, the crux of Bailey's retaliation claim is that Angles gave her a poor performance review because she reported Recor's allegations that Angles had made sexual advances. Whether Angles was informed of Bailey's report of same remains, after discovery, unsupported by the record.

On September 25, 2012, Recor told Bailey that Angles had made what Recor interpreted as sexual advances to him and that Angles was being overly critical of Recor's job performance because he had declined those advances. Id. ¶ 57. The next day, Bailey and Recor met with Angles to discuss problems with Recor's performance, but the sexual allegations were not discussed. Id. ¶¶ 60-61. At this meeting, as Recor's supervisor, Bailey took responsibility for not scrutinizing Recor's work more carefully. D. 36-1 at 86; D. 36-14 at 3.

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and how many questions Bailey failed to answer. The motion is denied as, again, this challenge goes to the weight, not the admissibility, of such evidence at trial.

A few days later, Bailey reported Recor's allegations to Aries. D. 54 ¶ 149. Aries told her to tell Dillman. Id. ¶ 149. Dillman was Bailey's "relationship partner" at PwC and, therefore, provided counseling and played a role in the review process. Id. ¶ 150.

During the week of October 1, 2012, Bailey told Colleen Hurley, a manager at the same level as Angles, about Recor's allegations. D. 53 ¶ 64. Hurley was conflicted about whether Bailey should tell Angles about the allegations and Hurley promised to keep their conversation confidential. Id.

On October 5, 2012, Bailey reported Recor's allegations to Dillman. Id. ¶ 65. Dillman testified that did not repeat the allegations, or the fact that Bailey reported them to him, to anyone else. Id. ¶ 66; D. 36-4 at 14-16.

On October 8, 2012, Peloquin, Bailey and Recor met so Recor could tell Peloquin about Angles' sexual advances. D. 54 ¶ 157. At the meeting, Bailey told Peloquin that she had informed Dillman of Recor's allegations. Id. ¶ 159. Later that day, Peloquin contacted Gae Barbano-Grinder in Human Resources and reported Recor's allegations. D. 53 ¶ 69. Barbano-Grinder opened an investigation and Recor was immediately assigned to a different team where he would not report to Angles.[3] Id. ¶¶ 70, 74. The investigation ultimately concluded that the allegations were unsubstantiated. Id. ¶ 78.

C. Bailey Leaves the IFR Project and Returns to the Bench

[3] Bailey has moved to strike various paragraphs of Barbano-Grinder's declaration as inadmissible or conclusory. D. 50. The motion is denied. Contrary to Bailey's argument, Barbano-Grinder's statement that it was "brought to her attention" in summer 2012 that Recor and Bailey were not meeting expectations, see D. 43 ¶ 33 is admissible at least to explain why Barbano-Grinder assigned Bailey to work under Angles. Second, Bailey moves to strike that statement and six others on the basis that the statements lack sufficient detail or explanation. These arguments fail because the challenged statements are based on Barbano-Grinder's personal knowledge and Bailey's objections go to the weight, not admissibility, of the statements.

After working from home for a week, Angles returned to the Florida office on October 15, 2012, and complained about problems with Bailey's performance on the IFR project. D. 54 ¶¶ 162, 180. Other approvers also noted problems with Bailey's performance. One approver, Diane Thai, reported to Peloquin on October 24, 2012 that 16 of 19 files reviewed by Bailey contained errors that should have been resolved before the file reached an approver. D. 53 ¶ 75; D. 36-16.

Peloquin assigned a selection of Bailey's files to Thai and four other approvers to conduct independent reviews of Bailey's performance to confirm that others agreed with Angles that Bailey's performance was not meeting expectations. D. 53 ¶ 76. Each approver reported to Peloquin that he or she had identified errors in Bailey's work. Id. ¶ 77; D. 36-18. These errors included inconsistencies, typos, incorrect answers and formatting problems. D. 36-18 at 2-3.

Peloquin spoke to Barbano-Grinder and took Bailey off the IFR project because of her performance problems. D. 53 ¶¶ 80-81. On November 12, 2012, Peloquin notified the approvers and reviewers on the IFR that the review was moving to a two-level rather than a three-level process. Id. ¶ 79. This change meant that after a preparer completed a foreclosure file, the file would be reviewed only one more time, by a reviewer or an approver. Id. Bailey was removed from the project on November 28, 2012. Id. ¶ 81. The change to a two-level review was implemented in January 2013 and multiple reviewers were rolled off the IFR project as a result of this restructuring. Id. ¶ 79. According to Peloquin, if Bailey had still been on the IFR at the time of the restructuring, she would been rolled off at that time. D. 36-3 at 24. However, Peloquin was unwilling to keep Bailey on the project until the restructuring due to her poor performance. Id.

In December 2012, Angles completed a written performance review finding Bailey's work on the IFR to be "Below Expectations." D. 53 ¶ 82. Peloquin, as a secondary reviewer, noted in the review that problems with Bailey's work had been identified by Angles and other approvers. Id. ¶ 83. These problems included inconsistencies in Bailey's responses to issues in the file, missed documentation and lack of attention to detail. Id.

After Bailey was taken off the IFR, she was on the bench. Id. ¶ 89. While it was Bailey's understanding that Human Resources and her coach were supposed to find her new work, Bailey also contacted partners to try to find a project. D. 54 ¶¶ 210-11. Human Resources Demand Manager Kristin Cheek tried to find projects for Bailey but had difficulty staffing her due to her limited range of skills and prior experience.[4] D. 37 ¶¶ 5-7. Between December 2012 and June 2013, Bailey scanned her key card at the Boston office only twice, but she came to the office with other employees (who scanned their key cards) at least forty times. D. 54 ¶ 223. Cheek contacted Bailey in late February to inquire about her work. D. 53 ¶ 93. Bailey responded that she would be on vacation for two weeks and unavailable until March 18, 2013. Id.

In April 2013, Bailey was invited by PwC director Dharmaraj Khot to join a short-term tax advisory project. Id. ¶¶ 94-95. Bailey refused the offer because she considered herself unqualified. Id. ¶ 95. The project was scheduled to last only three to four weeks and Bailey did not think she would have time to learn the relevant financial concepts and perform the work in

[4] Bailey has moved to strike the portions of Cheek's declaration that address Cheek's efforts to find new engagements for Bailey, Cheek's characterization of Bailey's experience and skills as "limited," and her statement that the available engagements required skills that Bailey lacked. D. 48. Bailey has moved to strike these statements as conclusory and without foundation. Id. The motion to strike is denied. The challenged statements are based upon Cheek's personal knowledge and experience as a PwC employee who was involved with helping Bailey look for new projects. D. 37 ¶¶ 1-4.

that time. Id. The following month, Dillman spoke to Bailey about a potential engagement involving document validation, but PwC was not retained for that engagement. Id. ¶ 97.

D. Bailey's Unsatisfactory Performance Rating and Termination

An IFR ARC met to discuss Bailey's performance on April 15, 2013. Id. ¶¶ 102, 106. The ARC rated Bailey a "5" or "Unsatisfactory," the lowest rating, because of her low billing hours and the negative performance review from Angles. Id. ¶ 106. Dillman did not object to that rating. Id. ¶ 107.

On June 7, 2013, the ARC for the Capital Markets group met to assign performance ratings for the year. Id. ¶ 109. Bailey had performed no work since the IFR ARC's rating two months earlier, and the Capital Markets ARC finalized her "Unsatisfactory" rating. Id. Bailey's employment with PwC was terminated on June 20, 2013. Id. ¶ 110. According to Dillman, the decision to terminate Bailey was based 80% on her lack of work for over six months and 20% on the negative performance review from Angles. Id. ¶ 111.

IV. Procedural History

Bailey instituted this action on January 20, 2014. D. 1. Defendants have now jointly moved for summary judgment. D. 33. The Court heard the parties on the pending motion and took the matter under advisement. D. 68.

V. Discussion

A. Retaliation

To establish a prima facie case of retaliation claim under Title VII or Chapter 151B, Bailey must show that: 1) she engaged in some protected activity; 2) suffered some material adverse action by employer; and 3) the employer's adverse action was causally linked to her protected activity. Prescott v. Higgins, 538 F.3d 32, 43 (1st Cir. 2008); Mole v. Univ. of Mass.,

442 Mass. 582, 591-92 (2004). Neither side disputes that Bailey engaged in protected conduct when she reported that Recor had been subjected to sexual advances by Angles and unjustified criticism of his work after he rejected the advances. The disputed issue here is whether the evidence could support a finding that Bailey's termination was caused by such protected activity. Bailey claims that Angles retaliated against her for reporting Recor's allegations by giving her an unjustified negative performance review and getting her rolled off of the IFR project, which led directly to her termination.

1. There Is No Evidence Angles Knew of Bailey's Report

The summary judgment record, however, after a full course of discovery, reveals gaps in the chain of causation between Bailey's protected activity and her termination that are fatal to her retaliation claims. Bailey must show that Angles, the alleged retaliator, knew about her protected activity — "after all, one cannot have been motivated to retaliate by something he was unaware of." Medina-Rivera v. MVM, Inc., 713 F.3d 132, 139 (1st Cir. 2013). Despite Bailey's argument to the contrary, there is no evidence in the record from which a reasonable jury could conclude that Angles was aware that Bailey had reported Recor's harassment allegations to Dillman. Without knowledge of Bailey's report, Angles could be found to have retaliated against her for such conduct. See Domenichetti v. Premier Educ. Grp., LP, No. 12-cv-11311-IT, 2015 WL 58630, at *7 (D. Mass. Jan. 5, 2015) (holding that plaintiff's "retaliation claim fails because she is unable to demonstrate that any of the relevant decisionmakers knew about her protected conduct when they took the adverse employment actions").

First, Bailey argues that Angles learned of her report to Dillman from Peloquin. Both Angles and Peloquin, however, deny that Peloquin told Angles. Peloquin testified at his deposition that he honored a request from Human Resources not to discuss the matter with

anyone outside of Human Resources. D. 36-3 at 15-16. Angles testified that Peloquin did not tell him that he had spoken with Bailey regarding Recor's allegations. D. 36-2 at 13-14. Bailey argues that Peloquin must have shared this information with Angles because they "had been very close," had shared information in the past and gave "inconsistent" testimony as to whether they ever ate dinner alone together. D. 52 at 8. In fact, Peloquin and Angles testified consistently that they had work dinners with each other in group settings, but were not friends outside of work. D. 57-2 at 4-5; D. 57-3 at 3. Bailey offers only unsupported speculation to support her theory that Peloquin and Angles spoke about her report.

Second, Bailey contends that her colleague Hurley informed Angles about Bailey's report to Dillman. At her deposition, however, Bailey testified that Hurley promised Bailey that she would not talk to Angles. D. 36-1 at 96. Although Bailey believes that Hurley nonetheless told Angles about Recor's allegations, there is no evidence in the record that she did. Bailey's supposition that Hurley did so because Angles worked from home the following week rather than reporting to Florida as usual, D. 54 ¶¶ 153-156, is, at most, speculative.

Finally, Bailey argues that Angles must have known about her report of Recor's allegations because he suddenly began to criticize her performance on October 15, 2012. D. 52 at 14. The evidence, however, reveals that Bailey had performance problems at PwC that were reported before October 2012. For example, Bailey's work was criticized by her previous supervisor Tassone and the preparers Bailey supervised on her previous project, including Green and Salese. D. 40 ¶¶ 7-13; D. 41 ¶¶ 7-9; D. 42 ¶¶ 9-13. Before Bailey reported Recor's allegations to Dillman, Peloquin had assigned Bailey to Angles's team because of her poor performance. D. 36-3 at 7-8.

2. There is No Evidence Peloquin's Decision to Remove Bailey from the IFR Project Was Retaliatory

There is no evidence in the record upon which a reasonable jury could conclude that Peloquin removed Bailey from the IFR project for a retaliatory reason. Even assuming that Angles knew of her report to Dillman and gave her a retaliatory negative review, Bailey has provided no evidence that Angles' alleged retaliatory motive can be attributed to Peloquin or that Peloquin's stated reason for removing her from the project was pretextual.

Peloquin testified that his decision to remove Bailey from the IFR project due to her poor performance was informed not only by Angles's evaluation of her work, but also by the negative feedback he received from approvers who reviewed Bailey's work. D. 36-3 at 18-22. After Peloquin assigned several of Bailey's files to Thai and four other approvers to review Bailey's work product, the approvers reported a range of issues with Bailey's files, including inconsistencies, typographical errors, incorrect answers, formatting problems and inattention to detail. D. 36-18 at 2-3. According to Bailey, "[n]one of the responses provided any criticisms of [her] work." D. 54 ¶ 185. Bailey attributed the errors in her files to poor directions from Angles, a problem with her computer or the fact that the files were old. Id. ¶¶ 186-194.

Regardless of her actual performance, Bailey "must do more than cast doubt on the rationale proffered by [PwC;] the evidence must be of such strength and quality as to permit a reasonable finding that [her termination] was obviously or manifestly unsupported." Shorette v. Rite Aid of Maine, 155 F.3d 8, 13 (1st Cir. 1998) (emphasis in original) (internal citation and quotation marks omitted). "The question is not whether [Bailey] was actually performing below expectations, but whether [PwC] believed that she was." Feliciano v. El Conquistador Resort & Country Club, 218 F.3d 1, 7 (1st Cir. 2000). Bailey has identified no specific admissible

evidence to support her position that PwC actually believed that her job performance was adequate yet nonetheless rolled her off the IFR project out of retaliatory animus.[5]

3. There Is No Evidence Connecting the Alleged Retaliation to a Material Adverse Employment Action

Finally, Bailey has not presented evidence that the alleged retaliatory review led to a material adverse employment action. Bailey does not argue that the poor performance review or her removal from the IFR project were actionable adverse employment actions. Instead, she argues that her termination from PwC was a material adverse employment action "derived entirely from the retaliatory negative evaluation prepared by Mr. Angles." D. 52 at 18. Bailey, however, has pointed to no evidence to support her theory that the negative performance review prepared by Angles led to her termination.

Bailey must show that the alleged retaliation was the but-for cause of her termination, Ponte v. Steelcase Inc., 741 F.3d 310, 321 (1st Cir. 2014), and she has failed to do so. It is undisputed that Bailey was terminated as a result of an unsatisfactory rating from the Capital Markets group ARC. There is no evidence in the record that any of the ARC decisionmakers, aside from Dillman, knew of either Bailey's report to Dillman or the underlying allegations by Recor. It is undisputed that Bailey did no billable work from the time she was rolled off the IFR engagement at the end of November 2012 through her performance assessment in April 2013. D. 53 ¶ 101. Dillman testified without contradiction that Bailey's "inability to secure work and employment was the dominant reason why she was severed." D. 36-4 at 22. Furthermore,

[5] Relatedly, Bailey has moved to strike all references to errors in her IFR files on the basis that the files themselves were not produced and therefore any reference to the errors is without foundation. D. 55. Bailey similarly has also moved to strike various exhibits that address the review of IFR files. D. 56. The motions are denied. Testimony about the problems with Bailey's performance that were reported to Peloquin would be admissible and relevant because it is probative of Peloquin's good faith belief that Bailey was not performing adequately.

Bailey attributes no discriminatory or retaliatory motive to Dillman and cannot identify any other members of the ARC. D. 53 ¶ 107; D. 36-1 at 130. To the extent that the Angles review played a role in the ARC's decision, Dillman's unrebutted testimony is that "[o]ne [performance review] does not, you know, ruin – quote unquote ruin somebody," and "80 percent of the [termination] determination was her inability to find employment and perhaps 20 percent" the negative performance review from Angles. D. 36-4 at 23-24. No reasonable jury could conclude that Bailey's protected activity was the but-for cause of her termination from PwC. See Mole, 442 Mass. at 598 (noting that "[d]espite a retaliatory or discriminatory motive on the part of a supervisor who recommends that some adverse action be taken against an employee, a third person's independent decision to take adverse action breaks the causal connection between the supervisor's retaliatory or discriminatory animus and the adverse action").

B. Age Discrimination

The ADEA and Massachusetts law make it unlawful for an employer to take an adverse employment action against an employee on the basis of age. 29 U.S.C. § 623(a); Mass. Gen. L. c. 151B § 4. Under the burden-shifting framework for discrimination cases under federal and state law, Torrech-Hernández v. Gen. Elec. Co., 519 F.3d 41, 48 (1st Cir. 2008), a plaintiff must make a prima facie by showing that 1) the plaintiff was at least 40 years old; 2) the plaintiff's job performance met the employer's legitimate expectations; 3) plaintiff suffered an adverse employment action; and 4) employer filled his/her position with another. See Adamson v. Walgreens Co., 750 F.3d 73, 78 (1st Cir. 2014); Dunn v. Trustees of Boston Univ., 761 F.3d 63, 68 (1st Cir. 2014). If plaintiff makes out a prima facie case, then the burden shifts to the employer to "articulate a legitimate, non discriminatory reason for its decisions." Adamson, 750 F.3d at 78 (internal quotations and citation omitted). "If the employer meets this burden, the

focus shifts back to the plaintiff, who must then show, by a preponderance of the evidence, that the employer's articulated reason for the adverse employment action is pretextual and that the true reason for the adverse action is discriminatory." Id. (internal quotations and citation omitted).

For the reasons discussed above in regard to her job performance, it is not clear that Bailey has established a prima facie claim of age discrimination, particularly in regard to whether her job performance met her employer's legitimate expectations. Assuming *arguendo* that she has made this showing, PwC has articulated a legitimate, non-discriminatory reason for its termination of her employment, namely that her job performance, as evaluated by several reviewers and managers, and lack of billing, and as ultimately determined by the ARC, was the basis of her termination. Bailey has failed to rebut this showing and show that these reasons are pretextual. Bailey makes several arguments that the reasons are pretextual. First, Bailey testified that she thought that PwC favored younger employees because they were smarter, D. 36-1 at 124-25, but her belief regarding same does not raise a reasonable inference of discrimination. Second, Bailey described one occasion in November 2012 when Peloquin asked her if she would not rather be home with her grandchildren and if she were not getting "a little too old" to be "traveling and doing what [she] was doing." Id. at 125-26. Bailey responded that she enjoyed the work and the travel, and the conversation ended. Id. at 126. Isolated questions or stray remarks from a supervisor, particularly one who did not make the ultimate, adverse decision regarding termination, about retirement plans do not on their own constitute evidence of age bias. See Shorette, 155 F.3d at 13 (noting that asking plaintiff "how old he was and when he planned to retire" was "a textbook example of an isolated remark which demonstrates nothing"); see Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 6 n.8 (1st Cir. 1998) (observing that "stray

remarks in the workplace . . . , statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" are generally insufficient to prove discriminatory animus) (internal citation and quotation marks omitted). Finally, Bailey stated that three other employees between the ages of forty and seventy left PwC, but the record offers nothing about the relevance of their departures (i.e., circumstances of departure, job performance) to Bailey's claim. D. 36-1 at 127-28. Accordingly, having failed to show that the stated reasons for her termination were pretext for age discrimination, Bailey's discrimination claims must also fail.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Defendants' motion for summary judgment, D. 33, and DENIES Bailey's motions to strike, D. 48, D. 49, D. 50, D. 51, D. 55, D. 56. Defendants' motions to strike portions of Bailey's and Aries's affidavits are DENIED as moot, D. 66, D. 67.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit I.g

Attachment Casper=Boone-v-OldColonyYMCA,Docket.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

CLOSED

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:13–cv–13131–DJC

Boone v. Old Colony Young Men's Christian Association et al
Assigned to: Judge Denise J. Casper
Demand: $250,000
Cause: 28:1331 Fed. Question: Employment Discrimination

Date Filed: 12/10/2013
Date Terminated: 02/12/2016
Jury Demand: Both
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

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Mediator

Judge Judith G. Dein
TERMINATED: 02/11/2016

Date Filed	#	Docket Text
12/10/2013	1	COMPLAINT against All Defendants Filing fee: $ 400, receipt number 0101–4768167 (Fee Status: Filing Fee paid), filed by Jessika Boone. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Civil Cover Sheet, # 4 Civil Cover Sheet)(Trombetta, Christopher) (Entered: 12/10/2013)
12/10/2013	2	ELECTRONIC NOTICE of Case Assignment. Judge Denise J. Casper assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Jennifer C. Boal. (Abaid, Kimberly) (Entered: 12/10/2013)

12/10/2013	3	Summons Issued as to All Defendants. **Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service.** (Geraldino−Karasek, Clarilde) (Entered: 12/10/2013)
01/27/2014	4	ANSWER to 1 Complaint, with Jury Demand by Old Colony Young Men's Christian Association.(Pursley, Thomas) (Entered: 01/27/2014)
01/27/2014	5	ANSWER to 1 Complaint, with Jury Demand by Joseph Barakat.(Pursley, Thomas) (Entered: 01/27/2014)
01/27/2014	6	ANSWER to 1 Complaint, with Jury Demand by Ralph McHugh.(Pursley, Thomas) (Entered: 01/27/2014)
01/27/2014	7	CORPORATE DISCLOSURE STATEMENT by Old Colony Young Men's Christian Association. (Pursley, Thomas) (Entered: 01/27/2014)
01/28/2014	8	NOTICE of Scheduling Conference Scheduling Conference set for 3/3/2014 02:45 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 01/28/2014)
01/28/2014	9	Judge Denise J. Casper: ORDER entered. Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys(Hourihan, Lisa) (Entered: 01/28/2014)
02/24/2014	10	JOINT SUBMISSION pursuant to Local Rule 16.1 *(D)* by Old Colony Young Men's Christian Association.(Pursley, Thomas) (Entered: 02/24/2014)
02/27/2014	11	CERTIFICATION pursuant to Local Rule 16.1 *by Defendant Old Colony YMCA*. (Pursley, Thomas) (Entered: 02/27/2014)
02/27/2014	12	CERTIFICATION pursuant to Local Rule 16.1 *by Defendant Joseph Barakat*. (Pursley, Thomas) (Entered: 02/27/2014)
02/27/2014	13	CERTIFICATION pursuant to Local Rule 16.1 *by Defendant Ralph McHugh*. (Pursley, Thomas) (Entered: 02/27/2014)
02/28/2014	14	NOTICE of Change of Address or Firm Name by Christopher J. Trombetta (Trombetta, Christopher) (Entered: 02/28/2014)
03/03/2014	15	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Scheduling Conference held on 3/3/2014. Initial Disclosures due by 3/31/14. Amended Pleadings due by 6/27/2014. Fact discovery to be completed by 10/31/2014. Summary Judgment Motions due by 12/15/2014. Status Conference set for 11/17/2014 02:30 PM in Courtroom 11 before Judge Denise J. Casper. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Christopher Trombetta for the plaintiff Thomas Pursley and Andrew Lynch for the defendants.) (Hourihan, Lisa) (Entered: 03/04/2014)
03/04/2014	16	Judge Denise J. Casper: ORDER entered. SCHEDULING ORDER.(Hourihan, Lisa) (Entered: 03/04/2014)
03/31/2014	18	Disclosure pursuant to Rule 26 by Old Colony Young Men's Christian Association.(Pursley, Thomas) (Entered: 03/31/2014)
09/05/2014	19	MOTION to Compel *Plaintiff Jessika Boone to Answer Interrogatories and Respond to Requests for Production of Documents and Memorandum in Support* by Old Colony Young Men's Christian Association. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Pursley, Thomas) (Entered: 09/05/2014)
09/19/2014	20	MOTION for Extension of Time to File Response/Reply as to 19 MOTION to Compel *Plaintiff Jessika Boone to Answer Interrogatories and Respond to Requests for Production of Documents and Memorandum in Support* by Jessika Boone.(Trombetta, Christopher) (Entered: 09/19/2014)
09/22/2014	21	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 20 Motion for Extension of Time to File Response/Reply re 19 MOTION to Compel *Plaintiff Jessika Boone to Answer Interrogatories and Respond to Requests for Production of Documents and Memorandum in Support* Responses due by 9/26/2014 (Hourihan,

		Lisa) (Entered: 09/22/2014)
10/07/2014	22	Judge Denise J. Casper: ELECTRONIC ORDER entered re 19 MOTION to Compel *Plaintiff Jessika Boone to Answer Interrogatories and Respond to Requests for Production of Documents and Memorandum in Support* filed by Old Colony Young Men's Christian Association. Court orders parties to confer and inform the Court by 10/14/14 whether or not the moving party presses the motion or whether there is need for the court to resolve the motion. (Hourihan, Lisa) (Entered: 10/07/2014)
10/16/2014	23	Letter/request (non−motion) *Regarding Defendant's Motion to Compel*. (Pursley, Thomas) (Entered: 10/16/2014)
10/17/2014	24	Judge Denise J. Casper: ELECTRONIC ORDER entered denying as moot 19 Motion to Compel in light of the filing of D. 23. (Hourihan, Lisa) (Entered: 10/17/2014)
10/31/2014	25	Joint MOTION for Extension of Time to 02/28/2015 to Complete Discovery *by Defendants and* by Jessika Boone.(Trombetta, Christopher) (Entered: 10/31/2014)
11/04/2014	26	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 25 Motion for Extension of Time to Complete Discovery Discovery to be completed by 2/27/2015. Motions due by 4/15/2015. NO FURTHER EXTENSIONS ANTICIPATED. (Hourihan, Lisa) (Entered: 11/04/2014)
11/04/2014	27	ELECTRONIC NOTICE OF RESCHEDULING Status Conference set for 3/9/2015 02:15 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 11/04/2014)
03/09/2015	28	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Status Conference held on 3/9/2015. Counsel report on the status and report that depositions remain to be taken. Parties to work out the scheduling of the depositions but the summary judgment filing date remains the same. Motion for Summary Judgment Hearing or Initial Pretrial Conference set for 5/27/2015 03:00 PM in Courtroom 11 before Judge Denise J. Casper. The parties shall confer regarding the topics identified under Local Rule 16.5(d) and shall prepare and submit a joint pretrial memorandum in accordance with Local Rule 16.5(d) no later than five (5) business days prior to the pretrial conference. The pretrial memorandum shall also propose deadlines for the filing of motions in limine, proposed jury instructions, proposed jury voir dire and a proposed trial date. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Christopher Trombetta for the plaintiff. Thomas Pursley for the defendants.) (Hourihan, Lisa) (Entered: 03/11/2015)
04/15/2015	30	MOTION for Summary Judgment *and Memorandum by all Defendants* by Old Colony Young Men's Christian Association. (Attachments: # 1 Statement of Undisputed Facts, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K)(Pursley, Thomas) (Entered: 04/15/2015)
04/28/2015	31	ELECTRONIC NOTICE Setting Hearing on Motion 30 MOTION for Summary Judgment *and Memorandum by all Defendants* : Motion Hearing set for 5/27/2015 03:00 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 04/28/2015)
04/29/2015	32	Assented to MOTION for Extension of Time to File Response/Reply as to 30 MOTION for Summary Judgment *and Memorandum by all Defendants from May 6, 2015 to May 12, 2015* by Jessika Boone.(Trombetta, Christopher) (Entered: 04/29/2015)
04/30/2015	33	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 32 Motion for Extension of Time to File Response/Reply re 30 MOTION for Summary Judgment *and Memorandum by all Defendants* Responses due by 5/12/2015. NO FURTHER EXTENSIONS ANTICIPATED. (Hourihan, Lisa) (Entered: 04/30/2015)
05/12/2015	34	Opposition re 30 MOTION for Summary Judgment *and Memorandum by all Defendants* filed by Jessika Boone. (Trombetta, Christopher) (Entered: 05/12/2015)
05/12/2015	35	AFFIDAVIT in Opposition re 30 MOTION for Summary Judgment *and Memorandum by all Defendants* filed by Jessika Boone. (Trombetta, Christopher) (Entered: 05/12/2015)

05/12/2015	36	Statement of Material Facts L.R. 56.1 re 30 MOTION for Summary Judgment *and Memorandum by all Defendants* filed by Jessika Boone. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Trombetta, Christopher) (Entered: 05/12/2015)
05/26/2015	37	REPLY to Response to 30 MOTION for Summary Judgment *and Memorandum by all Defendants* filed by Old Colony Young Men's Christian Association. (Pursley, Thomas) (Entered: 05/26/2015)
05/26/2015	38	Amended Statement of Material Facts L.R. 56.1 re 30 MOTION for Summary Judgment *and Memorandum by all Defendants* filed by Old Colony Young Men's Christian Association. (Attachments: # 1 Exhibit Affidavit of Mark Showan)(Pursley, Thomas) (Entered: 05/26/2015)
05/27/2015	39	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Motion Hearing held on 5/27/2015 re 30 MOTION for Summary Judgment *and Memorandum by all Defendants* filed by Old Colony Young Men's Christian Association. Arguments. Court takes under advisement 30 Motion for Summary Judgment; (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Christopher Trombetta for the plaintiff. Thomas Pursley for the defendant.) (Hourihan, Lisa) (Entered: 05/27/2015)
11/17/2015	41	Judge Denise J. Casper: ORDER entered. MEMORANDUM AND ORDER – The Court ALLOWS in part and DENIES in part Defendants' motion for summary judgment, D. 30. The Court ALLOWS summary judgment for Defendants on the claim of intentional infliction of emotional distress (Count III) and DENIES summary judgment on the claims of racial discrimination (Counts I and II).(Hourihan, Lisa) (Entered: 11/17/2015)
11/17/2015	42	ELECTRONIC NOTICE of Hearing. Initial Pretrial Conference set for 12/7/2015 02:15 PM in Courtroom 11 before Judge Denise J. Casper. The parties shall confer regarding the topics identified under Local Rule 16.5(d) and shall prepare and submit a joint pretrial memorandum in accordance with Local Rule 16.5(d) no later than five (5) business days prior to the pretrial conference. The pretrial memorandum shall also propose deadlines for the filing of motions in limine, proposed jury instructions, proposed jury voir dire and a proposed trial date.(Hourihan, Lisa) (Entered: 11/17/2015)
11/30/2015	43	PRETRIAL MEMORANDUM by Old Colony Young Men's Christian Association. (Pursley, Thomas) (Entered: 11/30/2015)
12/07/2015	44	Electronic Clerk's Notes for proceedings held before Judge Denise J. Casper: Initial Pretrial Conference held on 12/7/2015. Final Pretrial Conference set for 3/22/2016 02:00 PM in Courtroom 11 before Judge Denise J. Casper. Jury Trial set for 3/28/2016 09:00 AM in Courtroom 11 before Judge Denise J. Casper. All motions in limine shall be filed by 3/8/16. Any opposition to motions in limine shall be filed by 3/15/16. Proposed jury instructions and proposed voir dire shall be filed by 3/15/16. (In addition to the filing of proposed jury instructions via ECF, each party shall e–mail a courtesy copy of any proposed jury instructions in a Word document to the Court's Deputy Clerk, Lisa Hourihan at Lisa_Hourihan@mad.uscourts.gov, upon the filing of same via ECF). The parties' final witness lists and exhibit lists shall be filed by 3/15/16. To the extent that the parties can reach agreement about the proposed exhibits, they shall be numbered and a courtesy copy submitted on disc to the Court by 3/15/16. To the extent that there is disagreement about the admissibility of any exhibits, those exhibits should be marked for identification with letters (Exh. A, Exh. B et al.) and a courtesy copy of these exhibits should also be submitted on disc to the Court by 3/15/16. The Court will hear argument on the motions in limine at the Final Pretrial Conference. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Christopher Trombetta for the plaintiff. Thomas Pursley for the defendant.) (Hourihan, Lisa) (Entered: 12/08/2015)
12/16/2015	45	Judge Denise J. Casper: ORDER entered. REFERRING CASE to Alternative Dispute Resolution.(Hourihan, Lisa) (Entered: 12/16/2015)
12/23/2015	46	Notice of assignment to ADR Provider. Judge Judith G. Dein appointed.(Garvin, Brendan) (Entered: 12/23/2015)

12/23/2015	47	ELECTRONIC NOTICE OF AND ORDER REGARDING ADR CONFERENCE: Mediation before Magistrate Judge Dein set for *Tuesday, February 2, 2016, at 10:00AM in Courtroom #15 on the 5th Floor.* Counsel are directed to be present with their clients or representatives thereof with full settlement authority. No later than three business days before the conference, each party shall submit (by mail or hand delivery addressed to Judge Dein, or by email to Jolyne_Dambrosio@mad.uscourts.gov) a brief memorandum marked "Confidential – Not for Docketing" addressing the party's position on the merits of the case and on settlement. If you use a standard form settlement agreement, please bring a copy with you. If you believe the case is not ripe for mediation at this time, please notify opposing counsel and the court as soon as possible.(Dambrosio, Jolyne) (Entered: 12/23/2015)
02/01/2016	48	ELECTRONIC NOTICE RESETTING HEARING: At the plaintiff's request, the mediation currently scheduled for 2/2/16 is reset to *2/11/16 at 10:00AM* in Courtroom 15 before Magistrate Judge Dein. The requirements of the Electronic Notice & Order of 12/23/15 (Docket No. 47) remain in place. (Dambrosio, Jolyne) (Entered: 02/01/2016)
02/11/2016	50	ELECTRONIC REPORT OF ADR PROVIDER. Magistrate Judge Dein: On February 11, 2016, I conducted a mediation in this case. All parties were represented by counsel, and were present in person, by telephone or by authorized corporate officer. The case was settled. Your clerk should enter a thirty (30) day order of dismissal. (Dambrosio, Jolyne) (Entered: 02/11/2016)
02/12/2016	51	Judge Denise J. Casper: ORDER entered. SETTLEMENT ORDER OF DISMISSAL (Hourihan, Lisa) (Entered: 02/12/2016)
02/24/2016	52	STIPULATION of Dismissal *with Prejudice* by Old Colony Young Men's Christian Association. (Pursley, Thomas) (Entered: 02/24/2016)

Exhibit I.h

Attachment Casper=Boone-v-OldColonyYMCA.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JESSIKA BOONE, **Plaintiff,** **v.** **OLD COLONY YOUNG MEN'S CHRISTIAN ASSOCIATION, JOSEPH BARAKAT and RALPH MCHUGH,** **Defendants.**	**Civil Action 13-13131-DJC**

MEMORANDUM AND ORDER

CASPER, J. **November 17, 2015**

I. Introduction

Plaintiff Jessika Boone ("Boone") has filed this lawsuit against Old Colony Young Men's Christian Association ("OCY"), Joseph Barakat ("Barakat") and Ralph McHugh ("McHugh") (collectively, "Defendants") alleging racial discrimination in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e *et seq.* and intentional infliction of emotional distress. D. 1. Defendants have moved for summary judgment. D. 30. For the reasons stated below, the Court **ALLOWS** in part and **DENIES** in part the motion.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect

the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

Boone, an African-American woman, joined the OCY staff in September 2011. D. 30-4 at 3. She started with OCY as a youth care advocate and tutor at the Fall River STARR program, a residential treatment program for children. Id. In January 2013, Boone left the STARR program to become a caseworker at OCY's YouthBuild program in Brockton, Massachusetts, where she was paid $13 per hour. D. 30-5 at 3. YouthBuild is a community-based educational and vocational training program that serves disadvantaged young people from the Brockton area, over half of whom are African American. D. 30-6 at 3; D. 35 ¶ 12. Boone worked under the supervision of Barakat, the Assistant Director of the Brockton YouthBuild program. D. 35 ¶ 9.

During her employment at YouthBuild, Boone received reports from students that McHugh, a YouthBuild teacher, had made racially offensive comments. An African-American student reported that McHugh told her: "There are more African American people on Welfare than Whites; you should be ashamed of yourself. I know you all feel bad and might want to donate to the kids in Africa but I could give a damn. I change the channel and keep eating my food." D. 36-1 at 2. A student from Cape Verde said that McHugh said "he could care less about the kids in Africa . . . and there are enough people like that on welfare anyway." D. 36-2 at 2. A white student reported that McHugh told the class that he did "not know why people get so mad about slavery, sorry to break it to you guys but you guys were the ones selling your own fucking kind first."[1] D. 36-3 at 2. Boone and a coworker approached Barakat in early 2013 to report their discomfort with these comments. D. 35 ¶ 29. Barakat responded that that was the way McHugh was and they had to live with it. Id. ¶ 33.

Boone experienced several offensive incidents while working at OCY. First, at a staff meeting in January 2013, Barakat asked another employee if he had seen a pornographic movie called "Big Black Cocks." D. 35 ¶ 35-36. Boone, as well as two other employees, left the meeting after that comment. Id. ¶ 37. Second, in February 2013, McHugh stated to Boone at a staff meeting that Barakat, who is of Egyptian descent, was a "dune coon." Id. ¶ 39. Boone understood the term to be a derogatory reference to African Americans. Id. ¶ 40. Third, a white student in an angry and confrontational manner told Boone that she could "suck his dick." Id. ¶ 42. The student was suspended for one day and hired several weeks later as an employee at OCY. Id. ¶¶ 43, 52. Fourth, Barakat accused Boone of touching a male student inappropriately.

[1] Boone's complaint includes allegations of additional comments made by McHugh to students, but these additional allegations are unsupported by affidavits from the students and the Court has not considered them in its consideration of this motion.

Id. ¶¶ 54, 56. Another employee had felt the student's pants pocket to determine if he had some keys. Id. ¶ 55. When Barakat learned that Boone was not the one who had touched the student's pocket, he did not apologize. Id. ¶ 58. Finally, Barakat used offensive gestures and language when interacting with Boone. He gave Boone the middle finger as he walked past her desk. Id. ¶ 60. He told her that she was a "fucking idiot" for riding a motorcycle. Id. ¶ 61. He told her to "stop being a pussy." Id. ¶ 62. On one occasion, apparently when Boone had finished a project, he said: "bitch, there is plenty of work to do." Id. ¶ 63. Barakat did not make such comments to white employees. Id. ¶ 65.

In May 2013, Boone's mother, Darcel Boone, wrote a letter detailing her daughter's complaints about the YouthBuild program and sent it to the Chief Executive Officer of OCY. D. 30-1 ¶ 30; D. 30-9 at 2-3. The letter stated that Boone at her interview had been promised a higher wage for the caseworker position and that Boone had to do all of the work of another caseworker who was receiving a higher hourly wage. D. 30-9 at 2. The letter also stated that Barakat was "not a very approachable person" and had engaged in the "very inappropriate" behaviors detailed above. Id. Darcel Boone reported that Boone had complained to her about "constant racial slurs" and "inappropriate topics in staff meetings." Id. The letter also claimed that Boone was denied favorable treatment (pay raises, perks and dispensation to arrive late, leave early or skip shifts) afforded to other employees. Id.

Upon receipt of the letter, OCY conducted an internal investigation of the allegations. D. 30-4 at 27. OCY's investigation yielded evidence of inappropriate language and discussion topics, but found no evidence of gender-based or race-based discrimination or harassment. D. 30-6 at 5-9. Barakat told the other YouthBuild employees about the letter from Boone's mother and Boone was ostracized at work. D. 30-4 at 26; D. 35 ¶ 70. Many of Boone's coworkers

refused to associate with her. D. 35 ¶ 71. Boone's coworker, Michael Piatelli, with whom she shared an office, negatively changed his behavior towards Boone and locked her out of the office after he learned of her mother's letter. D. 30-4 at 15. At a staff training, no one except Barakat sat at Boone's table, and Barakat did not discipline the other employees. D. 35 ¶¶ 72-75.

On May 22, 2013, Boone filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against OCY and Barakat in which she alleged a hostile work environment and discrimination based on race and gender in violation of Title VII. D. 30-10 at 2. OCY responded to the complaint by detailing both the allegations made by Boone and her mother and the findings from its internal investigation. D. 30-6. On September 30, 2013, the EEOC dismissed Boone's claim. D. 30-11 at 2.

Boone continued to work in the YouthBuild program at OCY until the end of October 2014, when she was laid off due to loss of funding for her position. D. 30-4 at 20. She does not allege that her layoff was discriminatory. See id.

IV. Procedural History

Boone instituted this action on December 10, 2013. D. 1. The Court heard the parties on the pending motion for summary judgment and took this matter under advisement. D. 39.

V. Discussion

A. Boone Has Raised a Triable Issue of Fact as to Whether She Suffered a Hostile Work Environment

Although Boone has asserted separate claims under Title VII and § 1981, the analysis of both claims is governed by the same framework, so the Court will consider these claims together. See T & S Serv. Assoc., Inc. v. Crenson, 666 F.2d 722, 724 (1st Cir. 1981). To establish a prima facie case for race discrimination Boone must show: (i) she is a member of a protected class; (ii) she was qualified for the employment she held; (iii) she suffered an adverse employment action;

and (iv) evidence of a causal connection between membership in the protected class and the adverse employment action. Bhatti v. Trustees of Boston Univ., 659 F.3d 64, 70-71 (1st Cir. 2011). The First Circuit has stated that the showing a plaintiff must make to establish a prima facie case is "small showing," "not onerous" and "easily made." Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003) (internal citations omitted).

The parties do not dispute that Boone as an African American is a member of a protected class or that she was qualified for her position as a caseworker at OCY. The parties disagree as to whether Boone suffered an adverse employment action and, if she did, whether such an adverse employment action was caused by her race. An adverse employment action must materially change the condition of the plaintiff's employment. Gu v. Boston Police Dep't., 312 F.3d 6, 14 (1st Cir. 2002). Material changes must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." Marrero v. Goya of P.R., Inc., 304 F.3d 7, 23 (1st Cir. 2002) (internal quotation omitted). Workplace harassment, if sufficiently severe or pervasive to create a hostile work environment, may constitute an adverse employment action. See Noviello v. City of Boston, 398 F.3d 76, 89 (1st Cir. 2005). To succeed on a hostile workplace environment claim,[2] Boone must show:

> (1) that she is a member of a protected class; (2) that she was subjected to unwelcome harassment; (3) that the harassment was based on her membership of the protected class; (4) that the harassment was so severe or pervasive that it altered the conditions of her employment and created an abusive work environment; (5) that the objectionable conduct was objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

[2] Boone also alleges in her complaint that she was promised a higher salary in her initial interview than she ultimately received as a caseworker. D. 1 ¶ 22. She does not press this contention in her brief as an adverse employment action for purposes of her discrimination claims nor does she cite any evidence in the record that the change in her starting pay was based on her race.

Torres-Negron v. Merck & Co., 488 F.3d 34, 39 (1st Cir. 2007) (citing O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001)).

"There is no mathematically precise test to determine whether [a plaintiff] presented sufficient evidence" that she was subjected to a severely or pervasively hostile work environment. Kosereis, 331 F.3d at 216 (internal citations omitted). The degree of hostility or abuse to which a plaintiff was exposed can be determined only by examining the totality of the circumstances and relevant considerations "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). A hostile work environment is generally not created by a "mere offensive utterance," id., nor from "simple teasing, offhand comments, and isolated incidents." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (internal citation and quotation omitted). The hostile environment question is "commonly one of degree—both as to severity and pervasiveness—to be resolved by the trier of fact on the basis of inferences drawn 'from a broad array of circumstantial and often conflicting evidence.'" Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002) (quoting Lipsett v. Univ. of P.R., 864 F.2d 881, 895 (1st Cir. 1988)). While this fact specific determination "is often reserved for a fact finder, . . . summary judgment is an appropriate vehicle for policing the baseline for hostile environment claims." Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 83 (1st Cir. 2006) (internal citations and quotation omitted).

The Court concludes that the record provides a sufficient basis from which a reasonable factfinder could find that Boone was subjected to a hostile work environment on the basis of her race. In her affidavit, Boone describes a series of incidents of harassment from January through

May 2013.[3] At a staff meeting Boone attended, Barakat referred to a pornographic movie called "Big Black Cocks." D. 35 ¶ 36. This explicit pornographic title is based on racial stereotypes and a reasonable factfinder could find this comment to be harassment based on race. On another occasion, McHugh told Boone that Barakat was a "dune coon." Id. ¶ 39. The use of this charged racial epithet in Boone's presence could also be interpreted by a reasonable fact-finder as race-based harassment. Barakat called Boone a "bitch," "pussy" and "fucking idiot," and did not use that language to describe white employees. Id. ¶ 65. A reasonable jury could find that this pattern of explicit and humiliating remarks was more than "simple teasing, offhand comments, and isolated incidents" and rose to a level that a reasonable person would have felt it affected the conditions of her employment. Faragher, 524 U.S. at 788. Barakat also wrongly accused Boone of touching a male student inappropriately. D. 35 ¶¶ 54, 56. The First Circuit has held that false accusations of misconduct can contribute to the creation of a hostile work environment. Noviello, 398 F.3d at 93 (considering in hostile work environment claim fact that employer leveled a baseless charge of inappropriate workplace conduct against plaintiff). In addition, Barakat displayed indifference by refusing to intervene when Boone and a coworker complained to him about comments that could be taken by a reasonable factfinder to reflect race-based animus coming from McHugh. D. 35 ¶¶ 33-34. Taking the record evidence in aggregate in the

[3]In their reply, Defendants ask the Court to strike Boone's affidavit, D. 35, on the basis that it contradicts her prior sworn testimony. D. 37 at 1-3. It is correct that "[w]hen an interested witness has given clear answers to unambiguous questions, [she] cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994). Defendants have pointed to a list of allegedly contradictory statements in Boone's affidavit. See D. 37 at 2 n.1. Although any inconsistencies between the two by Boone will be appropriate fodder for cross examination at trial, the Court does not conclude that these alleged inconsistencies merit striking the affidavit in its entirety. Accordingly, the Court denies the request to strike Boone's affidavit.

light most favorable to Boone, the Court finds that a reasonable jury could find that she was subjected to a hostile work environment based on her race.

The Court therefore denies Defendants' motion for summary judgment on Boone's § 1983 claim (Count I) and Title VII claim (Count II).

B. Boone's Claim of Intentional Infliction of Emotional Distress is Barred

Boone's claim for intentional infliction of emotional distress is barred by the exclusivity clause of the Massachusetts Workers' Compensation Act ("Compensation Act"). Mass. Gen. L. c. 152 § 24. The exclusivity provision bars claims outside of the Compensation Act against employers "where (1) the plaintiff is shown to be an employee; (2) her condition is shown to be a personal injury within the meaning of the [Compensation Act]; and (3) the injury is shown to have arisen out of and in the course of her employment." Brown v. Nutter, McClennen & Fish, 45 Mass. App. Ct. 212, 215 (1998). All of the conduct described in Boone's complaint was in the course and scope of her employment at OCY. The exclusivity bar encompasses emotional distress claims and claims against coworkers. Doe v. Purity Supreme, Inc., 422 Mass. 563, 565 (1996); see McCarty v. Verizon New England, Inc., 674 F.3d 119, 122 (1st Cir. 2012); Rooney v. Bank of America, No. 12-11173-TSH, 2014 WL 1347124, at *8 (D. Mass. April 3, 2014).

The Court therefore grants summary judgment in favor of Defendants on Boone's intentional infliction of emotional distress claim (Count III).

VI. Conclusion

For the foregoing reasons, the Court ALLOWS in part and DENIES in part Defendants' motion for summary judgment, D. 30. The Court ALLOWS summary judgment for Defendants on the claim of intentional infliction of emotional distress (Count III) and DENIES summary judgment on the claims of racial discrimination (Counts I and II).

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit I.i

Attachment Casper=Marchinuk-v-Lew.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CORY MARCINUK,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 13-cv-12722**
JACOB J. LEW, **Secretary of the Treasury,**	)	
Defendant.	)	

MEMORANDUM AND ORDER

CASPER, J. **January 11, 2016**

I. Introduction

Plaintiff Cory Marcinuk ("Marcinuk") has filed this lawsuit against Jacob J. Lew ("Lew") in his official capacity as Secretary of the Treasury, alleging that his former employer, the Internal Revenue Service ("IRS"), violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"), by failing to rehire him in 2011 in retaliation for filing an Equal Employment Opportunity ("EEO") complaint. D. 1. Marcinuk has now moved for summary judgment, D. 60, and Lew has cross-moved for summary judgment, D. 63. For the reasons stated below, the Court DENIES Marcinuk's motion and ALLOWS Lew's motion.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute on any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect

the outcome of the suit under the applicable law." García-González v. Puig-Morales, 761 F.3d 81, 87 (1st Cir. 2014) (quoting Newman v. Advanced Tech. Innovation Corp., 749 F.3d 33, 36 (1st Cir. 2014)) (internal quotation marks omitted). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Rosciti v. Ins. Co. of Pennsylvania, 659 F.3d 92, 96 (1st Cir. 2011). Once that burden is met, the non-moving party may not rest on the allegations or denials in his pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which [he] would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in [his] favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). The Court "view[s] the record in the light most favorable" to the non-moving party, "drawing reasonable inferences" in his favor. Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009). "Conclusory allegations, improbable inferences, and unsupported speculation," however, are "insufficient to establish a genuine dispute of fact." Travers v. Flight Servs. & Sys., Inc., 737 F.3d 144, 146 (1st Cir. 2013) (citation and internal quotation mark omitted). "Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the Court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Grp., Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

III. Factual Background

The following facts are drawn from the parties' statements of material facts, D. 61, D. 64, and unless otherwise noted, are undisputed.

Marcinuk was a full-time IRS employee from January 1997 until November 2007 as a contact representative. D. 64 at 2. In July 2001, Marcinuk filed a physical disability discrimination EEO complaint. Id. In July 2003, an EEO action formally opened. Id. The

matter was resolved in the IRS's favor in September 2004 and closed after an appeal by Marcinuk in March 2006. Id. at 2-3. In November 2007, the IRS terminated Marcinuk. Id. at 4.

In August 2011, the IRS opened a contact representative position and Marcinuk applied. Id.; D. 61 ¶¶ 1-2. In October 2011, the IRS interviewed Marcinuk by phone. D. 64 at 4. He received a Superior Qualified rating, which placed him in a category of candidates given first consideration. Id. In December 2011, the IRS informed Marcinuk that another candidate was hired for the position. Id.

IV. Procedural History

Marcinuk filed this lawsuit on September 27, 2013. D. 1. On December 30, 2014, the Court partially granted Lew's motion to dismiss under Fed. R. Civ. P. 12(b)(6). D. 41. On October 14, 2015, Marcinuk moved for summary judgment. D. 60. On November 5, 2015, Lew cross-moved for summary judgment. D. 63. On December 9, 2015, the Court heard the parties on their motions and took the matters under advisement. D. 66.

V. Discussion

1. Marcinuk Cannot Establish a Prima Facie Case on Causation

To make a *prima facie* showing of Title VII retaliation, the plaintiff must show "that [he] engaged in protected conduct, that [he] suffered an adverse employment action, and that a causal nexus exists between the protected activity and the adverse action." Ponte v. Steelcase Inc., 741 F.3d 310, 321 (1st Cir. 2014). Because neither party disputes the first two prongs, whether Marcinuk has established a *prima facie* case turns on the existence of a causal nexus between Marcinuk's alleged protected action and the IRS's alleged adverse action.

"Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test" for Title VII discrimination claims. Univ. of Texas

Sw. Med. Ctr. v. Nassar, __ U.S. __, 133 S. Ct. 2517, 2533 (2013). A plaintiff's retaliation claim thus fails unless the plaintiff can show "that the desire to retaliate was the but-for cause of the challenged employment action." Id. at 2528; see Maldonado-Gonzalez v. Puerto Rico Police, No. 12-cv-1088-PAD, 2015 WL 3900225, at *8 (D.P.R. June 25, 2015) (granting summary judgment for the defendant because there was no "significantly probative evidence" that the adverse action "would not have occurred but for" the plaintiff's protected activity).

"The mere fact that an adverse action was taken after an employee" takes protected action "is not enough" to establish a *prima facie* case. Maymí v. Puerto Rico Ports Auth., 515 F.3d 20, 28 (1st Cir. 2008). Similarly, "[c]hronological proximity does not by itself establish causality." Ponte, 741 F.3d at 322 (citation and internal quotation mark omitted). Where "temporal proximity is the only evidence establishing retaliation, the proximity must be 'very close.'" Holloway v. Thompson Island Outward Bound Educ. Ctr., Inc., 492 F. Supp. 2d 20, 26 (D. Mass. 2007) (quoting Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001)), aff'd, 275 F. App'x 25 (1st Cir. 2008). If other evidence of causation is weak or nonexistent, courts have granted summary judgment for the employer when the events at issue are "widely separated in time." Lewis v. Gillette Co., 22 F.3d 22, 25 (1st Cir. 1994); see Ahern v. Shinseki, 629 F.3d 49, 58 (1st Cir. 2010) (stating that "[w]ithout some corroborating evidence suggestive of causation—and there is none here—a gap of several months cannot alone ground an inference of a causal connection between a complaint and an allegedly retaliatory action"); Mesnick v. Gen. Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991) (affirming summary judgment because being fired approximately nine months after filing an EEO complaint and eighteen months after an informal complaint suggested "the absence of a causal connection").

Marcinuk cannot establish a *prima facie* case of but-for causation here. First, no

temporal proximity exists here. Marcinuk's EEO complaint and the alleged retaliatory refusal to hire is separated by a gulf of ten years.

Second, during this ten-year period, the IRS documented several instances of ethical violations, absenteeism and insubordination, which ultimately led to Marcinuk's termination. Courts hold that intervening events undercut claims of causation. See, e.g., Dressler v. Daniel, 315 F.3d 75, 80 (1st Cir. 2003) (agreeing with the lower court that no reasonable trier of fact could conclude that the sexual harassment charge in 1997 caused the adverse actions in 1999 because the record suggested that events "more recent than the discrimination charge were far more likely" to be the cause of the alleged retaliation); Scott v. Univ. of New Hampshire Co-op. Extension, No. 03-cv-027-M, 2004 WL 235258, at *9 (D.N.H. Feb. 9, 2004) (granting summary judgment on retaliation claim because the plaintiff's more recent decision was "an intervening act that would prevent any reasonable jury from finding that retaliation for [her] letter of complaint . . . was the cause for her dismissal").

Numerous intervening events occurred here. In June 2004, Marcinuk was suspended for three days for violating government ethics. D. 64 at 3. A year later, he was suspended for seven days for failing to observe designated duty hours and break times, failing to request leave properly, being disruptive and leaving the work area without properly notifying his manager. Id. In January 2006, Marcinuk was suspended over similar issues. Id. In performance appraisals from 2005 to 2007, Marcinuk received failing ratings in his workplace interaction and customer satisfaction application in his March 2005 to February 2006 annual rating. Id. During this same period, Marcinuk "more than occasionally fail[ed] to interact in a courteous and professional manner with others to foster and maintain cooperative work relationships." Id. He "dismisse[d] direction from his Lead and Manager as unworthy of his attention" and he "demonstrated an

obvious lack of respect for both in his unwillingness to take suggestions." Id. Charles Clinton ("Clinton"), the selecting official for the 2011 position, id. at 4, knew that Marcinuk had this work history. Id. at 5. In 2007, Clinton witnessed an incident where Marcinuk argued with his manager over proper call procedure. Id. In November 2007, the IRS ultimately terminated him for being absent without leave, not following proper leave requesting procedures, failing to observe designated duty hours and being disruptive at work. Id. at 4.

Finally, Marcinuk cannot show that the IRS would have rehired him in 2011 had he not filed the EEO complaint in 2001. See Wirshing v. Banco Santander De Puerto Rico, 57 F. Supp. 3d 138, 141 (D.P.R. 2014) (stating that the plaintiff has the burden of proving that the defendant took the adverse action "because of [the protected conduct], i.e., that [the] adverse employment action would not have occurred but for [the protected conduct]"). By the time of the 2011 decision not to rehire Marcinuk, the IRS had previously terminated Marcinuk in 2007 for poor performance. Against this backdrop and the decade-long passage of time from his EEO complaint, however qualified Marcinuk may have otherwise been for the 2011 opening, a factfinder thus cannot reasonably conclude that the IRS would have rehired him but for a decade-old EEO complaint.

Marcinuk stresses that Clinton "was aware" of Marcinuk's 2001 EEO complaint. D. 60 at 1. But "knowledge alone cannot provide the causal link." Pearson v. Massachusetts Bay Transp. Auth., 723 F.3d 36, 42 (1st Cir. 2013). If knowledge of the protected conduct was enough, "then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint." Mesnick, 950 F.2d at 828.

2. Even Assuming a Prima Facie Case on Causation, Marcinuk Cannot Establish That the IRS's Explanation is Pretext and Retaliation Was the Real Reason

Even if the Court assumes that Marcinuk has established a *prima facie* case, including but-for causation, he cannot meet his burden to show that the legitimate reason offered for refusing to rehire him was pretext. "In assessing pretext, a court's 'focus must be on the perception of the decisionmaker,' that is, whether the employer believed its stated reason to be credible." Id. at 824 (quoting Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 256 (1st Cir. 1986)). The defendant's reason is legitimate unless the plaintiff can show two things: "both that the reason was false" and "that [retaliation] was the real reason." Hoeppner v. Crotched Mountain Rehab. Ctr., Inc., 31 F.3d 9, 17 (1st Cir. 1994) (citation and internal quotation mark omitted); see Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 26 (1st Cir. 2004) (stating that the plaintiff must show "that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant's retaliatory animus").

To survive this hurdle at this summary judgment juncture, Marcinuk "must do more than cast doubt on the rationale" offered by the IRS. Rivera-Aponte v. Rest. Metropol #3, Inc., 338 F.3d 9, 12 (1st Cir. 2003). It is "not enough for [Marcinuk] merely to impugn the veracity of the employer's justification." Mesnick, 950 F.2d at 824. Nor is it enough for Marcinuk to show "that [the IRS was] wrong or tactless." Collazo-Rosado v. Univ. of Puerto Rico, 765 F.3d 86, 92 (1st Cir. 2014). "Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions." Mesnick, 950 F.2d at 825. Instead, Marcinuk must offer evidence "of such strength and quality . . . to permit a reasonable finding that [the adverse action] was *obviously or manifestly unsupported*." Bailey v. Pricewaterhousecoopers, LLP, No. 14-10141-DJC, 2015 WL 7295460, at *6 (D. Mass. Nov. 18,

2015) (quoting Shorette v. Rite Aid of Maine, 155 F.3d 8, 13 (1st Cir. 1998) (emphasis in original and internal quotation marks omitted)).

Marcinuk cannot meet this burden. The IRS contends it declined to rehire Marcinuk due to his uneven work history. In an effort to establish that the IRS's explanation is "false," Hoeppner, 31 F.3d at 17, Marcinuk suggested at oral argument that the IRS fabricated its explanation. Assertions, however, "cannot take the place of proof in the summary judgment calculus." Bennett v. Saint-Gobain Corp., 507 F.3d 23, 31 (1st Cir. 2007). Instead, to demonstrate that a defendant's proffered explanation is a sham, a plaintiff needs to point to the explanation's "[w]eaknesses, implausibilities, inconsistencies, incoherencies, or contradictions." Collazo-Rosado, 765 F.3d at 93. The IRS's reason, however, does not suffer from these flaws. Marcinuk's work issues were well-documented and the reason the IRS asserted for terminating him. No evidence exists to show that the IRS did not in good faith believe that his flaws would still be issues if he returned. See, e.g., Kouvchinov v. Parametric Tech. Corp., 537 F.3d 62, 70 (1st Cir. 2008) (stating that the defendant's "reasonable belief . . . guides the inquiry" and where the plaintiff "has failed to make out a genuine issue as to the reasonableness of [the defendant's belief] . . . the charge of pretext fails").

Even if this Court assumes that Marcinuk is able to "produce evidence beyond the mere assertion that the [IRS's] alleged justification is implausible," Marcinuk must show that a retaliatory animus "actually motivated the adverse employment action." Rosado v. Wackenhut Puerto Rico, Inc., 160 F. App'x 5, 9 (1st Cir. 2005). "Insubordination, aggressive behavior, and tardiness are all legitimate grounds" for termination. Holloway, 492 F. Supp. 2d at 24-25. They are thus also legitimate reasons against rehiring. Statutes that bar retaliation for exercising rights guaranteed by law "do 'not clothe the complainant with immunity for past and present

inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers.'" Mesnick, 950 F.2d at 828-29 (quoting Jackson v. St. Joseph State Hosp., 840 F.2d 1287 at 1391 (8th Cir. 1988)).

Here, Clinton testified repeatedly at his deposition that the IRS refused to rehire Marcinuk because of his poor work history. D. 65-2 at 11, 15, 22. Marcinuk nevertheless points out that in one instance, Clinton states that he "took into consideration" that Marcinuk had filed an EEO complaint but that this fact did not "weigh[] into [his] decision-making." D. 65-2 at 15-16. That testimony, however, does not establish that retaliation was the IRS's true reason. More importantly, if Marcinuk is suggesting that his EEO complaint could have been a motivating factor behind the IRS's decision, Nassar requires that the protected action be the but-for cause of the retaliatory conduct. Nassar, 133 S. Ct. at 2530; see Ponte, 741 F.3d at 321 (noting that Nassar "rejected the less stringent standard that the plaintiff must show only that retaliation was a 'motivating factor" in favor of the but-for standard); see, e.g., Moreta v. First Transit of PR, Inc., 39 F. Supp. 3d 169, 181 (D.P.R. 2014) (granting summary judgment because "while his filing of the [anti-discrimination] complaint may have factored into [the employer's] decision making process, given the paucity of evidence regarding retaliatory intent, no reasonable jury could conclude that [the employer] decided to terminate [the plaintiff] 'because of' his protected activity"); see also Garayalde-Rijos v. Muncipality of Carolina, 747 F.3d 15, 25 & n.8 (1st Cir. 2014) (reversing dismissal of failure-to-hire and retaliation claims at the pleading stage, noting that cases cited by district court and defendant regarding temporal proximity concerned summary judgment and noting that the court would "not rule out that some pleadings may allege a temporal gap so attenuated as not to meet the plausibility standard for surviving motions to dismiss"). Although the determination of but-for causation is not, in most circumstances,

particularly suited to disposition at the summary judgment level, Moreta, 39 F. Supp. 3d at 181 (citing Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 (2d Cir. 2013)), on the developed record in this case as discussed above, summary judgment for the defendant is appropriate here where no reasonable factfinder could conclude that the but-for standard has been satisfied.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Lew's motion for summary judgment, D. 63, and DENIES Marcinuk's motion for summary judgment, D. 60.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit I.j

Attachment Casper=Joyce-v-TheUpperCrust.pdf to email of Oct. 3, 2016 (first) (Exhibit I, *supra*).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PATRICK JOYCE,		
Plaintiff,		
v.	)	**Civil Action No. 10-12204-DJC**
THE UPPER CRUST, LLC., JJB HANSON MANAGEMENT CO., INC. and JORDAN TOBINS,		
Defendants.		

MEMORANDUM AND ORDER

CASPER, J. **July 21, 2015**

I. Introduction

Plaintiff Patrick Joyce ("Joyce") brings this action against his former employer, The Upper Crust, LLC. ("Upper Crust"), its principal owner, Jordan Tobins ("Tobins") and JJB Hanson Management, Inc. ("JJB") (collectively, the "Defendants") alleging retaliation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3), and Mass. Gen. L. c. 149, § 148A (the "Wage Act"), as well as Massachusetts common law claims and violation of his civil rights under Mass. Gen. L. c. 12, § 11I. D. 64. Tobins has moved for partial summary judgment on Joyce's retaliation claims. D. 87. Tobins has also moved to strike certain portions of the affidavit Joyce submitted in support of Joyce's opposition to Tobins's motion for partial

summary judgment. D. 90 and 91.[1] For the reasons discussed below, the Court DENIES Tobins's motion for partial summary judgment, D. 87, and ALLOWS IN PART and DENIES IN PART Tobins's motion to strike, D. 90 and 91.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

[1] The Court notes that D. 90 and D. 91, titled, respectively, motion to strike and motion to correct, were filed on the same day and are identical.

III. Procedural History

Joyce instituted this action against Tobins and Upper Crust on December 20, 2010. D. 1. On March 1, 2011, Upper Crust and Tobins moved to dismiss. D. 6. The Court subsequently allowed Joyce to amend the complaint – adding JJB as a defendant, additional factual allegations and a claim for intentional infliction of emotional distress against Tobins – and denied without prejudice the motion to dismiss. 8/9/11 docket entry. The Defendants then moved to dismiss the amended complaint, D. 21 and 23, and JJB moved for sanctions, D. 25. Joyce thereafter moved to file a second amended complaint ("SAC"), D. 26, and on July 25, 2012, the Court granted Joyce's motion. D. 36. The Court simultaneously granted, without prejudice, Defendants' motion to dismiss as to Joyce's Massachusetts retaliation claim only and denied JJB's motion for sanctions. Id.

Upper Crust and JJB filed a Suggestion of Bankruptcy on October 4, 2012. D. 56. On October 16, 2012, the Court administratively closed the case as to all Defendants without prejudice to either party moving to restore the action upon final determination of bankruptcy proceedings. D. 57. On December 28, 2012, Joyce moved to reopen the case as to non-debtor co-defendant Tobins only, D. 58, and the Court subsequently granted the motion, D. 60. Thereafter, the Court considered Joyce's motion to dismiss Tobins's counterclaims, D. 45, which had not been resolved prior to the case being closed. On December 26, 2013, the Court denied Joyce's motion to dismiss. D. 73.

On June 6, 2013, Joyce filed a third amended complaint ("TAC") to add a retaliation claim under the Wage Act, Mass. Gen. L. c. 149 § 148A. D. 64. In his TAC, Joyce alleges retaliation under the FLSA, 29 U.S.C. § 215(a)(3) (Count I), retaliation under Mass. Gen. L. c. 149, § 148A, (Count II), violation of his civil rights under Mass. Gen. L. c. 12, § 11I (Count III),

defamation (Count IV) and intentional infliction of emotional distress (Count V). Id. Tobins has now moved for partial summary judgment as to Joyce's retaliation claims only. D. 87. Tobins also moved to strike certain portions of the affidavit Joyce submitted in support of his opposition to Tobins's motion. D. 90 and 91. The Court heard argument on Tobins's pending motions and took the matters under advisement. D. 106.

IV. Factual Background[2]

The following facts are as described in Joyce's statement of material facts, D. 85. Tobins did not file a statement of material facts in support of his motion for partial summary judgment.[3]

Upper Crust is a limited liability corporation, operating multiple pizzerias in Massachusetts. D. 85 ¶ 2. At all relevant times, Tobins was an owner of Upper Crust. Id. ¶ 3. Joyce began working for Upper Crust in 2003 as a counter person in the Brookline location. Id. ¶ 5. In 2007, Joyce was promoted to Operations Manager, a position that included "overseeing the kitchen managers and front of the house managers" at six locations across eastern

[2] As a threshold matter, to decide Defendants' motion for summary judgment, the Court must determine what evidence it can consider. See Fed. R. Civ. P. 56(c). Tobins has moved to strike certain portions of Joyce's affidavit submitted in support of his memorandum in opposition to Tobins' motion for partial summary judgment. D. 90 and 91. Specifically, Tobins moves to strike paragraphs ten, thirteen, fourteen, sixteen and twenty of Joyce's affidavit, as well as the third sentence of paragraph nineteen. Id. After review of Joyce's affidavit, the Court ALLOWS IN PART Tobins's motion to strike, D. 90 and 91, and therefore STRIKES paragraphs thirteen, sixteen and the third sentence of paragraph nineteen because these sections rely on inadmissible hearsay, simply assert a legal theory and/or are not based upon personal knowledge. See Joyce Aff., D. 86-1 ¶¶ 13, 16, 19. Joyce's affidavit otherwise stands.

[3] At oral argument, Joyce argued that Tobins's motion for partial summary judgment should be dismissed as Tobins did not submit a concise statement of material facts in support of his motion in accordance with Local Rule 56.1. See Mass. L. R. 56.1 (noting that "[m]otions for summary judgment shall include a concise statement of the material facts. . ." and that "[f]ailure to include such a statement constitutes grounds for denial of the motion"). Tobins indicated, however, that for the purposes of summary judgment, he did not dispute the facts as presented by Joyce. Accordingly, the Court will not dismiss Tobins's motion due to this procedural flaw, but will rely upon Joyce's statement of facts with all reasonable inferences drawn in Joyce's favor.

Massachusetts. Id. ¶ 7. In his role as Operations Manager, Joyce had regular contact with Upper Crust owners and upper-level managers, including Tobins. Id. ¶ 8.

In 2009, the U.S. Department of Labor ("DOL") started an investigation into Upper Crust's wage and hour practices, specifically for unpaid overtime. Id. ¶ 9. In July 2009, as a result of the investigation, the DOL ordered Upper Crust to pay $341,545.53 in back wages to current and former employees. Id. Following these payments, in August 2009, Tobins attended a meeting with other Upper Crust owners and managers and told employees that they would have to pay the money back to the company if they wanted to keep their jobs. Id. ¶ 10. Upset about this requirement to remit back pay, the employees complained to Upper Crust store managers, including Joyce. Id. ¶ 12. Joyce then brought the employees concerns to the attention of owner Brendan Higgins ("Higgins"), General Manager ("GM") Barry Proctor ("Proctor") and Chief Financial Officer ("CFO") David Marcus ("Marcus"), notifying them that the employees were very distressed about this ultimatum and that they were becoming uncooperative as a result. Id. ¶ 16. Joyce also told Higgins and Marcus that he was concerned that such a requirement was illegal. Id. In response, Joyce was simply told to fire any employees who were uncooperative. Id. ¶ 17. Joyce also spoke with Upper Crust manager Luciano Botelho ("Botelho") about Tobins's requirement that the employees return their back wages and told Botelho that he was planning to notify the DOL investigator. Id. ¶ 13, 14. Botelho was an Upper Crust kitchen manager who Tobins had ordered to tell Upper Crust's Brazilian workers about the requirement to remit their back pay. Id. ¶ 11. In January 2010, Joyce called the DOL on his company cell phone and reported Upper Crust's remittance policy. Id. ¶¶ 18, 29. The DOL subsequently undertook a new investigation into the Upper Crust's practices and notified Tobins of the

investigation soon afterward. Id. ¶ 18. Joyce also informed Botelho that he had contacted DOL. Id. ¶ 15.

After Joyce's internal and external complaints, the behavior of Upper Crust's ownership and upper-level management towards Joyce changed precipitously. Id. ¶ 19. The owners told Joyce that he was not working hard enough and began requiring him to clock in and out every day even though salaried employees were not typically required to clock in and out. Id. ¶ 20. Tobins and the other owners also called Joyce into a "special meeting" in March 2010 where they critiqued his job performance and told him that he was not doing well. Id. ¶ 21. Joyce did not believe that his work quality had deteriorated and he was not aware that any Upper Crust manager had ever complained about his work. Id. In April 2010, owners Josh Huggard and Tobins called Joyce and yelled at him about a water leak in the Brookline location, despite the fact that the owners had been aware of the leak and were actively engaged in a dispute with the building's management company about the cost of the repairs. Id. ¶¶ 22, 23. Although Huggard and Tobins knew that the issue was out of Joyce's control, they called him to yell at him about the problem when they knew that he was away planning his wedding. Id. ¶ 23. The next month, on May 18, 2010, Tobins called Joyce in the early morning, accusing Joyce of being involved in a theft that had taken place at the Commonwealth Avenue location of Upper Crust the previous night. Id. ¶ 24. During the phone call Tobins screamed and yelled obscenities at Joyce. Id. ¶¶ 24-25.

As a result of these incidents, Joyce decided that he could no longer work at the company. Id. ¶ 26. On May 18, 2010, the same day as Tobins's phone call, Joyce gave notice. Id. His resignation was effective June 1, 2010. Id. Upon receiving his last pay check, Joyce noticed that it was short by several hundred dollars. Id. ¶ 27. After contacting Marcus, the

Upper Crust CFO, and another owner about the deficit, Joyce eventually heard from Tobins that the money had been deducted from Joyce's check to cover Joyce's personal use of his company cell phone. Id. ¶¶ 28, 29. Tobins indicated that he had reviewed Joyce's cell phone records and had deducted the cost of his personal calls. Id. ¶ 28. It was common practice for Upper Crust employees to use company issued cell phones for both business and personal calls. Id. ¶ 30. Joyce had used the phone for years for both business and personal calls, including his call to the DOL, with the understanding that personal use was permissible. Id. ¶¶ 29, 30. Joyce told Tobins that if he did not receive the balance of his final check that he would report it to the DOL. Id. ¶ 31. In response, Tobins threatened Joyce saying, "Patrick if you go to the [DOL] I will (expletive) kill you. I will tell your fiancée that you are cheating on her and I will ruin your life." Id. Joyce did not receive the balance due on his check, but decided not to notify the DOL. Id. ¶ 32.

V. Discussion

Tobins seeks summary judgment as to Joyce's retaliation claims only, arguing that Joyce has made no showing that Tobins had any knowledge of any of Joyce's alleged complaints to the DOL regarding violations of either the FLSA or the Wage Act. D. 82 at 5-6. As such, Tobins argues that he could not be liable for retaliating against Joyce for making a complaint that he did not know about. Id.

A. Count I: Retaliation Claim Under 29 U.S.C. § 215(a)(3)

Joyce alleges a retaliation claim under the FLSA, which makes it "unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related" to the Act. 29 U.S.C. § 215(a)(3). To state a claim for retaliation under the FLSA,

Joyce must show that: "(1) [he] engaged in a statutorily protected activity, and (2) his employer thereafter subjected him to an adverse employment action (3) as a reprisal for having engaged in protected activity." Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99, 102 (1st Cir. 2004). Tobins focuses on the third element. Tobins argues that "[k]nowledge that a person engaged in protected activity is at the heart of any retaliation case," D. 82 at 7, and relies on Kasten v. Saint-Gobain Performance Plastics Corp., ___U.S.___, 131 S. Ct. 1325, 1335 (2011) for the proposition that "it is difficult to see how an employer who does not (or should not) know an employee has made a complaint could discriminate because of that complaint."[4]

Considering Joyce's retaliation claim, however, the key inquiry is whether he has shown specific admissible facts "from which a reasonable factfinder could infer that the employer retaliated against him for engaging in the protected activity." Blackie v. State of Me., 75 F.3d 716, 723 (1st Cir. 1996) (citing Mesnick v. General Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992)). In other words, Joyce need only proffer a "causal connection . . . between the protected conduct and the adverse action." Id. at 723 (emphasis and citation omitted). Joyce must make some showing that Tobins "knew of the plaintiff's protected conduct

[4] At the motion hearing, Tobins also relied on Ocasio-Hernández v. Fortuño-Burset, 777 F.3d 1 (1st Cir. 2015) and Ameen v. Amphenol Printed Circuits, Inc., 777 F.3d 63 (1st Cir. 2015) to argue that Joyce must show that Tobins knew about Joyce's protected activity. The Court agrees that Joyce must make some showing that Tobins knew that Joyce complained to the DOL. In the cases cited by Tobins, however, there was no evidence at all that the defendants knew of the plaintiff's protected activity. Ocasio-Hernández, 777 F.3d at 7 (noting that the First Circuit has "consistently held that circumstantial evidence can suffice to show a defendant's knowledge," but concluding that plaintiffs had pointed "to no evidence showing that the defendants they sued had [the requisite] knowledge"); Ameen, 777 F.3d at 70 (acknowledging that a plaintiff "must show that the retaliator knew about [his] protected activity," but noting that in the present case the parties did not dispute that the defendant had no knowledge of the plaintiff's protected activity).

when he [] decided to take the adverse employment action," but "[t]emporal proximity can create an inference of causation in the proper case." Pomales v. Celulares Telefónica, Inc., 447 F.3d 79, 85 (1st Cir. 2006) (citations omitted). "A showing of adverse action soon after an employee engages in protected activity is evidence that there is a causal connection between the adverse action and the protected activity." Cheng v. IDEAssocs., Inc., No. 96-cv-11718-PBS, 2000 WL 1029219, at *5 (D. Mass. July 6, 2000). "Such a causal connection creates an inference of retaliation." Id.; Oliver v. Digital Equip. Corp., 846 F.2d 103, 110 (1st Cir. 1988) (holding that "[a] showing of discharge soon after the employee engages in [protected activity] . . . is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation" (citations omitted)).

At the very least, here, there is evidence of a close temporal proximity between the adverse action and the protected activity. After Joyce reported his concerns to the DOL in January 2010, Joyce's standing at Upper Crust began to deteriorate – receiving unexpected criticisms only months later and being forced to quit within six months. D. 85 ¶¶ 19-26. Additional evidence of a causal connection between Joyce's protected activity and the adverse action exists here, however, where the record indicates that Joyce regularly reported his concerns regarding Upper Crust's treatment of its employees to several of Upper Crust's owners and managers, both before and during the second DOL investigation. Id. ¶¶ 14-17. Joyce specifically reported to Upper Crust owner Higgins and CFO Marcus that he was concerned that Tobins's requirement that the employees remit their back pay was illegal. Id. ¶ 16. Moreover, Joyce informed manager Botelho that he was planning on reporting Tobins's alleged remittance requirement to the DOL and subsequently confirmed to Botelho that he had done so. Id. ¶¶ 14, 15. Furthermore, after Joyce resigned, Tobins admitted to Joyce that he had access to, and was

reviewing, Joyce's phone records. Id. ¶¶ 28, 29. Tobins seems to acknowledge that Joyce's final pay check was reduced based on the personal calls Joyce made from his company cell phone, see D. 100 at 3-4, which is the same phone that Joyce contends he used to notify the DOL of Upper Crusts wage practices. Taken together, these factual allegations are sufficient to support the inference of a causal connection between the adverse action and Joyce's report to the DOL. D. 85 ¶ 29.

Notably, Tobins has presented no evidence to contest that Joyce complained to managers about Tobins's remittance requirement or that Joyce told Botelho of his intention to notify DOL with his concerns. Nor does Tobins dispute that in early 2010, soon after Joyce's complaint to DOL, Upper Crust management began to express concerns about Joyce's job performance. Rather, Tobins simply denies that he knew, prior to Joyce's resignation from the company, that Joyce had reported anything to DOL regarding Upper Crust's conditions of employment. See Tobins Aff., D. 82-2 ¶¶ 2, 3. Tobins's lack of knowledge is disputed by Joyce in light of the circumstantial evidence cited above, however, and as such, Tobins's affidavit, standing alone, is insufficient to demonstrate an absence of a genuine issue of material fact.

Tobins offers a different version of events, of course, arguing that there was a legitimate reason for Joyce's worsening relationship with management. Tobins contends that management's behavior toward Joyce was warranted and was due to deterioration in Joyce's job performance, not Joyce's report to DOL. D. 100 at 2-3. Indeed, the FLSA anti-retaliation provision does not prohibit necessary business and employment decisions "simply because doing so may affect an employee who successfully asserted FLSA-protected rights." Blackie, 75 F.3d at 723. All the provision mandates is "that an employer must put to one side an employee's lawful efforts to secure rights assured by the FLSA." Id. Here, Tobins argues that Joyce was

initially an "effective" employee, but that "[a]s he took on more responsibility, it seemed somewhat overwhelming for him, and he was not as effective." D. 100 at 8. Tobins further argues that Joyce was not spending enough time in his assigned stores and that Tobins and the other owners had to speak with him about being present more often. Id. at 8-9. As to Tobins's May 2010 phone call to Joyce regarding a theft at an Upper Crust location, Tobins contends that Joyce had left a spare set of keys to the store safe out on the counter, and that when Tobins called to speak with Joyce about the incident that he was "upset," in part, because he had a hard time reaching him. Id. at 2-3. Tobins suggests that the episode called into question Joyce's competence and that, when Tobins confronted Joyce, Joyce got very upset and tendered his resignation. Id. at 11. Finally, Tobins argues that his behavior was inconsistent with someone who knew that Joyce had made a report to the DOL, especially since Tobins "never asked [Joyce] why he was calling DOL" and because Tobins allowed Joyce to complete his two-week notice rather than terminating his employment effective immediately. Id. at 4. While Tobins is free to make these arguments to the factfinder, they are insufficient to demonstrate the absence of a genuine issue of material fact regarding Tobins's knowledge of Joyce's complaint to the DOL.

In sum, Joyce and Tobins offer different versions of events. These different narratives establish a genuine dispute of material fact. Accordingly, the Court concludes that Tobins has failed to show an absence of material fact as to Joyce's FLSA retaliation claim.

B. Count II: Retaliation Claim Under Mass. Gen. L. c. 149, § 148A

Joyce also asserts a retaliation claim under the Wage Act, Mass. Gen. L. c. 149, § 148A. The Wage Act's anti-retaliation provision prohibits an employer from penalizing an employee "in any way as a result of any action on the part of an employee to seek his or her rights under the wages and hours provisions of this chapter." Mass. Gen. L. c. 149, § 148A. The Wage Act

further provides that "[a]ny employer who discharges or in any other manner discriminates against any employee because such employee has made a complaint to the attorney general or any other person . . . shall have violated this section . . . ." Id. The purpose of the anti-retaliation provision is "to encourage enforcement of the wage laws by protecting employees who complain about violations of the same." Smith v. Winter Place LLC, 447 Mass. 363, 368 (2006).

Here, Joyce bears the burden of showing that Tobins's justification for the adverse action is pretextual and that there is "a causal connection between [Joyce's] action and [Tobins's] adverse action." Belghiti v. Select Restaurants, Inc., No. 10–cv-12049-GAO, 2014 WL 1281476, at *4 (D. Mass. Mar. 31, 2014) (citation omitted). "A plaintiff may establish pretext using circumstantial evidence based on the temporal proximity between a plaintiff's action and a defendant's adverse action." Id. As with the FLSA claim discussed above, then, Joyce need only show a causal connection between his protected activity and the adverse action to create an inference of retaliation. For the reasons discussed in detail above, the Court concludes that there is a genuine issue of material fact whether Tobins's knew of Joyce's report to the DOL and retaliated against him in violation of the Wage Act. In addition, the Court notes that when considering summary judgment motions based on issues such as knowledge, the Court should exercise particular restraint. Id. (noting that "[c]ourts should exercise particular caution before granting summary judgment for employers on such issues as pretext, motive, and intent"). Accordingly, concludes that Tobins has failed to show an absence of material fact as to Joyce's retaliation claim under the Wage Act.

VI. Conclusion

For the foregoing reasons, the Court DENIES Tobins's motion for partial summary judgment, D. 87. In addition, the Court ALLOWS IN PART and DENIES IN PART Tobins's motion to strike, D. 90 and 91.

So Ordered.

/s/ Denise J. Casper
United States District Judge

Exhibit J

Emails with F. Pagano, Oct. 3, 2016 (second).

The attachments mentioned on ℘243 are included in this JCApx at: Exhibit G, Exhibit G.a, Exhibit G.b, Exhibit G.c, Exhibit H, Exhibit H.a, Exhibit I ,Exhibit I.a (see also Exhibit I.b, Exhibit I.c, Exhibit I.d, Exhibit I.e, Exhibit I.f, Exhibit I.g, Exhibit I.h, Exhibit I.i, Exhibit I.j).

Subject: Re: More material relevant to Complaints of Judicial Misconduct
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 10/03/16 16:26
To: Florence_Pagano@ca1.uscourts.gov

Thank you too. I sent one letter yesterday and one today (both by email and U.S. mail), so you should receive the U.S. mail versions in a day or two.

- Walt Tuvell

On 10/03/16 16:24, Florence_Pagano@ca1.uscourts.gov wrote:

> Yes, thank you.
>
> Florence Pagano
> Assistant Circuit Executive for Legal Affairs
> U.S. Courts for the First Circuit
> 1 Courthouse Way - Suite 3700
> Boston, MA 02210
> 617-748-9376
>
> From: Walt Tuvell <walt.tuvell@gmail.com>
> To: Florence_Pagano@ca1.uscourts.gov
> Date: 10/03/2016 04:13 PM
> Subject: Re: More material relevant to Complaints of Judicial Misconduct
>
> ---
>
> Thank you, I have always done that, as stated in the letter itself.
>
> The emails (as opposed to U.S. Mail) have been for your convenience only. The additional PDF attachments to the emails consist of case opinions. I assume I don't need to send paper copies of those, because you already have them officially filed there in your files at the courthouse (therefore you need to rely upon your copies, because I could be sending fake/counterfeit copies, for all you know). I was sending them just for your convenience.
>
> OK?
>
> - Walt Tuvell
>
> On 10/03/16 15:06, Florence_Pagano@ca1.uscourts.gov wrote:
> Mr. Tuvell,

Please note that any documents pertaining to your pending misconduct complaints, Nos. 01-16-90036 - 01-16-90041, must be filed in accordance with Rule 6 of the Rules of Judicial-Conduct, and sent by mail to the address below.

Thank you,

Florence Pagano
Assistant Circuit Executive for Legal Affairs
U.S. Courts for the First Circuit
1 Courthouse Way - Suite 3700
Boston, MA 02210
617-748-9376

From: Walt Tuvell <walt.tuvell@gmail.com>
To: Florence_Pagano@ca1.uscourts.gov
Date: 10/03/2016 01:57 PM
Subject: More material relevant to Complaints of Judicial Misconduct

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Ms. Pagano -

Please see the attached letter (PaganoLetter2.pdf) for explanation of this email and its attachments.

- Walt Tuvell
[attachment "PaganoLetter2.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Boone-v-OldColonyYMCA,Docket.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Bailey-v-PWC,Docket.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Joyce-v-TheUpperCrust.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Marchinuk-v-Lew.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Boone-v-OldColonyYMCA.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Bailey-v-PWC.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Sanchez-v-NECCO.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Griffin-v-AdamsAssoc.pdf" deleted by Florence Pagano/CA01/01/USCOURTS] [attachment "Casper=Breda-v-McDonald.pdf" deleted by Florence Pagano/CA01/01/USCOURTS]

Exhibit K

Email to F. Pagano, Oct. 13, 2016.

- **Attachment SuppBrief2+Apx.pdf —** Filed with Supreme Court (hardcopy, Oct. 13, 2016). Filed with Judicial Council (hardcopy and PDF, Oct. 13, 2016). Omitted in this JCApx (available as separate submission).

Subject: PetWritCert, Supplemental Brief #2
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 10/13/16 11:06
To: Florence_Pagano@ca1.uscourts.gov

Ms. Pagano -

Please be advised I am today filing my 2nd Supplemental Brief to my PetWritCert today. A PDF copy is attached hereto, and a hard-copy booklet is being sent to you via U.S. mail.

- Walt Tuvell

Attachments:

SuppBrief2+Apx.pdf 190 KB

Exhibit L

Email to F. Pagano, Nov. 19, 2016.

- **Attachment PaganoLetter3.pdf —** Included in this JCApx at Exhibit F.a, *infra.*
- **Attachment PetReh.pdf —** Filed with Supreme Court (hardcopy, Nov. 19, 2016). Filed with Judicial Council (hardcopy and PDF, Nov. 19, 2016). Omitted in this JCApx (available as separate submission).

Subject: Petition for Rehearing
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/19/16 08:44
To: Florence_Pagano@ca1.uscourts.gov

Ms. Pagano -

Please see two attached PDFs. Hard-copies are being sent to you today via U.S. mail.

- Walt Tuvell

Attachments:

PetReh.pdf	2.4 MB
PaganoLetter3.pdf	216 KB

Exhibit L.a

Attachment PaganoLetter3.pdf to email of Nov. 19, 2016 (Exhibit L, *supra*).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 19, 2016

Dear Ms. Pagano:

This letter[1] continues the series of materials I have been submitting in support of my Complaints of Judicial Misconduct (№01-16-90036, №01-16-90041).

As you are aware, the Supreme Court has (falsely) denied my *Petition for Writ of Certiorari.* I am today submitting to that Court my *Petition for Rehearing* ("PetReh" proper, with Appendix, "RehApx"). A copy of the booklet accompanies this letter (and PDF copy as email attachment).[2]

The PetReh has very strong (true/germane/protected) words to say about the Supreme Court itself. That same wording applies *mutatis mutandis* to the First Circuit District and Appeals Courts — which is the reason I am filing the PetReh with you now. Particular attention is drawn to the comments made concerning potential **criminal** conduct (RehApx ℘8f‡ι∗).

It goes without saying that this information is to be conveyed forthwith to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

---

1 • Delivered by both email and U.S. mail.

2 • The seven hand-written corrections (at PetReh ℘iv,1f2,2,2 and RehApx ℘4,4,8) have been made in all extant copies of the booklet (and in the PDF).

Exhibit M

Email to F. Pagano, Nov. 20, 2016.

- **Attachment PaganoLetter4.pdf —** Included in this JCApx at Exhibit M.a, *infra.*
- **Attachment SOX=HouseReport.pdf —** Included in this JCApx as Exhibit M.b, *infra.*
- **Attachment SOX=SenateReport.pdf —** Included in this JCApx as Exhibit M.c, *infra.*
- **Attachment SOX=PubL107-204.pdf —** Included in this JCApx as Exhibit M.d, *infra.*
- **Attachment SOX=CongressionalRecord.pdf —** Included in this JCApx as Exhibit M.e, *infra.*
- **Attachment SOX=Yates-v-US.pdf —** Included in this JCApx as Exhibit M.f, *infra.*

Subject: Follow-up letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/20/16 11:17
To: Florence_Pagano@ca1.uscourts.gov

Please see attached letter, PaganoLetter4.pdf (which explains the other attachments).

Hardcopy follows via U.S. Mail.

Attachments:

SOX=HouseReport.pdf	310 KB
SOX=SenateReport.pdf	232 KB
SOX=PubL107-204.pdf	281 KB
Yates-v-US.pdf	222 KB
SOX=CongressionalRecord.pdf	276 KB
PaganoLetter4.pdf	547 KB

Exhibit M.a

Attachment PaganoLetter4.pdf to email of Nov. 20, 2016 (Exhibit M, *supra*).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 20, 2016

Dear Ms. Pagano:

This letter[1] is a follow-up to the letter I sent you yesterday. In yesterday's letter, I brought your attention to potential **criminal** conduct (RehApx ℘8ƒ‡ι∗) committed by the First Circuit courts/judges.[2] In this letter, for the convenience of the Judicial Council, I *elaborate* upon *just one* of those potentialities, namely 18 USC §1519.

Originally, §1519 was passed as part of the Sarbanes-Oxley Act ("SOX"), enacted in 2002, and incorporated into 18 USC Title 1 Chapter 73 **("Obstruction of Justice").** While SOX is generally thought-of in terms of corporate wrong-doing (fraud, corruption), §1519 itself is intended to have a broader scope, and has no such restriction.[3]

The language of §1519 is as follows:[4]

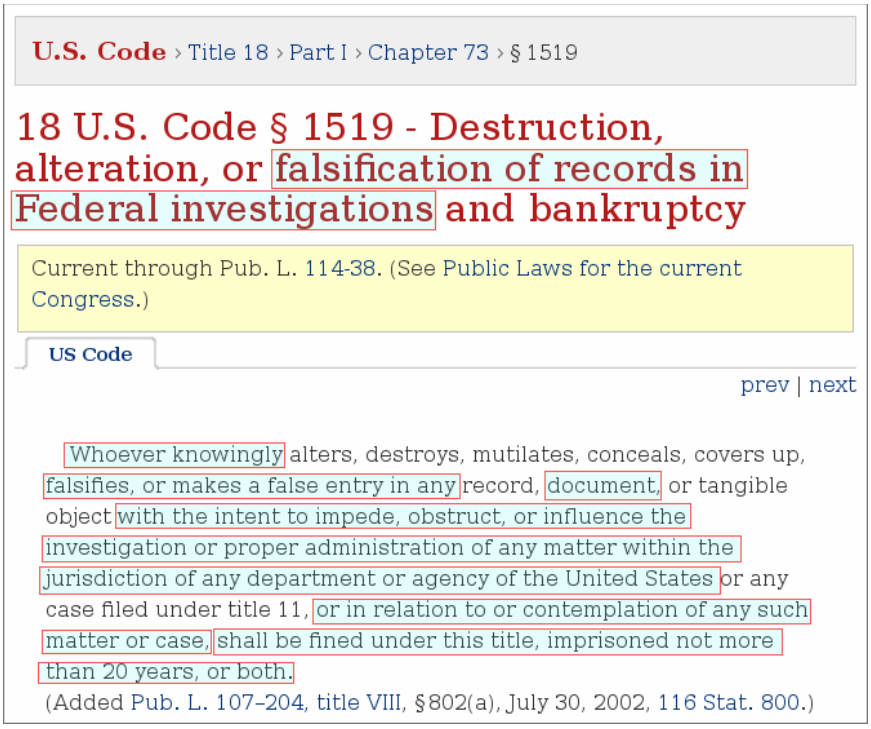
---

1 • Delivered by both email and U.S. mail.

2 • While federal judges enjoy "judicial immunity" against *civil* actions (e.g., 42 USC §1983), they are not protected from *criminal* charges.

3 • Nevertheless, my case does have that nexus if it were needed, because the defendant is a corporation, IBM, charged with serious civil rights violations.

4 • Emphasis/highlighting has been added to the screenshots throughout this letter.



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code

prev | next

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

Most of the provisions of §1519 are clearly satisfied in my case, and need no further analysis. For example, in my case, the judges have *obviously* "falsified the record," as I have *alleged/proved* throughout the materials I've submitted to the Judicial Council. Namely, the district judge lied/falsified the district court's Opinion ("Op"), and then all subsequent judges have blindly adopted/supported/swallowed that falsified Op, despite *knowing* full-well its falsity.

However, for three of §1519's provisions, it is *not* certain whether my case satisfies them (I contend they *are* satisfied), and so these *do* require further analysis. These are (all considered in the special context of §1519):

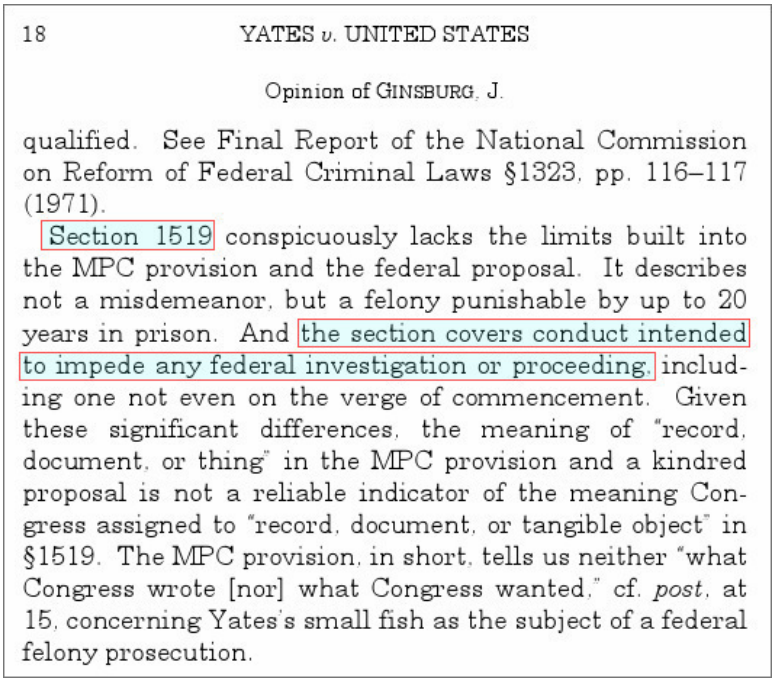
- **"(Federal) investigation" —** Does this mean only "FBI-style" investigations, or does it also apply to "court proceedings"?
- **"Jurisdiction" —** Does this encompass "judicial jurisdiction" in the sense of the judicial system?
- **"Department/agency" —** Insofar as I have been able to determine, these terms are rather context-sensitive, not hard-coded universally-well-defined terms of art/law (except that "department" does seem to refer to executive branch of government, not legislative or judicial). Are the "courts" included within the ambit of "departments/agencies"?

My research has led me to the following conclusions.

To begin with, the legislative history of SOX (House & Senate reports, Congressional Record, official/exact Public Law)[5] is all "supportive" of my position, albeit not "dispositive." Too, the "Official U.S. Government Manual" (online, at http://usgovernmentmanual.gov/), does of course "list" the federal courts, but that still doesn't resolve the question whether the courts are to be considered "departments/agencies" in the sense of §1519.

The background just mentioned played a decisive role in the recent Supreme Court case, *Yates v. U.S.*, 574 U.S. ____, №13-7451 (2015)[6] — which for our purposes here, does yield a definitive resolution of my contention (in the affirmative).

Yates contains the following three passages, all of which solidly support my contention (the third passage, from the dissenting opinion, chooses to supports me via §1512(c)(1) instead of §1519, though that minor distinction of law is already overridden by the second passage in any case):



18 YATES *v.* UNITED STATES

Opinion of GINSBURG, J.

qualified. See Final Report of the National Commission on Reform of Federal Criminal Laws §1323, pp. 116–117 (1971).

Section 1519 conspicuously lacks the limits built into the MPC provision and the federal proposal. It describes not a misdemeanor, but a felony punishable by up to 20 years in prison. And the section covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement. Given these significant differences, the meaning of "record, document, or thing" in the MPC provision and a kindred proposal is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in §1519. The MPC provision, in short, tells us neither "what Congress wrote [nor] what Congress wanted," cf. *post*, at 15, concerning Yates's small fish as the subject of a federal felony prosecution.

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5 • All of which I am transmitting to you as email attachments, for your convenience.

6 • Attached in email. (This is the controversial "a-fish-is-not-a-tangible-case" case.)

[5] Despite this sweeping "in relation to" language, the dissent remarkably suggests that §1519 does not "ordinarily operate in th[e] context [of] federal court[s]," for those courts are not "department[s] or agenc[ies]." *Post*, at 10. That suggestion, which, as one would expect, lacks the Government's endorsement, does not withstand examination. The Senate Committee Report on §1519, on which the dissent elsewhere relies, see *post*, at 6, explained that an obstructive act is within §1519's scope if "done 'in contemplation' of or in relation to a matter or investigation." S. Rep. 107–146, at 15. The Report further informed that §1519 "is . . . meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title." *Ibid.* If any doubt remained about the multiplicity of contexts in which §1519 was designed to apply, the Report added, "[t]he intent of the provision is simple: people should not be destroying, altering, or falsifying documents to obstruct any government function." *Ibid.*

For example, an FBI investigation counts as a matter within a federal department's jurisdiction, but falls outside the statutory definition of "official proceeding" as construed by courts. See, *e.g.*, *United States* v. *Gabriel*, 125 F. 3d 89, 105, n. 13 (CA2 1997). But conversely, §1512(c)(1) sometimes reaches more widely than §1519. For example, because an "official proceeding" includes any "proceeding before a judge or court of the United States," §1512(c)(1) prohibits tampering with evidence in federal litigation between private parties. See §1515(a)(1)(A); *United States* v. *Burge*, 711 F. 3d 803, 808–810 (CA7 2013); *United States* v. *Reich*, 479 F. 3d 179, 185–187 (CA2 2007) (Sotomayor, J.). By contrast, §1519 wouldn't ordinarily operate in that context because a federal court isn't a "department or agency." See *Hubbard* v. *United States*, 514 U. S. 695, 715 (1995).[3] So the surplusage canon doesn't come into play.[4] Overlap—even significant overlap—abounds in the criminal law. See *Loughrin* v. *United*

As always, I expect this information to be conveyed forthwith to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

Exhibit M.b

Attachment SOX=HouseReport.pdf to email of Nov. 20, 2016 (Exhibit M, *supra*).

107TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
107–610

SARBANES-OXLEY ACT OF 2002

JULY 24, 2002.—Ordered to be printed

Mr. OXLEY, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 3763]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3763), to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Sarbanes-Oxley Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

80–931

SEC. 2. DEFINITIONS.

(a) IN GENERAL.—In this Act, the following definitions shall apply:

(1) APPROPRIATE STATE REGULATORY AUTHORITY.—The term "appropriate State regulatory authority" means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State or States having jurisdiction over a registered public accounting firm or associated person thereof, with respect to the matter in question.

(2) AUDIT.—The term "audit" means an examination of the financial statements of any issuer by an independent public accounting firm in accordance with the rules of the Board or the Commission (or, for the period preceding the adoption of applicable rules of the Board under section 103, in accordance with then-applicable generally accepted auditing and related standards for such purposes), for the purpose of expressing an opinion on such statements.

(3) AUDIT COMMITTEE.—The term "audit committee" means—

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(4) AUDIT REPORT.—The term "audit report" means a document or other record—

(A) prepared following an audit performed for purposes of compliance by an issuer with the requirements of the securities laws; and

(B) in which a public accounting firm either—

(i) sets forth the opinion of that firm regarding a financial statement, report, or other document; or

(ii) asserts that no such opinion can be expressed.

(5) BOARD.—The term "Board" means the Public Company Accounting Oversight Board established under section 101.

(6) COMMISSION.—The term "Commission" means the Securities and Exchange Commission.

(7) ISSUER.—The term "issuer" means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.

(8) NON-AUDIT SERVICES.—The term "non-audit services" means any professional services provided to an issuer by a registered public accounting firm, other than those provided to an issuer in connection with an audit or a review of the financial statements of an issuer.

(9) PERSON ASSOCIATED WITH A PUBLIC ACCOUNTING FIRM.—

(A) IN GENERAL.—The terms "person associated with a public accounting firm" (or with a "registered public accounting firm") and "associated person of a public accounting firm" (or of a "registered public accounting firm") mean any individual proprietor, partner, shareholder, principal, accountant, or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report—

(i) shares in the profits of, or receives compensation in any other form from, that firm; or

(ii) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm.

(B) EXEMPTION AUTHORITY.—The Board may, by rule, exempt persons engaged only in ministerial tasks from the definition in subparagraph (A), to the extent that the Board determines that any such exemption is consistent with the purposes of this Act, the public interest, or the protection of investors.

(10) PROFESSIONAL STANDARDS.—The term "professional standards" means—

(A) accounting principles that are—

(i) established by the standard setting body described in section 19(b) of the Securities Act of 1933, as amended by this Act, or prescribed by the Commission under section 19(a) of that Act (15 U.S.C. 17a(s)) or section 13(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78a(m)); and

(ii) relevant to audit reports for particular issuers, or dealt with in the quality control system of a particular registered public accounting firm; and

(B) auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing title II) that the Board or the Commission determines—

(i) relate to the preparation or issuance of audit reports for issuers; and

(ii) are established or adopted by the Board under section 103(a), or are promulgated as rules of the Commission.

(11) PUBLIC ACCOUNTING FIRM.—The term "public accounting firm" means—

(A) a proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports; and

(B) to the extent so designated by the rules of the Board, any associated person of any entity described in subparagraph (A).

(12) REGISTERED PUBLIC ACCOUNTING FIRM.—The term "registered public accounting firm" means a public accounting firm registered with the Board in accordance with this Act.

(13) RULES OF THE BOARD.—The term "rules of the Board" means the bylaws and rules of the Board (as submitted to, and approved, modified, or amended by the Commission, in accordance with section 107), and those stated policies, practices, and interpretations of the Board that the Commission, by rule, may deem to be rules of the Board, as necessary or appropriate in the public interest or for the protection of investors.

(14) SECURITY.—The term "security" has the same meaning as in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(15) SECURITIES LAWS.—The term "securities laws" means the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), as amended by this Act, and includes the rules, regulations, and orders issued by the Commission thereunder.

(16) STATE.—The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other territory or possession of the United States.

(b) CONFORMING AMENDMENT.—Section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) is amended by inserting "the Sarbanes-Oxley Act of 2002," before "the Public".

SEC. 3. COMMISSION RULES AND ENFORCEMENT.

(a) REGULATORY ACTION.—The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.

(b) ENFORCEMENT.—

(1) IN GENERAL.—A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

(2) INVESTIGATIONS, INJUNCTIONS, AND PROSECUTION OF OFFENSES.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended—

(A) in subsection (a)(1), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,";

(B) in subsection (d)(1), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,";

(C) in subsection (e), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,"; and

(D) in subsection (f), by inserting "or the Public Company Accounting Oversight Board" after "self-regulatory organization" each place that term appears.

(3) CEASE-AND-DESIST PROCEEDINGS.—Section 21C(c)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)(2)) is amended by inserting "registered public accounting firm (as defined in section 2 of the Sarbanes-Oxley Act of 2002)," after "government securities dealer,".

(4) ENFORCEMENT BY FEDERAL BANKING AGENCIES.—Section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(i)) is amended by—

(A) striking "sections 12," each place it appears and inserting "sections 10A(m), 12,"; and

(B) striking "and 16," each place it appears and inserting "and 16 of this Act, and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002,".

(c) EFFECT ON COMMISSION AUTHORITY.—Nothing in this Act or the rules of the Board shall be construed to impair or limit—

(1) the authority of the Commission to regulate the accounting profession, accounting firms, or persons associated with such firms for purposes of enforcement of the securities laws;

(2) the authority of the Commission to set standards for accounting or auditing practices or auditor independence, derived from other provisions of the securities laws or the rules or regulations thereunder, for purposes of the preparation and issuance of any audit report, or otherwise under applicable law; or

(3) the ability of the Commission to take, on the initiative of the Commission, legal, administrative, or disciplinary action against any registered public accounting firm or any associated person thereof.

TITLE I—PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

SEC. 101. ESTABLISHMENT; ADMINISTRATIVE PROVISIONS.

(a) ESTABLISHMENT OF BOARD.—There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related mat-

ters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.

(b) STATUS.—The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

(c) DUTIES OF THE BOARD.—The Board shall, subject to action by the Commission under section 107, and once a determination is made by the Commission under subsection (d) of this section—

(1) register public accounting firms that prepare audit reports for issuers, in accordance with section 102;

(2) establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers, in accordance with section 103;

(3) conduct inspections of registered public accounting firms, in accordance with section 104 and the rules of the Board;

(4) conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms, in accordance with section 105;

(5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out this Act, in order to protect investors, or to further the public interest;

(6) enforce compliance with this Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof; and

(7) set the budget and manage the operations of the Board and the staff of the Board.

(d) COMMISSION DETERMINATION.—The members of the Board shall take such action (including hiring of staff, proposal of rules, and adoption of initial and transitional auditing and other professional standards) as may be necessary or appropriate to enable the Commission to determine, not later than 270 days after the date of enactment of this Act, that the Board is so organized and has the capacity to carry out the requirements of this title, and to enforce compliance with this title by registered public accounting firms and associated persons thereof. The Commission shall be responsible, prior to the appointment of the Board, for the planning for the establishment and administrative transition to the Board's operation.

(e) BOARD MEMBERSHIP.—

(1) COMPOSITION.—The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures required of issuers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures.

(2) LIMITATION.—Two members, and only 2 members, of the Board shall be or have been certified public accountants pursuant to the laws of 1 or more States, provided that, if 1 of those 2 members is the chairperson, he or she may not have been a practicing certified public accountant for at least 5 years prior to his or her appointment to the Board.

(3) FULL-TIME INDEPENDENT SERVICE.—Each member of the Board shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity. No member of the Board may share in any of the profits of, or receive payments from, a public accounting firm (or any other person, as determined by rule of the Commission), other than fixed continuing payments, subject to such conditions as the Commission may impose, under standard arrangements for the retirement of members of public accounting firms.

(4) APPOINTMENT OF BOARD MEMBERS.—

(A) INITIAL BOARD.—Not later than 90 days after the date of enactment of this Act, the Commission, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, shall appoint the chairperson and other initial members of the Board, and shall designate a term of service for each.

(B) VACANCIES.—A vacancy on the Board shall not affect the powers of the Board, but shall be filled in the same manner as provided for appointments under this section.

(5) TERM OF SERVICE.—

(A) IN GENERAL.—The term of service of each Board member shall be 5 years, and until a successor is appointed, except that—

(i) the terms of office of the initial Board members (other than the chairperson) shall expire in annual increments, 1 on each of the first 4 anniversaries of the initial date of appointment; and

(ii) any Board member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of that term.

(B) TERM LIMITATION.—No person may serve as a member of the Board, or as chairperson of the Board, for more than 2 terms, whether or not such terms of service are consecutive.

(6) REMOVAL FROM OFFICE.—A member of the Board may be removed by the Commission from office, in accordance with section 107(d)(3), for good cause shown before the expiration of the term of that member.

(f) POWERS OF THE BOARD.—In addition to any authority granted to the Board otherwise in this Act, the Board shall have the power, subject to section 107—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the Commission, in any Federal, State, or other court;

(2) to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act, in any State, without regard to any qualification, licensing, or other provision of law in effect in such State (or a political subdivision thereof);

(3) to lease, purchase, accept gifts or donations of or otherwise acquire, improve, use, sell, exchange, or convey, all of or an interest in any property, wherever situated;

(4) to appoint such employees, accountants, attorneys, and other agents as may be necessary or appropriate, and to determine their qualifications, define their duties, and fix their salaries or other compensation (at a level that is comparable to private sector self-regulatory, accounting, technical, supervisory, or other staff or management positions);

(5) to allocate, assess, and collect accounting support fees established pursuant to section 109, for the Board, and other fees and charges imposed under this title; and

(6) to enter into contracts, execute instruments, incur liabilities, and do any and all other acts and things necessary, appropriate, or incidental to the conduct of its operations and the exercise of its obligations, rights, and powers imposed or granted by this title.

(g) RULES OF THE BOARD.—The rules of the Board shall, subject to the approval of the Commission—

(1) provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act;

(2) permit, as the Board determines necessary or appropriate, delegation by the Board of any of its functions to an individual member or employee of the Board, or to a division of the Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter, except that—

(A) the Board shall retain a discretionary right to review any action pursuant to any such delegated function, upon its own motion;

(B) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Board upon such review shall be deemed to be the action of the Board for all purposes (including appeal or review thereof); and

(C) if the right to exercise a review described in subparagraph (A) is declined, or if no such review is sought within the time stated in the rules of the Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Board;

(3) establish ethics rules and standards of conduct for Board members and staff, including a bar on practice before the

Board (and the Commission, with respect to Board-related matters) of 1 year for former members of the Board, and appropriate periods (not to exceed 1 year) for former staff of the Board; and

(4) provide as otherwise required by this Act.

(h) ANNUAL REPORT TO THE COMMISSION.—The Board shall submit an annual report (including its audited financial statements) to the Commission, and the Commission shall transmit a copy of that report to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, not later than 30 days after the date of receipt of that report by the Commission.

SEC. 102. REGISTRATION WITH THE BOARD.

(a) MANDATORY REGISTRATION.—Beginning 180 days after the date of the determination of the Commission under section 101(d), it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer.

(b) APPLICATIONS FOR REGISTRATION.—

(1) FORM OF APPLICATION.—A public accounting firm shall use such form as the Board may prescribe, by rule, to apply for registration under this section.

(2) CONTENTS OF APPLICATIONS.—Each public accounting firm shall submit, as part of its application for registration, in such detail as the Board shall specify—

(A) the names of all issuers for which the firm prepared or issued audit reports during the immediately preceding calendar year, and for which the firm expects to prepare or issue audit reports during the current calendar year;

(B) the annual fees received by the firm from each such issuer for audit services, other accounting services, and non-audit services, respectively;

(C) such other current financial information for the most recently completed fiscal year of the firm as the Board may reasonably request;

(D) a statement of the quality control policies of the firm for its accounting and auditing practices;

(E) a list of all accountants associated with the firm who participate in or contribute to the preparation of audit reports, stating the license or certification number of each such person, as well as the State license numbers of the firm itself;

(F) information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report;

(G) copies of any periodic or annual disclosure filed by an issuer with the Commission during the immediately preceding calendar year which discloses accounting disagreements between such issuer and the firm in connection with an audit report furnished or prepared by the firm for such issuer; and

(H) such other information as the rules of the Board or the Commission shall specify as necessary or appropriate in the public interest or for the protection of investors.

(3) CONSENTS.—Each application for registration under this subsection shall include—

(A) a consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this title (and an agreement to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm); and

(B) a statement that such firm understands and agrees that cooperation and compliance, as described in the consent required by subparagraph (A), and the securing and enforcement of such consents from its associated persons, in accordance with the rules of the Board, shall be a condition to the continuing effectiveness of the registration of the firm with the Board.

(c) ACTION ON APPLICATIONS.—

(1) TIMING.—The Board shall approve a completed application for registration not later than 45 days after the date of receipt of the application, in accordance with the rules of the Board, unless the Board, prior to such date, issues a written notice of disapproval to, or requests more information from, the prospective registrant.

(2) TREATMENT.—A written notice of disapproval of a completed application under paragraph (1) for registration shall be treated as a disciplinary sanction for purposes of sections 105(d) and 107(c).

(d) PERIODIC REPORTS.—Each registered public accounting firm shall submit an annual report to the Board, and may be required to report more frequently, as necessary to update the information contained in its application for registration under this section, and to provide to the Board such additional information as the Board or the Commission may specify, in accordance with subsection (b)(2).

(e) PUBLIC AVAILABILITY.—Registration applications and annual reports required by this subsection, or such portions of such applications or reports as may be designated under rules of the Board, shall be made available for public inspection, subject to rules of the Board or the Commission, and to applicable laws relating to the confidentiality of proprietary, personal, or other information contained in such applications or reports, provided that, in all events, the Board shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information.

(f) REGISTRATION AND ANNUAL FEES.—The Board shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports.

SEC. 103. AUDITING, QUALITY CONTROL, AND INDEPENDENCE STANDARDS AND RULES.

(a) AUDITING, QUALITY CONTROL, AND ETHICS STANDARDS.—

(1) IN GENERAL.—The Board shall, by rule, establish, including, to the extent it determines appropriate, through adoption of standards proposed by 1 or more professional groups of accountants designated pursuant to paragraph (3)(A) or advisory groups convened pursuant to paragraph (4), and amend or otherwise modify or alter, such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.

(2) RULE REQUIREMENTS.—In carrying out paragraph (1), the Board—

(A) shall include in the auditing standards that it adopts, requirements that each registered public accounting firm shall—

(i) prepare, and maintain for a period of not less than 7 years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report;

(ii) provide a concurring or second partner review and approval of such audit report (and other related information), and concurring approval in its issuance, by a qualified person (as prescribed by the Board) associated with the public accounting firm, other than the person in charge of the audit, or by an independent reviewer (as prescribed by the Board); and

(iii) describe in each audit report the scope of the auditor's testing of the internal control structure and procedures of the issuer, required by section 404(b), and present (in such report or in a separate report)—

(I) the findings of the auditor from such testing;

(II) an evaluation of whether such internal control structure and procedures—

(aa) include maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(bb) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and

(III) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing.

(B) shall include, in the quality control standards that it adopts with respect to the issuance of audit reports, re-

quirements for every registered public accounting firm relating to—

(i) monitoring of professional ethics and independence from issuers on behalf of which the firm issues audit reports;

(ii) consultation within such firm on accounting and auditing questions;

(iii) supervision of audit work;

(iv) hiring, professional development, and advancement of personnel;

(v) the acceptance and continuation of engagements;

(vi) internal inspection; and

(vii) such other requirements as the Board may prescribe, subject to subsection (a)(1).

(3) AUTHORITY TO ADOPT OTHER STANDARDS.—

(A) IN GENERAL.—In carrying out this subsection, the Board—

(i) may adopt as its rules, subject to the terms of section 107, any portion of any statement of auditing standards or other professional standards that the Board determines satisfy the requirements of paragraph (1), and that were proposed by 1 or more professional groups of accountants that shall be designated or recognized by the Board, by rule, for such purpose, pursuant to this paragraph or 1 or more advisory groups convened pursuant to paragraph (4); and

(ii) notwithstanding clause (i), shall retain full authority to modify, supplement, revise, or subsequently amend, modify, or repeal, in whole or in part, any portion of any statement described in clause (i).

(B) INITIAL AND TRANSITIONAL STANDARDS.—The Board shall adopt standards described in subparagraph (A)(i) as initial or transitional standards, to the extent the Board determines necessary, prior to a determination of the Commission under section 101(d), and such standards shall be separately approved by the Commission at the time of that determination, without regard to the procedures required by section 107 that otherwise would apply to the approval of rules of the Board.

(4) ADVISORY GROUPS.—The Board shall convene, or authorize its staff to convene, such expert advisory groups as may be appropriate, which may include practicing accountants and other experts, as well as representatives of other interested groups, subject to such rules as the Board may prescribe to prevent conflicts of interest, to make recommendations concerning the content (including proposed drafts) of auditing, quality control, ethics, independence, or other standards required to be established under this section.

(b) INDEPENDENCE STANDARDS AND RULES.—The Board shall establish such rules as may be necessary or appropriate in the public interest or for the protection of investors, to implement, or as authorized under, title II of this Act.

(c) COOPERATION WITH DESIGNATED PROFESSIONAL GROUPS OF ACCOUNTANTS AND ADVISORY GROUPS.—

(1) IN GENERAL.—The Board shall cooperate on an ongoing basis with professional groups of accountants designated under subsection (a)(3)(A) and advisory groups convened under subsection (a)(4) in the examination of the need for changes in any standards subject to its authority under subsection (a), recommend issues for inclusion on the agendas of such designated professional groups of accountants or advisory groups, and take such other steps as it deems appropriate to increase the effectiveness of the standard setting process.

(2) BOARD RESPONSES.—The Board shall respond in a timely fashion to requests from designated professional groups of accountants and advisory groups referred to in paragraph (1) for any changes in standards over which the Board has authority.

(d) EVALUATION OF STANDARD SETTING PROCESS.—The Board shall include in the annual report required by section 101(h) the results of its standard setting responsibilities during the period to which the report relates, including a discussion of the work of the Board with any designated professional groups of accountants and advisory groups described in paragraphs (3)(A) and (4) of subsection (a), and its pending issues agenda for future standard setting projects.

SEC. 104. INSPECTIONS OF REGISTERED PUBLIC ACCOUNTING FIRMS.

(a) IN GENERAL.—The Board shall conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.

(b) INSPECTION FREQUENCY.—

(1) IN GENERAL.—Subject to paragraph (2), inspections required by this section shall be conducted—

(A) annually with respect to each registered public accounting firm that regularly provides audit reports for more than 100 issuers; and

(B) not less frequently than once every 3 years with respect to each registered public accounting firm that regularly provides audit reports for 100 or fewer issuers.

(2) ADJUSTMENTS TO SCHEDULES.—The Board may, by rule, adjust the inspection schedules set under paragraph (1) if the Board finds that different inspection schedules are consistent with the purposes of this Act, the public interest, and the protection of investors. The Board may conduct special inspections at the request of the Commission or upon its own motion.

(c) PROCEDURES.—The Board shall, in each inspection under this section, and in accordance with its rules for such inspections—

(1) identify any act or practice or omission to act by the registered public accounting firm, or by any associated person thereof, revealed by such inspection that may be in violation of this Act, the rules of the Board, the rules of the Commission, the firm's own quality control policies, or professional standards;

(2) report any such act, practice, or omission, if appropriate, to the Commission and each appropriate State regulatory authority; and

(3) begin a formal investigation or take disciplinary action, if appropriate, with respect to any such violation, in accordance with this Act and the rules of the Board.

(d) CONDUCT OF INSPECTIONS.—In conducting an inspection of a registered public accounting firm under this section, the Board shall—

(1) inspect and review selected audit and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and 1 or more third parties), performed at various offices and by various associated persons of the firm, as selected by the Board;

(2) evaluate the sufficiency of the quality control system of the firm, and the manner of the documentation and communication of that system by the firm; and

(3) perform such other testing of the audit, supervisory, and quality control procedures of the firm as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.

(e) RECORD RETENTION.—The rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by section 103 or the rules issued thereunder.

(f) PROCEDURES FOR REVIEW.—The rules of the Board shall provide a procedure for the review of and response to a draft inspection report by the registered public accounting firm under inspection. The Board shall take such action with respect to such response as it considers appropriate (including revising the draft report or continuing or supplementing its inspection activities before issuing a final report), but the text of any such response, appropriately redacted to protect information reasonably identified by the accounting firm as confidential, shall be attached to and made part of the inspection report.

(g) REPORT.—A written report of the findings of the Board for each inspection under this section, subject to subsection (h), shall be—

(1) transmitted, in appropriate detail, to the Commission and each appropriate State regulatory authority, accompanied by any letter or comments by the Board or the inspector, and any letter of response from the registered public accounting firm; and

(2) made available in appropriate detail to the public (subject to section 105(b)(5)(A), and to the protection of such confidential and proprietary information as the Board may determine to be appropriate, or as may be required by law), except that no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.

(h) INTERIM COMMISSION REVIEW.—

(1) REVIEWABLE MATTERS.—A registered public accounting firm may seek review by the Commission, pursuant to such rules as the Commission shall promulgate, if the firm—

(A) has provided the Board with a response, pursuant to rules issued by the Board under subsection (f), to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response; or

(B) disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report, for purposes of subsection (g)(2).

(2) TREATMENT OF REVIEW.—Any decision of the Commission with respect to a review under paragraph (1) shall not be reviewable under section 25 of the Securities Exchange Act of 1934 (15 U.S.C. 78y), or deemed to be "final agency action" for purposes of section 704 of title 5, United States Code.

(3) TIMING.—Review under paragraph (1) may be sought during the 30-day period following the date of the event giving rise to the review under subparagraph (A) or (B) of paragraph (1).

SEC. 105. INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS.

(a) IN GENERAL.—The Board shall establish, by rule, subject to the requirements of this section, fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms.

(b) INVESTIGATIONS.—

(1) AUTHORITY.—In accordance with the rules of the Board, the Board may conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, regardless of how the act, practice, or omission is brought to the attention of the Board.

(2) TESTIMONY AND DOCUMENT PRODUCTION.—In addition to such other actions as the Board determines to be necessary or appropriate, the rules of the Board may—

(A) require the testimony of the firm or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation;

(B) require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board considers relevant or material to the investigation, and may inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied;

(C) request the testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to an investigation under

this section, with appropriate notice, subject to the needs of the investigation, as permitted under the rules of the Board; and

(D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and production of any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation under this section.

(3) NONCOOPERATION WITH INVESTIGATIONS.—

(A) IN GENERAL.—If a registered public accounting firm or any associated person thereof refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may—

(i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association;

(ii) suspend or revoke the registration of the public accounting firm; and

(iii) invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.

(B) PROCEDURE.—Any action taken by the Board under this paragraph shall be subject to the terms of section 107(c).

(4) COORDINATION AND REFERRAL OF INVESTIGATIONS.—

(A) COORDINATION.—The Board shall notify the Commission of any pending Board investigation involving a potential violation of the securities laws, and thereafter coordinate its work with the work of the Commission's Division of Enforcement, as necessary to protect an ongoing Commission investigation.

(B) REFERRAL.—The Board may refer an investigation under this section—

(i) to the Commission;

(ii) to any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of such regulator; and

(iii) at the direction of the Commission, to—

(I) the Attorney General of the United States;

(II) the attorney general of 1 or more States; and

(III) the appropriate State regulatory authority.

(5) USE OF DOCUMENTS.—

(A) CONFIDENTIALITY.—Except as provided in subparagraph (B), all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 104 or with an investigation

under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c).

(B) AVAILABILITY TO GOVERNMENT AGENCIES.—Without the loss of its status as confidential and privileged in the hands of the Board, all information referred to in subparagraph (A) may—

(i) be made available to the Commission; and

(ii) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of this Act or to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), other than the Commission, with respect to an audit report for an institution subject to the jurisdiction of such regulator;

(III) State attorneys general in connection with any criminal investigation; and

(IV) any appropriate State regulatory authority,

each of which shall maintain such information as confidential and privileged.

(6) IMMUNITY.—Any employee of the Board engaged in carrying out an investigation under this Act shall be immune from any civil liability arising out of such investigation in the same manner and to the same extent as an employee of the Federal Government in similar circumstances.

(c) DISCIPLINARY PROCEDURES.—

(1) NOTIFICATION; RECORDKEEPING.—The rules of the Board shall provide that in any proceeding by the Board to determine whether a registered public accounting firm, or an associated person thereof, should be disciplined, the Board shall—

(A) bring specific charges with respect to the firm or associated person;

(B) notify such firm or associated person of, and provide to the firm or associated person an opportunity to defend against, such charges; and

(C) keep a record of the proceedings.

(2) PUBLIC HEARINGS.—Hearings under this section shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing.

(3) SUPPORTING STATEMENT.—A determination by the Board to impose a sanction under this subsection shall be supported by a statement setting forth—

(A) each act or practice in which the registered public accounting firm, or associated person, has engaged (or

omitted to engage), or that forms a basis for all or a part of such sanction;

(B) the specific provision of this Act, the securities laws, the rules of the Board, or professional standards which the Board determines has been violated; and

(C) the sanction imposed, including a justification for that sanction.

(4) SANCTIONS.—If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or associated person thereof has engaged in any act or practice, or omitted to act, in violation of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, subject to applicable limitations under paragraph (5), including—

(A) temporary suspension or permanent revocation of registration under this title;

(B) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;

(C) temporary or permanent limitation on the activities, functions, or operations of such firm or person (other than in connection with required additional professional education or training);

(D) a civil money penalty for each such violation, in an amount equal to—

(i) not more than $100,000 for a natural person or $2,000,000 for any other person; and

(ii) in any case to which paragraph (5) applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(E) censure;

(F) required additional professional education or training; or

(G) any other appropriate sanction provided for in the rules of the Board.

(5) INTENTIONAL OR OTHER KNOWING CONDUCT.—The sanctions and penalties described in subparagraphs (A) through (C) and (D)(ii) of paragraph (4) shall only apply to—

(A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or

(B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.

(6) FAILURE TO SUPERVISE.—

(A) IN GENERAL.—The Board may impose sanctions under this section on a registered accounting firm or upon the supervisory personnel of such firm, if the Board finds that—

(i) the firm has failed reasonably to supervise an associated person, either as required by the rules of the

Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under this Act, or professional standards; and

(ii) such associated person commits a violation of this Act, or any of such rules, laws, or standards.

(B) RULE OF CONSTRUCTION.—No associated person of a registered public accounting firm shall be deemed to have failed reasonably to supervise any other person for purposes of subparagraph (A), if—

(i) there have been established in and for that firm procedures, and a system for applying such procedures, that comply with applicable rules of the Board and that would reasonably be expected to prevent and detect any such violation by such associated person; and

(ii) such person has reasonably discharged the duties and obligations incumbent upon that person by reason of such procedures and system, and had no reasonable cause to believe that such procedures and system were not being complied with.

(7) EFFECT OF SUSPENSION.—

(A) ASSOCIATION WITH A PUBLIC ACCOUNTING FIRM.—It shall be unlawful for any person that is suspended or barred from being associated with a registered public accounting firm under this subsection willfully to become or remain associated with any registered public accounting firm, or for any registered public accounting firm that knew, or, in the exercise of reasonable care should have known, of the suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(B) ASSOCIATION WITH AN ISSUER.—It shall be unlawful for any person that is suspended or barred from being associated with an issuer under this subsection willfully to become or remain associated with any issuer in an accountancy or a financial management capacity, and for any issuer that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(d) REPORTING OF SANCTIONS.—

(1) RECIPIENTS.—If the Board imposes a disciplinary sanction, in accordance with this section, the Board shall report the sanction to—

(A) the Commission;

(B) any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified; and

(C) the public (once any stay on the imposition of such sanction has been lifted).

(2) CONTENTS.—The information reported under paragraph (1) shall include—

(A) the name of the sanctioned person;

(B) a description of the sanction and the basis for its imposition; and

(C) such other information as the Board deems appropriate.

(e) STAY OF SANCTIONS.—

(1) IN GENERAL.—Application to the Commission for review, or the institution by the Commission of review, of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders (summarily or after notice and opportunity for hearing on the question of a stay, which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that no such stay shall continue to operate.

(2) EXPEDITED PROCEDURES.—The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection.

SEC. 106. FOREIGN PUBLIC ACCOUNTING FIRMS.

(a) APPLICABILITY TO CERTAIN FOREIGN FIRMS.—

(1) IN GENERAL.—Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to this Act and the rules of the Board and the Commission issued under this Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State, except that registration pursuant to section 102 shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) BOARD AUTHORITY.—The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm (or firms) for purposes of registration under, and oversight by the Board in accordance with, this title.

(b) PRODUCTION OF AUDIT WORKPAPERS.—

(1) CONSENT BY FOREIGN FIRMS.—If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented—

(A) to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report; and

(B) to be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for production of such workpapers.

(2) CONSENT BY DOMESTIC FIRMS.—A registered public accounting firm that relies upon the opinion of a foreign public accounting firm, as described in paragraph (1), shall be deemed—

(A) to have consented to supplying the audit workpapers of that foreign public accounting firm in response to a request for production by the Board or the Commission; and

(B) to have secured the agreement of that foreign public accounting firm to such production, as a condition of its reliance on the opinion of that foreign public accounting firm.

(c) EXEMPTION AUTHORITY.—The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) DEFINITION.—In this section, the term "foreign public accounting firm" means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

SEC. 107. COMMISSION OVERSIGHT OF THE BOARD.

(a) GENERAL OVERSIGHT RESPONSIBILITY.—The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 17(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(a)(1)), and of section 17(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(b)(1)) shall apply to the Board as fully as if the Board were a "registered securities association" for purposes of those sections 17(a)(1) and 17(b)(1).

(b) RULES OF THE BOARD.—

(1) DEFINITION.—In this section, the term "proposed rule" means any proposed rule of the Board, and any modification of any such rule.

(2) PRIOR APPROVAL REQUIRED.—No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 103(a)(3)(B) with respect to initial or transitional standards.

(3) APPROVAL CRITERIA.—The Commission shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors.

(4) PROPOSED RULE PROCEDURES.—The provisions of paragraphs (1) through (3) of section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section 19(b), except that, for purposes of this paragraph—

(A) the phrase "consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization" in section 19(b)(2) of that Act shall be deemed to read "consistent with the requirements of title I

of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors"; and

(B) the phrase "otherwise in furtherance of the purposes of this title" in section 19(b)(3)(C) of that Act shall be deemed to read "otherwise in furtherance of the purposes of title I of the Sarbanes-Oxley Act of 2002".

(5) COMMISSION AUTHORITY TO AMEND RULES OF THE BOARD.—The provisions of section 19(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(c)) shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a "registered securities association" for purposes of that section 19(c), except that the phrase "to conform its rules to the requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title" in section 19(c) of that Act shall, for purposes of this paragraph, be deemed to read "to assure the fair administration of the Public Company Accounting Oversight Board, conform the rules promulgated by that Board to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board".

(c) COMMISSION REVIEW OF DISCIPLINARY ACTION TAKEN BY THE BOARD.—

(1) NOTICE OF SANCTION.—The Board shall promptly file notice with the Commission of any final sanction on any registered public accounting firm or on any associated person thereof, in such form and containing such information as the Commission, by rule, may prescribe.

(2) REVIEW OF SANCTIONS.—The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d)(2) and (e)(1)) shall govern the review by the Commission of final disciplinary sanctions imposed by the Board (including sanctions imposed under section 105(b)(3) of this Act for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1), except that, for purposes of this paragraph—

(A) section 105(e) of this Act (rather than that section 19(d)(2)) shall govern the extent to which application for, or institution by the Commission on its own motion of, review of any disciplinary action of the Board operates as a stay of such action;

(B) references in that section 19(e)(1) to "members" of such an organization shall be deemed to be references to registered public accounting firms;

(C) the phrase "consistent with the purposes of this title" in that section 19(e)(1) shall be deemed to read "consistent with the purposes of this title and title I of the Sarbanes-Oxley Act of 2002";

(D) references to rules of the Municipal Securities Rulemaking Board in that section 19(e)(1) shall not apply; and

(E) the reference to section 19(e)(2) of the Securities Exchange Act of 1934 shall refer instead to section 107(c)(3) of this Act.

(3) COMMISSION MODIFICATION AUTHORITY.—The Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof, if the Commission, having due regard for the public interest and the protection of investors, finds, after a proceeding in accordance with this subsection, that the sanction—

(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or

(B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.

(d) CENSURE OF THE BOARD; OTHER SANCTIONS.—

(1) RESCISSION OF BOARD AUTHORITY.—The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.

(2) CENSURE OF THE BOARD; LIMITATIONS.—The Commission may, by order, as it determines necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, censure or impose limitations upon the activities, functions, and operations of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that the Board—

(A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws; or

(B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof.

(3) CENSURE OF BOARD MEMBERS; REMOVAL FROM OFFICE.—The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove from office or censure any member of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that such member—

(A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;

(B) has willfully abused the authority of that member; or

(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

SEC. 108. ACCOUNTING STANDARDS.

(a) AMENDMENT TO SECURITIES ACT OF 1933.—Section 19 of the Securities Act of 1933 (15 U.S.C. 77s) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) RECOGNITION OF ACCOUNTING STANDARDS.—

"(1) IN GENERAL.—In carrying out its authority under subsection (a) and under section 13(b) of the Securities Exchange Act of 1934, the Commission may recognize, as 'generally accepted' for purposes of the securities laws, any accounting principles established by a standard setting body—

"(A) that—

"(i) is organized as a private entity;

"(ii) has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest, the majority of whom are not, concurrent with their service on such board, and have not been during the 2-year period preceding such service, associated persons of any registered public accounting firm;

"(iii) is funded as provided in section 109 of the Sarbanes-Oxley Act of 2002;

"(iv) has adopted procedures to ensure prompt consideration, by majority vote of its members, of changes to accounting principles necessary to reflect emerging accounting issues and changing business practices; and

"(v) considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors; and

"(B) that the Commission determines has the capacity to assist the Commission in fulfilling the requirements of subsection (a) and section 13(b) of the Securities Exchange Act of 1934, because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws.

"(2) ANNUAL REPORT.—A standard setting body described in paragraph (1) shall submit an annual report to the Commission and the public, containing audited financial statements of that standard setting body.".

(b) COMMISSION AUTHORITY.—The Commission shall promulgate such rules and regulations to carry out section 19(b) of the Securities Act of 1933, as added by this section, as it deems necessary or appropriate in the public interest or for the protection of investors.

(c) NO EFFECT ON COMMISSION POWERS.—Nothing in this Act, including this section and the amendment made by this section, shall be construed to impair or limit the authority of the Commission to establish accounting principles or standards for purposes of enforcement of the securities laws.

(d) STUDY AND REPORT ON ADOPTING PRINCIPLES-BASED ACCOUNTING.—

(1) STUDY.—

(A) IN GENERAL.—The Commission shall conduct a study on the adoption by the United States financial reporting system of a principles-based accounting system.

(B) STUDY TOPICS.—The study required by subparagraph (A) shall include an examination of—

(i) the extent to which principles-based accounting and financial reporting exists in the United States;

(ii) the length of time required for change from a rules-based to a principles-based financial reporting system;

(iii) the feasibility of and proposed methods by which a principles-based system may be implemented; and

(iv) a thorough economic analysis of the implementation of a principles-based system.

(2) REPORT.—Not later than 1 year after the date of enactment of this Act, the Commission shall submit a report on the results of the study required by paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

SEC. 109. FUNDING.

(a) IN GENERAL.—The Board, and the standard setting body designated pursuant to section 19(b) of the Securities Act of 1933, as amended by section 108, shall be funded as provided in this section.

(b) ANNUAL BUDGETS.—The Board and the standard setting body referred to in subsection (a) shall each establish a budget for each fiscal year, which shall be reviewed and approved according to their respective internal procedures not less than 1 month prior to the commencement of the fiscal year to which the budget pertains (or at the beginning of the Board's first fiscal year, which may be a short fiscal year). The budget of the Board shall be subject to approval by the Commission. The budget for the first fiscal year of the Board shall be prepared and approved promptly following the appointment of the initial five Board members, to permit action by the Board of the organizational tasks contemplated by section 101(d).

(c) SOURCES AND USES OF FUNDS.—

(1) RECOVERABLE BUDGET EXPENSES.—The budget of the Board (reduced by any registration or annual fees received under section 102(e) for the year preceding the year for which the budget is being computed), and all of the budget of the standard setting body referred to in subsection (a), for each fiscal year of each of those 2 entities, shall be payable from annual accounting support fees, in accordance with subsections (d) and (e). Accounting support fees and other receipts of the Board and of such standard-setting body shall not be considered public monies of the United States.

(2) FUNDS GENERATED FROM THE COLLECTION OF MONETARY PENALTIES.—Subject to the availability in advance in an appropriations Act, and notwithstanding subsection (i), all funds collected by the Board as a result of the assessment of monetary penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, which program is to be

administered by the Board or by an entity or agent identified by the Board.

(d) ANNUAL ACCOUNTING SUPPORT FEE FOR THE BOARD.—

(1) ESTABLISHMENT OF FEE.—The Board shall establish, with the approval of the Commission, a reasonable annual accounting support fee (or a formula for the computation thereof), as may be necessary or appropriate to establish and maintain the Board. Such fee may also cover costs incurred in the Board's first fiscal year (which may be a short fiscal year), or may be levied separately with respect to such short fiscal year.

(2) ASSESSMENTS.—The rules of the Board under paragraph (1) shall provide for the equitable allocation, assessment, and collection by the Board (or an agent appointed by the Board) of the fee established under paragraph (1), among issuers, in accordance with subsection (g), allowing for differentiation among classes of issuers, as appropriate.

(e) ANNUAL ACCOUNTING SUPPORT FEE FOR STANDARD SETTING BODY.—The annual accounting support fee for the standard setting body referred to in subsection (a)—

(1) shall be allocated in accordance with subsection (g), and assessed and collected against each issuer, on behalf of the standard setting body, by 1 or more appropriate designated collection agents, as may be necessary or appropriate to pay for the budget and provide for the expenses of that standard setting body, and to provide for an independent, stable source of funding for such body, subject to review by the Commission; and

(2) may differentiate among different classes of issuers.

(f) LIMITATION ON FEE.—The amount of fees collected under this section for a fiscal year on behalf of the Board or the standards setting body, as the case may be, shall not exceed the recoverable budget expenses of the Board or body, respectively (which may include operating, capital, and accrued items), referred to in subsection (c)(1).

(g) ALLOCATION OF ACCOUNTING SUPPORT FEES AMONG ISSUERS.—Any amount due from issuers (or a particular class of issuers) under this section to fund the budget of the Board or the standard setting body referred to in subsection (a) shall be allocated among and payable by each issuer (or each issuer in a particular class, as applicable) in an amount equal to the total of such amount, multiplied by a fraction—

(1) the numerator of which is the average monthly equity market capitalization of the issuer for the 12-month period immediately preceding the beginning of the fiscal year to which such budget relates; and

(2) the denominator of which is the average monthly equity market capitalization of all such issuers for such 12-month period.

(h) CONFORMING AMENDMENTS.—Section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2)) is amended—

(1) in subparagraph (A), by striking "and" at the end; and

(2) in subparagraph (B), by striking the period at the end and inserting the following: "; and

"(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting

support fee or fees, determined in accordance with section 109 of the Sarbanes-Oxley Act of 2002.".

(i) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to render either the Board, the standard setting body referred to in subsection (a), or both, subject to procedures in Congress to authorize or appropriate public funds, or to prevent such organization from utilizing additional sources of revenue for its activities, such as earnings from publication sales, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual and perceived independence of such organization.

(j) START-UP EXPENSES OF THE BOARD.—From the unexpended balances of the appropriations to the Commission for fiscal year 2003, the Secretary of the Treasury is authorized to advance to the Board not to exceed the amount necessary to cover the expenses of the Board during its first fiscal year (which may be a short fiscal year).

TITLE II—AUDITOR INDEPENDENCE

SEC. 201. SERVICES OUTSIDE THE SCOPE OF PRACTICE OF AUDITORS.

(a) PROHIBITED ACTIVITIES.—Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1) is amended by adding at the end the following:

"(g) PROHIBITED ACTIVITIES.—Except as provided in subsection (h), it shall be unlawful for a registered public accounting firm (and any associated person of that firm, to the extent determined appropriate by the Commission) that performs for any issuer any audit required by this title or the rules of the Commission under this title or, beginning 180 days after the date of commencement of the operations of the Public Company Accounting Oversight Board established under section 101 of the Sarbanes-Oxley Act of 2002 (in this section referred to as the 'Board'), the rules of the Board, to provide to that issuer, contemporaneously with the audit, any non-audit service, including—

"(1) bookkeeping or other services related to the accounting records or financial statements of the audit client;

"(2) financial information systems design and implementation;

"(3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;

"(4) actuarial services;

"(5) internal audit outsourcing services;

"(6) management functions or human resources;

"(7) broker or dealer, investment adviser, or investment banking services;

"(8) legal services and expert services unrelated to the audit; and

"(9) any other service that the Board determines, by regulation, is impermissible.

"(h) PREAPPROVAL REQUIRED FOR NON-AUDIT SERVICES.—A registered public accounting firm may engage in any non-audit service, including tax services, that is not described in any of paragraphs (1) through (9) of subsection (g) for an audit client, only if

the activity is approved in advance by the audit committee of the issuer, in accordance with subsection (i).".

(b) EXEMPTION AUTHORITY.—The Board may, on a case by case basis, exempt any person, issuer, public accounting firm, or transaction from the prohibition on the provision of services under section 10A(g) of the Securities Exchange Act of 1934 (as added by this section), to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors, and subject to review by the Commission in the same manner as for rules of the Board under section 107.

SEC. 202. PREAPPROVAL REQUIREMENTS.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(i) PREAPPROVAL REQUIREMENTS.—

"(1) IN GENERAL.—

"(A) AUDIT COMMITTEE ACTION.—All auditing services (which may entail providing comfort letters in connection with securities underwritings or statutory audits required for insurance companies for purposes of State law) and non-audit services, other than as provided in subparagraph (B), provided to an issuer by the auditor of the issuer shall be preapproved by the audit committee of the issuer.

"(B) DE MINIMUS EXCEPTION.—The preapproval requirement under subparagraph (A) is waived with respect to the provision of non-audit services for an issuer, if—

"(i) the aggregate amount of all such non-audit services provided to the issuer constitutes not more than 5 percent of the total amount of revenues paid by the issuer to its auditor during the fiscal year in which the nonaudit services are provided;

"(ii) such services were not recognized by the issuer at the time of the engagement to be non-audit services; and

"(iii) such services are promptly brought to the attention of the audit committee of the issuer and approved prior to the completion of the audit by the audit committee or by 1 or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.

"(2) DISCLOSURE TO INVESTORS.—Approval by an audit committee of an issuer under this subsection of a non-audit service to be performed by the auditor of the issuer shall be disclosed to investors in periodic reports required by section 13(a).

"(3) DELEGATION AUTHORITY.—The audit committee of an issuer may delegate to 1 or more designated members of the audit committee who are independent directors of the board of directors, the authority to grant preapprovals required by this subsection. The decisions of any member to whom authority is delegated under this paragraph to preapprove an activity under this subsection shall be presented to the full audit committee at each of its scheduled meetings.

"(4) APPROVAL OF AUDIT SERVICES FOR OTHER PURPOSES.—In carrying out its duties under subsection (m)(2), if the audit

committee of an issuer approves an audit service within the scope of the engagement of the auditor, such audit service shall be deemed to have been preapproved for purposes of this subsection.".

SEC. 203. AUDIT PARTNER ROTATION.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(j) AUDIT PARTNER ROTATION.—It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the 5 previous fiscal years of that issuer.".

SEC. 204. AUDITOR REPORTS TO AUDIT COMMITTEES.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(k) REPORTS TO AUDIT COMMITTEES.—Each registered public accounting firm that performs for any issuer any audit required by this title shall timely report to the audit committee of the issuer—

"(1) all critical accounting policies and practices to be used;

"(2) all alternative treatments of financial information within generally accepted accounting principles that have been discussed with management officials of the issuer, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and

"(3) other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences.".

SEC. 205. CONFORMING AMENDMENTS.

(a) DEFINITIONS.—Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is amended by adding at the end the following:

"(58) AUDIT COMMITTEE.—The term 'audit committee' means—

"(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

"(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

"(59) REGISTERED PUBLIC ACCOUNTING FIRM.—The term 'registered public accounting firm' has the same meaning as in section 2 of the Sarbanes-Oxley Act of 2002.".

(b) AUDITOR REQUIREMENTS.—Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1) is amended—

(1) by striking "an independent public accountant" each place that term appears and inserting "a registered public accounting firm";

(2) by striking "the independent public accountant" each place that term appears and inserting "the registered public accounting firm";

(3) in subsection (c), by striking "No independent public accountant" and inserting "No registered public accounting firm"; and

(4) in subsection (b)—

(A) by striking "the accountant" each place that term appears and inserting "the firm";

(B) by striking "such accountant" each place that term appears and inserting "such firm"; and

(C) in paragraph (4), by striking "the accountant's report" and inserting "the report of the firm".

(c) OTHER REFERENCES.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended—

(1) in section 12(b)(1) (15 U.S.C. 78l(b)(1)), by striking "independent public accountants" each place that term appears and inserting "a registered public accounting firm"; and

(2) in subsections (e) and (i) of section 17 (15 U.S.C. 78q), by striking "an independent public accountant" each place that term appears and inserting "a registered public accounting firm".

(d) CONFORMING AMENDMENT.—Section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78k(f)) is amended—

(1) by striking "DEFINITION" and inserting "DEFINITIONS"; and

(2) by adding at the end the following: "As used in this section, the term 'issuer' means an issuer (as defined in section 3), the securities of which are registered under section 12, or that is required to file reports pursuant to section 15(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.".

SEC. 206. CONFLICTS OF INTEREST.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(l) CONFLICTS OF INTEREST.—It shall be unlawful for a registered public accounting firm to perform for an issuer any audit service required by this title, if a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit.".

SEC. 207. STUDY OF MANDATORY ROTATION OF REGISTERED PUBLIC ACCOUNTING FIRMS.

(a) STUDY AND REVIEW REQUIRED.—The Comptroller General of the United States shall conduct a study and review of the potential effects of requiring the mandatory rotation of registered public accounting firms.

(b) REPORT REQUIRED.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the

Senate and the Committee on Financial Services of the House of Representatives on the results of the study and review required by this section.

(c) DEFINITION.—For purposes of this section, the term "mandatory rotation" refers to the imposition of a limit on the period of years in which a particular registered public accounting firm may be the auditor of record for a particular issuer.

SEC. 208. COMMISSION AUTHORITY.

(a) COMMISSION REGULATIONS.—Not later than 180 days after the date of enactment of this Act, the Commission shall issue final regulations to carry out each of subsections (g) through (l) of section 10A of the Securities Exchange Act of 1934, as added by this title.

(b) AUDITOR INDEPENDENCE.—It shall be unlawful for any registered public accounting firm (or an associated person thereof, as applicable) to prepare or issue any audit report with respect to any issuer, if the firm or associated person engages in any activity with respect to that issuer prohibited by any of subsections (g) through (l) of section 10A of the Securities Exchange Act of 1934, as added by this title, or any rule or regulation of the Commission or of the Board issued thereunder.

SEC. 209. CONSIDERATIONS BY APPROPRIATE STATE REGULATORY AUTHORITIES.

In supervising nonregistered public accounting firms and their associated persons, appropriate State regulatory authorities should make an independent determination of the proper standards applicable, particularly taking into consideration the size and nature of the business of the accounting firms they supervise and the size and nature of the business of the clients of those firms. The standards applied by the Board under this Act should not be presumed to be applicable for purposes of this section for small and medium sized nonregistered public accounting firms.

TITLE III—CORPORATE RESPONSIBILITY

SEC. 301. PUBLIC COMPANY AUDIT COMMITTEES.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78f) is amended by adding at the end the following:

"(m) STANDARDS RELATING TO AUDIT COMMITTEES.—

"(1) COMMISSION RULES.—

"(A) IN GENERAL.—Effective not later than 270 days after the date of enactment of this subsection, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6).

"(B) OPPORTUNITY TO CURE DEFECTS.—The rules of the Commission under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition under subparagraph (A), before the imposition of such prohibition.

"(2) RESPONSIBILITIES RELATING TO REGISTERED PUBLIC ACCOUNTING FIRMS.—The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

"(3) INDEPENDENCE.—

"(A) IN GENERAL.—Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.

"(B) CRITERIA.—In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—

"(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

"(ii) be an affiliated person of the issuer or any subsidiary thereof.

"(C) EXEMPTION AUTHORITY.—The Commission may exempt from the requirements of subparagraph (B) a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

"(4) COMPLAINTS.—Each audit committee shall establish procedures for—

"(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

"(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

"(5) AUTHORITY TO ENGAGE ADVISERS.—Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

"(6) FUNDING.—Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation—

"(A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and

"(B) to any advisers employed by the audit committee under paragraph (5).".

SEC. 302. CORPORATE RESPONSIBILITY FOR FINANCIAL REPORTS.

(a) REGULATIONS REQUIRED.—The Commission shall, by rule, require, for each company filing periodic reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)), that the principal executive officer or officers and the principal financial officer or officers, or persons performing similar

functions, certify in each annual or quarterly report filed or submitted under either such section of such Act that—

(1) the signing officer has reviewed the report;

(2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;

(3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report;

(4) the signing officers—

(A) are responsible for establishing and maintaining internal controls;

(B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared;

(C) have evaluated the effectiveness of the issuer's internal controls as of a date within 90 days prior to the report; and

(D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;

(5) the signing officers have disclosed to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)—

(A) all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize, and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls; and

(B) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and

(6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

(b) FOREIGN REINCORPORATIONS HAVE NO EFFECT.—Nothing in this section 302 shall be interpreted or applied in any way to allow any issuer to lessen the legal force of the statement required under this section 302, by an issuer having reincorporated or having engaged in any other transaction that resulted in the transfer of the corporate domicile or offices of the issuer from inside the United States to outside of the United States.

(c) DEADLINE.—The rules required by subsection (a) shall be effective not later than 30 days after the date of enactment of this Act.

SEC. 303. IMPROPER INFLUENCE ON CONDUCT OF AUDITS.

(a) RULES TO PROHIBIT.—It shall be unlawful, in contravention of such rules or regulations as the Commission shall prescribe as necessary and appropriate in the public interest or for the protection of investors, for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

(b) ENFORCEMENT.—In any civil proceeding, the Commission shall have exclusive authority to enforce this section and any rule or regulation issued under this section.

(c) NO PREEMPTION OF OTHER LAW.—The provisions of subsection (a) shall be in addition to, and shall not supersede or preempt, any other provision of law or any rule or regulation issued thereunder.

(d) DEADLINE FOR RULEMAKING.—The Commission shall—

(1) propose the rules or regulations required by this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules or regulations required by this section, not later than 270 days after that date of enactment.

SEC. 304. FORFEITURE OF CERTAIN BONUSES AND PROFITS.

(a) ADDITIONAL COMPENSATION PRIOR TO NONCOMPLIANCE WITH COMMISSION FINANCIAL REPORTING REQUIREMENTS.—If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for—

(1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and

(2) any profits realized from the sale of securities of the issuer during that 12-month period.

(b) COMMISSION EXEMPTION AUTHORITY.—The Commission may exempt any person from the application of subsection (a), as it deems necessary and appropriate.

SEC. 305. OFFICER AND DIRECTOR BARS AND PENALTIES.

(a) UNFITNESS STANDARD.—

(1) SECURITIES EXCHANGE ACT OF 1934.—Section 21(d)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)) is amended by striking "substantial unfitness" and inserting "unfitness".

(2) SECURITIES ACT OF 1933.—Section 20(e) of the Securities Act of 1933 (15 U.S.C. 77t(e)) is amended by striking "substantial unfitness" and inserting "unfitness".

(b) EQUITABLE RELIEF.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)) is amended by adding at the end the following:

"(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.".

SEC. 306. INSIDER TRADES DURING PENSION FUND BLACKOUT PERIODS.

(a) PROHIBITION OF INSIDER TRADING DURING PENSION FUND BLACKOUT PERIODS.—

(1) IN GENERAL.—Except to the extent otherwise provided by rule of the Commission pursuant to paragraph (3), it shall be unlawful for any director or executive officer of an issuer of any equity security (other than an exempted security), directly or indirectly, to purchase, sell, or otherwise acquire or transfer any equity security of the issuer (other than an exempted security) during any blackout period with respect to such equity security if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer.

(2) REMEDY.—

(A) IN GENERAL.—Any profit realized by a director or executive officer referred to in paragraph (1) from any purchase, sale, or other acquisition or transfer in violation of this subsection shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such director or executive officer in entering into the transaction.

(B) ACTIONS TO RECOVER PROFITS.—An action to recover profits in accordance with this subsection may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit shall be brought more than 2 years after the date on which such profit was realized.

(3) RULEMAKING AUTHORIZED.—The Commission shall, in consultation with the Secretary of Labor, issue rules to clarify the application of this subsection and to prevent evasion thereof. Such rules shall provide for the application of the requirements of paragraph (1) with respect to entities treated as a single employer with respect to an issuer under section 414(b), (c), (m), or (o) of the Internal Revenue Code of 1986 to the extent necessary to clarify the application of such requirements and to prevent evasion thereof. Such rules may also provide for appropriate exceptions from the requirements of this subsection, including exceptions for purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election.

(4) BLACKOUT PERIOD.—For purposes of this subsection, the term "blackout period", with respect to the equity securities of any issuer—

(A) means any period of more than 3 consecutive business days during which the ability of not fewer than 50 percent of the participants or beneficiaries under all indi-

vidual account plans maintained by the issuer to purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan; and

(B) does not include, under regulations which shall be prescribed by the Commission—

(i) a regularly scheduled period in which the participants and beneficiaries may not purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer, if such period is—

(I) incorporated into the individual account plan; and

(II) timely disclosed to employees before becoming participants under the individual account plan or as a subsequent amendment to the plan; or

(ii) any suspension described in subparagraph (A) that is imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor.

(5) INDIVIDUAL ACCOUNT PLAN.—For purposes of this subsection, the term "individual account plan" has the meaning provided in section 3(34) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(34), except that such term shall not include a one-participant retirement plan (within the meaning of section 101(i)(8)(B) of such Act (29 U.S.C. 1021(i)(8)(B))).

(6) NOTICE TO DIRECTORS, EXECUTIVE OFFICERS, AND THE COMMISSION.—In any case in which a director or executive officer is subject to the requirements of this subsection in connection with a blackout period (as defined in paragraph (4)) with respect to any equity securities, the issuer of such equity securities shall timely notify such director or officer and the Securities and Exchange Commission of such blackout period.

(b) NOTICE REQUIREMENTS TO PARTICIPANTS AND BENEFICIARIES UNDER ERISA.—

(1) IN GENERAL.—Section 101 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021) is amended by redesignating the second subsection (h) as subsection (j), and by inserting after the first subsection (h) the following new subsection:

"(i) NOTICE OF BLACKOUT PERIODS TO PARTICIPANT OR BENEFICIARY UNDER INDIVIDUAL ACCOUNT PLAN.—

"(1) DUTIES OF PLAN ADMINISTRATOR.—In advance of the commencement of any blackout period with respect to an individual account plan, the plan administrator shall notify the plan participants and beneficiaries who are affected by such action in accordance with this subsection.

"(2) NOTICE REQUIREMENTS.—

"(A) IN GENERAL.—The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include—

"(i) the reasons for the blackout period,

"(ii) an identification of the investments and other rights affected,

"(iii) the expected beginning date and length of the blackout period,

"(iv) in the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period, and

"(v) such other matters as the Secretary may require by regulation.

"(B) NOTICE TO PARTICIPANTS AND BENEFICIARIES.—Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies at least 30 days in advance of the blackout period.

"(C) EXCEPTION TO 30-DAY NOTICE REQUIREMENT.—In any case in which—

"(i) a deferral of the blackout period would violate the requirements of subparagraph (A) or (B) of section 404(a)(1), and a fiduciary of the plan reasonably so determines in writing, or

"(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing,

subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies as soon as reasonably possible under the circumstances unless such a notice in advance of the termination of the blackout period is impracticable.

"(D) WRITTEN NOTICE.—The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

"(E) NOTICE TO ISSUERS OF EMPLOYER SECURITIES SUBJECT TO BLACKOUT PERIOD.—In the case of any blackout period in connection with an individual account plan, the plan administrator shall provide timely notice of such blackout period to the issuer of any employer securities subject to such blackout period.

"(3) EXCEPTION FOR BLACKOUT PERIODS WITH LIMITED APPLICABILITY.—In any case in which the blackout period applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction, the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be

treated as met if the notice required under paragraph (1) is provided to such participants or beneficiaries to whom the blackout period applies as soon as reasonably practicable.

"(4) CHANGES IN LENGTH OF BLACKOUT PERIOD.—If, following the furnishing of the notice pursuant to this subsection, there is a change in the beginning date or length of the blackout period (specified in such notice pursuant to paragraph (2)(A)(iii)), the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable. In relation to the extended blackout period, such notice shall meet the requirements of paragraph (2)(D) and shall specify any material change in the matters referred to in clauses (i) through (v) of paragraph (2)(A).

"(5) REGULATORY EXCEPTIONS.—The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries.

"(6) GUIDANCE AND MODEL NOTICES.—The Secretary shall issue guidance and model notices which meet the requirements of this subsection.

"(7) BLACKOUT PERIOD.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'blackout period' means, in connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than 3 consecutive business days.

"(B) EXCLUSIONS.—The term 'blackout period' does not include a suspension, limitation, or restriction—

"(i) which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934),

"(ii) which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto, or

"(iii) which applies only to 1 or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d)(3)(K)), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i)).

"(8) INDIVIDUAL ACCOUNT PLAN.—

"(A) IN GENERAL.—For purposes of this subsection, the term 'individual account plan' shall have the meaning provided such term in section 3(34), except that such term shall not include a one-participant retirement plan.

"(B) ONE-PARTICIPANT RETIREMENT PLAN.—For purposes of subparagraph (A), the term 'one-participant retirement plan' means a retirement plan that—

"(i) on the first day of the plan year—

"(I) covered only the employer (and the employer's spouse) and the employer owned the entire business (whether or not incorporated), or

"(II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986)),

"(ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business,

"(iii) does not provide benefits to anyone except the employer (and the employer's spouse) or the partners (and their spouses),

"(iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and

"(v) does not cover a business that leases employees.".

(2) ISSUANCE OF INITIAL GUIDANCE AND MODEL NOTICE.—The Secretary of Labor shall issue initial guidance and a model notice pursuant to section 101(i)(6) of the Employee Retirement Income Security Act of 1974 (as added by this subsection) not later than January 1, 2003. Not later than 75 days after the date of the enactment of this Act, the Secretary shall promulgate interim final rules necessary to carry out the amendments made by this subsection.

(3) CIVIL PENALTIES FOR FAILURE TO PROVIDE NOTICE.—Section 502 of such Act (29 U.S.C. 1132) is amended—

(A) in subsection (a)(6), by striking "(5), or (6)" and inserting "(5), (6), or (7)";

(B) by redesignating paragraph (7) of subsection (c) as paragraph (8); and

(C) by inserting after paragraph (6) of subsection (c) the following new paragraph:

"(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i). For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.".

(3) PLAN AMENDMENTS.—If any amendment made by this subsection requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after the effective date of this section, if—

(A) during the period after such amendment made by this subsection takes effect and before such first plan year, the plan is operated in good faith compliance with the requirements of such amendment made by this subsection, and

(B) such plan amendment applies retroactively to the period after such amendment made by this subsection takes effect and before such first plan year.

(c) EFFECTIVE DATE.—The provisions of this section (including the amendments made thereby) shall take effect 180 days after the date of the enactment of this Act. Good faith compliance with the requirements of such provisions in advance of the issuance of applicable regulations thereunder shall be treated as compliance with such provisions.

SEC. 307. RULES OF PROFESSIONAL RESPONSIBILITY FOR ATTORNEYS.

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

SEC. 308. FAIR FUNDS FOR INVESTORS.

(a) CIVIL PENALTIES ADDED TO DISGORGEMENT FUNDS FOR THE RELIEF OF VICTIMS.—If in any judicial or administrative action brought by the Commission under the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

(b) ACCEPTANCE OF ADDITIONAL DONATIONS.—The Commission is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, to the United States for a disgorgement fund described in subsection (a). Such gifts, bequests, and devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in the disgorgement fund and shall be available for allocation in accordance with subsection (a).

(c) STUDY REQUIRED.—

(1) SUBJECT OF STUDY.—The Commission shall review and analyze—

(A) enforcement actions by the Commission over the five years preceding the date of the enactment of this Act that have included proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors; and

(B) other methods to more efficiently, effectively, and fairly provide restitution to injured investors, including methods to improve the collection rates for civil penalties and disgorgements.

(2) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate within 180 days after of the date of the enactment of this Act, and shall use such findings to revise its rules and regulations as necessary. The report shall include a discussion of regulatory or legislative actions that are recommended or that may be necessary to address concerns identified in the study.

(d) CONFORMING AMENDMENTS.—Each of the following provisions is amended by inserting ", except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002" after "Treasury of the United States":

(1) Section 21(d)(3)(C)(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(3)(C)(i)).

(2) Section 21A(d)(1) of such Act (15 U.S.C. 78u–1(d)(1)).

(3) Section 20(d)(3)(A) of the Securities Act of 1933 (15 U.S.C. 77t(d)(3)(A)).

(4) Section 42(e)(3)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(e)(3)(A)).

(5) Section 209(e)(3)(A) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(e)(3)(A)).

(e) DEFINITION.—As used in this section, the term "disgorgement fund" means a fund established in any administrative or judicial proceeding described in subsection (a).

TITLE IV—ENHANCED FINANCIAL DISCLOSURES

SEC. 401. DISCLOSURES IN PERIODIC REPORTS.

(a) DISCLOSURES REQUIRED.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended by adding at the end the following:

"(i) ACCURACY OF FINANCIAL REPORTS.—Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this title and filed with the Commission shall reflect all material correcting adjustments that have been identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

"(j) OFF-BALANCE SHEET TRANSACTIONS.—Not later than 180 days after the date of enactment of the Sarbanes-Oxley Act of 2002, the Commission shall issue final rules providing that each annual

and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.".

(b) COMMISSION RULES ON PRO FORMA FIGURES.—Not later than 180 days after the date of enactment of the Sarbanes-Oxley Act fo 2002, the Commission shall issue final rules providing that pro forma financial information included in any periodic or other report filed with the Commission pursuant to the securities laws, or in any public disclosure or press or other release, shall be presented in a manner that—

(1) does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the pro forma financial information, in light of the circumstances under which it is presented, not misleading; and

(2) reconciles it with the financial condition and results of operations of the issuer under generally accepted accounting principles.

(c) STUDY AND REPORT ON SPECIAL PURPOSE ENTITIES.—

(1) STUDY REQUIRED.—The Commission shall, not later than 1 year after the effective date of adoption of off-balance sheet disclosure rules required by section 13(j) of the Securities Exchange Act of 1934, as added by this section, complete a study of filings by issuers and their disclosures to determine—

(A) the extent of off-balance sheet transactions, including assets, liabilities, leases, losses, and the use of special purpose entities; and

(B) whether generally accepted accounting rules result in financial statements of issuers reflecting the economics of such off-balance sheet transactions to investors in a transparent fashion.

(2) REPORT AND RECOMMENDATIONS.—Not later than 6 months after the date of completion of the study required by paragraph (1), the Commission shall submit a report to the President, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, setting forth—

(A) the amount or an estimate of the amount of off-balance sheet transactions, including assets, liabilities, leases, and losses of, and the use of special purpose entities by, issuers filing periodic reports pursuant to section 13 or 15 of the Securities Exchange Act of 1934;

(B) the extent to which special purpose entities are used to facilitate off-balance sheet transactions;

(C) whether generally accepted accounting principles or the rules of the Commission result in financial statements of issuers reflecting the economics of such transactions to investors in a transparent fashion;

(D) whether generally accepted accounting principles specifically result in the consolidation of special purpose entities sponsored by an issuer in cases in which the issuer

has the majority of the risks and rewards of the special purpose entity; and

(E) any recommendations of the Commission for improving the transparency and quality of reporting off-balance sheet transactions in the financial statements and disclosures required to be filed by an issuer with the Commission.

SEC. 402. ENHANCED CONFLICT OF INTEREST PROVISIONS.

(a) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following:

"(k) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.—

"(1) IN GENERAL.—It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on the date of enactment of this subsection shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after that date of enactment.

"(2) LIMITATION.—Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 5 of the Home Owners' Loan Act (12 U.S.C. 1464)), consumer credit (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or any extension of credit under an open end credit plan (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or a charge card (as defined in section 127(c)(4)(e) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(e)), or any extension of credit by a broker or dealer registered under section 15 of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 7 of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—

"(A) made or provided in the ordinary course of the consumer credit business of such issuer;

"(B) of a type that is generally made available by such issuer to the public; and

"(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.

"(3) RULE OF CONSTRUCTION FOR CERTAIN LOANS.—Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b).".

SEC. 403. DISCLOSURES OF TRANSACTIONS INVOLVING MANAGEMENT AND PRINCIPAL STOCKHOLDERS.

(a) AMENDMENT.—Section 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78p) is amended by striking the heading of such section and subsection (a) and inserting the following:

"SEC. 16. DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS.

"(a) DISCLOSURES REQUIRED.—

"(1) DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS REQUIRED TO FILE.—Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 12, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission (and, if such security is registered on a national securities exchange, also with the exchange).

"(2) TIME OF FILING.—The statements required by this subsection shall be filed—

"(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g);

"(B) within 10 days after he or she becomes such beneficial owner, director, or officer;

"(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note)) involving such equity security, before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

"(3) CONTENTS OF STATEMENTS.—A statement filed—

"(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

"(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing under such subparagraph.

"(4) ELECTRONIC FILING AND AVAILABILITY.—Beginning not later than 1 year after the date of enactment of the Sarbanes-Oxley Act of 2002—

"(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

"(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

"(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.".

(b) EFFECTIVE DATE.—The amendment made by this section shall be effective 30 days after the date of the enactment of this Act.

SEC. 404. MANAGEMENT ASSESSMENT OF INTERNAL CONTROLS.

(a) RULES REQUIRED.—The Commission shall prescribe rules requiring each annual report required by section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) to contain an internal control report, which shall—

(1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and

(2) contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

(b) INTERNAL CONTROL EVALUATION AND REPORTING.—With respect to the internal control assessment required by subsection (a), each registered public accounting firm that prepares or issues the audit report for the issuer shall attest to, and report on, the assessment made by the management of the issuer. An attestation made under this subsection shall be made in accordance with standards for attestation engagements issued or adopted by the Board. Any such attestation shall not be the subject of a separate engagement.

SEC. 405. EXEMPTION.

Nothing in section 401, 402, or 404, the amendments made by those sections, or the rules of the Commission under those sections shall apply to any investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8).

SEC. 406. CODE OF ETHICS FOR SENIOR FINANCIAL OFFICERS.

(a) CODE OF ETHICS DISCLOSURE.—The Commission shall issue rules to require each issuer, together with periodic reports required pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934, to disclose whether or not, and if not, the reason therefor, such issuer has adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions.

(b) CHANGES IN CODES OF ETHICS.—The Commission shall revise its regulations concerning matters requiring prompt disclosure on Form 8–K (or any successor thereto) to require the immediate disclosure, by means of the filing of such form, dissemination by the Internet or by other electronic means, by any issuer of any change in or waiver of the code of ethics for senior financial officers.

(c) DEFINITION.—In this section, the term "code of ethics" means such standards as are reasonably necessary to promote—

(1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and

(3) compliance with applicable governmental rules and regulations.

(d) DEADLINE FOR RULEMAKING.—The Commission shall—

(1) propose rules to implement this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules to implement this section, not later than 180 days after that date of enactment.

SEC. 407. DISCLOSURE OF AUDIT COMMITTEE FINANCIAL EXPERT.

(a) RULES DEFINING "FINANCIAL EXPERT".—The Commission shall issue rules, as necessary or appropriate in the public interest and consistent with the protection of investors, to require each issuer, together with periodic reports required pursuant to sections 13(a) and 15(d) of the Securities Exchange Act of 1934, to disclose whether or not, and if not, the reasons therefor, the audit committee of that issuer is comprised of at least 1 member who is a financial expert, as such term is defined by the Commission.

(b) CONSIDERATIONS.—In defining the term "financial expert" for purposes of subsection (a), the Commission shall consider whether a person has, through education and experience as a public accountant or auditor or a principal financial officer, comptroller, or principal accounting officer of an issuer, or from a position involving the performance of similar functions—

(1) an understanding of generally accepted accounting principles and financial statements;

(2) experience in—

(A) the preparation or auditing of financial statements of generally comparable issuers; and

(B) the application of such principles in connection with the accounting for estimates, accruals, and reserves;

(3) experience with internal accounting controls; and

(4) an understanding of audit committee functions.

(c) DEADLINE FOR RULEMAKING.—The Commission shall—

(1) propose rules to implement this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules to implement this section, not later than 180 days after that date of enactment.

SEC. 408. ENHANCED REVIEW OF PERIODIC DISCLOSURES BY ISSUERS.

(a) REGULAR AND SYSTEMATIC REVIEW.—The Commission shall review disclosures made by issuers reporting under section 13(a) of the Securities Exchange Act of 1934 (including reports filed on Form 10–K), and which have a class of securities listed on a national securities exchange or traded on an automated quotation facility of a national securities association, on a regular and systematic basis for the protection of investors. Such review shall include a review of an issuer's financial statement.

(b) REVIEW CRITERIA.—For purposes of scheduling the reviews required by subsection (a), the Commission shall consider, among other factors—

(1) issuers that have issued material restatements of financial results;

(2) issuers that experience significant volatility in their stock price as compared to other issuers;

(3) issuers with the largest market capitalization;

(4) emerging companies with disparities in price to earning ratios;

(5) issuers whose operations significantly affect any material sector of the economy; and

(6) any other factors that the Commission may consider relevant.

(c) MINIMUM REVIEW PERIOD.—In no event shall an issuer required to file reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 be reviewed under this section less frequently than once every 3 years.

SEC. 409. REAL TIME ISSUER DISCLOSURES.

Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following:

"(l) REAL TIME ISSUER DISCLOSURES.—Each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.".

TITLE V—ANALYST CONFLICTS OF INTEREST

SEC. 501. TREATMENT OF SECURITIES ANALYSTS BY REGISTERED SECURITIES ASSOCIATIONS AND NATIONAL SECURITIES EXCHANGES.

(a) RULES REGARDING SECURITIES ANALYSTS.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 15C the following new section:

"SEC. 15D. SECURITIES ANALYSTS AND RESEARCH REPORTS.

"(a) ANALYST PROTECTIONS.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to address conflicts of interest that can arise when securities analysts recommend equity securities in research reports and public appearances, in order to improve the objectivity of research and provide investors with more useful and reliable information, including rules designed—

"(1) to foster greater public confidence in securities research, and to protect the objectivity and independence of securities analysts, by—

"(A) restricting the prepublication clearance or approval of research reports by persons employed by the broker or dealer who are engaged in investment banking activities, or persons not directly responsible for investment research, other than legal or compliance staff;

"(B) limiting the supervision and compensatory evaluation of securities analysts to officials employed by the broker or dealer who are not engaged in investment banking activities; and

"(C) requiring that a broker or dealer and persons employed by a broker or dealer who are involved with investment banking activities may not, directly or indirectly, retaliate against or threaten to retaliate against any securities analyst employed by that broker or dealer or its affiliates as a result of an adverse, negative, or otherwise unfa-

vorable research report that may adversely affect the present or prospective investment banking relationship of the broker or dealer with the issuer that is the subject of the research report, except that such rules may not limit the authority of a broker or dealer to discipline a securities analyst for causes other than such research report in accordance with the policies and procedures of the firm;

"(2) to define periods during which brokers or dealers who have participated, or are to participate, in a public offering of securities as underwriters or dealers should not publish or otherwise distribute research reports relating to such securities or to the issuer of such securities;

"(3) to establish structural and institutional safeguards within registered brokers or dealers to assure that securities analysts are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of those whose involvement in investment banking activities might potentially bias their judgment or supervision; and

"(4) to address such other issues as the Commission, or such association or exchange, determines appropriate.

"(b) DISCLOSURE.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to require each securities analyst to disclose in public appearances, and each registered broker or dealer to disclose in each research report, as applicable, conflicts of interest that are known or should have been known by the securities analyst or the broker or dealer, to exist at the time of the appearance or the date of distribution of the report, including—

"(1) the extent to which the securities analyst has debt or equity investments in the issuer that is the subject of the appearance or research report;

"(2) whether any compensation has been received by the registered broker or dealer, or any affiliate thereof, including the securities analyst, from the issuer that is the subject of the appearance or research report, subject to such exemptions as the Commission may determine appropriate and necessary to prevent disclosure by virtue of this paragraph of material non-public information regarding specific potential future investment banking transactions of such issuer, as is appropriate in the public interest and consistent with the protection of investors;

"(3) whether an issuer, the securities of which are recommended in the appearance or research report, currently is, or during the 1-year period preceding the date of the appearance or date of distribution of the report has been, a client of the registered broker or dealer, and if so, stating the types of services provided to the issuer;

"(4) whether the securities analyst received compensation with respect to a research report, based upon (among any other factors) the investment banking revenues (either generally or specifically earned from the issuer being analyzed) of the registered broker or dealer; and

"(5) such other disclosures of conflicts of interest that are material to investors, research analysts, or the broker or dealer

as the Commission, or such association or exchange, determines appropriate.

"(c) DEFINITIONS.—In this section—

"(1) the term 'securities analyst' means any associated person of a registered broker or dealer that is principally responsible for, and any associated person who reports directly or indirectly to a securities analyst in connection with, the preparation of the substance of a research report, whether or not any such person has the job title of 'securities analyst'; and

"(2) the term 'research report' means a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.".

(b) ENFORCEMENT.—Section 21B(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–2(a)) is amended by inserting "15D," before "15B".

(c) COMMISSION AUTHORITY.—The Commission may promulgate and amend its regulations, or direct a registered securities association or national securities exchange to promulgate and amend its rules, to carry out section 15D of the Securities Exchange Act of 1934, as added by this section, as is necessary for the protection of investors and in the public interest.

TITLE VI—COMMISSION RESOURCES AND AUTHORITY

SEC. 601. AUTHORIZATION OF APPROPRIATIONS.

Section 35 of the Securities Exchange Act of 1934 (15 U.S.C. 78kk) is amended to read as follows:

"SEC. 35. AUTHORIZATION OF APPROPRIATIONS.

"In addition to any other funds authorized to be appropriated to the Commission, there are authorized to be appropriated to carry out the functions, powers, and duties of the Commission, $776,000,000 for fiscal year 2003, of which—

"(1) $102,700,000 shall be available to fund additional compensation, including salaries and benefits, as authorized in the Investor and Capital Markets Fee Relief Act (Public Law 107–123; 115 Stat. 2390 et seq.);

"(2) $108,400,000 shall be available for information technology, security enhancements, and recovery and mitigation activities in light of the terrorist attacks of September 11, 2001; and

"(3) $98,000,000 shall be available to add not fewer than an additional 200 qualified professionals to provide enhanced oversight of auditors and audit services required by the Federal securities laws, and to improve Commission investigative and disciplinary efforts with respect to such auditors and services, as well as for additional professional support staff necessary to strengthen the programs of the Commission involving Full Disclosure and Prevention and Suppression of Fraud, risk management, industry technology review, compliance, inspections, examinations, market regulation, and investment management.".

SEC. 602. APPEARANCE AND PRACTICE BEFORE THE COMMISSION.

The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 4B the following:

"SEC. 4C. APPEARANCE AND PRACTICE BEFORE THE COMMISSION.

"(a) AUTHORITY TO CENSURE.—The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter—

"(1) not to possess the requisite qualifications to represent others;

"(2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or

"(3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

"(b) DEFINITION.—With respect to any registered public accounting firm or associated person, for purposes of this section, the term 'improper professional conduct' means—

"(1) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; and

"(2) negligent conduct in the form of—

"(A) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which the registered public accounting firm or associated person knows, or should know, that heightened scrutiny is warranted; or

"(B) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.".

SEC. 603. FEDERAL COURT AUTHORITY TO IMPOSE PENNY STOCK BARS.

(a) SECURITIES EXCHANGE ACT OF 1934.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)), as amended by this Act, is amended by adding at the end the following:

"(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

"(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

"(B) DEFINITION.—For purposes of this paragraph, the term 'person participating in an offering of penny stock' includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.".

(b) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following:

"(g) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

"(1) IN GENERAL.—In any proceeding under subsection (a) against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

"(2) DEFINITION.—For purposes of this subsection, the term 'person participating in an offering of penny stock' includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.".

SEC. 604. QUALIFICATIONS OF ASSOCIATED PERSONS OF BROKERS AND DEALERS.

(a) BROKERS AND DEALERS.—Section 15(b)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended—

(1) by striking subparagraph (F) and inserting the following:

"(F) is subject to any order of the Commission barring or suspending the right of the person to be associated with a broker or dealer;"; and

(2) in subparagraph (G), by striking the period at the end and inserting the following: "; or

"(H) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

"(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

"(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.".

(b) INVESTMENT ADVISERS.—Section 203(e) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e)) is amended—

(1) by striking paragraph (7) and inserting the following:

"(7) is subject to any order of the Commission barring or suspending the right of the person to be associated with an investment adviser;";

(2) in paragraph (8), by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(9) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

"(A) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

"(B) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.".

(c) CONFORMING AMENDMENTS.—

(1) SECURITIES EXCHANGE ACT OF 1934.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended—

(A) in section 3(a)(39)(F) (15 U.S.C. 78c(a)(39)(F))—

(i) by striking "or (G)" and inserting "(H), or (G)"; and

(ii) by inserting ", or is subject to an order or finding," before "enumerated";

(B) in each of section 15(b)(6)(A)(i) (15 U.S.C. 78o(b)(6)(A)(i)), paragraphs (2) and (4) of section 15B(c) (15 U.S.C. 78o–4(c)), and subparagraphs (A) and (C) of section 15C(c)(1) (15 U.S.C. 78o–5(c)(1))—

(i) by striking "or (G)" each place that term appears and inserting "(H), or (G)"; and

(ii) by striking "or omission" each place that term appears, and inserting ", or is subject to an order or finding,"; and

(C) in each of paragraphs (3)(A) and (4)(C) of section 17A(c) (15 U.S.C. 78q–1(c))—

(i) by striking "or (G)" each place that term appears and inserting "(H), or (G)"; and

(ii) by inserting ", or is subject to an order or finding," before "enumerated" each place that term appears.

(2) INVESTMENT ADVISERS ACT OF 1940.—Section 203(f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(f)) is amended—

(A) by striking "or (8)" and inserting "(8), or (9)"; and

(B) by inserting "or (3)" after "paragraph (2)".

TITLE VII—STUDIES AND REPORTS

SEC. 701. GAO STUDY AND REPORT REGARDING CONSOLIDATION OF PUBLIC ACCOUNTING FIRMS.

(a) STUDY REQUIRED.—The Comptroller General of the United States shall conduct a study—

(1) to identify—

(A) the factors that have led to the consolidation of public accounting firms since 1989 and the consequent reduction in the number of firms capable of providing audit services to large national and multi-national business organizations that are subject to the securities laws;

(B) the present and future impact of the condition described in subparagraph (A) on capital formation and securities markets, both domestic and international; and

(C) solutions to any problems identified under subparagraph (B), including ways to increase competition and the number of firms capable of providing audit services to large national and multinational business organizations that are subject to the securities laws;

(2) of the problems, if any, faced by business organizations that have resulted from limited competition among public accounting firms, including—

(A) higher costs;

(B) lower quality of services;

(C) impairment of auditor independence; or

(D) lack of choice; and

(3) whether and to what extent Federal or State regulations impede competition among public accounting firms.

(b) CONSULTATION.—In planning and conducting the study under this section, the Comptroller General shall consult with—

(1) the Commission;

(2) the regulatory agencies that perform functions similar to the Commission within the other member countries of the Group of Seven Industrialized Nations;

(3) the Department of Justice; and

(4) any other public or private sector organization that the Comptroller General considers appropriate.

(c) REPORT REQUIRED.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report on the results of the study required by this section to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

SEC. 702. COMMISSION STUDY AND REPORT REGARDING CREDIT RATING AGENCIES.

(a) STUDY REQUIRED.—

(1) IN GENERAL.—The Commission shall conduct a study of the role and function of credit rating agencies in the operation of the securities market.

(2) AREAS OF CONSIDERATION.—The study required by this subsection shall examine—

(A) the role of credit rating agencies in the evaluation of issuers of securities;

(B) the importance of that role to investors and the functioning of the securities markets;

(C) any impediments to the accurate appraisal by credit rating agencies of the financial resources and risks of issuers of securities;

(D) any barriers to entry into the business of acting as a credit rating agency, and any measures needed to remove such barriers;

(E) any measures which may be required to improve the dissemination of information concerning such resources and risks when credit rating agencies announce credit ratings; and

(F) any conflicts of interest in the operation of credit rating agencies and measures to prevent such conflicts or ameliorate the consequences of such conflicts.

(b) REPORT REQUIRED.—The Commission shall submit a report on the study required by subsection (a) to the President, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate not later than 180 days after the date of enactment of this Act.

SEC. 703. STUDY AND REPORT ON VIOLATORS AND VIOLATIONS.

(a) STUDY.—The Commission shall conduct a study to determine, based upon information for the period from January 1, 1998, to December 31, 2001—

(1) the number of securities professionals, defined as public accountants, public accounting firms, investment bankers, investment advisers, brokers, dealers, attorneys, and other securities professionals practicing before the Commission—

(A) who have been found to have aided and abetted a violation of the Federal securities laws, including rules or regulations promulgated thereunder (collectively referred to in this section as "Federal securities laws"), but who have not been sanctioned, disciplined, or otherwise penalized as a primary violator in any administrative action or civil proceeding, including in any settlement of such an action or proceeding (referred to in this section as "aiders and abettors"); and

(B) who have been found to have been primary violators of the Federal securities laws;

(2) a description of the Federal securities laws violations committed by aiders and abettors and by primary violators, including—

(A) the specific provision of the Federal securities laws violated;

(B) the specific sanctions and penalties imposed upon such aiders and abettors and primary violators, including the amount of any monetary penalties assessed upon and collected from such persons;

(C) the occurrence of multiple violations by the same person or persons, either as an aider or abettor or as a primary violator; and

(D) whether, as to each such violator, disciplinary sanctions have been imposed, including any censure, suspension, temporary bar, or permanent bar to practice before the Commission; and

(3) the amount of disgorgement, restitution, or any other fines or payments that the Commission has assessed upon and collected from, aiders and abettors and from primary violators.

(b) REPORT.—A report based upon the study conducted pursuant to subsection (a) shall be submitted to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives not later than 6 months after the date of enactment of this Act.

SEC. 704. STUDY OF ENFORCEMENT ACTIONS.

(a) STUDY REQUIRED.—The Commission shall review and analyze all enforcement actions by the Commission involving violations of reporting requirements imposed under the securities laws, and restatements of financial statements, over the 5-year period preceding the date of enactment of this Act, to identify areas of reporting that are most susceptible to fraud, inappropriate manipulation, or inappropriate earnings management, such as revenue recognition and the accounting treatment of off-balance sheet special purpose entities.

(b) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate, not later than 180 days after the date of enactment of this Act, and shall use such findings to revise its rules and regulations, as necessary. The report shall include a discussion of regulatory or legislative steps that are recommended or that may be necessary to address concerns identified in the study.

SEC. 705. STUDY OF INVESTMENT BANKS.

(a) GAO STUDY.—The Comptroller General of the United States shall conduct a study on whether investment banks and financial advisers assisted public companies in manipulating their earnings and obfuscating their true financial condition. The study should address the rule of investment banks and financial advisers—

(1) in the collapse of the Enron Corporation, including with respect to the design and implementation of derivatives transactions, transactions involving special purpose vehicles, and other financial arrangements that may have had the effect of altering the company's reported financial statements in ways that obscured the true financial picture of the company;

(2) in the failure of Global Crossing, including with respect to transactions involving swaps of fiberoptic cable capacity, in the designing transactions that may have had the effect of altering the company's reported financial statements in ways that obscured the true financial picture of the company; and

(3) generally, in creating and marketing transactions which may have been designed solely to enable companies to manipulate revenue streams, obtain loans, or move liabilities off balance sheets without altering the economic and business risks faced by the companies or any other mechanism to obscure a company's financial picture.

(b) REPORT.—The Comptroller General shall report to Congress not later than 180 days after the date of enactment of this Act on the results of the study required by this section. The report shall include a discussion of regulatory or legislative steps that are recommended or that may be necessary to address concerns identified in the study.

TITLE VIII—CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY

SEC. 801. SHORT TITLE.

This title may be cited as the "Corporate and Criminal Fraud Accountability Act of 2002".

SEC. 802. CRIMINAL PENALTIES FOR ALTERING DOCUMENTS.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by adding at the end the following:

"§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

"Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

"§ 1520. Destruction of corporate audit records

"(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.

"(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

"(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

"(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by adding at the end the following new items:

"1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.
"1520. Destruction of corporate audit records.".

SEC. 803. DEBTS NONDISCHARGEABLE IF INCURRED IN VIOLATION OF SECURITIES FRAUD LAWS.

Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (17), by striking "or" after the semicolon;

(2) in paragraph (18), by striking the period at the end and inserting "; or"; and

(3) by adding at the end, the following:

"(19) that—

"(A) is for—

"(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

"(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

"(B) results from—

"(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

"(ii) any settlement agreement entered into by the debtor; or

"(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.".

SEC. 804. STATUTE OF LIMITATIONS FOR SECURITIES FRAUD.

(a) IN GENERAL.—Section 1658 of title 28, United States Code, is amended—

(1) by inserting "(a)" before "Except"; and

(2) by adding at the end the following:

"(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

"(1) 2 years after the discovery of the facts constituting the violation; or

"(2) 5 years after such violation.".

(b) EFFECTIVE DATE.—The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act.

(c) NO CREATION OF ACTIONS.—Nothing in this section shall create a new, private right of action.

SEC. 805. REVIEW OF FEDERAL SENTENCING GUIDELINES FOR OBSTRUCTION OF JUSTICE AND EXTENSIVE CRIMINAL FRAUD.

(a) ENHANCEMENT OF FRAUD AND OBSTRUCTION OF JUSTICE SENTENCES.—Pursuant to section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that—

(1) the base offense level and existing enhancements contained in United States Sentencing Guideline 2J1.2 relating to

obstruction of justice are sufficient to deter and punish that activity;

(2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where—

(A) the destruction, alteration, or fabrication of evidence involves—

(i) a large amount of evidence, a large number of participants, or is otherwise extensive;

(ii) the selection of evidence that is particularly probative or essential to the investigation; or

(iii) more than minimal planning; or

(B) the offense involved abuse of a special skill or a position of trust;

(3) the guideline offense levels and enhancements for violations of section 1519 or 1520 of title 18, United States Code, as added by this title, are sufficient to deter and punish that activity;

(4) a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims; and

(5) the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct.

(b) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the prcedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"§ 1514A. Civil action to protect against retaliation in fraud cases

"(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

"(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders,

when the information or assistance is provided to or the investigation is conducted by—

"(A) a Federal regulatory or law enforcement agency;

"(B) any Member of Congress or any committee of Congress; or

"(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

"(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

"(b) ENFORCEMENT ACTION.—

"(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

"(A) filing a complaint with the Secretary of Labor; or

"(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE.—

"(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

"(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

"(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

"(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

"(c) REMEDIES.—

"(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

"(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

"(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

"(B) the amount of back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of

any employee under any Federal or State law, or under any collective bargaining agreement.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item:

"1514A. Civil action to protect against retaliation in fraud cases.".

SEC. 807. CRIMINAL PENALTIES FOR DEFRAUDING SHAREHOLDERS OF PUBLICLY TRADED COMPANIES.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by adding at the end the following:

"§ 1348. Securities fraud

"Whoever knowingly executes, or attempts to execute, a scheme or artifice—

"(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or

"(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));

shall be fined under this title, or imprisoned not more than 25 years, or both.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

"1348. Securities fraud.".

TITLE IX—WHITE-COLLAR CRIME PENALTY ENHANCEMENTS

SEC. 901. SHORT TITLE.

This title may be cited as the "White-Collar Crime Penalty Enhancement Act of 2002".

SEC. 902. ATTEMPTS AND CONSPIRACIES TO COMMIT CRIMINAL FRAUD OFFENSES.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by inserting after section 1348 as added by this Act the following:

"§ 1349. Attempt and conspiracy

"Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

"1349. Attempt and conspiracy.".

SEC. 903. CRIMINAL PENALTIES FOR MAIL AND WIRE FRAUD.

(a) MAIL FRAUD.—Section 1341 of title 18, United States Code, is amended by striking "five" and inserting "20".

(b) WIRE FRAUD.—Section 1343 of title 18, United States Code, is amended by striking "five" and inserting "20".

SEC. 904. CRIMINAL PENALTIES FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Section 501 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1131) is amended—

(1) by striking "$5,000" and inserting "$100,000";

(2) by striking "one year" and inserting "10 years"; and

(3) by striking "$100,000" and inserting "$500,000".

SEC. 905. AMENDMENT TO SENTENCING GUIDELINES RELATING TO CERTAIN WHITE-COLLAR OFFENSES.

(a) DIRECTIVE TO THE UNITED STATES SENTENCING COMMISSION.—Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of this Act.

(b) REQUIREMENTS.—In carrying out this section, the Sentencing Commission shall—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this Act, the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;

(2) consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act;

(3) assure reasonable consistency with other relevant directives and sentencing guidelines;

(4) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(5) make any necessary conforming changes to the sentencing guidelines; and

(6) assure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

(c) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the

procedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 906. CORPORATE RESPONSIBILITY FOR FINANCIAL REPORTS.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by inserting after section 1349, as created by this Act, the following:

"§ 1350. Failure of corporate officers to certify financial reports

(a) CERTIFICATION OF PERIODIC FINANCIAL REPORTS.—Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer.

"(b) CONTENT.—The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

"(c) CRIMINAL PENALTIES.—Whoever—

"(1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $1,000,000 or imprisoned not more than 10 years, or both; or

"(2) willfully certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $5,000,000, or imprisoned not more than 20 years, or both.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following:

"1350. Failure of corporate officers to certify financial reports.".

TITLE X—CORPORATE TAX RETURNS

SEC. 1001. SENSE OF THE SENATE REGARDING THE SIGNING OF CORPORATE TAX RETURNS BY CHIEF EXECUTIVE OFFICERS.

It is the sense of the Senate that the Federal income tax return of a corporation should be signed by the chief executive officer of such corporation.

TITLE XI—CORPORATE FRAUD ACCOUNTABILITY

SEC. 1101. SHORT TITLE.

This title may be cited as the "Corporate Fraud Accountability Act of 2002".

SEC. 1102. TAMPERING WITH A RECORD OR OTHERWISE IMPEDING AN OFFICIAL PROCEEDING.

Section 1512 of title 18, United States Code, is amended—

(1) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively; and

(2) by inserting after subsection (b) the following new subsection:

"(c) Whoever corruptly—

"(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

"(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.".

SEC. 1103. TEMPORARY FREEZE AUTHORITY FOR THE SECURITIES AND EXCHANGE COMMISSION.

(a) IN GENERAL.—Section 21C(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)) is amended by adding at the end the following:

"(3) TEMPORARY FREEZE.—

"(A) IN GENERAL.—

"(i) ISSUANCE OF TEMPORARY ORDER.—Whenever, during the course of a lawful investigation involving possible violations of the Federal securities laws by an issuer of publicly traded securities or any of its directors, officers, partners, controlling persons, agents, or employees, it shall appear to the Commission that it is likely that the issuer will make extraordinary payments (whether compensation or otherwise) to any of the foregoing persons, the Commission may petition a Federal district court for a temporary order requiring the issuer to escrow, subject to court supervision, those payments in an interest-bearing account for 45 days.

"(ii) STANDARD.—A temporary order shall be entered under clause (i), only after notice and opportunity for a hearing, unless the court determines that notice and hearing prior to entry of the order would be impracticable or contrary to the public interest.

"(iii) EFFECTIVE PERIOD.—A temporary order issued under clause (i) shall—

"(I) become effective immediately;

"(II) be served upon the parties subject to it; and

"(III) unless set aside, limited or suspended by a court of competent jurisdiction, shall remain effective and enforceable for 45 days.

"(iv) EXTENSIONS AUTHORIZED.—The effective period of an order under this subparagraph may be extended by the court upon good cause shown for not longer than 45 additional days, provided that the combined period of the order shall not exceed 90 days.

"(B) PROCESS ON DETERMINATION OF VIOLATIONS.—

"(i) VIOLATIONS CHARGED.—If the issuer or other person described in subparagraph (A) is charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the order shall remain in effect, subject to court approval, until the conclusion of any legal proceedings related thereto, and the affected issuer or other person, shall have the right to petition the court for review of the order.

"(ii) VIOLATIONS NOT CHARGED.—If the issuer or other person described in subparagraph (A) is not charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the escrow shall terminate at the expiration of the 45-day effective period (or the expiration of any extension period, as applicable), and the disputed payments (with accrued interest) shall be returned to the issuer or other affected person.".

(b) TECHNICAL AMENDMENT.—Section 21C(c)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)(2)) is amended by striking "This" and inserting "paragraph (1)".

SEC. 1104. AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES.

(a) REQUEST FOR IMMEDIATE CONSIDERATION BY THE UNITED STATES SENTENCING COMMISSION.—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission is requested to—

(1) promptly review the sentencing guidelines applicable to securities and accounting fraud and related offenses;

(2) expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses; and

(3) submit to Congress an explanation of actions taken by the Sentencing Commission pursuant to paragraph (2) and any additional policy recommendations the Sentencing Commission may have for combating offenses described in paragraph (1).

(b) CONSIDERATIONS IN REVIEW.—In carrying out this section, the Sentencing Commission is requested to—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses;

(2) assure reasonable consistency with other relevant directives and with other guidelines;

(3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;

(4) ensure that guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated;

(5) ensure that the guideline offense levels and enhancements under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50;

(6) make any necessary conforming changes to the sentencing guidelines; and

(7) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

(c) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than the 180 days after the date of enactment of this Act, in accordance with the procedures sent forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 1105. AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.

(a) SECURITIES EXCHANGE ACT OF 1934.—Section 21C of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3) is amended by adding at the end the following:

"(f) AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 10(b) or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12, or that is required to file reports pursuant to section 15(d), if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.".

(b) SECURITIES ACT OF 1933.—Section 8A of the Securities Act of 1933 (15 U.S.C. 77h–1) is amended by adding at the end of the following:

"(f) AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 17(a)(1) or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or that is required to file reports pursuant to section 15(d) of that Act, if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.".

SEC. 1106. INCREASED CRIMINAL PENALTIES UNDER SECURITIES EXCHANGE ACT OF 1934.

Section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)) is amended—

(1) by striking "$1,000,000, or imprisoned not more than 10 years" and inserting "$5,000,000, or imprisoned not more than 20 years"; and

(2) by striking "$2,500,000" and inserting "$25,000,000".

SEC. 1107. RETALIATION AGAINST INFORMANTS.

(a) IN GENERAL.—Section 1513 of title 18, United States Code, is amended by adding at the end the following:

"(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.".

And the Senate agree to the same.

From the Committee on Financial Services, for consideration of the House bill and the Senate amendments, and modifications committed to conference:

MICHAEL G. OXLEY,
RICHARD H. BAKER,
ED ROYCE,
ROBERT W. NEY,
SUE W. KELLY,
CHRIS COX,
JOHN J. LAFALCE,
BARNEY FRANK,
PAUL E. KANJORSKI,
MAXINE WATERS,

Provided that Mr. Shows is appointed in lieu of Ms. Waters for consideration of section 11 of the House bill and section 305 of the Senate amendment, and modifications committed to conference:

RONNIE SHOWS,

From the Committee on Education and the Workforce, for consideration of sections 306 and 904 of the Senate amendment, and modifications committed to conference:

JOHN BOEHNER,
SAM JOHNSON,
GEORGE MILLER,

From the Committee on Energy and Commerce, for consideration of sections 108 and 109 of the Senate amendment, and modifications committed to conference:

BILLY TAUZIN,
JAMES GREENWOOD,
JOHN D. DINGELL,

From the Committee on the Judiciary, for consideration of section 105 and titles VIII and IX of the Senate amendment, and modifications committed to conference:

F. JAMES SENSENBRENNER,
LAMAR SMITH,
JOHN CONYERS,

From the Committee on Ways and Means, for consideration of section 109 of the Senate amendment, and modifications committed to conference:

WILLIAM THOMAS,
JIM MCCRERY,
CHARLES B. RANGEL,
Managers on the Part of the House.

PAUL SARBANES,
CHRISTOPHER DODD,
TIM JOHNSON,
JACK REED,
PATRICK J. LEAHY,
RICHARD C. SHELBY,
ROBERT F. BENNETT,
MICHAEL B. ENZI,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3763), to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

The Managers on the part of the House and the Senate met on July 19 and July 24, 2002 (the House chairing), and reconciled the differences between the House bill and the Senate amendment.

From the Committee on Financial Services, for consideration of the House bill and the Senate amendments, and modifications committed to conference:

MICHAEL G. OXLEY,
RICHARD H. BAKER,
ED ROYCE,
ROBERT W. NEY,
SUE W. KELLY,
CHRIS COX,
JOHN J. LAFALCE,
BARNEY FRANK,
PAUL E. KANJORSKI,
MAXINE WATERS,

Provided that Mr. Shows is appointed in lieu of Ms. Waters for consideration of section 11 of the House bill and section 305 of the Senate amendment, and modifications committed to conference:

RONNIE SHOWS,

From the Committee on Education and the Workforce, for consideration of sections 306 and 904 of the Senate amendment, and modifications committed to conference:

JOHN BOEHNER,
SAM JOHNSON,
GEORGE MILLER,

From the Committee on Energy and Commerce, for consideration of sections 108 and 109 of the Senate amendment, and modifications committed to conference:

BILLY TAUZIN,
JAMES GREENWOOD,
JOHN D. DINGELL,

From the Committee on the Judiciary, for consideration of section 105 and titles VIII and IX of the Senate amendment, and modifications committed to conference:

F. JAMES SENSENBRENNER,
LAMAR SMITH,
JOHN CONYERS,

From the Committee on Ways and Means, for consideration of section 109 of the Senate amendment, and modifications committed to conference:

WILLIAM THOMAS,
JIM MCCRERY,
CHARLES B. RANGEL,

Managers on the Part of the House.

PAUL SARBANES,
CHRISTOPHER DODD,
TIM JOHNSON,
JACK REED,
PATRICK J. LEAHY,
RICHARD C. SHELBY,
ROBERT F. BENNETT,
MICHAEL B. ENZI,

Managers on the Part of the Senate.

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Exhibit M.c

Attachment SOX=SenateReport.pdf to email of Nov. 20, 2016 (Exhibit M, *supra*).

Calendar No. 366

107TH CONGRESS
2d Session

SENATE

REPORT
107–146

THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002

MAY 6, 2002.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[Including the cost estimate of the Congressional Budget Office]

[To accompany S. 2010]

The Committee on the Judiciary, to which was referred the bill (S. 2010) to provide for criminal prosecution of persons who alter or destroy evidence in certain Federal investigations or defraud investors of publicly traded securities, to disallow debts incurred in violation of securities fraud laws from being discharged in bankruptcy, to protect whistleblowers against retaliation by their employers, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

CONTENTS

99–010

I. PURPOSE

The purpose of S. 2010, the "Corporate and Criminal Fraud Accountability Act of 2002," is to provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain Federal investigations, to disallow debts incurred in violation of securities fraud laws from being discharged in bankruptcy, to protect whistleblowers who report fraud against retaliation by their employers, and for other purposes.

II. BACKGROUND AND NEED FOR THE LEGISLATION

A. Introduction

The "Corporate and Criminal Fraud Accountability Act of 2002," S. 2010, was introduced by Senator Patrick Leahy, with Senators Daschle, Durbin, and Harkin as original cosponsors, on March 12, 2002. This legislation aims to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions.

In the wake of the continuing Enron Corporation ("Enron") debacle, the trust of the United States' investors and pensioners in the nation's stock market has been seriously eroded. This is bad for our markets, bad for our economy, and bad for the future growth of investment in American companies. This bill would play a crucial role in restoring trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted. While greed cannot be legislated against, the federal government must do its utmost to ensure that such greed does not succeed. This bill contains a number of provisions intended to increase the criminal penalties for serious fraud, ensure that evidence—both physical and testimonial—is preserved and available in fraud cases, provide prosecutors with the tools they need to prosecute those who commit securities fraud, and make sure that victims of securities fraud have a fair chance to pursue their claims and recoup their losses.

B. Enron's collapse

Enron began in 1985 as a pipeline company in Houston, Texas. It garnered profits by promising to deliver agreed-upon numbers of cubic feet of gas to a particular utility or business on a specific day at market price. That changed with the deregulation of electrical power markets, a change due in part to lobbying from senior Enron officials. Under the direction of former Chairman Kenneth L. Lay, Enron expanded into an energy broker, trading electricity and other commodities.

According to a Report of Investigation commissioned by a Special Investigative Committee of Enron's Board of Directors ("the Powers Report"), Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price.

The alleged activity Enron used to mislead investors was not the work of novices. It was the work of highly educated professionals, spinning an intricate spider's web of deceit. The partnerships—with names like Jedi, Chewco, Rawhide, Ponderosa and

Sundance—were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially. The actions of Enron's executives, accountants, and lawyers exhibit a "Wild West" attitude which valued profit over honesty.

Some Enron executives, with the knowledge and approval of its Board of Directors, managed these entities, reaped millions of dollars in salary and stock options, and received conflict-of-interest waivers from Enron's Board. As the Powers Report states, "[m]any of the most significant transactions apparently were designed to accomplish favorable financial statement results, not to achieve bona fide economic objectives or to transfer risk" (Powers Report at 4). Much of this conduct occurred with "extensive participation and structuring advice from [Arthur] Andersen," ("Andersen") which was simultaneously serving as both consultant and "independent" auditor for Enron.[1]

With the assistance of Andersen and its other auditors, Enron apparently successfully deceived the investing public and reaped millions for some select few insiders.[2] To the outside world, Enron and its auditors were either not reporting their massive debt at all, or were making "disclosures [that] were obtuse, did not communicate the essence of [Enron] transactions completely or clearly, and failed to convey the substance of what was going on between Enron and its partnerships" (Powers Report at 17). In short, through the use of sophisticated professional advice and complex financial structures, Enron and Andersen were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed. By the fall of 2001, the painting bore little or no resemblance to the reality.

According to a federal indictment, on October 16, 2001, Enron announced a $618 million net loss for the third quarter of 2001 and that it would reduce shareholder equity by $1.2 billion.[3] Six days later, the Securities and Exchange Commission ("SEC") began investigating the financial practices of Enron and Andersen. On November 8, 2001, Enron announced that it had overstated earnings during the prior four years by $586 million and was responsible for $3 billion in obligations that were never publicly reported. Upon these disclosures, Enron stock fell to $8.41 a share and has since fallen to less than $1 (the stock had been trading at near $90 per share). Less than a month later Enron filed for bankruptcy—the largest corporate bankruptcy in the history of the United States.

On February 6, 2001, at a Senate Judiciary Committee hearing on "Accountability Issues: Lessons Learned from Enron's Fall" ("Committee hearing"), witnesses testified that Enron's sudden collapse left thousands of investors holding virtually worthless stock, and most Enron employees with a worthless retirement account.

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[1] Powers Report at 5. For example, Enron's records show that Andersen billed Enron $5.7 million for advice in connection with the now infamous "LJM" and "Chewco" transactions, beyond its regular audit fees. Id.

[2] For example, in one insider transaction, known as "Southhampton Place," insider Andrew Fastow, a senior Enron official, invested $25,000 and received $4.5 million in return in a period of two months. Powers Report at 16. On an annual basis, this represents a profit margin of over 100,000%.

[3] See Indictment, *United States* v. *Arthur Andersen LLP*, Cr. No. CRH–02–121, United States District Court for the Southern District of Texas at 2–3. ("Andersen Indictment"). The indictment, filed on March 7, 2002, charges Andersen with persuading others to destroy documents in violation of 18 U.S.C. § 1512(b)(2).

Pension funds nationwide, including state and union-owned pension funds, literally lost billions on Enron-related investments. Bruce Raynor, President of the Union of Needletrades, Industrial and Textile Employees ("UNITE") and Vice President of the American Federation of Labor-Congress of Industrial Organizations ("AFL–CIO"), and Co-Chair of the Council of Institutional Investors, testified that UNITE members lost millions in the Enron collapse and that institutional investments, such as pension funds, are "particularly vulnerable" to such fraud because of their reliance on index funds, which "rely on the market to accurately price securities." Firefighters, teachers, garment workers, and police officers who had no way of knowing or finding out about Enron's apparently deceitful conduct ahead of time lost millions in pension fund investments.

Mr. Raynor, Washington State Attorney General Christine O. Gregoire, and securities and legal ethics expert Professor Susan P. Koniak, of the Boston University School of Law, also testified that Enron was merely one extreme example of numerous other cases of fraud on investors. Like those cases, the few at Enron who profited appear to be senior officers and directors who cashed out while they and professionals from accounting firms, law firms and business consulting firms, who were paid millions to advise Enron on these practices, assured others that Enron was a solid investment.

C. The aftermath of Enron's collapse and the cover up

As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding "tons" of documents, according to the Andersen Indictment. Instead of preserving records relevant and material to the later investigation of Enron or any private action against Enron, "Andersen partners assigned to the Enron engagement team launched on October 23, 2001, a wholesale destruction of documents at Andersen's offices in Houston, Texas." Moreover, "instead of being advised to preserve documentation so as to assist Enron and the SEC, Andersen employees on the Enron engagement team were instructed by Andersen partners and others to destroy immediately documentation relating to Enron, and told to work overtime if necessary to accomplish the destruction" (Andersen Indictment at 5–6).

The systematic destruction of records apparently extended beyond paper records and included efforts to "purge the computer hard drives and E-mail system of Enron related files" not only in Houston but in Andersen's offices in Portland, Chicago, Illinois, and London, England (Id. at 6). Indeed, the current rules on audit record retention are so vague that Andersen's lawyers issued ambiguous advice encouraging such document destruction—advice that they linked to highly questionable interpretations of current law. In addition to the indictment of Andersen, Andersen partner David Duncan, who did significant work for Enron, has pleaded guilty to the same obstruction charge. Allegedly, these actions were undertaken in anticipation of a SEC subpoena to Andersen for its auditing and consulting work related to Enron.

The apparent efforts to cover up any alleged misconduct by Enron or Andersen were not limited to Andersen and the destruction of physical evidence and documents. In a variety of instances

when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud, but they were discouraged at nearly every turn. For instance, a shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside lawyer's counseled Enron, in pertinent part, as follows:

> You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: 1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged * * *

In other words, after this high level employee at Enron reported improper accounting practices, Enron did not consider firing Andersen; rather, the company sought advice on the legality of discharging the whistleblower. Of course, Enron's lawyers would claim that they merely provided their client with accurate legal advice—there is no protection for corporate whistleblowers under current Texas law. In the end, Ms. Watkins did not report the matter to the authorities until after she had been subpoenaed, and after "tons" of documents had been destroyed.[4]

According to media accounts, this was not an isolated example of whistleblowing associated with the Enron case. In addition, a financial adviser at UBS Paine Webber's Houston office claims that he was fired for e-mailing his clients to advise them to sell Enron stock.[5] A top Enron risk management official alleges he was cut off from financial information and later resigned from Enron after repeatedly warning both orally and in writing as early as 1999 of improprieties in some of the company's off-balance sheet partnerships.[6] An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000.[7] These examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

D. The legal and ethical landscape and the need for reform

The Committee hearing of February 6, 2002, revealed that while Enron and Andersen were taking advantage of a system that allowed them to behave in an apparently fraudulent manner, as well as engage in both the destruction of valuable evidence and retalia-

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[4] "Enron Changes Climate for Whistle-blowers," The Christian Science Monitor, March 1, 2002.

[5] "Man Says Advice to Sell Enron Led to Firing," New York Times, March 5, 2002.

[6] "Economist Raised Doubts About Partnerships; Enron Researcher Raised Issue in '99," Houston Chronicle, March 19, 2002.

[7] "Andersen Whistleblower was Removed," New York Times, April 3, 2002.

tion against potential witnesses, the regulators, the victims of fraud, and the corporate whistleblowers were faced with daunting challenges to punish the wrongdoers and protect the victims' rights. The legal regime that, on one hand, allowed this conduct to take place, and, on the other, may serve as an impediment to punishing all the wrongdoers and protecting all the victims has led to widespread calls for reform and support for S. 2010, in particular.

The following groups and individuals have written in support of S. 2010: a bipartisan group of State Attorneys General from Kansas, Oklahoma, Oregon, Georgia, Washington, Ohio, and Vermont, including both the current and incoming heads of the National Association of Attorneys General; the North American Securities Administrators Association, whose membership consists of the securities administrators in all fifty states, the District of Columbia, Canada, Mexico, and Puerto Rico; the AFL–CIO; numerous whistleblower protection groups, including the Government Accountability Project, Taxpayers Against Fraud, and the National Whistleblower Center; consumer protection groups, including the Consumers Union and the Consumer Federation of America; the Vermont Department of Banking, Insurance, Securities and Health Care Administration; and the California State Teachers' Retirement System.

Outlined below are some of the shortcomings in current law that the Enron matter has publicly exposed.

First, unlike bank fraud, health care fraud, and bankruptcy fraud, there is no specific "securities fraud" provision in the criminal code to outlaw the breadth of schemes and artifices to defraud investors in publicly traded companies.[8] Currently, in securities fraud cases, prosecutors must rely on generic mail and wire charges that carry maximum penalties of up to only five years imprisonment and require prosecutors to carry the sometimes awkward burden of proving the use of the mail or the interstate wires to carry out the fraud. Alternatively, prosecutors may charge a willful violation of certain specific securities laws or regulations, but such regulations often contain technical legal requirements, and proving willful violations of these complex regulations allows defendants to argue that they did not possess the requisite criminal intent.[9] There is no logical reason for imposing such awkward and heightened burdens on the prosecution of criminal securities fraud cases. The investing public is entitled to no less protection than those who keep money in federally insured financial institutions enjoy under the bank fraud statute.

Second, current federal obstruction of justice statutes relating to document destruction is riddled with loopholes and burdensome proof requirements. Those provisions are a patchwork of various prohibitions that have been interpreted very narrowly by federal courts. For instance, certain current provisions in Title 18, such as section 1512(b), make it a crime to persuade another person to destroy documents, but not a crime for a person to destroy the same documents personally. Other provisions, such section 1503, have

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[8] See 18 U.S.C. 1344 (bank fraud), 1347 (health care fraud), and 157 (bankruptcy fraud).

[9] See e.g., *SEC* v. *Zandford,* 238 F.3d 559 (4th Cir. 559) (holding that straight out stealing of investors' money did not violate SEC rule 10b–5 because stealing was not sufficiently related to technical "purchase or sale" requirement), cert. granted, 122 S. Ct. 510 (2001). This case is one, although not the only example, of why federal prosecutors are justifiably hesitant to include technical SEC regulations as part of a criminal indictment.

been narrowly interpreted by courts, including the Supreme Court in *United States* v. *Aguillar,* 115 S. Ct. 593 (1995), and the First Circuit in *United States* v. *Frankhauser,* 80 F.3d 641 (1st Cir. 1996), to apply only to situations when the obstruction of justice may be closely tied to a judicial proceeding. Still other provisions, such as sections 152(8), 1517 and 1518, apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud. In short, the current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected.

Indeed, even in the current Andersen case, prosecutors have been forced to use the "witness tampering" statute, 18 U.S.C. 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves. Although prosecutors have been able to bring charges thus far in the case, in a case with a single person doing the shredding, this legal hurdle might present an insurmountable bar to a successful prosecution. When a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical legal distinctions should neither hinder nor prevent prosecution and punishment.

Even more surprising, in the context of audits and reviews conducted under the Securities and Exchange Act of 1934, there is currently no clear statutory requirement that accountants retain the most basic work papers to support the conclusions reached and opinions expressed in their audits, much less more detailed records, to facilitate determinations by federal regulators and law enforcement officials of whether a corporation or its accountants tried to mislead the public, as in the Enron matter.

Third, federal sentences sufficiently neither punish serious frauds and obstruction of justice nor take into account all aggravating factors that should be considered in order to enhance sentences for the most serious fraud and obstruction of justice cases. Currently, United States Sentencing Guidelines (U.S.S.G.) § 2J1.2 recognizes that a wide variety of conduct falls under the offense of "obstruction of justice." For obstruction cases involving the murder of a witness or another crime, the Guidelines allow, by cross reference, significant enhancements based on the underlying crimes, such as murder or attempted murder. For cases when obstruction is the only offense, however, the guidelines provide little assistance in differentiating between different types of obstruction—including the organized, large scale shredding that apparently occurred in the Enron/Andersen matter.

The current fraud sentencing guidelines also fail to provide for sufficient additional punishment based upon certain important aggravating factors. For instance, the fraud guidelines in U.S.S.G. § 2B1.1, require the sentencing judge to take the number of victims into account, but only to very limited degrees in small and medium-sized cases. Specifically, once there are more than fifty victims, the guidelines do not require any further enhancement of the sentence, so that a case with fifty-one victims may be treated the same as a case with five thousand victims. As the Enron matter demonstrates, serious frauds, especially for cases in which publicly traded securities are involved, can leave thousands of victims

robbed of their life savings. In addition, while the 2B1.1 guidelines provide a specific offense characteristic to enhance sentences where a financial institution's solvency is jeopardized, there is no similar enhancement for the risk of devastating a substantial number of private fraud victims, which is instead treated only as a ground for departure. That distinction is unsound and should be reconsidered. Finally, the Chapter 8 Guidelines relating to Sentencing Organizations for criminal conduct are outdated and do not sufficiently deter organizational or corporate misconduct.

Fourth, innocent, defrauded investors attempting to recoup their losses face unfair time limitations under current law. The current statute of limitations for most securities fraud cases is three years from the date of the fraud or one year after the fraud was discovered. This can unfairly limit recovery for defrauded investors in some cases. As Washington State Attorney General Gregoire testified at the Committee hearing, in the Enron state pension fund litigation, the current short statute of limitations has forced some states to forgo claims against Enron based on alleged securities fraud in1997 and 1998. In Washington state alone, the short statute of limitations may cost hard-working state employees, firefighters and police officers nearly $50 million in lost Enron investments, which they will never recover.

Especially in complex securities fraud cases, the current short statute of limitations may insulate the worst offenders from accountability and rewards those who can successfully cover up their misconduct for at least a year. As Justices O'Connor and Kennedy said in their dissent in *Lampf, Pleva. Lipkind, Prupis, & Petigrow* v. *Gilbertson,* 111 S. Ct. 2773 (1991), the 5–4 Supreme Court decision that changed decades of presumably settled law, and imposed a uniform, short statute of limitations in most securities fraud cases, the current "one and three" limitations period makes securities fraud actions "all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three years after the violation occurred."[10]

Other experts agree with Justices Kennedy and O'Connor. In fact, the last two SEC Chairmen supported extending the statute of limitations in securities fraud cases. Then Chairman Arthur Levitt testified before a Senate subcommittee in 1995 that "extending the statute of limitations is warranted because many securities frauds are inherently complex, and the law should not reward the perpetrator of a fraud, who successfully conceals its existence for more than three years." Before Chairman Levitt, in the first Bush administration, then SEC Chairman Richard Breeden also testified before Congress in favor of extending the statute of limitations in securities fraud cases. Reacting to the *Lampf* opinion, Breeden stated in 1991 that "[e]vents only come to light years after the original distribution of securities, and the *Lampf* cases could well

[10] *Lampf, Pleva. Lipkind, Prupis, & Petigrow* v. *Gilbertson,* 111 S. Ct. 2773, 2790 (1991). In *Lampf*, the 5–4 majority changed the decades old practice of deferring to state limitations period in securities fraud cases, and it adopted a national statute of limitations instead. In addition, as opposed to adopting the longer federal limitations period that the SEC and then Solicitor General Kenneth Starr supported from a 1988 securities law, *id.* at 2781, the Court held not only that the shorter "1 and 3" period imported from § 9(e) of the 1934 Act (15 U.S.C. § 78i(e)) governed, but that fraud victims did not even have the right to raise the customary doctrine of "equitable tolling," which can protect them in cases where they can demonstrate that the defendant took affirmative steps to conceal the fraud. Id. at 2782. In short, current law encourages fraud artists to game the system.

mean that by the time investors discover they have a case, they are already barred from the courthouse." Both the FDIC and the State securities regulators joined the SEC in calling for a legislative reversal of the *Lampf* decisions at that time.

The one year statute of limitations from the date the fraud is discovered is also particularly harsh on innocent defrauded investors. This short limitations period has the effect of placing true fraud victims on a "stop watch," from the moment they know that they have been cheated. As most prosecutors and victims will confirm, however, the best cons are designed so that even after victims are cheated, they will not know who cheated them, or how. Especially in securities fraud cases, the complexities of how the fraud was executed often take well over a year to unravel, even after the fraud is discovered. Even with use of the full resources of the FBI, a Special Task Force of Justice Department Attorneys, and the power of a federal grand jury, complex fraud cases such as Enron are difficult to unravel and rarely can be charged within a year.

This one year "stop watch" is even more unfair when considered in light of the significant obstacles that current law places between a victim and the courthouse in securities fraud cases. A lead plaintiff must be selected by the court, a process that can take months. Discovery is automatically stayed during the pendency of any motion to dismiss, consideration of which can take over a year in itself. During that period the stop watch continues to run on the claim, even though the victim has little or no ability to find out more about exactly who participated in the fraudulent activity and how the fraud was accomplished. With the higher pleading standards that also govern securities fraud victims, it is unfair to expect victims to be able to negotiate such obstacles in the span of 12 months (See 15 U.S.C. § 78u–4).

In short, by the time a victim learns enough facts to file a complaint under a heightened pleading standard, survives a motion to dismiss, begins discovery, and learns that an additional wrongdoer or theory should be added to the case, that claim is likely to be time barred, then the wrongdoer is able to avoid liability and the victim is left holding the proverbial bag. Moreover, current law sets up a perverse incentive for victims to race into court, so as not to be barred by time, and immediately sue. Plaintiffs who wish to spend more time investigating the matter or trying to resolve the matter without litigation are punished under the current law.

Furthermore, the short statute of limitations does nothing to discourage frivolous cases, as a plaintiff operating in bad faith would have little trouble meeting the one year deadline and simply throwing in every possible defendant and every claim. After all, by definition of the so-called "strike suit," filing occurs almost immediately upon a change in the stock price. Instead of stopping bad faith suits, the short statute merely blocks the meritorious claims of fraud victims. Statutes of limitations are simply not proper means of deciding legitimate cases which should be decided on the merits—that is the role of the underlying substantive law.

In many securities fraud cases the short limitations period under current law is an invitation to take sophisticated steps to conceal the deceit. The experts have long agreed on that point, and unfortunately they have been proven right. Based on the Enron and Andersen cases, it only takes a few seconds to warm up the shredder,

but it will take years for victims to put this complex case back together again. It is time that the law is changed to provide victims the time they need to prove their cases to recoup their losses.

Fifth, victims of securities fraud can be thwarted from fair recovery when a debtor, such as Enron, declares bankruptcy. Current bankruptcy law permits wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations. This loophole in the law should be closed to help defrauded investors recoup their losses and to hold accountable those who incur debts by violating our securities laws.

State regulators are also unfairly disadvantaged under the current system. Under current laws, state regulators are often forced to "re-prove" their fraud cases in bankruptcy court to prevent discharge because remedial statutes often have different technical elements than the analogous common law causes of action. Moreover, settlements may not have the same collateral estoppel effect as judgments obtained through fully litigated legal proceedings. In short, with limited resources already stretched to protect fraud victims, state regulators must plow the same ground twice in securities fraud cases.[11]

Sixth, corporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to "who knew what, and when," crucial questions not only in the Enron matter but in all complex securities fraud investigations. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With one in every two Americans investing in public companies, this distinction fails to serve the public good.

Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

E. The future

Many people and institutions contributed to the Enron debacle, including the corporate officers and directors whose actions led to

[11] The North American Securities Administrators Association (NASAA) has endorsed S. 2010, stating that it would "enhance the ability of state and federal regulators to help defrauded investors recoup their losses and to hold accountable those who perpetrate securities fraud." See letter from Joseph P. Borg, NASAA President and Director of Alabama Securities Commission.

Enron's failure, the well-paid professionals who helped create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns, the regulators who did not protect the public and our public markets, and the Congress and the courts, which have thrown obstacles in the way of securities fraud victims. Now Congress must contribute to making the Enron situation right and ensuring that this never happens again. Without discipline, professionalism, an effective legal structure, and accountability, greed can run rampant, with devastating results. Unfortunately, business failures during a permissive era rarely happen in isolation.

Accountability is important and must be restored because Enron is not alone. It is only a case study exposing the shortcomings in our current laws. At the Committee hearing, experts gave investors the grave warnings that it is likely that there are more "Enrons" lurking out there, simply eluding discovery. Future debacles wait to be discovered not only by investigators or the media, but by the more than one in two Americans who depend on the transparency and integrity of our public markets.

The majority of Americans depend on capital markets to invest in the future needs of their families—from their children's college fund to their retirement nest eggs. American investors deserve action. Congress must act now to restore confidence in the integrity of the public markets and deter fraud artists who believe their crimes will go unpunished. Restoring such accountability is the aim of the Corporate and Criminal Fraud Accountability Act of 2002.

Accountability and transparency help our markets work as they should, in ways that benefit investors, employees, consumers and our national economy. The Enron debacle has arrived on our doorstep, and our job is to make sure that there are adequate doses of accountability in our legal system to prevent such occurrences in the future, and to offer a constructive remedy and decisive punishment should they occur. The time has come for Congress to rethink and reform our laws in order to prevent corporate deceit, to protect investors and to restore full confidence in the capital markets.

III. Section-by-Section Analysis and Discussion

S. 2010 has three major components that will enhance accountability. First, it provides prosecutors with new and better tools to effectively prosecute and punish those who defraud investors, which means ensuring criminal laws are flexible enough to keep pace with the most sophisticated and clever con artists. It also means providing for criminal penalties tough enough to make them think twice before defrauding the public.

Second, this bill establishes tools to improve the ability of investigators and regulators to collect and preserve evidence which proves fraud. This ensures that corporate whistleblowers are protected and that those who destroy evidence of fraud are punished.

Third, the bill protects victims' rights to recover from those who have cheated them. In short, S. 2010 will not only save documents from the shredder, but also send wrongdoers to jail once they are caught.

SECTION-BY-SECTION ANALYSIS

Section 1.—Title. "Corporate and Criminal Fraud Accountability Act."

Section 2. Criminal penalties for altering documents

This section provides two new criminal statutes which would clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.

First, this section would create a new 10-year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is within the jurisdiction of any federal agency or any bankruptcy.

Second, the section creates a new 5-year felony which applies specifically to the willful failure to preserve audit papers of companies that issue securities. Section (a) of the statute has two sections which apply to accountants who conduct audits under the provisions of the Securities and Exchange Act of 1934. Subsection (a)(1) is an independent criminal prohibition on the destruction of audit or review work papers for five years, as that term is widely understood by regulators and in the accounting industry. Subsection (a)(2) requires the SEC to promulgate reasonable and necessary regulations within 180 days, after the opportunity for public comment, regarding the retention of categories of electronic and non electronic audit records which contain opinions, conclusions, analysis or financial data, in addition to the actual work papers. Willful violation of such regulations would be a crime. Neither the statute nor any regulations promulgated under it would relieve any person of any independent legal obligation under state or federal law to maintain or refrain from destroying such records.

Section 3.—Debts nondischargeable if incurred in violation of securities fraud laws

This provision would amend the federal bankruptcy code to make judgments and settlements arising from state and federal securities law violations brought by state or federal regulators and private individuals non-dischargeable. Current bankruptcy law may permit wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and securities law violations.

Section 4.—Statute of limitations

This section would set the statute of limitations in private securities fraud cases to the earlier of five years after the date of the fraud or two years after the fraud was discovered. The current statute of limitations for most private securities fraud cases is the earlier of three years from the date of the fraud or one year from the date of discovery. This provision states that it is not meant to create any new private cause of action, but only to govern already existing private causes of action under federal securities laws.

Section 5.—Review and enhancement of criminal sentences in cases of fraud and evidence destruction

This section would require the United States Sentencing Commission ("Commission") to review and consider enhancing, as appropriate, criminal penalties in cases involving obstruction of justice and in serious fraud cases. The Commission is also directed to generally review the U.S.S.G. Chapter 8 guidelines relating to sentencing organizations for criminal misconduct, to ensure that such guidelines are sufficient to punish and deter criminal misconduct by corporations.

Subsection 1 requires that the Commission generally review all the base offense level and sentencing enhancements under U.S.S.G. § 2J1.2. Subsection 2 specifically directs the Commission to consider including enhancements or specific offense characteristics for cases based on various factors including the destruction, alteration, or fabrication of physical evidence, the amount of evidence destroyed, the number of participants, or otherwise extensive nature of the destruction, the selection of evidence that is particularly probative or essential to the investigation, and whether the offense involved more than minimal planning or the abuse of a special skill or position of trust. Subsection 3 requires the Commission to establish appropriate punishments for the new obstruction of justice offenses created in this Act.

Subsections 4 and 5 require the Commission to review guideline offense levels and enhancements under U.S.S.G. § 2B1.1, relating to fraud. Specifically, the Commission is requested to review the fraud guidelines and consider enhancements for cases involving significantly greater than 50 victims and cases in which the solvency or financial security of a substantial number of victims is endangered. Subsection 6 requires a comprehensive review of Chapter 8 guidelines relating to sentencing organizations.

Section 6.—Whistleblower protection for employees of publicly traded companies

This section would provide whistleblower protection to employees of publicly traded companies. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. If the employer does take illegal action in retaliation for lawful and protected conduct, subsection (b) allows the employee to file a complaint with the Department of Labor, to be governed by the same procedures and burdens of proof now applicable in the whistleblower law in the aviation industry.[12] The employee can bring the matter to federal court only if the Department of Labor does not resolve the matter in 180 days (and there is no showing that such delay is due to the bad faith of the claimant) as a normal case in law or equity, with no amount in controversy requirement. Subsection (c) governs remedies and provides for the reinstatement of the whistleblower, backpay, and compensatory damages to make a victim whole, in-

[12] See 49 U.S.C. § 42121 *et seq.*

cluding reasonable attorney fees and costs, as remedies if the claimant prevails.

Section 7.—Criminal penalties for securities fraud

This provision would create a new 10-year felony for defrauding shareholders of publicly traded companies. The provision would supplement the patchwork of existing technical securities law violations with a more general and less technical provision, with elements and intent requirements comparable to current bank fraud and health care fraud statutes.

DISCUSSION

S. 2010 is one part of the response needed to solve the problems exposed by Enron's fall. Securities law experts, consumer protection groups, and others in Congress, both in the Senate and the House of Representatives, have made various proposals and introduced legislation that deserve careful consideration. Certainly, in light of recent events, careful reexamination is required of both the decisions of the Supreme Court and current laws. Despite the best of intentions, federal laws may have helped create an environment in which greed was inflated and integrity devalued. S. 2010 is an important starting point in that process. Following is a discussion and analysis of the bill's provisions.

Section 2 of the bill would create two new felonies to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records. First, it creates a new general anti shredding provision, 18 U.S.C. § 1519, with a 10-year maximum prison sentence. Currently, provisions governing the destruction or fabrication of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts. For instance, certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself.[13] Other provisions, such as 18 U.S.C. § 1503, have been narrowly interpreted by courts, including the Supreme Court in *United States* v. *Aguillar,* 115 S. Ct. 593 (1995), to apply only to situations where the obstruction of justice can be closely tied to a pending judicial proceeding. Still other statutes have been interpreted to draw distinctions between what type of government function is obstructed.[14] Still other provisions, such as sections 152(8), 1517 and 1518 apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud. In short, the current laws regarding destruction of evidence are full of ambiguities and technical limitations that should be corrected. This provision is meant to accomplish those ends.

Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation. This statute is specifically meant not to include any technical require-

[13] See 18 U.S.C. § 1512(b).

[14] See *United States* v. *Frankhauser,* 80 F.3d 641 (1st Cir. 1996) (1503 prohibits destroying evidence to thwart grand jury investigation, but not FBI investigation).

ment, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter. It is also sufficient that the act is done "in contemplation" of or in relation to a matter or investigation. It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute.[15] Questions of criminal intent are, as in all cases, appropriately decided by a jury on a case-by-cases basis. It also extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution. The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function. Finally, this section could also be used to prosecute a person who actually destroys the records himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers.[16]

Second, Section 2 creates a five-year felony, 18 U.S.C. § 1520, to punish the willful failure to preserve financial audit papers of companies that issue securities as defined in the Securities Exchange Act of 1934. The new statute, in subsection (a)(1), would independently require that accountants preserve audit work papers for five years from the conclusion of the audit. Subsection (b) would make it a felony to knowingly and willfully violate the five-year audit retention period in (1)(a). The materials covered in subsection (1)(b), which requires the SEC to issues reasonable rules and regulations, are intended to include additional records which contain conclusions, opinions, analysis, and financial data relevant to an audit or review. The regulations are intended to cover the retention of such substantive material, whether or not the conclusions, opinions, analyses or data in such records support the final conclusions reached by the auditor or expressed in the final audit or review so that state and federal law enforcement officials and regulators can conduct more effective inquiries into the decisions and determinations made by accountants in auditing public corporations. Nonsubstantive materials, however, such as administrative records, which are not relevant to the conclusions or opinions expressed (or not expressed), need not be included in such retention regulations. The language of the provision is clear. The SEC "shall" promulgate regulations relating to the retention of the categories of items which are specifically enumerated in the statutory provision. Willful violation of these regulations will also be a crime under this section.

In light of the apparent massive document destruction by Andersen, and the company's apparently misleading document retention policy, even in light of its prior SEC violations, it is intended that the SEC promulgate rules and regulations that require the reten-

[15] See 18 U.S.C. § 1001.
[16] See 18 U.S.C. § 1512(b).

tion of such substantive material, including material which casts doubt on the views expressed in the audit of review, for such a period as is reasonable and necessary for effective enforcement of the securities laws and the criminal laws, most of which have a five-year statute of limitations. It should also be noted that criminal tax violations, which many of these documents relate to, have a six-year statute of limitations. By granting the SEC the power to issue such regulations, it is not intended that the SEC be prohibited from consulting with other government agencies, such as the Department of Justice, which has primary authority regarding enforcement of federal criminal law or pertinent state regulatory agencies. Nor is it the intention of this provision that the general public, private or institutional investors, or other investor or consumer protection groups be excluded from the SEC rulemaking process. These views of these groups, who often represent the victims of fraud, should be considered at least on an equal footing with "industry experts" and others who participate in the rulemaking process at the SEC.

This section not only penalizes the willful failure to maintain specified audit records, but also will result in clear and reasonable rules that will require accountants to put strong safeguards in place to ensure that such corporate audit records are retained. Had such clear requirements and policies been established at the time Andersen was considering what to do with its audit documents, countless documents might have been saved from the shredder. The idea behind the statute is not only to provide for prosecution of those who obstruct justice, but to ensure that important financial evidence is retained so that law enforcement officials, regulators, and victims can assess whether the law was broken to begin with and, if so, whether or not such was done intentionally, or with or without the knowledge or assistance of an auditor.

Section 3 of this bill would amend the Bankruptcy Code to make judgments and settlements based upon securities law violations non-dischargeable, protecting victims' ability to recover their losses. Current bankruptcy law may permit such wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations. This loophole in the law should be closed to help defrauded investors recoup their losses and to hold accountable those who violate securities laws after a government unit or private suit results in a judgement or settlement against the wrongdoer.

State securities regulators have indicated their strong support for this change in the bankruptcy law. Under current laws, state regulators are often forced to "reprove" their fraud cases in bankruptcy court to prevent discharge because remedial statutes often have different technical elements than the analogous common law causes of action. Moreover, settlements may not have the same collateral estoppel effect as judgments obtained through fully litigated legal proceedings. In short, with their resources already stretched to the breaking point, state regulators must plow the same ground twice in securities fraud cases. By ensuring securities law judgments and settlements in state cases are non-dischargeable, precious state enforcement resources will be preserved and directed at preventing fraud in the first place.

Section 4 of S. 2010 would protect victims by extending the statute of limitations in private securities fraud cases. It would set the statute of limitations in private securities fraud cases to the earlier of five years after the date of the fraud or two years after the fraud was discovered. The current statute of limitations for most such fraud cases is three years from the date of the fraud or one year after discovery, which can unfairly limit recovery for defrauded investors in some cases. As Attorney General Gregoire testified at the Committee hearing, in the Enron state pension fund litigation the current short statute of limitations has forced some states to forgo claims against Enron based on alleged securities fraud in 1997 and 1998. In Washington state alone, the short statute of limitations may cost hard-working state employees, firefighters and police officers nearly $50 million in lost Enron investments which they can never recover.

Especially in complex securities fraud cases, the current short statute of limitations may insulate the worst offenders from accountability. As Justices O'Connor and Kennedy said in their dissent in *Lampf, Pleva. Lipkind, Prupis, & Petigrow* v. *Gilbertson,* 111 S. Ct. 2773 (1991), the 5–4 decision upholding this short statute of limitations in most securities fraud cases, the current "one and three" limitations period makes securities fraud actions "all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three years after the violation occurred." The Consumers Union and Consumer Federation of America, along with the AFL-CIO and other institutional investors, strongly support the bill, and view this section in particular as a needed measure to protect investors.

The experts agree with that view. In fact, the last two SEC Chairmen supported extending the statute of limitations in securities fraud cases. Former Chairman Arthur Levitt testified before a Senate Subcommittee in 1995 that "extending the statute of limitations is warranted because many securities frauds are inherently complex, and the law should not reward the perpetrator of a fraud, who successfully conceals its existence for more than three years." Before Chairman Levitt, in the last Bush administration, then SEC Chairman Richard Breeden also testified before Congress in favor of extending the statute of limitations in securities fraud cases. Reacting to the *Lampf* opinion, Breeden stated in 1991 that "[e]vents only come to light years after the original distribution of securities, and the *Lampf* cases could well mean that by the time investors discover they have a case, they are already barred from the courthouse." Both the FDIC and the State securities regulators joined the SEC in calling for a legislative reversal of the *Lampf* decisions at that time.

In fraud cases the short limitations period under current law is an invitation to take sophisticated steps to conceal the deceit. The experts have long agreed on that point, but unfortunately they have been proven right again. As recent experience shows, it only takes a few seconds to warm up the shredder, but unfortunately it will take years for victims to put this complex case back together

again.[17] It is time that the law is changed to give victims the time they need to prove their fraud cases.

Section 5 of S. 2010 ensures that those who destroy evidence or perpetrate fraud are appropriately punished. It would require the Commission to consider enhancing criminal penalties in cases involving obstruction of justice and serious fraud cases where a large number of victims are injured or when the victims face financial ruin.

Currently, the U.S.S.G. recognize that a wide variety of conduct falls under the offense of "obstruction of justice." For obstruction cases involving the murder of a witness or another crime, the U.S.S.G. allow, by cross reference, significant enhancements based on the underlying crimes, such as murder or attempted murder. For cases when obstruction is the only offense, however, they provide little guidance on differentiating between different types of obstruction. This provision requests that the Commission consider raising the penalties for obstruction where no cross reference is available and defining meaningful specific enhancements and adjustments for cases where evidence and records are actually destroyed or fabricated (and for more serious cases even within that category of case) so as to thwart investigators, a serious form of obstruction.

This provision, in subsections (4) and (5), also requires that the Commission consider enhancing the penalties in fraud cases which are particularly extensive or serious, even in addition to the recent amendments to the Chapter 2 guidelines for fraud cases. The current fraud guidelines require that the sentencing judge take the number of victims into account, but only to a very limited degree in small and medium-sized cases. Specifically, once there are more than 50 victims, the guidelines do not require any further enhancement of the sentence. A case with 51 victims, therefore, may be treated the same as a case with 5,000 victims. As the Enron matter demonstrates, serious frauds, especially in cases where publicly traded securities are involved, can affect thousands of victims.

In addition, current guidelines allow only very limited consideration of the extent of devastation that a fraud offense causes its victims. Judges may only consider whether a fraud endangers the "solvency or financial security" of a victim to impose an upward departure from the recommended sentencing range. This is not a factor in establishing the range itself unless the victim is a financial institution. Subsection (5) requires the Commission to consider requiring judges to consider the extent of such devastation in setting the actual recommended sentencing range in cases such as the Enron matter, when many private victims, including individual investors, have lost their life savings. Finally this provision requires a complete review of the Chapter 8 corporate misconduct guidelines, which are outdated and need to be toughened to deter corporate crime.

Section 6 of the bill would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to

[17] Of course, the allegations in the Enron case as set forth in this report are still being investigated, and 8 months after the public disclosures of Enron's conduct, not one Enron executive has been charged, even with the resources of the FBI available. That is another example of why a one year statute of limitations for such complex fraud cases is simply unreasonable.

supervisors or appropriate individuals within their company. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With an unprecedented portion of the American public investing in these companies and depending upon their honesty, this distinction does not serve the public good.

In addition, corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas, see supra) may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, companies with a corporate culture that punishes whistleblowers for being "disloyal" and "litigation risks" often transcend state lines, and most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law. U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies. S. 2010 is supported by groups such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, all of whom have written a letter placed in the Committee record calling this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information. In addition, a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (See generally *Passaic Valley Sewerage Commissioners* v. *Department of Labor,* 992 F. 2d 474, 478). Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief.

Under new protections provided by S. 2010, if the employer does take illegal action in retaliation for such lawful and protected conduct, subsection (b) allows the employee to elect to file an administrative complaint at the Department of Labor, as is the case for employees who provide assistance in aviation safety. Only if there is no final agency decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she may bring a de novo case in federal court with a jury trial available (See United States Constitution, Amendment VII; Title 42 United States Code, Section 1983). Should such a case be brought in federal court, it is intended that the same burdens of proof which would have governed in the Department of Labor

will continue to govern the action. Subsection (c) of this section requires both reinstatement of the whistleblower, backpay, and compensatory damages to make a victim whole should the claimant prevail. The bill does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies.

Section 7 of the bill would create a new ten-year felony under Title 18 for defrauding shareholders of publicly traded companies. Currently, unlike bank fraud or health care fraud, there is no generally accessible statute that deals with the specific problem of securities fraud. In these cases, federal investigators and prosecutors are forced either to resort to a patchwork of technical Title 15 offenses and regulations, which may criminalize particular violations of securities law, or to treat the cases as generic mail or wire fraud cases and to meet the technical elements of those statutes, with their five year maximum penalties.

This bill, then, would create a new ten-year felony for securities fraud—a more general and less technical provision comparable to the bank fraud and health care fraud statutes in Title 18. It adds a provision to Chapter 63 of Title 18 at section 1348 which would criminalize the execution or attempted execution of any scheme or artifice to defraud persons in connection with securities of publicly traded companies or obtain their money or property. The provision should not be read to require proof of technical elements from the securities laws, and is intended to provide needed enforcement flexibility in the context of publicly traded companies to protect shareholders and prospective shareholders against all the types schemes and frauds which inventive criminals may devise in the future. The intent requirements are to be applied consistently with those found in 18 U.S.C. §§ 1341, 1343, 1344, 1347.

By covering all "schemes and artifices to defraud" (see 18 U.S.C. §§ 1344, 1341, 1343, 1347), new § 1348 will be more accessible to investigators and prosecutors and will provide needed enforcement flexibility and, in the context of publicly traded companies, protection against all the types schemes and frauds which inventive criminals may devise in the future.

This bill is only part of the needed response to the problems exposed by the Enron debacle. For instance, a provision granting State Attorneys General and the SEC the authority to use the civil RICO statute would have been another important tool in battling fraud and protecting investors. The SEC has tremendous expertise in protecting investors, and the States, whose officials are more directly accountable to the public than federal officials, have traditionally played a major positive role in responsibly exercising their authority to protect our nation's investors and consumers. The tobacco industry litigation is but one recent example of this important role played by the States. Although the provision had received bipartisan support from State Attorneys General around the nation, it was removed from S. 2010 as a compromise, after objections were raised that such elected state officials could not be entrusted with the same enforcement powers as the federal government.

Changes are clearly needed to restore accountability in U.S. markets, which have already been adversely affected by recent events. Instead of acting as gatekeepers who detect and deter fraud, it appears that Enron's accountants and lawyers brought all their skills

and knowledge to bear in assisting the fraud to succeed and then in covering it up. Congress must reconsider the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent.

IV. COMMITTEE CONSIDERATION

On Thursday, April 25, 2002, the full Committee met in open session and ordered favorably reported the bill, S. 2010, by unanimous consent, with an amendment in the nature of a substitute sponsored by Senator Leahy and, after adopting an amendment sponsored by Senator Hatch and cosponsored by Senator Leahy and Senator Schumer, an amendment sponsored by Senator Feinstein and cosponsored by Senator Cantwell, and an amendment sponsored by Senator Grassley and cosponsored by Senator Leahy, a quorum being present.

V. VOTES OF THE COMMITTEE

First, Senator Leahy offered an amendment in the nature of a substitute, clarifying that the statute of limitations provision in Section 5 of S. 2010 was not intended to establish any new private right of action, amending Section 7 of S. 2010 dealing with whistleblowers, removing Section 3 from S. 2010, which would have authorized State Attorneys General and the Securities and Exchange Commission to bring suits under 18 U.S.C. § 1964 [civil provision of the Racketeering Influenced Corrupt Organizations Act ("RICO")], and renumbering the remaining provisions accordingly. This substitute was accepted by unanimous consent.

Second, Senator Hatch offered an amendment to the substitute, cosponsored by Senator Leahy and Senator Schumer, to make technical corrections to the criminal provisions, defining a publicly traded company in Section 7 of the substitute, narrowing the scope of the new audit records destruction crime created in Section 2 of the substitute, raising the maximum penalty for the general antishredding provision created in Section 2 of the substitute (new 18 U.S.C. § 1519) from 5 to 10 years, and modifying and adding additional provisions to Section 5 of the substitute relating to review of the sentencing guidelines in fraud and obstruction of justice cases a well as for organizational misconduct. The amendment was adopted by vote of 18 yeas to 0 nays.

Yeas	Nays
Leahy	
Kennedy (proxy)	
Biden (proxy)	
Kohl	
Feinstein	
Feingold	
Schumer	
Durbin	
Cantwell	
Edwards (proxy)	
Hatch	
Thurmond (proxy)	
Grassley	
Kyl (proxy)	
DeWine	
Sessions (proxy)	
Brownback	
McConnell (proxy)	

Third, Senator Feinstein offered an amendment, cosponsored by Senator Cantwell, to Section 4 of the substitute to lower the statute of limitations created in that provision from the earlier of 3 years from the date of discovery of the fraud or five years from the fraud to the earlier of 2 years from the date of discovery of the fraud or 5 years from the fraud. Senator Hatch offered a second degree amendment to the Feinstein-Cantwell amendment to strike the statute of limitations provision in Section 4 of the substitute. Senator Hatch's second degree amendment was rejected by vote of 7 yeas to 11 nays.

Yeas	Nays
Hatch	Leahy
Thurmond (proxy)	Kennedy (proxy)
Grassley	Biden (proxy)
Kyl (proxy)	Kohl
DeWine	Feinstein
Sessions (proxy)	Feingold
McConnell (proxy)	Schumer
	Durbin
	Cantwell
	Edwards (proxy)
	Brownback

The Feinstein-Cantwell amendment was then adopted by voice vote.

Fourth, Senator Grassley offered an amendment, cosponsored by Senator Leahy, to Section 5 of the substitute dealing with whistleblower rights. This amendment replaced the option for immediate suit in federal court with an administrative remedy and resort to federal court if the administrative decision is not made within six months, removed enhanced penalties in whistleblower matters, removed the provision dealing with arbitration agreements, and lowered the statute of limitations in whistleblower cases from 180 to 90 days. The amendment was adopted by unanimous consent.

The Committee agreed to favorably report S. 2010, as amended, by unanimous consent.

VI. Congressional Budget Office Cost Estimate

In compliance with paragraph 11(a) of rule XXVI of the standing rules of the Senate, the Committee sets forth, with respect to the bill, S. 2010, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

VII. Regulatory Impact Statement

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 2, 2002.

Hon. Patrick J. Leahy,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2010, the Corporate and Criminal Fraud Accountability Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for federal costs), Susan Sieg Tompkins (for the state and local costs), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

Barry B. Anderson
(For Dan L. Crippen, Director).

Encloures:

S. 2010—Corporate and Criminal Fraud Accountability Act of 2002

Summary: S. 2010 would create new crimes for persons who destroy records that could aid a federal investigation, people who commit securities fraud, or auditors who intentionally fail to retain certain audit records five years. In addition, the bill would prohibit certain fines assessed for violations of securities laws from being discharged in bankruptcy proceedings. Under S. 2010, employees who aid the SEC with investigations of publicly traded companies and who are subsequently discriminated against by their employer would have access to the Occupational Safety and Health Administration's (OSHA's) program for investigating illegal discrimination and termination of whistleblowers.

CBO estimates that implementing S. 2010 would cost about $2 million over the 2003–2007 period, subject to the availability of appropriated funds. The bill also would increase direct spending and receipts by less than $500,000 a year; therefore, pay-as-you-go procedures would apply.

S. 2010 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments. This legislation would impose private-sector mandates, as defined by UMRA, but CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA ($115 million in 2002, adjusted annually for inflation).

Estimated cost to the Federal Government: CBO estimates that implementing S. 2010 would cost about $2 million over the 2003–2007 period, subject to the availability of appropriated funds. This bill also would increase direct spending and receipts by less than $500,000 a year. The costs of this legislation fall within budget functions 370 (mortgage and housing credit) and 550 (health).

Basis of estimate: For this estimate, CBO assumes that S. 2010 will be enacted before the start of fiscal year 2003, and that the necessary amounts will be appropriate each fiscal year. Components of the estimated costs are described below.

Spending subject to appropriation

Under S. 2010, employees who provide information or otherwise assist investigations could file claims with OSHA in the event of discrimination or termination by their employer as a result of their whistleblowing activities. OSHA currently investigates whistleblower claims of discrimination against employers who violate occupational or environmental laws and regulations. To handle the additional claims that would arise if S. 2010 were enacted. CBO assumes OSHA would have to hire three additional employees. Subject to the availability of appropriated funds, CBO estimates that implementing the bill would cost less than $500,000 in 2003 and about $2 million over the 2003–2007 period.

Under S. 2010, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that any increase in federal costs for law enforcement, court proceedings, or prison operations would not be significant, however, because of the small number of cases likely to be involved. Any such additional costs would be subject to the availability of appropriated funds.

Direct Spending and Revenues

Because those prosecuted and convicted under S. 2010 could be subject to criminal fines, the federal government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. CBO expects that any additional receipts and direct spending would be less than $500,000 each year.

S. 2010 also would affect revenues by preventing certain fines the SEC assesses for violations for securities laws from being discharged in bankruptcy proceedings. This provision would apply to disgorgement funds, under which the SEC collects payments from violators and distributes them directly to the victims of the violation. Typically, these disgorgement funds are deposited in the Treasury only if the administrative costs of distributing the funds to the victims are prohibitive. Under current law, a violator could escape paying disgorgement funds under bankruptcy proceedings. S. 2010 would no longer allow such payments to be discharged in bankruptcy, and therefore, in certain cases could result in an increase of receipts to the Treasury. CBO estimates that any such increase would not be significant.

Pay-as-you-go-considerations: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for leg-

islation affecting direct spending or receipts through 2006. CBO estimates that any such effects would be less than $500,000 a year.

Estimated impact on state, local, and tribal governments: S. 2010 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimated impact on the private sector: S. 2010 would impose private-sector mandates, as defined by UMRA, but CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA ($115 million in 2002, adjusted annually for inflation).

The bill would impose a private-sector mandate by requiring that any accountant who conducts certain corporate audits to maintain all audit or review work papers for a five-year time period. According to the American Institute of Certified Public Accountants and industry representatives, the accounting industry currently retains financial statement working papers and records for seven years. Therefore, CBO estiamtes that the direct cost, if any, to comply with this mandate would be small.

The bill also would protect employees of certain publicly traded companies who provide information to the U.S. government (whistleblowers). Those companies would not be able to discharge, demote, suspend, threaten, harass, or discriminate against such employees in the terms and conditions of their employment. Based on information from the Occupational Safety and Health Administration, the agency that would enforce this provision, CBO estimates that those publicly traded companies would incur minimal, if any, direct cost to comply with the whistleblower protection requirements.

Estimate prepared by: Federal Costs: Ken Johnson and Alexis Ahlstrom; Impact on State, Local, and Tribal Government: Susan Sieg Tompkins; and Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VIII. ADDITIONAL VIEWS OF SENATORS HATCH, THURMOND, GRASSLEY, KYL, DEWINE, SESSIONS, BROWNBACK, AND MCCONNELL

A. GENERAL

The Chairman's Report contains a lengthy dissertation of facts and circumstances that allegedly gave rise to Enron's bankruptcy. We do not ascribe to the particulars outlined in the Report because at this point, a determination of the facts is the subject of ongoing investigations and court proceedings. We also do not necessarily agree that the Enron situation can be attributed to loopholes in current law; rather, it appears to be the result of bad actors violating existing laws.

In its amended form, S. 2010 is a marked improvement from the original version as introduced, and thus, the bill passed out of this committee unanimously by voice vote. We note that the amended version incorporates some of the provisions Senator Hatch included in his original amendment to S. 2010. Specifically, it further strengthens and refines prosecutorial tools and penalties for criminal conduct. In addition, as amended, S. 2010 removes a particularly troubling and unnecessary provision that would have extended the Department of Justice's (DOJ) automatic standing to bring suit under the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) to the 50 State Attorneys General and the Securities and Exchange Commission (SEC). To date, the Enron situation has left no doubt that the DOJ and SEC are aggressively investigating and bringing charges against offending parties. Moreover, to allow all 50 State Attorneys General and the SEC to bring multiple and duplicative civil RICO actions would result in inconsistent applications of the statute and undermine DOJ's proper role in this area. We know that other members of this committee, on both sides, shared these concerns, and we are pleased that we were able to remove this section from the bill.

Another improvement to S. 2010 resulted from a revision to the proposed new protections for corporate whistleblowers. As originally drafted, the proposal would have provided for overly expansive damage awards which could have encouraged frivolous claims that abuse the protections we seek to bestow. We believe that protections for corporate whistleblowers should track those already existing for airline employees. Those protections, contained in the Aviation Safety Protection Act of 2000, do not include a private cause of action, excessive damages or voluntary arbitration. To reach a compromise, we agreed to allow whistleblowers access to federal district court in cases where the Secretary of Labor has failed to issue a final decision on a whistleblower claim within 6 months.

Despite these improvements, we believe that S. 2010 still contains language that is problematic and even unnecessary to address the concerns that have arisen in light of the Enron bankruptcy, the consequences of which have indeed been devastating to a great many people. We are hopeful that improvements to S. 2010 will continue.

Below we clarify our intent and understanding with regard to specific provisions of S. 2010, as amended.

B. Specific Provisions

SECTION 2.—CRIMINAL PENALTIES FOR ALTERING DOCUMENTS

Section 2 of S. 2010 creates two new Title 18 offenses: an obstruction statute specifically directed to the destruction of documents, 18 U.S.C. 1519, and a document retention provision that applies to auditors of publicly traded securities, 18 U.S.C. 1520. Although it certainly appears, to date, that existing criminal obstruction of justice statutes are adequate to prosecute those who may be culpable in the Enron matter, we support providing prosecutors with all the tools they need to ensure that individuals who destroy evidence with the intent to impede a pending or future criminal investigation are punished. We also support the view that there is a need for a baseline retention standard that will apply to audit or review workpapers, which are the most critical documents relating to audits of publicly traded companies.

Section 1519

We recognize that section 1519 overlaps with a number of existing obstruction of justice statutes, but we also believe it captures a small category of criminal acts which are not currently covered under existing laws—for example, acts of destruction committed by an individual acting alone and with the intent to obstruct a future criminal investigation.

We have voiced our concern that section 1519, and in particular, the phrase "or proper administration of any matter within the jurisdiction of any department or agency of the United States" could be interpreted more broadly than we intend. In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the specific intent to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case. It should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.

Section 1520

Although the scope of section 1520, the document retention provision, has been significantly narrowed since S. 2010 was introduced, we are concerned that the Chairman's Report does not reflect the full extent to which this provision was narrowed.

As we made clear before S. 2010 was amended, we strongly believe that a broad federal mandate requiring accountants of publicly traded companies to retain all documents sent, received or cre-

ated in connection with any audit, review or other similar engagement, would create an unworkable standard—one that would require auditors to retain warehouses of documents, including those immaterial to an audit's conclusions. We believe that any such mandate would have a substantial and adverse effect on this nation's economy.

In its current form, section 1520 requires accountants of publicly traded companies to maintain audit and review workpapers for a period of 5 years. It does not impose any such requirement with respect to other documents, such as memoranda, correspondence, communications, and electronic records. Instead, with respect to other such documents, section 1520(a)(2) directs the SEC to promulgate, after adequate notice and opportunity for comment from industry experts, regulators and government agencies, such rules and regulations "as are reasonably necessary".

It is our intention that the SEC will exercise its discretion prudently in determining the necessity for and the scope of document retention regulations. In so doing, we anticipate that the SEC may well determine that the retention of many documents that fall within the list of categories of documents enumerated in section 1520(a)(2) is unecessary. Similarly, the SEC may also determine that it is unreasonable to apply a 5-year retention period, to all regulated documents.

We understand that the accounting profession has implemented standards relating to the retention of workpapers. We encourage the profession to review their existing standards, and we urge the SEC to consider such standards when implementing regulations pursuant to section 1520(a)(2).

In supporting section 1520, it is our intention to strike a fair balance between the legitimate needs of investigators and the accounting profession. In our view, it is not the role of Congress to impose unnecessary and draconian retention requirements on a profession, particularly where broad criminal obstruction statutes serve to deter and punish severely those who destroy documents with the intent to impede a pending or future investigation.

SECTION 4.—STATUTE OF LIMITATIONS

1. General views

We believe current law likely provides an adequate length of time in which people who have been defrauded can file suit—one year after an individual knows he or she has been defrauded or three years after the date of the fraud. This period mirrors legislatively enacted limitations that apply to statutory claims that are most analogous to those contemplated here. Such statutes of limitations provide for certainty in the markets and adequately protect genuinely aggrieved consumers. There has been no evidence to indicate that the time period after a claimant has discovered a fraud needs to be doubled, let alone tripled, as was proposed originally in S. 2010. It is worthy to note that even though they dissented from the majority holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U.S. 350, 369, 374 (1991) Justices O'Connor and Kennedy were clear in their support for the current one-year limitation after discovery of the fraud. Regrettably, the

sponsors of S. 2010 prevailed in their effort to extend the current statute of limitations, and we would like to clarify our understanding of the intended parameters of that extension.

Section 4(a) of this bill amends section 1658 of Title 28, United States Code to address the *Lampf* holding. Specifically, it sets a five-year outer limit on implied private rights of action involving a claim of fraud, deceit, manipulation, or contrivance, which are in contravention of a regulatory requirement concerning the federal securities laws. Consequently, section 4(a) is not intended to conflict with existing limitations periods for any express private rights of action under the federal securities laws.

2. Five-year maximum limit

In addition, because of the two-year limitation provided in section 1658(b)(2) of Title 28, United States Code, as amended by this bill, the five-year outer limit is not subject to equitable tolling. This is consistent with existing law applying statutes of limitation to securities fraud actions. Where there is a bifurcated limitations period, with an inner limit running from the time when the fraud was or should have been discovered, the inner limit "by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The [outer limit] is a period of repose inconsistent with tolling." *Lampf,* 501 U.S. at 363.

3. Two-year discovery limit

Section 4 of this bill is not intended to change existing case law holding that an objective standard should be used to measure the starting point as to when a securities fraud should have been discovered for purposes of a limitations period. In other words, this provision is intended to be consistent with established case law in that the "discovery" limitations period for private antifraud actions under section 10(b) of the Exchange Act begins to run when the plaintiff is on "inquiry notice" of a fraud. Rather than requiring actual knowledge to begin the running of the statute of limitations, the limitations period begins to run after discovery should have been made by exercise of reasonable diligence. This requirement, which has "long applied in fraud cases outside as well as in the securities field," *Tregenza* v. *Great American Communications Co.,* 12 F.3d 717, 722 (7th Cir. 1993) and cases cited therein, is necessary to limit "the opportunistic use of federal securities law to protect investors against market risk." Id. When "the circumstances would suggest to an investor of ordinary intelligence that she has been defrauded, a duty of inquiry arises, and knowledge will be imputed to the investor who does not make such an inquiry." *Dodds* v. *Cigna Sec., Inc.,* 12 F.3d 346, 350 (2d Cir. 1993), *cert. denied,* 511 U.S. 1019 (1994). *See also, inter alia, Menowitz* v. *Brown,* 991 F.2d 36, 41 (2d Cir. 1993); *Kahn* v. *Kohlberg, Kravis, Roberts & Co.,* 970 F.2d 1030, 1042 (2d Cir.), *cert. denied,* 506 U.S. 986 (1992).

4. No expansion of existing private rights of action

We agree that Section 4 of this bill is not intended to create a new private right of action or to broaden any existing private right of action.

SECTION 5.—REVIEW AND ENHANCEMENT OF CRIMINAL SENTENCES IN CASES OF FRAUD AND EVIDENCE DESTRUCTION

We support the provisions of section 5 which have incorporated many of our suggestions. We strongly endorse the view that the Sentencing Commission should revisit the guidelines that apply to corporate misconduct, as well as to those that apply to obstruction of justice and fraud offenses. We believe that tougher penalties, coupled with new criminal offenses, will enhance the ability of prosecutors to respond to egregious acts of obstruction and fraud.

SECTION 6.—WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES

This bill provides federal protection for corporate whistleblowers, who should be shielded from illegal retaliatory action. The amendment offered by Senators Grassley and Leahy revises the original bill to make these protections consistent with the Aviation Safety Protection Act of 2000 in which we provided whistleblower protections to another class of non-government employees. Because we had already extended whistleblower protections to non civil service employees, we thought it best to track those protections as closely as possible.

To make the corporate whistleblower protections consistent with those provided to airline employees, the amendment struck the excessive damages included in the original bill and subsequent compromises. It also removed a provision that allowed immediate access to federal district courts. However, this compromise does provide whistleblowers with access to federal court in the event the Secretary of Labor fails to issue a final decision within 6 months.

SECTION 7.—CRIMINAL PENALTIES FOR SECURITIES FRAUD

Although we believe that existing criminal statutes are adequate to prosecute criminal acts involving securities fraud, we support the creation of a new securities fraud offense. In our view, this provision will make it easier, in a limited class of cases, for prosecutors to prove securities fraud by eliminating, for example, the element that the mails or wires were used to further the scheme to defraud.

This new securities fraud offense does not lower the standard of criminal intent prosecutors must meet to convict securities fraud offenders. Like the bank and health care fraud statutes on which this provision is modeled, prosecutors must prove that a defendant knowingly engaged in a scheme or artifice to defraud, or knowingly made false statements or representations to obtain money in a securities transaction. This standard, which includes knowledge and intent elements, is consistent with existing securities fraud statutes.

3. CONCLUSION

As we consider legislative reforms to address concerns highlighted by the Enron debacle, it should be noted that there are a host of issues, many of which are outside of the jurisdiction of this Committee. While S. 2010 tightens and strengthening criminal penalties, among other things, it does not address issues relating

to corporate and professional responsibility and disclosure. Complementary legislation is necessary to address these issues which are the focus of the President's "10 Point Plan" and debate in other Senate and House committees.

Not only does legislation need to address corporate and professional responsibility and disclosure, it also must be deliberate and measured so that our economy is not adversely affected. We look forward to working with the full Senate, the other legislative chamber and the President to find the appropriate balanced solution to these complex issues.

ORRIN G. HATCH.
STROM THURMOND.
CHUCK E. GRASSLEY.
JON KYL.
MIKE DEWINE.
JEFF SESSIONS.
SAM BROWNBACK.
MITCH MCCONNELL.

IX. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2010, as reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 11—BANKRUPTCY

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CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

Subchapter I—Creditors and Claims

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SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

* * * * * * *

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

* * * * * * *

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of this title 28; [or]

(18) owed under State law to a State or municipality that is—

(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.)[.]*; or*

(19) that—

(A) arises under a claim relating to—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), any State securities laws, or any regulations or orders issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, in relation to any claim described in subparagraph (A), from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

* * * * * * *

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

§ 1341. Frauds and swindles

Whoever, having devised * * *

* * * * * * *

§ 1347. Health care fraud

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program.

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

§ 1348. Securities fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));

shall be fined under this title, or imprisoned not more than 10 years, or both.

* * * * * * *

CHAPTER 73—OBSTRUCTION OF JUSTICE

Sec.
1501. Assault on process server.

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1514. Civil action to restrain harassment of a victim or witness.
1514A. Civil action to protect against retaliation in fraud cases.

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1518. Obstruction of criminal investigations of health care offenses.
1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.
1520. Destruction of corporate audit records.

§ 1501. Assault on process server

Whoever knowingly * * *

* * * * * * *

§ 1514. Civil action to restrain harassment of a victim or witness

(a)(1) A United States * * *

* * * * * * *

(c) As used in this section—

(1) the term "harassment" means a course of conduct directed at a specific person that—

(A) causes substantial emotional distress in such person; and

(B) serves no legitimate purpose; and

(2) the term "course of conduct" means a series of acts over a period of time, however short, indicating a continuity of purpose.

§ 1514A. Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violoation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privilege, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

§ 1518. Obstruction of criminal investigation of health care offenses.

(a) Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses.

§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 10 years, or both.

§ 1529. Destruction of corporate audit records

(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.

(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies.

(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 5 years, or both.

(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation, imposed by Federal or State law or regulation, to maintain, or refrain from destroying, any document.

* * * * * * *

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment

of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 5 years after the date on which the alleged violation occurred; or

(2) 2 years after the date on which the alleged violation was discovered.

* * * * * * *

○

Exhibit M.d

Attachment SOX=PubL107-204.pdf to email of Nov. 20, 2016 (Exhibit M, *supra*).

Public Law 107–204
107th Congress

An Act

To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.

July 30, 2002
[H.R. 3763]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sarbanes-Oxley Act of 2002.
Corporate responsibility.
15 USC 7201 note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Sarbanes-Oxley Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

15 USC 7201.

SEC. 2. DEFINITIONS.

(a) IN GENERAL.—In this Act, the following definitions shall apply:

(1) APPROPRIATE STATE REGULATORY AUTHORITY.—The term "appropriate State regulatory authority" means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State or States

having jurisdiction over a registered public accounting firm or associated person thereof, with respect to the matter in question.

(2) AUDIT.—The term "audit" means an examination of the financial statements of any issuer by an independent public accounting firm in accordance with the rules of the Board or the Commission (or, for the period preceding the adoption of applicable rules of the Board under section 103, in accordance with then-applicable generally accepted auditing and related standards for such purposes), for the purpose of expressing an opinion on such statements.

(3) AUDIT COMMITTEE.—The term "audit committee" means—

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(4) AUDIT REPORT.—The term "audit report" means a document or other record—

(A) prepared following an audit performed for purposes of compliance by an issuer with the requirements of the securities laws; and

(B) in which a public accounting firm either—

(i) sets forth the opinion of that firm regarding a financial statement, report, or other document; or

(ii) asserts that no such opinion can be expressed.

(5) BOARD.—The term "Board" means the Public Company Accounting Oversight Board established under section 101.

(6) COMMISSION.—The term "Commission" means the Securities and Exchange Commission.

(7) ISSUER.—The term "issuer" means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.

(8) NON-AUDIT SERVICES.—The term "non-audit services" means any professional services provided to an issuer by a registered public accounting firm, other than those provided to an issuer in connection with an audit or a review of the financial statements of an issuer.

(9) PERSON ASSOCIATED WITH A PUBLIC ACCOUNTING FIRM.—

(A) IN GENERAL.—The terms "person associated with a public accounting firm" (or with a "registered public accounting firm") and "associated person of a public accounting firm" (or of a "registered public accounting firm") mean any individual proprietor, partner, shareholder, principal, accountant, or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report—

(i) shares in the profits of, or receives compensation in any other form from, that firm; or

(ii) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm.

(B) EXEMPTION AUTHORITY.—The Board may, by rule, exempt persons engaged only in ministerial tasks from the definition in subparagraph (A), to the extent that the Board determines that any such exemption is consistent with the purposes of this Act, the public interest, or the protection of investors.

(10) PROFESSIONAL STANDARDS.—The term "professional standards" means—

(A) accounting principles that are—

(i) established by the standard setting body described in section 19(b) of the Securities Act of 1933, as amended by this Act, or prescribed by the Commission under section 19(a) of that Act (15 U.S.C. 17a(s)) or section 13(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78a(m)); and

(ii) relevant to audit reports for particular issuers, or dealt with in the quality control system of a particular registered public accounting firm; and

(B) auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing title II) that the Board or the Commission determines—

(i) relate to the preparation or issuance of audit reports for issuers; and

(ii) are established or adopted by the Board under section 103(a), or are promulgated as rules of the Commission.

(11) PUBLIC ACCOUNTING FIRM.—The term "public accounting firm" means—

(A) a proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports; and

(B) to the extent so designated by the rules of the Board, any associated person of any entity described in subparagraph (A).

(12) REGISTERED PUBLIC ACCOUNTING FIRM.—The term "registered public accounting firm" means a public accounting firm registered with the Board in accordance with this Act.

(13) RULES OF THE BOARD.—The term "rules of the Board" means the bylaws and rules of the Board (as submitted to, and approved, modified, or amended by the Commission, in accordance with section 107), and those stated policies, practices, and interpretations of the Board that the Commission, by rule, may deem to be rules of the Board, as necessary or appropriate in the public interest or for the protection of investors.

(14) SECURITY.—The term "security" has the same meaning as in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(15) SECURITIES LAWS.—The term "securities laws" means the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), as amended by this Act, and includes the rules, regulations, and orders issued by the Commission thereunder.

(16) STATE.—The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other territory or possession of the United States.

(b) CONFORMING AMENDMENT.—Section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) is amended by inserting "the Sarbanes-Oxley Act of 2002," before "the Public".

SEC. 3. COMMISSION RULES AND ENFORCEMENT. 15 USC 7202.

(a) REGULATORY ACTION.—The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.

(b) ENFORCEMENT.—

(1) IN GENERAL.—A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

(2) INVESTIGATIONS, INJUNCTIONS, AND PROSECUTION OF OFFENSES.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended—

(A) in subsection (a)(1), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,";

(B) in subsection (d)(1), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,";

(C) in subsection (e), by inserting "the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm," after "is a participant,"; and

(D) in subsection (f), by inserting "or the Public Company Accounting Oversight Board" after "self-regulatory organization" each place that term appears.

(3) CEASE-AND-DESIST PROCEEDINGS.—Section 21C(c)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)(2)) is amended by inserting "registered public accounting firm (as defined in section 2 of the Sarbanes-Oxley Act of 2002)," after "government securities dealer,".

(4) ENFORCEMENT BY FEDERAL BANKING AGENCIES.—Section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(i)) is amended by—

(A) striking "sections 12," each place it appears and inserting "sections 10A(m), 12,"; and

(B) striking "and 16," each place it appears and inserting "and 16 of this Act, and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002,".

(c) EFFECT ON COMMISSION AUTHORITY.—Nothing in this Act or the rules of the Board shall be construed to impair or limit—

(1) the authority of the Commission to regulate the accounting profession, accounting firms, or persons associated with such firms for purposes of enforcement of the securities laws;

(2) the authority of the Commission to set standards for accounting or auditing practices or auditor independence, derived from other provisions of the securities laws or the rules or regulations thereunder, for purposes of the preparation and issuance of any audit report, or otherwise under applicable law; or

(3) the ability of the Commission to take, on the initiative of the Commission, legal, administrative, or disciplinary action against any registered public accounting firm or any associated person thereof.

TITLE I—PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

15 USC 7211.

SEC. 101. ESTABLISHMENT; ADMINISTRATIVE PROVISIONS.

(a) ESTABLISHMENT OF BOARD.—There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.

(b) STATUS.—The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

(c) DUTIES OF THE BOARD.—The Board shall, subject to action by the Commission under section 107, and once a determination is made by the Commission under subsection (d) of this section—

(1) register public accounting firms that prepare audit reports for issuers, in accordance with section 102;

(2) establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers, in accordance with section 103;

(3) conduct inspections of registered public accounting firms, in accordance with section 104 and the rules of the Board;

(4) conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon,

registered public accounting firms and associated persons of such firms, in accordance with section 105;

(5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out this Act, in order to protect investors, or to further the public interest;

(6) enforce compliance with this Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof; and

(7) set the budget and manage the operations of the Board and the staff of the Board.

(d) COMMISSION DETERMINATION.—The members of the Board shall take such action (including hiring of staff, proposal of rules, and adoption of initial and transitional auditing and other professional standards) as may be necessary or appropriate to enable the Commission to determine, not later than 270 days after the date of enactment of this Act, that the Board is so organized and has the capacity to carry out the requirements of this title, and to enforce compliance with this title by registered public accounting firms and associated persons thereof. The Commission shall be responsible, prior to the appointment of the Board, for the planning for the establishment and administrative transition to the Board's operation.

(e) BOARD MEMBERSHIP.—

(1) COMPOSITION.—The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures required of issuers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures.

(2) LIMITATION.—Two members, and only 2 members, of the Board shall be or have been certified public accountants pursuant to the laws of 1 or more States, provided that, if 1 of those 2 members is the chairperson, he or she may not have been a practicing certified public accountant for at least 5 years prior to his or her appointment to the Board.

(3) FULL-TIME INDEPENDENT SERVICE.—Each member of the Board shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity. No member of the Board may share in any of the profits of, or receive payments from, a public accounting firm (or any other person, as determined by rule of the Commission), other than fixed continuing payments, subject to such conditions as the Commission may impose, under standard arrangements for the retirement of members of public accounting firms.

(4) APPOINTMENT OF BOARD MEMBERS.—

(A) INITIAL BOARD.—Not later than 90 days after the date of enactment of this Act, the Commission, after consultation with the Chairman of the Board of Governors Deadline.

of the Federal Reserve System and the Secretary of the Treasury, shall appoint the chairperson and other initial members of the Board, and shall designate a term of service for each.

(B) VACANCIES.—A vacancy on the Board shall not affect the powers of the Board, but shall be filled in the same manner as provided for appointments under this section.

(5) TERM OF SERVICE.—

(A) IN GENERAL.—The term of service of each Board member shall be 5 years, and until a successor is appointed, except that—

(i) the terms of office of the initial Board members (other than the chairperson) shall expire in annual increments, 1 on each of the first 4 anniversaries of the initial date of appointment; and

(ii) any Board member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of that term.

(B) TERM LIMITATION.—No person may serve as a member of the Board, or as chairperson of the Board, for more than 2 terms, whether or not such terms of service are consecutive.

(6) REMOVAL FROM OFFICE.—A member of the Board may be removed by the Commission from office, in accordance with section 107(d)(3), for good cause shown before the expiration of the term of that member.

(f) POWERS OF THE BOARD.—In addition to any authority granted to the Board otherwise in this Act, the Board shall have the power, subject to section 107—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the Commission, in any Federal, State, or other court;

(2) to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act, in any State, without regard to any qualification, licensing, or other provision of law in effect in such State (or a political subdivision thereof);

(3) to lease, purchase, accept gifts or donations of or otherwise acquire, improve, use, sell, exchange, or convey, all of or an interest in any property, wherever situated;

(4) to appoint such employees, accountants, attorneys, and other agents as may be necessary or appropriate, and to determine their qualifications, define their duties, and fix their salaries or other compensation (at a level that is comparable to private sector self-regulatory, accounting, technical, supervisory, or other staff or management positions);

(5) to allocate, assess, and collect accounting support fees established pursuant to section 109, for the Board, and other fees and charges imposed under this title; and

Contracts.

(6) to enter into contracts, execute instruments, incur liabilities, and do any and all other acts and things necessary, appropriate, or incidental to the conduct of its operations and the exercise of its obligations, rights, and powers imposed or granted by this title.

(g) RULES OF THE BOARD.—The rules of the Board shall, subject to the approval of the Commission—

(1) provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act;

(2) permit, as the Board determines necessary or appropriate, delegation by the Board of any of its functions to an individual member or employee of the Board, or to a division of the Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter, except that—

(A) the Board shall retain a discretionary right to review any action pursuant to any such delegated function, upon its own motion;

(B) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Board upon such review shall be deemed to be the action of the Board for all purposes (including appeal or review thereof); and

(C) if the right to exercise a review described in subparagraph (A) is declined, or if no such review is sought within the time stated in the rules of the Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Board;

(3) establish ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the Commission, with respect to Board-related matters) of 1 year for former members of the Board, and appropriate periods (not to exceed 1 year) for former staff of the Board; and

(4) provide as otherwise required by this Act.

(h) ANNUAL REPORT TO THE COMMISSION.—The Board shall submit an annual report (including its audited financial statements) to the Commission, and the Commission shall transmit a copy of that report to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, not later than 30 days after the date of receipt of that report by the Commission. Deadline.

SEC. 102. REGISTRATION WITH THE BOARD. 15 USC 7212.

(a) MANDATORY REGISTRATION.—Beginning 180 days after the date of the determination of the Commission under section 101(d), it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer.

(b) APPLICATIONS FOR REGISTRATION.—

(1) FORM OF APPLICATION.—A public accounting firm shall use such form as the Board may prescribe, by rule, to apply for registration under this section.

(2) CONTENTS OF APPLICATIONS.—Each public accounting firm shall submit, as part of its application for registration, in such detail as the Board shall specify—

(A) the names of all issuers for which the firm prepared or issued audit reports during the immediately preceding calendar year, and for which the firm expects to prepare or issue audit reports during the current calendar year;

(B) the annual fees received by the firm from each such issuer for audit services, other accounting services, and non-audit services, respectively;

(C) such other current financial information for the most recently completed fiscal year of the firm as the Board may reasonably request;

(D) a statement of the quality control policies of the firm for its accounting and auditing practices;

(E) a list of all accountants associated with the firm who participate in or contribute to the preparation of audit reports, stating the license or certification number of each such person, as well as the State license numbers of the firm itself;

(F) information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report;

(G) copies of any periodic or annual disclosure filed by an issuer with the Commission during the immediately preceding calendar year which discloses accounting disagreements between such issuer and the firm in connection with an audit report furnished or prepared by the firm for such issuer; and

(H) such other information as the rules of the Board or the Commission shall specify as necessary or appropriate in the public interest or for the protection of investors.

(3) CONSENTS.—Each application for registration under this subsection shall include—

(A) a consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this title (and an agreement to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm); and

(B) a statement that such firm understands and agrees that cooperation and compliance, as described in the consent required by subparagraph (A), and the securing and enforcement of such consents from its associated persons, in accordance with the rules of the Board, shall be a condition to the continuing effectiveness of the registration of the firm with the Board.

(c) ACTION ON APPLICATIONS.—

Deadline.

(1) TIMING.—The Board shall approve a completed application for registration not later than 45 days after the date of receipt of the application, in accordance with the rules of the Board, unless the Board, prior to such date, issues a written notice of disapproval to, or requests more information from, the prospective registrant.

(2) TREATMENT.—A written notice of disapproval of a completed application under paragraph (1) for registration shall be treated as a disciplinary sanction for purposes of sections 105(d) and 107(c).

(d) PERIODIC REPORTS.—Each registered public accounting firm shall submit an annual report to the Board, and may be required

to report more frequently, as necessary to update the information contained in its application for registration under this section, and to provide to the Board such additional information as the Board or the Commission may specify, in accordance with subsection (b)(2).

(e) PUBLIC AVAILABILITY.—Registration applications and annual reports required by this subsection, or such portions of such applications or reports as may be designated under rules of the Board, shall be made available for public inspection, subject to rules of the Board or the Commission, and to applicable laws relating to the confidentiality of proprietary, personal, or other information contained in such applications or reports, provided that, in all events, the Board shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information.

(f) REGISTRATION AND ANNUAL FEES.—The Board shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports.

SEC. 103. AUDITING, QUALITY CONTROL, AND INDEPENDENCE STANDARDS AND RULES. 15 USC 7213.

(a) AUDITING, QUALITY CONTROL, AND ETHICS STANDARDS.—

(1) IN GENERAL.—The Board shall, by rule, establish, including, to the extent it determines appropriate, through adoption of standards proposed by 1 or more professional groups of accountants designated pursuant to paragraph (3)(A) or advisory groups convened pursuant to paragraph (4), and amend or otherwise modify or alter, such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.

(2) RULE REQUIREMENTS.—In carrying out paragraph (1), the Board—

(A) shall include in the auditing standards that it adopts, requirements that each registered public accounting firm shall—

(i) prepare, and maintain for a period of not less than 7 years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report;

(ii) provide a concurring or second partner review and approval of such audit report (and other related information), and concurring approval in its issuance, by a qualified person (as prescribed by the Board) associated with the public accounting firm, other than the person in charge of the audit, or by an independent reviewer (as prescribed by the Board); and

(iii) describe in each audit report the scope of the auditor's testing of the internal control structure and procedures of the issuer, required by section 404(b), and present (in such report or in a separate report)—

(I) the findings of the auditor from such testing;

(II) an evaluation of whether such internal control structure and procedures—

(aa) include maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(bb) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and

(III) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing.

(B) shall include, in the quality control standards that it adopts with respect to the issuance of audit reports, requirements for every registered public accounting firm relating to—

(i) monitoring of professional ethics and independence from issuers on behalf of which the firm issues audit reports;

(ii) consultation within such firm on accounting and auditing questions;

(iii) supervision of audit work;

(iv) hiring, professional development, and advancement of personnel;

(v) the acceptance and continuation of engagements;

(vi) internal inspection; and

(vii) such other requirements as the Board may prescribe, subject to subsection (a)(1).

(3) AUTHORITY TO ADOPT OTHER STANDARDS.—

(A) IN GENERAL.—In carrying out this subsection, the Board—

(i) may adopt as its rules, subject to the terms of section 107, any portion of any statement of auditing standards or other professional standards that the Board determines satisfy the requirements of paragraph (1), and that were proposed by 1 or more professional groups of accountants that shall be designated or recognized by the Board, by rule, for such purpose, pursuant to this paragraph or 1 or more advisory groups convened pursuant to paragraph (4); and

(ii) notwithstanding clause (i), shall retain full authority to modify, supplement, revise, or subsequently amend, modify, or repeal, in whole or in part, any portion of any statement described in clause (i).

(B) INITIAL AND TRANSITIONAL STANDARDS.—The Board shall adopt standards described in subparagraph (A)(i) as initial or transitional standards, to the extent the Board determines necessary, prior to a determination of the

Commission under section 101(d), and such standards shall be separately approved by the Commission at the time of that determination, without regard to the procedures required by section 107 that otherwise would apply to the approval of rules of the Board.

(4) ADVISORY GROUPS.—The Board shall convene, or authorize its staff to convene, such expert advisory groups as may be appropriate, which may include practicing accountants and other experts, as well as representatives of other interested groups, subject to such rules as the Board may prescribe to prevent conflicts of interest, to make recommendations concerning the content (including proposed drafts) of auditing, quality control, ethics, independence, or other standards required to be established under this section.

(b) INDEPENDENCE STANDARDS AND RULES.—The Board shall establish such rules as may be necessary or appropriate in the public interest or for the protection of investors, to implement, or as authorized under, title II of this Act.

(c) COOPERATION WITH DESIGNATED PROFESSIONAL GROUPS OF ACCOUNTANTS AND ADVISORY GROUPS.—

(1) IN GENERAL.—The Board shall cooperate on an ongoing basis with professional groups of accountants designated under subsection (a)(3)(A) and advisory groups convened under subsection (a)(4) in the examination of the need for changes in any standards subject to its authority under subsection (a), recommend issues for inclusion on the agendas of such designated professional groups of accountants or advisory groups, and take such other steps as it deems appropriate to increase the effectiveness of the standard setting process.

(2) BOARD RESPONSES.—The Board shall respond in a timely fashion to requests from designated professional groups of accountants and advisory groups referred to in paragraph (1) for any changes in standards over which the Board has authority.

(d) EVALUATION OF STANDARD SETTING PROCESS.—The Board shall include in the annual report required by section 101(h) the results of its standard setting responsibilities during the period to which the report relates, including a discussion of the work of the Board with any designated professional groups of accountants and advisory groups described in paragraphs (3)(A) and (4) of subsection (a), and its pending issues agenda for future standard setting projects.

SEC. 104. INSPECTIONS OF REGISTERED PUBLIC ACCOUNTING FIRMS. 15 USC 7214.

(a) IN GENERAL.—The Board shall conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.

(b) INSPECTION FREQUENCY.—

(1) IN GENERAL.—Subject to paragraph (2), inspections required by this section shall be conducted—

(A) annually with respect to each registered public accounting firm that regularly provides audit reports for more than 100 issuers; and

(B) not less frequently than once every 3 years with respect to each registered public accounting firm that regularly provides audit reports for 100 or fewer issuers.

(2) ADJUSTMENTS TO SCHEDULES.—The Board may, by rule, adjust the inspection schedules set under paragraph (1) if the Board finds that different inspection schedules are consistent with the purposes of this Act, the public interest, and the protection of investors. The Board may conduct special inspections at the request of the Commission or upon its own motion.

(c) PROCEDURES.—The Board shall, in each inspection under this section, and in accordance with its rules for such inspections—

(1) identify any act or practice or omission to act by the registered public accounting firm, or by any associated person thereof, revealed by such inspection that may be in violation of this Act, the rules of the Board, the rules of the Commission, the firm's own quality control policies, or professional standards;

(2) report any such act, practice, or omission, if appropriate, to the Commission and each appropriate State regulatory authority; and

(3) begin a formal investigation or take disciplinary action, if appropriate, with respect to any such violation, in accordance with this Act and the rules of the Board.

(d) CONDUCT OF INSPECTIONS.—In conducting an inspection of a registered public accounting firm under this section, the Board shall—

(1) inspect and review selected audit and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and 1 or more third parties), performed at various offices and by various associated persons of the firm, as selected by the Board;

(2) evaluate the sufficiency of the quality control system of the firm, and the manner of the documentation and communication of that system by the firm; and

(3) perform such other testing of the audit, supervisory, and quality control procedures of the firm as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.

(e) RECORD RETENTION.—The rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by section 103 or the rules issued thereunder.

(f) PROCEDURES FOR REVIEW.—The rules of the Board shall provide a procedure for the review of and response to a draft inspection report by the registered public accounting firm under inspection. The Board shall take such action with respect to such response as it considers appropriate (including revising the draft report or continuing or supplementing its inspection activities before issuing a final report), but the text of any such response, appropriately redacted to protect information reasonably identified by the accounting firm as confidential, shall be attached to and made part of the inspection report.

(g) REPORT.—A written report of the findings of the Board for each inspection under this section, subject to subsection (h), shall be—

(1) transmitted, in appropriate detail, to the Commission and each appropriate State regulatory authority, accompanied by any letter or comments by the Board or the inspector, and any letter of response from the registered public accounting firm; and

(2) made available in appropriate detail to the public (subject to section 105(b)(5)(A), and to the protection of such confidential and proprietary information as the Board may determine to be appropriate, or as may be required by law), except that no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.

(h) INTERIM COMMISSION REVIEW.—

(1) REVIEWABLE MATTERS.—A registered public accounting firm may seek review by the Commission, pursuant to such rules as the Commission shall promulgate, if the firm—

(A) has provided the Board with a response, pursuant to rules issued by the Board under subsection (f), to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response; or

(B) disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report, for purposes of subsection (g)(2).

(2) TREATMENT OF REVIEW.—Any decision of the Commission with respect to a review under paragraph (1) shall not be reviewable under section 25 of the Securities Exchange Act of 1934 (15 U.S.C. 78y), or deemed to be "final agency action" for purposes of section 704 of title 5, United States Code.

(3) TIMING.—Review under paragraph (1) may be sought during the 30-day period following the date of the event giving rise to the review under subparagraph (A) or (B) of paragraph (1).

SEC. 105. INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS.

15 USC 7215.

(a) IN GENERAL.—The Board shall establish, by rule, subject to the requirements of this section, fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms.

Establishment.

(b) INVESTIGATIONS.—

(1) AUTHORITY.—In accordance with the rules of the Board, the Board may conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, regardless of how the act, practice, or omission is brought to the attention of the Board.

(2) TESTIMONY AND DOCUMENT PRODUCTION.—In addition to such other actions as the Board determines to be necessary or appropriate, the rules of the Board may—

(A) require the testimony of the firm or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation;

(B) require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board considers relevant or material to the investigation, and may inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied;

(C) request the testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to an investigation under this section, with appropriate notice, subject to the needs of the investigation, as permitted under the rules of the Board; and

(D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and production of any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation under this section.

(3) NONCOOPERATION WITH INVESTIGATIONS.—

(A) IN GENERAL.—If a registered public accounting firm or any associated person thereof refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may—

(i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association;

(ii) suspend or revoke the registration of the public accounting firm; and

(iii) invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.

(B) PROCEDURE.—Any action taken by the Board under this paragraph shall be subject to the terms of section 107(c).

(4) COORDINATION AND REFERRAL OF INVESTIGATIONS.—

Notification.

(A) COORDINATION.—The Board shall notify the Commission of any pending Board investigation involving a potential violation of the securities laws, and thereafter coordinate its work with the work of the Commission's Division of Enforcement, as necessary to protect an ongoing Commission investigation.

(B) REFERRAL.—The Board may refer an investigation under this section—

(i) to the Commission;

(ii) to any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of such regulator; and

(iii) at the direction of the Commission, to—

(I) the Attorney General of the United States;

(II) the attorney general of 1 or more States; and

(III) the appropriate State regulatory authority.

(5) USE OF DOCUMENTS.—

(A) CONFIDENTIALITY.—Except as provided in subparagraph (B), all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 104 or with an investigation under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c).

(B) AVAILABILITY TO GOVERNMENT AGENCIES.—Without the loss of its status as confidential and privileged in the hands of the Board, all information referred to in subparagraph (A) may—

(i) be made available to the Commission; and

(ii) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of this Act or to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), other than the Commission, with respect to an audit report for an institution subject to the jurisdiction of such regulator;

(III) State attorneys general in connection with any criminal investigation; and

(IV) any appropriate State regulatory authority,

each of which shall maintain such information as confidential and privileged.

(6) IMMUNITY.—Any employee of the Board engaged in carrying out an investigation under this Act shall be immune from any civil liability arising out of such investigation in the same manner and to the same extent as an employee of the Federal Government in similar circumstances.

(c) DISCIPLINARY PROCEDURES.—

(1) NOTIFICATION; RECORDKEEPING.—The rules of the Board shall provide that in any proceeding by the Board to determine

whether a registered public accounting firm, or an associated person thereof, should be disciplined, the Board shall—

(A) bring specific charges with respect to the firm or associated person;

(B) notify such firm or associated person of, and provide to the firm or associated person an opportunity to defend against, such charges; and

(C) keep a record of the proceedings.

(2) PUBLIC HEARINGS.—Hearings under this section shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing.

(3) SUPPORTING STATEMENT.—A determination by the Board to impose a sanction under this subsection shall be supported by a statement setting forth—

(A) each act or practice in which the registered public accounting firm, or associated person, has engaged (or omitted to engage), or that forms a basis for all or a part of such sanction;

(B) the specific provision of this Act, the securities laws, the rules of the Board, or professional standards which the Board determines has been violated; and

(C) the sanction imposed, including a justification for that sanction.

(4) SANCTIONS.—If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or associated person thereof has engaged in any act or practice, or omitted to act, in violation of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, subject to applicable limitations under paragraph (5), including—

(A) temporary suspension or permanent revocation of registration under this title;

(B) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;

(C) temporary or permanent limitation on the activities, functions, or operations of such firm or person (other than in connection with required additional professional education or training);

(D) a civil money penalty for each such violation, in an amount equal to—

(i) not more than $100,000 for a natural person or $2,000,000 for any other person; and

(ii) in any case to which paragraph (5) applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(E) censure;

(F) required additional professional education or training; or

(G) any other appropriate sanction provided for in the rules of the Board.

(5) INTENTIONAL OR OTHER KNOWING CONDUCT.—The sanctions and penalties described in subparagraphs (A) through (C) and (D)(ii) of paragraph (4) shall only apply to—

(A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or

(B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.

(6) FAILURE TO SUPERVISE.—

(A) IN GENERAL.—The Board may impose sanctions under this section on a registered accounting firm or upon the supervisory personnel of such firm, if the Board finds that—

(i) the firm has failed reasonably to supervise an associated person, either as required by the rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under this Act, or professional standards; and

(ii) such associated person commits a violation of this Act, or any of such rules, laws, or standards.

(B) RULE OF CONSTRUCTION.—No associated person of a registered public accounting firm shall be deemed to have failed reasonably to supervise any other person for purposes of subparagraph (A), if—

(i) there have been established in and for that firm procedures, and a system for applying such procedures, that comply with applicable rules of the Board and that would reasonably be expected to prevent and detect any such violation by such associated person; and

(ii) such person has reasonably discharged the duties and obligations incumbent upon that person by reason of such procedures and system, and had no reasonable cause to believe that such procedures and system were not being complied with.

(7) EFFECT OF SUSPENSION.—

(A) ASSOCIATION WITH A PUBLIC ACCOUNTING FIRM.—It shall be unlawful for any person that is suspended or barred from being associated with a registered public accounting firm under this subsection willfully to become or remain associated with any registered public accounting firm, or for any registered public accounting firm that knew, or, in the exercise of reasonable care should have known, of the suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(B) ASSOCIATION WITH AN ISSUER.—It shall be unlawful for any person that is suspended or barred from being associated with an issuer under this subsection willfully to become or remain associated with any issuer in an accountancy or a financial management capacity, and for any issuer that knew, or in the exercise of reasonable

care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(d) REPORTING OF SANCTIONS.—

(1) RECIPIENTS.—If the Board imposes a disciplinary sanction, in accordance with this section, the Board shall report the sanction to—

(A) the Commission;

(B) any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified; and

(C) the public (once any stay on the imposition of such sanction has been lifted).

(2) CONTENTS.—The information reported under paragraph (1) shall include—

(A) the name of the sanctioned person;

(B) a description of the sanction and the basis for its imposition; and

(C) such other information as the Board deems appropriate.

(e) STAY OF SANCTIONS.—

(1) IN GENERAL.—Application to the Commission for review, or the institution by the Commission of review, of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders (summarily or after notice and opportunity for hearing on the question of a stay, which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that no such stay shall continue to operate.

(2) EXPEDITED PROCEDURES.—The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection.

15 USC 7216.

SEC. 106. FOREIGN PUBLIC ACCOUNTING FIRMS.

(a) APPLICABILITY TO CERTAIN FOREIGN FIRMS.—

(1) IN GENERAL.—Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to this Act and the rules of the Board and the Commission issued under this Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State, except that registration pursuant to section 102 shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) BOARD AUTHORITY.—The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm

(or firms) for purposes of registration under, and oversight by the Board in accordance with, this title.

(b) PRODUCTION OF AUDIT WORKPAPERS.—

(1) CONSENT BY FOREIGN FIRMS.—If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented—

(A) to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report; and

(B) to be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for production of such workpapers.

(2) CONSENT BY DOMESTIC FIRMS.—A registered public accounting firm that relies upon the opinion of a foreign public accounting firm, as described in paragraph (1), shall be deemed—

(A) to have consented to supplying the audit workpapers of that foreign public accounting firm in response to a request for production by the Board or the Commission; and

(B) to have secured the agreement of that foreign public accounting firm to such production, as a condition of its reliance on the opinion of that foreign public accounting firm.

(c) EXEMPTION AUTHORITY.—The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) DEFINITION.—In this section, the term "foreign public accounting firm" means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

SEC. 107. COMMISSION OVERSIGHT OF THE BOARD. 15 USC 7217.

(a) GENERAL OVERSIGHT RESPONSIBILITY.—The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 17(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(a)(1)), and of section 17(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(b)(1)) shall apply to the Board as fully as if the Board were a "registered securities association" for purposes of those sections 17(a)(1) and 17(b)(1).

(b) RULES OF THE BOARD.—

(1) DEFINITION.—In this section, the term "proposed rule" means any proposed rule of the Board, and any modification of any such rule.

(2) PRIOR APPROVAL REQUIRED.—No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 103(a)(3)(B) with respect to initial or transitional standards.

(3) APPROVAL CRITERIA.—The Commission shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors.

(4) PROPOSED RULE PROCEDURES.—The provisions of paragraphs (1) through (3) of section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section 19(b), except that, for purposes of this paragraph—

(A) the phrase "consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization" in section 19(b)(2) of that Act shall be deemed to read "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors"; and

(B) the phrase "otherwise in furtherance of the purposes of this title" in section 19(b)(3)(C) of that Act shall be deemed to read "otherwise in furtherance of the purposes of title I of the Sarbanes-Oxley Act of 2002".

(5) COMMISSION AUTHORITY TO AMEND RULES OF THE BOARD.—The provisions of section 19(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(c)) shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a "registered securities association" for purposes of that section 19(c), except that the phrase "to conform its rules to the requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title" in section 19(c) of that Act shall, for purposes of this paragraph, be deemed to read "to assure the fair administration of the Public Company Accounting Oversight Board, conform the rules promulgated by that Board to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board".

(c) COMMISSION REVIEW OF DISCIPLINARY ACTION TAKEN BY THE BOARD.—

(1) NOTICE OF SANCTION.—The Board shall promptly file notice with the Commission of any final sanction on any registered public accounting firm or on any associated person thereof, in such form and containing such information as the Commission, by rule, may prescribe.

(2) REVIEW OF SANCTIONS.—The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d)(2) and (e)(1)) shall govern the review by the Commission of final disciplinary sanctions imposed by the Board (including sanctions imposed under section 105(b)(3) of this Act for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1), except that, for purposes of this paragraph—

(A) section 105(e) of this Act (rather than that section 19(d)(2)) shall govern the extent to which application for, or institution by the Commission on its own motion of, review of any disciplinary action of the Board operates as a stay of such action;

(B) references in that section 19(e)(1) to "members" of such an organization shall be deemed to be references to registered public accounting firms;

(C) the phrase "consistent with the purposes of this title" in that section 19(e)(1) shall be deemed to read "consistent with the purposes of this title and title I of the Sarbanes-Oxley Act of 2002";

(D) references to rules of the Municipal Securities Rulemaking Board in that section 19(e)(1) shall not apply; and

(E) the reference to section 19(e)(2) of the Securities Exchange Act of 1934 shall refer instead to section 107(c)(3) of this Act.

(3) COMMISSION MODIFICATION AUTHORITY.—The Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof, if the Commission, having due regard for the public interest and the protection of investors, finds, after a proceeding in accordance with this subsection, that the sanction—

(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or

(B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.

(d) CENSURE OF THE BOARD; OTHER SANCTIONS.—

(1) RESCISSION OF BOARD AUTHORITY.—The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.

(2) CENSURE OF THE BOARD; LIMITATIONS.—The Commission may, by order, as it determines necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, censure or impose limitations upon the activities, functions, and operations of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that the Board—

(A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws; or

(B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof.

(3) CENSURE OF BOARD MEMBERS; REMOVAL FROM OFFICE.—The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove

from office or censure any member of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that such member—

(A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;

(B) has willfully abused the authority of that member; or

(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

15 USC 7218.

SEC. 108. ACCOUNTING STANDARDS.

(a) AMENDMENT TO SECURITIES ACT OF 1933.—Section 19 of the Securities Act of 1933 (15 U.S.C. 77s) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) RECOGNITION OF ACCOUNTING STANDARDS.—

"(1) IN GENERAL.—In carrying out its authority under subsection (a) and under section 13(b) of the Securities Exchange Act of 1934, the Commission may recognize, as 'generally accepted' for purposes of the securities laws, any accounting principles established by a standard setting body—

"(A) that—

"(i) is organized as a private entity;

"(ii) has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest, the majority of whom are not, concurrent with their service on such board, and have not been during the 2-year period preceding such service, associated persons of any registered public accounting firm;

"(iii) is funded as provided in section 109 of the Sarbanes-Oxley Act of 2002;

"(iv) has adopted procedures to ensure prompt consideration, by majority vote of its members, of changes to accounting principles necessary to reflect emerging accounting issues and changing business practices; and

"(v) considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors; and

"(B) that the Commission determines has the capacity to assist the Commission in fulfilling the requirements of subsection (a) and section 13(b) of the Securities Exchange Act of 1934, because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws.

"(2) ANNUAL REPORT.—A standard setting body described in paragraph (1) shall submit an annual report to the Commission and the public, containing audited financial statements of that standard setting body.".

(b) COMMISSION AUTHORITY.—The Commission shall promulgate such rules and regulations to carry out section 19(b) of the Securities Act of 1933, as added by this section, as it deems necessary or appropriate in the public interest or for the protection of investors. Regulations.

(c) NO EFFECT ON COMMISSION POWERS.—Nothing in this Act, including this section and the amendment made by this section, shall be construed to impair or limit the authority of the Commission to establish accounting principles or standards for purposes of enforcement of the securities laws.

(d) STUDY AND REPORT ON ADOPTING PRINCIPLES-BASED ACCOUNTING.—

(1) STUDY.—

(A) IN GENERAL.—The Commission shall conduct a study on the adoption by the United States financial reporting system of a principles-based accounting system.

(B) STUDY TOPICS.—The study required by subparagraph (A) shall include an examination of—

(i) the extent to which principles-based accounting and financial reporting exists in the United States;

(ii) the length of time required for change from a rules-based to a principles-based financial reporting system;

(iii) the feasibility of and proposed methods by which a principles-based system may be implemented; and

(iv) a thorough economic analysis of the implementation of a principles-based system.

(2) REPORT.—Not later than 1 year after the date of enactment of this Act, the Commission shall submit a report on the results of the study required by paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

SEC. 109. FUNDING. 15 USC 7219.

(a) IN GENERAL.—The Board, and the standard setting body designated pursuant to section 19(b) of the Securities Act of 1933, as amended by section 108, shall be funded as provided in this section.

(b) ANNUAL BUDGETS.—The Board and the standard setting body referred to in subsection (a) shall each establish a budget for each fiscal year, which shall be reviewed and approved according to their respective internal procedures not less than 1 month prior to the commencement of the fiscal year to which the budget pertains (or at the beginning of the Board's first fiscal year, which may be a short fiscal year). The budget of the Board shall be subject to approval by the Commission. The budget for the first fiscal year of the Board shall be prepared and approved promptly following the appointment of the initial five Board members, to permit action by the Board of the organizational tasks contemplated by section 101(d).

(c) SOURCES AND USES OF FUNDS.—

(1) RECOVERABLE BUDGET EXPENSES.—The budget of the Board (reduced by any registration or annual fees received under section 102(e) for the year preceding the year for which the budget is being computed), and all of the budget of the standard setting body referred to in subsection (a), for each fiscal year of each of those 2 entities, shall be payable from annual accounting support fees, in accordance with subsections (d) and (e). Accounting support fees and other receipts of the Board and of such standard-setting body shall not be considered public monies of the United States.

(2) FUNDS GENERATED FROM THE COLLECTION OF MONETARY PENALTIES.—Subject to the availability in advance in an appropriations Act, and notwithstanding subsection (i), all funds collected by the Board as a result of the assessment of monetary penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, which program is to be administered by the Board or by an entity or agent identified by the Board.

(d) ANNUAL ACCOUNTING SUPPORT FEE FOR THE BOARD.—

(1) ESTABLISHMENT OF FEE.—The Board shall establish, with the approval of the Commission, a reasonable annual accounting support fee (or a formula for the computation thereof), as may be necessary or appropriate to establish and maintain the Board. Such fee may also cover costs incurred in the Board's first fiscal year (which may be a short fiscal year), or may be levied separately with respect to such short fiscal year.

(2) ASSESSMENTS.—The rules of the Board under paragraph (1) shall provide for the equitable allocation, assessment, and collection by the Board (or an agent appointed by the Board) of the fee established under paragraph (1), among issuers, in accordance with subsection (g), allowing for differentiation among classes of issuers, as appropriate.

(e) ANNUAL ACCOUNTING SUPPORT FEE FOR STANDARD SETTING BODY.—The annual accounting support fee for the standard setting body referred to in subsection (a)—

(1) shall be allocated in accordance with subsection (g), and assessed and collected against each issuer, on behalf of the standard setting body, by 1 or more appropriate designated collection agents, as may be necessary or appropriate to pay for the budget and provide for the expenses of that standard setting body, and to provide for an independent, stable source of funding for such body, subject to review by the Commission; and

(2) may differentiate among different classes of issuers.

(f) LIMITATION ON FEE.—The amount of fees collected under this section for a fiscal year on behalf of the Board or the standards setting body, as the case may be, shall not exceed the recoverable budget expenses of the Board or body, respectively (which may include operating, capital, and accrued items), referred to in subsection (c)(1).

(g) ALLOCATION OF ACCOUNTING SUPPORT FEES AMONG ISSUERS.—Any amount due from issuers (or a particular class of issuers) under this section to fund the budget of the Board or the standard setting body referred to in subsection (a) shall be allocated among and payable by each issuer (or each issuer in

a particular class, as applicable) in an amount equal to the total of such amount, multiplied by a fraction—

(1) the numerator of which is the average monthly equity market capitalization of the issuer for the 12-month period immediately preceding the beginning of the fiscal year to which such budget relates; and

(2) the denominator of which is the average monthly equity market capitalization of all such issuers for such 12-month period.

(h) CONFORMING AMENDMENTS.—Section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2)) is amended—

(1) in subparagraph (A), by striking "and" at the end; and

(2) in subparagraph (B), by striking the period at the end and inserting the following: "; and

"(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Sarbanes-Oxley Act of 2002.".

(i) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to render either the Board, the standard setting body referred to in subsection (a), or both, subject to procedures in Congress to authorize or appropriate public funds, or to prevent such organization from utilizing additional sources of revenue for its activities, such as earnings from publication sales, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual and perceived independence of such organization.

(j) START-UP EXPENSES OF THE BOARD.—From the unexpended balances of the appropriations to the Commission for fiscal year 2003, the Secretary of the Treasury is authorized to advance to the Board not to exceed the amount necessary to cover the expenses of the Board during its first fiscal year (which may be a short fiscal year).

TITLE II—AUDITOR INDEPENDENCE

SEC. 201. SERVICES OUTSIDE THE SCOPE OF PRACTICE OF AUDITORS.

(a) PROHIBITED ACTIVITIES.—Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1) is amended by adding at the end the following:

"(g) PROHIBITED ACTIVITIES.—Except as provided in subsection (h), it shall be unlawful for a registered public accounting firm (and any associated person of that firm, to the extent determined appropriate by the Commission) that performs for any issuer any audit required by this title or the rules of the Commission under this title or, beginning 180 days after the date of commencement of the operations of the Public Company Accounting Oversight Board established under section 101 of the Sarbanes-Oxley Act of 2002 (in this section referred to as the 'Board'), the rules of the Board, to provide to that issuer, contemporaneously with the audit, any non-audit service, including—

"(1) bookkeeping or other services related to the accounting records or financial statements of the audit client;

"(2) financial information systems design and implementation;

"(3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;

"(4) actuarial services;

"(5) internal audit outsourcing services;

"(6) management functions or human resources;

"(7) broker or dealer, investment adviser, or investment banking services;

"(8) legal services and expert services unrelated to the audit; and

"(9) any other service that the Board determines, by regulation, is impermissible.

"(h) PREAPPROVAL REQUIRED FOR NON-AUDIT SERVICES.—A registered public accounting firm may engage in any non-audit service, including tax services, that is not described in any of paragraphs (1) through (9) of subsection (g) for an audit client, only if the activity is approved in advance by the audit committee of the issuer, in accordance with subsection (i).".

15 USC 7231.

(b) EXEMPTION AUTHORITY.—The Board may, on a case by case basis, exempt any person, issuer, public accounting firm, or transaction from the prohibition on the provision of services under section 10A(g) of the Securities Exchange Act of 1934 (as added by this section), to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors, and subject to review by the Commission in the same manner as for rules of the Board under section 107.

SEC. 202. PREAPPROVAL REQUIREMENTS.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(i) PREAPPROVAL REQUIREMENTS.—

"(1) IN GENERAL.—

"(A) AUDIT COMMITTEE ACTION.—All auditing services (which may entail providing comfort letters in connection with securities underwritings or statutory audits required for insurance companies for purposes of State law) and non-audit services, other than as provided in subparagraph (B), provided to an issuer by the auditor of the issuer shall be preapproved by the audit committee of the issuer.

"(B) DE MINIMUS EXCEPTION.—The preapproval requirement under subparagraph (A) is waived with respect to the provision of non-audit services for an issuer, if—

"(i) the aggregate amount of all such non-audit services provided to the issuer constitutes not more than 5 percent of the total amount of revenues paid by the issuer to its auditor during the fiscal year in which the nonaudit services are provided;

"(ii) such services were not recognized by the issuer at the time of the engagement to be non-audit services; and

"(iii) such services are promptly brought to the attention of the audit committee of the issuer and approved prior to the completion of the audit by the audit committee or by 1 or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.

"(2) DISCLOSURE TO INVESTORS.—Approval by an audit committee of an issuer under this subsection of a non-audit service to be performed by the auditor of the issuer shall be disclosed to investors in periodic reports required by section 13(a).

"(3) DELEGATION AUTHORITY.—The audit committee of an issuer may delegate to 1 or more designated members of the audit committee who are independent directors of the board of directors, the authority to grant preapprovals required by this subsection. The decisions of any member to whom authority is delegated under this paragraph to preapprove an activity under this subsection shall be presented to the full audit committee at each of its scheduled meetings.

"(4) APPROVAL OF AUDIT SERVICES FOR OTHER PURPOSES.—In carrying out its duties under subsection (m)(2), if the audit committee of an issuer approves an audit service within the scope of the engagement of the auditor, such audit service shall be deemed to have been preapproved for purposes of this subsection.".

SEC. 203. AUDIT PARTNER ROTATION.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(j) AUDIT PARTNER ROTATION.—It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the 5 previous fiscal years of that issuer.".

SEC. 204. AUDITOR REPORTS TO AUDIT COMMITTEES.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(k) REPORTS TO AUDIT COMMITTEES.—Each registered public accounting firm that performs for any issuer any audit required by this title shall timely report to the audit committee of the issuer—

"(1) all critical accounting policies and practices to be used;

"(2) all alternative treatments of financial information within generally accepted accounting principles that have been discussed with management officials of the issuer, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and

"(3) other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences.".

SEC. 205. CONFORMING AMENDMENTS.

(a) DEFINITIONS.—Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is amended by adding at the end the following:

"(58) AUDIT COMMITTEE.—The term 'audit committee' means—

"(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the

purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

"(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

"(59) REGISTERED PUBLIC ACCOUNTING FIRM.—The term 'registered public accounting firm' has the same meaning as in section 2 of the Sarbanes-Oxley Act of 2002.".

(b) AUDITOR REQUIREMENTS.—Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1) is amended—

(1) by striking "an independent public accountant" each place that term appears and inserting "a registered public accounting firm";

(2) by striking "the independent public accountant" each place that term appears and inserting "the registered public accounting firm";

(3) in subsection (c), by striking "No independent public accountant" and inserting "No registered public accounting firm"; and

(4) in subsection (b)—

(A) by striking "the accountant" each place that term appears and inserting "the firm";

(B) by striking "such accountant" each place that term appears and inserting "such firm"; and

(C) in paragraph (4), by striking "the accountant's report" and inserting "the report of the firm".

(c) OTHER REFERENCES.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended—

(1) in section 12(b)(1) (15 U.S.C. 78l(b)(1)), by striking "independent public accountants" each place that term appears and inserting "a registered public accounting firm"; and

(2) in subsections (e) and (i) of section 17 (15 U.S.C. 78q), by striking "an independent public accountant" each place that term appears and inserting "a registered public accounting firm".

(d) CONFORMING AMENDMENT.—Section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78k(f)) is amended— 15 USC 78j–1.

(1) by striking "DEFINITION" and inserting "DEFINITIONS"; and

(2) by adding at the end the following: "As used in this section, the term 'issuer' means an issuer (as defined in section 3), the securities of which are registered under section 12, or that is required to file reports pursuant to section 15(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.".

SEC. 206. CONFLICTS OF INTEREST.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(l) CONFLICTS OF INTEREST.—It shall be unlawful for a registered public accounting firm to perform for an issuer any audit service required by this title, if a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in

any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit.".

SEC. 207. STUDY OF MANDATORY ROTATION OF REGISTERED PUBLIC ACCOUNTING FIRMS. 15 USC 7232.

(a) STUDY AND REVIEW REQUIRED.—The Comptroller General of the United States shall conduct a study and review of the potential effects of requiring the mandatory rotation of registered public accounting firms.

(b) REPORT REQUIRED.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the results of the study and review required by this section. Deadline.

(c) DEFINITION.—For purposes of this section, the term "mandatory rotation" refers to the imposition of a limit on the period of years in which a particular registered public accounting firm may be the auditor of record for a particular issuer.

SEC. 208. COMMISSION AUTHORITY. 15 USC 7233.

(a) COMMISSION REGULATIONS.—Not later than 180 days after the date of enactment of this Act, the Commission shall issue final regulations to carry out each of subsections (g) through (l) of section 10A of the Securities Exchange Act of 1934, as added by this title. Deadline.

(b) AUDITOR INDEPENDENCE.—It shall be unlawful for any registered public accounting firm (or an associated person thereof, as applicable) to prepare or issue any audit report with respect to any issuer, if the firm or associated person engages in any activity with respect to that issuer prohibited by any of subsections (g) through (l) of section 10A of the Securities Exchange Act of 1934, as added by this title, or any rule or regulation of the Commission or of the Board issued thereunder.

SEC. 209. CONSIDERATIONS BY APPROPRIATE STATE REGULATORY AUTHORITIES. 15 USC 7234.

In supervising nonregistered public accounting firms and their associated persons, appropriate State regulatory authorities should make an independent determination of the proper standards applicable, particularly taking into consideration the size and nature of the business of the accounting firms they supervise and the size and nature of the business of the clients of those firms. The standards applied by the Board under this Act should not be presumed to be applicable for purposes of this section for small and medium sized nonregistered public accounting firms.

TITLE III—CORPORATE RESPONSIBILITY

SEC. 301. PUBLIC COMPANY AUDIT COMMITTEES.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78f) is amended by adding at the end the following: 15 USC 78j–1.

"(m) STANDARDS RELATING TO AUDIT COMMITTEES.—

"(1) COMMISSION RULES.—

Deadline.

"(A) IN GENERAL.—Effective not later than 270 days after the date of enactment of this subsection, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6).

"(B) OPPORTUNITY TO CURE DEFECTS.—The rules of the Commission under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition under subparagraph (A), before the imposition of such prohibition.

"(2) RESPONSIBILITIES RELATING TO REGISTERED PUBLIC ACCOUNTING FIRMS.—The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

"(3) INDEPENDENCE.—

"(A) IN GENERAL.—Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.

"(B) CRITERIA.—In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—

"(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

"(ii) be an affiliated person of the issuer or any subsidiary thereof.

"(C) EXEMPTION AUTHORITY.—The Commission may exempt from the requirements of subparagraph (B) a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

"(4) COMPLAINTS.—Each audit committee shall establish procedures for—

"(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

"(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

"(5) AUTHORITY TO ENGAGE ADVISERS.—Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

"(6) FUNDING.—Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation—

"(A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and

"(B) to any advisers employed by the audit committee under paragraph (5).".

SEC. 302. CORPORATE RESPONSIBILITY FOR FINANCIAL REPORTS. 15 USC 7241.

(a) REGULATIONS REQUIRED.—The Commission shall, by rule, require, for each company filing periodic reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)), that the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of such Act that—

(1) the signing officer has reviewed the report;

(2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;

(3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report;

(4) the signing officers—

(A) are responsible for establishing and maintaining internal controls;

(B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared;

(C) have evaluated the effectiveness of the issuer's internal controls as of a date within 90 days prior to the report; and

(D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;

(5) the signing officers have disclosed to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)—

(A) all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize, and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls; and

(B) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and

(6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

(b) FOREIGN REINCORPORATIONS HAVE NO EFFECT.—Nothing in this section 302 shall be interpreted or applied in any way to allow any issuer to lessen the legal force of the statement required under this section 302, by an issuer having reincorporated or having engaged in any other transaction that resulted in the transfer of the corporate domicile or offices of the issuer from inside the United States to outside of the United States.

(c) DEADLINE.—The rules required by subsection (a) shall be effective not later than 30 days after the date of enactment of this Act.

15 USC 7242.

SEC. 303. IMPROPER INFLUENCE ON CONDUCT OF AUDITS.

(a) RULES TO PROHIBIT.—It shall be unlawful, in contravention of such rules or regulations as the Commission shall prescribe as necessary and appropriate in the public interest or for the protection of investors, for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

(b) ENFORCEMENT.—In any civil proceeding, the Commission shall have exclusive authority to enforce this section and any rule or regulation issued under this section.

(c) NO PREEMPTION OF OTHER LAW.—The provisions of subsection (a) shall be in addition to, and shall not supersede or preempt, any other provision of law or any rule or regulation issued thereunder.

(d) DEADLINE FOR RULEMAKING.—The Commission shall—

(1) propose the rules or regulations required by this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules or regulations required by this section, not later than 270 days after that date of enactment.

15 USC 7243.

SEC. 304. FORFEITURE OF CERTAIN BONUSES AND PROFITS.

(a) ADDITIONAL COMPENSATION PRIOR TO NONCOMPLIANCE WITH COMMISSION FINANCIAL REPORTING REQUIREMENTS.—If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for—

(1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and

(2) any profits realized from the sale of securities of the issuer during that 12-month period.

(b) COMMISSION EXEMPTION AUTHORITY.—The Commission may exempt any person from the application of subsection (a), as it deems necessary and appropriate.

SEC. 305. OFFICER AND DIRECTOR BARS AND PENALTIES.

(a) UNFITNESS STANDARD.—

(1) SECURITIES EXCHANGE ACT OF 1934.—Section 21(d)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)) is amended by striking "substantial unfitness" and inserting "unfitness".

(2) SECURITIES ACT OF 1933.—Section 20(e) of the Securities Act of 1933 (15 U.S.C. 77t(e)) is amended by striking "substantial unfitness" and inserting "unfitness".

(b) EQUITABLE RELIEF.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)) is amended by adding at the end the following:

"(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.".

SEC. 306. INSIDER TRADES DURING PENSION FUND BLACKOUT PERIODS. 15 USC 7244.

(a) PROHIBITION OF INSIDER TRADING DURING PENSION FUND BLACKOUT PERIODS.—

(1) IN GENERAL.—Except to the extent otherwise provided by rule of the Commission pursuant to paragraph (3), it shall be unlawful for any director or executive officer of an issuer of any equity security (other than an exempted security), directly or indirectly, to purchase, sell, or otherwise acquire or transfer any equity security of the issuer (other than an exempted security) during any blackout period with respect to such equity security if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer.

(2) REMEDY.—

(A) IN GENERAL.—Any profit realized by a director or executive officer referred to in paragraph (1) from any purchase, sale, or other acquisition or transfer in violation of this subsection shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such director or executive officer in entering into the transaction.

(B) ACTIONS TO RECOVER PROFITS.—An action to recover profits in accordance with this subsection may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit shall be brought more than 2 years after the date on which such profit was realized.

(3) RULEMAKING AUTHORIZED.—The Commission shall, in consultation with the Secretary of Labor, issue rules to clarify the application of this subsection and to prevent evasion thereof. Such rules shall provide for the application of the requirements of paragraph (1) with respect to entities treated as a single employer with respect to an issuer under section 414(b), (c), (m), or (o) of the Internal Revenue Code of 1986 to the extent necessary to clarify the application of such requirements and to prevent evasion thereof. Such rules may also provide for

appropriate exceptions from the requirements of this subsection, including exceptions for purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election.

(4) BLACKOUT PERIOD.—For purposes of this subsection, the term "blackout period", with respect to the equity securities of any issuer—

(A) means any period of more than 3 consecutive business days during which the ability of not fewer than 50 percent of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan; and

(B) does not include, under regulations which shall be prescribed by the Commission—

(i) a regularly scheduled period in which the participants and beneficiaries may not purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer, if such period is—

(I) incorporated into the individual account plan; and

(II) timely disclosed to employees before becoming participants under the individual account plan or as a subsequent amendment to the plan; or

(ii) any suspension described in subparagraph (A) that is imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor.

(5) INDIVIDUAL ACCOUNT PLAN.—For purposes of this subsection, the term "individual account plan" has the meaning provided in section 3(34) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(34), except that such term shall not include a one-participant retirement plan (within the meaning of section 101(i)(8)(B) of such Act (29 U.S.C. 1021(i)(8)(B))).

(6) NOTICE TO DIRECTORS, EXECUTIVE OFFICERS, AND THE COMMISSION.—In any case in which a director or executive officer is subject to the requirements of this subsection in connection with a blackout period (as defined in paragraph (4)) with respect to any equity securities, the issuer of such equity securities shall timely notify such director or officer and the Securities and Exchange Commission of such blackout period.

(b) NOTICE REQUIREMENTS TO PARTICIPANTS AND BENEFICIARIES UNDER ERISA.—

(1) IN GENERAL.—Section 101 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021) is amended by redesignating the second subsection (h) as subsection (j), and by inserting after the first subsection (h) the following new subsection:

"(i) NOTICE OF BLACKOUT PERIODS TO PARTICIPANT OR BENEFICIARY UNDER INDIVIDUAL ACCOUNT PLAN.—

"(1) DUTIES OF PLAN ADMINISTRATOR.—In advance of the commencement of any blackout period with respect to an individual account plan, the plan administrator shall notify the plan participants and beneficiaries who are affected by such action in accordance with this subsection.

"(2) NOTICE REQUIREMENTS.—

"(A) IN GENERAL.—The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include—

"(i) the reasons for the blackout period,

"(ii) an identification of the investments and other rights affected,

"(iii) the expected beginning date and length of the blackout period,

"(iv) in the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period, and

"(v) such other matters as the Secretary may require by regulation.

"(B) NOTICE TO PARTICIPANTS AND BENEFICIARIES.—Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies at least 30 days in advance of the blackout period.

"(C) EXCEPTION TO 30-DAY NOTICE REQUIREMENT.—In any case in which—

"(i) a deferral of the blackout period would violate the requirements of subparagraph (A) or (B) of section 404(a)(1), and a fiduciary of the plan reasonably so determines in writing, or

"(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing,

subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies as soon as reasonably possible under the circumstances unless such a notice in advance of the termination of the blackout period is impracticable.

"(D) WRITTEN NOTICE.—The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

"(E) NOTICE TO ISSUERS OF EMPLOYER SECURITIES SUBJECT TO BLACKOUT PERIOD.—In the case of any blackout period in connection with an individual account plan, the plan administrator shall provide timely notice of such

blackout period to the issuer of any employer securities subject to such blackout period.

"(3) EXCEPTION FOR BLACKOUT PERIODS WITH LIMITED APPLICABILITY.—In any case in which the blackout period applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction, the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be treated as met if the notice required under paragraph (1) is provided to such participants or beneficiaries to whom the blackout period applies as soon as reasonably practicable.

"(4) CHANGES IN LENGTH OF BLACKOUT PERIOD.—If, following the furnishing of the notice pursuant to this subsection, there is a change in the beginning date or length of the blackout period (specified in such notice pursuant to paragraph (2)(A)(iii)), the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable. In relation to the extended blackout period, such notice shall meet the requirements of paragraph (2)(D) and shall specify any material change in the matters referred to in clauses (i) through (v) of paragraph (2)(A).

"(5) REGULATORY EXCEPTIONS.—The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries.

"(6) GUIDANCE AND MODEL NOTICES.—The Secretary shall issue guidance and model notices which meet the requirements of this subsection.

"(7) BLACKOUT PERIOD.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'blackout period' means, in connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than 3 consecutive business days.

"(B) EXCLUSIONS.—The term 'blackout period' does not include a suspension, limitation, or restriction—

"(i) which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934),

"(ii) which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto, or

"(iii) which applies only to 1 or more individuals, each of whom is the participant, an alternate payee

(as defined in section 206(d)(3)(K)), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i)).

"(8) INDIVIDUAL ACCOUNT PLAN.—

"(A) IN GENERAL.—For purposes of this subsection, the term 'individual account plan' shall have the meaning provided such term in section 3(34), except that such term shall not include a one-participant retirement plan.

"(B) ONE-PARTICIPANT RETIREMENT PLAN.—For purposes of subparagraph (A), the term 'one-participant retirement plan' means a retirement plan that—

"(i) on the first day of the plan year—

"(I) covered only the employer (and the employer's spouse) and the employer owned the entire business (whether or not incorporated), or

"(II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986)),

"(ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business,

"(iii) does not provide benefits to anyone except the employer (and the employer's spouse) or the partners (and their spouses),

"(iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and

"(v) does not cover a business that leases employees.".

(2) ISSUANCE OF INITIAL GUIDANCE AND MODEL NOTICE.— Deadlines.
The Secretary of Labor shall issue initial guidance and a model notice pursuant to section 101(i)(6) of the Employee Retirement Income Security Act of 1974 (as added by this subsection) not later than January 1, 2003. Not later than 75 days after Regulations.
the date of the enactment of this Act, the Secretary shall promulgate interim final rules necessary to carry out the amendments made by this subsection.

(3) CIVIL PENALTIES FOR FAILURE TO PROVIDE NOTICE.—
Section 502 of such Act (29 U.S.C. 1132) is amended—

(A) in subsection (a)(6), by striking "(5), or (6)" and inserting "(5), (6), or (7)";

(B) by redesignating paragraph (7) of subsection (c) as paragraph (8); and

(C) by inserting after paragraph (6) of subsection (c) the following new paragraph:

"(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i). For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.".

(3) PLAN AMENDMENTS.—If any amendment made by this subsection requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after the effective date of this section, if—

(A) during the period after such amendment made by this subsection takes effect and before such first plan year, the plan is operated in good faith compliance with the requirements of such amendment made by this subsection, and

(B) such plan amendment applies retroactively to the period after such amendment made by this subsection takes effect and before such first plan year.

(c) EFFECTIVE DATE.—The provisions of this section (including the amendments made thereby) shall take effect 180 days after the date of the enactment of this Act. Good faith compliance with the requirements of such provisions in advance of the issuance of applicable regulations thereunder shall be treated as compliance with such provisions.

15 USC 7245.

SEC. 307. RULES OF PROFESSIONAL RESPONSIBILITY FOR ATTORNEYS.

Deadline.

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 USC 7246.

SEC. 308. FAIR FUNDS FOR INVESTORS.

(a) CIVIL PENALTIES ADDED TO DISGORGEMENT FUNDS FOR THE RELIEF OF VICTIMS.—If in any judicial or administrative action brought by the Commission under the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

(b) ACCEPTANCE OF ADDITIONAL DONATIONS.—The Commission is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, to the United

States for a disgorgement fund described in subsection (a). Such gifts, bequests, and devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in the disgorgement fund and shall be available for allocation in accordance with subsection (a).

(c) STUDY REQUIRED.—

(1) SUBJECT OF STUDY.—The Commission shall review and analyze—

(A) enforcement actions by the Commission over the five years preceding the date of the enactment of this Act that have included proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors; and

(B) other methods to more efficiently, effectively, and fairly provide restitution to injured investors, including methods to improve the collection rates for civil penalties and disgorgements.

(2) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate within 180 days after of the date of the enactment of this Act, and shall use such findings to revise its rules and regulations as necessary. The report shall include a discussion of regulatory or legislative actions that are recommended or that may be necessary to address concerns identified in the study. Deadline.

(d) CONFORMING AMENDMENTS.—Each of the following provisions is amended by inserting ", except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002" after "Treasury of the United States":

(1) Section 21(d)(3)(C)(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(3)(C)(i)).

(2) Section 21A(d)(1) of such Act (15 U.S.C. 78u-1(d)(1)).

(3) Section 20(d)(3)(A) of the Securities Act of 1933 (15 U.S.C. 77t(d)(3)(A)).

(4) Section 42(e)(3)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(e)(3)(A)).

(5) Section 209(e)(3)(A) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(e)(3)(A)).

(e) DEFINITION.—As used in this section, the term "disgorgement fund" means a fund established in any administrative or judicial proceeding described in subsection (a).

TITLE IV—ENHANCED FINANCIAL DISCLOSURES

SEC. 401. DISCLOSURES IN PERIODIC REPORTS. 15 USC 7261.

(a) DISCLOSURES REQUIRED.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended by adding at the end the following:

"(i) ACCURACY OF FINANCIAL REPORTS.—Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this title and filed with the Commission shall reflect all material correcting adjustments that have been

identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

Deadline. Regulations.

"(j) OFF-BALANCE SHEET TRANSACTIONS.—Not later than 180 days after the date of enactment of the Sarbanes-Oxley Act of 2002, the Commission shall issue final rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.".

Deadline.

(b) COMMISSION RULES ON PRO FORMA FIGURES.—Not later than 180 days after the date of enactment of the Sarbanes-Oxley Act fo 2002, the Commission shall issue final rules providing that pro forma financial information included in any periodic or other report filed with the Commission pursuant to the securities laws, or in any public disclosure or press or other release, shall be presented in a manner that—

(1) does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the pro forma financial information, in light of the circumstances under which it is presented, not misleading; and

(2) reconciles it with the financial condition and results of operations of the issuer under generally accepted accounting principles.

(c) STUDY AND REPORT ON SPECIAL PURPOSE ENTITIES.—

Deadline.

(1) STUDY REQUIRED.—The Commission shall, not later than 1 year after the effective date of adoption of off-balance sheet disclosure rules required by section 13(j) of the Securities Exchange Act of 1934, as added by this section, complete a study of filings by issuers and their disclosures to determine—

(A) the extent of off-balance sheet transactions, including assets, liabilities, leases, losses, and the use of special purpose entities; and

(B) whether generally accepted accounting rules result in financial statements of issuers reflecting the economics of such off-balance sheet transactions to investors in a transparent fashion.

Deadline.

(2) REPORT AND RECOMMENDATIONS.—Not later than 6 months after the date of completion of the study required by paragraph (1), the Commission shall submit a report to the President, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, setting forth—

(A) the amount or an estimate of the amount of off-balance sheet transactions, including assets, liabilities, leases, and losses of, and the use of special purpose entities by, issuers filing periodic reports pursuant to section 13 or 15 of the Securities Exchange Act of 1934;

(B) the extent to which special purpose entities are used to facilitate off-balance sheet transactions;

(C) whether generally accepted accounting principles or the rules of the Commission result in financial statements of issuers reflecting the economics of such transactions to investors in a transparent fashion;

(D) whether generally accepted accounting principles specifically result in the consolidation of special purpose entities sponsored by an issuer in cases in which the issuer has the majority of the risks and rewards of the special purpose entity; and

(E) any recommendations of the Commission for improving the transparency and quality of reporting off-balance sheet transactions in the financial statements and disclosures required to be filed by an issuer with the Commission.

SEC. 402. ENHANCED CONFLICT OF INTEREST PROVISIONS.

(a) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following:

"(k) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.—

"(1) IN GENERAL.—It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on the date of enactment of this subsection shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after that date of enactment.

"(2) LIMITATION.—Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 5 of the Home Owners' Loan Act (12 U.S.C. 1464)), consumer credit (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or any extension of credit under an open end credit plan (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or a charge card (as defined in section 127(c)(4)(e) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(e)), or any extension of credit by a broker or dealer registered under section 15 of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 7 of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—

"(A) made or provided in the ordinary course of the consumer credit business of such issuer;

"(B) of a type that is generally made available by such issuer to the public; and

"(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.

"(3) RULE OF CONSTRUCTION FOR CERTAIN LOANS.—Paragraph (1) does not apply to any loan made or maintained

by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b).".

SEC. 403. DISCLOSURES OF TRANSACTIONS INVOLVING MANAGEMENT AND PRINCIPAL STOCKHOLDERS.

(a) AMENDMENT.—Section 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78p) is amended by striking the heading of such section and subsection (a) and inserting the following:

"SEC. 16. DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS.

"(a) DISCLOSURES REQUIRED.—

"(1) DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS REQUIRED TO FILE.—Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 12, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission (and, if such security is registered on a national securities exchange, also with the exchange).

"(2) TIME OF FILING.—The statements required by this subsection shall be filed—

"(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g);

"(B) within 10 days after he or she becomes such beneficial owner, director, or officer;

"(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note)) involving such equity security, before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

"(3) CONTENTS OF STATEMENTS.—A statement filed—

"(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

"(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing under such subparagraph.

Deadline.

"(4) ELECTRONIC FILING AND AVAILABILITY.—Beginning not later than 1 year after the date of enactment of the Sarbanes-Oxley Act of 2002—

"(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

Deadline.

"(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

"(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.". Deadline.

(b) EFFECTIVE DATE.—The amendment made by this section shall be effective 30 days after the date of the enactment of this Act. 15 USC 78p note.

SEC. 404. MANAGEMENT ASSESSMENT OF INTERNAL CONTROLS. 15 USC 7262.

(a) RULES REQUIRED.—The Commission shall prescribe rules requiring each annual report required by section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) to contain an internal control report, which shall—

(1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and

(2) contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

(b) INTERNAL CONTROL EVALUATION AND REPORTING.—With respect to the internal control assessment required by subsection (a), each registered public accounting firm that prepares or issues the audit report for the issuer shall attest to, and report on, the assessment made by the management of the issuer. An attestation made under this subsection shall be made in accordance with standards for attestation engagements issued or adopted by the Board. Any such attestation shall not be the subject of a separate engagement.

SEC. 405. EXEMPTION. 15 USC 7263.

Nothing in section 401, 402, or 404, the amendments made by those sections, or the rules of the Commission under those sections shall apply to any investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8).

SEC. 406. CODE OF ETHICS FOR SENIOR FINANCIAL OFFICERS. 15 USC 7264.

(a) CODE OF ETHICS DISCLOSURE.—The Commission shall issue rules to require each issuer, together with periodic reports required pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934, to disclose whether or not, and if not, the reason therefor, such issuer has adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions. Regulations.

(b) CHANGES IN CODES OF ETHICS.—The Commission shall revise its regulations concerning matters requiring prompt disclosure on Form 8–K (or any successor thereto) to require the immediate disclosure, by means of the filing of such form, dissemination by the Internet or by other electronic means, by any issuer of any change in or waiver of the code of ethics for senior financial officers. Regulations.

(c) DEFINITION.—In this section, the term "code of ethics" means such standards as are reasonably necessary to promote—

(1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and

(3) compliance with applicable governmental rules and regulations.

(d) DEADLINE FOR RULEMAKING.—The Commission shall—

(1) propose rules to implement this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules to implement this section, not later than 180 days after that date of enactment.

15 USC 7265.

SEC. 407. DISCLOSURE OF AUDIT COMMITTEE FINANCIAL EXPERT.

(a) RULES DEFINING "FINANCIAL EXPERT".—The Commission shall issue rules, as necessary or appropriate in the public interest and consistent with the protection of investors, to require each issuer, together with periodic reports required pursuant to sections 13(a) and 15(d) of the Securities Exchange Act of 1934, to disclose whether or not, and if not, the reasons therefor, the audit committee of that issuer is comprised of at least 1 member who is a financial expert, as such term is defined by the Commission.

(b) CONSIDERATIONS.—In defining the term "financial expert" for purposes of subsection (a), the Commission shall consider whether a person has, through education and experience as a public accountant or auditor or a principal financial officer, comptroller, or principal accounting officer of an issuer, or from a position involving the performance of similar functions—

(1) an understanding of generally accepted accounting principles and financial statements;

(2) experience in—

(A) the preparation or auditing of financial statements of generally comparable issuers; and

(B) the application of such principles in connection with the accounting for estimates, accruals, and reserves;

(3) experience with internal accounting controls; and

(4) an understanding of audit committee functions.

(c) DEADLINE FOR RULEMAKING.—The Commission shall—

(1) propose rules to implement this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules to implement this section, not later than 180 days after that date of enactment.

15 USC 7266.

SEC. 408. ENHANCED REVIEW OF PERIODIC DISCLOSURES BY ISSUERS.

(a) REGULAR AND SYSTEMATIC REVIEW.—The Commission shall review disclosures made by issuers reporting under section 13(a) of the Securities Exchange Act of 1934 (including reports filed on Form 10–K), and which have a class of securities listed on a national securities exchange or traded on an automated quotation facility of a national securities association, on a regular and systematic basis for the protection of investors. Such review shall include a review of an issuer's financial statement.

(b) REVIEW CRITERIA.—For purposes of scheduling the reviews required by subsection (a), the Commission shall consider, among other factors—

(1) issuers that have issued material restatements of financial results;

(2) issuers that experience significant volatility in their stock price as compared to other issuers;

(3) issuers with the largest market capitalization;

(4) emerging companies with disparities in price to earning ratios;

(5) issuers whose operations significantly affect any material sector of the economy; and

(6) any other factors that the Commission may consider relevant.

(c) MINIMUM REVIEW PERIOD.—In no event shall an issuer required to file reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 be reviewed under this section less frequently than once every 3 years.

SEC. 409. REAL TIME ISSUER DISCLOSURES.

Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following:

"(l) REAL TIME ISSUER DISCLOSURES.—Each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.".

TITLE V—ANALYST CONFLICTS OF INTEREST

SEC. 501. TREATMENT OF SECURITIES ANALYSTS BY REGISTERED SECURITIES ASSOCIATIONS AND NATIONAL SECURITIES EXCHANGES.

(a) RULES REGARDING SECURITIES ANALYSTS.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 15C the following new section:

"SEC. 15D. SECURITIES ANALYSTS AND RESEARCH REPORTS.

15 USC 78*o*–6.

"(a) ANALYST PROTECTIONS.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to address conflicts of interest that can arise when securities analysts recommend equity securities in research reports and public appearances, in order to improve the objectivity of research and provide investors with more useful and reliable information, including rules designed—

Deadline.

"(1) to foster greater public confidence in securities research, and to protect the objectivity and independence of securities analysts, by—

"(A) restricting the prepublication clearance or approval of research reports by persons employed by the broker or dealer who are engaged in investment banking activities, or persons not directly responsible for investment research, other than legal or compliance staff;

"(B) limiting the supervision and compensatory evaluation of securities analysts to officials employed by the broker or dealer who are not engaged in investment banking activities; and

"(C) requiring that a broker or dealer and persons employed by a broker or dealer who are involved with investment banking activities may not, directly or indirectly, retaliate against or threaten to retaliate against any securities analyst employed by that broker or dealer or its affiliates as a result of an adverse, negative, or otherwise unfavorable research report that may adversely affect the present or prospective investment banking relationship of the broker or dealer with the issuer that is the subject of the research report, except that such rules may not limit the authority of a broker or dealer to discipline a securities analyst for causes other than such research report in accordance with the policies and procedures of the firm;

"(2) to define periods during which brokers or dealers who have participated, or are to participate, in a public offering of securities as underwriters or dealers should not publish or otherwise distribute research reports relating to such securities or to the issuer of such securities;

"(3) to establish structural and institutional safeguards within registered brokers or dealers to assure that securities analysts are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of those whose involvement in investment banking activities might potentially bias their judgment or supervision; and

"(4) to address such other issues as the Commission, or such association or exchange, determines appropriate.

"(b) DISCLOSURE.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to require each securities analyst to disclose in public appearances, and each registered broker or dealer to disclose in each research report, as applicable, conflicts of interest that are known or should have been known by the securities analyst or the broker or dealer, to exist at the time of the appearance or the date of distribution of the report, including—

"(1) the extent to which the securities analyst has debt or equity investments in the issuer that is the subject of the appearance or research report;

"(2) whether any compensation has been received by the registered broker or dealer, or any affiliate thereof, including the securities analyst, from the issuer that is the subject of the appearance or research report, subject to such exemptions as the Commission may determine appropriate and necessary to prevent disclosure by virtue of this paragraph of material non-public information regarding specific potential future investment banking transactions of such issuer, as is appropriate in the public interest and consistent with the protection of investors;

"(3) whether an issuer, the securities of which are recommended in the appearance or research report, currently is, or during the 1-year period preceding the date of the appearance or date of distribution of the report has been, a client of the registered broker or dealer, and if so, stating the types of services provided to the issuer;

"(4) whether the securities analyst received compensation with respect to a research report, based upon (among any other factors) the investment banking revenues (either generally or specifically earned from the issuer being analyzed) of the registered broker or dealer; and

"(5) such other disclosures of conflicts of interest that are material to investors, research analysts, or the broker or dealer as the Commission, or such association or exchange, determines appropriate.

"(c) DEFINITIONS.—In this section—

"(1) the term 'securities analyst' means any associated person of a registered broker or dealer that is principally responsible for, and any associated person who reports directly or indirectly to a securities analyst in connection with, the preparation of the substance of a research report, whether or not any such person has the job title of 'securities analyst'; and

"(2) the term 'research report' means a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.".

(b) ENFORCEMENT.—Section 21B(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–2(a)) is amended by inserting "15D," before "15B".

(c) COMMISSION AUTHORITY.—The Commission may promulgate and amend its regulations, or direct a registered securities association or national securities exchange to promulgate and amend its rules, to carry out section 15D of the Securities Exchange Act of 1934, as added by this section, as is necessary for the protection of investors and in the public interest.

15 USC 78*o*–6 note.

TITLE VI—COMMISSION RESOURCES AND AUTHORITY

SEC. 601. AUTHORIZATION OF APPROPRIATIONS.

Section 35 of the Securities Exchange Act of 1934 (15 U.S.C. 78kk) is amended to read as follows:

"SEC. 35. AUTHORIZATION OF APPROPRIATIONS.

"In addition to any other funds authorized to be appropriated to the Commission, there are authorized to be appropriated to carry out the functions, powers, and duties of the Commission, $776,000,000 for fiscal year 2003, of which—

"(1) $102,700,000 shall be available to fund additional compensation, including salaries and benefits, as authorized in the Investor and Capital Markets Fee Relief Act (Public Law 107–123; 115 Stat. 2390 et seq.);

"(2) $108,400,000 shall be available for information technology, security enhancements, and recovery and mitigation activities in light of the terrorist attacks of September 11, 2001; and

"(3) $98,000,000 shall be available to add not fewer than an additional 200 qualified professionals to provide enhanced oversight of auditors and audit services required by the Federal securities laws, and to improve Commission investigative and

disciplinary efforts with respect to such auditors and services, as well as for additional professional support staff necessary to strengthen the programs of the Commission involving Full Disclosure and Prevention and Suppression of Fraud, risk management, industry technology review, compliance, inspections, examinations, market regulation, and investment management.".

SEC. 602. APPEARANCE AND PRACTICE BEFORE THE COMMISSION.

The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 4B the following:

15 USC 78d–3.

"SEC. 4C. APPEARANCE AND PRACTICE BEFORE THE COMMISSION.

"(a) AUTHORITY TO CENSURE.—The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter—

"(1) not to possess the requisite qualifications to represent others;

"(2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or

"(3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

"(b) DEFINITION.—With respect to any registered public accounting firm or associated person, for purposes of this section, the term 'improper professional conduct' means—

"(1) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; and

"(2) negligent conduct in the form of—

"(A) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which the registered public accounting firm or associated person knows, or should know, that heightened scrutiny is warranted; or

"(B) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.".

SEC. 603. FEDERAL COURT AUTHORITY TO IMPOSE PENNY STOCK BARS.

(a) SECURITIES EXCHANGE ACT OF 1934.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)), as amended by this Act, is amended by adding at the end the following:

"(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

"(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

"(B) DEFINITION.—For purposes of this paragraph, the term 'person participating in an offering of penny stock' includes

any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.".

(b) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following:

"(g) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

"(1) IN GENERAL.—In any proceeding under subsection (a) against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

"(2) DEFINITION.—For purposes of this subsection, the term 'person participating in an offering of penny stock' includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.".

SEC. 604. QUALIFICATIONS OF ASSOCIATED PERSONS OF BROKERS AND DEALERS.

(a) BROKERS AND DEALERS.—Section 15(b)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended—

(1) by striking subparagraph (F) and inserting the following:

"(F) is subject to any order of the Commission barring or suspending the right of the person to be associated with a broker or dealer;"; and

(2) in subparagraph (G), by striking the period at the end and inserting the following: "; or

"(H) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

"(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

"(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.".

(b) INVESTMENT ADVISERS.—Section 203(e) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e)) is amended—

(1) by striking paragraph (7) and inserting the following:

"(7) is subject to any order of the Commission barring or suspending the right of the person to be associated with an investment adviser;";

(2) in paragraph (8), by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(9) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

"(A) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

"(B) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.".

(c) CONFORMING AMENDMENTS.—

(1) SECURITIES EXCHANGE ACT OF 1934.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended—

(A) in section 3(a)(39)(F) (15 U.S.C. 78c(a)(39)(F))—

(i) by striking "or (G)" and inserting "(H), or (G)"; and

(ii) by inserting ", or is subject to an order or finding," before "enumerated";

(B) in each of section 15(b)(6)(A)(i) (15 U.S.C. 78o(b)(6)(A)(i)), paragraphs (2) and (4) of section 15B(c) (15 U.S.C. 78o–4(c)), and subparagraphs (A) and (C) of section 15C(c)(1) (15 U.S.C. 78o–5(c)(1))—

(i) by striking "or (G)" each place that term appears and inserting "(H), or (G)"; and

(ii) by striking "or omission" each place that term appears, and inserting ", or is subject to an order or finding,"; and

(C) in each of paragraphs (3)(A) and (4)(C) of section 17A(c) (15 U.S.C. 78q–1(c))—

(i) by striking "or (G)" each place that term appears and inserting "(H), or (G)"; and

(ii) by inserting ", or is subject to an order or finding," before "enumerated" each place that term appears.

(2) INVESTMENT ADVISERS ACT OF 1940.—Section 203(f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(f)) is amended—

(A) by striking "or (8)" and inserting "(8), or (9)"; and

(B) by inserting "or (3)" after "paragraph (2)".

TITLE VII—STUDIES AND REPORTS

SEC. 701. GAO STUDY AND REPORT REGARDING CONSOLIDATION OF PUBLIC ACCOUNTING FIRMS.

15 USC 7201 note.

(a) STUDY REQUIRED.—The Comptroller General of the United States shall conduct a study—

(1) to identify—

(A) the factors that have led to the consolidation of public accounting firms since 1989 and the consequent reduction in the number of firms capable of providing audit services to large national and multi-national business organizations that are subject to the securities laws;

(B) the present and future impact of the condition described in subparagraph (A) on capital formation and securities markets, both domestic and international; and

(C) solutions to any problems identified under subparagraph (B), including ways to increase competition and the number of firms capable of providing audit services to large national and multinational business organizations that are subject to the securities laws;

(2) of the problems, if any, faced by business organizations that have resulted from limited competition among public accounting firms, including—

(A) higher costs;

(B) lower quality of services;

(C) impairment of auditor independence; or

(D) lack of choice; and

(3) whether and to what extent Federal or State regulations impede competition among public accounting firms.

(b) CONSULTATION.—In planning and conducting the study under this section, the Comptroller General shall consult with—

(1) the Commission;

(2) the regulatory agencies that perform functions similar to the Commission within the other member countries of the Group of Seven Industrialized Nations;

(3) the Department of Justice; and

(4) any other public or private sector organization that the Comptroller General considers appropriate.

(c) REPORT REQUIRED.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report on the results of the study required by this section to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

Deadline.

SEC. 702. COMMISSION STUDY AND REPORT REGARDING CREDIT RATING AGENCIES.

(a) STUDY REQUIRED.—

(1) IN GENERAL.—The Commission shall conduct a study of the role and function of credit rating agencies in the operation of the securities market.

(2) AREAS OF CONSIDERATION.—The study required by this subsection shall examine—

(A) the role of credit rating agencies in the evaluation of issuers of securities;

(B) the importance of that role to investors and the functioning of the securities markets;

(C) any impediments to the accurate appraisal by credit rating agencies of the financial resources and risks of issuers of securities;

(D) any barriers to entry into the business of acting as a credit rating agency, and any measures needed to remove such barriers;

(E) any measures which may be required to improve the dissemination of information concerning such resources and risks when credit rating agencies announce credit ratings; and

(F) any conflicts of interest in the operation of credit rating agencies and measures to prevent such conflicts or ameliorate the consequences of such conflicts.

Deadline.

(b) REPORT REQUIRED.—The Commission shall submit a report on the study required by subsection (a) to the President, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate not later than 180 days after the date of enactment of this Act.

SEC. 703. STUDY AND REPORT ON VIOLATORS AND VIOLATIONS.

(a) STUDY.—The Commission shall conduct a study to determine, based upon information for the period from January 1, 1998, to December 31, 2001—

(1) the number of securities professionals, defined as public accountants, public accounting firms, investment bankers, investment advisers, brokers, dealers, attorneys, and other securities professionals practicing before the Commission—

(A) who have been found to have aided and abetted a violation of the Federal securities laws, including rules or regulations promulgated thereunder (collectively referred to in this section as "Federal securities laws"), but who have not been sanctioned, disciplined, or otherwise penalized as a primary violator in any administrative action or civil proceeding, including in any settlement of such an action or proceeding (referred to in this section as "aiders and abettors"); and

(B) who have been found to have been primary violators of the Federal securities laws;

(2) a description of the Federal securities laws violations committed by aiders and abettors and by primary violators, including—

(A) the specific provision of the Federal securities laws violated;

(B) the specific sanctions and penalties imposed upon such aiders and abettors and primary violators, including the amount of any monetary penalties assessed upon and collected from such persons;

(C) the occurrence of multiple violations by the same person or persons, either as an aider or abettor or as a primary violator; and

(D) whether, as to each such violator, disciplinary sanctions have been imposed, including any censure, suspension, temporary bar, or permanent bar to practice before the Commission; and

(3) the amount of disgorgement, restitution, or any other fines or payments that the Commission has assessed upon and collected from, aiders and abettors and from primary violators.

(b) REPORT.—A report based upon the study conducted pursuant to subsection (a) shall be submitted to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives not later than 6 months after the date of enactment of this Act.

SEC. 704. STUDY OF ENFORCEMENT ACTIONS.

(a) STUDY REQUIRED.—The Commission shall review and analyze all enforcement actions by the Commission involving violations of reporting requirements imposed under the securities laws, and restatements of financial statements, over the 5-year period preceding the date of enactment of this Act, to identify areas of reporting that are most susceptible to fraud, inappropriate manipulation, or inappropriate earnings management, such as revenue recognition and the accounting treatment of off-balance sheet special purpose entities.

(b) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate, not later than 180 days after the date of enactment of this Act, and shall use such findings to revise its rules and regulations, as necessary. The report shall include a discussion of regulatory or legislative steps that are recommended or that may be necessary to address concerns identified in the study. Deadline.

SEC. 705. STUDY OF INVESTMENT BANKS.

(a) GAO STUDY.—The Comptroller General of the United States shall conduct a study on whether investment banks and financial advisers assisted public companies in manipulating their earnings and obfuscating their true financial condition. The study should address the rule of investment banks and financial advisers—

(1) in the collapse of the Enron Corporation, including with respect to the design and implementation of derivatives transactions, transactions involving special purpose vehicles, and other financial arrangements that may have had the effect of altering the company's reported financial statements in ways that obscured the true financial picture of the company;

(2) in the failure of Global Crossing, including with respect to transactions involving swaps of fiberoptic cable capacity, in the designing transactions that may have had the effect of altering the company's reported financial statements in ways that obscured the true financial picture of the company; and

(3) generally, in creating and marketing transactions which may have been designed solely to enable companies to manipulate revenue streams, obtain loans, or move liabilities off balance sheets without altering the economic and business risks faced by the companies or any other mechanism to obscure a company's financial picture.

(b) REPORT.—The Comptroller General shall report to Congress not later than 180 days after the date of enactment of this Act on the results of the study required by this section. The report shall include a discussion of regulatory or legislative steps that Deadline.

are recommended or that may be necessary to address concerns identified in the study.

Corporate and Criminal Fraud Accountability Act of 2002.

TITLE VIII—CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY

18 USC 1501 note.

SEC. 801. SHORT TITLE.

This title may be cited as the "Corporate and Criminal Fraud Accountability Act of 2002".

SEC. 802. CRIMINAL PENALTIES FOR ALTERING DOCUMENTS.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by adding at the end the following:

"§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

"Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

"§ 1520. Destruction of corporate audit records

"(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.

Regulations.

"(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

"(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

"(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by adding at the end the following new items:

"1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.

"1520. Destruction of corporate audit records.".

SEC. 803. DEBTS NONDISCHARGEABLE IF INCURRED IN VIOLATION OF SECURITIES FRAUD LAWS.

Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (17), by striking "or" after the semicolon;

(2) in paragraph (18), by striking the period at the end and inserting "; or"; and

(3) by adding at the end, the following:

"(19) that—

"(A) is for—

"(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

"(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

"(B) results from—

"(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

"(ii) any settlement agreement entered into by the debtor; or

"(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.".

SEC. 804. STATUTE OF LIMITATIONS FOR SECURITIES FRAUD.

(a) IN GENERAL.—Section 1658 of title 28, United States Code, is amended—

(1) by inserting "(a)" before "Except"; and

(2) by adding at the end the following:

"(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

"(1) 2 years after the discovery of the facts constituting the violation; or

"(2) 5 years after such violation.".

(b) EFFECTIVE DATE.—The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act. 28 USC 1658 note.

(c) NO CREATION OF ACTIONS.—Nothing in this section shall create a new, private right of action. 28 USC 1658 note.

28 USC 994 note.

SEC. 805. REVIEW OF FEDERAL SENTENCING GUIDELINES FOR OBSTRUCTION OF JUSTICE AND EXTENSIVE CRIMINAL FRAUD.

(a) ENHANCEMENT OF FRAUD AND OBSTRUCTION OF JUSTICE SENTENCES.—Pursuant to section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that—

(1) the base offense level and existing enhancements contained in United States Sentencing Guideline 2J1.2 relating to obstruction of justice are sufficient to deter and punish that activity;

(2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where—

(A) the destruction, alteration, or fabrication of evidence involves—

(i) a large amount of evidence, a large number of participants, or is otherwise extensive;

(ii) the selection of evidence that is particularly probative or essential to the investigation; or

(iii) more than minimal planning; or

(B) the offense involved abuse of a special skill or a position of trust;

(3) the guideline offense levels and enhancements for violations of section 1519 or 1520 of title 18, United States Code, as added by this title, are sufficient to deter and punish that activity;

(4) a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims; and

(5) the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct.

Deadline.

(b) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the prcedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"§ 1514A. Civil action to protect against retaliation in fraud cases

"(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)),

or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

"(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

"(A) a Federal regulatory or law enforcement agency;

"(B) any Member of Congress or any committee of Congress; or

"(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

"(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

"(b) ENFORCEMENT ACTION.—

"(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

"(A) filing a complaint with the Secretary of Labor; or

"(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE.—

"(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

"(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

"(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

"(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs. Deadline.

"(c) REMEDIES.—

"(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

"(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

"(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

"(B) the amount of back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item:

"1514A. Civil action to protect against retaliation in fraud cases.".

SEC. 807. CRIMINAL PENALTIES FOR DEFRAUDING SHAREHOLDERS OF PUBLICLY TRADED COMPANIES.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by adding at the end the following:

"§ 1348. Securities fraud

"Whoever knowingly executes, or attempts to execute, a scheme or artifice—

"(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or

"(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));

shall be fined under this title, or imprisoned not more than 25 years, or both.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

"1348. Securities fraud.".

White-Collar Crime Penalty Enhancement Act of 2002.

TITLE IX—WHITE-COLLAR CRIME PENALTY ENHANCEMENTS

18 USC 1341 note.

SEC. 901. SHORT TITLE.

This title may be cited as the "White-Collar Crime Penalty Enhancement Act of 2002".

SEC. 902. ATTEMPTS AND CONSPIRACIES TO COMMIT CRIMINAL FRAUD OFFENSES.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by inserting after section 1348 as added by this Act the following:

"§ 1349. Attempt and conspiracy

"Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

"1349. Attempt and conspiracy.".

SEC. 903. CRIMINAL PENALTIES FOR MAIL AND WIRE FRAUD.

(a) MAIL FRAUD.—Section 1341 of title 18, United States Code, is amended by striking "five" and inserting "20".

(b) WIRE FRAUD.—Section 1343 of title 18, United States Code, is amended by striking "five" and inserting "20".

SEC. 904. CRIMINAL PENALTIES FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Section 501 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1131) is amended—

(1) by striking "$5,000" and inserting "$100,000";

(2) by striking "one year" and inserting "10 years"; and

(3) by striking "$100,000" and inserting "$500,000".

SEC. 905. AMENDMENT TO SENTENCING GUIDELINES RELATING TO CERTAIN WHITE-COLLAR OFFENSES. 28 USC 994 note.

(a) DIRECTIVE TO THE UNITED STATES SENTENCING COMMISSION.—Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of this Act.

(b) REQUIREMENTS.—In carrying out this section, the Sentencing Commission shall—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this Act, the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;

(2) consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act;

(3) assure reasonable consistency with other relevant directives and sentencing guidelines;

(4) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(5) make any necessary conforming changes to the sentencing guidelines; and

(6) assure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

(c) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 906. CORPORATE RESPONSIBILITY FOR FINANCIAL REPORTS.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by inserting after section 1349, as created by this Act, the following:

"§ 1350. Failure of corporate officers to certify financial reports

(a) CERTIFICATION OF PERIODIC FINANCIAL REPORTS.—Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer.

"(b) CONTENT.—The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act pf 1934 (15 U.S.C. 78m or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

"(c) CRIMINAL PENALTIES.—Whoever—

"(1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $1,000,000 or imprisoned not more than 10 years, or both; or

"(2) willfully certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $5,000,000, or imprisoned not more than 20 years, or both.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following:

"1350. Failure of corporate officers to certify financial reports.".

TITLE X—CORPORATE TAX RETURNS

SEC. 1001. SENSE OF THE SENATE REGARDING THE SIGNING OF CORPORATE TAX RETURNS BY CHIEF EXECUTIVE OFFICERS.

It is the sense of the Senate that the Federal income tax return of a corporation should be signed by the chief executive officer of such corporation.

TITLE XI—CORPORATE FRAUD ACCOUNTABILITY

Corporate Fraud Accountability Act of 2002.

SEC. 1101. SHORT TITLE.

15 USC 78a note.

This title may be cited as the "Corporate Fraud Accountability Act of 2002".

SEC. 1102. TAMPERING WITH A RECORD OR OTHERWISE IMPEDING AN OFFICIAL PROCEEDING.

Section 1512 of title 18, United States Code, is amended—

(1) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively; and

(2) by inserting after subsection (b) the following new subsection:

"(c) Whoever corruptly—

"(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

"(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.".

SEC. 1103. TEMPORARY FREEZE AUTHORITY FOR THE SECURITIES AND EXCHANGE COMMISSION.

(a) IN GENERAL.—Section 21C(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)) is amended by adding at the end the following:

"(3) TEMPORARY FREEZE.—

"(A) IN GENERAL.—

"(i) ISSUANCE OF TEMPORARY ORDER.—Whenever, during the course of a lawful investigation involving possible violations of the Federal securities laws by an issuer of publicly traded securities or any of its directors, officers, partners, controlling persons, agents, or employees, it shall appear to the Commission that it is likely that the issuer will make extraordinary payments (whether compensation or otherwise) to any of the foregoing persons, the Commission may petition a Federal district court for a temporary order requiring the issuer to escrow, subject to court supervision, those payments in an interest-bearing account for 45 days.

"(ii) STANDARD.—A temporary order shall be entered under clause (i), only after notice and opportunity for a hearing, unless the court determines that

notice and hearing prior to entry of the order would be impracticable or contrary to the public interest.

"(iii) EFFECTIVE PERIOD.—A temporary order issued under clause (i) shall—

"(I) become effective immediately;

"(II) be served upon the parties subject to it; and

"(III) unless set aside, limited or suspended by a court of competent jurisdiction, shall remain effective and enforceable for 45 days.

"(iv) EXTENSIONS AUTHORIZED.—The effective period of an order under this subparagraph may be extended by the court upon good cause shown for not longer than 45 additional days, provided that the combined period of the order shall not exceed 90 days.

"(B) PROCESS ON DETERMINATION OF VIOLATIONS.—

"(i) VIOLATIONS CHARGED.—If the issuer or other person described in subparagraph (A) is charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the order shall remain in effect, subject to court approval, until the conclusion of any legal proceedings related thereto, and the affected issuer or other person, shall have the right to petition the court for review of the order.

"(ii) VIOLATIONS NOT CHARGED.—If the issuer or other person described in subparagraph (A) is not charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the escrow shall terminate at the expiration of the 45-day effective period (or the expiration of any extension period, as applicable), and the disputed payments (with accrued interest) shall be returned to the issuer or other affected person.".

(b) TECHNICAL AMENDMENT.—Section 21C(c)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)(2)) is amended by striking "This" and inserting "paragraph (1)".

28 USC 994 note.

SEC. 1104. AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES.

(a) REQUEST FOR IMMEDIATE CONSIDERATION BY THE UNITED STATES SENTENCING COMMISSION.—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission is requested to—

(1) promptly review the sentencing guidelines applicable to securities and accounting fraud and related offenses;

(2) expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses; and

(3) submit to Congress an explanation of actions taken by the Sentencing Commission pursuant to paragraph (2) and

any additional policy recommendations the Sentencing Commission may have for combating offenses described in paragraph (1).

(b) CONSIDERATIONS IN REVIEW.—In carrying out this section, the Sentencing Commission is requested to—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses;

(2) assure reasonable consistency with other relevant directives and with other guidelines;

(3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;

(4) ensure that guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated;

(5) ensure that the guideline offense levels and enhancements under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50;

(6) make any necessary conforming changes to the sentencing guidelines; and

(7) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553 (a)(2) of title 18, United States Code.

(c) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than the 180 days after the date of enactment of this Act, in accordance with the procedures sent forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired. Deadline.

SEC. 1105. AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.

(a) SECURITIES EXCHANGE ACT OF 1934.—Section 21C of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3) is amended by adding at the end the following:

"(f) AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 10(b) or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12, or that is required to file reports pursuant to section 15(d), if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.".

(b) SECURITIES ACT OF 1933.—Section 8A of the Securities Act of 1933 (15 U.S.C. 77h–1) is amended by adding at the end of the following:

"(f) AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 17(a)(1) or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or that is required to file reports pursuant to section 15(d) of that Act, if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.".

SEC. 1106. INCREASED CRIMINAL PENALTIES UNDER SECURITIES EXCHANGE ACT OF 1934.

Section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)) is amended—

(1) by striking "$1,000,000, or imprisoned not more than 10 years" and inserting "$5,000,000, or imprisoned not more than 20 years"; and

(2) by striking "$2,500,000" and inserting "$25,000,000".

SEC. 1107. RETALIATION AGAINST INFORMANTS.

(a) IN GENERAL.—Section 1513 of title 18, United States Code, is amended by adding at the end the following:

Penalties.

"(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.".

Approved July 30, 2002.

LEGISLATIVE HISTORY—H.R. 3763 (S. 2673):

HOUSE REPORTS: Nos. 107–414 (Comm. on Financial Services) and 107–610 (Comm. of Conference).

SENATE REPORTS: No. 107–205 accompanying S. 2673 (Comm. on Banking, Housing, and Urban Affairs).

CONGRESSIONAL RECORD, Vol. 148 (2002):

Apr. 24, considered and passed House.

July 15, considered and passed Senate, amended, in lieu of S. 2673.

July 25, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 38 (2002):

July 30, Presidential remarks and statement.

○

Exhibit M.e

Attachment SOX=CongressionalRecord.pdf to email of Nov. 20, 2016 (Exhibit M, *supra*).

under the 180-day marketing exclusivity provision. Before we change the law, let us have a serious re-examination of whether to retain the 180-day marketing exclusivity in its current form both in terms of the length of the exclusivity period and whether the rewards for successful invalidity and non-infringement challenges should be treated identically.

I urge my colleagues, as well as consumer organizations and pharmaceutical purchasers such as insurers and self-insured businesses to reflect upon what I have said on this subject today.

This is an area in which I think we would be wise to reject Senator SCHUMER's argument that all we are doing with this legislation is restoring the integrity of the old Hatch-Waxman Act. But why should we be governed by the world of 1984 when, for example, the best selling drugs in this country have increased sales by a factor of 10? Why should the value of the marketing exclusivity reward increase in direct proportion?

On a number of occasions, I have commended Senator SCHUMER and Senator MCCAIN for moving their legislation forward, even if the bill that came out of the HELP Committee does not resemble very closely their bill, and I still have problems with the floor vehicle as I have laid out in some detail. I commend them again today.

I hope to return to the floor before this debate ends to offer a few suggestions for a more comprehensive approach to reforming the Drug Price Competition and Patent Term Restoration Act.

This in no way minimizes the importance of he matters that are the subject of the pending legislation, because they are important areas. I do not believe, however, that these are the most important issues we can address.

Rather than focusing on how best to bring the law back to the old days of 1984, as Senator SCHUMER suggests, I want to discuss ways to modify the law to help usher in a new era of drug discovery while, at the same time, increasing patient access to the latest medicines.

Mr. President, I yield the floor.

ORDER OF PROCEDURE

Mr. REID. Mr. President, I ask unanimous consent that following disposition of H.R. 5121, the legislative branch appropriations bill, Rockefeller amendment No. 4316 be agreed to, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. REID. Mr. President, I ask unanimous consent that immediately following action on adoption of the Rockefeller amendment, the Senate proceed to the consideration of the conference report to accompany H.R. 3763, the Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002, and that it be considered under the following limitations: That there be a time limitation of 2 hours equally divided and controlled between the chair and ranking member of the committee or their designees; that upon the use or yielding back of time, without further intervening action or debate, the Senate proceed to vote on adoption of the conference report.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

LEGISLATIVE BRANCH APPROPRIATIONS ACT, 2003—Resumed

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to vote on H.R. 5121, the Legislative Branch Appropriations Act.

Mr. REID. Mr. President, I ask for the yeas and nays on the legislative branch appropriations bill.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the conference report. The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from North Carolina (Mr. HELMS) is necessarily absent.

The PRESIDING OFFICER (Mrs. CARNAHAN). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 85, nays 14, as follows:

[Rollcall Vote No. 191 Leg.]

YEAS —- 85

Akaka	Durbin	McConnell
Allen	Edwards	Mikulski
Baucus	Feingold	Miller
Bennett	Feinstein	Murkowski
Biden	Frist	Murray
Bingaman	Graham	Nelson (FL)
Bond	Grassley	Nelson (NE)
Boxer	Gregg	Nickles
Breaux	Hagel	Reed
Burns	Harkin	Reid
Byrd	Hatch	Rockefeller
Campbell	Hollings	Santorum
Cantwell	Hutchinson	Sarbanes
Carnahan	Hutchison	Schumer
Carper	Inouye	Sessions
Chafee	Jeffords	Shelby
Cleland	Johnson	Smith (OR)
Clinton	Kennedy	Snowe
Cochran	Kerry	Specter
Collins	Kohl	Stabenow
Corzine	Kyl	Stevens
Craig	Landrieu	Thompson
Crapo	Leahy	Thurmond
Daschle	Levin	Torricelli
Dayton	Lieberman	Warner
DeWine	Lincoln	Wellstone
Dodd	Lott	Wyden
Domenici	Lugar	
Dorgan	McCain	

NAYS —- 14

Allard	Ensign	Roberts
Bayh	Enzi	Smith (NH)
Brownback	Fitzgerald	Thomas
Bunning	Gramm	Voinovich
Conrad	Inhofe	

NOT VOTING—1

Helms

The bill (H.R. 5121) was passed, as follows:

(The bill will be printed in a future edition of the RECORD.)

Mr. DURBIN. Madam President, I move to reconsider the vote.

Mr. REID. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Under the previous order, the Senate insists on its amendments and requests a conference with the House on the disagreeing votes of the two Houses.

The PRESIDING OFFICER appointed Mr. DURBIN, Mr. JOHNSON, Mr. REED of Rhode Island, Mr. BYRD, Mr. BENNETT, Mr. STEVENS, and Mr. COCHRAN conferees on the part of the Senate.

GREATER ACCESS TO AFFORDABLE PHARMACEUTICALS ACT OF 2001—Continued

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 812. The Rockefeller amendment No. 4316 is agreed to, and the motion to reconsider that vote is laid on the table.

The amendment (No. 4316) was agreed to.

SARBANES-OXLEY ACT OF 2002—CONFERENCE REPORT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of the conference report to acompany H.R. 3763, which the clerk will report.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3763), to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes, having met, have agreed that the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, and the Senate agree to the same, signed by a majority of the conferees on the part of both Houses.

The PRESIDING OFFICER. The Senate will proceed to the consideration of the conference report.

(The report is printed in the House proceedings of the RECORD of July 24, 2002.)

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. REID. Madam President, I suggest the absence of a quorum and ask that the time not be charged against either manager.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SARBANES. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SARBANES. Madam President, parliamentary inquiry of the Chair: What is pending before the Senate?

The PRESIDING OFFICER. The debate on the conference report is limited to 2 hours equally divided.

Mr. SARBANES. So there is 1 hour on each side.

The PRESIDING OFFICER. The Senator is correct.

Mr. SARBANES. Madam President, I yield myself 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SARBANES. Madam President, I am very pleased that we are now considering the conference report on the Public Company Accounting Reform and Investor Protection Act of 2002. The Senate approved this legislation on July 15 on a 97–0 vote. Conferees were named promptly both here and in the House, and the conference committee immediately went to work.

Agreement was reached yesterday in the early evening, about 7 o'clock, by the conference committee, and the House took up the conference report this morning and acted on it earlier in the day. The vote, I believe, was 422—3.

The conference report has now come over to us, and obviously, under our procedures, it is our turn to proceed to consider it.

This legislation establishes a carefully constructed statutory framework to deal with the numerous conflicts of interest that in recent years have undermined the integrity of our capital markets and betrayed the trust of millions of investors.

I say to my colleagues that in every one of its central provisions, the conference report closely tracks or parallels the provisions in the Senate bill for which, as I indicated earlier, all the Members present at the time, 97 of us, voted only a short time ago.

This legislation establishes a strong independent accounting oversight board, thereby bringing to an end the system of self-regulation in the accounting profession which, regrettably, has not only failed to protect investors, as we have seen in recent months, but which has in effect abused the confidence in the markets, whose integrity investors have taken almost as an article of faith.

This legislation reflects the extraordinary efforts of many colleagues on both sides of the Capitol. I want especially to recognize and express my deep gratitude to Senators DODD and CORZINE who early on introduced legislation that in many respects serves as the basis for titles 1 and 2 of this legislation.

On the House side, Congressman LAFALCE introduced comprehensive legislation on which we drew.

I also wish to acknowledge the many important contributions that my Republican colleague, Senator ENZI, made at every step in the process. Senator ENZI had legislation of his own, but in addition we worked very closely in the course of developing this legislation. Again and again I was struck by the thoughtfulness and reasonableness of his proposals for improving in the legislation. While in the end not all of them were included in the legislation, a significant number are, and I thank him very much for all his contributions.

Before addressing the major provisions of the legislation, let me make very clear that it applies exclusively to public companies—that is, to companies registered with the Securities and Exchange Commission. It is not applicable to provide companies, who make up the vast majority of companies across the country.

This legislation prohibits accounting firms from providing certain specified consulting services if they are also the auditors of the company. In our considered judgment, there are certain consulting services which inherently carry with them significant conflicts of interest. Auditors, in effect, find themselves in the position of auditing their own work. They may be acting as management of the company, for instance, on personnel matters when, as the outside auditor, they were supposed to be standing one step removed from the company as the outside auditor. This is the reasoning behind the prohibition.

What has happened in recent years is that the fees earned from the consulting work have dwarfed the fees earned from the auditors, which inevitably leads to concerns that punches may be pulled on the audit to accommodate the significant and remunerative involvement on the consulting side. Certain enumerated consulting practices are therefore not allowed, with the exception that a case-by-case exemption can be obtained from the oversight board that this legislation establishes.

The auditor can engage in the balance of consulting services with the pre-approval of the audit committee of the corporation. And of course an auditor can engage in whatever consulting services the firm and the corporation agree upon so long as the firm is not also acting as the corporation's auditor.

The bill sets significantly higher standards for corporate responsibility governance. It requires public companies to have independent audit committees and also enhances the role of the audit committee, which will have responsibility for hiring and firing the auditors and setting their compensation.

The legislation requires full and prompt disclosure of stock sales by company executives. Senator CARNAHAN added an important provision to the bill, requiring electronic filing with respect to such sales. That requirement would take effect in a year's time, to allow time for the necessary systems to be put in place; once in place it will assure prompt and accurate disclosure of these very significant transactions.

The legislation places limits on loans by corporations to their executive officers. It sets certain requirements for disclosure with respect to special purpose entities, which were used by some corporations that have run into such serious difficulty in recent months. It seeks to address the statement of pro forma earnings, in order to assure a more complete and accurate picture of a public company's financial position.

It also addresses the conflicts of interests that arise for stock analysts to whom investors look for impartial research-based advice about stocks. Unfortunately, many of these analysts are under pressure to promote stocks in which their broker-dealer firms may have an investment banking interest; on the one hand they are supposed to give unbiased advice to potential purchasers of stock, whether to buy or sell, but at the same time the firm of which they are a part is interested in developing a business relationship with the company on which the analyst is passing judgment. It has been sobering to discover that analysts have been formally recommending certain stocks to the investing public, while at the same time discussing them contemptuously among themselves. We have had too many demonstrations of this occurring.

The legislation includes provisions to protect analysts against retaliation, in cases where a negative recommendation may invite retaliation. Furthermore, the bill authorizes significant increases in funding for the Securities and Exchange Commission, which for the first time in many years will give it something close to the funding resources it needs.

There are also extensive criminal penalties contained in this legislation. These were initially included in legislation reported by the Judiciary Committee, which Senator LEAHY offered as an amendment to the bill. The House then passed its own bill with respect to criminal penalties, a separate standing bill, which in many instances doubled or even tripled the penalties in the Leahy proposal as it came to the floor, and the Leahy proposals were further supplemented by an amendment from Senators BIDEN and HATCH and another from Senator LOTT.

The PRESIDING OFFICER. The Senator has consumed 10 minutes.

Mr. SARBANES. I yield myself 4 additional minutes.

The PRESIDING OFFICER. The Senator has that right.

Mr. SARBANES. These provisions, among other things, require the CEOs and CFOs to certify their company's financial statements under penalty of potentially severe punishments.

We provide a $776 million authorization for the SEC. I want to spend a minute on this point, because it is very important. The Senate Appropriations Committee is now working on an appropriation that would contain $750 million for the SEC. It is urgent that we provide adequate funding for the Commission, whose responsibilities have expanded as the volume of market activity has grown, but whose funding has lagged. Clearly, the Commission must have the resources necessary to ensure a decisive and expeditious response to the scandals we have seen in

recent months, and to minimize the likelihood that we will see others in the future.

I must underscore this point. The Commission has been underfunded, and the result has been understaffing, high staff turnover and low morale as the Commission seeks to carry out its work. The SEC must be in a position to address immediately the problems of inadequate staff resources and inadequate pay.

At the moment, the SEC cannot offer its attorneys and accountants the same level of salary and benefits that their counterparts receive at the five Federal bank regulatory agencies. Talented and dedicated staff attorneys and accountants can increase their compensation by as much as one-third simply by moving to another agency. This is an intolerable situation. Pay parity has been authorized and now must be funded; this legislation specifically provide the necessary funding.

In addition, the authorization provides funding that will enable the Commission to upgrade its technical capacities, its computer systems, and it provides significant resources so that the Commission can augment its staff of attorneys, accountants and examiners at a time when they are needed to address a very heavy workload burden.

As an aside, I mention that this morning the committee reported to the Senate four nominees to bring the Securities and Exchange Commission to its full complement of five members. I very much hope we will be able to approve them next week so that they will be able to take their positions before the August recess. If we do, the Commission will be at full strength. They will all be in place and ready to do the job, and I think that is highly desirable.

In closing, let me say that I believe this conference report reflects our best efforts to deal with issues which we know to be numerous and complex. Throughout the process, we have worked together carefully on these issues. We have sought advice from the most distinguished and experienced practitioners in the field. We held 10 hearings in March with some of the very best experts in the country as our witnesses. We have consulted extensively, and I hope my colleagues will agree in good faith and across party lines. Our vision has been broad, our purpose steady. I think our approach has been reasonable.

We will send to the President legislation establishing a solid statutory framework for the reforms we know are urgently needed.

Our markets have benefited beyond measure from the statutory framework that created the SEC nearly 70 years ago. Indeed, I think we have had a tendency to take that for granted. Those markets have been a very significant economic asset for the United States, and an integral part of our economic strength. This legislation will serve to complement and reinforce that framework, which has served us well, and I believe it will stand the test of time.

Our markets, which have the reputation of being the fairest, the most efficient, the most transparent in the world, have suffered greatly in recent times, so much so that they seem to have lost the confidence of our investors. It is our purpose, with this legislation and through other actions that will have to be taken by the regulatory agencies and by the private sector, to see that once again our capital markets deserve the enviable reputation for fairness, efficiency, and transparency that they have enjoyed through the years.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. GRAMM. Madam President, I yield myself such time as I may consume.

I want to begin with some thankyous and congratulations. First, I want to congratulate Senator SARBANES on this bill, and I want to make note that in a very difficult period, where so many were trying to point the finger of blame, when it seemed almost every day that people were clamoring to make the strongest statement they could make to get the sound bite on television, Senator SARBANES could have taken that same route in the Banking Committee. We are the committee that has jurisdiction over the issues that had been at the very heart of our recent concerns in the capital markets.

However, Senator SARBANES did not take that route. I congratulate him. He not only brought good reflection on himself, but he helped raise the esteem that the Banking Committee is held in and reflected well on the Senate. We had hearings but we were focusing on what could be done to fix the problem. As a result, those hearings were the most productive that were held. They contributed to bringing us to where we are.

Now let me make it clear, from the very beginning there has been a broad consensus, and a very deep consensus, on 90 percent of the issues in this bill. One of my frustrations in this debate—and when you are debating something as high profile as this is, there are frustrations. I am not complaining—as my wife says whenever I complain about this job, not only did nobody force you to take it, but a lot of good people worked hard to keep you from getting it—I am not complaining, but part of our problem has been that the media has wanted to present this as a debate that had to do with how tough people were being, to the exclusion, often, in my opinion, of how reasonable we need to be.

We have before the Senate a bill that is clearly an improvement over the status quo. I don't care how disappointed you are in any one provision—and on several provisions I am very disappointed. No matter how disappointed a Member is, this is an improvement over the status quo, and for two reasons. One is obvious. That is, we needed stiffer criminal penalties. And, second, we needed to create an independently funded and an independently operating accounting oversight board so that we could deal with ethics questions in a framework that will promote high ethical standards, in the framework of independence. In addition, we desperately needed to have an independently funded FASB.

I would just say as an aside, Madam President, over the years I have agreed with FASB in some of their decisions; I have disagreed with FASB on some of their decisions. However, I am proud to be able to say today I have never taken the position that Congress ought to override FASB. As incomprehensible as some of their rulings have been to my way of thinking, having Congress vote on accounting standards is a very dangerous thing.

Some of our colleagues want to vote on the whole issue of expensing stock options. Wherever you come down on that issue, having Congress vote on accounting standards is very dangerous, very counterproductive. I hope that will not happen. Certainly, I am not going to vote to impose accounting standards on this board. We want FASB to set accounting standards. We want to be sure they have the independence that is necessary to allow them to do it.

In those areas there has never been a disagreement on this bill. The disagreements that have occurred have had to do with the perception of individual Members as to what was practical, what was workable, what was desirable. The one view I have always subscribed to, and I would have to say given my period of service in public life I am more convinced of it than ever, is that Thomas Jefferson was right when he said good men—he would say good people today, of course—good men with the same information are prone to have different opinions.

There is a natural tendency in the human mind to think, if people disagree with you, that either, A, they don't know what they are talking about; or B, they don't have good intentions. I subscribe to the Jefferson thesis.

The areas where I disagree with the bill are pretty straightforward. First of all, I believe there is a very real problem in auditor independence. If I were a member of this new accounting oversight board that we are going to put into place and I had to vote on the nine prohibited areas that are written into law in the bill, I would want to study them in detail. I might very well support all nine of them. I do not believe they should be written into law.

The advantages of letting the board set these standards—it seems to me that there are three:

No. 1, the board is going to have more time and more expertise than we have and is likely to do a better job.

No. 2, if we make a mistake and we write it into law, it is hard to fix things that are written into law. As Alan Greenspan has said, if Glass-Steagall, Depression-era banking legislation, had been a regulation, it clearly would have been changed by the 1950s. We did not change it until 1999. It took a long time to change it.

Finally, and probably of greatest importance, there is a natural tendency when we are talking about the problem in an era where we are all reading about Enron and WorldCom and the huge companies, to forget this law will apply to 16,254 companies. Many of these companies are quite small. One of the advantages of allowing the accounting oversight board to set out prohibitions on auditors performing other services in regulation, instead of prescribing them in law, is that the board can find a system whereby they can recognize what is practical in dealing with smaller companies and how that might differ from what is practical for General Motors.

An example that has come to my mind is one where I am operating a small public company, stock traded on an exchange or on Nasdaq, and I employ an accounting firm that has a CPA who basically does my auditing. He is in Houston. I am trying to hire a new bookkeeper in my company. I have three candidates. When my auditor is in town auditing my books, I say: I have these three candidates. I majored in physics in college, and I don't know anything about accounting. Could you interview these three bookkeepers and tell me who you think would be best?

Under this bill, that would be illegal. That would be providing a personnel service. It is prohibited for my auditor to provide that service for me as well.

For General Motors, should your auditor be providing a personnel service? My guess is they probably should not. But for this small company in College Station, Texas, what this prohibition ultimately will do is force them to do one of three things: In all probability, they will hire the bookkeeper without ever getting the advice of a CPA; No. 2, they can hire another CPA to interview these three candidates for a bookkeeper and pay them; No. 3, they can file for a waiver through the SEC and through the board. Each option is a worse choice from those available to such a small company today, and a worse choice for its shareholders.

The bill allows a waiver on an individual company by company basis. I rejoice that is the case. I personally believe we should have given the board, with the agreement of the SEC, the ability to grant blanket waivers based on the circumstances of classes of individual companies.

For example, if you have already granted 1,000 waivers where companies have applied for a waiver for a certain requirement based on their size, their location, practicality, the cost, whatever, at that point shouldn't the board be able to say: We have established this principle, and if your company meets these conditions, you are granted the waiver? Then, all they have to do is prove they meet the conditions.

My concern—and who knows, maybe this will be true, maybe it will not. The problem is we are legislating. We don't know. We can't look into the future. My concern is that by not granting them the ability to provide blanket waivers we are going to force a lot of smaller companies to hire lawyers and lobbyists to come to Washington to petition the SEC and the board. My concern is that this is going to use up their time and use up the resources of companies.

There is another side of this story and that is the concern that blanket waivers could be used to get around the intent of the law. How do you deal with that? How do you find a happy balance? It is not an easy question. I would have to say I believe we have imposed a one-size-fits-all regimentation that is going to be difficult to deal with—not impossible to deal with, but I think it is going to be difficult.

Another problem I have is that we have in this bill an accounting oversight board. Its members are not elected officials. They are not appointed in the sense that they are not Government officials. They will have the ability to make decisions that will affect the livelihood of Americans who are in the accounting profession. They will literally have the ability to say to a CPA: We are taking your license away and you can never practice again in providing accounting services to a publicly traded company.

Clearly, there are cases where that is justified. Clearly, there are cases where people ought to be fined and, clearly, there are cases where people ought to be put in prison. But I think when you are taking people's livelihoods, they ought to have an opportunity to appeal to the Federal district court where they live.

I think there ought to be a burden on them to make their case, and obviously the court is going to take into account that this board, that was duly constituted, made a decision. But I think that is an opportunity that people ought to have that they do not have under this bill.

I am also concerned about litigation. During the whole Clinton administration, there was only one bill where we overrode the President's veto, and that was a bill having to do with private securities litigation reform. We had a massive number of predatory strike suits where people filed lawsuits against companies. They almost always settled out of court. We had one law firm that filed the lion's share of the lawsuits. And the chief lawyer in that company said, in effect, ''It is wonderful to practice law where you don't have clients.''

That was a mistake when he said that, but he said it.

We took action to try to eliminate or minimize this abuse. In doing so, we codified a 1991 Supreme Court decision that addressed what happens if you think you have been wronged. We are not talking about criminal activity. We are not talking about SEC enforcement. We are not talking about the Justice Department. We are talking about civil disputes that people have. Under that law, in codifying what the 1991 Supreme Court decision said, we said that within a year after you believe you have been wronged, you have to file your lawsuit, and within 3 years after the event happens, you have to file your lawsuit.

One of the things this bill does, which I oppose, is it raises that to 2 years and 5 years, respectively. I would say that if there were evidence that people were not getting these lawsuits filed because of a lack of time, that under the circumstances I think that increasing the statute of limitations would have been justified. But as we have looked at the data, the mean average lawsuit is filed 11 days after the injury is discovered. Something like 90 percent of the lawsuits are filed in the first 6 months. It seems to me that this provision and other provisions of the bill that expand the ability of people to sue may have a positive effect in making people pay attention to their business, but we all know, based on our legal system, that it is going to be abused and that very heavy costs are going to be imposed on the private sector of the economy as litigation costs ultimately are added to the cost of the product that is produced and reduced from the stock value held by shareholders.

I could go on and on. There are other people who want to speak. We are under a time limit. But let me sum up.

I thought about this long and hard, and as I thought about this bill, I had to weigh, Does it do more good than harm? I have concluded that it does. It does less good than it could have done; it does more harm than it should have done—we could have corrected these things—but, quite frankly, in the environment we were in it was impossible. In the environment we were in, where everything was judged on some concept of being tough rather than on practicality and workability, it was impossible for us to come back and deal with these problems.

Finally, in the timeframe that we all faced in conference, we never really got around to discussing the practical kinds of things that do not seem important when you are writing law but seem very important 2 or 5 years later when you are implementing it.

Having said all that, I cannot stand up here and argue that this bill has worsened the status quo. This bill is better than the status quo for two reasons. No. 1, change needs to be made and criminal penalties need to be raised. These independent boards need to be established, and 90 percent of this bill, in my opinion, clearly represents a step in the right direction.

But, second—and this may sound like strange logic but I think it is important. I think to understand American government you have to understand it. The American people expect Congress to respond to a problem. We may not know the answer. We may not have perfect knowledge. But they expect us to try to do something about it. That in and of itself is an argument to which we should respond.

I would argue—being a conservative, as everyone engaged in this debate knows—I would argue we need to be careful. But in the end this bill is an improvement on the status quo. It could have been better. There are changes that could have been made that were not. But in the end, I cannot argue that this bill should not pass, should not become law. The President is going to sign the bill, and clearly he should.

I do believe we will have to come back after the fact and we will have to correct some of these issues. I think as time goes on we will see we may not have done enough in one area. Maybe we went overboard in another area. But the Congress will meet again, people will be paid to do this work, and I am confident that it will be done.

So let me conclude on this thought. I believe the marketplace has gone a long way toward solving this problem. I think the New York Stock Exchange action was excellent. Once again, they are proving that they are a great institution. As I have often said about the New York Stock Exchange, I feel as if I am standing on holy ground at the New York Stock Exchange.

Every boardroom is different from what it was before this crisis started. No one sitting on a board, corporate board or an audit committee, will ever be the same. No auditors will ever look at their task the way they did before all of this started, at least for a very long time. or at least for a very long time.

One of the advantages of having structure is when they forget, the structure won't forget. I totally agree with that. I think this represents a complement to it.

There is much in here I would have done differently. But in the end, I think this is a response that people can say the Government did hear, the Government did care, and Congress did try to fix it. I don't doubt that there are mistakes in here. I think I could name some, if asked to. But, on the whole, this is a response that was aimed at the problem. People went about it in a reasonable manner.

Certainly, the authors of this bill intended to do as good a job as they could do.

I again want to congratulate Senator SARBANES. I also want to thank him, looking back now at how quickly the conference went. I know people were unhappy when we had this period when the floor was tied up, and there were numerous amendments people wanted to add to the bill. But I think, given how the whole thing played out, it worked out from that point of view pretty much right.

If people on Wall Street are listening to the debate and trying to figure out whether they should be concerned about this bill, I think they can rightly feel that this bill could have been much worse. I think if people had wanted to be irresponsible, this is a bill on which they could have been irresponsible and almost anything would have passed on the floor of the Senate.

I think given where we are on this bill that it is a testament to the fact that our system works pretty well.

I yield the floor.

The PRESIDING OFFICER (Mr. EDWARDS). Who yields time?

Mr. GRAMM. Mr. President, I yield 12 minutes to the Senator from Wyoming.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. Thank you, Mr. President.

I am here today to speak in support of the conference report to the accounting reform bill. I will be encouraging all Senators to vote for the conference report.

This is earthshaking legislation that has been done with tremendous speed. It had to be earthshaking because we are trying to counteract the tremors from the volcanic action of the mountaintop being blown off such companies as Enron, WorldCom, Global Crossing, and others. Those collapses have set up a series of tremors across this country.

Congress is not the one to solve all the problems. But as Senator GRAMM just mentioned, we are expected to work at solving all of the problems. We have put in a huge effort on this bill, and it will make a difference.

While we have been working, the stock market has been going through some tremendous gyrations. I think some of those reactions in the stock market were to see how carefully we would consider and resolve this issue. I believe, the stock market was worried that we would overreact. The market watched to see if Congress would keep adding and adding things, until we destroyed the whole system. They can now see that did not happen—Congress acted responsibly. We took a long and tough look at the problem and reacted, but we did not overreact. At the same time corporations across the country have been making sure they did not have the kinds of problems brought to light in a few of these companies.

''Corporations'' should not be a bad word in this country. This country was built on business.

I always like to mention that it was primarily built on small business—small businesses that grew up, in many cases, but nevertheless ideas that started out as a small business.

We have to keep our focus on those small businesses, and make sure they are able to continue to operate in the climate that we have in the United States and under the laws that we pass.

I am pleased to say that the actions we took in this bill provide some assurance to small businesses and small accounting firms that they can continue to operate the way they have in the past.

We have given encouragement to the States not to run out and apply the same types of laws. I hope the States are paying attention because they will ruin a very good thing if they destroy small business. Keep the eye on small business, and we will continue to have big business.

Corporations have been checking what has been going on in their firms to a greater extent than they have ever before. Boards, CEOs, CFOs, and audit committees have been checking to see if they have the kinds of problems that brought down these other companies.

It is much like when there is a plane crash. Right after a plane crash is probably the safest time in the world to fly because everybody checks their equipment ever so much more carefully to make sure that the kind of defects that may have caused other problems will not happen to them. And the effect lasts for a long time afterwards.

Corporations have been checking their books. They have begun changing procedures. Some of the changes they have made have resulted in restatements. They have paid a price for doing restatements. But they have done the right thing by doing a restatement, and they should be recognized for that. I mentioned speed before. The Senate is not designed for speed. We started out slow. We held 10 hearings. We looked at the issues very carefully, everybody resolved in writing their own ideas.

One of the tough things about legislating is putting it down in writing. The concepts are so easy, but the details are so tough.

There are a number of people who drafted bills on this—both in the House and in the Senate. On this side, Senator GRAMM and I drafted a bill. Senator CORZINE and Senator DODD introduced a bill. Of course, Senator SARBANES had the overreaching bill, and I believe his benefited a little bit from having copies of both the House and Senate bills on which to build his bill. I compliment him for the way he took ideas from all of these different approaches.

Again, it shows the value of legislating by a wide variety of people. You get a wide variety of viewpoints, which actually provides some insights into areas that a person might not have thought about.

But, at any rate, we concluded the hearings, and we merged the bill. This came to committee the week before the Fourth of July. It passed out of committee in one day. It came to the floor of this body just 2 weeks ago. And now, it has already been conferenced, and come back to us for final passage. Part of that is a result of the atmosphere we are in, and the need for action. Timing can be everything on a bill. But part of it is because of the concentration of people who worked on this.

This legislation is a response to problems highlighted by the recent corporation failures of Enron, WorldCom, and others. It does send a clear signal to corporate America that executives can no longer abuse the trust their shareholders place in them without severe consequences.

This legislation builds a strong and independent board to oversee the accounting industry. It will eliminate the climate of self-regulation that has historically guided accounting.

However, I would like to make one point clear. I believe that, overall, accountants take their responsibilities very seriously. They did before, and they do now. We have the best system in the world. What we are doing with this is to maintain that we have the best system in the world. Most accountants are honest and hard working. They work for the benefit of the investors with probably the same percentage of exceptions as other professions.

This legislation will also provide for strong disciplinary action against executives who break the law. No longer will they be disciplined with a slap on the wrist. The bill recognizes that executives who destroy the dreams of investors by irresponsible and unethical behavior will be given the severe punishment they deserve.

I also want to again thank Senator SARBANES and Senator GRAMM for their leadership on this issue. They both have worked tirelessly the past few months to get this bill finished in a timely manner. I particularly appreciate some of the insights Senator GRAMM gave me as he worked on this bill in more detail than most people ever achieve. It is his standard, and he carried that out again this time, which did resolve a number of the problems. I want to congratulate Senator SARBANES, and thank him for the way he conducted the hearings. A lot of people do not realize that the Chairman of a committee usually gets to pick most of the witnesses, and the ranking member gets to pick a few of the witnesses.

As we went through these 10 hearings, I couldn't find any witnesses that I wouldn't have picked were I given the selection. There were some very qualified people who testified. Some of them were even accountants. I did appreciate that. I apologize for asking some questions of them but it was such a great opportunity for me. My staff noticed that when the camera focused in on the person giving the answer, the wedge of people behind them were all asleep.

So what we dealt with is not the kind of thing that Americans get really excited about. It is far too detailed for us to get too excited about it. For accountants, these kinds of discussions are almost like watching ESPN.

Senator SARBANES did continue to meet with me and other Members and continued to make changes that improved the bill. There was a wide variety of Senators who worked on this bill. I have mentioned Senators DODD and CORZINE and GRAMM. Senator EDWARDS worked with me on one provision that is in this bill to make sure that not only accountants, analysts, CEOs, CFOs, Boards and audit committees were addressed under this bill, but lawyers have some responsibility, too.

I find it very exciting we are going to make lawyers have a code of ethics when they are dealing with the Securities and Exchange Commission, and that they are going to have an obligation to report things when they find them. I know that causes some consternation among some attorneys, but I think it will make, overall, the same kind of improvements we are expecting from everybody else.

Senators ALLEN, GREGG, BAUCUS, GRASSLEY, and KENNEDY all worked on some provisions that we don't talk about too much; again, it is in the detail area, but it has to do with the blackout period when you are dealing with pension and other stock sales by executives. I know the intense hours it took to come up with a solution that would work. And if you have that many people agreeing on it, there is probably a good chance it will work.

Again, I congratulate all those people for their constraint in limiting their ideas to what needed to be done for this bill. A lot of ideas were floating around here on lots of things we can with corporations and executives that people want to have fixed, but this bill did maintain some real constraint to stay on topic.

I do believe the conference report is an improved bill from the one that passed the Senate. Again, I appreciate Senator SARBANES working with me to make some of the changes about which I spoke.

One change we made changes the implication that not all nonaudited services should be presumed illegal. The bill has been changed to clearly allow the audit committee to make that determination without the law implying that it is illegal.

In addition, he made some changes dealing with the testing of internal compliance. I believe the new language more clearly represents the true role of auditors. One of the problems we dealt with throughout this process is educating Members on exactly what the role of an auditor is. I believe the new language represents that realization, and I thank the chairman for making the change.

There is another important change in the provision dealing with corporate loans. The provision would still prohibit corporate executives from reaping millions of dollars in loans from their companies, but the new language also realizes that executives need to use things such as credit cards to conduct their business. So this section is a vast improvement.

Another item I would like to comment on is the understanding that insurance companies, many times, have audits they must file with their State regulators. It would be burdensome and expensive to require these companies to hire a separate auditing firm to perform this responsibility. That problem was also recognized, and the needed changes were made.

However, I also understand that due to the time constraints, a report will not be filed with the bill. I think this will pose a series of problems because we will not be defining what the authors actually intended with certain sections of the bill and allowing the same written discourse that there would be on the bill. I think this may especially cause problems with the extraordinary number of regulations that are going to have to be written to implement the bill.

As the ranking member of the subcommittee with jurisdiction over the Securities and Exchange Commission, I do intend to work closely with the Commission to ensure that the new regulations are consistent with what I see as congressional intent. I will work with others to make sure these regulations conform.

I ask the ranking member, could I have an additional 3 minutes?

Mr. GRAMM. Sure.

Mr. President, I yield an additional 3 minutes to the Senator from Wyoming.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. I thank the Senator.

Mr. President, some of the issues that did not come up in this bill dealt with FASB. We did something marvelous for FASB. We made sure of its independence. One way we made sure of its independence, besides citing in the law, was to make sure FASB has independent funding. They will not have to come to Congress with a budget. And they will not have to go to corporate America for funding. They will get independent funding to be able to do the job they need to do. That will inhibit us from trying to change what they are doing in setting accounting standards.

I am pleased to state that we have taken a look at the things they are working on right now. They are working on four issues that are extremely important to make sure what happened with other companies will not happen again.

I have to tell you, in those four things they have listed as a priority, one of them is not stock options and what to do with them. They do need to address that, but I certainly hope that Congress does not decide that what we see as a problem does supersede other problems that may have caused collapses such as Enron's.

So I hope we will not get in a position of dictating now to FASB what they should be working on, and in what order, and to what degree, or, worse yet, just going ahead and passing accounting standards on our own.

With respect to section 302, the conference recognizes that results presented in financial statements often necessarily require accompanying disclosures in order to apprise investors of

the company's true financial condition and results of operations. The supplemental information contained in these additional disclosures increases transparency for investors. Accordingly, the relevant officers must certify that the financial statements together with the disclosures contained in the periodic report, taken as a whole, are appropriate and fairly represent, in all material respects, the operations and financial condition of the issuer.

I also believe the conferees contemplate that the Board will have discretion to contract or outsource certain tasks to be undertaken pursuant to this legislation and the regulations promulgated under the Act. The Board may outsource functions which can be done more efficiently by existing and established organization. An exercise of discretion in this manner does not absolve the Board of responsibility for the proper execution of the contracted or outsourced tasks.

I also believe that the Conferees expect that the Board and the standard setting body will deem investment companies registered under Section 8 of the Investment Company Act of 1940 to be a class of issuers for purposes of establishing the fees pursuant to this section, and that investment companies as a class will pay a fee rate that is consistent with the reduced risk they pose to investors when compared to an individual company. Audits of investment companies are substantially less complex than audits of corporate entities. The failure to treat investment companies as a separate class of issuers would result in investment companies paying a disproportionate level of fees.

In addition, I believe we need to be clear with respect to the area of foreign issuers and their coverage under the bill's broad definitions. While foreign issuers can be listed and traded in the U.S. if they agree to conform to GAAP and New York Stock Exchange rules, the SEC historically has permitted the home country of the issuer to implement corporate governance standards. Foreign issuers are not part of the current problems being seen in the U.S. capital markets, and I do not believe it was the intent of the conferees to export U.S. standards disregarding the sovereignty of other countries as well as their regulators.

I also realize inconsistencies appear in sections 302 and 906. The SEC is required to complete rulemaking within 30 days after the date of enactment with regard to CEO certification under section 302. However, section 906 suggests that certification would be required upon enactment, thus the penalties would go into effect before the certification requirement is completed through the rulemaking process. I believe it was the intent of the Conferees that the penalties under section 906 should not become effective until the rulemaking process is finalized.

Under the conference report, section 3(a) gives the SEC wide authority to enact implementing regulations that are ''necessary or appropriate in the public interest.'' I believe it is the intent of the conferees to permit the Commission wide latitude in using their rulemaking authority to deal with technical matters such as the scope of the definitions and their applicability to foreign issuers. I would encourage the SEC to use its authority to make the act as workable as possible consistent with longstanding SEC interpretations.

Finally, I not only thank the Senators I have been able to work with on this, but I also thank the staffs. I thank particularly Katherine McGuire, my legislative director, and Mike Thompson, who handles my banking issues. I also thank Kristi Sansonetti, who works on all of my legal issues, and Ilyse Schuman, who played a very important role in the blackout pension period.

I thank, on Senator SARBANES's staff, Steve Harris, Marty Gruenberg, Steve Kroll, Dean Shahinian, Lynsey Graham, and Vince Meehan.

I thank, on Senator GRAMM's staff, Wayne Abernathy, Linda Lord, who is probably one of the most knowledgeable lawyers in this area I have ever encountered, Michelle Jackson and Stacie Thomas.

And, on Senator DODD's staff, I thank Alex Sternhell.

America will never know all the work these people have done on this bill, the hours they have spent on it, daytime and nighttime. I have seen them working in the early morning hours on this, and that is after spending the previous night working on it. They have just spent incredible time on this.

There is some incredible expertise among these people. Without their help, we would have never gotten to this point. So I thank all of them.

I thank the chairman and Senator GRAMM and all the others who have had a part in this. It is time we adopt this bill.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, let me first say, I think Senator ENZI has been extremely gracious in recognizing the extraordinary contribution that has been made by the staff as we have formulated this legislation. I appreciate him doing that. I certainly associate myself with his remarks about the dedication and the perseverance and the extraordinarily high level of competence that is brought to this matter by staff on both sides of the aisle—committee staff and personal staff.

Mr. President, I yield 10 minutes to the Senator from New Jersey.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. CORZINE. Mr. President, I am honored today to stand before the Senate to express my strong support and appreciation for the conference report that I suspect, within an hour or so, we will adopt, and, hopefully, unanimously, as we did the original bill that came out of the Senate.

I think it is historic. I think it is truly critical in bringing about the kind of important reforms that will make a real difference to our financial system, not just today but I think as a standard it will be very much an important part of the structure of our financial system for decades to come.

I have said often, since we have talked about this legislation, that it really does, in my mind, fill a large gap that has been missing in our securities laws that were written 70 years ago. I think it very well may be the most important step we will have taken in that interim period, to make sure we have a measured but strong securities and reporting structure in our Nation that makes for the depth and breadth and beauty and effectiveness of our financial markets.

This legislation, as has been noted, comprehensively deals with reform of our accounting profession, enhances corporate accountability, improves transparency, moderates conflicts in a number of parts of our financial world, deals with the transparency of corporate financial statements, strengthens the SEC, tightens penalties and more securely sets the law, and ultimately, I believe, will restore the trust, the needed trust, and investor confidence in the integrity of America's capital markets.

This was an absolutely necessary step at this time in our Nation's history. There has been an enormous betrayal of trust, demonstrated, certainly, by the headlines and the litany of corporate abuses. Let me say, it goes deeper than just the headlines. There have been 1,100 corporate earnings restatements in the last 4 years. There is a basic loss of more than just the simple sense of trust that people get from the headlines. It is hard for people to make investment decisions when they don't have good facts, good numbers, and the ability to draw good conclusions about where the investor dollar should go.

It has led to a misallocation of capital. And there was a serious need for people to have reform in this area because this betrayal really went at the heart of why people were employees of various firms, why investors put their trust in investing in companies, and why the American system, which so relies on trust, has been called into question with respect to the integrity of our financial markets in recent days.

It is an extraordinary step. I am pleased to have been a part of it.

I see the chairman just left the Chamber. I want to take a few moments to make sure he knows how strongly I feel about the leadership he played. For those who were not a part of this measured process that Chairman SARBANES put forward—I have said this to him personally—the 10 hearings we had were the moral equivalent of a graduate finance program. I

suspect that very few times in congressional history have we seen the breakdown in the detail and presentation of sophisticated information, complicated topics, presented with the security and integrity that were presented in our hearings that led to the creation of this legislation. He did an incredible job of putting together a bill.

I get a little nervous when I hear people say this was a rush to justice, a rush to an answer. This was one of the most thoughtful and measured programs of review put in place before the legislation was written that absolutely could ever have been conceived. He deserves enormous credit for making sure we were thoughtful in the process.

Like Senator ENZI, I compliment all the staffs who were involved in this. This was an incredible effort on all of their parts. From the bottom of my heart—and I am sure all those others who were involved in this process—I truly appreciate the thoughtfulness and care they all gave to it.

I also would be remiss if I did not mention Senator DODD for his great help in originally putting together our initiatives with regard to accounting reform, corporate oversight, and resourcing the SEC, which I think are fundamental parts of the legislation. We feel good about that. I think Senator DODD has taken an extraordinary step in leadership.

Once again, I say to the Senator from Wyoming, this is about making America better. It is fundamentally about doing the right thing at the right time. His leadership on that, to make sure we stayed constrained, as he says, thoughtful, and measured about how we addressed the problem, has been most appropriate, and I have appreciated the opportunity to work with him. I compliment him for that effort.

I would say the same about the Presiding Officer. The addition of a number of the amendments that have come, particularly with regard to bringing in the responsibility that is associated with lawyering in America, as important as it is for accountants and CFOs and CEOs, I think was an important step. There has been a lot of really great effort here.

Now that the chairman is back in the Chamber, I want to say again, this is a classic example of quality leadership, of thoughtful leadership, and getting to a result that will make a difference in the lives of Americans in the years ahead.

This is a little more personal for me because for the 5 years before I came here, I was a CEO. Sometimes you want to hide from that moniker these days since it is not so popular. I think these days about the words of Andy Grove, who said that he was ashamed and embarrassed by some of the actions and many of the actions that are associated with the abuse we have seen. I stand with Andy Grove on that.

This is not one of our prouder moments in our financial system. But what does make me proud is that we could work together in a bipartisan way to come to a thoughtful, measured response that will make a difference, that really will move our securities laws in a direction that will give the American people confidence in how they read an income statement, when they look at a balance sheet and when they judge where they want to work, that they will have the necessary information.

I am not going to go into detail on the bill. Senator SARBANES and Senator ENZI did that. It is a great piece of legislation. I don't think it went too far at all. In fact, I think it is about spot on. I am sure there will be things we will need to review in time, tweak with, but this is a good set of initiatives which will make a difference in America's financial system.

When we address these issues, it does beg to recognize that there are additional tasks that need to be addressed. I heard the chairman talk about it is not good enough to authorize; we have to appropriate the funds to go with the necessary obligations we put on the SEC; we need to make sure our new advisory board actually has the resources. I think we do. But their independence, their ability to function, will come because they have the resources. The same as the SEC; we have to do our job in the second part of this to make sure those resources are available.

We do need to make sure the SEC Commissioners are in place so that we can have a credible process of looking at enforcement and review of laws and making sure that as we structure the SEC in the days going forward, we have the best of minds brought to bear there. I hope we can vote on these Commissioners very quickly.

For myself—I know there are differences of views about this—there are other unmet items on the agenda. Not necessarily do they apply to this bill, but in my view we should, as a nation, deal with the stock options issue. I don't think Congress should write the accounting rules, but I believe to recognize that stock options are an expense is relatively self-evident to those who have operated in business. They are used as a substitute for compensation. Compensation is an expense. That is why you see Chairman Greenspan and all of what I think is the critical weight of those who have observed on this issue speaking out that this is an issue that needs to be addressed. The Bermuda registry of companies, derivatives regulation are also issues.

Could I have 1 additional minute?

Mr. SARBANES. I yield an additional minute.

The PRESIDING OFFICER. The Senator may continue.

Mr. CORZINE. We need to address these issues. There are missing gaps in other parts of our oversight of our securities markets and financial markets that need to be addressed.

Finally, I believe there is a gaping hole in our oversight of what our investors and employees and the public need to see addressed, and that is pension reform. I know working their way through Congress right now are a number of initiatives on it. Fewer than 50 percent of Americans have pensions. We have a major need to address this. We should pull it together in as thoughtful a way as Chairman Sarbanes has led our Senate to this conclusion, led this debate to a positive conclusion. I hope we will address that in the future. So, once again, I express my great gratitude to all those involved. I particularly thank Chairman SARBANES for his strong leadership.

Mr. SARBANES. Mr. President, I thank the able Senator from New Jersey for his kind and gracious remarks about my efforts. I underscore the enormously valuable contribution that Senator CORZINE made to the development not only of this legislation but all of the work that has come before the committee. He brought a perspective and perception here that were extremely important, enabling us to work through some difficult issues. I appreciate that.

I yield 7 minutes to the Senator from Vermont, chairman of the Judiciary Committee.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I thank the chairman. The Senator from California wishes 1 minute. I yield 1 minute to her.

Mrs. BOXER. Mr. President, I came to the floor to give my deepest thanks to Senator SARBANES and Senator LEAHY for leading us in just the way we needed to be led toward a tough, fair reform that would lead to confidence in our financial system. I also thank Senator ENZI for his work.

I was a stockbroker years ago, decades ago, and in those days the big accounting firms were known for their integrity, and CEOs were highly respected. That check and balance was lost along the way and it must be restored.

I believe this bill will do it and our people will, once again, have trust and confidence in our financial system. They will know when they read an annual report and it is signed off on by an accounting firm that it means what it says and says what it means. That will bring the stock market back into balance. It will not happen tomorrow. This isn't magic legislation. But over time confidence will be restored and our economy will be on solid footing once again. I thank my friends.

Mr. LEAHY. Mr. President, I thank Chairman SARBANES for his leadership on this impressive bill and on the conference agreement. The then-Congressman SARBANES was one of the first people I met when I came to Washington as an elected Member of this body. We have been friends from that time forward. I have been so pleased to work with him.

I am proud that the conference agreement includes and adopts the provisions of the Leahy-McCain amendment,

which the Senate adopted by a 97-to-0 vote—again, with the strong help and support of the Senator from Maryland.

These provisions are nearly identical to the Corporate and Criminal Fraud Accountability Act, which I introduced with Majority Leader DASCHLE and others in February. It was reported unanimously by the Senate Judiciary Committee in April.

The Presiding Officer helped get this through the Judiciary Committee. The Leahy-McCain amendment provides new crimes with tough criminal penalties to restore accountability and transparency in our markets. It accomplishes this in three ways: No. 1. It punishes criminals who commit corporate fraud. No. 2. It preserves evidence that can prove corporate fraud. No. 3. It protects victims of corporate fraud.

As a former prosecutor, I know nothing focuses one's attention on the question of morality like seeing steel bars closing on them for a number of years because of what they did.

The conference report includes a tough new crime of securities fraud which will cover any scheme or artifice to defraud investors. We added the longer jail term of the other body.

There are three key provisions of the Senate-passed bill that were not in the recently passed House bill but are now in the conference agreement. I think they are truly an essential part of a comprehensive reform measure. First, we extend the statute of limitations in securities fraud cases. In many of the State pension funds cases, the current short statute has barred fraud victims from seeking recovery for Enron's misdeeds in 1997 and 1998. For example, Washington State's policemen, firefighters, and teachers were blocked from recovery of nearly $50 million in Enron investments by the short statute of limitations. That is why the last two SEC Chairmen—one a Republican and the other a Democrat—endorsed a longer short statute of limitations to provide victims with a fair chance to recoup their losses.

Secondly, we include meaningful protections for corporate whistleblowers, as passed by the Senate. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Enron wanted to silence her as a whistleblower because Texas law would allow them to do it. Look what they were doing on this chart. There is no way we could have known about this without that kind of a whistleblower. Look at this. They had all these hidden corporations—Jedi, Kenobi, Chewco, Big Doe—I guess they must have had ''little doe''—Yosemite, Cactus, Ponderosa, Raptor, Braveheart. I think they were probably watching too many old reruns when they put this together. The fact is, they were hiding hundreds of millions of dollars of stockholders' money in their pension funds. The provisions Senator GRASSLEY and I worked out in Judiciary Committee make sure whistleblowers are protected.

Third, we include new anti-shredding crimes and the requirement that corporate audit documents be preserved for 5 years with a 10 year maximum penalty for willful violations. Prosecutors cannot prove their cases without evidence. As the Andersen case showed, instead of just incorporating the loopholes from existing crimes and raising the penalties, we need tough new provisions that will make sure key documents do not get shredded in the first place.

It only takes a minute to warm up the shredder, but it can take years for prosecutors and victims to prove a case.

The conference report also maintains almost identical provisions to those authored by Senator BIDEN and approved unanimously by the Senate. These include enhanced criminal penalties for pension fraud, mail fraud, wire fraud, and a new crime for certifying false financial reports. As chairman of the Judiciary's Subcommittee on Crime and Drugs, Senator BIDEN deserves praise for his leadership of these issues.

It is time for action—decisive and comprehensive reforms that will restore confidence and accountability in our public markets for the millions of Americans whose economic security is threatened by corporate greed.

We cannot stop greed, but we can keep greed from succeeding.

We have seized this moment to make a good beginning to fashion protections for corporate fraud victims, preserve evidence of corporate crimes and hold corporate wrongdoers accountable. We have much to do to help repair the breaches of trust that have so shattered confidence in our markets and market information. We have made a good start today toward restoring that confidence but more will be needed. In addition we will need swift and strong enforcement actions and good faith administration of the reform set forth in our conference report. Our conference is concluding but our work is just beginning.

Again, I thank the Senator from Maryland.

Mr. SARBANES. Mr. President, I thank the Senator from Vermont. I underscore again how important his contributions were. The Senate Judiciary Committee reported out a bill without opposition in the committee. That is something which accompanied this legislation.

I yield 4 minutes to the Senator from South Dakota, and then it is my intention to go to the Senator from North Carolina.

Mr. JOHNSON. Mr. President, most of all I thank him for his extraordinary leadership on the development of this landmark legislation. I think it is fair to say this is the most critically important piece of investor protection legislation since the Securities Act of 1933 or the Securities Exchange Act of 1934.

This comes on the heels of the disclosure of corporate corruption that has been endemic in recent months, where we have witnessed lost jobs, lost savings, lost pensions, and ultimately lost confidence worldwide in America's capital markets.

There is an urgency that strong legislation be passed by this body and the Congress to restore confidence—restore both the perception and the reality of integrity in our capital markets.

This legislation is strong legislation. That is why it has been applauded by editorial writers from the east coast to the west coast. Senator SARBANES has been the subject of much congratulatory observation on the part of so many. This comes on the heels of, frankly, much weaker legislation that had been passed previously in the House of Representatives, the other body.

By passing a strong Senate bill, we were able to go to conference. I am proud to have served on that conference committee and to craft legislation there that goes in the direction of the Senate rather than in the direction of the other body and gives this Nation strong securities legislation. It provides a stiff penalty for corporate wrongdoing, creates a strong oversight board to ensure that corporate audits are done properly, and that the books, in fact, are not cooked. It imposes tough new corporate responsibility standards and implements control over stock analysts' conflicts of interest, so they are not making a fortune while advising their clients to invest. It requires public companies to quickly and accurately disclose financial information. It ensures that the Securities and Exchange Commission has the resources to accomplish its mission of regulating the securities markets.

These important provisions will ensure that America's financial markets remain efficient and transparent and the envy of the world. It will benefit average people who may not have had enough information to make informed decisions in the past and certainly could not have possibly known that the books were cooked, that the audits were incorrect, and that corruption was running rife. They had no way of knowing that.

This will turn that around. This is not the last word, but this is a critically important step in the right direction to returning integrity to our markets. We can observe, having come through this horrible experience in recent months of disclosure after disclosure of corruption having taken place, a recognition that free market economies can only work when there is a cop on the beat. Free market economies can only work when there are fair, well-enforced, and strictly enforced rules. A free market economy without rules, without a cop on the beat, is not an economy that will ever work at all.

This goes a long way, I believe, to reviving confidence in America's economic future. It goes a long way to restoring the fairness and transparency

so that people may make their investments—and investments may go up, and they may go down, but they can know when they make those investments, they are making those investments based on true and accurate analysis and not on bogus numbers that some audit firm on the take has been willing to put forward as the truth when, in fact, they are not the truth.

Again, the whole Nation owes a great deal of gratitude to Chairman SARBANES and to the Senate, in this case, for what I am confident is going to be an overwhelming vote in favor of this legislation.

I yield the floor.

Mr. SARBANES. Mr. President, I yield 6 minutes to the Senator from North Carolina.

The PRESIDING OFFICER (Mr. CORZINE). The Senator from North Carolina.

Mr. EDWARDS. Mr. President, I thank, along with all my colleagues, Senator SARBANES for the extraordinary work he has done on this bill. We are proud of him. America appreciates very much what he and others who have worked with him have done.

I also thank Senator ENZI, who is in the Chamber, and Senator CORZINE, who is presiding, for the work they have done with me on what I think is an important part of this legislation which, in addition to corporate CEOs and accountants, is holding the lawyers involved in these transactions responsible and accountable; that if they see something wrong occurring, they should do something about it—report it to their client, to the corporation, report it to the CEO, the chief legal officer and, if necessary, report it to the board.

In Congress, we are doing what needs to be done and stepping to the plate with regard to corporate responsibility. That is in striking contrast to what is going on in my home State right now.

At a time when Americans are demanding more corporate responsibility, when Congress is stepping up and doing what needs to be done, the President has gone to North Carolina today to ask for less corporate responsibility, to make it easier on insurance companies and to make it harder on victims.

The President is in North Carolina today proposing some of the smallest limits that have ever been proposed for families who have suffered tragedies, serious problems, as a result of poor medical care at a time when medical malpractice insurance premiums constitute way less than 1 percent, substantially less than 1 percent, of medical care costs in this country.

The President is holding a roundtable, as I speak, on this subject. I would like to see how many victims of medical negligence, of medical malpractice, people who have been devastated and their lives devastated, are participating in this roundtable. I know these people. For many years I have represented them. I have been in their homes. I have been in homes and spent time with families whose child will never walk, who have been blinded for life, who have been crippled for life, who have suffered injuries from which they will never recover.

These children blinded for life, crippled for life, severely injured for life—there is a description in the HHS report on which the President is relying which talks about when juries find they have been hurt and award money to them, they describe it as ''winning the lottery ticket.'' The parents of a child who has been blinded for life, the parents of a child who will never walk, rest assured they do not believe they have the winning lottery ticket.

My question is: How many of those people are the President talking to when he is in North Carolina today? The next time he comes back to North Carolina, we invite him to talk to some of those people because those are the ordinary Americans to whom he should be talking. Those are the people who are going to be impacted. The children who have suffered serious injuries are the ones who are going to have the greatest impact and have their rights taken away by what the President is proposing.

Unfortunately, listening to ordinary people is not what this administration does. They have done it time and time again. It is stunning, but it is sad and consistent. When this administration has a choice between protecting the rights of big companies, big insurance companies versus the rights of ordinary people, they choose the big insurance company, the big companies every single time. They have been dragged kicking and screaming to do something about corporate responsibility, which we are doing in the Congress.

On the Patients' Bill of Rights, on which Senator KENNEDY, Senator MCCAIN, and I have worked so hard, they have consistently sided with the big HMOs, which is why we do not have a Patients' Bill of Rights in this country.

On prescription drugs, when we tried to do something about the cost of prescription drugs on the floor of the Senate, this administration consistently sided with the big drug companies. When it comes to the environment, this administration has weakened clean air laws that protect the air for our children and consistently sided with the big energy companies that are polluting our air.

Today the President adds to that list, in going to the State of North Carolina, the big insurance companies. This President loves to talk about compassion. My question to him is: Where is his compassion for the victims?

Mr. President, I yield the floor.

Mr. BAYH. Mr. President, I rise today in support of the accounting reform and corporate responsibility conference agreement. I do so, because I believe very strongly that it is in the best interests of America at this critical time in our history.

I believe it goes way beyond mere accounting issues. What we are agreeing to today deals with the financial security of millions of individual investors across this country, the security of their pensions, their 401(k) programs, and their other investments for the future of their children and their grandchildren.

What we are talking about today involves the very vitality of our economy, the amount of investment that will take place in the economy, the number of jobs that will be created, and the vitality of farms. It involves the standing of AMERICA in the international economy, whether we will continue to be a safe haven for investments from those abroad, attracting the capital that helps us build a strong foundation for America's economy.

More than anything else, this bill embodies the basic values upon which this has been based. It clearly answers the question: Will we continue to encourage those virtues that have always characterized America and will our Nation continue to be the land of opportunity based upon hard work, honesty, and playing by the rules or, will we be perceived as the land of opportunity based upon deceit. I believe that the right answer, based upon traditional values and virtues, is embodied in the accounting reform and corporate responsibility bill.

I congratulate our colleagues, Senators SARBANES, DODD, CORZINE and ENZI. They demonstrated leadership and foresight in this issue.

Since the tragedies of 9/11, our country has been involved in twin struggles: One, the physical national security of this country; and, second, getting this economy moving again to ensure the economic security of Americans across this country. There are parallels between these two challenges. Both occurred as a result of unexpected tragedies but have presented us with opportunities to make this an even better, stronger, more secure Nation. Both involve breaking the political gridlock and the bureaucratic inertia that all too often make progress in this Capitol difficult. And both involve striking the right balance between individual freedom and liberty on the one hand, that we cherish, and collective security, which makes individual liberty meaningful, on the other.

Let me conclude where I began. This issue goes a long way beyond mere accounting issues. It goes a long way beyond economic policy. It goes to the very heart of who we are, what we stand for as a people, and the kind of values we cherish in the United States of America. This will protect individual investors. It will help to ensure the integrity of our economy. But more than anything else, it will ensure that those Americans who have embraced our tradition with virtues, who have worked hard and saved their money, who have played by the rules, and are honest are able to get ahead in this society.

It will send a loud and clear signal to those who practice corporate fraud that they do not have an avenue to success in this country. That does not embody the best values of America. I strongly support the accounting reform and corporate responsibility conference agreement. I urge my colleagues to enact this important legislation.

Mr. KERRY. Mr. President, I strongly support the Sarbanes-Oxley Act of 2002 because it will help end the corporate abuses that in recent months have plagued our economy and will help restore confidence in our economy. I would like to take this opportunity to express my appreciation for the efforts that Senator PAUL SARBANES, Chairman of the Senate Banking, Housing and Urban Affairs Committee, has made to develop and enact this important legislation. As a former member of the Banking Committee, I know how difficult it is to respond quickly to recent events that affected our capital markets. However, Senator SARBANES has put together a coalition which led to a unanimous vote in support of his bill in the Senate, and the provisions of which is the base text for this conference report.

The United States must stand for the fairest, most transparent and efficient financial markets in the world. However, the trust and confidence of the American people in their financial markets have been dangerously eroded by the emergence of serious accounting irregularities by some companies and possible fraudulent actions by companies like WorldCom, Inc., Enron, Arthur Andersen and others. Some investment banks have been charged with publicly recommending stocks for public purchase that their own analysts regarded as junk.

The shocking malfeasance by these businesses and accounting firms has put a strain on the growth of our economy. The misconduct by a few senior executives has cost the jobs of hardworking Americans, including 17,000 at WorldCom and thousands more at companies accused of similar wrongdoing. The lack of faith in our financial markets contributed to an overall decline in stock values and has caused grave losses to individual investors and pension funds. For example, the losses to the California Public Employees Retirement System from the recent WorldCom disclosures total more than $580 million.

The conference report creates a new Public Company Accounting Oversight Board to oversee the auditing of companies that are subject to the federal securities laws. The Board will establish auditing, quality control, and ethical standards for accounting firms. The conference report restricts accounting firms from providing a number of non-audit services to its audit clients to preserve the firm's independence. It also requires accounting firms to change the lead or coordinating partners for a company every five years.

The conference report requires CEOs to certify their financial statements or face up to 20 years in prison for falsifying information on reports. It keeps executives from obtaining corporate loans that are not available to outsiders. It requires public companies to provide periodic reports to the SEC on off-balance transactions, arrangements, obligations and other relationships that may have a material current or future effect on the company's financial condition. It requires directors, officers and 10 percent equity holders to report their purchases and sales of company securities within two days of the transaction.

I am pleased that the conference report includes the Corporate Fraud and Criminal Fraud Accountability Act which will provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in Federal investigations. It will also prohibit debts incurred in violation of securities fraud laws from being discharged in bankruptcy and protect whistle blowers who report fraud against retaliation by their employers.

The conference report requires the SEC to adopt rules to foster greater public confidence in securities research including: protecting the objectivity and independence of stock analysts who publish research intended for the public by prohibiting the pre-publication clearance of such research or recommendations by investment banking or other staff not directly responsible for investment research; disclosing whether the public company being analyzed has been a client of the analyst's firm and what services the firm provided; limiting the supervision of research analysts to officials not engaged in investment banking activities; protecting securities analysts from retaliation by investment banking staff.

The provisions included in this legislation will help restore confidence in our capital markets and in turn will help provide for future economic growth. It is an important first step, not a last. Mr. President, I am pleased to support the Conference Report and will continue to look for ways to improve investor confidence in our financial markets.

Mr. SCHUMER. Mr. President, everyone knows that New York City is the financial capital of the world. Yet as we continue to rebuild our city in light of the tragic events of September 11, we are now faced with the devastating effects of depressed markets and unsure investors, who are once again victims. With more than half of American households investing in the markets, we're all affected by a crisis in investor confidence.

I can't think of a more appropriate time than the present for the Senate to debate legislation to restore dwindling investor confidence and bring sound footing back to our financial markets. Isn't it ironic? Just a few weeks ago, the headlines read ''Sarbanes bill dead'' or ''Accounting Reform Fading.''

In the wake of recent revelations about WorldCom and just 2 days ago Merck, corporate corruption has reached an all-time high; we are now at a new level of corporate corruption. We've reached a new low and the question every member of the Senate must be asking is: ''Where does it end?''

Buzzwords like ''accounting fraud,'' ''corporate corruption,'' ''Restatements,'' ''Cooking the books,'' are being bandied about in the press, in the coffee shops, at the dinner tables across America. Just this weekend at the Taste of Buffalo, people came up to me and said ''Throw 'em in jail, Chuck!'' They were talking about the Ken Lay's, Bernard Ebers', the Andrew Fasdow's of the corporate world. White collar criminals who ran giant corporations and used tricky gimmicks to rob investors of not only their hard money but also their confidence in the strongest and fairest markets in the world. * * * They are the investment giants: Enron, Arthur Andersen, Adelphia, CMS Energy, Reliant Resources, Dynergy, Tyco International, and now Xerox and WorldCom. A mere handful of our nations top companies who have gone under as a result of misrepresented earnings and poor management. In less than a years time, these so-called investment giants through the great gift of deceit and tricky accounting practices have reduced themselves to mere shells of their former existence.

As a result, their use of tricky gimmicks to hide the real picture and literally milk the system dry have caused investors around the globe to question integrity of our nations markets, which are supposed to be the strongest and most resilient because they are perceived as the most open, most transparent markets in the world. Up until now, the United States had been a magnet for foreign investment. Yet, the selfish, greedy actions of a small few have led to a steady and precipitous drop in foreign investment in our financial markets.

It is no secret that greed played a major role in our markets rapid decline and slow demise. The heads of these entities stole millions, some billions of dollars from investors, and it is now time that we make them pay for their actions.

I commend the NASDAQ and the New York Stock Exchange for their announcements of new, tough corporate governance standards. The New York markets have taken the first steps to correct corporate corruption, and now it is our turn to find the right balance in light of these unsteady markets and times.

So what is the right balance? The right balance is one that will not only offer strict corporate governance laws, protect the average investor from being swindled out of his or her hard earned savings by a fast-talking, wheeling and dealing broker, but will

also severely punish those individuals who intentionally mislead investors with faulty practices. That is why I am introducing the following amendments to the Public Company Accounting Reform and Investor Protection Act of 2002 to further limit the ability of company execs from personally manipulating and rigging the system for their personal benefit and interest.

The first amendment prohibits companies from issuing personal loans to company executives as seen with Worldcom, whose CEO received more than $300,000 in loans from the technology giant. Instead, CEOs will have to go to the bank, just like everyone else, to acquire a loan; which, will reduce the risk of CEOs ability to use company funds for personal purposes.

The second amendment requires company execs to forfeit any and all bonuses and additional compensation if their restatements occur along with criminal liability.

It is my hope that by revealing the few bad apples at the bottom of the barrel, and punishing these individuals for their immoral behavior, we can save the rest of the industry and restore confidence in our markets.

The legislation pending before us will make it harder for companies to lie about their assets. Thats the least we can do in re-establishing public confidence in corporate America. Our common purpose today is to ensure that the Enron's, the Tyco's, and the WorldCom's never happen again.

Now is the time for us to act. It is the least we can do to shore up the investing public's confidence in our markets.

Mr. WELLSTONE. Mr. President, 2 years ago it was pretty lonely being in favor of the auditor independence reforms that then-SEC Chairman Arthur Levitt said were necessary to guard against unprecedented accounting scandals. I am proud that I was one of the few who thought Chairman Levitt was going in the right direction. Unfortunately it took the implosion of several multi-billion dollar firms, and a loss of tens of thousands of jobs and hundreds of billions of dollars in investor equity, to prove that he was right. Now America's capital markets have been shaken by a dramatic loss in investor confidence, threatening the economic recovery.

But today, Congress has acted. I rise today in strong support of the Public Company Accounting Reform and Investor Protection Act conference report. I commend the Senator from Maryland, the Chairman of the Banking Committee for putting together significant, structural reform of corporate governance and auditor independence and for defending it in conference.

And I am heartened that the President and the House leadership have finally agreed to comprehensive reform instead of mere half-measures and tough rhetoric.

This bill holds the bad actors accountable for their fraud and deception. But the legislation goes much further, as it should, because the problem goes much deeper. We are faced with more than the wrong doing of individual executives, we are faced with a crisis in confidence in American capital markets and American business.

This conference report retains the strong Senate reforms virtually intact. It bars an auditor from offering audit services and other consulting services to the same client. It says publically traded companies must change the partner in charge of the audit every five years. It strengthens oversight of accountants, by establishing an independent board to set and enforce standards. And it enhances disclosure. This alone is real reform. But the bill does more. It makes corporate executives more accountable to their shareholders. It makes investment analysts more accountable to the public. And it's bill contains strong penalties for corporate wrong-doers.

All and all, this legislation lets the sunshine back into the smoke-filled corporate board rooms so that insiders have harder time cheating the outsiders. It is structural reform that restores checks and balances that will protect against fraud, deception, and reckless carelessness.

We need to restore America's faith in corporate America. It has gone beyond individual wrong doing. The system hides and encourages corruption. Today the Congress passes strong reform. Now I call on the President to make enactment and enforcement of this new law a priority.

Mr. BOND. Mr. President, last night, the conference committee released its final report on comprehensive accounting reform and corporate governance legislation. The reaction of our financial markets confirms that this legislation is absolutely necessary to help restore integrity and confidence to our free market system and our investment community.

However, in our rush to enact broad reforms, we may be damaging the economic framework for small companies to reach our capital markets. In the long term, the reforms will make our economy stronger. In the short term, we will be creating complete chaos for small publicly traded companies and companies trying to gain the capital for growth through stock offerings.

I am extremely disappointed in the conferees' decision not to recognize this fact and provide the Securities and Exchange Commission and the proposed Public Company Accounting Oversight Board with greater flexibility in dealing with small firms. Small business has been the driving force of our economy for well over a decade. The high hurdles in the legislation are necessary for large, conglomerate companies but they may be a trip wire for our small business entrepreneurial community.

Mr. SARBANES. Mr. President, I note that the Congress, in the Enhanced Review of Periodic Disclosures section in the Sarbanes-Oxley Act, provides for regular and systematic reviews by the Securities and Exchange Commission of the periodic reports filed by public companies that are listed on a national securities exchange or on Nasdaq. The section requires that there be some review of issuers' disclosures at least once every three years. The bill identifies factors which the Commission should consider in scheduling reviews, including the issuer's capitalization, stock price volatility and restatements of earnings. We expect the Commission to exercise its discretion to determine the appropriate level and scope of review for each company's reports in the furtherance of the protection of investors and the public interest.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. Mr. President, may I ask what the time situation is?

The PRESIDING OFFICER. The Senator from Maryland has 15 minutes 10 seconds. The Senator from Wyoming has 21 minutes 30 seconds.

Mr. SARBANES. I yield 3 minutes to the Senator from New York.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. I thank the Chair.

Mr. President, this is an extremely important day for our capital markets, for our country, and for the future of our economy. As we all know, capitalism has its ups and downs and works in ups and downs, and there have been periods throughout our history—I can think of the S&L crisis a decade ago—where things get off track, out of control. It is our job as Government not to interfere with entrepreneurial vigor, not to create such regulation that they become a straitjacketed company, but at the time when the markets show that things have gotten off track, it is our job to help put them back on track.

There is a bottom line principle here: If investors, whether throughout the United States or the rest of the world, do not believe companies are on the level, they will not invest. Unfortunately, the revelations of the last year have given people the view that they are not on the level. That it is not the same for them in terms of even information as it is for somebody at the top, that the information they may be getting may be wrong or distorted far beyond what they normally would in the world. So this bill puts that back.

I think it is a carefully balanced bill. There are some changes in it. There are some changes not in it that I would like to have seen, but the perfect should not be the enemy of the good. It is a good bill, a fine bill. In fact, when the agreement was reached, the Dow Jones went up 400 points. I do not think it was coincidental. Whether it be CEOs of large companies or individual investors, the public is saying to us, make it right. Look at the abuses that occurred in the past and make sure they cannot occur again, and do it

in a careful way that keeps our markets fluid, liquid, deep, and important. I think this bill does it.

I want to pay a great deal of tribute to our chairman, Senator SARBANES, and to so many others who made this bill a reality. With the passage of this bill, we can tell investors, while we have not cleared up every problem, and perhaps we will come back and address this later—I think we will have to in a couple areas—we have certainly made things better.

A few weeks ago, Washington looked as if it was dithering in the face of crisis, but today we proudly act in a bipartisan way to restore faith in our markets, the deepest, strongest, and best markets in the world.

I dare say, I know there are some who are against any change or any regulation, but our markets will be stronger tomorrow than they were this morning when this bill passes the House, the Senate, and is signed by the President.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. Mr. President, we are down quite far in our time. Senator DODD, who wishes to speak, is at a memorial service. I suggest if the other side could use some of its time, it would be helpful in balancing this out. I ask unanimous consent that while we are trying to work this out the time not be charged to either party, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ENZI. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ENZI. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SARBANES. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SARBANES. Mr. President, I yield 8 minutes to the distinguished Senator from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, when we opened the conference on this legislation a week or so ago, I said my hope was the passage of this bill would be quick, decisive, and unanimous. Two out of three is not bad. We got quick and decisive and almost unanimous. Our colleague from Texas, and our friend, was unable to support the final product for reasons he has already explained.

I thought we did an excellent job in moving as quickly as we did. I believe passage of the legislation and the quick and decisive manner and nearly unanimous way we achieved the result and overwhelming support of the Senate and the House fulfill a responsibility of Congress to protect investors. There is more work to be done, but we have begun a significant part of the journey. In fact, we traveled a great distance down the road in fulfilling a congressional responsibility in responding to the events that began to unfold, at least to the public's awareness, last October. And the story is not yet complete. We do not know the final results.

I have a few minutes in which to share some thoughts. I am going to move quickly to share comments. I begin by commending my colleague from Maryland, the chairman of the Banking Committee, for the tremendous job he has done. I said yesterday, any students of the Congress of the United States who want to seek out good examples of how a legislative product can be developed, nurtured, analyzed, discussed, debated, and finally passed, this is about as good an example as I have seen in recent years of how one ought to proceed. Certainly the hearings we held in the Banking Committee I don't recall attracting much attention. I don't recall a single one of the 12 hearings we held appearing on the nightly news or being lead stories on some of the 24-hour news stations.

I recall a great many hearings where people sat there, raised their right hand, and took the fifth amendment. That got a lot of attention. The 12 hearings held in the Banking Committee of the Senate, where we went through the deliberate, slow, ponderous process of actually listening to people who had something to say about what ought to be done to clean up this mess, never made it on the nightly news that I am aware of.

I commend again my friend and colleague with whom I have enjoyed my service in the Congress of the United States for more than a quarter of a century. We have sat next to each other for a good part of that time in both the House and in this Chamber. I sit next to him on the Foreign Affairs Committee and on the Banking Committee. If I could make the choice and it would not be determined by seniority, I would make him my choice for seatmate. I have great respect for him and admire him immensely. He has proven the value of having PAUL SARBANES as a Member of this body.

I also point out the Presiding Officer, one of the most junior Members of this Chamber, who provided an incredible, invaluable support and source of ideas, guidance. Rarely does a new Member play such an important role on such an important piece of legislation. Of any Member who was involved in this process, MIKE ENZI of Wyoming and others all would agree, in any history written of the development of the bill, the role of a freshman Senator from the State of New Jersey named JON CORZINE needs to be talked about. He played a very important role. We would not be here without him. I tip my hat to him and to MIKE ENZI, the only Member of this Chamber who actually knew something at a practical level about what it was to be an accountant and what life was like in the trenches.

For the staff and others who worked on this legislation, this was not the most popular idea in the world. Had it not been for unfolding events, I am not sure we would have developed that kind of support. I will love to one day tell my daughter, who is only an infant, that it was the power of our persuasion which convinced a majority here to go along.

Not many understood the value, the substantive value, of this bill. MIKE ENZI did, a number of others did, there were many in the House who did, but an awful lot of people, even as late as a week ago, were suggesting maybe this bill was a bad idea, and that it would not go anywhere, and it shouldn't go anywhere; we ought to spend another couple of months thinking about it.

Those notices were not a month old, or 2 months old; that was 5 or 6 day ago. I understand it was the public's demand that we respond to this that had an awful lot to do with the support we garnered. That is all right. I never argue about how you get support around here as long as you get it in the end. We got it in the end, and that is the important news.

The fact is, we are about to vote overwhelmingly to support a very critical piece of legislation. I am confident, as he has already indicated, that the President will sign this bill into law. We are already seeing markets respond, not entirely because of this, but certainly in no small measure because of the events that have unfolded and the parts Congress played.

The chairman of the committee has talked about part of the bill. There are very important pieces, including the auditor independence. The board will be revolutionary in how it operates. Someone pointed out today, a lot of what the regulators do will determine the value of what we have written legislatively. I am confident that will be the case.

Having FASB now be compensated for and paid for from public money and not relying on the largess and generosity of the accounting industry to receive compensation will make a significant difference in establishing accounting rules and procedures. Certainly having prohibitions against those going from the industry, working for the clients for whom they have done audits, will have a beneficial effect on slowing down this not only appearance of conflict, but certainly the conflicts of interest that have occurred too often.

There are many other parts of the bill, including corporate penalties, that were crafted by our colleague from Vermont and other Members of the Judiciary Committee, that deserve a great deal of credit for their contribution to this process. The leadership,

Senator DASCHLE, certainly for insisting we move as rapidly as we did to get the product done in committee and get it on the floor of the Senate, understanding how important this issue would be to the shareholder interests and pensioners and to others who depend upon a solid, strong economy for their well-being—certainly their contribution is extremely important as well.

We have seen the economy begin to do a bit better. I don't think our work is done, despite the accomplishments in this legislation. My hope would be that before this Senate adjourns in a week and a half from now, we might deal with the pension issue. I don't know if that will be possible. I know there are a lot of other issues that need to be considered. My hope is if we are not able to do that in the next week and a half, we will come back soon after we reconvene in September.

I sit on the Health, Education, Labor, and Pensions Committee with the presiding officer who is interested in that committee. My hope is that we can deal with the pension reform matters that are necessary, as well, for adoption by this Congress before the 107th Congress adjourns.

Again, I commend all those involved. I thank Alex Sternhill of my office, Steve Harris, Marty Gruenberg, all the Members who worked with the chairman's committee and the full committee of the Senate Banking Committee, and those on the minority side, as well, who played an extremely important role.

While he disagreed with the final outcome of the bill, the Senator from Texas and I have had a great relationship over these many years we have served together. I have always enjoyed being on his side. He is a tough opponent, but when we worked together we have done some pretty good work around here and passed some pretty good bills.

He is leaving and I believe the Senate will be less vibrant an institution because of his absence. It is important that this place be a place of ideas for debate to occur, and the Senator from Texas has always made that kind of contribution.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. DODD. Hang on. I am commending him. He is going to give me more time.

Mr. GRAMM. The Senator can have all the time he wants.

Mr. DODD. Mr. President, I have learned after more than 20 years that if you want the minority to give you a little more time, start complementing them. It is amazing. Egos are alive and well in the Senate.

I am going to miss him. He is not done. We have more work, obviously, in the remaining weeks, but this may be one of the last major bills the Banking Committee considers. I don't know what life holds for him down the road, but the good Lord is not done with him yet.

I look forward to your vibrancy, your ideas, and your passion in whatever role you decide to assume in the next part of your life, and thank you for the tremendous work you have given to the committee and this body through your service.

I thank again the chairman and other members of the committee for contributing to what may be one of the most important pieces of legislation this body will consider in the 107th Congress and one of the most important in the area of financial services in many, many decades.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. GRAMM. Mr. President, how much time do we have?

The PRESIDING OFFICER. The Senator from Texas has 14 minutes.

Mr. GRAMM. We were going to shoot for about 4:30 so I may yield some of it back, depending on who comes over.

Let me, first, thank my dear colleague, Senator DODD, for his kind comments. I have enjoyed working with him over the years. I very much appreciate the comments he made.

I want to say something about my staff. A famous philosopher once said: In no way can you get a keener insight into the true nature of a leader than by looking at the people by whom he surrounds himself.

I would always be happy to have anybody judge me by Linda Lord and by Wayne Abernathy. It is amazing how much impact staffers have on the Senate. I am blessed in this area to have two of the best staff people who have ever served any Senator in the history of this country. On most issues on which I worked with Linda Lord, she knows more about this subject than anybody, and generally more than everybody else combined. In working with her, I see that the Lord was a great discriminator; he gave some people incredible ability and most of us he gave relatively few, in the way of talents. I thank her for the great job she has done.

I thank Wayne Abernathy. In the years I was chairman of the Banking Committee, Wayne Abernathy was chairman of the Banking Committee. In the day-to-day work, he has made an incredible contribution. If there is an unfairness to it, it is that I have gotten credit for all the good work that they have done, and I am grateful for that.

I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. How much time do I have remaining?

The PRESIDING OFFICER. The Senator has 3 minutes remaining.

Mr. SARBANES. I yield 1 minute to the Senator from Minnesota.

Mr. WELLSTONE. I thank the Senator from Maryland. I thank him forhis great leadership and the other Senators working on this. I can only say this in 1 minute: I remember when Arthur Levitt came by several years ago to talk with me about the need for audit independence. Senator SARBANES and others have made that possible. Many people took their savings, converted it to stock, and thought it would be there for their children or grandchildren. Many people had 401(k)s they were counting on. All of this has eroded in value. Investors do not have the confidence in the economy. I think the key is to make the structural change and make sure people can count on the independent audits, that no one is cooking their books. This is the best of government oversight. I am very proud to support this legislation.

Once again, I thank the chair of the Banking Committee for exceptional leadership.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, as Senator GRAMM was speaking earlier I was thinking to myself that he really was exemplifying on the floor of the Senate the sort of dialog we went through in the committee. As he was making an argument about auditor independence, I was thinking that is really a very reasonable argument and one to which we really paid attention. I want to give the counterargument, and then make a concluding comment about the terrific work of the staff on this bill.

Senator GRAMM has suggested that the conference report should be changed to give the SEC or the Oversight Board authority to grant broad categorical exemptions from the list of non-audit services that Section 201 of the bill prohibits registered public accounting firms to provide to public company audit clients.

Such a change, in my view, would weaken one of the fundamental objectives of the conference report: to draw a bright line around a limited list of non-audit services that accounting firms may not provide to public company audit clients because their doing so creates a fundamental conflict of interest for the accounting firms.

This limited list is based on a set of simple principles:

A public company auditor, in order to be independent, should not audit its own work (as it would if it provided internal audit outsourcing services, financial information systems design, appraisal or valuation services, actuarial services, or bookkeeping services to an audit client).

A public company auditor should not function as part of management or as an employee of the audit client (as it would if it provided human resources services such as recruiting, hiring, and designing compensation packages for the officers, directors, and managers of an audit client).

A public company auditor, to be independent, should not act as an advocate of its audit client (as it would if it provided legal and expert services to an audit client in judicial or regulatory proceedings.)

A public company auditor should not be a promoter of the company's stock or other financial interests (as it would be if it served as a broker-dealer, investment adviser, or investment banker for the company).

I want to emphasize that Section 201 does not bar accounting firms from offering consulting services. It simply requires that they not offer certain consulting services to public companies for which they wish to serve as ''independent auditor.'' An accounting firm is free to offer any services it wants to any public companies it does not audit (or to any private companies). It also may engage in any non-audit service, including tax services, that is not on the list for an audit client if the activity is approved in advance by the audit committee of the public company.

The conference report does authorize the new Oversight Board, on a case-by-case basis, to exempt any person, issuer, public accounting firm, or transaction from the prohibition on the provision of non-audit services to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.

The exemptive authority provided the Board is intentionally narrow to apply to individual cases where the application of the statutory requirement would impose some extraordinary hardship or circumstance that would merit an exemption consistent with the protection of the public interest and the protection of investors.

But the fundamental presumption of the provision is that these non-audit services, by their very nature, present a conflict of interest for an accounting firm if provided to a public company audit client.

Arthur Andersen was conflicted because it served Enron as both an auditor and a consultant, and for two years it also served as Enron's internal auditor, essentially auditing its own work. Enron was Andersen's largest client, and in 2000 Andersen earned $27 million in consulting fees from the company ($25 million in audit fees).

In its oversight hearing earlier this year on the failure of Superior Bank in Hinsdale, Illinois, the Senate Banking Committee learned first-hand the risks associated with allowing accounting firms to audit their own work. In that case, the accounting firm audited and certified a valuation of risky residual assets calculated according to a methodology it had provided as a consultant. The valuation was excessive and led to the failure of the institution.

The SEC's recent actions against one of the large public accounting firms (KPMG) in an enforcement case illustrates the danger of allowing an accounting firm to serve as a broker dealer, investment advisor, or investment banker for a public company audit client (Porta Systems). In that case, the accounting firm set up an affiliate and the affiliate provided ''turn around'' services to the issuer, including functioning as the president of the company. There would have been no need for an SEC action if the non-audit service were simply prohibited.

The inherent conflict created by these consulting services has been exacerbated by their rapid growth in the last 15 years. According to the SEC, 55 percent of the average revenue of the big five accounting firms came from accounting and auditing services in 1988. Twenty-two percent of the average revenue came from management consulting services. By 1999, those figures had fallen to 31 percent for accounting and auditing services, and risen to 50 percent for management consulting services. Recent data reported to the SEC showed on average public accounting firms' non-audit fees comprised 73 percent of their total fees, or $2.69 in non-audit fees for every $1.00 in audit fees.

A number of the most knowledgeable and thoughtful witnesses who testified before the Senate Banking Committee in the hearings held in preparation for this legislation argued that the growth in the non-audit consulting business done by the large accounting firms for their audit clients has so compromised the independence of the audits that a complete prohibition on the provision of consulting services by accounting firms to their public audit clients is required. Perhaps the strongest advocates of this view have been the managers of large pension funds who are entrusted with people's retirement savings.

For example, the California Public Employees' Retirement System (CalPERS), manages pension and health benefits for more than 1.3 million members and has aggregate holdings totaling almost $150 billion. According to CalPERS CEO, James E. Burton:

> the inherent conflicts created when an external auditor is simultaneously receiving fees from a company for non-audit work cannot be remedied by anything less than a bright-line ban. An accounting firm should be an auditor or a consultant, but not both to the same client.

John Biggs is CEO of Teachers Insurance and Annuity Association College Retirement Equities Fund (TIAA-CREF), the largest private pension system in the world, which manages approximately $275 billion in pension assets for over 2 million participants in the education and research community. Mr. Biggs was also a member of the last Public Oversight Board. He told the Committee that:

> TIAA-CREF does not allow our public audit firm to provide any consulting services to us, and our policy even bars our auditor from providing tax services.

The conference report chose not to follow the approach of imposing a complete prohibition on the provision of non-audit services to audit clients. Instead it chose the approach of identifying the non-audit services which by their very nature pose a conflict of interest and should be prohibited. Among those supporting this approach are former Comptroller General Charles Bowsher, former SEC Chairman Arthur Levitt, and former Federal Reserve Board Chairman Paul Volcker.

The argument is made that small companies, in particular, may be burdened by this requirement and that the SEC should have broad authority to grant categorical exemptions. It is even argued that so many companies would seek case-by-case exemptions that the SEC would become overwhelmed and would be unable to process the exemptions in a timely manner.

The point is that if the provision of a non-audit service to a public company audit client creates a conflict of interest for the accounting firm that non-audit service should be prohibited, whether the public company is large or small. Investors rely on the audit in making their investment decisions, and the independence of the audit should not be compromised by the provision of the non-audit service. If a legitimate exceptional hardship is imposed, then the Oversight Board would have the authority to grant case-by-case exemptions.

The present Comptroller General, David Walker, issued a particularly strong statement in support of the approach to auditor independence taken in the bill conference report I would like to quote:

> I believe that legislation that will provide a framework and guidance for the SEC to use in setting independence standards for public company audits is needed. History has shown that the AICPA [American Institute of Certified Public Accountants] and the SEC have failed to update their independence standards in a timely fashion and that past updates have not adequately protected the public's interests. In addition, the accounting profession has placed too much emphasis on growing non-audit fees and not enough emphasis on modernizing the auditing profession for the 21st century environment. Congress is the proper body to promulgate a framework for the SEC to use in connection with independence related regulatory and enforcement actions in order to help ensure confidence in financial reporting and safeguard investors and the public's interests. The independence provision [of the bill] . . . strikes a reasoned and reasonable balance that will enable auditors to perform a range of non-audit services for their audit clients and an unlimited range of non-audit services for their non-audit clients. . . . In my opinion, the time to act on independence legislation is now.

This auditor independence provision is at the very center of this legislation. It goes to the public trust granted to public accounting firms by our securities laws which require comprehensive financial statements that must be prepared, in the words of the Securities Act of 1933, by ''an independent public or certified accountant.''

The statutory independent audit requirement has two sides, a private franchise and a public trust. It grants a franchise to the nation's public accountants—their services, and only their services—must be secured before an issuer of securities can go to market, have the securities listed on the nation's stock exchanges, or comply

with the reporting requirements of the securities laws. This is a source of significant private benefit.

But the franchise is conditional. It comes in return for the CPA's assumption of a public duty and obligation. As a unanimous Supreme Court noted nearly 20 years ago:

In certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility. . . . [That auditor] owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This ''public watchdog'' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

We must cut the chord between the audit and the consulting services which by their very nature undermine the independence of the audit. We must break this culture that exists, and to do that we need a bright line. In my view granting broad exemption authority to the Oversight Board or the SEC to permit these non-audit services would undermine the separation the conference report is intended to establish.

I wanted to underscore the fact that there was a very reasoned, intense discussion of these issues. There is reason on both sides. I thought the Senator made a very strong statement. I wanted to give the counterstatement here.

I share Senator DODD's view about this exchange of ideas and its importance to the functioning of this institution. The Senator from Texas has certainly made an important contribution in that regard.

I wish to take a moment to recognize the terrific work of the staff. Senator GRAMM referred to Wayne Abernathy and Linda Lord, and of course Mike Thompson and Katherine McGuire of Senator ENZI's staff; Laura Ayoud of the legislative counsel who worked day and night to put this thing in legislative language; the staff of the Banking Committee led by Steve Harris, Dean Shahinian, Steve Kroll, Lynsey Graham, Vincent Meehan, Sarah Kline, Judy Keenan, Jesse Jacobs, Craig Davis, Marty Gruenberg, Gary Gensler, and, as I said, all led so ably by Steve Harris.

We had the very able staff of the Senators on the committee: Alex Sternhell, Naomi Camper, Jon Berger, Jimmy Williams, Catherine Cruz Wojtasik, Leslie Wooley, Margaret Simmons, Matt Young, Roger Hollingsworth, and Matt Pippin.

I thank again all my colleagues who participated. I think I recognized most of them in the course of the day, and I want to say just a word about Chairman OXLEY and Congressman LAFALCE on the House side, who made it possible for us to work through this conference and with whom we have worked so cooperatively on so many issues that have come before our committee.

The PRESIDING OFFICER. The time of the Senator has expired. Who yields time?

Mr. SARBANES. How much time is remaining?

The PRESIDING OFFICER. The Senator from Maryland is without time. There are 12 minutes for the Senator from Texas.

Mr. GRAMM. Mr. President, we have reached the hour that we set for a vote. I am ready to yield back the 12 minutes and have the vote proceed.

I reiterate that this is a bill that was fraught with danger in the environment that we were in. Literally anything could have passed. I think, by a combination of good work and some good fortune, that has not been the case. We have a vehicle before us that I think will be complicated. It will be difficult to implement.

I think we will probably change it in the future. But I think in terms of our ability to prosper under the bill, and for the economy to survive not only the illness but the prescription of the doctor in this case, I think it is doable.

I yield the remainder of our time.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

Mr. SARBANES. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from North Carolina (Mr. HELMS) is necessarily absent.

I further announce that if present and voting the Senator from North Carolina (Mr. HELMS) would vote ''yea.''

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 99, nays 0, as follows:

[Rollcall Vote No. 192 Leg.]

YEAS—99

Akaka	Dorgan	Lugar
Allard	Durbin	McCain
Allen	Edwards	McConnell
Baucus	Ensign	Mikulski
Bayh	Enzi	Miller
Bennett	Feingold	Murkowski
Biden	Feinstein	Murray
Bingaman	Fitzgerald	Nelson (FL)
Bond	Frist	Nelson (NE)
Boxer	Graham	Nickles
Breaux	Gramm	Reed
Brownback	Grassley	Reid
Bunning	Gregg	Roberts
Burns	Hagel	Rockefeller
Byrd	Harkin	Santorum
Campbell	Hatch	Sarbanes
Cantwell	Hollings	Schumer
Carnahan	Hutchinson	Sessions
Carper	Hutchison	Shelby
Chafee	Inhofe	Smith (NH)
Cleland	Inouye	Smith (OR)
Clinton	Jeffords	Snowe
Cochran	Johnson	Specter
Collins	Kennedy	Stabenow
Conrad	Kerry	Stevens
Corzine	Kohl	Thomas
Craig	Kyl	Thompson
Crapo	Landrieu	Thurmond
Daschle	Leahy	Torricelli
Dayton	Levin	Voinovich
DeWine	Lieberman	Warner
Dodd	Lincoln	Wellstone
Domenici	Lott	Wyden

NOT VOTING—1

Helms

The conference report was agreed to.

Mr. SARBANES. Mr. President, I move to reconsider the vote.

Mr. DASCHLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. DAYTON). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Ms. CANTWELL). Without objection, it is so ordered.

ORDER OF PROCEDURE

Mr. REID. Madam President, I ask unanimous consent that immediately after the cloture vote on the nomination of Julia Smith Gibbons, all time postcloture be considered used, and that on Monday, July 29, at 5:30 p.m., the Senate proceed to executive session to vote on the nomination of Julia Smith Gibbons, to be a U.S. circuit judge; that upon confirmation, the President be immediately notified of the Senate's action and that the Senate return to legislative session; further, that on Friday, July 26, immediately following the cloture vote on the nomination, the Senate return to legislative session and resume consideration of S. 812; that Senator GREGG or his designee be recognized to offer a second-degree amendment; that during Friday's session, there be up to 3 hours for debate with respect to the amendment, with the time equally divided and controlled between Senators KENNEDY and GREGG or their designees; and that whenever the Senate resumes consideration of S. 812, the Gregg or designee amendment remain debatable.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

UNANIMOUS CONSENT AGREEMENT— EXECUTIVE CALENDAR

Mr. REID. Madam President, we have spent considerable time this evening in a quorum call, but in spite of that, we have had a very productive legislative day. We have passed the conference report on corporate governance; the Appropriations Committee this afternoon reported the final four bills out of the

Exhibit M.f

Attachment Yates-v-US.pdf to email of Nov. 20, 2016 (Exhibit M, *supra*).

Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

YATES *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 13–7451. Argued November 5, 2014—Decided February 25, 2015

While conducting an offshore inspection of a commercial fishing vessel in the Gulf of Mexico, a federal agent found that the ship's catch contained undersized red grouper, in violation of federal conservation regulations. The officer instructed the ship's captain, petitioner Yates, to keep the undersized fish segregated from the rest of the catch until the ship returned to port. After the officer departed, Yates instead told a crew member to throw the undersized fish overboard. For this offense, Yates was charged with destroying, concealing, and covering up undersized fish to impede a federal investigation, in violation of 18 U. S. C. §1519. That section provides that a person may be fined or imprisoned for up to 20 years if he "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation. At trial, Yates moved for a judgment of acquittal on the §1519 charge. Pointing to §1519's origin as a provision of the Sarbanes-Oxley Act of 2002, a law designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation, Yates argued that §1519's reference to "tangible object" subsumes objects used to store information, such as computer hard drives, not fish. The District Court denied Yates's motion, and a jury found him guilty of violating §1519. The Eleventh Circuit affirmed the conviction, concluding that §1519 applies to the destruction or concealment of fish because, as objects having physical form, fish fall within the dictionary definition of "tangible object."

Held: The judgment is reversed, and the case is remanded.

733 F. 3d 1059, reversed and remanded.

Syllabus

JUSTICE GINSBURG, joined by THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded that a "tangible object" within §1519's compass is one used to record or preserve information. Pp. 6–20.

(a) Although dictionary definitions of the words "tangible" and "object" bear consideration in determining the meaning of "tangible object" in §1519, they are not dispositive. Whether a statutory term is unambiguous "is determined [not only] by reference to the language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341. Identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute. See, *e.g., FAA* v. *Cooper*, 566 U. S. ___, ___. Pp. 7–10.

(b) Familiar interpretive guides aid the construction of "tangible object." Though not commanding, §1519's heading—"Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"—conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records.

Section 1519's position within Title 18, Chapter 73, further signals that §1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence. Congress placed §1519 at the end of Chapter 73 following immediately after pre-existing specialized provisions expressly aimed at corporate fraud and financial audits.

The contemporaneous passage of §1512(c)(1), which prohibits a person from "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object . . . with the intent to impair the object's integrity or availability for use in an official proceeding," is also instructive. The Government argues that §1512(c)(1)'s reference to "other object" includes any and every physical object. But if §1519's reference to "tangible object" already included all physical objects, as the Government also contends, then Congress had no reason to enact §1512(c)(1). Section 1519 should not be read to render superfluous an entire provision passed in proximity as part of the same Act. See *Marx* v. *General Revenue Corp.*, 568 U. S. ___, ___.

The words immediately surrounding "tangible object" in §1519—"falsifies, or makes a false entry in any record [or] document"—also cabin the contextual meaning of that term. Applying the canons *noscitur a sociis* and *ejusdem generis*, "tangible object," as the last in a list of terms that begins "any record [or] document," is appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects used to record or preserve information. This moderate interpretation accords with the list of actions §1519 proscribes; the verbs "falsif[y]" and "mak[e] a false entry in" typically

take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. See *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575.

Use of traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and §1519 itself thus call for rejection of an aggressive interpretation of "tangible object."

Furthermore, the meaning of "record, document, or thing" in a provision of the 1962 Model Penal Code (MPC) that has been interpreted to prohibit tampering with any kind of physical evidence is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in §1519. There are significant differences between the offense described by the MPC provision and the offense created by §1519. Pp. 10–18.

(c) Finally, if recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object" in §1519, it would be appropriate to invoke the rule of lenity. Pp. 18–19.

JUSTICE ALITO concluded that traditional rules of statutory construction confirm that Yates has the better argument. Title 18 U. S. C. §1519's list of nouns, list of verbs, and title, when combined, tip the case in favor of Yates. Applying the canons *noscitur a sociis* and *ejusdem generis* to the list of nouns—"any record, document, or tangible object"—the term "tangible object" should refer to something similar to records or documents. And while many of §1519's verbs—"alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in"—could apply to far-flung nouns such as salamanders or sand dunes, the term "makes a false entry in" makes no sense outside of filekeeping. Finally, §1519's title—"Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"—also points toward filekeeping rather than fish. Pp. 1–4.

GINSBURG, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and BREYER and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. KAGAN, J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 13–7451

JOHN L. YATES, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[February 25, 2015]

JUSTICE GINSBURG announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

John Yates, a commercial fisherman, caught undersized red grouper in federal waters in the Gulf of Mexico. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea. For this offense, he was charged with, and convicted of, violating 18 U. S. C. §1519, which provides:

> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

Yates was also indicted and convicted under §2232(a), which provides:

> "DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.—Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both."

Yates does not contest his conviction for violating §2232(a), but he maintains that fish are not trapped within the term "tangible object," as that term is used in §1519.

Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction. But it would cut §1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups, we conclude that a matching construction of §1519 is in order: A tangible object captured by §1519, we hold, must be one used to record or preserve information.

I

On August 23, 2007, the *Miss Katie*, a commercial fishing boat, was six days into an expedition in the Gulf of

Mexico. Her crew numbered three, including Yates, the captain. Engaged in a routine offshore patrol to inspect both recreational and commercial vessels, Officer John Jones of the Florida Fish and Wildlife Conservation Commission decided to board the *Miss Katie* to check on the vessel's compliance with fishing rules. Although the *Miss Katie* was far enough from the Florida coast to be in exclusively federal waters, she was nevertheless within Officer Jones's jurisdiction. Because he had been deputized as a federal agent by the National Marine Fisheries Service, Officer Jones had authority to enforce federal, as well as state, fishing laws.

Upon boarding the *Miss Katie*, Officer Jones noticed three red grouper that appeared to be undersized hanging from a hook on the deck. At the time, federal conservation regulations required immediate release of red grouper less than 20 inches long. 50 CFR §622.37(d)(2)(ii) (effective April 2, 2007). Violation of those regulations is a civil offense punishable by a fine or fishing license suspension. See 16 U. S. C. §§1857(1)(A), (G), 1858(a), (g).

Suspecting that other undersized fish might be on board, Officer Jones proceeded to inspect the ship's catch, setting aside and measuring only fish that appeared to him to be shorter than 20 inches. Officer Jones ultimately determined that 72 fish fell short of the 20-inch mark. A fellow officer recorded the length of each of the undersized fish on a catch measurement verification form. With few exceptions, the measured fish were between 19 and 20 inches; three were less than 19 inches; none were less than 18.75 inches. After separating the fish measuring below 20 inches from the rest of the catch by placing them in wooden crates, Officer Jones directed Yates to leave the fish, thus segregated, in the crates until the *Miss Katie* returned to port. Before departing, Officer Jones issued Yates a citation for possession of undersized fish.

Four days later, after the *Miss Katie* had docked in

Cortez, Florida, Officer Jones measured the fish contained in the wooden crates. This time, however, the measured fish, although still less than 20 inches, slightly exceeded the lengths recorded on board. Jones surmised that the fish brought to port were not the same as those he had detected during his initial inspection. Under questioning, one of the crew members admitted that, at Yates's direction, he had thrown overboard the fish Officer Jones had measured at sea, and that he and Yates had replaced the tossed grouper with fish from the rest of the catch.

For reasons not disclosed in the record before us, more than 32 months passed before criminal charges were lodged against Yates. On May 5, 2010, he was indicted for destroying property to prevent a federal seizure, in violation of §2232(a), and for destroying, concealing, and covering up undersized fish to impede a federal investigation, in violation of §1519.[1] By the time of the indictment, the minimum legal length for Gulf red grouper had been lowered from 20 inches to 18 inches. See 50 CFR §622.37(d)(2)(iv) (effective May 18, 2009). No measured fish in Yates's catch fell below that limit. The record does not reveal what civil penalty, if any, Yates received for his possession of fish undersized under the 2007 regulation. See 16 U. S. C. §1858(a).

Yates was tried on the criminal charges in August 2011. At the end of the Government's case in chief, he moved for a judgment of acquittal on the §1519 charge. Pointing to §1519's title and its origin as a provision of the Sarbanes-Oxley Act, Yates argued that the section sets forth "a documents offense" and that its reference to "tangible object[s]" subsumes "computer hard drives, logbooks, [and] things of that nature," not fish. App. 91–92. Yates

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[1] Yates was also charged with making a false statement to federal law enforcement officers, in violation of 18 U. S. C. §1001(a)(2). That charge, on which Yates was acquitted, is not relevant to our analysis.

acknowledged that the Criminal Code contains "sections that would have been appropriate for the [G]overnment to pursue" if it wished to prosecute him for tampering with evidence. App. 91. Section 2232(a), set out *supra,* at 1–2, fit that description. But §1519, Yates insisted, did not.

The Government countered that a "tangible object" within §1519's compass is "simply something other than a document or record." App. 93. The trial judge expressed misgivings about reading "tangible object" as broadly as the Government urged: "Isn't there a Latin phrase [about] construction of a statute . . . . The gist of it is . . . you take a look at [a] line of words, and you interpret the words consistently. So if you're talking about documents, and records, tangible objects are tangible objects in the nature of a document or a record, as opposed to a fish." *Ibid.* The first-instance judge nonetheless followed controlling Eleventh Circuit precedent. While recognizing that §1519 was passed as part of legislation targeting corporate fraud, the Court of Appeals had instructed that "the broad language of §1519 is not limited to corporate fraud cases, and 'Congress is free to pass laws with language covering areas well beyond the particular crisis *du jour* that initially prompted legislative action.'" No. 2:10–cr–66–FtM–29SPC (MD Fla., Aug. 8, 2011), App. 116 (quoting *United States* v. *Hunt*, 526 F. 3d 739, 744 (CA11 2008)). Accordingly, the trial court read "tangible object" as a term "independent" of "record" or "document." App. 116. For violating §1519 and §2232(a), the court sentenced Yates to imprisonment for 30 days, followed by supervised release for three years. App. 118–120. For life, he will bear the stigma of having a federal felony conviction.

On appeal, the Eleventh Circuit found the text of §1519 "plain." 733 F. 3d 1059, 1064 (2013). Because "tangible object" was "undefined" in the statute, the Court of Appeals gave the term its "ordinary or natural meaning," *i.e.*, its dictionary definition, "[h]aving or possessing physical

form." *Ibid.* (quoting Black's Law Dictionary 1592 (9th ed. 2009)).

We granted certiorari, 572 U. S. ___ (2014), and now reverse the Eleventh Circuit's judgment.

II

The Sarbanes-Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents. The Government acknowledges that §1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. Brief for United States 46. Prior law made it an offense to "intimidat[e], threate[n], or corruptly persuad[e] *another person*" to shred documents. §1512(b) (emphasis added). Section 1519 cured a conspicuous omission by imposing liability on a person who destroys records himself. See S. Rep. No. 107–146, p. 14 (2002) (describing §1519 as "a new general anti shredding provision" and explaining that "certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself"). The new section also expanded prior law by including within the provision's reach "any matter within the jurisdiction of any department or agency of the United States." *Id.*, at 14–15.

In the Government's view, §1519 extends beyond the principal evil motivating its passage. The words of §1519, the Government argues, support reading the provision as a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter under federal investigation.

Yates urges a contextual reading of §1519, tying "tangible object" to the surrounding words, the placement of the provision within the Sarbanes-Oxley Act, and related

provisions enacted at the same time, in particular §1520 and §1512(c)(1), see *infra*, at 10, 12–13. Section 1519, he maintains, targets not all manner of evidence, but records, documents, and tangible objects used to preserve them, *e.g.*, computers, servers, and other media on which information is stored.

We agree with Yates and reject the Government's unrestrained reading. "Tangible object" in §1519, we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.

A

The ordinary meaning of an "object" that is "tangible," as stated in dictionary definitions, is "a discrete . . . thing," Webster's Third New International Dictionary 1555 (2002), that "possess[es] physical form," Black's Law Dictionary 1683 (10th ed. 2014). From this premise, the Government concludes that "tangible object," as that term appears in §1519, covers the waterfront, including fish from the sea.

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). See also *Deal* v. *United States*, 508 U. S. 129, 132 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.

We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute. See, *e.g., FAA* v. *Cooper*, 566 U. S. ___, ___–___ (2012), (slip op., at 6–7) ("actual damages" has different meanings in different statutes); *Wachovia Bank, N. A.* v. *Schmidt*, 546 U. S. 303, 313–314 (2006) ("located" has different meanings in different provisions of the National Bank Act); *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 595–597 (2004) ("age" has different meanings in different provisions of the Age Discrimination in Employment Act of 1967); *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 213 (2001) ("wages paid" has different meanings in different provisions of Title 26 U. S. C.); *Robinson*, 519 U. S., at 342–344 ("employee" has different meanings in different sections of Title VII of the Civil Rights Act of 1964); *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 807–808 (1986) ("arising under" has different meanings in U. S. Const., Art. III, §2, and 28 U. S. C. §1331); *District of Columbia* v. *Carter*, 409 U. S. 418, 420–421 (1973) ("State or Territory" has different meanings in 42 U. S. C. §1982 and §1983); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433–437 (1932) ("trade or commerce" has different meanings in different sections of the Sherman Act). As the Court observed in *Atlantic Cleaners & Dyers*, 286 U. S., at 433:

> "Most words have different shades of meaning and consequently may be variously construed . . . . Where the subject matter to which the words refer is not the same in the several places where [the words] are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a

> consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed."[2]

In short, although dictionary definitions of the words "tangible" and "object" bear consideration, they are not dispositive of the meaning of "tangible object" in §1519.

Supporting a reading of "tangible object," as used in §1519, in accord with dictionary definitions, the Government points to the appearance of that term in Federal Rule of Criminal Procedure 16. That Rule requires the prosecution to grant a defendant's request to inspect "tangible objects" within the Government's control that have utility for the defense. See Fed. Rule Crim. Proc. 16(a)(1)(E).

Rule 16's reference to "tangible objects" has been interpreted to include any physical evidence. See 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §20.3(g), pp. 405–406, and n. 120 (3d ed. 2007). Rule 16 is a discovery rule designed to protect defendants by compelling the prosecution to turn over to the defense evidence material to the charges at issue. In that context, a comprehensive construction of "tangible objects" is fitting. In contrast, §1519 is a penal provision that refers to "tangible object" not in relation to a request for information relevant to a specific court proceeding, but rather in relation to federal investigations or proceedings of every kind, including those not yet begun.[3] See *Commissioner* v. *National Carbide Corp.*, 167 F. 2d 304, 306 (CA2 1948) (Hand, J.)

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[2] The dissent assiduously ignores all this, *post*, at 11–12, in insisting that Congress wrote §1519 to cover, along with shredded corporate documents, red grouper slightly smaller than the legal limit.

[3] For the same reason, we do not think the meaning of "tangible objects" (or "tangible things," see Fed. Rule Civ. Proc. 26(b)) in other discovery prescriptions cited by the Government leads to the conclusion that "tangible object" in §1519 encompasses any and all physical evidence existing on land or in the sea.

("words are chameleons, which reflect the color of their environment"). Just as the context of Rule 16 supports giving "tangible object" a meaning as broad as its dictionary definition, the context of §1519 tugs strongly in favor of a narrower reading.

B

Familiar interpretive guides aid our construction of the words "tangible object" as they appear in §1519.

We note first §1519's caption: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. Neither does the title of the section of the Sarbanes-Oxley Act in which §1519 was placed, §802: "Criminal penalties for altering documents." 116 Stat. 800. Furthermore, §1520, the only other provision passed as part of §802, is titled "Destruction of corporate audit records" and addresses only that specific subset of records and documents. While these headings are not commanding, they supply cues that Congress did not intend "tangible object" in §1519 to sweep within its reach physical objects of every kind, including things no one would describe as records, documents, or devices closely associated with them. See *Almendarez-Torres* v. *United States*, 523 U. S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). If Congress indeed meant to make §1519 an all-encompassing ban on the spoliation of evidence, as the dissent believes Congress did, one would have expected a clearer indication of that intent.

Section 1519's position within Chapter 73 of Title 18 further signals that §1519 was not intended to serve as a cross-the-board ban on the destruction of physical evi-

dence of every kind. Congress placed §1519 (and its companion provision §1520) at the end of the chapter, following immediately after the pre-existing §1516, §1517, and §1518, each of them prohibiting obstructive acts in specific contexts. See §1516 (audits of recipients of federal funds); §1517 (federal examinations of financial institutions); §1518 (criminal investigations of federal health care offenses). See also S. Rep. No. 107–146, at 7 (observing that §1517 and §1518 "apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud").

But Congress did not direct codification of the Sarbanes-Oxley Act's other additions to Chapter 73 adjacent to these specialized provisions. Instead, Congress directed placement of those additions within or alongside retained provisions that address obstructive acts relating broadly to official proceedings and criminal trials: Section 806, "Civil Action to protect against retaliation in fraud cases," was codified as §1514A and inserted between the pre-existing §1514, which addresses civil actions to restrain harassment of victims and witnesses in criminal cases, and §1515, which defines terms used in §1512 and §1513. Section 1102, "Tampering with a record or otherwise impeding an official proceeding," was codified as §1512(c) and inserted within the pre-existing §1512, which addresses tampering with a victim, witness, or informant to impede any official proceeding. Section 1107, "Retaliation against informants," was codified as §1513(e) and inserted within the pre-existing §1513, which addresses retaliation against a victim, witness, or informant in any official proceeding. Congress thus ranked §1519, not among the broad proscriptions, but together with specialized provisions expressly aimed at corporate fraud and financial audits. This placement accords with the view that Congress' conception of §1519's coverage was considerably

more limited than the Government's.[4]

The contemporaneous passage of §1512(c)(1), which was contained in a section of the Sarbanes-Oxley Act discrete from the section embracing §1519 and §1520, is also instructive. Section 1512(c)(1) provides:

> "(c) Whoever corruptly—
>
> "(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding
>
> . . . . .
>
> "shall be fined under this title or imprisoned not more than 20 years, or both."

The legislative history reveals that §1512(c)(1) was drafted and proposed after §1519. See 148 Cong. Rec. 12518, 13088–13089 (2002). The Government argues, and Yates does not dispute, that §1512(c)(1)'s reference to "other object" includes any and every physical object. But if §1519's reference to "tangible object" already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact §1512(c)(1): Virtually any act that would violate §1512(c)(1) no doubt would violate §1519 as well, for §1519 applies to "the

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[4] The dissent contends that nothing can be drawn from the placement of §1519 because, before and after Sarbanes-Oxley, "all of Chapter 73 was ordered chronologically." *Post*, at 9. The argument might have some force if the factual premise were correct. In Sarbanes-Oxley, Congress directed insertion of §1514A *before* §1518, then the last section in Chapter 73. If, as the dissent argues, Congress adopted §1519 to fill out §1512, *post*, at 6–7, it would have made more sense for Congress to codify the substance of §1519 within §1512 or in a new §1512A, rather than placing §1519 among specialized provisions. Notably, in Sarbanes-Oxley, Congress added §1512(c)(1), "a broad ban on evidence-spoliation," cf. *post*, at 9, n. 2, to §1512, even though §1512's preexisting title and provisions all related to witness-tampering.

investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter," not just to "an official proceeding."[5]

The Government acknowledges that, under its reading, §1519 and §1512(c)(1) "significantly overlap." Brief for United States 49. Nowhere does the Government explain what independent function §1512(c)(1) would serve if the Government is right about the sweeping scope of §1519. We resist a reading of §1519 that would render superfluous an entire provision passed in proximity as part of the same Act.[6] See *Marx* v. *General Revenue Corp.*, 568 U. S. ___, ___ (2013) (slip op., at 14) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

The words immediately surrounding "tangible object" in §1519—"falsifies, or makes a false entry in any record [or]

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[5] Despite this sweeping "in relation to" language, the dissent remarkably suggests that §1519 does not "ordinarily operate in th[e] context [of] federal court[s]," for those courts are not "department[s] or agenc[ies]." *Post*, at 10. That suggestion, which, as one would expect, lacks the Government's endorsement, does not withstand examination. The Senate Committee Report on §1519, on which the dissent elsewhere relies, see *post*, at 6, explained that an obstructive act is within §1519's scope if "done 'in contemplation' of or in relation to a matter or investigation." S. Rep. 107–146, at 15. The Report further informed that §1519 "is . . . meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title." *Ibid.* If any doubt remained about the multiplicity of contexts in which §1519 was designed to apply, the Report added, "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." *Ibid.*

[6] Furthermore, if "tangible object" in §1519 is read to include any physical object, §1519 would prohibit all of the conduct proscribed by §2232(a), which imposes a maximum penalty of five years in prison for destroying or removing "property" to prevent its seizure by the Government. See *supra,* at 1–2.

document"—also cabin the contextual meaning of that term. As explained in *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995), we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." (internal quotation marks omitted). See also *United States* v. *Williams*, 553 U. S. 285, 294 (2008) ("a word is given more precise content by the neighboring words with which it is associated"). In *Gustafson*, we interpreted the word "communication" in §2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably "notice, circular, [and] advertisement," making it "apparent that the list refer[red] to documents of wide dissemination." 513 U. S., at 575–576. And we did so even though the list began with the word "any."

The *noscitur a sociis* canon operates in a similar manner here. "Tangible object" is the last in a list of terms that begins "any record [or] document." The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.,* objects used to record or preserve information. See United States Sentencing Commission, Guidelines Manual §2J1.2, comment., n. 1 (Nov. 2014) ("'Records, documents, or tangible objects' includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.").

This moderate interpretation of "tangible object" accords with the list of actions §1519 proscribes. The section applies to anyone who "alters, destroys, mutilates, conceals, covers up, *falsifies*, or *makes a false entry in* any record, document, or tangible object" with the requisite

obstructive intent. (Emphasis added.) The last two verbs, "falsif[y]" and "mak[e] a false entry in," typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. See, *e.g.,* Black's Law Dictionary 720 (10th ed. 2014) (defining "falsify" as "[t]o make deceptive; to counterfeit, forge, or misrepresent; esp., to tamper with (a document, record, etc.)"). It would be unnatural, for example, to describe a killer's act of wiping his fingerprints from a gun as "falsifying" the murder weapon. But it would not be strange to refer to "falsifying" data stored on a hard drive as simply "falsifying" a hard drive. Furthermore, Congress did not include on §1512(c)(1)'s list of prohibited actions "falsifies" or "makes a false entry in." See §1512(c)(1) (making it unlawful to "alte[r], destro[y], mutilat[e], or concea[l] a record, document, or other object" with the requisite obstructive intent). That contemporaneous omission also suggests that Congress intended "tangible object" in §1519 to have a narrower scope than "other object" in §1512(c)(1).[7]

A canon related to *noscitur a sociis*, *ejusdem generis*, counsels: "Where general words follow specific words in a

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[7]The dissent contends that "record, document, or tangible object" in §1519 should be construed in conformity with "record, document, or other object" in §1512(c)(1) because both provisions address "the same basic problem." *Post*, at 11–12. But why should that be so when Congress prohibited in §1519 additional actions, specific to paper and electronic documents and records, actions it did not prohibit in §1512(c)(1)? When Congress passed Sarbanes-Oxley in 2002, courts had already interpreted the phrase "alter, destroy, mutilate, or conceal an object" in §1512(b)(2)(B) to apply to all types of physical evidence. See, *e.g.*, *United States* v. *Applewhaite*, 195 F. 3d 679, 688 (CA3 1999) (affirming conviction under §1512(b)(2)(B) for persuading another person to paint over blood spatter). Congress' use of a formulation in §1519 that did not track the one used in §1512(b)(2)(B) (and repeated in §1512(c)(1)) suggests that Congress designed §1519 to be interpreted apart from §1512, not in lockstep with it.

statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003) (internal quotation marks omitted). In *Begay* v. *United States*, 553 U. S. 137, 142–143 (2008), for example, we relied on this principle to determine what crimes were covered by the statutory phrase "any crime . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U. S. C. §924(e)(2)(B)(ii). The enumeration of specific crimes, we explained, indicates that the "otherwise involves" provision covers "only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" 553 U. S., at 142. Had Congress intended the latter "all encompassing" meaning, we observed, "it is hard to see why it would have needed to include the examples at all." *Ibid.* See also *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, ___ (2011) (slip op., at 16) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless."). Just so here. Had Congress intended "tangible object" in §1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to "record" or "document." The Government's unbounded reading of "tangible object" would render those words misleading surplusage.

Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and §1519 itself, we are persuaded that an aggressive interpretation of "tangible object" must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of

any and every kind in a provision targeting fraud in financial record-keeping.

The Government argues, however, that our inquiry would be incomplete if we failed to consider the origins of the phrase "record, document, or tangible object." Congress drew that phrase, the Government says, from a 1962 Model Penal Code (MPC) provision, and reform proposals based on that provision. The MPC provision and proposals prompted by it would have imposed liability on anyone who "alters, destroys, mutilates, conceals, or removes a record, document or thing." See ALI, MPC §241.7(1), p. 175 (1962). Those proscriptions were understood to refer to all physical evidence. See MPC §241.7, Comment 3, at 179 (1980) (provision "applies to any physical object"). Accordingly, the Government reasons, and the dissent exuberantly agrees, *post*, at 4–5, Congress must have intended §1519 to apply to the universe of physical evidence.

The inference is unwarranted. True, the 1962 MPC provision prohibited tampering with any kind of physical evidence. But unlike §1519, the MPC provision did not prohibit actions that specifically relate to records, documents, and objects used to record or preserve information. The MPC provision also ranked the offense as a misdemeanor and limited liability to instances in which the actor "believ[es] that an official proceeding or investigation is pending or about to be instituted." MPC §241.7(1), at 175. Yates would have had scant reason to anticipate a felony prosecution, and certainly not one instituted at a time when even the smallest of the fish he caught came within the legal limit. See *supra,* at 4; cf. *Bond* v. *United States*, 572 U. S. ___, ___ (2014), (slip op., at 14) (rejecting "boundless reading" of a statutory term given "deeply serious consequences" that reading would entail). A proposed federal offense in line with the MPC provision, advanced by a federal commission in 1971, was similarly

qualified. See Final Report of the National Commission on Reform of Federal Criminal Laws §1323, pp. 116–117 (1971).

Section 1519 conspicuously lacks the limits built into the MPC provision and the federal proposal. It describes not a misdemeanor, but a felony punishable by up to 20 years in prison. And the section covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement. Given these significant differences, the meaning of "record, document, or thing" in the MPC provision and a kindred proposal is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in §1519. The MPC provision, in short, tells us neither "what Congress wrote [nor] what Congress wanted," cf. *post*, at 15, concerning Yates's small fish as the subject of a federal felony prosecution.

C

Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object," as that term is used in §1519, we would invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland* v. *United States*, 531 U. S. 12, 25 (2000) (quoting *Rewis* v. *United States*, 401 U. S. 808, 812 (1971)). That interpretative principle is relevant here, where the Government urges a reading of §1519 that exposes individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil. See *Liparota* v. *United States*, 471 U. S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning

conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."). In determining the meaning of "tangible object" in §1519, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." See *Cleveland*, 531 U. S., at 25 (quoting *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222 (1952)). See also *Jones* v. *United States*, 529 U. S. 848, 858–859 (2000) (rule of lenity "reinforces" the conclusion that arson of an owner-occupied residence is not subject to federal prosecution under 18 U. S. C. §844(i) because such a residence does not qualify as property "used in" commerce or commerce-affecting activity).[8]

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[8]The dissent cites *United States* v. *McRae*, 702 F. 3d 806, 834–838 (CA5 2012), *United States* v. *Maury*, 695 F. 3d 227, 243–244 (CA3 2012), and *United States* v. *Natal*, 2014 U. S. Dist. LEXIS 108852, *24–*26 (Conn., Aug. 7, 2014), as cases that would not be covered by §1519 as we read it. *Post*, at 18–19. Those cases supply no cause for concern that persons who commit "major" obstructive acts, *id.* at 18, will go unpunished. The defendant in *McRae*, a police officer who seized a car containing a corpse and then set it on fire, was also convicted for that conduct under 18 U. S. C. §844(h) and sentenced to a term of 120 months' imprisonment for that offense. See 702 F. 3d, at 817–818, 839–840. The defendant in *Natal*, who repainted a van to cover up evidence of a fatal arson, was also convicted of three counts of violating 18 U. S. C. §3 and sentenced to concurrent terms of 174 months' imprisonment. See Judgment in *United States* v. *Morales*, No. 3:12–cr–164 (Conn., Jan. 12, 2015). And the defendant in *Maury*, a company convicted under §1519 of concealing evidence that a cement mixer's safety lock was disabled when a worker's fingers were amputated, was also convicted of numerous other violations, including three counts of violating 18 U. S. C. §1505 for concealing evidence of other worker safety violations. See 695 F. 3d, at 244–245. See also *United States* v. *Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514, *70 (NJ, Aug. 2, 2007) (setting forth charges against the company). For those violations, the company was fined millions of dollars and ordered to operate under the supervision of a court-appointed monitor. See 695 F. 3d, at 246.

* * *

For the reasons stated, we resist reading §1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be. Leaving that important decision to Congress, we hold that a "tangible object" within §1519's compass is one used to record or preserve information. The judgment of the U. S. Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–7451

JOHN L. YATES, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[February 25, 2015]

JUSTICE ALITO, concurring in the judgment.

This case can and should be resolved on narrow grounds. And though the question is close, traditional tools of statutory construction confirm that John Yates has the better of the argument. Three features of 18 U. S. C. §1519 stand out to me: the statute's list of nouns, its list of verbs, and its title. Although perhaps none of these features by itself would tip the case in favor of Yates, the three combined do so.

Start with the nouns. Section 1519 refers to "any record, document, or tangible object." The *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a "similar" meaning. See, *e.g., Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 576 (1995). A related canon, *ejusdem generis* teaches that general words following a list of specific words should usually be read in light of those specific words to mean something "similar." See, *e.g., Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. ___, ___ (2012) (slip op., at 18). Applying these canons to §1519's list of nouns, the term "tangible object" should refer to something similar to records or documents. A fish does not spring to mind—nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. All are "objects" that are "tangible." But who wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a "record" or "document,"

said "crocodile"?

This reading, of course, has its shortcomings. For instance, this is an imperfect *ejusdem generis* case because "record" and "document" are themselves quite general. And there is a risk that "tangible object" may be made superfluous—what is similar to a "record" or "document" but yet is not one? An e-mail, however, could be such a thing. See United States Sentencing Commission, Guidelines Manual §2J1.2 and comment. (Nov. 2003) (reading "records, documents, or tangible objects" to "includ[e]" what is found on "magnetic, optical, digital, other electronic, or other storage mediums or devices"). An e-mail, after all, might not be a "document" if, as was "traditionally" so, a document was a "piece of paper with information on it," not "information stored on a computer, electronic storage device, or any other medium." Black's Law Dictionary 587–588 (10th ed. 2014). E-mails might also not be "records" if records are limited to "minutes" or other formal writings "designed to memorialize [past] events." *Id.,* at 1465. A hard drive, however, is tangible and can contain files that are precisely akin to even these narrow definitions. Both "record" and "document" can be read more expansively, but adding "tangible object" to §1519 would ensure beyond question that electronic files are included. To be sure, "tangible object" presumably can capture more than just e-mails; Congress enacts "catchall[s]" for "known unknowns." *Republic of Iraq* v. *Beaty*, 556 U. S. 848, 860 (2009). But where *noscitur a sociis* and *ejusdem generis* apply, "known unknowns" should be similar to known knowns, *i.e.,* here, records and documents. This is especially true because reading "tangible object" too broadly could render "record" and "document" superfluous.

Next, consider §1519's list of verbs: "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." Although many of those verbs could apply to nouns as far-flung as salamanders, satellites, or sand

dunes, the last phrase in the list—"makes a false entry in"—makes no sense outside of filekeeping. How does one make a false entry in a fish? "Alters" and especially "falsifies" are also closely associated with filekeeping. Not one of the verbs, moreover, *cannot* be applied to filekeeping—certainly not in the way that "makes a false entry in" is always inconsistent with the aquatic.

Again, the Government is not without a response. One can imagine Congress trying to write a law so broadly that not every verb lines up with every noun. But failure to "line up" may suggest that something has gone awry in one's interpretation of a text. Where, as here, each of a statute's verbs applies to a certain category of nouns, there is some reason to think that Congress had that category in mind. Categories, of course, are often underinclusive or overinclusive—§1519, for instance, applies to a bomb-threatening letter but not a bomb. But this does not mean that categories are not useful or that Congress does not enact them. See, *e.g., Vance* v. *Bradley*, 440 U. S. 93, 108–109 (1979). Here, focusing on the verbs, the category of nouns appears to be filekeeping. This observation is not dispositive, but neither is it nothing. The Government also contends that §1519's verbs cut both ways because it is unnatural to apply "falsifies" to tangible objects, and that is certainly true. One does not falsify the outside casing of a hard drive, but one could falsify or alter data physically recorded on that hard drive.

Finally, my analysis is influenced by §1519's title: "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." (Emphasis added.) This too points toward filekeeping, not fish. Titles can be useful devices to resolve "'doubt about the meaning of a statute.'" *Porter* v. *Nussle*, 534 U. S. 516, 527–528 (2002) (quoting *Almendarez-Torres* v. *United States*, 523 U. S. 224, 234 (1998)); see also *Lawson* v. *FMR LLC*, 571 U. S. ___, ___–___ (2014) (SOTOMAYOR, J., dissenting) (slip op.,

at 4–6). The title is especially valuable here because it reinforces what the text's nouns and verbs independently suggest—that no matter how other statutes might be read, this particular one does not cover every noun in the universe with tangible form.

Titles, of course, are also not dispositive. Here, if the list of nouns did not already suggest that "tangible object" should mean something similar to records or documents, especially when read in conjunction with §1519's peculiar list of verbs with their focus on filekeeping, then the title would not be enough on its own. In conjunction with those other two textual features, however, the Government's argument, though colorable, becomes too implausible to accept. See, *e.g., Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384–385 (2003) (focusing on the "product of [two] canons of construction" which was "confirmed" by other interpretative evidence); cf. *Al-Adahi* v. *Obama*, 613 F. 3d 1102, 1105–1106 (CADC 2010) (aggregating evidence).

SUPREME COURT OF THE UNITED STATES

No. 13–7451

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[February 25, 2015]

JUSTICE KAGAN, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

A criminal law, 18 U. S. C. §1519, prohibits tampering with "any record, document, or tangible object" in an attempt to obstruct a federal investigation. This case raises the question whether the term "tangible object" means the same thing in §1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term "tangible object" is broad, but clear. Throughout the U. S. Code and many States' laws, it invariably covers physical objects of all kinds. And in §1519, context confirms what bare text says: All the words surrounding "tangible object" show that Congress meant the term to have a wide range. That fits with Congress's evident purpose in enacting §1519: to punish those who alter or destroy physical evidence—*any* physical evidence—with the intent of thwarting federal law enforcement.

The plurality instead interprets "tangible object" to cover "only objects one can use to record or preserve information." *Ante*, at 7. The concurring opinion similarly, if more vaguely, contends that "tangible object" should refer to "something similar to records or documents"—and shouldn't include colonial farmhouses, crocodiles, or fish. *Ante*, at 1 (ALITO, J., concurring in judgment). In my view, conventional tools of statutory construction all lead to a

more conventional result: A "tangible object" is an object that's tangible. I would apply the statute that Congress enacted and affirm the judgment below.

I

While the plurality starts its analysis with §1519's heading, see *ante*, at 10 ("We note first §1519's caption"), I would begin with §1519's text. When Congress has not supplied a definition, we generally give a statutory term its ordinary meaning. See, *e.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U. S. ___, ___ (2011) (slip op., at 5). As the plurality must acknowledge, the ordinary meaning of "tangible object" is "a discrete thing that possesses physical form." *Ante*, at 7 (punctuation and citation omitted). A fish is, of course, a discrete thing that possesses physical form. See generally Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960). So the ordinary meaning of the term "tangible object" in §1519, as no one here disputes, covers fish (including too-small red grouper).

That interpretation accords with endless uses of the term in statute and rule books as construed by courts. Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term "tangible object" or its first cousin "tangible thing"—some in association with documents, others not. See, *e.g.*, 7 U. S. C. §8302(2) (referring to "any material or tangible object that could harbor a pest or disease"); 15 U. S. C. §57b–1(c) (authorizing investigative demands for "documentary material or tangible things"); 18 U. S. C. §668(a)(1)(D) (defining "museum" as entity that owns "tangible objects that are exhibited to the public"); 28 U. S. C. §2507(b) (allowing discovery of "relevant facts, books, papers, documents or tangible things").[1] To my knowledge, no court

[1] From Alabama and Alaska through Wisconsin and Wyoming (and

has ever read any such provision to exclude things that don't record or preserve data; rather, all courts have adhered to the statutory language's ordinary (*i.e.*, expansive) meaning. For example, courts have understood the phrases "tangible objects" and "tangible things" in the Federal Rules of Criminal and Civil Procedure to cover everything from guns to drugs to machinery to . . . animals. See, *e.g.*, *United States* v. *Obiukwu*, 17 F. 3d 816, 819 (CA6 1994) (*per curiam*) (handgun); *United States* v. *Acarino*, 270 F. Supp. 526, 527–528 (EDNY 1967) (heroin); *In re Newman*, 782 F. 2d 971, 972–975 (CA Fed. 1986) (energy generation system); *Martin* v. *Reynolds Metals Corp.*, 297 F. 2d 49, 56–57 (CA9 1961) (cattle). No surprise, then, that—until today—courts have uniformly applied the term "tangible object" in §1519 in the same way. See, *e.g.*, *United States* v. *McRae*, 702 F. 3d 806, 834–838 (CA5 2012) (corpse); *United States* v. *Maury*, 695 F. 3d 227, 243–244 (CA3 2012) (cement mixer).

That is not necessarily the end of the matter; I agree with the plurality (really, who does not?) that context matters in interpreting statutes. We do not "construe the meaning of statutory terms in a vacuum." *Tyler* v. *Cain*, 533 U. S. 656, 662 (2001). Rather, we interpret particular words "in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). And sometimes that

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trust me—in all that come between), States similarly use the terms "tangible objects" and "tangible things" in statutes and rules of all sorts. See, *e.g.*, Ala. Code §34–17–1(3) (2010) (defining "landscape architecture" to include the design of certain "tangible objects and features"); Alaska Rule Civ. Proc. 34(a)(1) (2014) (allowing litigants to "inspect, copy, test, or sample any tangible things" that constitute or contain discoverable material); Wis. Stat. §804.09(1) (2014) (requiring the production of "designated tangible things" in civil proceedings); Wyo. Rule Crim. Proc. 41(h) (2014) (defining "property" for purposes of a search-and-seizure statute to include "documents, books, papers and any other tangible objects").

means, as the plurality says, that the dictionary definition of a disputed term cannot control. See, *e.g.*, *Bloate* v. *United States*, 559 U. S. 196, 205, n. 9 (2010). But this is not such an occasion, for here the text and its context point the same way. Stepping back from the words "tangible object" provides only further evidence that Congress said what it meant and meant what it said.

Begin with the way the surrounding words in §1519 reinforce the breadth of the term at issue. Section 1519 refers to "any" tangible object, thus indicating (in line with *that* word's plain meaning) a tangible object "of whatever kind." Webster's Third New International Dictionary 97 (2002). This Court has time and again recognized that "any" has "an expansive meaning," bringing within a statute's reach *all* types of the item (here, "tangible object") to which the law refers. *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 131 (2002); see, *e.g.*, *Republic of Iraq* v. *Beaty*, 556 U. S. 848, 856 (2009); *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 219–220 (2008). And the adjacent laundry list of verbs in §1519 ("alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry") further shows that Congress wrote a statute with a wide scope. Those words are supposed to ensure—just as "tangible object" is meant to—that §1519 covers the whole world of evidence-tampering, in all its prodigious variety. See *United States* v. *Rodgers*, 466 U. S. 475, 480 (1984) (rejecting a "narrow, technical definition" of a statutory term when it "clashes strongly" with "sweeping" language in the same sentence).

Still more, "tangible object" appears as part of a three-noun phrase (including also "records" and "documents") common to evidence-tampering laws and always understood to embrace things of all kinds. The Model Penal Code's evidence-tampering section, drafted more than 50 years ago, similarly prohibits a person from "alter[ing], destroy[ing], conceal[ing] or remov[ing] any *record, docu-*

ment or thing" in an effort to thwart an official investigation or proceeding. ALI, Model Penal Code §241.7(1), p. 175 (1962) (emphasis added). The Code's commentary emphasizes that the offense described in that provision is "not limited to conduct that [alters] a written instrument." *Id.*, §241.7, Comment 3, at 179. Rather, the language extends to "any physical object." *Ibid.* Consistent with that statement—and, of course, with ordinary meaning—courts in the more than 15 States that have laws based on the Model Code's tampering provision apply them to all tangible objects, including drugs, guns, vehicles and . . . yes, animals. See, *e.g.*, *State* v. *Majors*, 318 S. W. 3d 850, 859–861 (Tenn. 2010) (cocaine); *Puckett* v. *State*, 328 Ark. 355, 357–360, 944 S. W. 2d 111, 113–114 (1997) (gun); *State* v. *Bruno*, 236 Conn. 514, 519–520, 673 A. 2d 1117, 1122–1123 (1996) (bicycle, skeleton, blood stains); *State* v. *Crites*, 2007 Mont. Dist. LEXIS 615, *5–*7 (Dec. 21, 2007) (deer antlers). Not a one has limited the phrase's scope to objects that record or preserve information.

The words "record, document, or tangible object" in §1519 also track language in 18 U. S. C. §1512, the federal witness-tampering law covering (as even the plurality accepts, see *ante*, at 12) physical evidence in all its forms. Section 1512, both in its original version (preceding §1519) and today, repeatedly uses the phrase "record, document, or other object"—most notably, in a provision prohibiting the use of force or threat to induce another person to withhold any of those materials from an official proceeding. §4(a) of the Victim and Witness Protection Act of 1982, 96 Stat. 1249, as amended, 18 U. S. C. §1512(b)(2). That language, which itself likely derived from the Model Penal Code, encompasses no less the bloody knife than the incriminating letter, as all courts have for decades agreed. See, *e.g.*, *United States* v. *Kellington*, 217 F. 3d 1084, 1088 (CA9 2000) (boat); *United States* v. *Applewhaite*, 195 F. 3d 679, 688 (CA3 1999) (stone wall). And typically "only the

most compelling evidence" will persuade this Court that Congress intended "nearly identical language" in provisions dealing with related subjects to bear different meanings. *Communication Workers* v. *Beck*, 487 U. S. 735, 754 (1988); see A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 252 (2012). Context thus again confirms what text indicates.

And legislative history, for those who care about it, puts extra icing on a cake already frosted. Section 1519, as the plurality notes, see *ante*, at 2, 6, was enacted after the Enron Corporation's collapse, as part of the Sarbanes-Oxley Act of 2002, 116 Stat. 745. But the provision began its life in a separate bill, and the drafters emphasized that Enron was "only a case study exposing the shortcomings in our current laws" relating to both "corporate and criminal" fraud. S. Rep. No. 107–146, pp. 2, 11 (2002). The primary "loophole[]" Congress identified, see *id.*, at 14, arose from limits in the part of §1512 just described: That provision, as uniformly construed, prohibited a person from inducing another to destroy "record[s], document[s], or other object[s]"—of every type—but not from doing so himself. §1512(b)(2); see *supra*, at 5. Congress (as even the plurality agrees, see *ante*, at 6) enacted §1519 to close that yawning gap. But §1519 could fully achieve that goal only if it covered all the records, documents, and objects §1512 did, as well as all the means of tampering with them. And so §1519 was written to do exactly that—"to apply broadly to any acts to destroy or fabricate physical evidence," as long as performed with the requisite intent. S. Rep. No. 107–146, at 14. "When a person destroys evidence," the drafters explained, "overly technical legal distinctions should neither hinder nor prevent prosecution." *Id.*, at 7. Ah well: Congress, meet today's Court, which here invents just such a distinction with just such an effect. See *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 343 (1963) ("[C]reat[ing] a large loophole in

a statute designed to close a loophole" is "illogical and disrespectful of . . . congressional purpose").

As Congress recognized in using a broad term, giving immunity to those who destroy non-documentary evidence has no sensible basis in penal policy. A person who hides a murder victim's body is no less culpable than one who burns the victim's diary. A fisherman, like John Yates, who dumps undersized fish to avoid a fine is no less blameworthy than one who shreds his vessel's catch log for the same reason. Congress thus treated both offenders in the same way. It understood, in enacting §1519, that destroying evidence is destroying evidence, whether or not that evidence takes documentary form.

II

A

The plurality searches far and wide for anything—*anything*—to support its interpretation of §1519. But its fishing expedition comes up empty.

The plurality's analysis starts with §1519's title: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." See *ante*, at 10; see also *ante*, at 3–4 (opinion of ALITO, J.). That's already a sign something is amiss. I know of no other case in which we have *begun* our interpretation of a statute with the title, or relied on a title to override the law's clear terms. Instead, we have followed "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947).

The reason for that "wise rule" is easy to see: A title is, almost necessarily, an abridgment. Attempting to mention every term in a statute "would often be ungainly as well as useless"; accordingly, "matters in the text . . . are frequently unreflected in the headings." *Id.*, at 528. Just last year, this Court observed that two titles in a nearby

section of Sarbanes-Oxley serve as "but a short-hand reference to the general subject matter" of the provision at issue, "not meant to take the place of the detailed provisions of the text." *Lawson* v. *FMR LLC*, 571 U. S. ___, ___ (2014) (slip op., at 16) (quoting *Trainmen*, 331 U. S., at 528). The "under-inclusiveness" of the headings, we stated, was "apparent." *Lawson*, 571 U. S., at ___ (slip op., at 16). So too for §1519's title, which refers to "destruction, alteration, or falsification" but *not* to mutilation, concealment, or covering up, and likewise mentions "records" but *not* other documents or objects. Presumably, the plurality would not refuse to apply §1519 when a person only conceals evidence rather than destroying, altering, or falsifying it; instead, the plurality would say that a title is just a title, which cannot "undo or limit" more specific statutory text. *Ibid.* (quoting *Trainmen*, 331 U. S., at 529). The same holds true when the evidence in question is not a "record" but something else whose destruction, alteration, etc., is intended to obstruct justice.

The plurality next tries to divine meaning from §1519's "position within Chapter 73 of Title 18." *Ante*, at 10. But that move is yet odder than the last. As far as I can tell, this Court has never once suggested that the section number assigned to a law bears upon its meaning. Cf. Scalia, *supra*, at xi–xvi (listing more than 50 interpretive principles and canons without mentioning the plurality's new number-in-the-Code theory). And even on its own terms, the plurality's argument is hard to fathom. The plurality claims that if §1519 applied to objects generally, Congress would not have placed it "after the pre-existing §1516, §1517, and §1518" because those are "specialized provisions." *Ante*, at 11. But search me if I can find a better place for a broad ban on evidence-tampering. The plurality seems to agree that the law properly goes in Chapter 73—the criminal code's chapter on "obstruction of justice." But the provision does not logically fit into any of that

chapter's pre-existing sections. And with the first 18 numbers of the chapter already taken (starting with §1501 and continuing through §1518), the law naturally took the 19th place. That is standard operating procedure. Prior to the Sarbanes-Oxley Act of 2002, all of Chapter 73 was ordered chronologically: Section 1518 was later enacted than §1517, which was later enacted than §1516, which was . . . well, you get the idea. And after Sarbanes-Oxley, Congress has continued in the same vein. Section 1519 is thus right where you would expect it (as is the contemporaneously passed §1520)—between §1518 (added in 1996) and §1521 (added in 2008).[2]

The plurality's third argument, relying on the surplusage canon, at least invokes a known tool of statutory construction—but it too comes to nothing. Says the plurality: If read naturally, §1519 "would render superfluous" §1512(c)(1), which Congress passed "as part of the same act." *Ante*, at 13. But that is not so: Although the two provisions significantly overlap, each applies to conduct the other does not. The key difference between the two is that §1519 protects the integrity of "matter[s] within the jurisdiction of any [federal] department or agency" whereas §1512(c)(1) safeguards "official proceeding[s]" as defined in §1515(a)(1)(A). Section 1519's language often applies more broadly than §1512(c)(1)'s, as the plurality notes.

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[2]The lonesome exception to Chapter 73's chronological order is §1514A, added in Sarbanes-Oxley to create a civil action to protect whistleblowers. Congress decided to place that provision right after the only other section in Chapter 73 to authorize a civil action (that one to protect victims and witnesses). The plurality, seizing on the §1514 example, says it likewise "would have made more sense for Congress to codify the substance of §1519 within §1512 or in a new §1512A." *Ante*, at 12, n. 4. But §1512 is titled "Tampering with a witness, victim, or an informant," and its provisions almost all protect witnesses from intimidation and harassment. It makes perfect sense that Congress wanted a broad ban on evidence-spoliation to stand on its own rather than as part of—or an appendage to—a witness-tampering provision.

For example, an FBI investigation counts as a matter within a federal department's jurisdiction, but falls outside the statutory definition of "official proceeding" as construed by courts. See, *e.g.*, *United States* v. *Gabriel*, 125 F. 3d 89, 105, n. 13 (CA2 1997). But conversely, §1512(c)(1) sometimes reaches more widely than §1519. For example, because an "official proceeding" includes any "proceeding before a judge or court of the United States," §1512(c)(1) prohibits tampering with evidence in federal litigation between private parties. See §1515(a)(1)(A); *United States* v. *Burge*, 711 F. 3d 803, 808–810 (CA7 2013); *United States* v. *Reich*, 479 F. 3d 179, 185–187 (CA2 2007) (Sotomayor, J.). By contrast, §1519 wouldn't ordinarily operate in that context because a federal court isn't a "department or agency." See *Hubbard* v. *United States*, 514 U. S. 695, 715 (1995).[3] So the surplusage canon doesn't come into play.[4] Overlap—even significant overlap—abounds in the criminal law. See *Loughrin* v. *United*

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[3] The plurality's objection to this statement is difficult to understand. It cannot take issue with *Hubbard*'s holding that "a federal court is neither a 'department' nor an 'agency'" in a statute referring, just as §1519 does, to "any matter within the jurisdiction of any department or agency of the United States." 514 U. S., at 698, 715. So the plurality suggests that the phrase "in relation to . . . any such matter" in §1519 somehow changes *Hubbard*'s result. See *ante*, at 12–13, and n. 5. But that phrase still demands that evidence-tampering relate to a "matter within the jurisdiction of any department or agency"—excluding courts, as *Hubbard* commands. That is why the federal government, as far as I can tell, has never once brought a prosecution under §1519 for evidence-tampering in litigation between private parties. It instead uses §1512(c)(1) for that purpose.

[4] Section 1512(c)(1) also applies more broadly than §1519 in proceedings relating to insurance regulation. The term "official proceeding" in §1512(c)(1) is defined to include "proceeding[s] involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency." §1515(a)(1)(D). But §1519 wouldn't usually apply in that context because state, not federal, agencies handle most insurance regulation.

States, 573 U. S. ___, ___ – ___, n. 4 (2014) (slip op., at 6–7, n. 4). This Court has never thought that of such ordinary stuff surplusage is made. See *ibid.*; *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253 (1992).

And the legislative history to which the plurality appeals, see *ante*, at 6, only cuts against it because those materials show that lawmakers knew that §1519 and §1512(c)(1) share much common ground. Minority Leader Lott introduced the amendment that included §1512(c)(1) (along with other criminal and corporate fraud provisions) late in the legislative process, explaining that he did so at the specific request of the President. See 148 Cong. Rec. 12509, 12512 (2002) (remarks of Sen. Lott). Not only Lott but several other Senators noted the overlap between the President's package and provisions already in the bill, most notably §1519. See *id.*, at 12512 (remarks of Sen. Lott); *id.*, at 12513 (remarks of Sen. Biden); *id.*, at 12517 (remarks of Sens. Hatch and Gramm). The presence of both §1519 and §1512(c)(1) in the final Act may have reflected belt-and-suspenders caution: If §1519 contained some flaw, §1512(c)(1) would serve as a backstop. Or the addition of §1512(c)(1) may have derived solely from legislators' wish "to satisfy audiences other than courts"—that is, the President and his Justice Department. Gluck & Bressman, Statutory Interpretation from the Inside, 65 Stan. L. Rev. 901, 935 (2013) (emphasis deleted). Whichever the case, Congress's consciousness of overlap between the two provisions removes any conceivable reason to cast aside §1519's ordinary meaning in service of preventing some statutory repetition.

Indeed, the inclusion of §1512(c)(1) in Sarbanes-Oxley creates a far worse problem for the plurality's construction of §1519 than for mine. Section 1512(c)(1) criminalizes the destruction of any "record, document, or other object"; §1519 of any "record, document, or tangible object." On the plurality's view, one "object" is really an object, where-

as the other is only an object that preserves or stores information. But "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act," passed at the same time, "are intended to have the same meaning." *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986) (internal quotation marks omitted). And that is especially true when the different provisions pertain to the same subject. See *supra*, at 5–6. The plurality doesn't—really, can't—explain why it instead interprets the same words used in two provisions of the same Act addressing the same basic problem to mean fundamentally different things.

Getting nowhere with surplusage, the plurality switches canons, hoping that *noscitur a sociis* and *ejusdem generis* will save it. See *ante*, at 13–16; see also *ante*, at 1–2 (opinion of ALITO, J.). The first of those related canons advises that words grouped in a list be given similar meanings. The second counsels that a general term following specific words embraces only things of a similar kind. According to the plurality, those Latin maxims change the English meaning of "tangible object" to only things, like records and documents, "used to record or preserve information." *Ante*, at 14.[5] But understood as this Court always has, the canons have no such transformative effect on the worka-

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[5]The plurality seeks support for this argument in the Sentencing Commission's construction of the phrase "records, documents, or tangible objects," *ante*, at 14, but to no avail. The plurality cites a note in the Commission's Manual clarifying that this phrase, as used in the Sentencing Guidelines, "includes" various electronic information, communications, and storage devices. United States Sentencing Commission, Guidelines Manual §2J1.2, comment., n. 1 (Nov. 2014) (USSG). But "includes" (following its ordinary definition) "is not exhaustive," as the Commission's commentary makes explicit. USSG §1B1.1, comment., n. 2. Otherwise, the Commission's construction wouldn't encompass *paper* documents. All the note does is to make plain that "records, documents, or tangible objects" embraces stuff relating to the digital (as well as the material) world.

day language Congress chose.

As an initial matter, this Court uses *noscitur a sociis* and *ejusdem generis* to resolve ambiguity, not create it. Those principles are "useful rule[s] of construction where words are of obscure or doubtful meaning." *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 520 (1923). But when words have a clear definition, and all other contextual clues support that meaning, the canons cannot properly defeat Congress's decision to draft broad legislation. See, *e.g.*, *Ali*, 552 U. S., at 227 (rejecting the invocation of these canons as an "attempt to create ambiguity where the statute's text and structure suggest none").

Anyway, assigning "tangible object" its ordinary meaning comports with *noscitur a sociis* and *ejusdem generis* when applied, as they should be, with attention to §1519's subject and purpose. Those canons require identifying a common trait that links all the words in a statutory phrase. See, *e.g.*, *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 289, n. 7 (2010); *Ali*, 552 U. S., at 224–226. In responding to that demand, the plurality characterizes records and documents as things that preserve information—and so they are. But just as much, they are things that provide information, and thus potentially serve as evidence relevant to matters under review. And in a statute pertaining to obstruction of federal investigations, that evidentiary function comes to the fore. The destruction of records and documents prevents law enforcement agents from gathering facts relevant to official inquiries. And so too does the destruction of tangible objects—of whatever kind. Whether the item is a fisherman's ledger or an undersized fish, throwing it overboard has the identical effect on the administration of justice. See *supra*, at 7. For purposes of §1519, records, documents, and (all) tangible objects are therefore alike.

Indeed, even the plurality can't fully credit its *nosci-*

tur/ejusdem argument. The same reasoning would apply to *every* law placing the word "object" (or "thing") after "record" and "document." But as noted earlier, such statutes are common: The phrase appears (among other places) in many state laws based on the Model Penal Code, as well as in multiple provisions of §1512. See *supra*, at 4–5. The plurality accepts that in those laws "object" means object; its argument about superfluity positively *depends* on giving §1512(c)(1) that broader reading. See *ante*, at 13, 16. What, then, is the difference here? The plurality proposes that some of those statutes describe less serious offenses than §1519. See *ante*, at 17. How and why that distinction affects application of the *noscitur a sociis* and *ejusdem generis* canons is left obscure: Count it as one more of the plurality's never-before-propounded, not-readily-explained interpretive theories. See *supra*, at 7, 8–9, 11–12. But in any event, that rationale cannot support the plurality's willingness to give "object" its natural meaning in §1512, which (like §1519) sets out felonies with penalties of up to 20 years. See §§1512(a)(3)(C), (b), (c). The canons, in the plurality's interpretive world, apparently switch on and off whenever convenient.

And the plurality's invocation of §1519's verbs does nothing to buttress its canon-based argument. See *ante*, at 14–15; *ante*, at 2–3 (opinion of ALITO, J.). The plurality observes that §1519 prohibits "falsif[ying]" or "mak[ing] a false entry in" a tangible object, and no one can do those things to, say, a murder weapon (or a fish). *Ante*, at 14. But of course someone can alter, destroy, mutilate, conceal, or cover up such a tangible object, and §1519 prohibits those actions too. The Court has never before suggested that all the verbs in a statute need to match up with all the nouns. See *Robers* v. *United States*, 572 U. S. ___, ___ (2014) (slip op., at 4) ("[T]he law does not require legislators to write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a

phrase is not needed"). And for good reason. It is exactly when Congress sets out to draft a statute broadly—to include every imaginable variation on a theme—that such mismatches will arise. To respond by narrowing the law, as the plurality does, is thus to flout both what Congress wrote and what Congress wanted.

Finally, when all else fails, the plurality invokes the rule of lenity. See *ante*, at 18. But even in its most robust form, that rule only kicks in when, "after all legitimate tools of interpretation have been exhausted, 'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime." *Abramski* v. *United States*, 573 U. S. ___, ___ (2014) (SCALIA, J., dissenting) (slip op., at 12) (quoting *Moskal* v. *United States*, 498 U. S. 103, 108 (1990)). No such doubt lingers here. The plurality points to the breadth of §1519, see *ante*, at 18, as though breadth were equivalent to ambiguity. It is not. Section 1519 *is* very broad. It is also very clear. Every traditional tool of statutory interpretation points in the same direction, toward "object" meaning object. Lenity offers no proper refuge from that straightforward (even though capacious) construction.[6]

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[6] As part of its lenity argument, the plurality asserts that Yates did not have "fair warning" that his conduct amounted to a felony. *Ante*, at 18; see *ante*, at 17 (stating that "Yates would have had scant reason to anticipate a felony prosecution" when throwing fish overboard). But even under the plurality's view, the dumping of fish is potentially a federal felony—just under §1512(c)(1), rather than §1519. See *ante*, at 12–13. In any event, the plurality itself acknowledges that the ordinary meaning of §1519 covers Yates's conduct, see *ante*, at 7: That provision, no less than §1512(c)(1), announces its broad scope in the clearest possible terms. And when an ordinary citizen seeks notice of a statute's scope, he is more likely to focus on the plain text than (as the plurality would have it) on the section number, the superfluity principle, and the *noscitur* and *ejusdem* canons.

B

The concurring opinion is a shorter, vaguer version of the plurality's. It relies primarily on the *noscitur a sociis* and *ejusdem generis* canons, tries to bolster them with §1519's "list of verbs," and concludes with the section's title. See *supra*, at 7–8, 12–13, 14–15 (addressing each of those arguments). (Notably, even the concurrence puts no stock in the plurality's section-number and superfluity claims.) From those familiar materials, the concurrence arrives at the following definition: "'tangible object' should mean something similar to records or documents." *Ante*, at 4 (opinion of ALITO, J.). In amplifying that purported guidance, the concurrence suggests applying the term "tangible object" in keeping with what "a neighbor, when asked to identify something similar to record or document," might answer. *Ante*, at 1. "[W]ho wouldn't raise an eyebrow," the concurrence wonders, if the neighbor said "crocodile"? *Ante*, at 1–2. Courts sometimes say, when explaining the Latin maxims, that the "words of a statute should be interpreted consistent with their neighbors." See, *e.g.*, *United States* v. *Locke*, 529 U. S. 89, 105 (2000). The concurrence takes that expression literally.

But §1519's meaning should not hinge on the odd game of Mad Libs the concurrence proposes. No one reading §1519 needs to fill in a blank after the words "records" and "documents." That is because Congress, quite helpfully, already did so—adding the term "tangible object." The issue in this case is what that term means. So if the concurrence wishes to ask its neighbor a question, I'd recommend a more pertinent one: Do you think a fish (or, if the concurrence prefers, a crocodile) is a "tangible object"? As to that query, "who wouldn't raise an eyebrow" if the neighbor said "no"?

In insisting on its different question, the concurrence neglects the proper function of catchall phrases like "or tangible object." The reason Congress uses such terms is

precisely to reach things that, in the concurrence's words, "do[] not spring to mind"—to my mind, to my neighbor's, or (most important) to Congress's. *Ante*, at 1 (opinion of ALITO, J.). As this Court recently explained: "[T]he whole value of a generally phrased residual [term] is that it serves as a catchall for matters not specifically contemplated—known unknowns." *Beaty*, 556 U. S., at 860. Congress realizes that in a game of free association with "record" and "document," it will never think of all the other things—including crocodiles and fish—whose destruction or alteration can (less frequently but just as effectively) thwart law enforcement. Cf. *United States* v. *Stubbs*, 11 F. 3d 632, 637–638 (CA6 1993) (dead crocodiles used as evidence to support smuggling conviction). And so Congress adds the general term "or tangible object"—again, exactly because such things "do[] not spring to mind."[7]

The concurrence suggests that the term "tangible object" serves not as a catchall for physical evidence but to "ensure beyond question" that e-mails and other electronic files fall within §1519's compass. *Ante*, at 2. But that claim is eyebrow-raising in its own right. Would a Congress wishing to make certain that §1519 applies to e-mails add the phrase "tangible object" (as opposed, say, to "electronic communications")? Would a judge or jury member predictably find that "tangible object" encompasses something as virtual as e-mail (as compared, say,

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[7] The concurrence contends that when the *noscitur* and *ejusdem* canons are in play, "'known unknowns' should be similar to known knowns, *i.e.*, here, records and documents." *Ante*, at 2. But as noted above, records and documents *are* similar to crocodiles and fish as far as §1519 is concerned: All are potentially useful as evidence in an investigation. See *supra,* at 13. The concurrence never explains why *that* similarity isn't the relevant one in a statute aimed at evidence-tampering.

with something as real as a fish)? If not (and the answer is not), then that term cannot function as a failsafe for e-mails.

The concurrence acknowledges that no one of its arguments can carry the day; rather, it takes the Latin canons plus §1519's verbs plus §1519's title to "tip the case" for Yates. *Ante*, at 1. But the sum total of three mistaken arguments is . . . three mistaken arguments. They do not get better in the combining. And so the concurrence ends up right where the plurality does, except that the concurrence, eschewing the rule of lenity, has nothing to fall back on.

III

If none of the traditional tools of statutory interpretation can produce today's result, then what accounts for it? The plurality offers a clue when it emphasizes the disproportionate penalties §1519 imposes if the law is read broadly. See *ante*, at 17–18. Section 1519, the plurality objects, would then "expose[] individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense." *Ante*, at 18. That brings to the surface the real issue: overcriminalization and excessive punishment in the U. S. Code.

Now as to this statute, I think the plurality somewhat—though only somewhat—exaggerates the matter. The plurality omits from its description of §1519 the requirement that a person act "knowingly" and with "the intent to impede, obstruct, or influence" federal law enforcement. And in highlighting §1519's maximum penalty, the plurality glosses over the absence of any prescribed minimum. (Let's not forget that Yates's sentence was not 20 years, but 30 days.) Congress presumably enacts laws with high maximums and no minimums when it thinks the prohibited conduct may run the gamut from major to minor. That

is assuredly true of acts obstructing justice. Compare this case with the following, all of which properly come within, but now fall outside, §1519: *McRae*, 702 F. 3d, at 834–838 (burning human body to thwart murder investigation); *Maury*, 695 F. 3d, at 243–244 (altering cement mixer to impede inquiry into amputation of employee's fingers); *United States* v. *Natal*, 2014 U. S. Dist. LEXIS 108852, *24–*26 (D Conn., Aug. 7, 2014) (repainting van to cover up evidence of fatal arson). Most district judges, as Congress knows, will recognize differences between such cases and prosecutions like this one, and will try to make the punishment fit the crime. Still and all, I tend to think, for the reasons the plurality gives, that §1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, §1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.

But whatever the wisdom or folly of §1519, this Court does not get to rewrite the law. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." *Rodgers*, 466 U. S., at 484. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

I respectfully dissent.

Exhibit N

Email to F. Pagano, Nov. 22, 2016.

- **Attachment PaganoLetter4a.pdf —** Included in this JCApx at Exhibit N.a, *infra*.

Subject: Updated letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/22/16 07:36
To: Florence_Pagano@ca1.uscourts.gov

Please see the attached, UPDATED letter (REPLACING my Nov. 20 letter to you).

Hardcopy sent in U.S. Mail today.

Attachments:

PaganoLetter4a.pdf 562 KB

Exhibit N.a

Attachment PaganoLetter4a.pdf to email of Nov. 22, 2016 (Exhibit N, *supra*).

From:
Walter Tuvell
836 Main St.
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walt.tuvell@gmail.com

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 20/22, 2016

Dear Ms. Pagano:[2]

In my Nov. 19 letter to you, I brought your attention to potential **criminal** conduct (RehApx ℘8ƒ‡ι∗) committed by First Circuit judges.[3] In my Nov. 20 (and now, Nov. 22) letter, for the convenience of the Judicial Council, I *elaborate* upon *just one*[4] of those potentialities, namely 18 USC §1519.

Originally, §1519 was passed as part of the Sarbanes-Oxley Act ("SOX"), enacted in 2002, and incorporated into 18 USC Title 1 Chapter 73 **("Obstruction of Justice").** While SOX is generally thought-of in terms of corporate wrong-doing (fraud, corruption), §1519 itself is intended to have a broader scope, and has no such restriction.[5]

The language of §1519 is as follows:[6]

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1 • Delivered by both email and U.S. mail.

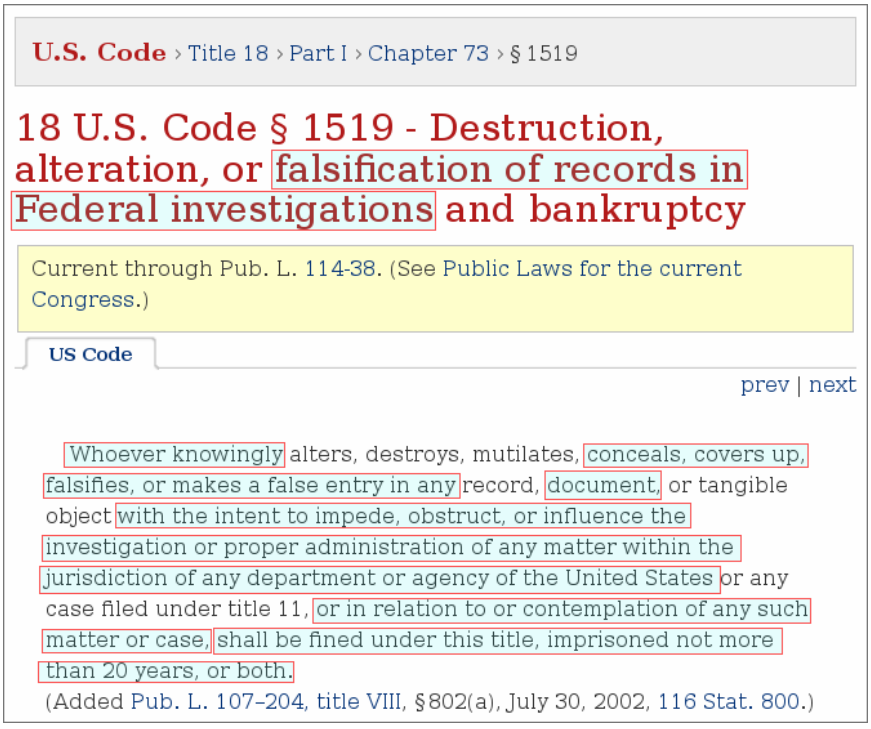
2 • *{ This letter, now dated Nov. 22, is a updated version of the letter I sent you two days ago (Nov. 20), with minor corrections, and adding some additional important details (esp. "cover-up"), strengthening my position. This Nov. 22 version* ***replaces*** *the Nov. 20 version }*

3 • While judges generally enjoy judicial immunity from *civil* liability for damages from acts committed within the scope of their jurisdiction (see e.g. 42 USC §1983), they don't enjoy immunity against *criminal* charges: U.S. Const Amend XIV §1 (Equal Protection Clause, see my *Petition for Writ of Certiorari* ℘4); 18 USC §242 (Deprivation of Rights Under Color of Law); *Mireles v. Waco,* 502 U.S. ℘9–15 (1991), ℘10ƒ1; etc.

4 • Others remain under investigation at this time.

5 • Nevertheless, my case does have that nexus if it were needed, because the defendant is a corporation, IBM, charged with serious civil rights violations.

6 • Emphasis/highlighting has been added to the screenshots throughout this letter.



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code

prev | next

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

Most of the provisions of §1519 are clearly satisfied in my case, and need no further analysis. For example, in my case, the judges have *obviously* "falsified/concealed/covered-up the record," as I have *alleged/proved* throughout the materials I've submitted to the Judicial Council. Namely: (i) the district judge lied/falsified the district court's Opinion ("Op"); and then (ii) all subsequent judges (now including the Supreme Court, but not the Judicial Council [yet]) have blindly adopted/supported/swallowed/concealed/covered-up that falsified Op, despite *knowing* full-well its falsity.

However, for three of §1519's provisions, it is *not* obvious whether my case satisfies them (I contend they *are* satisfied), and so these *do* require further analysis. These are (all considered in the special context of §1519):

- **"(Federal) investigation" —** Does this mean only "FBI-style" investigations, or does it also apply to "court proceedings"?
- **"Jurisdiction" —** Does this encompass "judicial jurisdiction" in the sense of the judicial system?
- **"Department/agency" —** Insofar as I have been able to determine, these terms are rather context-sensitive, not hard-coded universally-well-defined terms of art/law (except that "department" does seem

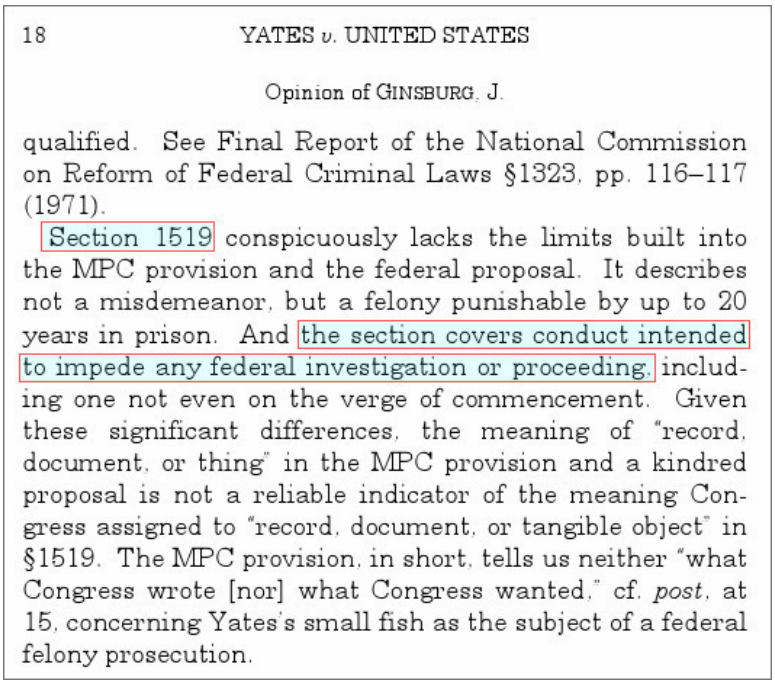
to refer to the executive branch of government, not legislative or judicial). Are the "courts" included within the ambit of "departments/agencies"?

My research has led me to the following conclusions.

To begin with, the legislative history of SOX (House & Senate reports, Congressional Record, official/exact Public Law)[7] is all "supportive" of my position, albeit not "dispositive." Too, the "Official U.S. Government Manual" (online, at http://usgovernmentmanual.gov/), does of course "list" the federal courts, but that still doesn't resolve the question whether the courts are to be considered "departments/agencies" in the sense of §1519.

The background just mentioned played a decisive role in the recent Supreme Court case, *Yates v. U.S.*, 574 U.S. ____, №13-7451 (2015)[8] — which for our purposes here, *does* yield a definitive resolution of my contention (in the affirmative).

Yates contains the following three passages, all of which solidly support my contention (the third passage, from the dissenting opinion, chooses to support me via §1512(c)(1) instead of §1519, though that minor distinction of law is already overridden by the majority opinion of the second passage in any case):



18 YATES *v.* UNITED STATES

Opinion of GINSBURG, J.

qualified. See Final Report of the National Commission on Reform of Federal Criminal Laws §1323, pp. 116–117 (1971).

Section 1519 conspicuously lacks the limits built into the MPC provision and the federal proposal. It describes not a misdemeanor, but a felony punishable by up to 20 years in prison. And the section covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement. Given these significant differences, the meaning of "record, document, or thing" in the MPC provision and a kindred proposal is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in §1519. The MPC provision, in short, tells us neither "what Congress wrote [nor] what Congress wanted," cf. *post*, at 15, concerning Yates's small fish as the subject of a federal felony prosecution.

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7 • All of which I am transmitting to you as email attachments, for your convenience.

8 • Attached in email. (This is the controversial "a-fish-is-not-a-tangible-object" case.)

[5] Despite this sweeping "in relation to" language, the dissent remarkably suggests that §1519 does not "ordinarily operate in th[e] context [of] federal court[s]," for those courts are not "department[s] or agenc[ies]." *Post*, at 10. That suggestion, which, as one would expect, lacks the Government's endorsement, does not withstand examination. The Senate Committee Report on §1519, on which the dissent elsewhere relies, see *post*, at 6, explained that an obstructive act is within §1519's scope if "done 'in contemplation' of or in relation to a matter or investigation." S. Rep. 107–146, at 15. The Report further informed that §1519 "is . . . meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title." *Ibid.* If any doubt remained about the multiplicity of contexts in which §1519 was designed to apply, the Report added, "[t]he intent of the provision is simple: people should not be destroying, altering, or falsifying documents to obstruct any government function." *Ibid.*

For example, an FBI investigation counts as a matter within a federal department's jurisdiction, but falls outside the statutory definition of "official proceeding" as construed by courts. See, *e.g.*, *United States* v. *Gabriel*, 125 F. 3d 89, 105, n. 13 (CA2 1997). But conversely, §1512(c)(1) sometimes reaches more widely than §1519. For example, because an "official proceeding" includes any "proceeding before a judge or court of the United States," §1512(c)(1) prohibits tampering with evidence in federal litigation between private parties. See §1515(a)(1)(A); *United States* v. *Burge*, 711 F. 3d 803, 808–810 (CA7 2013); *United States* v. *Reich*, 479 F. 3d 179, 185–187 (CA2 2007) (Sotomayor, J.). By contrast, §1519 wouldn't ordinarily operate in that context because a federal court isn't a "department or agency." See *Hubbard* v. *United States*, 514 U. S. 695, 715 (1995).[3] So the surplusage canon doesn't come into play.[4] Overlap—even significant overlap—abounds in the criminal law. See *Loughrin* v. *United*

As always, I expect this information to be conveyed forthwith to the appropriate members of the Judicial Council.

Sincerely yours,

WE Tuvell

Walter E. Tuvell

Exhibit O

Email to F. Pagano, Nov. 23, 2016 (first).

- **Attachment PaganoLetter5.pdf —** Included in this JCApx at Exhibit O.a, *infra*.

Subject: New letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/23/16 08:50
To: Florence_Pagano@ca1.uscourts.gov

Please see the attached new letter. Hardcopy sent in U.S. Mail today.

Attachments:

PaganoLetter5.pdf 691 KB

Exhibit O.a

Attachment PaganoLetter5.pdf to email of Nov. 23, 2016 (first) (Exhibit O, *supra*).

Final evolved/corrected version is at Exhibit U.a, *infra*.

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 23, 2016

Dear Ms. Pagano:

This letter is a follow-up to the letter I sent you yesterday (Nov. 22).

In that letter, I mentioned that additional accusations (beyond 18 USC §1519; see RehApx ℘8ƒ‡ι∗) of **criminal** conduct by the First Circuit judges remain under consideration.[2]

I have wavered about the best way to communicate that additional information to you. While at some future point a full(er) "brief" regarding each charge would be appropriate (as I produced in the Nov. 22 letter, concerning §1519), I believe that at this point it is necessary and sufficient to simply provide (relevant portions of) *screenshots* of the statutes in question. So that's what I do in this letter.

I trust this information will be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

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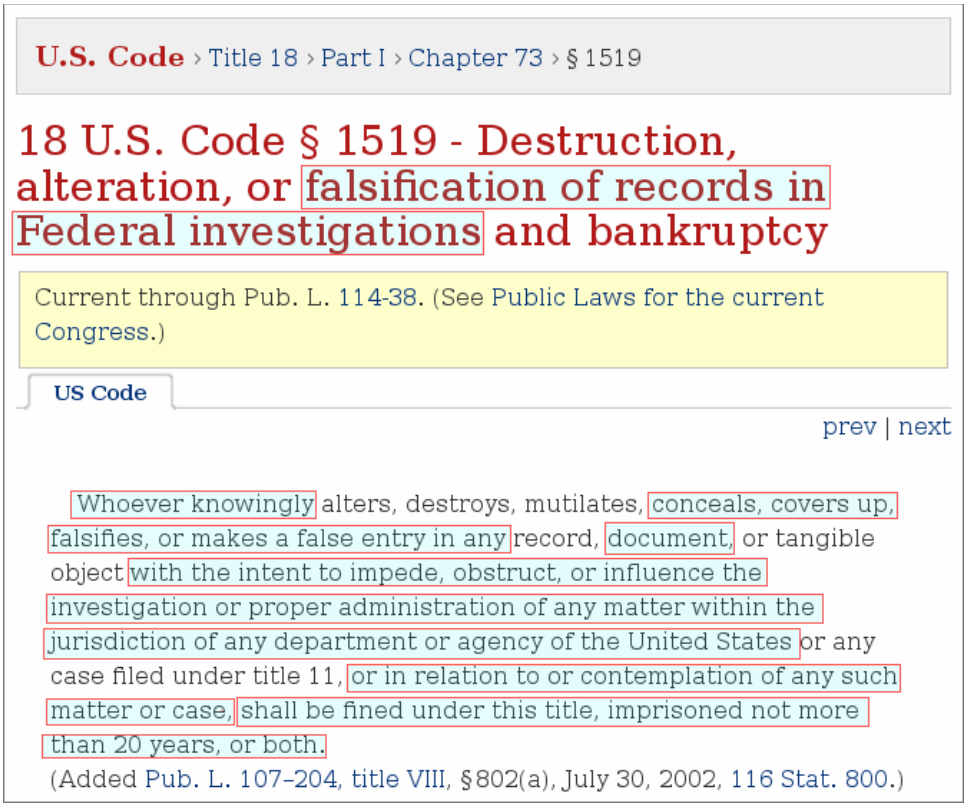
1 • Delivered by both email and U.S. mail.

2 • The list of charges may be adjusted over time, as new information comes to light.

18 USC §1519 — Obstruction Of Justice



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code

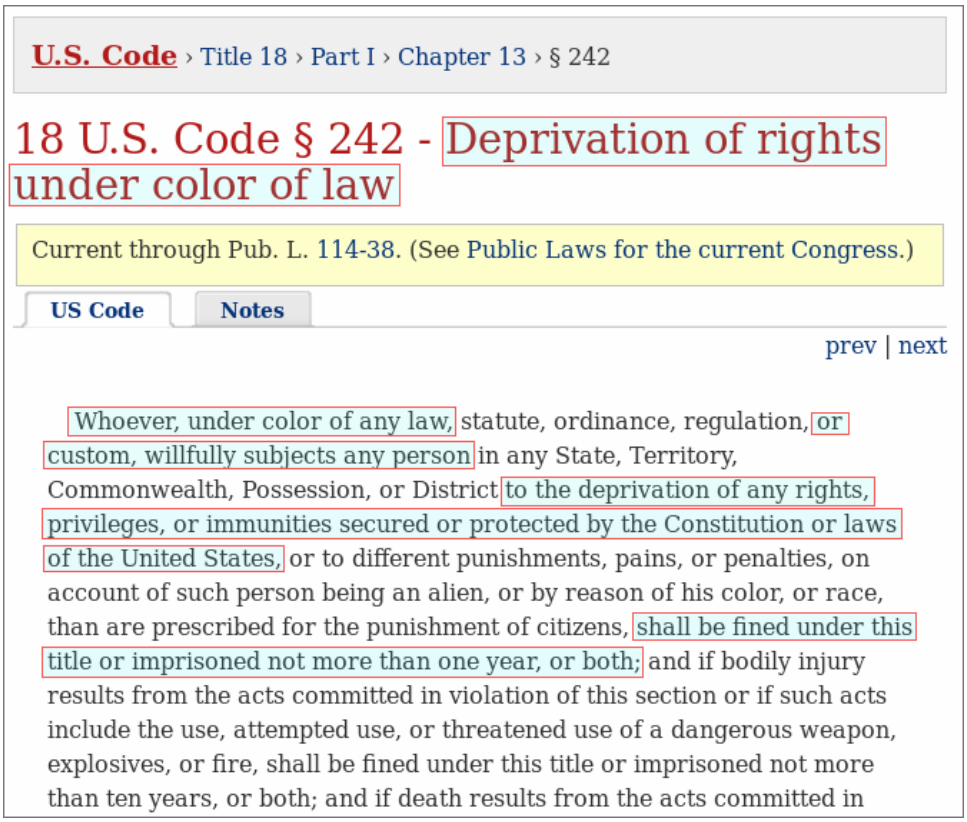
prev | next

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

A full(er) discussion of §1519 was given in the Nov. 22 letter.

18 USC §242 — Deprivation Of Rights Under Color Of Law



U.S. Code › Title 18 › Part I › Chapter 13 › § 242

18 U.S. Code § 242 - Deprivation of rights under color of law

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

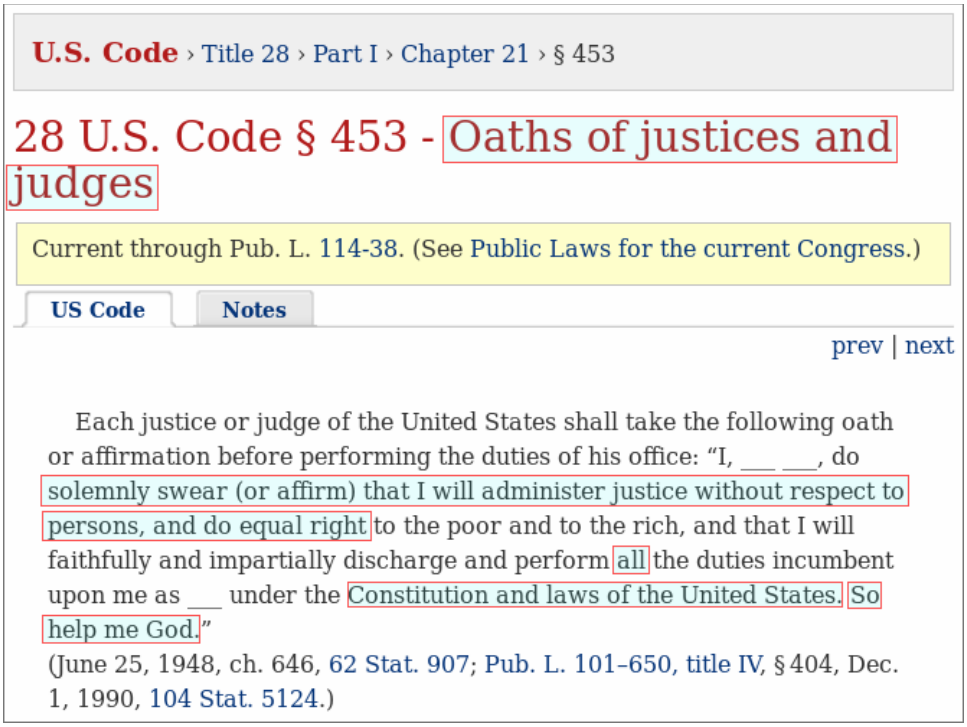
US Code | Notes

prev | next

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

28 USC §453 — Judicial Oath Of Office



U.S. Code › Title 28 › Part I › Chapter 21 › § 453

28 U.S. Code § 453 - Oaths of justices and judges

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) 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 ___ under the Constitution and laws of the United States. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 101–650, title IV, § 404, Dec. 1, 1990, 104 Stat. 5124.)

Anent, we also recall two constitutional provisions:[3]

> We the People of the United States, in Order to … **establish Justice** [which includes **Truth**] …
>
> — U.S. Const Preamble (emphasis added)

> [A]ll executive and **judicial** Officers, both of the United States and of the several States, shall be bound by **Oath** or Affirmation [i.e., **Promise**], to **support this Constitution** [esp. **law** (Art. III), which incorporates the doctrine of *stare decisis*] …
>
> — U.S. Const Art VI (emphasis added)

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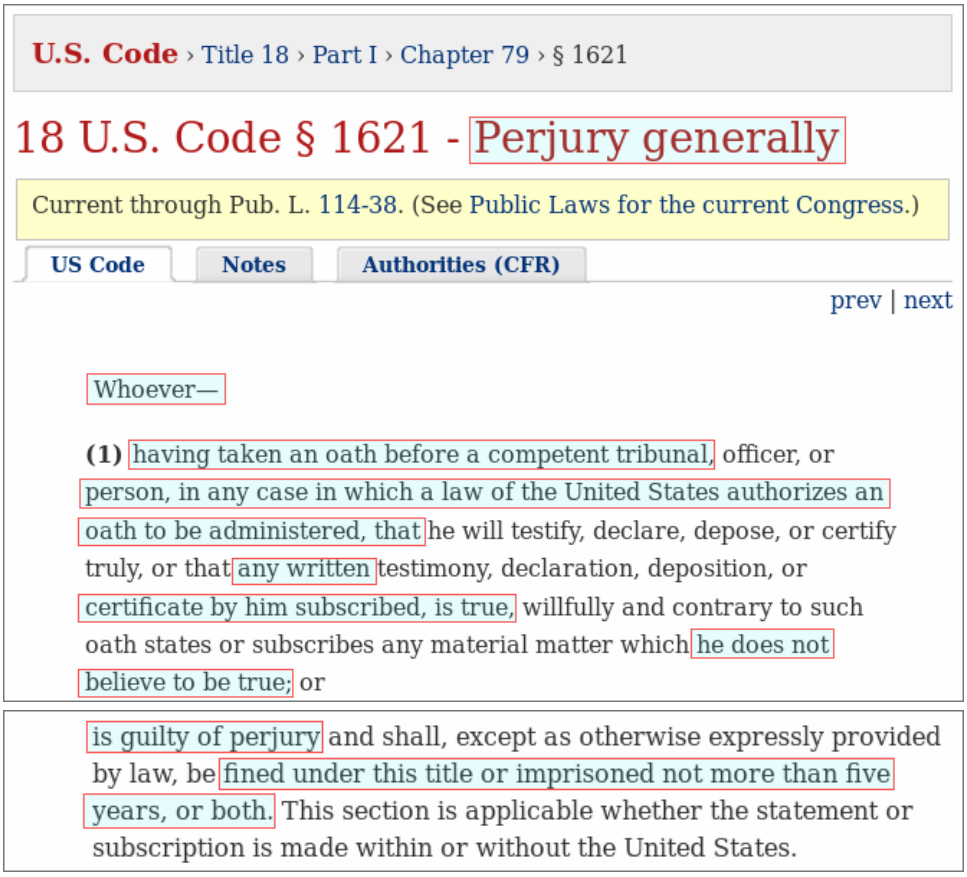
3 • Inside front cover of my Petition for Rehearing to the Supreme Court.

18 USC §1621–1623 — Perjury (Lying Under Oath)



U.S. Code › Title 18 › Part I › Chapter 79 › § 1621

18 U.S. Code § 1621 - Perjury generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

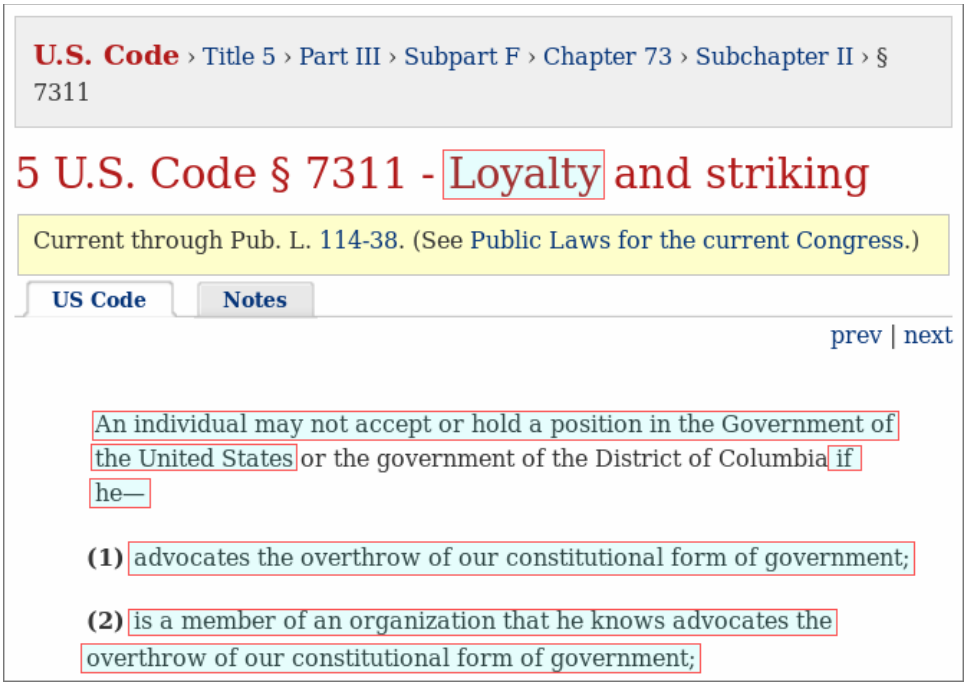
Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Judges/justices are, of course, *always* under oath on the bench (by their oath of office, 28 USC §453 *supra*).

5 USC §7311(1–2) — Loyalty



U.S. Code › Title 5 › Part III › Subpart F › Chapter 73 › Subchapter II › § 7311

5 U.S. Code § 7311 - Loyalty and striking

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

The "overthrow of our constitutional form of government" involved in my case refers to "dissing" (disregard/dismiss/disagree/disrespect/dissemble) the Judicial Branch as an institution (corruption of one-third of our constitutional form of government, entrusted with the **administration/interpretation of law** in the United States).[4]

The "organization" involved in my case refers to the collection of judges who are like-minded with the judges involved in the case.[5]

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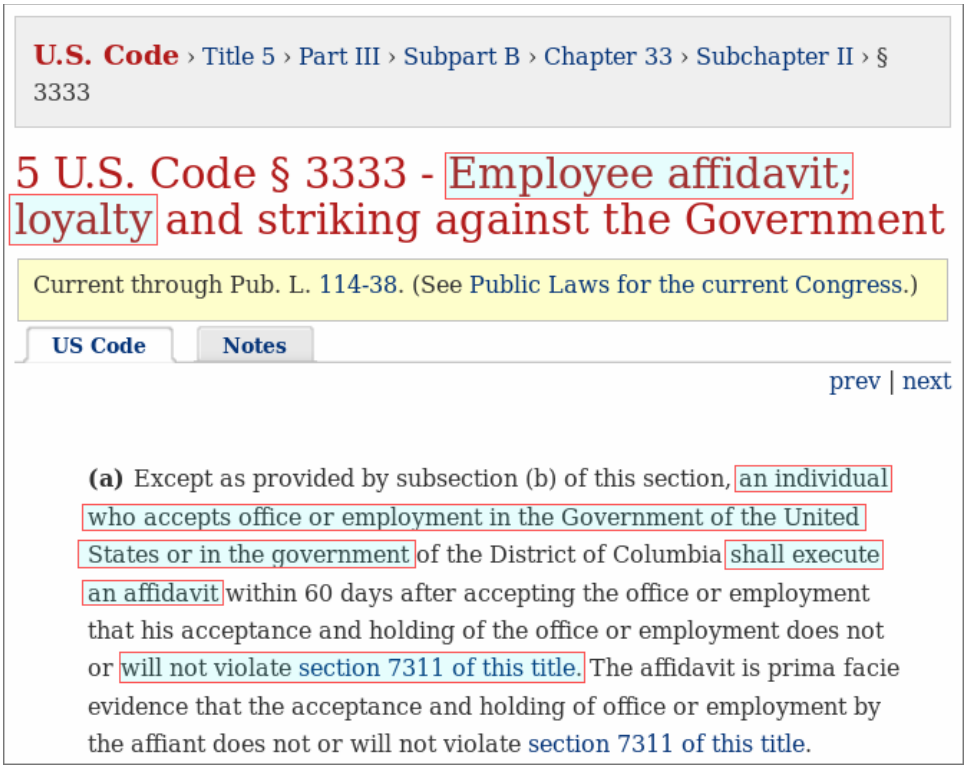
4 • A full(er) philosophical/jurisprudential discussion of the nexus amongst (i) law/justice, (ii) the Constitution, and (iii) the Judicial Branch, has been given in my PetReh (Petition for Rehearing to the Supreme Court).

5 • According to persuasive well-documented "rumors"/reports, this "organization" amounts to a substantial percentage of the federal judiciary. See my Petition for Writ of Certiorari ℘xif7 for a *dozen* recent topical references (and many more references cited therein).

5 USC §3333 — Affidavit Of Loyalty



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3333

5 U.S. Code § 3333 - Employee affidavit; loyalty and striking against the Government

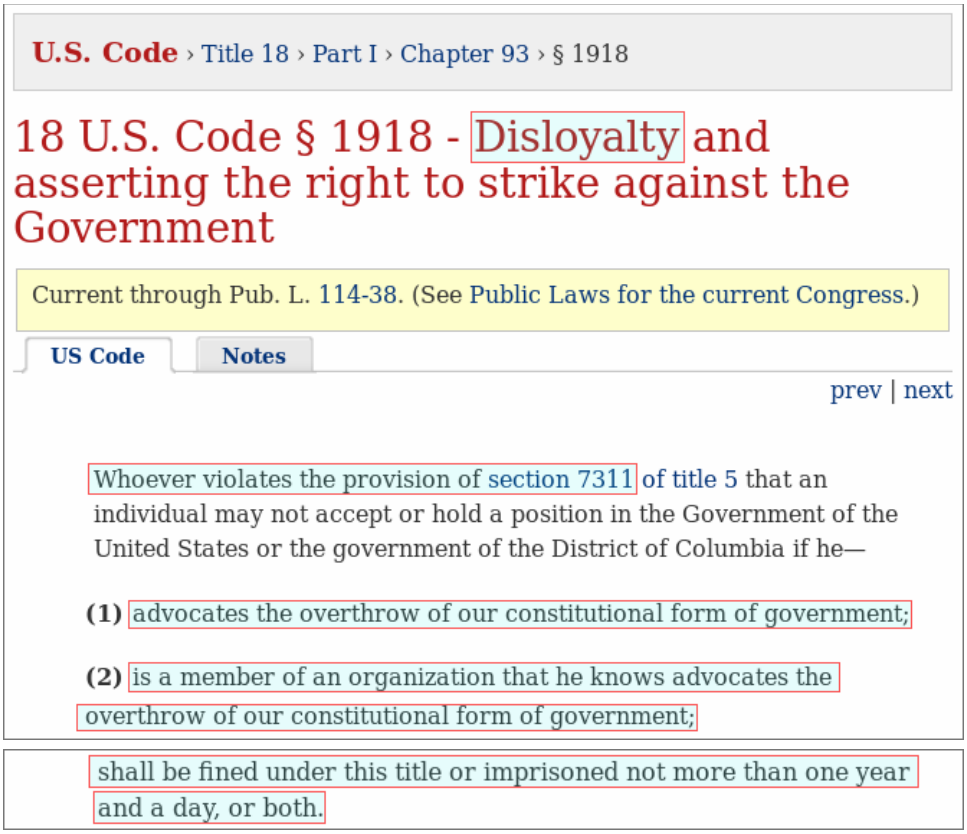
Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

18 USC §1918(1–2) — Disloyalty



U.S. Code › Title 18 › Part I › Chapter 93 › § 1918

18 U.S. Code § 1918 - Disloyalty and asserting the right to strike against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

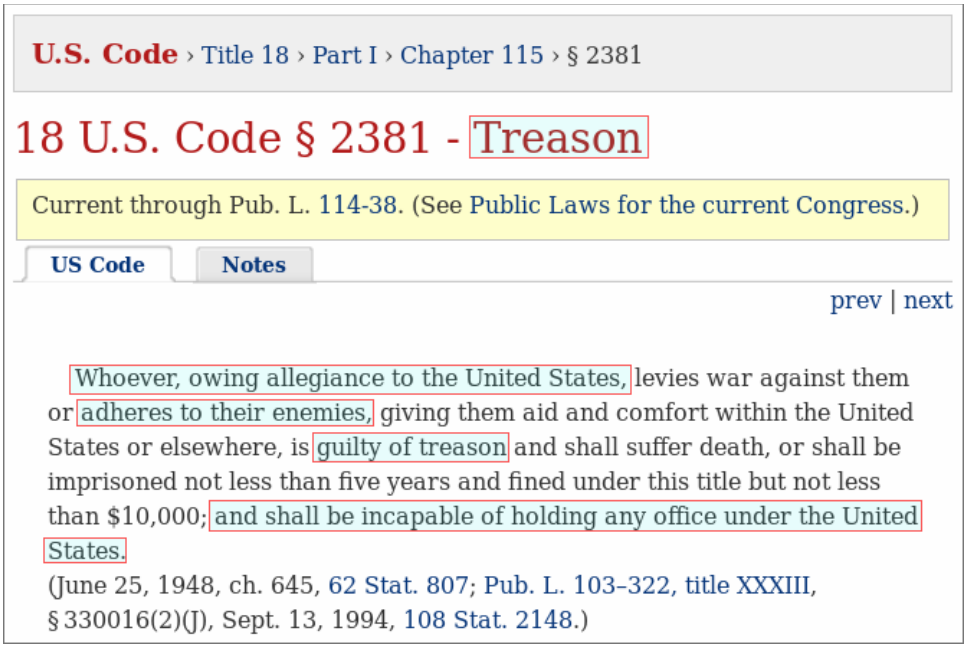
Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

shall be fined under this title or imprisoned not more than one year and a day, or both.

18 USC §2381 — Treason



U.S. Code › Title 18 › Part I › Chapter 115 › § 2381

18 U.S. Code § 2381 - Treason

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, § 330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

A conspiracy of judges who (i) obstruct justice, (ii) violate their oath of office, and (iii) commit perjury (all proven *supra*), cannot be "friends" of the United States; hence they must be "enemies."

Res Ipsa Loquitur.[6]

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6 • "The thing speaks for itself."

Exhibit P

Email to F. Pagano, Nov. 23, 2016 (second).

- **Attachment PaganoLetter5.pdf —** Included in this JCApx at Exhibit P.a, *infra*.

Subject: Re: New letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/23/16 12:32
To: Florence_Pagano@ca1.uscourts.gov

The "new letter" I set you earlier today had a fatal error in it: it neglected to included 18 USC §1622–1623.

The corrected version is attached hereto (the new material is on pages 6–7 of this version, and that is the only change from the earlier version today).

So please destroy the version from earlier today, and completely replace it with the version attached hereto.

A hardcopy is being mailed by U.S. Mail today.

Attachments:

PaganoLetter5.pdf 804 KB

Exhibit P.a

Attachment PaganoLetter5.pdf to email of Nov. 23, 2016 (second) (Exhibit P, *supra*).

Final evolved/corrected version is at Exhibit U.a, *infra*.

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 23, 2016

Dear Ms. Pagano:

This letter is a follow-up to the letter I sent you yesterday (Nov. 22).

In that letter, I mentioned that additional accusations (beyond 18 USC §1519; see RehApx ℘8ƒ‡ι∗) of **criminal** conduct by the First Circuit judges remain under consideration.[2]

I have wavered about the best way to communicate that additional information to you. While at some future point a full(er) "brief" regarding each charge would be appropriate (as I produced in the Nov. 22 letter, concerning §1519), I believe that at this point it is necessary and sufficient to simply provide (relevant portions of) *screenshots* of the statutes in question. So that's what I do in this letter.

I trust this information will be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

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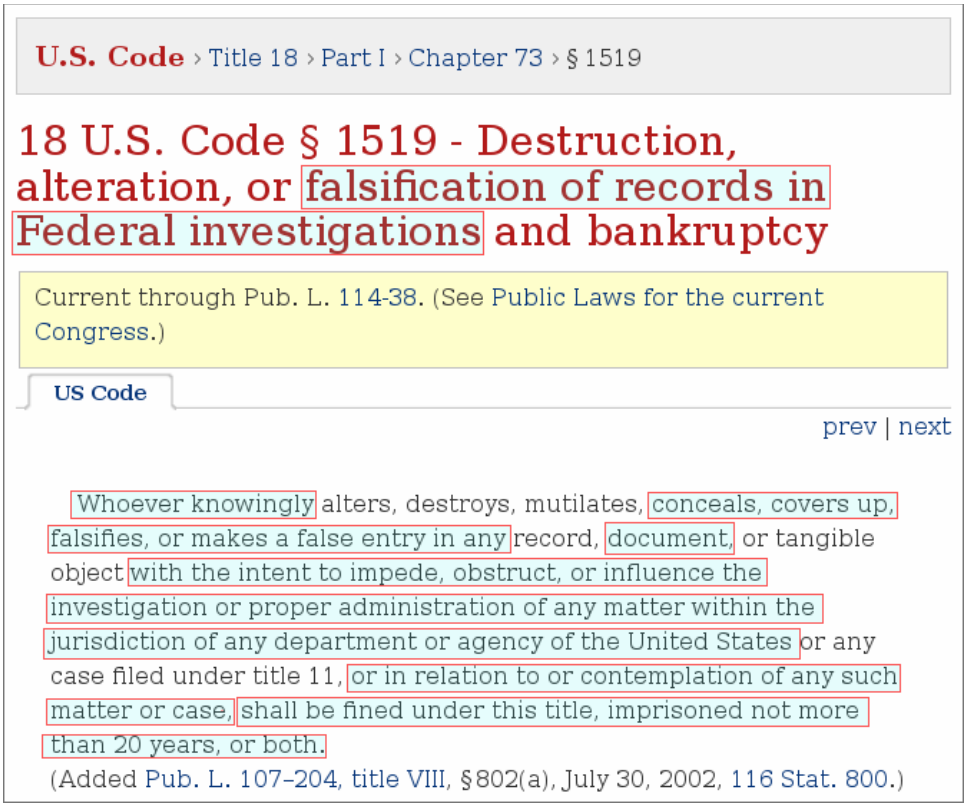
1 • Delivered by both email and U.S. mail.

2 • The list of charges may be adjusted over time, as new information comes to light.

18 USC §1519 — Obstruction Of Justice



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code

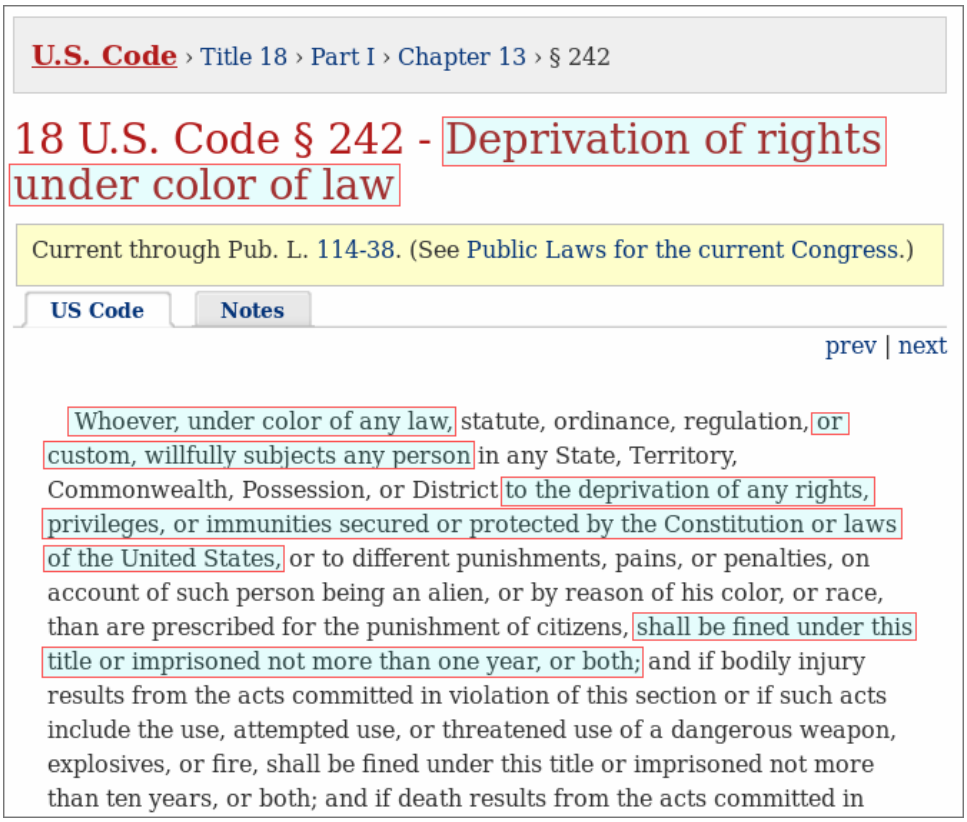
prev | next

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

A full(er) discussion of §1519 was given in the Nov. 22 letter.

18 USC §242 — Deprivation Of Rights Under Color Of Law



U.S. Code › Title 18 › Part I › Chapter 13 › § 242

18 U.S. Code § 242 - Deprivation of rights under color of law

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

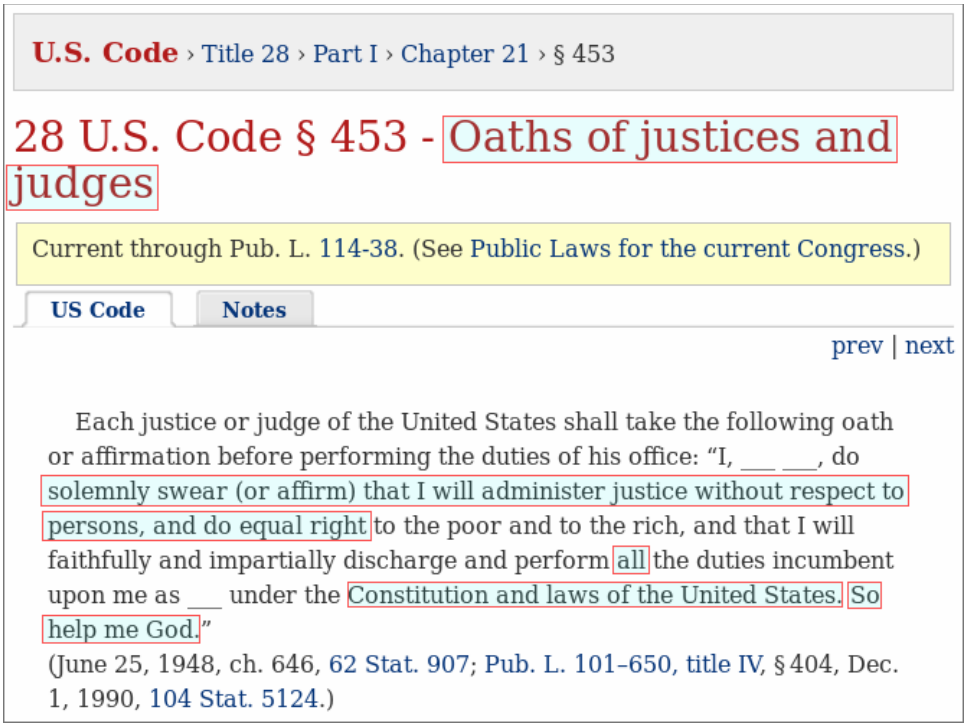
US Code | Notes

prev | next

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

28 USC §453 — Judicial Oath Of Office



U.S. Code › Title 28 › Part I › Chapter 21 › § 453

28 U.S. Code § 453 - Oaths of justices and judges

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) 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 ___ under the Constitution and laws of the United States. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 101–650, title IV, § 404, Dec. 1, 1990, 104 Stat. 5124.)

Anent, we also recall two constitutional provisions:[3]

> We the People of the United States, in Order to … **establish Justice** [which includes **Truth**] …
>
> — U.S. Const Preamble (emphasis added)

> [A]ll executive and **judicial** Officers, both of the United States and of the several States, shall be bound by **Oath** or Affirmation [i.e., **Promise**], to **support this Constitution** [esp. **law** (Art. III), which incorporates the doctrine of *stare decisis*] …
>
> — U.S. Const Art VI (emphasis added)

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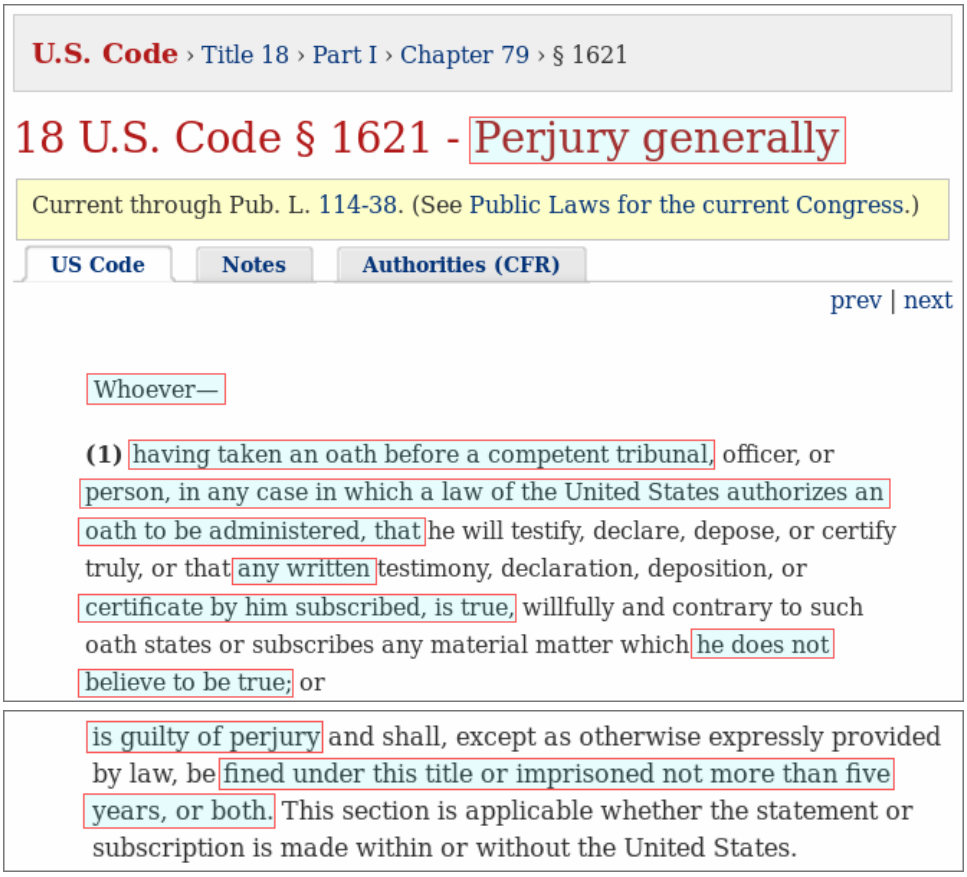
3 • Inside front cover of my Petition for Rehearing to the Supreme Court.

18 USC §1621–1623 — Perjury (Lying Under Oath)



U.S. Code › Title 18 › Part I › Chapter 79 › § 1621

18 U.S. Code § 1621 - Perjury generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Judges/justices are, of course, *always* under oath on the bench (by their oath of office, 28 USC §453 *supra*).

18 U.S. Code § 1622 - Subornation of perjury

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 774; Pub. L. 103–322, title XXXIII, § 330016(1)(I), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S. Code § 1623 - False declarations before grand jury or court

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

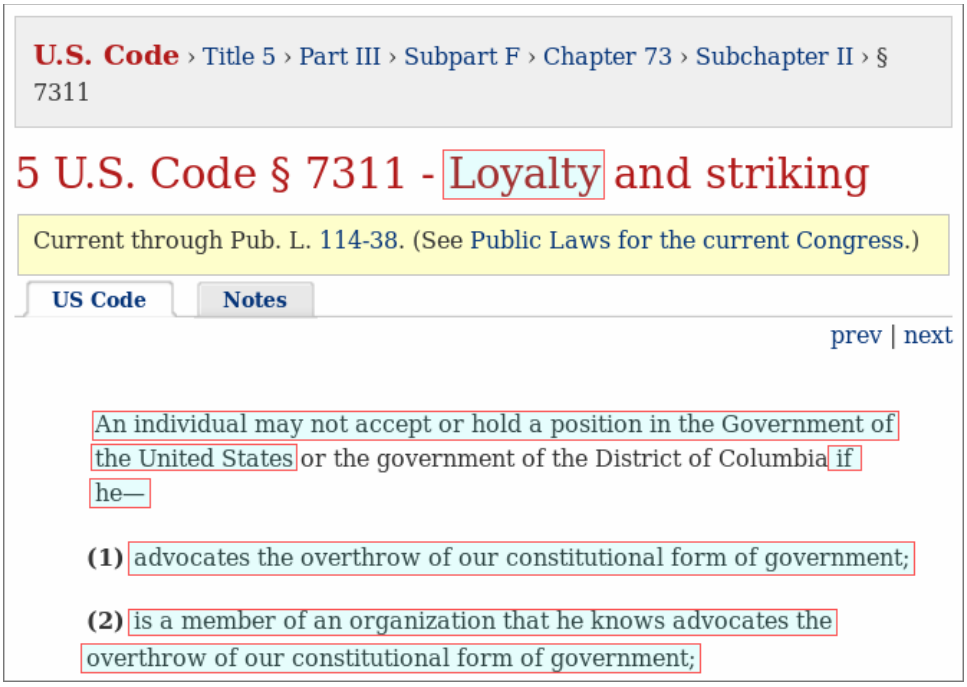
US Code | Notes

prev | next

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

5 USC §7311(1–2) — Loyalty



U.S. Code › Title 5 › Part III › Subpart F › Chapter 73 › Subchapter II › § 7311

5 U.S. Code § 7311 - Loyalty and striking

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

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(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

The "overthrow of our constitutional form of government" involved in my case refers to "dissing" (disregard/dismiss/disagree/disrespect/dissemble) the Judicial Branch as an institution (corruption of one-third of our constitutional form of government, entrusted with the **administration/interpretation of law** in the United States).[4]

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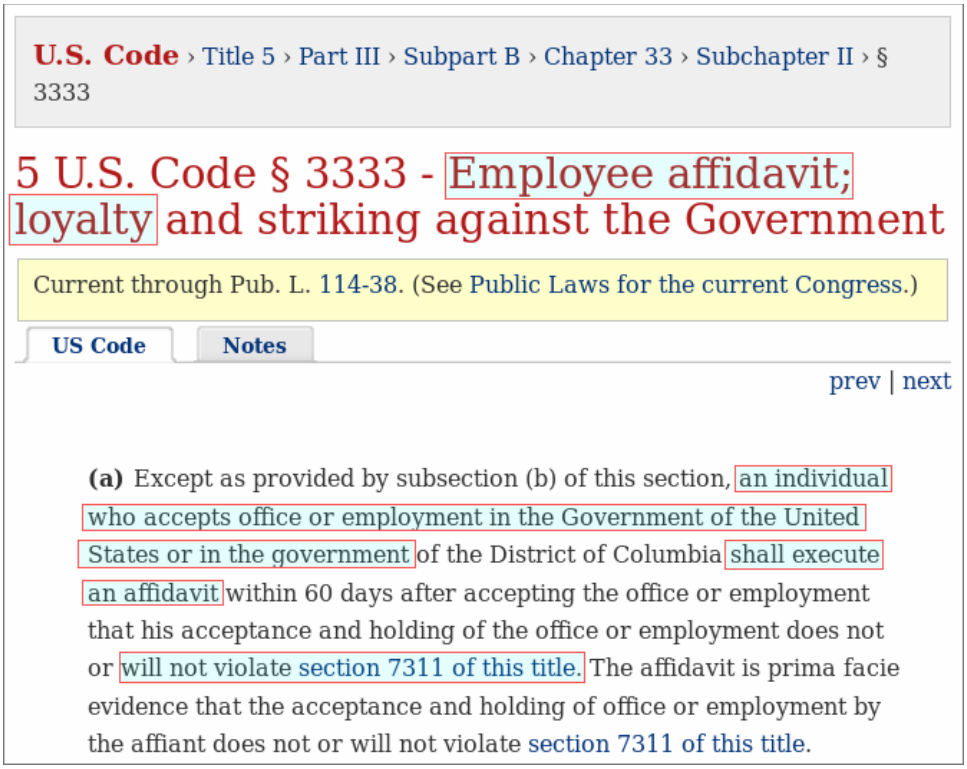
5 USC §3333 — Affidavit Of Loyalty



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3333

5 U.S. Code § 3333 - Employee affidavit; loyalty and striking against the Government

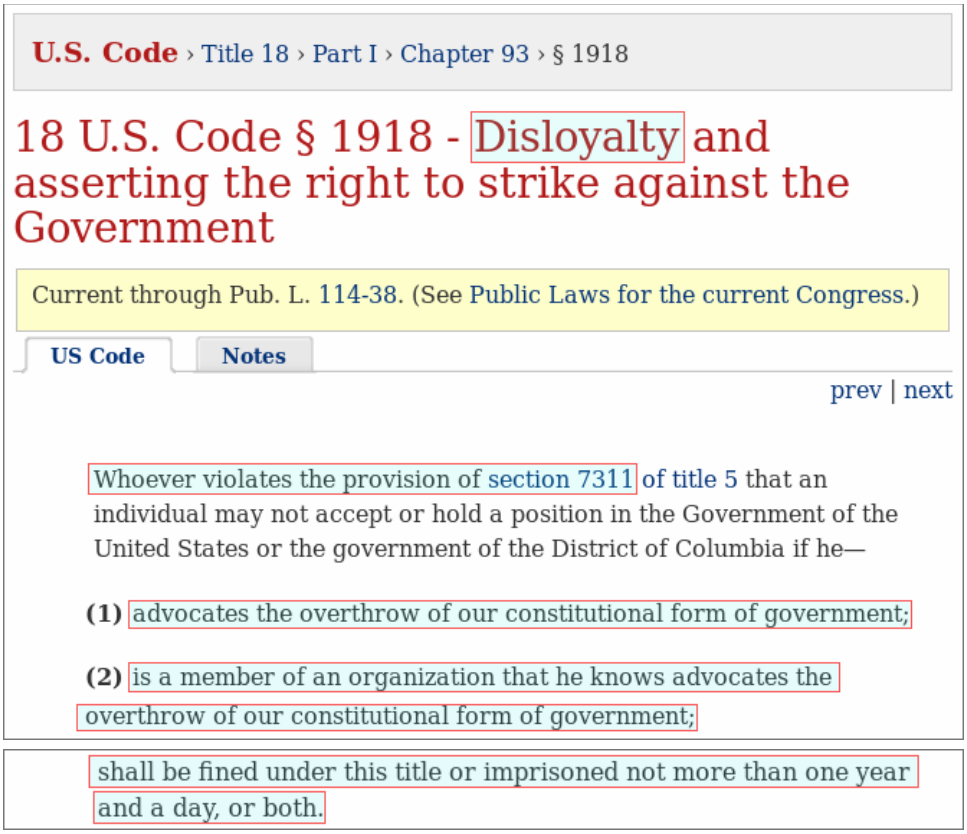
Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

18 USC §1918(1–2) — Disloyalty



U.S. Code › Title 18 › Part I › Chapter 93 › § 1918

18 U.S. Code § 1918 - Disloyalty and asserting the right to strike against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

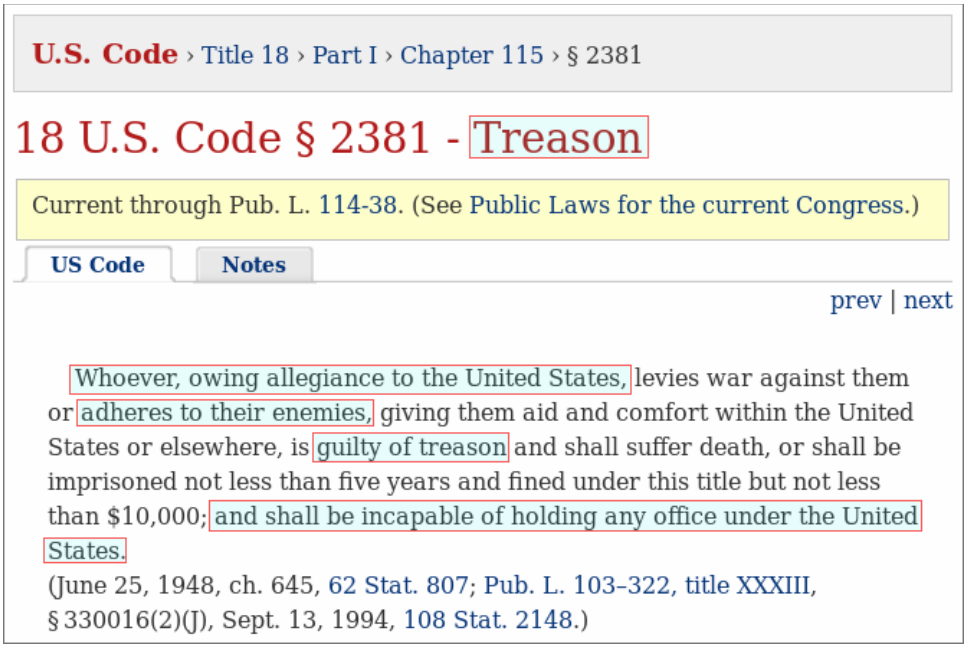
Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

shall be fined under this title or imprisoned not more than one year and a day, or both.

18 USC §2381 — Treason



U.S. Code › Title 18 › Part I › Chapter 115 › § 2381

18 U.S. Code § 2381 - Treason

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

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(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, § 330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

A conspiracy of judges who (i) obstruct justice, (ii) violate their oath of office, and (iii) commit perjury (all proven *supra*), cannot be "friends" of the United States; hence they must be "enemies."

Res Ipsa Loquitur.[6]

---

6 • "The thing speaks for itself."

Exhibit Q

Email to F. Pagano, Nov. 24, 2016 (first).

- **Attachment PaganoLetter5.pdf —** Included in this JCApx at Exhibit Q.a, *infra*.

Subject: Re: New letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/24/16 06:57
To: Florence_Pagano@ca1.uscourts.gov

Attached hereto is a newer letter, ***entirely replacing both*** of the two letters I sent you yesterday. It differs from the previous letter by adding sections on Civil Service Oath of Office, and on Conspiracy.

Hardcopy follows in U.S. Mail.

Today is Thanksgiving, so no mail will go out until tomorrow.

On 11/23/16 12:32, Walt Tuvell wrote:

> The "new letter" I set you earlier today had a fatal error in it: it
> neglected to included 18 USC §1622–1623.
>
> The corrected version is attached hereto (the new material is on pages
> 6–7 of this version, and that is the only change from the earlier
> version today).
>
> So please destroy the version from earlier today, and completely replace
> it with the version attached hereto.
>
> A hardcopy is being mailed by U.S. Mail today.

Attachments:

PaganoLetter5.pdf 928 KB

Exhibit Q.a

Attachment PaganoLetter5.pdf to email of Nov. 24, 2016 (first) (Exhibit Q, *supra*).

Final evolved/corrected version is at Exhibit U.a, *infra*.

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 24, 2016

Dear Ms. Pagano:

This letter is a follow-up to the letter I sent you on (Nov. 22).[2]

In that letter, I mentioned that *additional* accusations (beyond 18 USC §1519; see RehApx ℘8ƒ‡ι∗) of **criminal** conduct by the First Circuit judges remain under consideration.[3]

I have wavered about the best way to communicate that *additional* information to you. While at some future point a full(er) "brief" regarding each charge would be appropriate (along the lines of the the Nov. 22 letter, which concerned §1519), I believe that at this point it is necessary and sufficient to simply provide (relevant portions of) *screenshots* of the statutes in question. So that's what I do in this letter.

I trust this information will be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

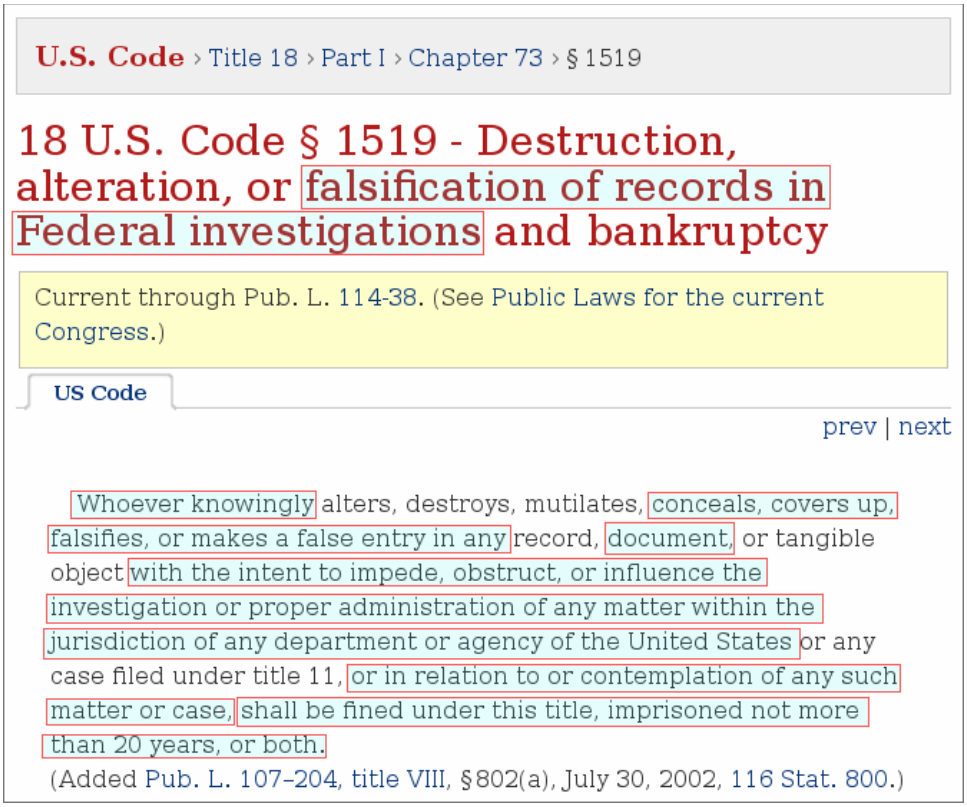
---

1 • Delivered by both email and U.S. mail.

2 • This letter **entirely replaces** both of its two earlier versions, which I sent you yesterday (Nov. 23). Please **ignore/delete/destroy** both of the Nov. 23 letters.

3 • The list of charges may be adjusted over time, as new information comes to light.

18 USC §1519 — Obstruction Of Justice



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code

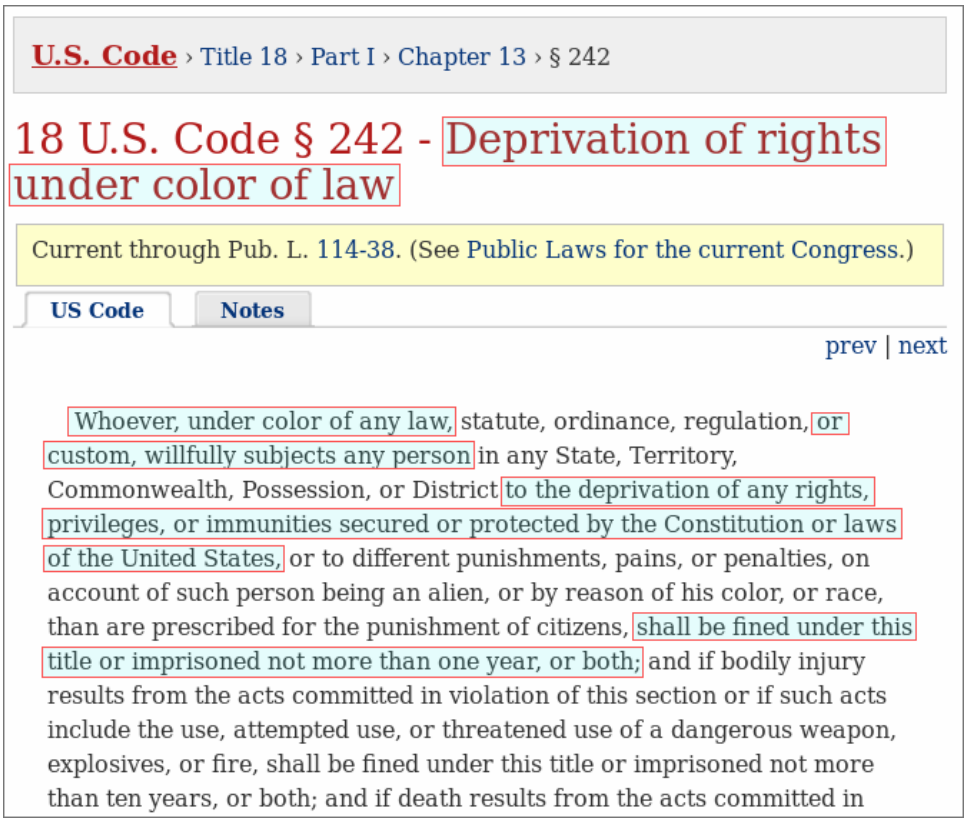
prev | next

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

A full(er) discussion of §1519 was given in the Nov. 22 letter.

18 USC §242 — Deprivation Of Rights Under Color Of Law



U.S. Code › Title 18 › Part I › Chapter 13 › § 242

18 U.S. Code § 242 - Deprivation of rights under color of law

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

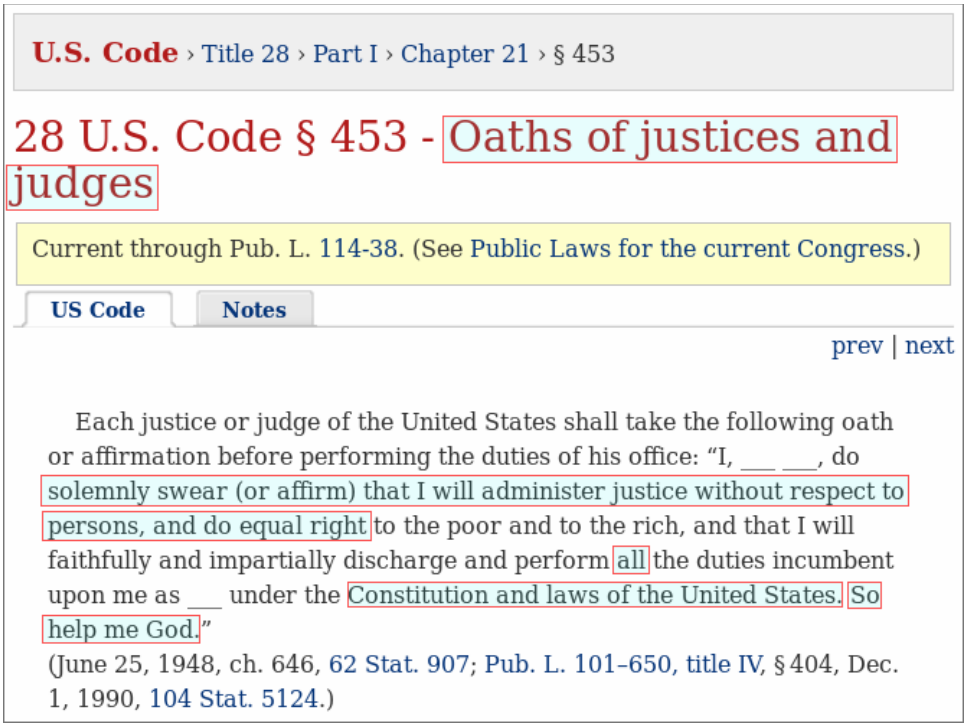
US Code | Notes

prev | next

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

28 USC §453 — Judicial Oath Of Office



U.S. Code › Title 28 › Part I › Chapter 21 › § 453

28 U.S. Code § 453 - Oaths of justices and judges

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) 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 ___ under the Constitution and laws of the United States. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 101–650, title IV, § 404, Dec. 1, 1990, 104 Stat. 5124.)

Anent, we also recall two constitutional provisions:[4]

> We the People of the United States, in Order to … **establish Justice** [which includes **Truth**] …
>
> — U.S. Const Preamble (emphasis added)

> [A]ll executive and **judicial** Officers, both of the United States and of the several States, shall be bound by **Oath** or Affirmation [i.e., **Promise**], to **support this Constitution** [esp. **law** (Art. III), which incorporates the doctrine of *stare decisis*] …
>
> — U.S. Const Art VI (emphasis added)

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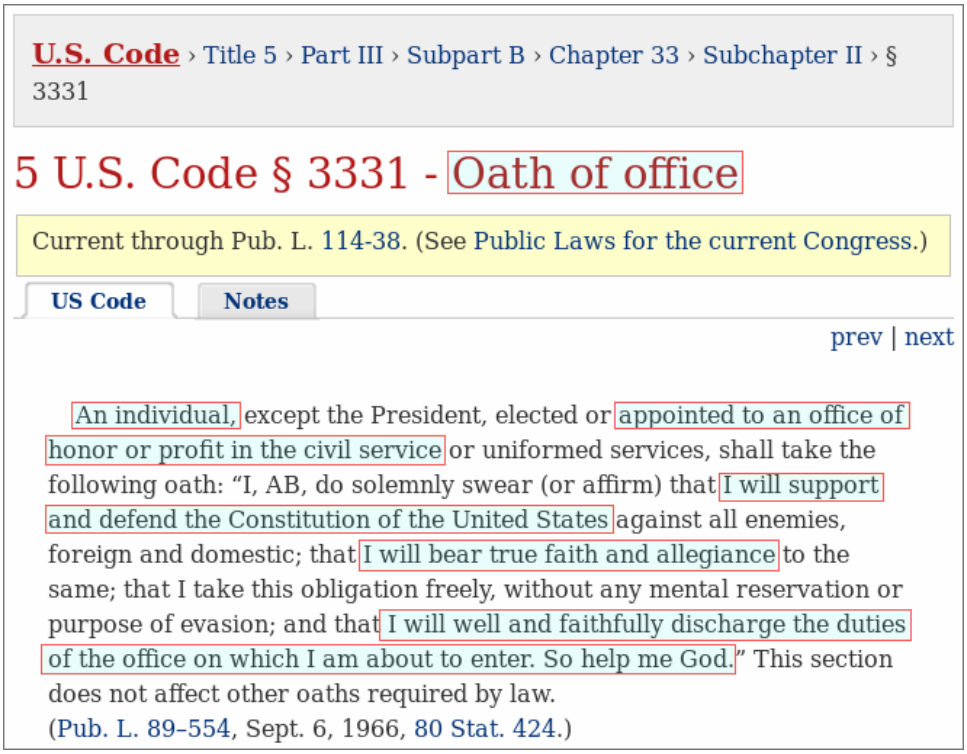
4 • Inside front cover of my Petition for Rehearing to the Supreme Court.

5 USC §1331 — Civil Service Oath Of Office



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3331

5 U.S. Code § 3331 - Oath of office

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

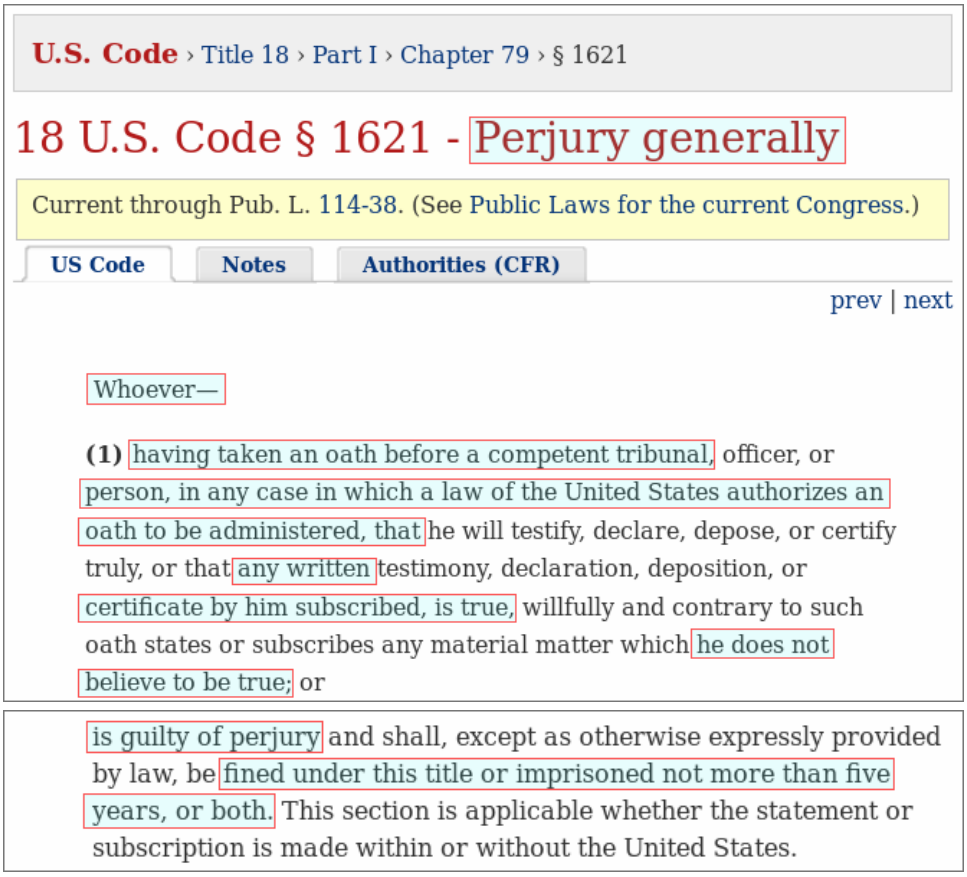
US Code | Notes

prev | next

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) 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." This section does not affect other oaths required by law.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 424.)

18 USC §1621–1623 — Perjury (Lying Under Oath)



U.S. Code › Title 18 › Part I › Chapter 79 › § 1621

18 U.S. Code § 1621 - Perjury generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Judges/justices are, of course, *always* under oath on the bench (by their oaths of office, 28 USC §453, 5 USC §3331, *supra*).

18 U.S. Code § 1622 - Subornation of perjury

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 774; Pub. L. 103–322, title XXXIII, § 330016(1)(I), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S. Code § 1623 - False declarations before grand jury or court

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

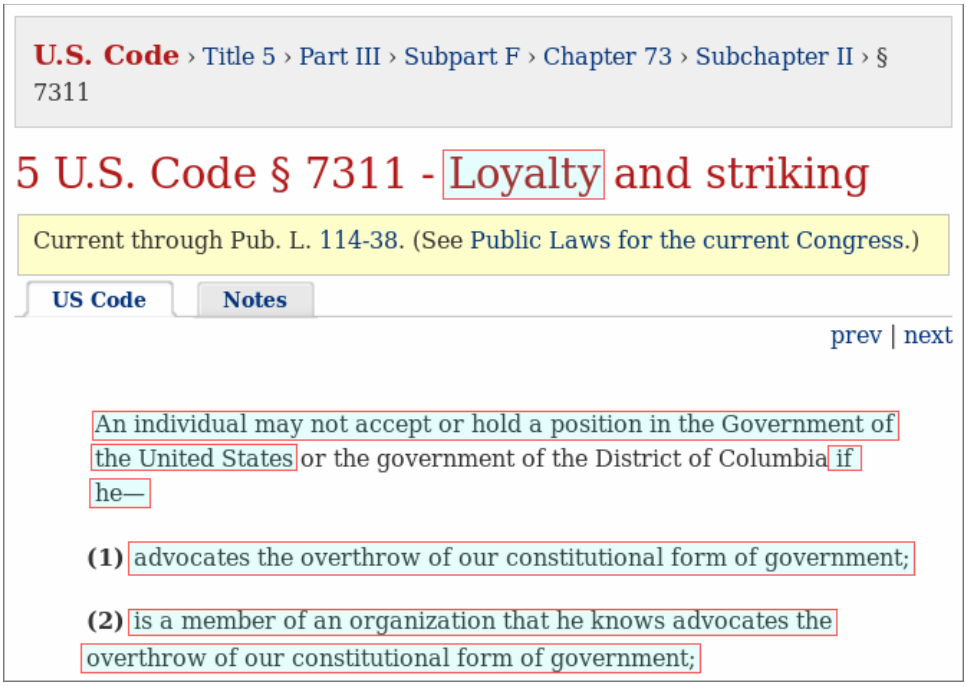
US Code | Notes

prev | next

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

5 USC §7311(1–2) — Loyalty



U.S. Code › Title 5 › Part III › Subpart F › Chapter 73 › Subchapter II › § 7311

5 U.S. Code § 7311 - Loyalty and striking

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

The "overthrow of our constitutional form of government" involved in my case refers to "dissing" (disregard/dismiss/disagree/disrespect/dissemble) the Judicial Branch as an institution (corruption of one-third of our constitutional form of government, entrusted with the **administration/interpretation of law** in the United States).[5]

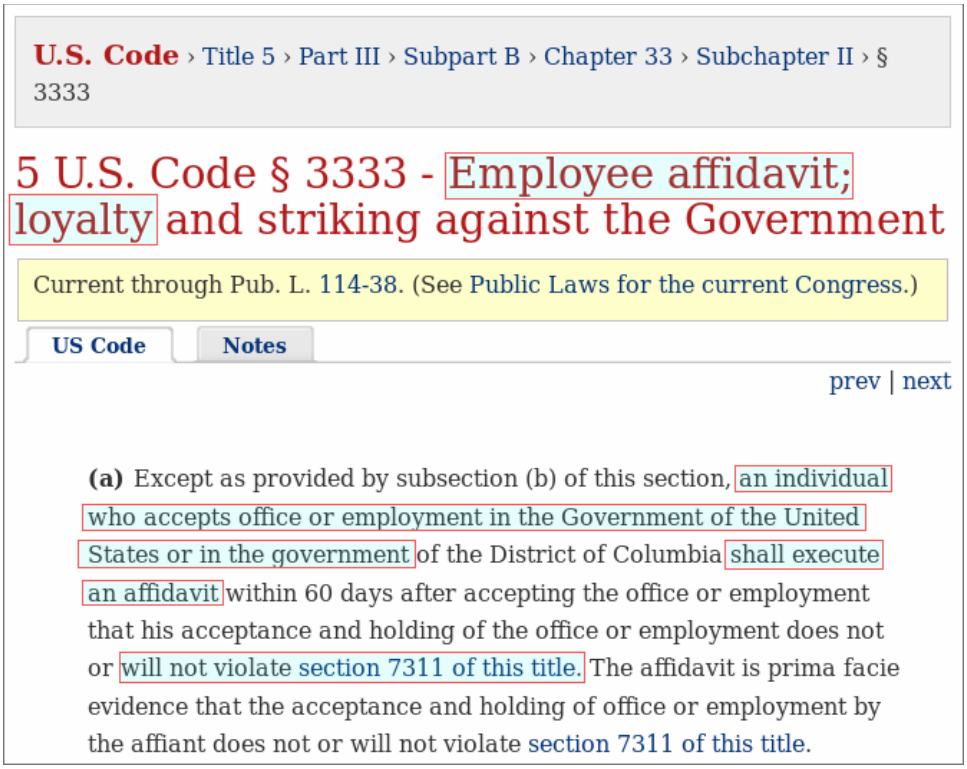
The "organization" involved in my case refers to the collection of judges who are like-minded with the judges involved in the case.[6]

---

5 • A full(er) philosophical/jurisprudential discussion of the nexus amongst (i) law/justice, (ii) the Constitution, and (iii) the Judicial Branch, has been given in my PetReh (Petition for Rehearing to the Supreme Court).

6 • According to persuasive well-documented "rumors"/reports, this "organization" amounts to a substantial percentage of the federal judiciary. See my Petition for Writ of Certiorari ℘xif7 for a *dozen* recent topical references (and many more references cited therein).

5 USC §3333 — Affidavit Of Loyalty



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3333

5 U.S. Code § 3333 - Employee affidavit; loyalty and striking against the Government

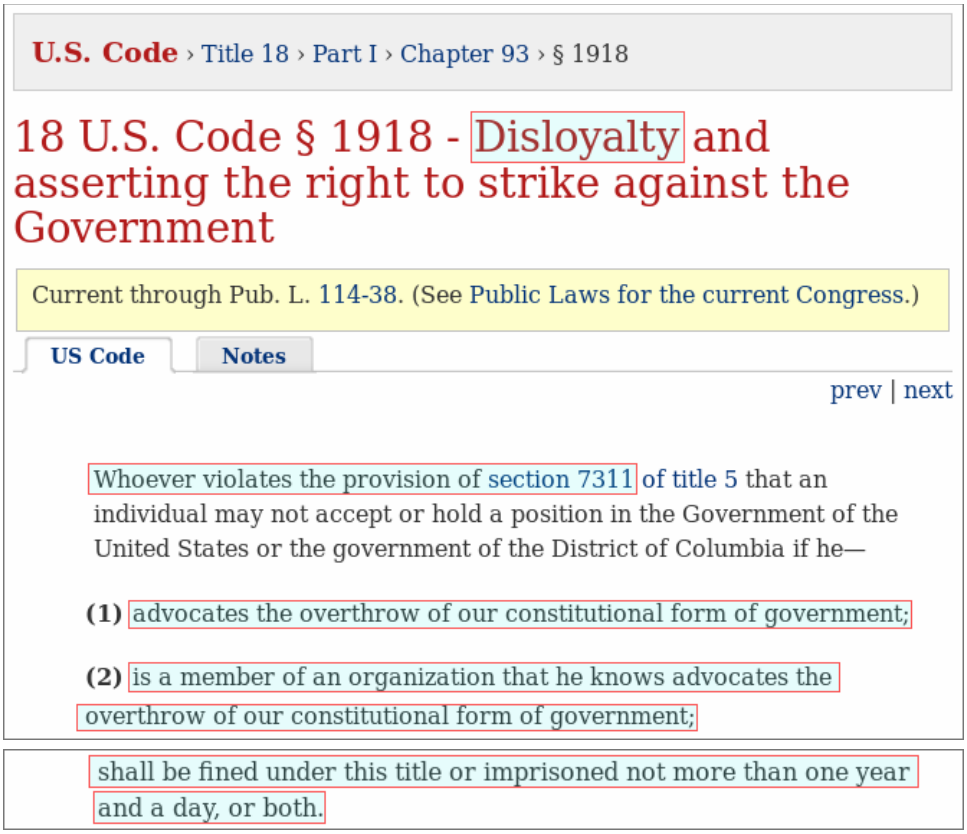
Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

18 USC §1918(1–2) — Disloyalty



U.S. Code › Title 18 › Part I › Chapter 93 › § 1918

18 U.S. Code § 1918 - Disloyalty and asserting the right to strike against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

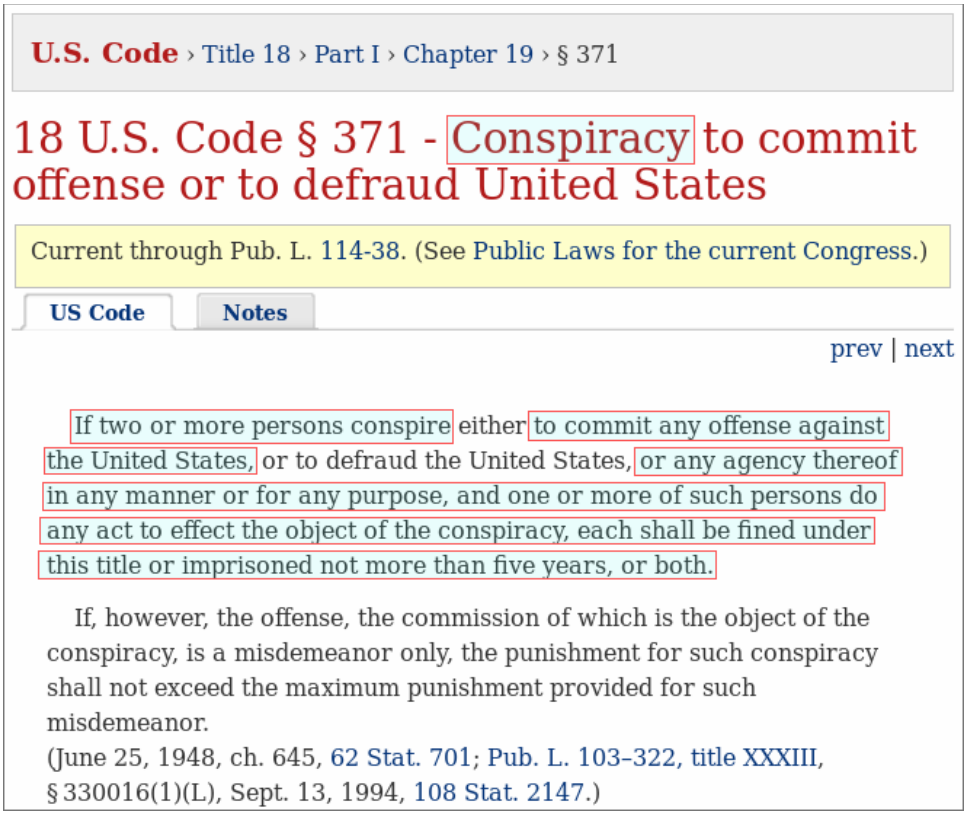
Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

shall be fined under this title or imprisoned not more than one year and a day, or both.

18 USC §371 — Conspiracy



U.S. Code › Title 18 › Part I › Chapter 19 › § 371

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

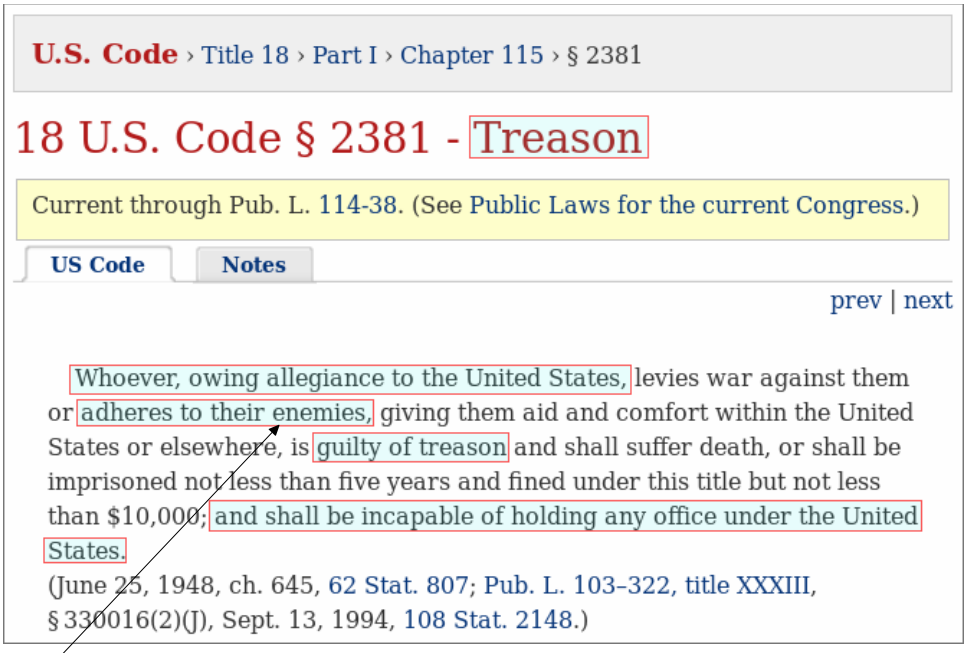
prev | next

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch. 645, 62 Stat. 701; Pub. L. 103–322, title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 USC §2381 — Treason



U.S. Code › Title 18 › Part I › Chapter 115 › § 2381

18 U.S. Code § 2381 - Treason

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, § 330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

Judges (trusted agents of the United States) who (i) disloyally (ii) conspire to (iii) obstruct justice, (iv) deprive rights, (v) violate their oaths of office, and (vi) commit perjury (all proven *supra*), cannot be *"friends"* of the United States. Hence, they are *"enemies."*

Res Ipsa Loquitur.[7]

7 • "The thing speaks for itself."

Exhibit R

Email to F. Pagano, Nov. 24, 2016 (second).

- **Attachment PaganoLetter5.pdf —** Included in this JCApx at Exhibit R.a, *infra*.

Subject: Re: New letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/24/16 12:04
To: Florence_Pagano@ca1.uscourts.gov

Oops, by administrative error, my previous email (timestamped 6:57AM this morning, see below) contained the WRONG copy of "PaganoLetter5.pdf". Please discard that copy. Attached hereto is the CORRECT copy. (This correct copy is the one that is being U.S.-mailed to you.)

Apologies for my error.

On 11/24/16 06:57, Walt Tuvell wrote:

> Attached hereto is a newer letter, ***entirely replacing both*** of the two letters I sent you yesterday. It differs from the previous letter by adding sections on Civil Service Oath of Office, and on Conspiracy.
>
> Hardcopy follows in U.S. Mail.
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Exhibit R.a

Attachment PaganoLetter5.pdf to email of Nov. 24, 2016 (second) (Exhibit R, *supra*).

Final evolved/corrected version is at Exhibit U.a, *infra*.

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 24, 2016

Dear Ms. Pagano:

This letter is a follow-up to the letter I sent you on Nov. 22.[2]

In that letter, I mentioned that *additional* accusations (beyond 18 USC §1519; see RehApx ℘8ƒ‡ι∗) of **criminal** conduct by the First Circuit judges remain under consideration.[3]

I have wavered about the best way to communicate that *additional* information to you. While at some future point a full(er) "brief" regarding each charge would be appropriate (along the lines of the the Nov. 22 letter, which concerned §1519), I believe that at this point it is necessary and sufficient to simply provide (relevant portions of) *screenshots* of the statutes in question. So that's what I do in this letter.

I trust this information will be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

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1 • Delivered by both email and U.S. mail.

2 • This letter **entirely replaces** both of its two earlier versions, which I sent you yesterday (Nov. 23). Please **ignore/delete/destroy** both of the Nov. 23 letters.

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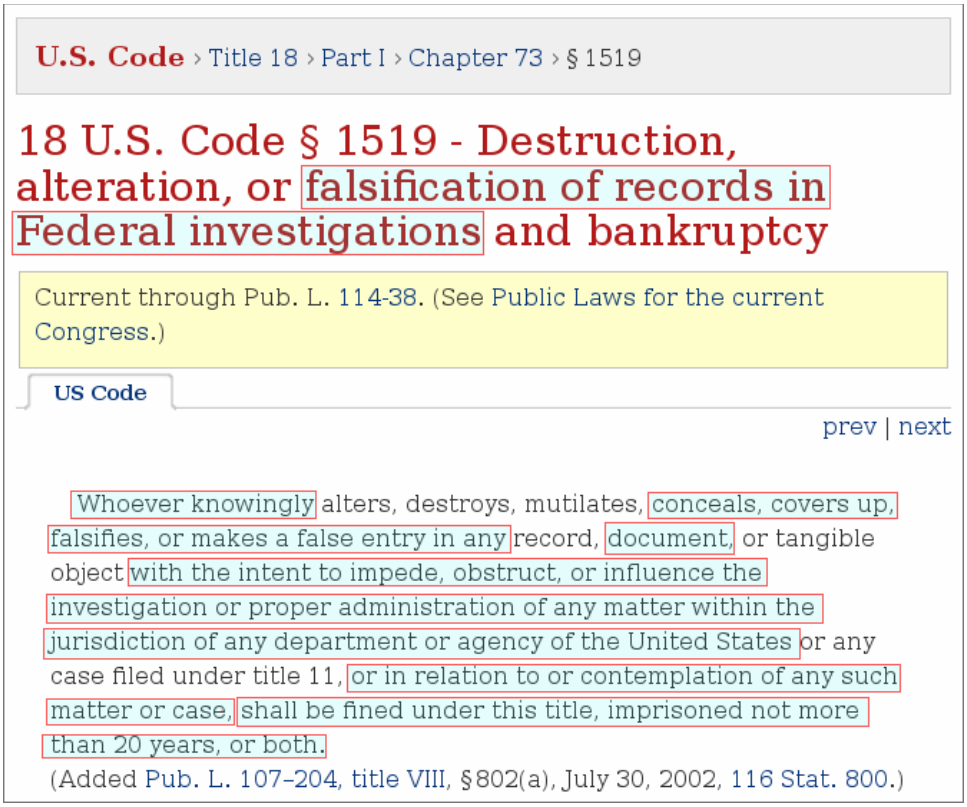

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US Code

prev | next

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(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

Note: 18 USC Part I Chapter 73 is entitled **"Obstruction of Justice".**

A full(er) discussion of §1519 was given in the Nov. 22 letter.

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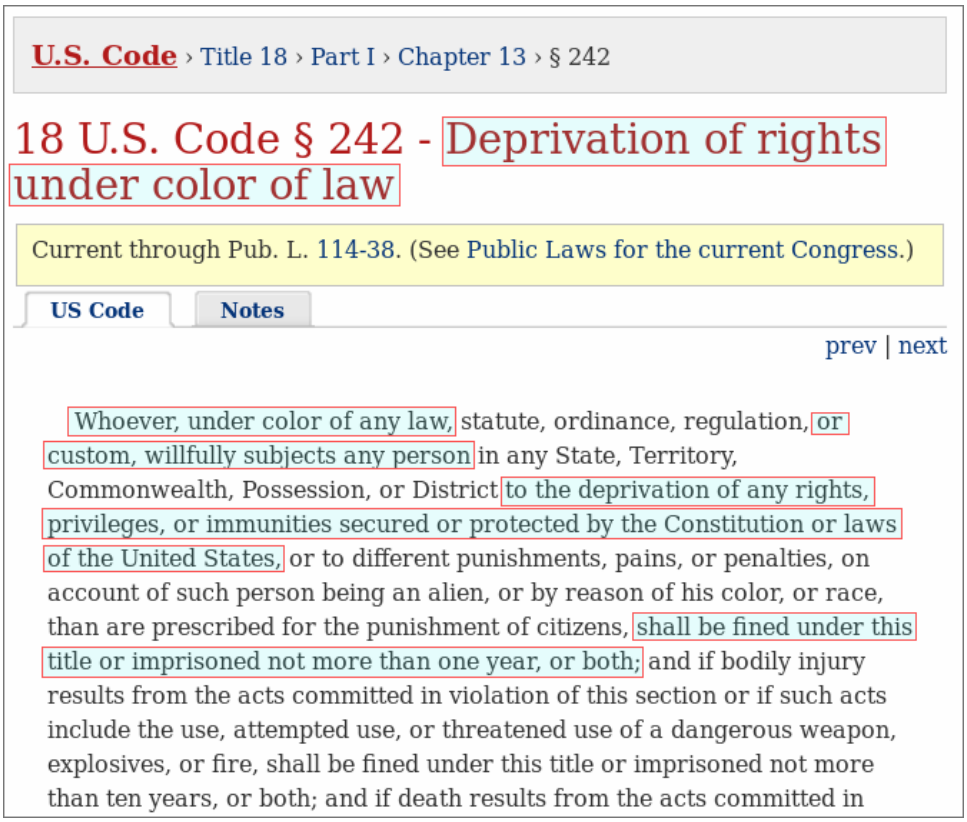

U.S. Code › Title 18 › Part I › Chapter 13 › § 242

18 U.S. Code § 242 - Deprivation of rights under color of law

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

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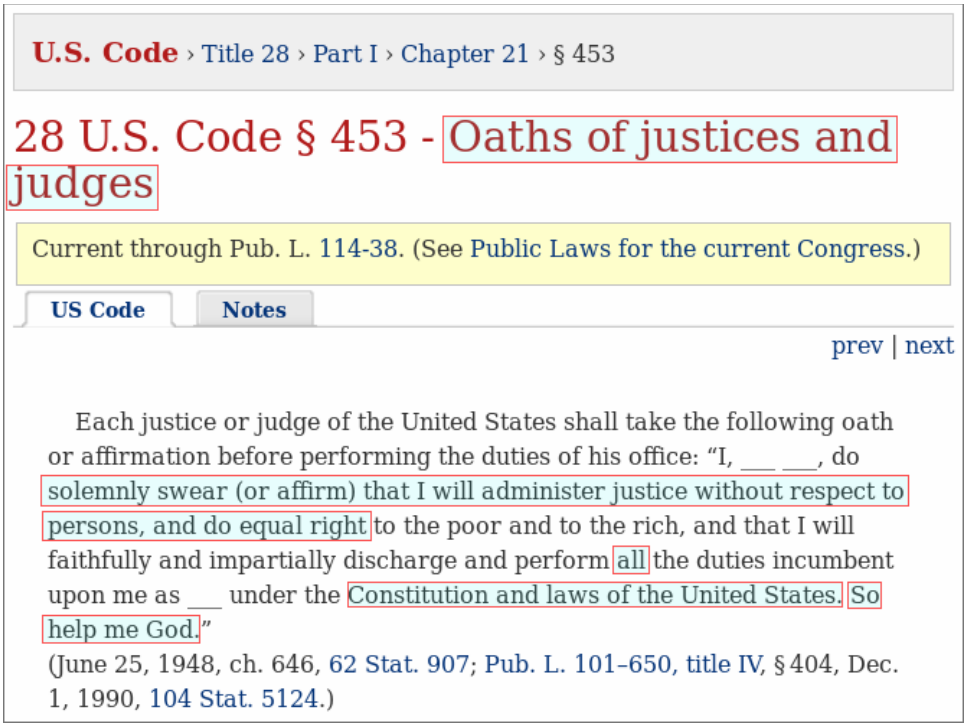

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US Code | Notes

prev | next

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Anent, we also recall two constitutional provisions:[4]

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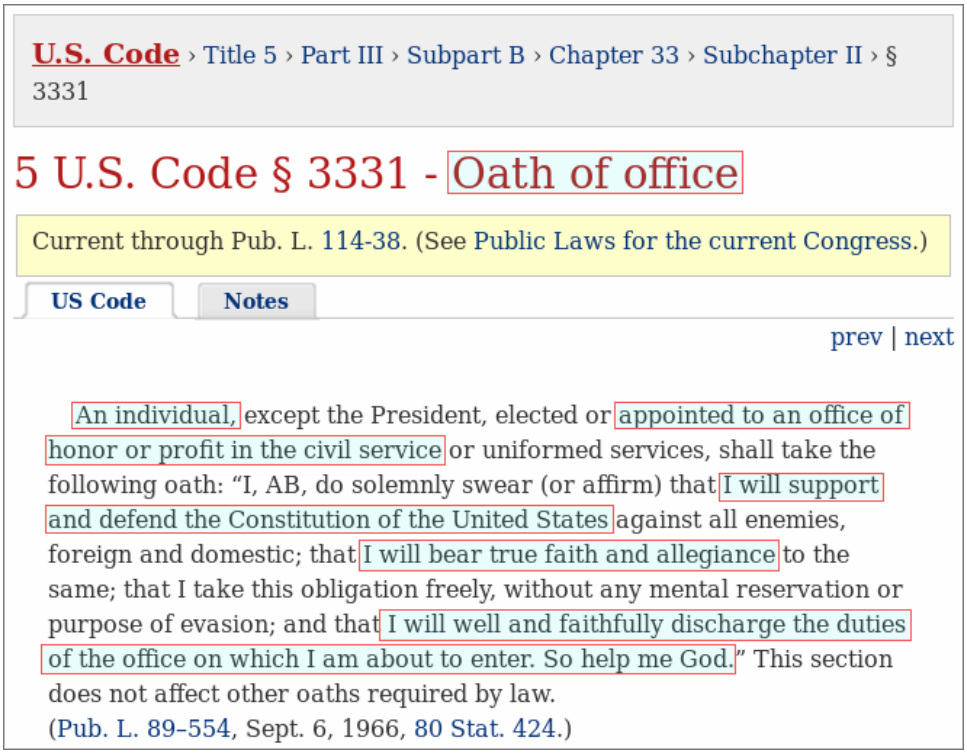


U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3331

5 U.S. Code § 3331 - Oath of office

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

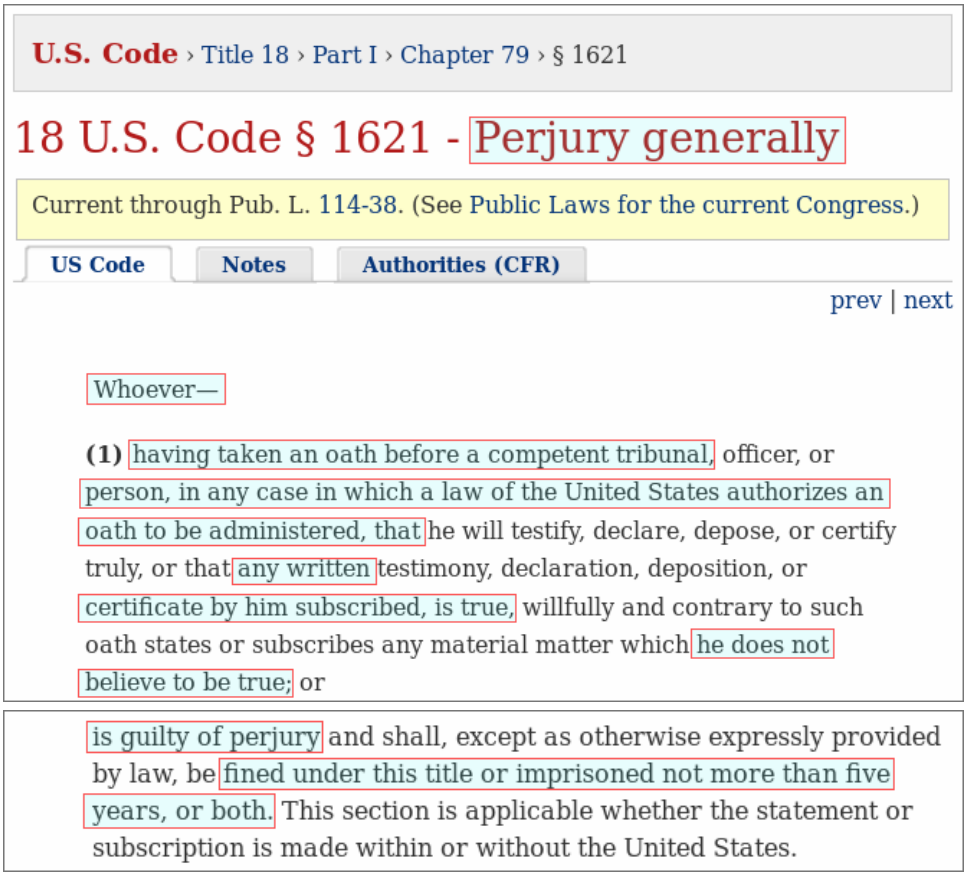
US Code | Notes

prev | next

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) 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." This section does not affect other oaths required by law.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 424.)

18 USC §1621–1623 — Perjury (Lying Under Oath)



U.S. Code › Title 18 › Part I › Chapter 79 › § 1621

18 U.S. Code § 1621 - Perjury generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Judges/justices are, of course, *always* under oath on the bench (by their oaths of office, 28 USC §453, 5 USC §3331, *supra*).

18 U.S. Code § 1622 - Subornation of perjury

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

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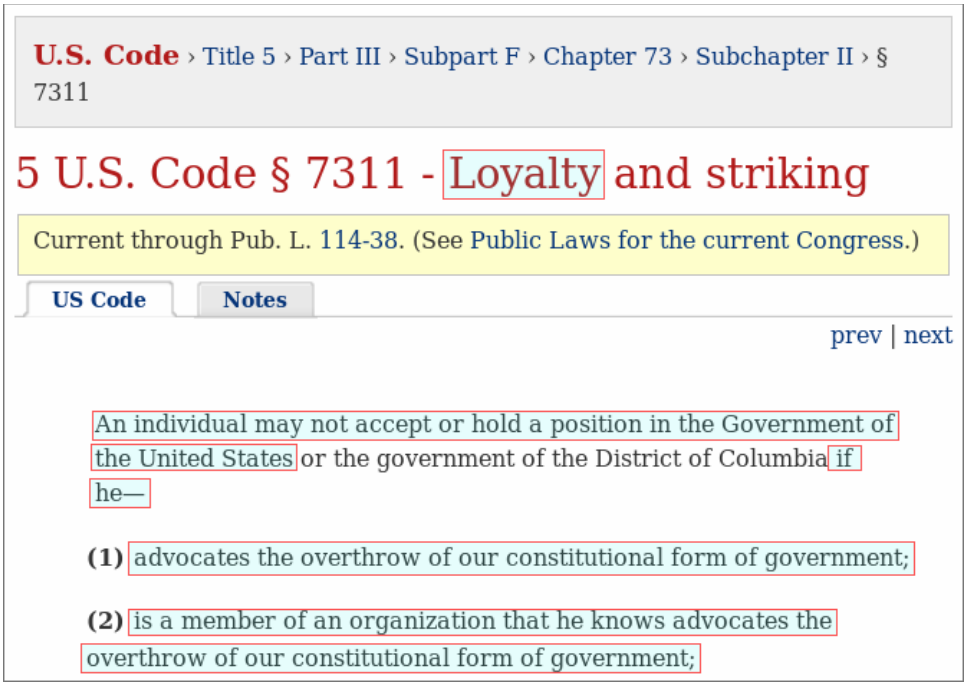
US Code | Notes

prev | next

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

5 USC §7311(1–2) — Loyalty



U.S. Code › Title 5 › Part III › Subpart F › Chapter 73 › Subchapter II › § 7311

5 U.S. Code § 7311 - Loyalty and striking

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

The "overthrow of our constitutional form of government" involved in my case refers to "dissing" (disregard/dismiss/disagree/disrespect/dissemble) the Judicial Branch as an institution (corruption of one-third of our constitutional form of government, entrusted with the **administration/interpretation of law** in the United States).[5]

The "organization" involved in my case refers to the collection of judges who are like-minded with the judges involved in the case.[6]

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5 • A full(er) philosophical/jurisprudential discussion of the nexus amongst (i) law/justice, (ii) the Constitution, and (iii) the Judicial Branch, has been given in my PetReh (Petition for Rehearing to the Supreme Court).

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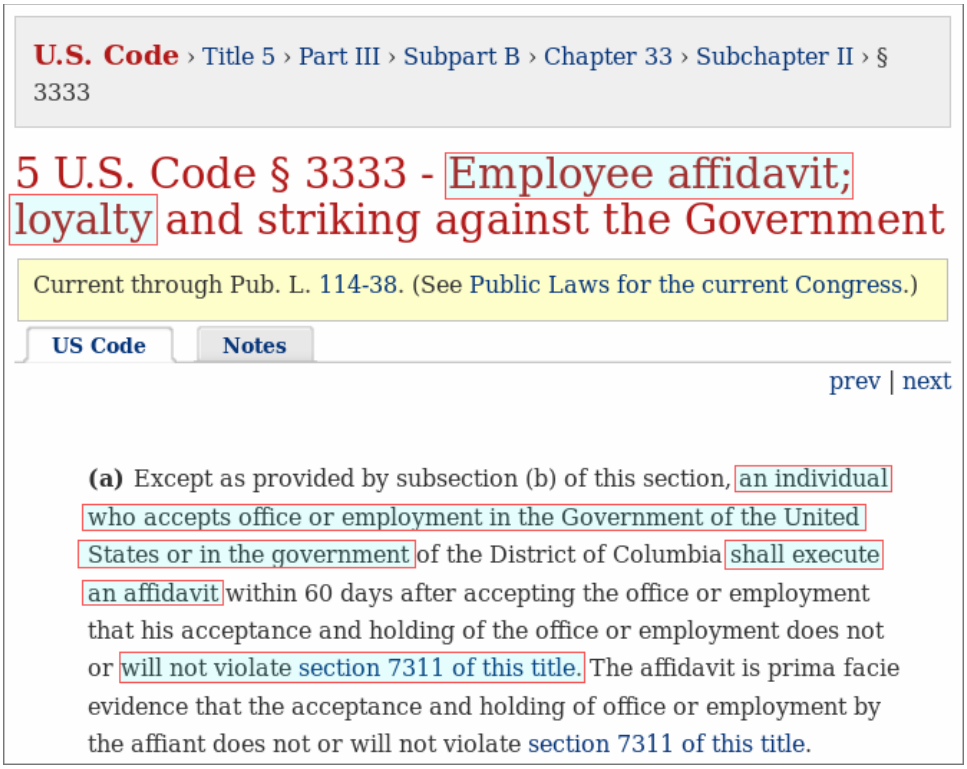
5 USC §3333 — Affidavit Of Loyalty



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3333

5 U.S. Code § 3333 - Employee affidavit; loyalty and striking against the Government

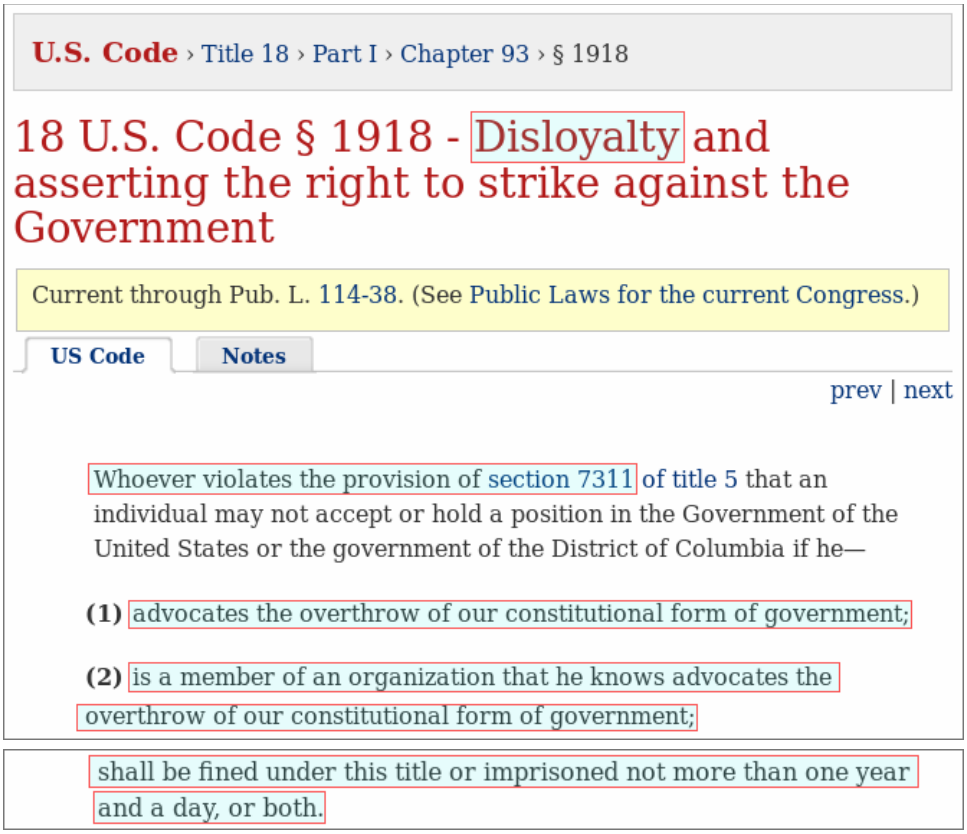
Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

18 USC §1918(1–2) — Disloyalty



U.S. Code › Title 18 › Part I › Chapter 93 › § 1918

18 U.S. Code § 1918 - Disloyalty and asserting the right to strike against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

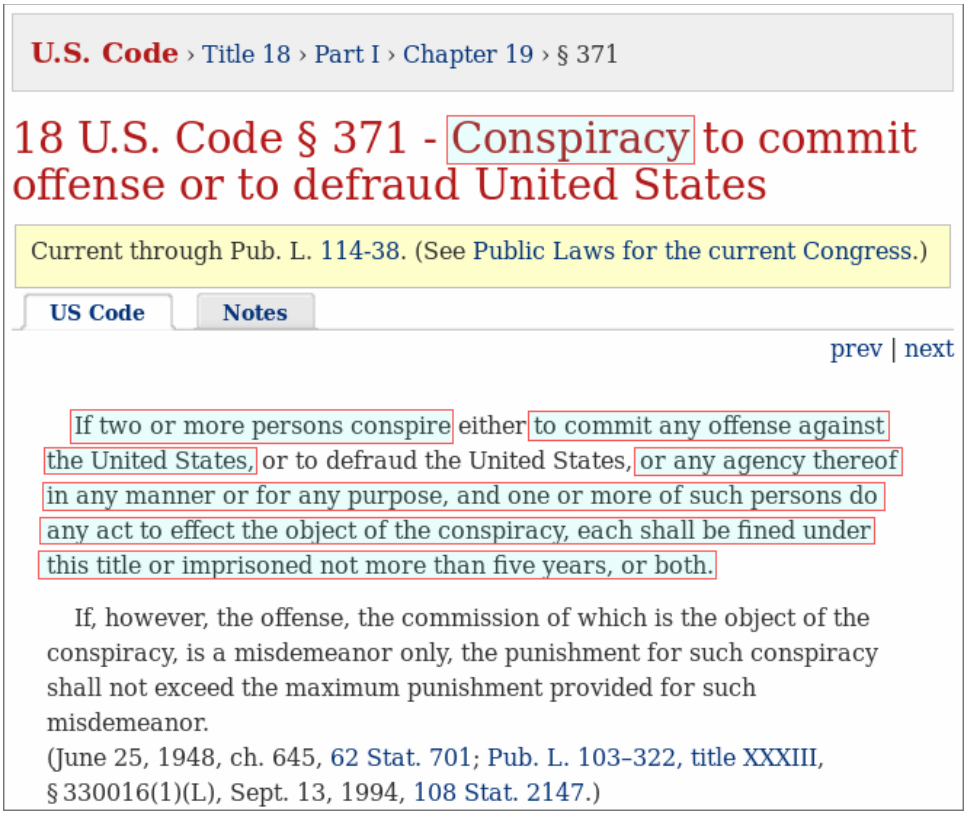
Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

shall be fined under this title or imprisoned not more than one year and a day, or both.

18 USC §371 — Conspiracy



U.S. Code › Title 18 › Part I › Chapter 19 › § 371

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

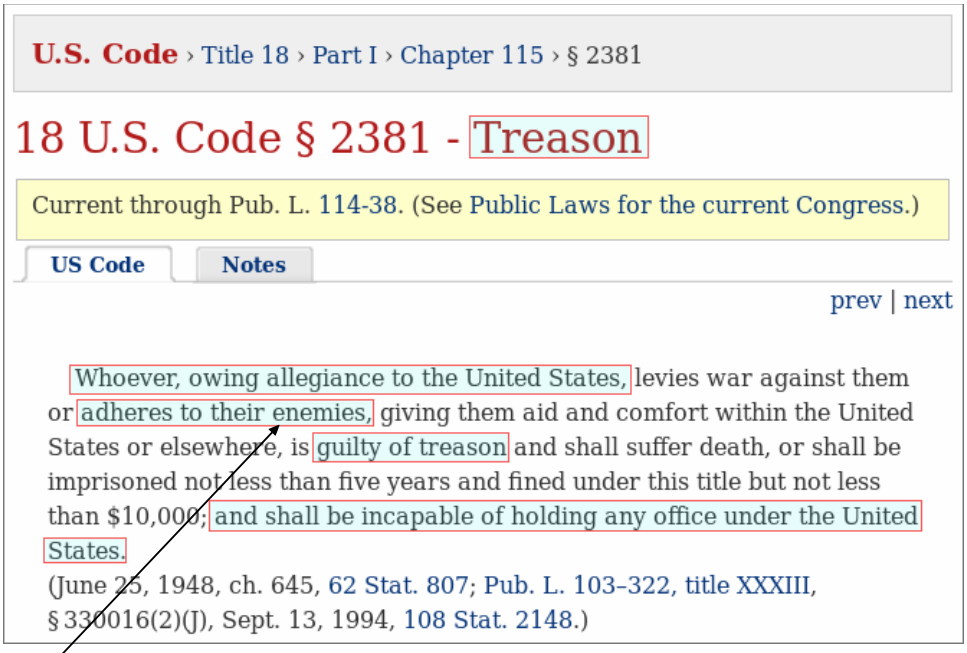
prev | next

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch. 645, 62 Stat. 701; Pub. L. 103–322, title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 USC §2381 — Treason



U.S. Code › Title 18 › Part I › Chapter 115 › § 2381

18 U.S. Code § 2381 - Treason

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

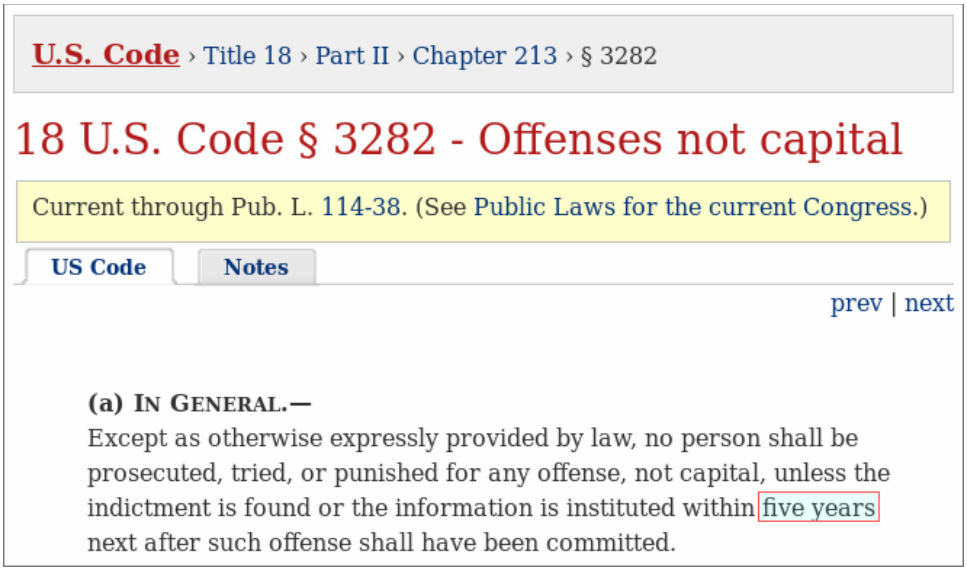
(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, §330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

Judges (trusted agents of the United States) who (i) disloyally (ii) conspire to (iii) obstruct justice, (iv) deprive rights, (v) violate their oaths of office, and (vi) commit perjury (all proven *supra*), cannot be *"friends"* of the United States. Hence, they are *"enemies."*

Res Ipsa Loquitur.[7]

7 • "The thing speaks for itself."

STATUTE OF LIMITATIONS



U.S. Code › Title 18 › Part II › Chapter 213 › § 3282

18 U.S. Code § 3282 - Offenses not capital

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

(a) IN GENERAL.—
Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Exhibit S

Email to F. Pagano, Nov. 25, 2016.

- **Attachment PaganoLetter5.pdf —** Included in this JCApx at Exhibit S.a, *infra.*

Subject: Re: New letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/25/16 09:33
To: Florence_Pagano@ca1.uscourts.gov

My apologies one last time. Since the mail didn't go out yesterday, I took the opportunity to add one more page (p. 15) to this letter (attached). This, then, is the final version that will go out in this morning's mail.

On 11/24/16 12:04, Walt Tuvell wrote:

Oops, by administrative error, my previous email (timestamped 6:57AM this morning, see below) contained the WRONG copy of "PaganoLetter5.pdf". Please discard that copy. Attached hereto is the CORRECT copy. (This correct copy is the one that is being U.S.-mailed to you.)

Apologies for my error.

On 11/24/16 06:57, Walt Tuvell wrote:

> Attached hereto is a newer letter, ***entirely replacing both*** of the two letters I sent you yesterday. It differs from the previous letter by adding sections on Civil Service Oath of Office, and on Conspiracy.
>
> Hardcopy follows in U.S. Mail.
>
> Today is Thanksgiving, so no mail will go out until tomorrow.
>
> On 11/23/16 12:32, Walt Tuvell wrote:
>
> > The "new letter" I set you earlier today had a fatal error in it: it neglected to included 18 USC §1622–1623.
> >
> > The corrected version is attached hereto (the new material is on pages 6–7 of this version, and that is the only change from the earlier version today).
> >
> > So please destroy the version from earlier today, and completely replace it with the version attached hereto.
> >
> > A hardcopy is being mailed by U.S. Mail today.

Attachments:

PaganoLetter5.pdf 981 KB

Exhibit S.a

Attachment PaganoLetter5.pdf to email of Nov. 25, 2016 (Exhibit S, *supra*).

Final evolved/corrected version is at Exhibit U.a, *infra*.

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 24, 2016

Dear Ms. Pagano:

This letter is a follow-up to the letter I sent you on Nov. 22.[2]

In that letter, I mentioned that *additional* accusations (beyond 18 USC §1519; see RehApx ℘8f‡ι∗) of **criminal** conduct by the First Circuit judges remain under consideration.[3]

I have wavered about the best way to communicate that *additional* information to you. While at some future point a full(er) "brief" regarding each charge would be appropriate (along the lines of the the Nov. 22 letter, which concerned §1519), I believe that at this point it is necessary and sufficient to simply provide (relevant portions of) *screenshots* of the statutes in question. So that's what I do in this letter.

I trust this information will be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

Walter E. Tuvell

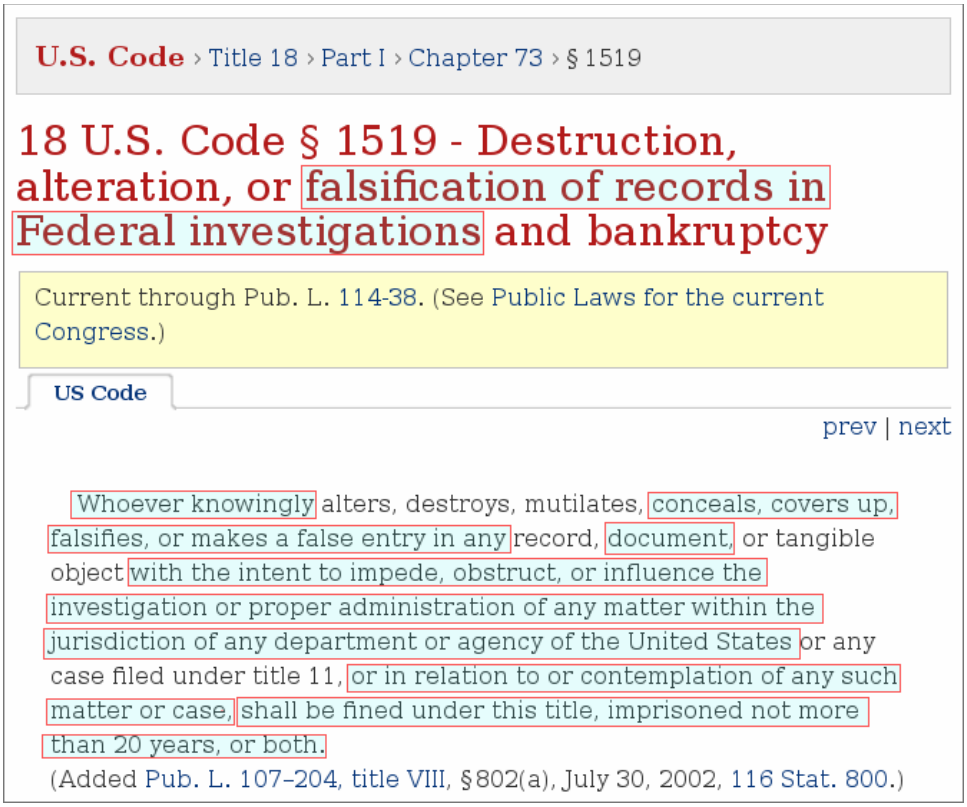
---

1 • Delivered by both email and U.S. mail.

2 • This letter **entirely replaces** both of its two earlier versions, which I sent you yesterday (Nov. 23). Please **ignore/delete/destroy** both of the Nov. 23 letters.

3 • The list of charges may be adjusted over time, as new information comes to light.

18 USC §1519 — Obstruction Of Justice



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code

prev | next

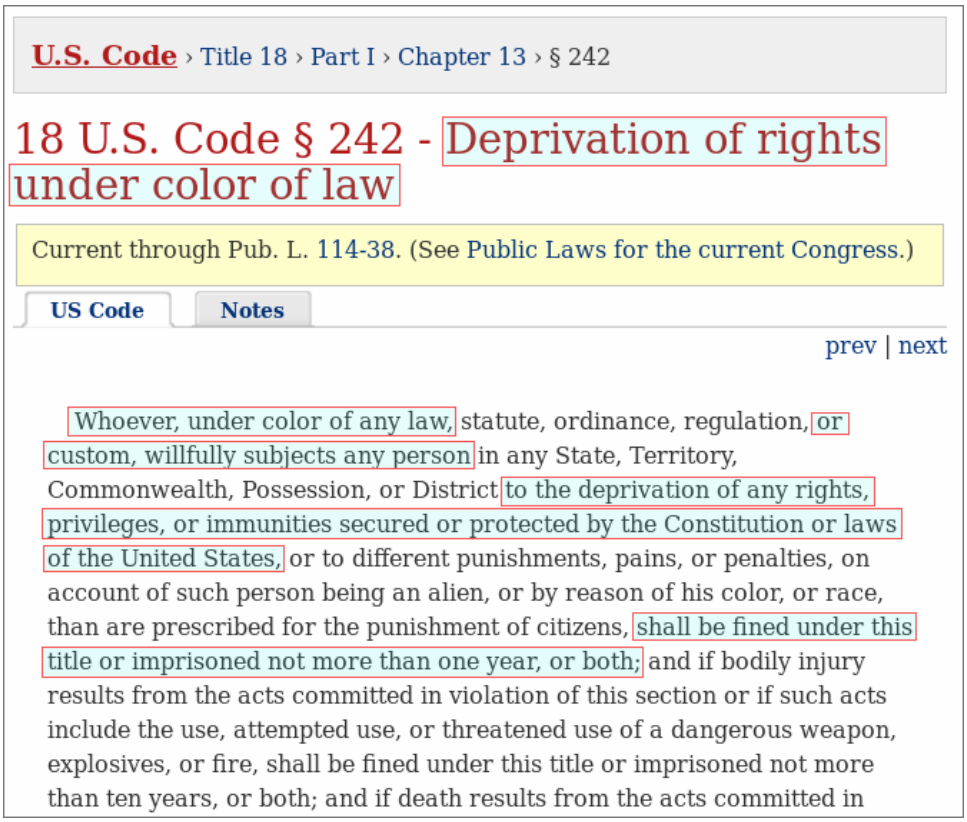
Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

Note: 18 USC Part I Chapter 73 is entitled **"Obstruction of Justice".**

A full(er) discussion of §1519 was given in the Nov. 22 letter.

18 USC §242 — Deprivation Of Rights Under Color Of Law



U.S. Code › Title 18 › Part I › Chapter 13 › § 242

18 U.S. Code § 242 - Deprivation of rights under color of law

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

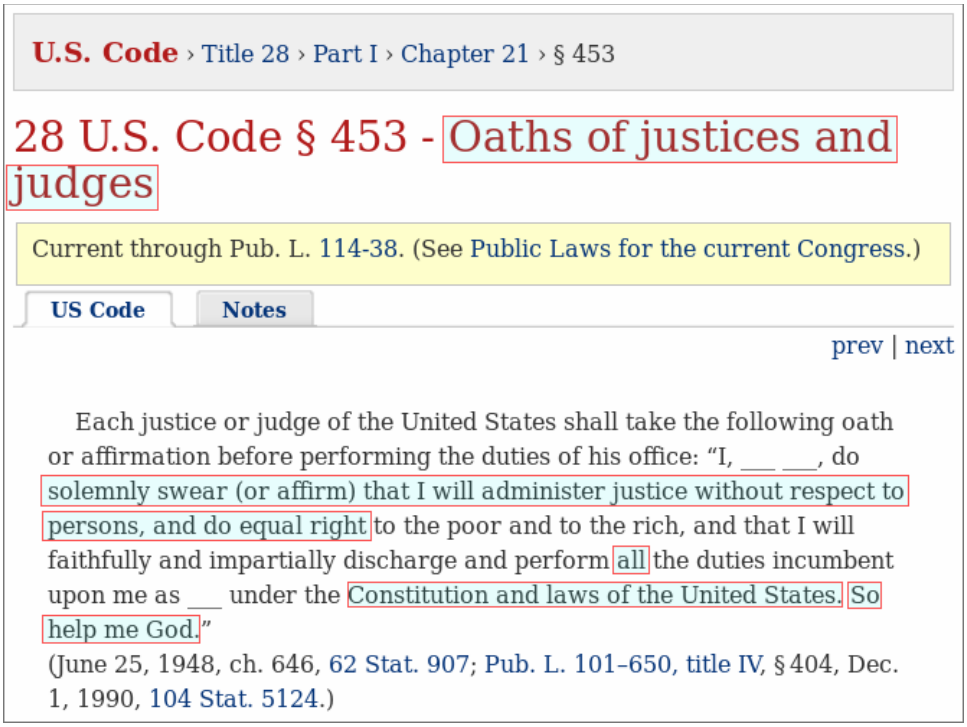
US Code | Notes

prev | next

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

28 USC §453 — Judicial Oath Of Office



U.S. Code › Title 28 › Part I › Chapter 21 › § 453

28 U.S. Code § 453 - Oaths of justices and judges

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) 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 ___ under the Constitution and laws of the United States. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 101–650, title IV, § 404, Dec. 1, 1990, 104 Stat. 5124.)

Anent, we also recall two constitutional provisions:[4]

> We the People of the United States, in Order to … **establish Justice** [which includes **Truth**] …
>
> — U.S. Const Preamble (emphasis added)

> [A]ll executive and **judicial** Officers, both of the United States and of the several States, shall be bound by **Oath** or Affirmation [i.e., **Promise**], to **support this Constitution** [esp. **law** (Art. III), which incorporates the doctrine of *stare decisis*] …
>
> — U.S. Const Art VI (emphasis added)

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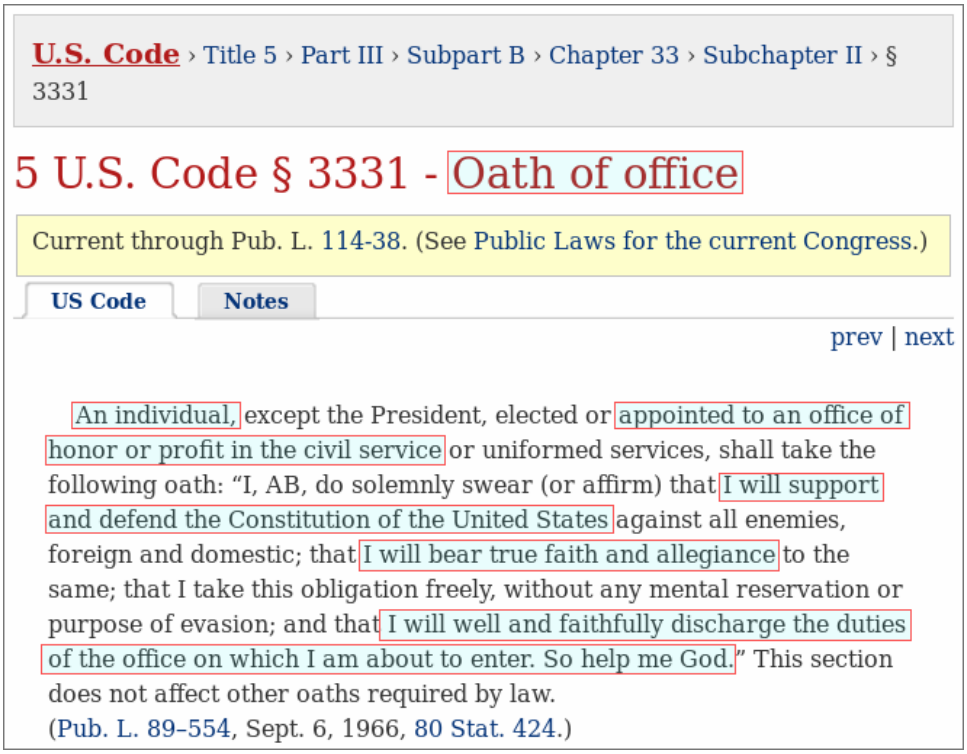
4 • Inside front cover of my Petition for Rehearing to the Supreme Court.

5 USC §1331 — Civil Service Oath Of Office



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3331

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US Code | Notes

prev | next

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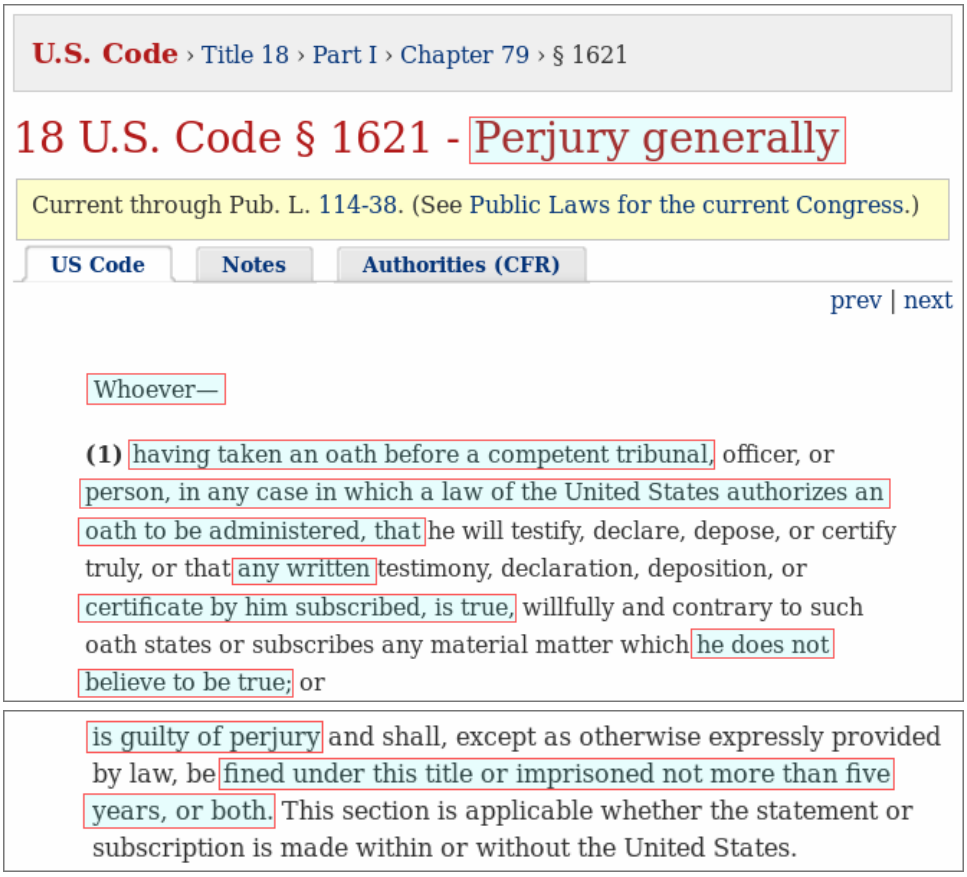

U.S. Code › Title 18 › Part I › Chapter 79 › § 1621

18 U.S. Code § 1621 - Perjury generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

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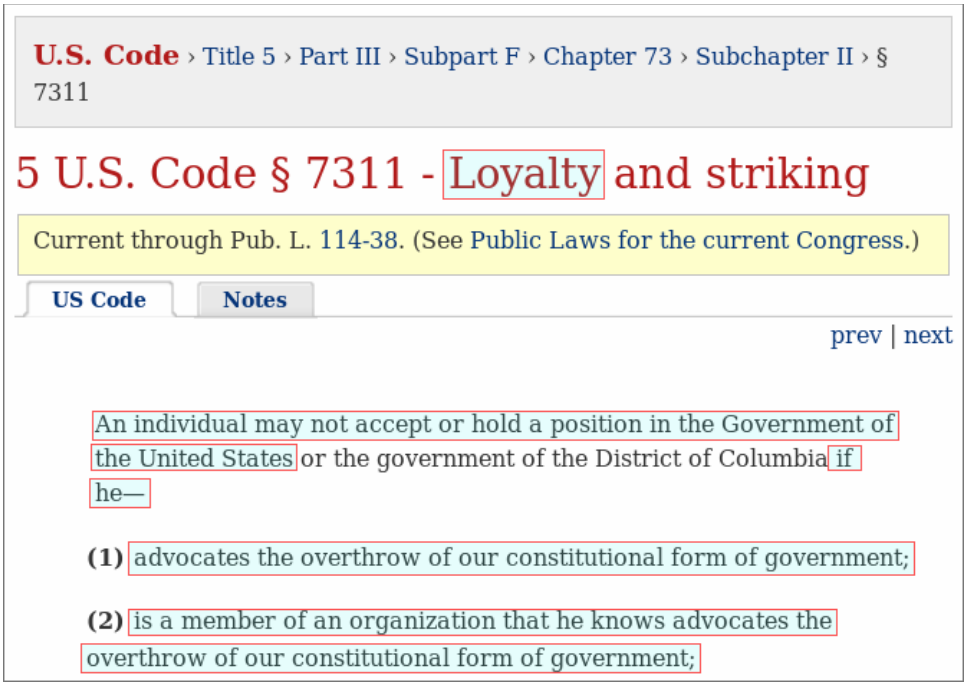
5 USC §7311(1–2) — Loyalty



U.S. Code › Title 5 › Part III › Subpart F › Chapter 73 › Subchapter II › § 7311

5 U.S. Code § 7311 - Loyalty and striking

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

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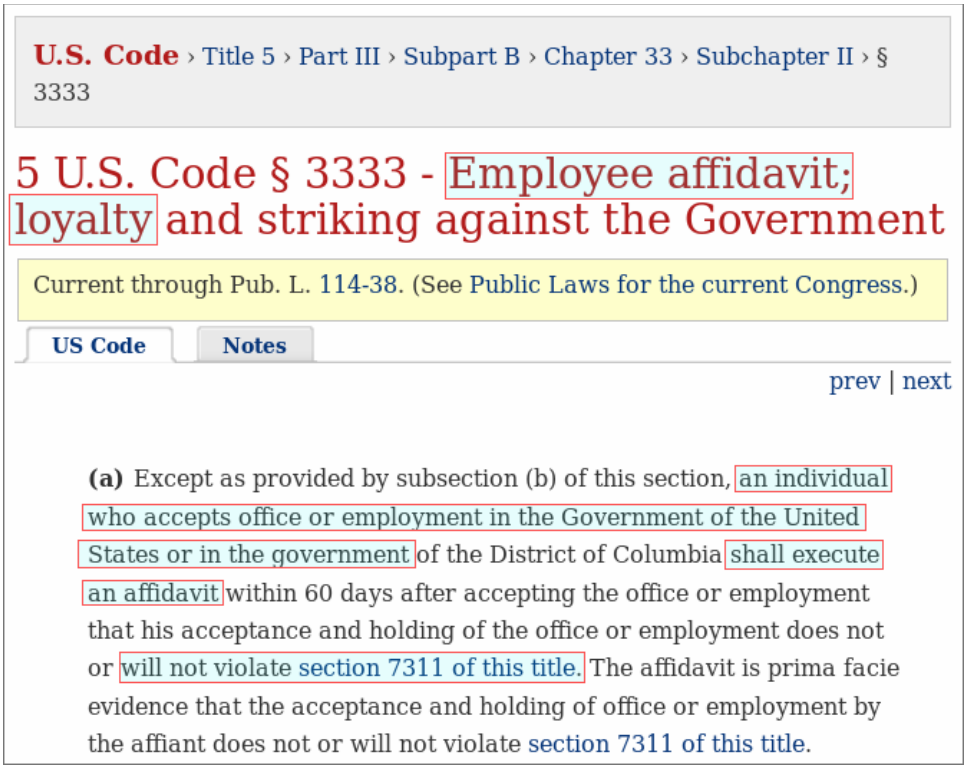

U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3333

5 U.S. Code § 3333 - Employee affidavit; loyalty and striking against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

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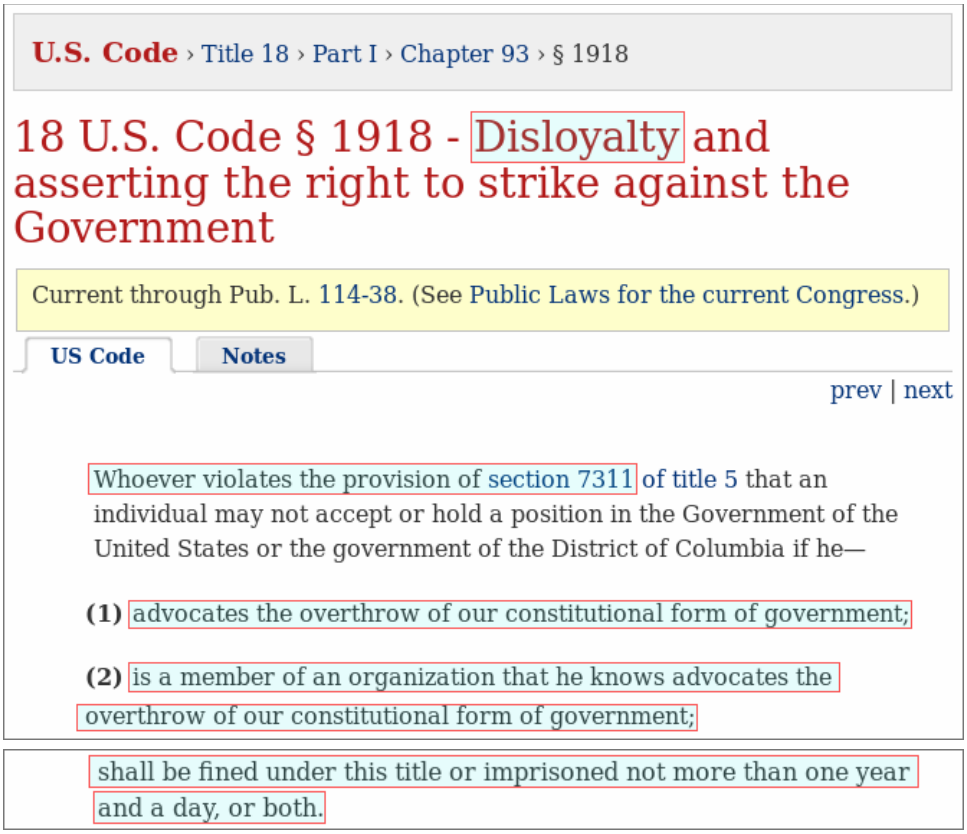
(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

18 USC §1918(1–2) — Disloyalty



U.S. Code › Title 18 › Part I › Chapter 93 › § 1918

18 U.S. Code § 1918 - Disloyalty and asserting the right to strike against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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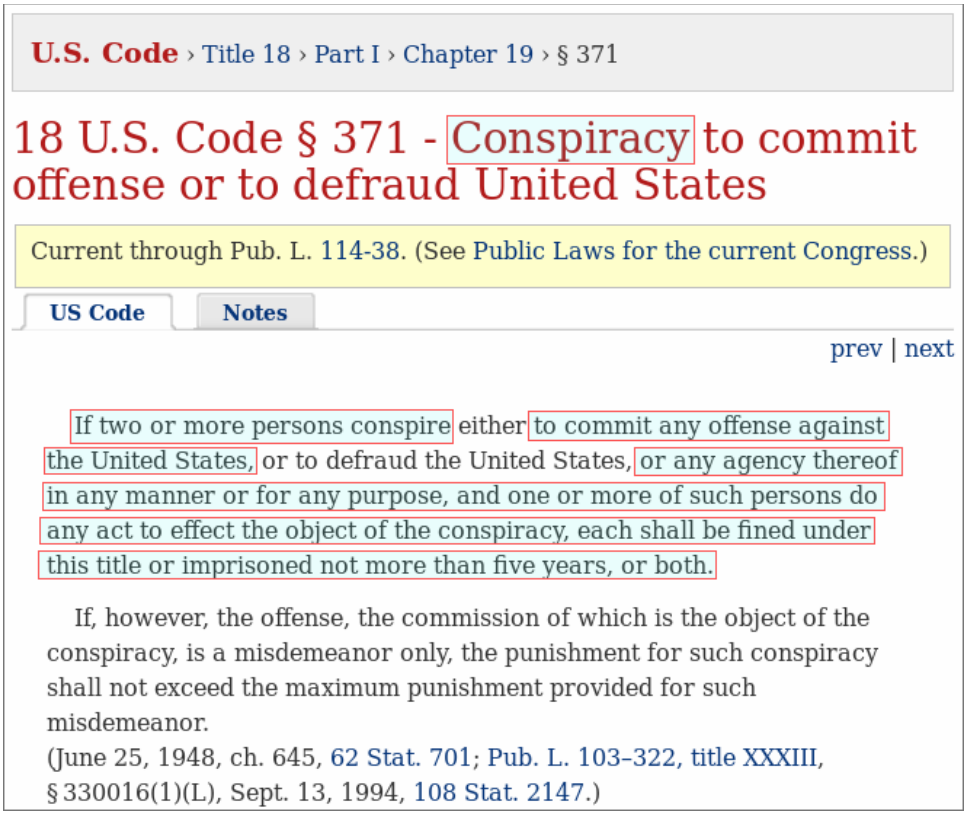
Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

shall be fined under this title or imprisoned not more than one year and a day, or both.

18 USC §371 — Conspiracy



U.S. Code › Title 18 › Part I › Chapter 19 › § 371

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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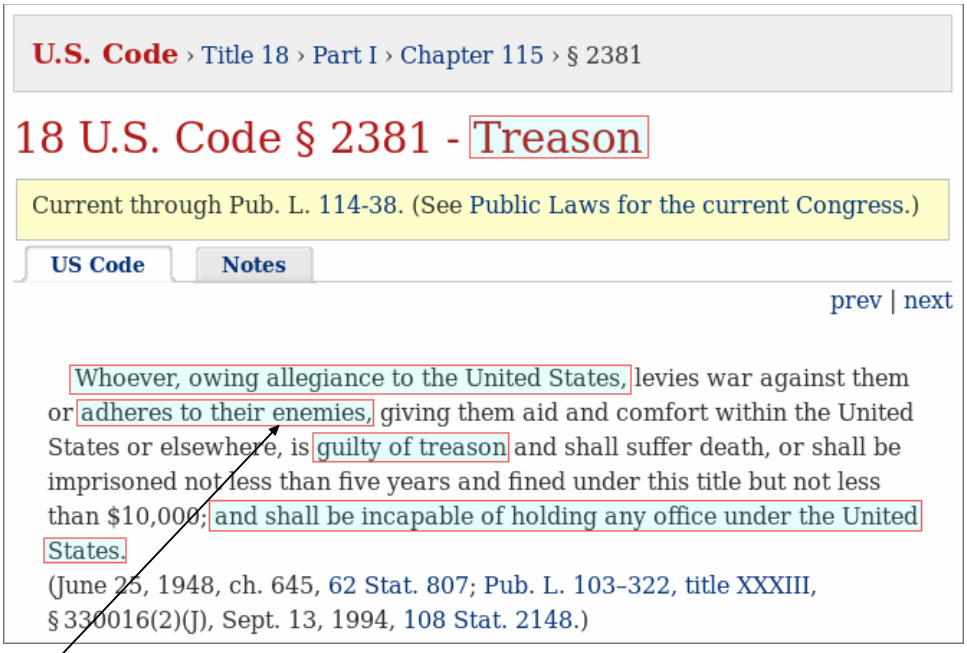
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch. 645, 62 Stat. 701; Pub. L. 103–322, title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 USC §2381 — Treason



U.S. Code › Title 18 › Part I › Chapter 115 › § 2381

18 U.S. Code § 2381 - Treason

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

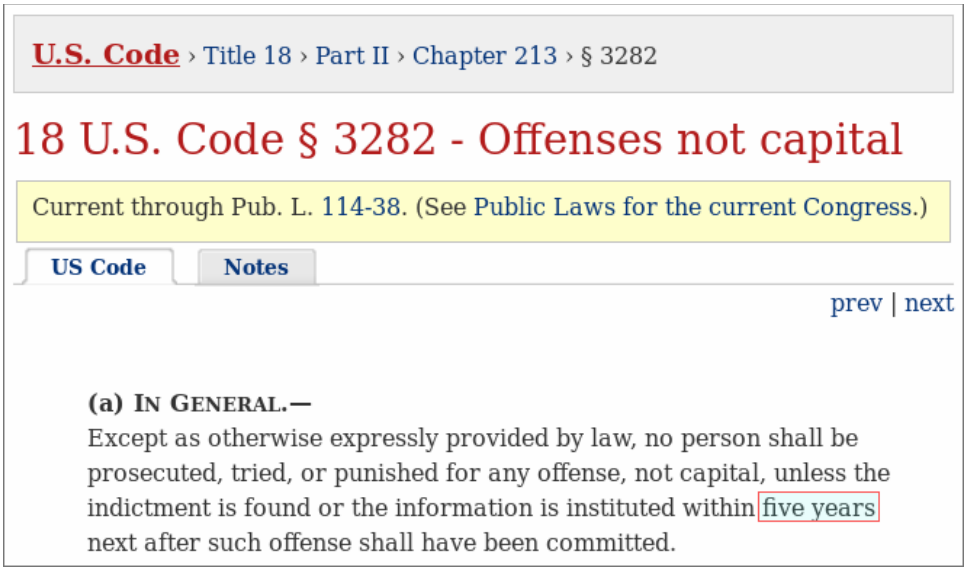
(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, §330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

Judges (trusted agents of the United States) who (i) disloyally (ii) conspire to (iii) obstruct justice, (iv) deprive rights, (v) violate their oaths of office, and (vi) commit perjury (all proven *supra*), cannot be *"friends"* of the United States. Hence, they are *"enemies."*

Res Ipsa Loquitur.[7]

7 • "The thing speaks for itself."

STATUTE OF LIMITATIONS



U.S. Code › Title 18 › Part II › Chapter 213 › § 3282

18 U.S. Code § 3282 - Offenses not capital

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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(a) IN GENERAL.—
Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

NO IMMUNITY

As mentioned in my previous letter (Nov. 23, ℘1f3, citing 42 USC §1983), judges generally enjoy immunity from *civil* liability; but nobody (not even the President) enjoys immunity from *criminal* charges, "as of right."

One sometimes sees this principal articulated as a *meme,* attributed to *Owen v. City of Independence,* 445 U.S. ℘622–683 (1980),[8] rejecting immunity based on "good faith" unconstitutional acts of authorities (persons or municipalities):

> **Officers of the government (specifically including judges) have no immunity, when violating a Constitutional right, from liability. <u>For they are deemed to know the law.</u>**

This language, however, does not actually occur in *Owen.* Instead, it is a *paraphrase* of *Owen,* largely based on the following passage from *Owen* ℘641 (cited there as the "*Thayer* principle"):

> Yet in the hundreds of cases from that era [colonial times] awarding damages against municipal governments for wrongs committed by them, **one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers [because they "know the law"].** Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. In the leading case of *Thayer v. Boston,* 36 Mass. 511, 515–516 (1837), for example, Chief Justice Shaw explained:
>
> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the **officers having competent authority,** either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done [even] with an **honest view** [much less a dishonest view] to obtain for the public some lawful benefit or advantage, **reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done.**"

---

8 • *Owen* involved 42 USC §1983, but at a time prior to its incorporation of its judicial immunity clause (added by Congress in 1996).

Exhibit T

Email to F. Pagano, Nov. 26, 2016.

Subject: Re: New letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/26/16 08:00
To: Florence_Pagano@ca1.uscourts.gov

As indicated in my previous email (included below), I did yesterday U.S.-mail to you "PaganoLetter5.pdf", dated Nov. 25.

However, please be informed now that (as indicated by footnote in my recent letters), I continue to research criminal conduct committed by the judges. Accordingly, I have today found even more statutes they have abridged. Therefore, I am re-revising "PaganoLetter5.pdf" yet again.

Therefore: Please ignore/disregard/destroy all the "PaganoLetter5.pdf" letters that I have sent to you up to now (dated Nov. 23–25). They will all be replaced by the next version of "PaganoLetter5.pdf" I will send to you (email and U.S.-mail), on Mon. Nov. 28.

My continued apologies for this activity, but I am motivated to send you all the information I possibly can, as quickly as I possibly can, to aid the Judicial Council in its investigation.

On 11/25/16 09:33, Walt Tuvell wrote:

> My apologies one last time. Since the mail didn't go out yesterday, I took the opportunity to add one more page (p. 15) to this letter (attached). This, then, is the final version that will go out in this morning's mail.
>
> On 11/24/16 12:04, Walt Tuvell wrote:
>
> > Oops, by administrative error, my previous email (timestamped 6:57AM this morning, see below) contained the WRONG copy of "PaganoLetter5.pdf". Please discard that copy. Attached hereto is the CORRECT copy. (This correct copy is the one that is being U.S.-mailed to you.)
> >
> > Apologies for my error.
> >
> > On 11/24/16 06:57, Walt Tuvell wrote:
> >
> > > Attached hereto is a newer letter, ***entirely replacing both*** of the two letters I sent you yesterday. It differs from the previous letter by adding sections on Civil Service Oath of Office, and on Conspiracy.

Hardcopy follows in U.S. Mail.

Today is Thanksgiving, so no mail will go out until tomorrow.

On 11/23/16 12:32, Walt Tuvell wrote:

> The "new letter" I set you earlier today had a fatal error in it: it neglected to included 18 USC §1622–1623.
>
> The corrected version is attached hereto (the new material is on pages 6–7 of this version, and that is the only change from the earlier version today).
>
> So please destroy the version from earlier today, and completely replace it with the version attached hereto.
>
> A hardcopy is being mailed by U.S. Mail today.

Exhibit U

Email to F. Pagano, Nov. 28, 2016.

- **Attachment PaganoLetter5.pdf —** Included in this JCApx at Exhibit U.a, *infra*.

Subject: Re: New letter
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 11/28/16 16:25
To: Florence_Pagano@ca1.uscourts.gov

FYI, I did U.S.-mail the LAST version of "PaganoLetter5" (dated Nov. 28) to you today, and the PDF is attached hereto. Please discard all previous versions.

On 11/26/16 08:00, Walt Tuvell wrote:

> As indicated in my previous email (included below), I did yesterday U.S.-mail to you "PaganoLetter5.pdf", dated Nov. 25.
>
> However, please be informed now that (as indicated by footnote in my recent letters), I continue to research criminal conduct committed by the judges. Accordingly, I have today found even more statutes they have abridged. Therefore, I am re-revising "PaganoLetter5.pdf" yet again.
>
> Therefore: Please ignore/disregard/destroy all the "PaganoLetter5.pdf" letters that I have sent to you up to now (dated Nov. 23–25). They will all be replaced by the next version of "PaganoLetter5.pdf" I will send to you (email and U.S.-mail), on Mon. Nov. 28.
>
> My continued apologies for this activity, but I am motivated to send you all the information I possibly can, as quickly as I possibly can, to aid the Judicial Council in its investigation.
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> > > Apologies for my error.

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> > pages
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> >
> > So please destroy the version from earlier today, and completely
> > replace
> > it with the version attached hereto.
> >
> > A hardcopy is being mailed by U.S. Mail today.

Attachments:

PaganoLetter5.pdf 1.3 MB

Exhibit U.a

Attachment PaganoLetter5.pdf to email of Nov. 28, 2016 (Exhibit U, *supra*).

This final version of PaganoLetter5.pdf evolved from earlier versions, at Exhibit O.a, Exhibit P.a, Exhibit Q.a, Exhibit R.a, Exhibit S.a, *supra*.

The version presented here is the corrected final version, differing from the original only to the extent of the following corrections:

- ℘8 (= JCApx ℘597): "5 USC §1331, ℘8 *supra*" ➡ "5 USC §1331".
- ℘15 (=JCApx ℘604) ƒ16: "7th" ➡ "7th" (two occurrences).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com
Judicial Misconduct Complaints №01-16-90036,01-16-90041

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

November 28, 2016

Dear Ms. Pagano:

This letter is a follow-up to my previous letter, dated "Nov. 20/22."[2]

In that letter, I mentioned that *additional* accusations (beyond 18 USC §1519; see RehApx ℘8ƒ‡ι∗) of **criminal** conduct by the First Circuit judges remain under consideration.[3]

I have wavered about the best way to communicate that *additional* information to you. While at some future point a full(er) "brief" regarding each charge would be appropriate (along the lines of the Nov. 20/22 letter, which concerned §1519, only), I believe that at this point it is necessary and sufficient to simply provide (relevant portions of) *screenshots* of the statutes in question, plus a little gloss. So that's what I do in this letter.

I trust this information will be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

WETuvell

Walter E. Tuvell

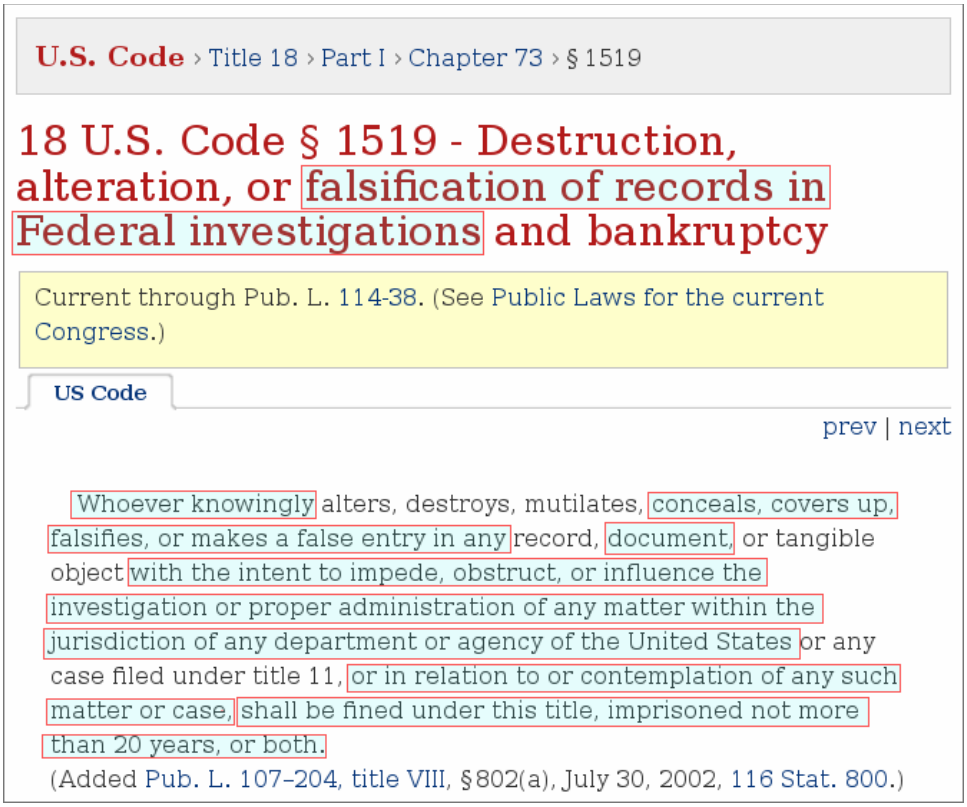
---

1 • Delivered by both email and U.S. mail.

2 • The present letter (dated Nov. 28), **entirely replaces** all earlier versions that I have sent you (dated Nov. 23–25). Please **ignore/delete/destroy** all of those earlier versions.

3 • The list of charges may be adjusted over time, as new information comes to light.

18 USC §1519 — Obstruction Of Justice: Falsification Of Records



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

(*Note:* 18 USC Part I Chap. 73 is entitled **"Obstruction of Justice".**)

In my case, the district judge is *directly* guilty of **(knowing)**[4] **falsification of records** (namely, her false Opinion), by virtue of her **original jurisdiction;** but so also are the panel judges, by virtue of their own **independent *de novo* review.**

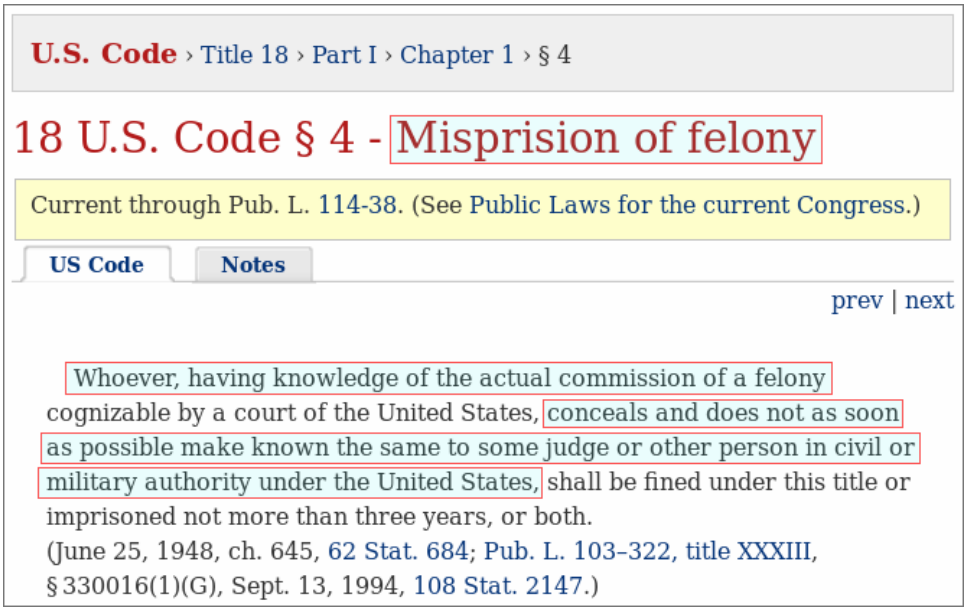
A full(er) discussion of §1519 was given in my Nov. 20/22 letter (e.g., regarding its "department or agency" language, citing *Yates v. U.S.,* 574 U.S. ___, №13-7451 (2015)). To which we now add: "[Even] when performing a judicial function, … [judges and justices] are subject to ***criminal*** liability" (*Nixon v. Fitzgerald,* 457 U.S. ℘731–799 (1982), ℘766, emphasis added).

Various terms are used widely, more-or-less synonymously, with **"concealment"** — such as **cover-up, whitewash** and **misprision.** See definitions on ℘4 *infra;* and see 18 USC §4, *Misprision of Felony,* ℘3 *infra.*

---

4 • "Knowingness," while correct, is *not a required element* of any of the causes-of-action claimed here (by the *Owen/Thayer* principle of governmental strict liability, ℘18 *infra*.)

18 USC §4 — Misprision Of Felony



U.S. Code › Title 18 › Part I › Chapter 1 › § 4

18 U.S. Code § 4 - Misprision of felony

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

(June 25, 1948, ch. 645, 62 Stat. 684; Pub. L. 103–322, title XXXIII, §330016(1)(G), Sept. 13, 1994, 108 Stat. 2147.)

See generally: (i) Christopher Mark Curenton, Commentary, *The Past, Present, and Future of 18 U.S.C. §4: An Exploration of the Federal Misprision Statute,* Alabama Law Review, vol. 55, Issue 1, ℘183–192 (2003–2004); (ii) *U.S. v. Osvaldo Caraballo-rodriguez,* 480 F.3d ℘62–88 (1st Cir. 2007).

A misprision of felony charge is especially appropriate against a person placed in a special position of trust/responsibility (such as a judge), and may be referred to as *"misfeasance/malfeasance in public office."*

In the U.S. today, misprision of felony is uniformly construed to require that the accused take some *"positive/active/affirmative step"* (beyond mere "negative/passive silence") to conceal the felony. In my case that's true of all *reviewing* authorities (appellate panel and higher, individually and/or collectively), all of whom were fully briefed about the district judge's falsification of facts felony (18 USC §1519, ℘2 *supra*), but *deliberately lied by producing (false) documentation* (official court filings), thereby *positively* concealing/refusing-to-recognize/refusing-to-"make-known" the felony.

Anent, *Code of Conduct for United States Judges,* Canon 3(B)(5):

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

Cover-Up[5] (Concealment)

A **cover-up** is an attempt, whether successful or not, to conceal evidence of wrongdoing, error, incompetence or other embarrassing information. In a passive cover-up, information is simply not provided; in an active cover-up, deception is used.

The expression is usually applied to people in positions of authority who abuse power to avoid or silence criticism or to deflect guilt of wrongdoing. Perpetrators of a cover-up (initiators or their allies) may be responsible for a misdeed, a breach of trust or duty, or a crime.

While the terms are often used interchangeably, **cover-up** involves withholding incriminatory evidence, while **whitewash** involves releasing misleading evidence. See also **misprision**.

When a scandal breaks, the discovery of an attempt to cover up is often regarded as even more reprehensible than the original deeds.

Whitewash[6] (Concealment)

To **whitewash** is a metaphor meaning "to gloss over or cover up vices, crimes or scandals or to exonerate by means of a perfunctory investigation or through biased presentation of data".[1] It is especially used in the context of corporations, governments or other organizations.

Misprision[7] (Concealment)

Misprision (from Old French: *mesprendre*, modern French: *se méprendre*, "to misunderstand") is a term of English law used to describe certain kinds of offence. Writers on criminal law usually divide misprision into two kinds, negative or positive.

Negative misprision is the concealment of treason or felony. By the common law of England it was the duty of every liege subject to inform the king's justices and other officers of the law of all treasons and felonies of which the informant had knowledge, and to bring the offender to justice by arrest (see Sheriffs Act 1887, s. 8). The duty fell primarily on the grand jurors of each

Positive misprision is the doing of something which ought not to be done; or the commission of a serious offence falling short of treason or felony, in other words of a misdemeanour of a public character (e.g. maladministration of high officials, contempt of the sovereign or magistrates). To endeavour to dissuade a witness from giving evidence, to disclose an examination before the privy council, or to advise a prisoner to stand mute, used to be described as misprisions (Hawk. P. C. bk. I. c. 20).

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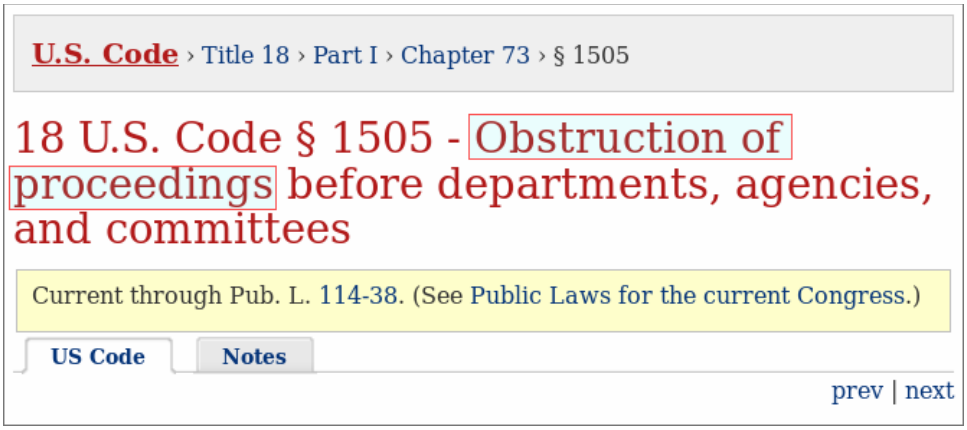
5 • From https://en.wikipedia.org/wiki/Cover-up.

6 • From https://en.wikipedia.org/wiki/Whitewashing_(censorship).

7 • From https://en.wikipedia.org/wiki/Misprision.

18 USC §1505 — Obstruction Of Justice: Obstruction Of Proceedings



U.S. Code › Title 18 › Part I › Chapter 73 › § 1505

18 U.S. Code § 1505 - Obstruction of proceedings before departments, agencies, and committees

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

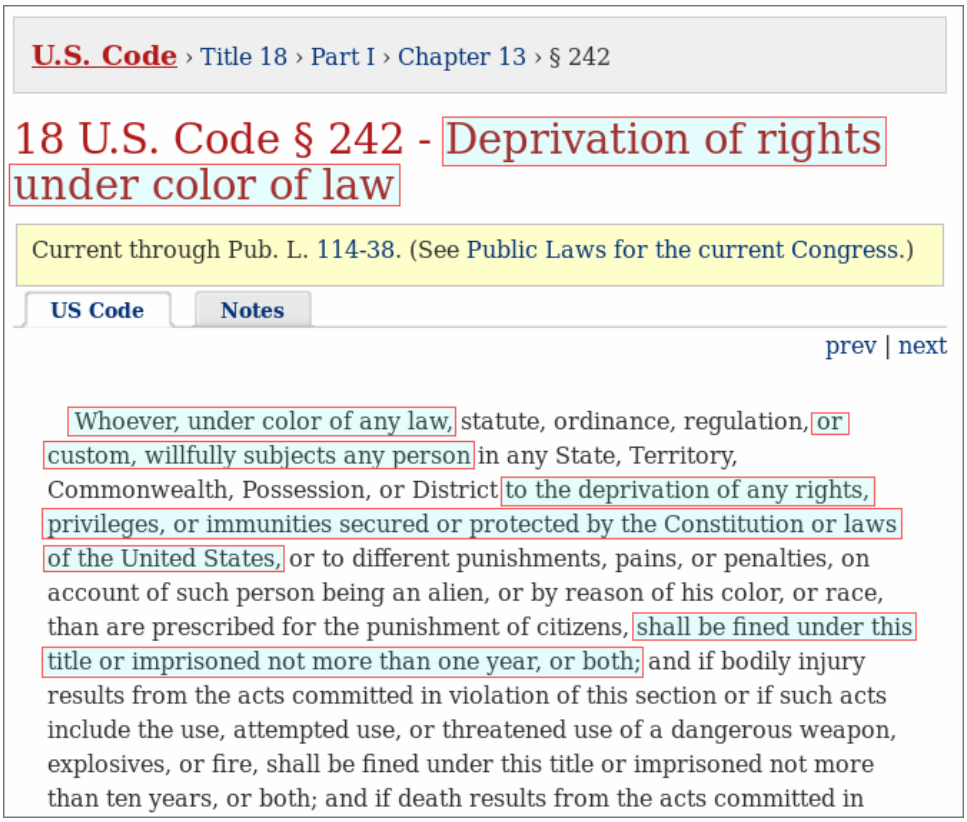
Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Concerning "department or agency," see the discussion of 18 USC §1519 (℘2 *supra,* and my Nov. 20/22 letter).

Concerning "corruptly," 18 USC §1515(b) provides:

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

18 USC §242 — Deprivation Of Rights Under Color Of Law[8]



U.S. Code › Title 18 › Part I › Chapter 13 › § 242

18 U.S. Code § 242 - Deprivation of rights under color of law

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

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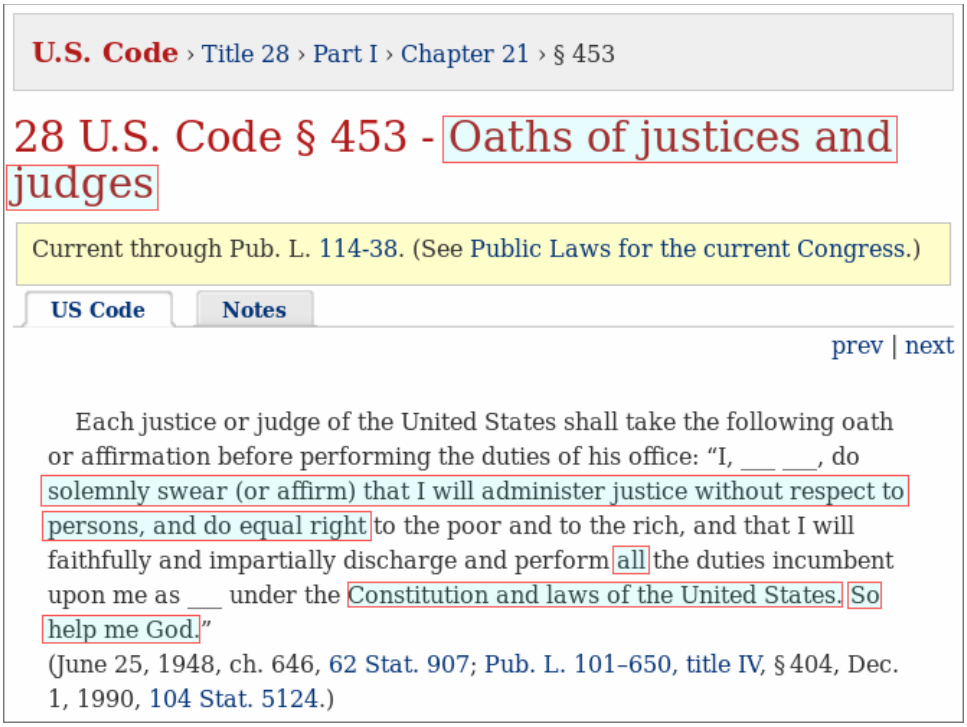
8 • To this *criminal* law (18 USC §242), compare its *civil* counterpart (42 USC §1983, *Civil Action for Deprivation of Rights*), which now (since 1996) includes a special[†] judicial civil immunity clause, as mentioned in my previous letter (Nov. 20/22, ℘1f3). See ℘18f14 *infra*. {† · A few other sporadic special civil immunity exceptions exist, too. E.g.: *Nixon v. Fitzgerald* 457 U.S. ℘731–799 (1982) (but holding that even the President, and judges, are liable for *criminal* wrongdoing); *Butz v. Economou* 438 U.S. ℘478–530 (1978).}

28 USC §453 — Judicial Oath Of Office



U.S. Code › Title 28 › Part I › Chapter 21 › § 453

28 U.S. Code § 453 - Oaths of justices and judges

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) 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 ___ under the Constitution and laws of the United States. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 101–650, title IV, § 404, Dec. 1, 1990, 104 Stat. 5124.)

Anent, we recall two constitutional provisions:[9]

> We the People of the United States, in Order to … **establish Justice** [which includes **Truth**] …
>
> — U.S. Const Preamble (emphasis added)

> [A]ll executive and **judicial** Officers, both of the United States and of the several States, shall be bound by **Oath** or Affirmation [i.e., **Promise**], to **support this Constitution** [esp. **law** (Art. III), which incorporates the doctrine of *stare decisis*] …
>
> — U.S. Const Art VI (emphasis added)

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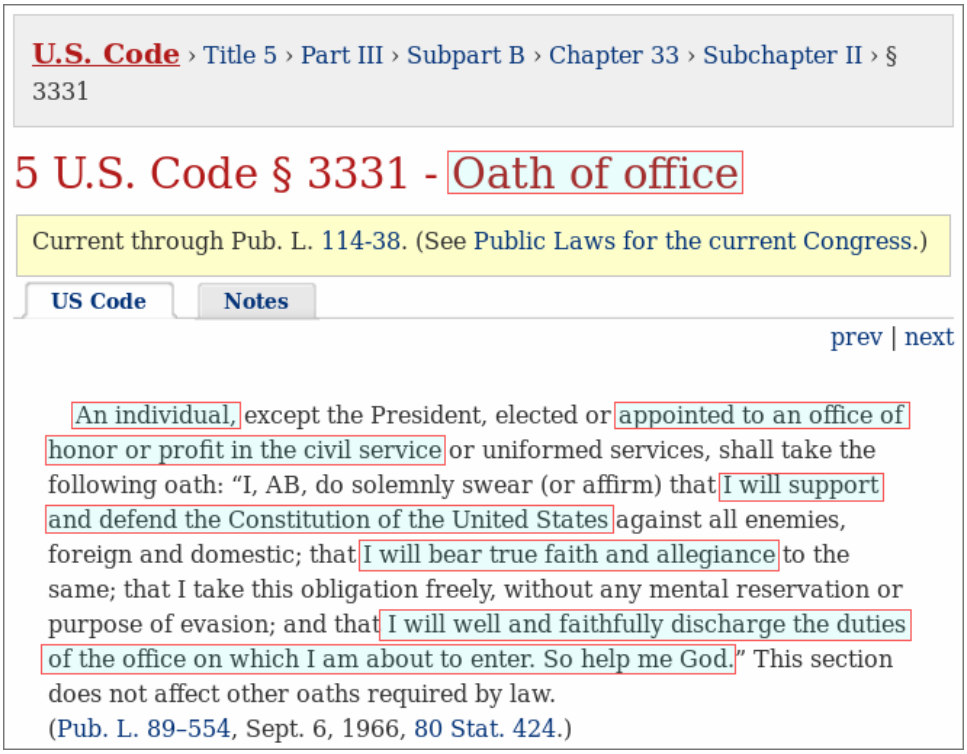
9 • Inside front cover of my Petition for Rehearing to the Supreme Court.

5 USC §1331 — Civil Service Oath Of Office



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3331

5 U.S. Code § 3331 - Oath of office

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

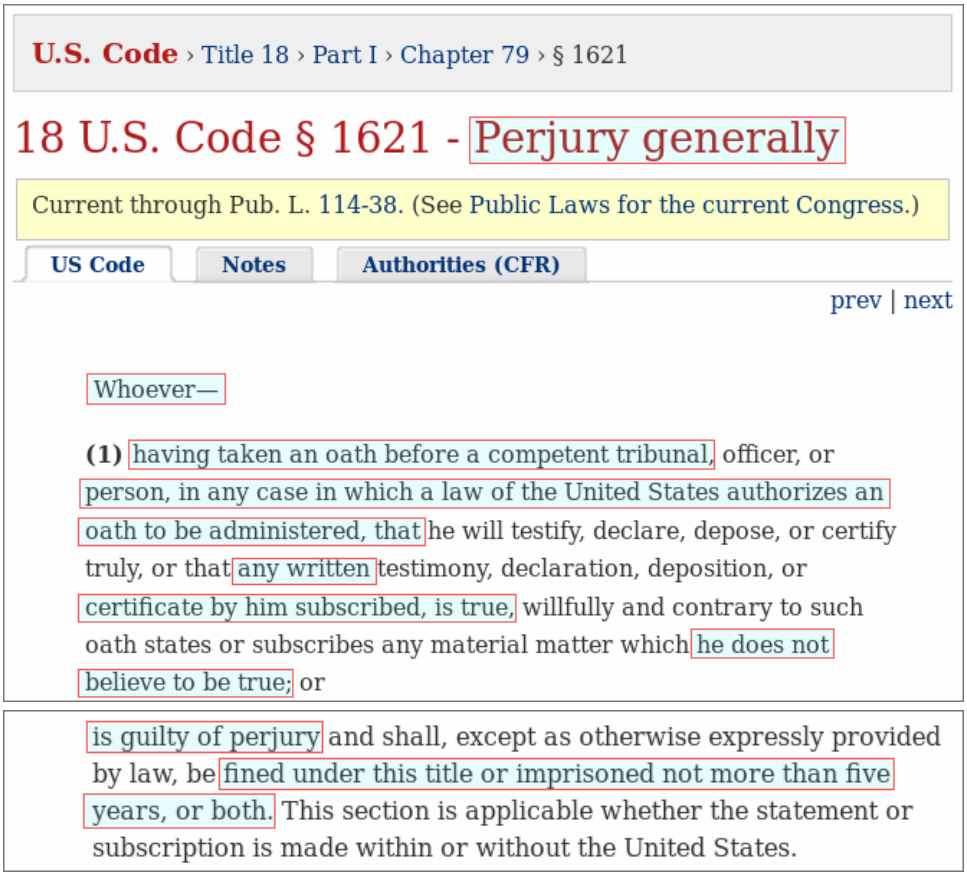
prev | next

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) 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." This section does not affect other oaths required by law.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 424.)

Judges must take *both* the judicial oath (28 USC §453, ℘7 *supra*) and this civil service oath (5 USC §1331).

18 USC §1621–1623 — Perjury (Lying Under Oath)



U.S. Code › Title 18 › Part I › Chapter 79 › § 1621

18 U.S. Code § 1621 - Perjury generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Judges/justices are, of course, ***always* under oath**[10] on the bench — by *both* their oaths of office, 28 USC §453 (℘7 *supra*) and 5 USC §1331 (℘8 *supra*).

---

10 • **"Oath"** (or affirmation) = personal promise to deity and government (Constitution), as sacred signs of solemn *veracity,* developed over time by various cultures as a symbolic concept in legal practice — namely, **willful violation of oath (lying about the duties one has promised-to under oath) subjects the false promisor to the crime of perjury.**

18 U.S. Code § 1622 - Subornation of perjury

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

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Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 774; Pub. L. 103–322, title XXXIII, § 330016(1)(I), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S. Code § 1623 - False declarations before grand jury or court

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

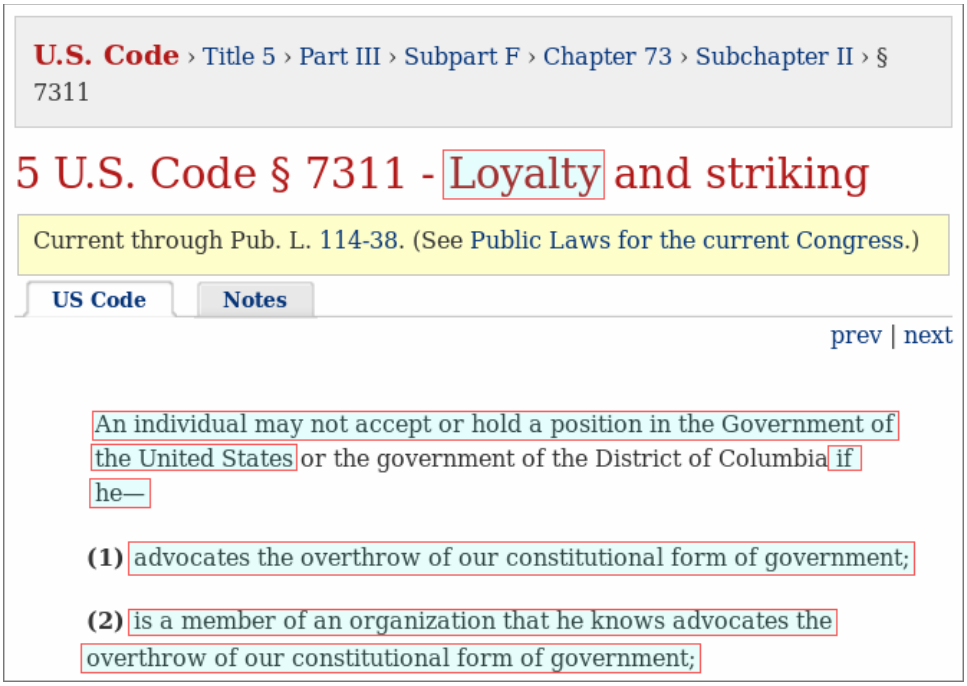
US Code | Notes

prev | next

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

5 USC §7311(1–2) — Loyalty



U.S. Code › Title 5 › Part III › Subpart F › Chapter 73 › Subchapter II › § 7311

5 U.S. Code § 7311 - Loyalty and striking

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

The "overthrow of our constitutional form of government" involved in my case refers to "dissing" (disregard/dismiss/disagree/disrespect/dissemble) the Judicial Branch as an institution (corruption of one-third of our constitutional form of government, entrusted by Const. Art. III with the **administration/interpretation of law** in the United States).[11]

The "organization"[12] involved in my case refers to the collection of judges who are like-minded[13] with the judges involved in the case.

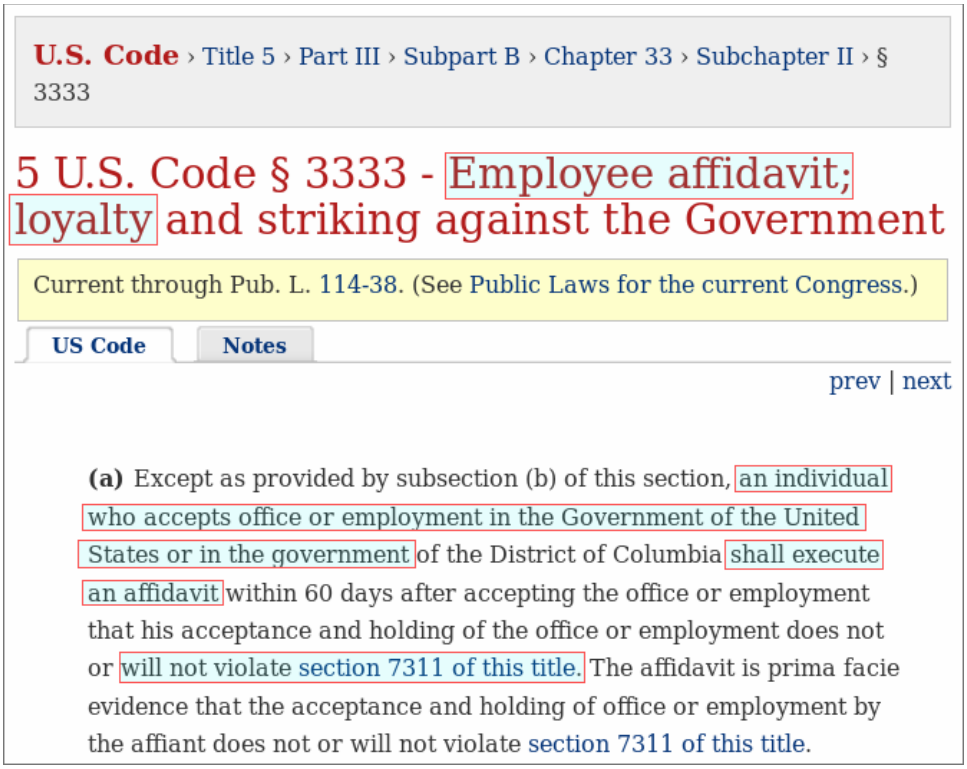
---

11 • A full(er) philosophical/jurisprudential discussion of the nexus amongst (i) law/justice, (ii) the Constitution, and (iii) the Judicial Branch, has been given in my PetReh (Petition for Rehearing to the Supreme Court).

12 • According to persuasive well-documented "rumors"/reports, this "organization" amounts to a substantial percentage of the federal judiciary. See my Petition for Writ of Certiorari ℘xif7 for a *dozen* recent topical references (and many more references cited therein).

13 • "Like-mindedness" also is also the hallmark of conspiracy (see ℘15).

5 USC §3333 — Affidavit[14] Of Loyalty



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3333

5 U.S. Code § 3333 - Employee affidavit; loyalty and striking against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

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(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

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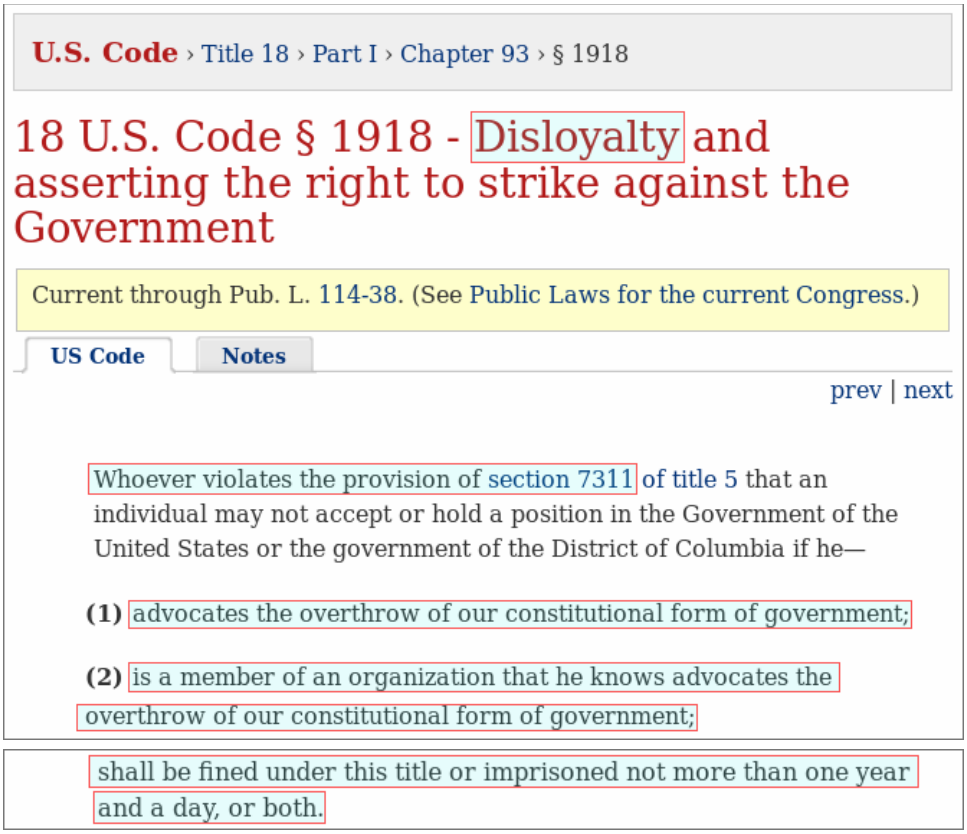
14 • **"Affidavit"** = written/signed version of an **oath.**

18 USC §1918(1–2) — Disloyalty



U.S. Code › Title 18 › Part I › Chapter 93 › § 1918

18 U.S. Code § 1918 - Disloyalty and asserting the right to strike against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

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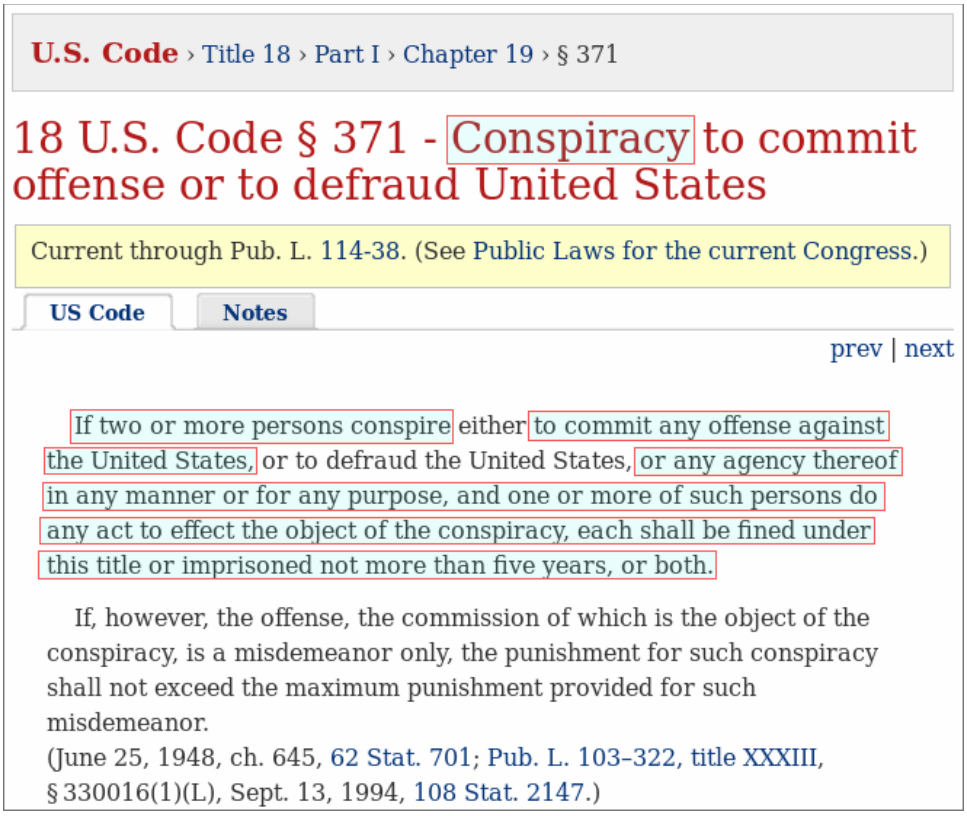
Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

shall be fined under this title or imprisoned not more than one year and a day, or both.

18 USC §371 — Conspiracy[15]



U.S. Code › Title 18 › Part I › Chapter 19 › § 371

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

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If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch. 645, 62 Stat. 701; Pub. L. 103–322, title XXXIII, §330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

The appellate panel and *en banc* court clearly satisfy the "two or more" criterion. But so does the district court, according to the next paragraph.

Conspiracy (successful or not) does not require written/spoken/express/formal "agreement." Nor does it require all-to-all ("N×N") consent. Nor does it even require co-conspirators' knowledge of one-another's identity or quantity. *Mere "like-mindedness" suffices:* **"All that is required is that a participant know of the others' existence and their activities to further the conspiracy."**[16] Neither repentance nor restitution limits liability.

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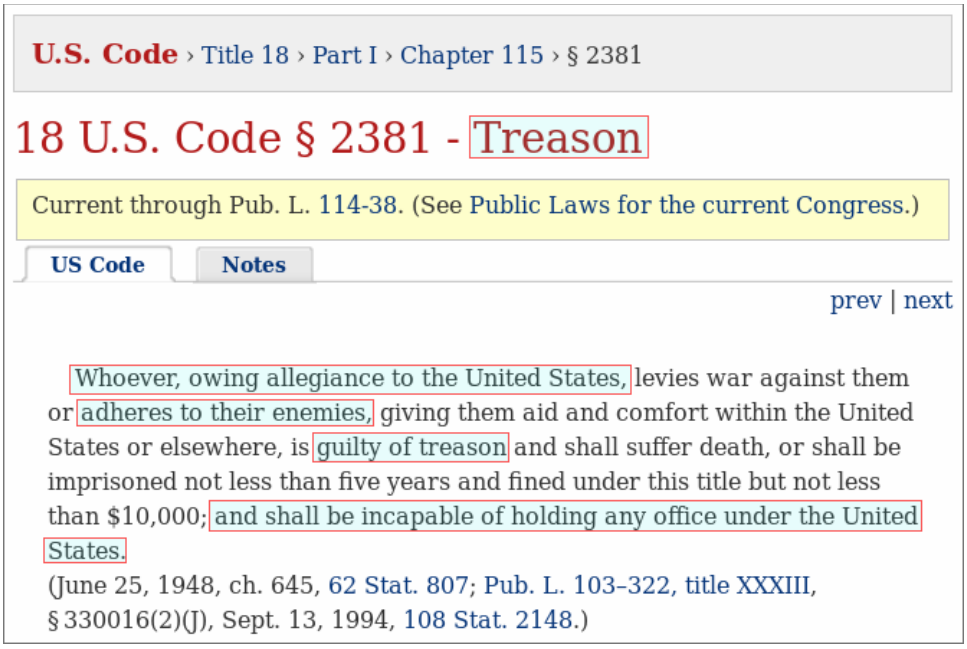
15 • This particular allegation, *"(real) conspiracy,"* is here based upon direct/proven observation/articulation of hard facts/evidence (namely, the district court's inarguable falsification of "undisputed facts" in its Opinion, and the appellate courts' false "blind-eye" attitude towards it) — as opposed to so-called *"(speculative) conspiracy-theory,"* a derogatory term involving extreme/unwarranted hypotheses, chiefly of psychological/socio-political origin, invented by a "fringe" victim of abuse having "secret knowledge," in an attempt to "explain inexplicable evil/dark forces," contradicting the prevailing understanding of history or simple facts. Absent confession, guilt of conspiracy must be decided by a jury at trial.

16 • *U.S. v. Monroe,* 73 F.3d 129 (7th Cir. 1995, emphasis added, internal quotation marks omitted); *aff'd* 124 F.3d 206 (7th Cir. 1997)

18 USC §2381 — Treason[17]



U.S. Code › Title 18 › Part I › Chapter 115 › § 2381

18 U.S. Code § 2381 - Treason

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, § 330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

Federal (i) judges/justices (trusted agents owing allegiance to the United States), involved in (ii) widespread (iii) conspiracy to (iv) disloyally (v) betray the Constitution, by (vi) obstructing justice, (vii) violating their oaths of office, (viii) committing perjury (falsifying documents), and (ix) depriving innocent citizens of their rights, (x) within the scope of their official duties — all proven beyond shadow of doubt — are *certainly not "friends"* of the United States. They are *"enemies"* to the very concept of America.

But, is a charge of *treason* appropriate, or is it hyperbolical, in the instant case (given that we're not talking here about national security, spying, espionage, sedition, etc.)? Since the Constitution went into effect, fewer than forty federal cases of treason have been prosecuted. The earliest example[18] involved the Whiskey Rebellion of 1797 (resisting taxation on distilled spirits); some were convicted, all were pardoned. The most famous example involved Arron Burr, charged with proposing the idea of stealing land in the Louisiana Purchase; he was acquitted.

Is a conspiracy of false judges on a par with those historical examples? *Res Ipsa Loquitur.*[19]

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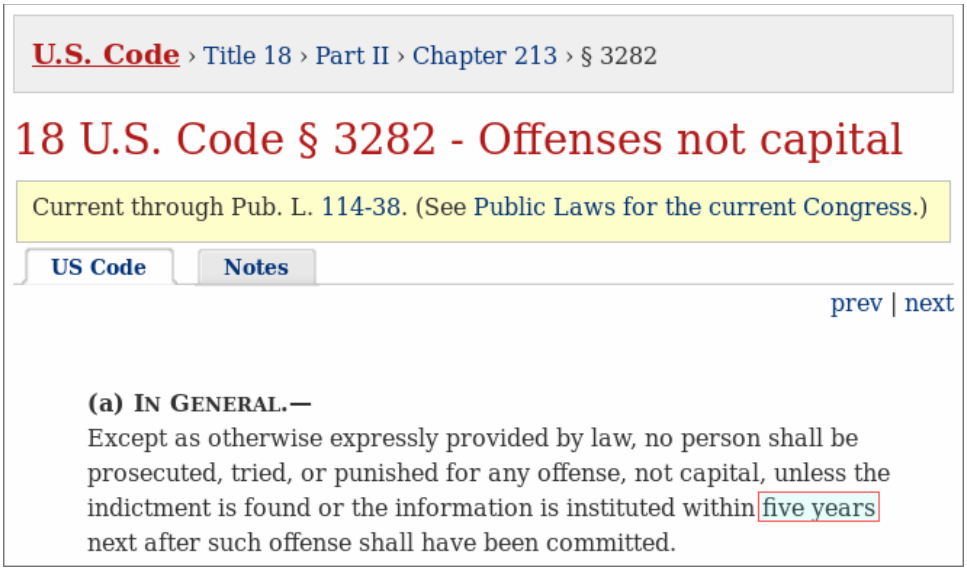
17 • See Const Art III §3.

18 • The case of Benedict Arnold's collaboration with the British occurred during the Revolutionary War, before the Constitution was written.

19 • "The thing speaks for itself."

Statute Of Limitations



U.S. Code › Title 18 › Part II › Chapter 213 › § 3282

18 U.S. Code § 3282 - Offenses not capital

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

(a) IN GENERAL.—
Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

No Immunity; Strict Liability (*Owen/Thayer* Principle)

Nobody in government (or out) (not even the President, ℘6f8ι†) enjoys ("as-of-right")-immunity from ***criminal*** liability. This principle is often encountered as a *"strict liability" meme,* attributed to *Owen v. City of Independence,* 445 U.S. ℘622–683 (1980), and articulated "something like" this:

> **Government cannot disavow liability for injuries it has begotten, whether based on bad faith or good. Government actors (individual or municipal) enjoy no immunity from liability,**[20] **when violating laws or Constitutional rights. *For they are deemed to know the law* (cannot pretend "ignorance of law").**

This language *per se,* however, does not occur in *Owen;* it is a *paraphrase,* largely based on the following passage from *Owen* ℘641 (and cited therein as "the *Thayer* principle") (emphasis added):

> Yet in the hundreds of cases from that era [colonial times] awarding damages against municipal governments for wrongs committed by them, **one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers [because, they "know the law"].** Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. In the leading case of *Thayer v. Boston,* 36 Mass. 511, 515–516 (1837), for example, Chief Justice Shaw explained:
>
> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, [even] if it was not known and understood to be unlawful at the time, [even] if it was an act done by the **officers having competent authority,** either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially **[even] if** the act was done **with an honest view ["good faith"]** to obtain for the public some lawful benefit or advantage, **reason and justice obviously [nonetheless] require that the city, in its corporate capacity, should be [strictly/absolutely] liable to make good the damage sustained by an individual, in consequence of the acts thus done.**"

---

20 • "Strict/absolute liability" = no immunity, regardless of intent, *scienter, mens rea,* "moral blameworthiness," bad/good faith, innocent error, etc. *Owen* involved liability under 42 USC §1983, but at a time *prior* to that statute's incorporation of Congress's anti-*Owen/Thayer* special judicial civil immunity clause. See ℘6f8 *supra*.

Exhibit V

Email to F. Pagano, Dec. 1, 2016.

- **Attachment PaganoLetter6.pdf —** Included in this JCApx at Exhibit V.a, *infra.*

Subject: Another felony
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 12/01/16 12:18
To: Florence_Pagano@ca1.uscourts.gov

Please see the attached letter, a copy of which is also being sent to you via U.S. Mail.

Attachments:

PaganoLetter6.pdf 301 KB

Exhibit V.a

Attachment PaganoLetter6.pdf to email of Dec. 1, 2016 (Exhibit V, *supra*).

The version presented here is the corrected version, differing from the original only to the extent of the following corrections:

- ℘1 (= JCApx ℘611): “This is the statute used to convict and imprison District Judge Walter Nixon in 1989 (later impeached, https://en.wikipedia.org/wiki/Walter_Nixon)” ➡ “This is the statute used to charge/imprison/impeach/convict District Judge Walter Nixon in 1989 (https://en.wikipedia.org/wiki/Walter_Nixon)”.
- ℘2 (= JCApx℘612): “False Statements Or Entries” ➡ “False Statements Or Entries (Oath Not Required)”.

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com
Judicial Misconduct Complaints №01-16-90036,01-16-90041

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

December 1, 2016

Dear Ms. Pagano:

This letter is a follow-up to my previous letters, dated "Nov. 20/22" and "Nov. 28." In those letters, I mentioned that *additional* accusations of **criminal** conduct by the First Circuit judges remain under consideration.

This note is to inform you that I have, indeed, discovered yet another statute that the judges have abridged: 18 USC 1001. This is the statute used to charge/imprison/impeach/convict District Judge Walter Nixon in 1989 (https://en.wikipedia.org/wiki/Walter_Nixon). It has has also been used to successfully prosecute many other "big names" (https://en.wikipedia.org/wiki/Making_false_statements1001).

I trust this information will be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

Walter E. Tuvell

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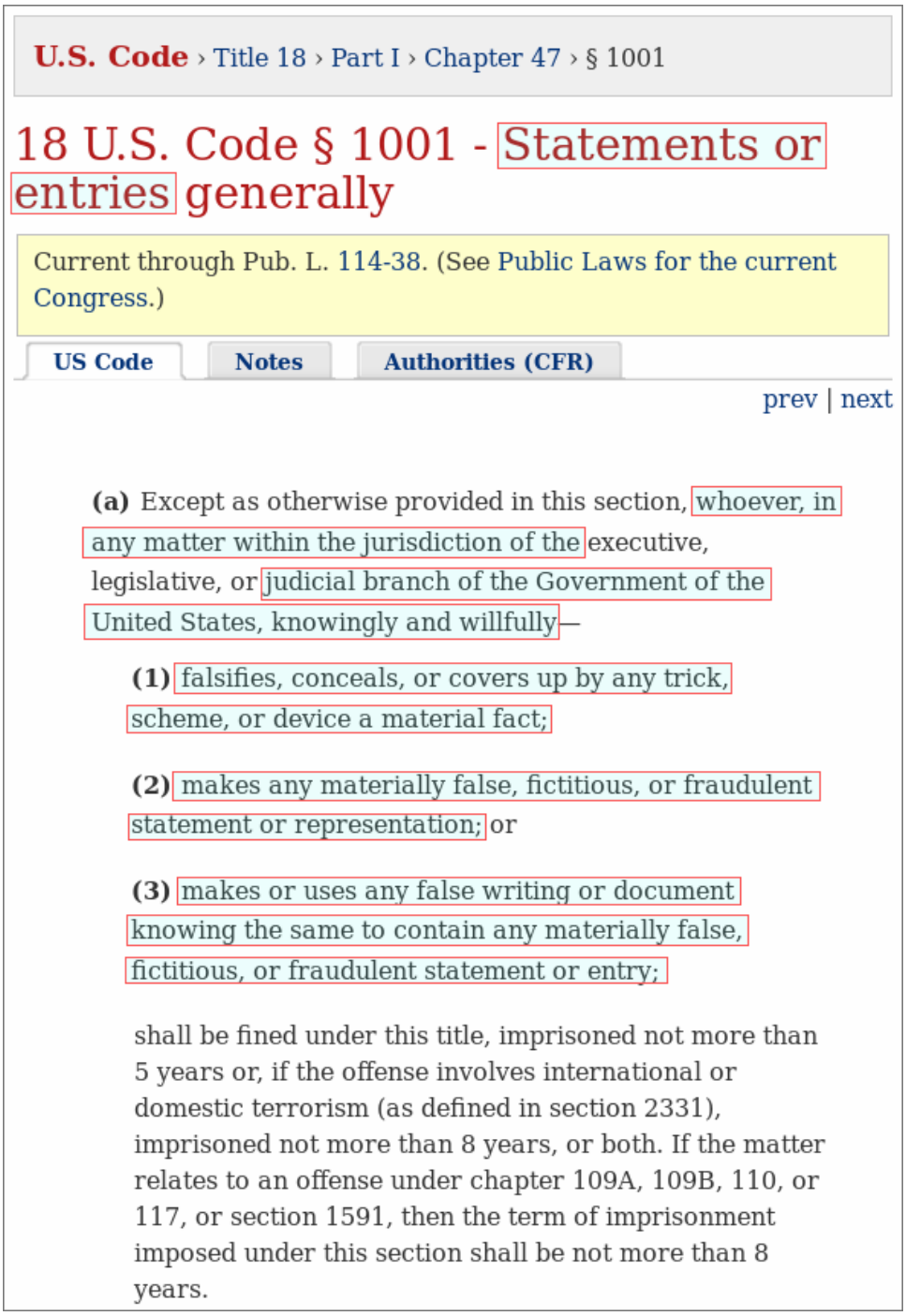
1 • Delivered by both email and U.S. mail.

18 USC §1001 — False Statements Or Entries (Oath Not Required)



U.S. Code › Title 18 › Part I › Chapter 47 › § 1001

18 U.S. Code § 1001 - Statements or entries generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

Exhibit W

Email to F. Pagano, Dec. 3, 2016.

- **Attachment PaganoLetter7.pdf —** Included in this JCApx at Exhibit W.a, *infra*.

Subject: Final letter on criminal misconduct
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 12/03/16 09:36
To: Florence_Pagano@ca1.uscourts.gov

Attached. Also mailed by U.S. mail.

Attachments:

PaganoLetter7.pdf 1.7 MB

Exhibit W.a

Attachment PaganoLetter7.pdf to email of Dec. 3, 2016 (Exhibit W, *supra*).

The version presented here is the corrected version, differing from the original only to the extent of the following corrections:

- ℘1 (= JCApx ℘616) ƒ2: “see esp.” ➡ “e.g., esp.”.
- ℘3 (= JCApx ℘618) ƒ5: “‘Knowingness,’ while correct, is *not a required element* of any of the causes-of-action claimed here (by the” ➡ “‘Knowingness’ means ‘knowledge of the act *per se*’, not ‘knowledge of the act’s illegality (“willfulness”)’ (cf.”.
- ℘10 (= JCApx ℘625): make final two paragraphs into bullet-list.
- ℘11 (= JCApx ℘626): “§1331” ➡ “§3331” (two occurrences).
- ℘16 (= JCApx ℘631) ƒ16: “also is also” ➡ “is also”.
- ℘21 (= JCApx ℘636) ƒ21: “not funneling” ➡ “not through funneling”.
- ℘24 (= JCApx ℘639): “municipal” ➡ “collective” (first occurrence).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com
Judicial Misconduct Complaints №01-16-90036,01-16-90041

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

December 3, 2016

Dear Ms. Pagano:

This letter is a **re-issuance** of my *previous three* letters to you (dated Nov. "20/22," Nov. 28, Dec. 1), **completely consolidating and replacing those three letters** (now, please ignore/discard/destroy those three). This letter is my *final* word in this forum (unless requested/invited otherwise) on the topic of **criminal activity (public corruption)**[2] by the judges involved in my case (initially broached in RehApx ℘8ƒ‡ι∗), collecting all my thoughts on this matter together into this one place, for everyone's convenience.

This letter must of course be promptly transmitted to the appropriate members of the Judicial Council.

Sincerely yours,

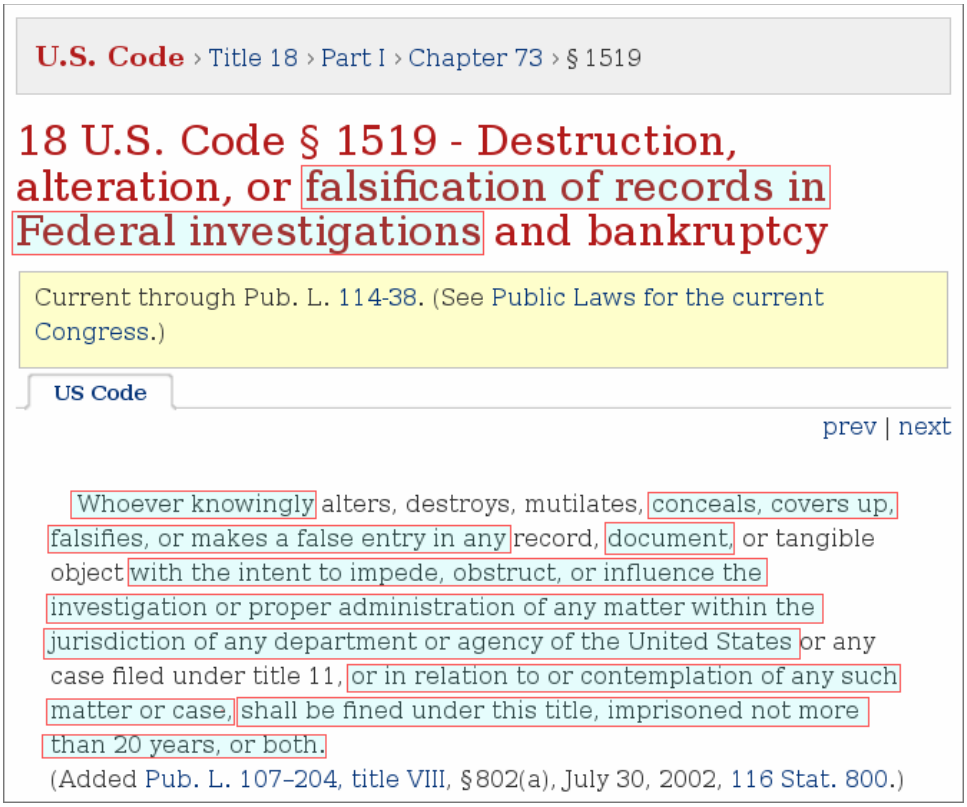
Walter E. Tuvell

---

1 • Delivered by both email and U.S. mail.

2 • While judges (public servants) generally enjoy "judicial immunity" from ***civil*** liability for damages from acts committed within the scope of their jurisdiction (e.g., esp., 42 USC §1983), nobody enjoys immunity against ***criminal*** charges: U.S. Const Amend XIV §1 (Equal Protection Clause [for me, against abuses by rogue judges], see my *Petition for Writ of Certiorari* ℘4); 18 USC §242 (Deprivation of Rights Under Color of Law, ℘9 *infra*); *Mireles v. Waco,* 502 U.S. ℘9–15 (1991), ℘10ƒ1; *Nixon v. Fitzgerald,* 457 U.S. ℘731–799 (1982), ℘766, emphasis added: **"[even] when performing a judicial function, … [judges and justices] are subject to criminal liability".** See also ℘9ƒ11, ℘24ƒ27 *infra.*

18 USC §1519 — Obstruction Of Justice: Falsification Of Records; Concealment (Cover-Up)



U.S. Code › Title 18 › Part I › Chapter 73 › § 1519

18 U.S. Code § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code

prev | next

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub. L. 107–204, title VIII, §802(a), July 30, 2002, 116 Stat. 800.)

Originally, §1519 was passed by Congress into law as part of the Sarbanes-Oxley Act ("SOX"), enacted in 2002, and incorporated into 18 USC Title 1 Chapter 73 **("Obstruction of Justice").** While SOX overall is generally thought-of in terms of corporate wrong-doing (fraud, corruption), §1519 itself is intended to have a broader scope, and has no such restriction.[3]

Most of the provisions of §1519 are clearly satisfied in my case, and for those no further analysis is needed. For example, in my case, the judges have ***obviously*** **"falsified/concealed/covered-up[4] the record,"** as I have *alleged/proved* throughout the materials I've submitted to the Judicial Council. Namely: (i) the district judge lied/falsified the district court's Opinion ("Op"); and then (ii) all subsequent judges (now including the Supreme Court, but not the Judicial Council [yet]) have blindly adopted/supported/

3 • Nevertheless, my case does have that nexus if it were needed, because the defendant is a corporation, IBM, charged with serious civil rights violations.

4 • Various terms are used widely, more-or-less synonymously, with **"concealment"** — such as **cover-up, whitewash** and **misprision.** See definitions on ℘5 *infra;* and see 18 USC §4, *Misprision of Felony,* ℘4 *infra.*

swallowed/**concealed/covered-up** that falsified Op, despite *knowing*[5] full-well its falsity. The district judge is *directly* guilty of this falsification (namely, her false Opinion), by virtue of her **original jurisdiction;** but the panel judges are also *directly* guilty, by virtue of their own **independent *de novo* review** (self-proclaimed, and required by common law). The panel and *en banc* judges are ***obviously* guilty of concealment/cover-up.**

However, for three of §1519's provisions, it is *not* obvious whether my case satisfies them (I contend they *are* satisfied), and so these *do* require further analysis. These are (all considered in the special context of §1519):

- **"(Federal) investigation" —** Does this mean only "FBI-style" investigations, or does it also apply to "court proceedings"?
- **"Jurisdiction" —** Does this encompass "judicial jurisdiction" in the sense of the judicial system?
- **"Department/agency" —** Insofar as I have been able to determine, these terms are rather context-sensitive, not hard-coded universally-well-defined terms of art/law (except that "department" does seem to refer to the executive branch of government, not legislative or judicial). Are the "courts" included within the ambit of "departments/agencies"?

My research has led me to the following conclusions.

To begin with, the legislative history of SOX (House & Senate reports, Congressional Record, official/exact Public Law)[6] is all "supportive" of my position, albeit not "dispositive." Too, the "Official U.S. Government Manual" (online, at http://usgovernmentmanual.gov/), does of course "list" the federal courts, but that still doesn't resolve the question whether the courts are to be considered "departments/agencies" in the sense of §1519.

The background just mentioned played a decisive role in the recent Supreme Court case, *Yates v. U.S.*, 574 U.S. ____, №13-7451 (2015)[7] — which for our purposes here, *does* yield a definitive resolution of my contention (in the affirmative).

Yates contains the following three passages, all of which solidly support my contention (the third passage, from the dissenting opinion, chooses to support me via §1512(c)(1) instead of §1519, though that minor distinction of law is already overridden by the majority opinion of the second passage in any event):

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5 • "Knowingness" means "knowledge of the act *per se*", not "knowledge of the act's illegality ('willfulness')" (cf. *Owen/Thayer* principle of governmental strict liability, ℘24 *infra*.)

6 • All of which I am transmitting to you as email attachments, for your convenience.

7 • Attached in email. (This is the controversial "a-fish-is-not-a-tangible-object" case.)

qualified. See Final Report of the National Commission on Reform of Federal Criminal Laws §1323, pp. 116–117 (1971).

Section 1519 conspicuously lacks the limits built into the MPC provision and the federal proposal. It describes not a misdemeanor, but a felony punishable by up to 20 years in prison. And the section covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement. Given these significant differences, the meaning of "record, document, or thing" in the MPC provision and a kindred proposal is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in §1519. The MPC provision, in short, tells us neither "what Congress wrote [nor] what Congress wanted," cf. *post*, at 15, concerning Yates's small fish as the subject of a federal felony prosecution.

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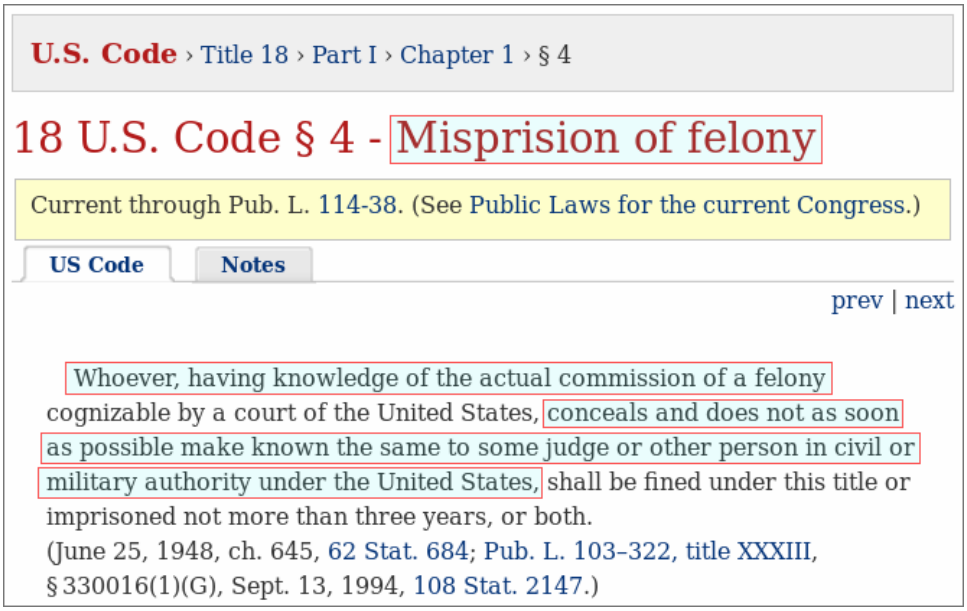
[5] Despite this sweeping "in relation to" language, the dissent remarkably suggests that §1519 does not "ordinarily operate in th[e] context [of] federal court[s]," for those courts are not "department[s] or agenc[ies]." *Post*, at 10. That suggestion, which, as one would expect, lacks the Government's endorsement, does not withstand examination. The Senate Committee Report on §1519, on which the dissent elsewhere relies, see *post*, at 6, explained that an obstructive act is within §1519's scope if "done 'in contemplation' of or in relation to a matter or investigation." S. Rep. 107–146, at 15. The Report further informed that §1519 "is . . . meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title." *Ibid.* If any doubt remained about the multiplicity of contexts in which §1519 was designed to apply, the Report added, "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." *Ibid.*

For example, an FBI investigation counts as a matter within a federal department's jurisdiction, but falls outside the statutory definition of "official proceeding" as construed by courts. See, *e.g.*, *United States* v. *Gabriel*, 125 F. 3d 89, 105, n. 13 (CA2 1997). But conversely, §1512(c)(1) sometimes reaches more widely than §1519. For example, because an "official proceeding" includes any "proceeding before a judge or court of the United States," §1512(c)(1) prohibits tampering with evidence in federal litigation between private parties. See §1515(a)(1)(A); *United States* v. *Burge*, 711 F. 3d 803, 808–810 (CA7 2013); *United States* v. *Reich*, 479 F. 3d 179, 185–187 (CA2 2007) (Sotomayor, J.). By contrast, §1519 wouldn't ordinarily operate in that context because a federal court isn't a "department or agency." See *Hubbard* v. *United States*, 514 U. S. 695, 715 (1995).[3] So the surplusage canon doesn't come into play.[4] Overlap—even significant overlap—abounds in the criminal law. See *Loughrin* v. *United*

18 USC §4 — Misprision Of Felony



U.S. Code › Title 18 › Part I › Chapter 1 › § 4

18 U.S. Code § 4 - Misprision of felony

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

(June 25, 1948, ch. 645, 62 Stat. 684; Pub. L. 103–322, title XXXIII, §330016(1)(G), Sept. 13, 1994, 108 Stat. 2147.)

See generally: (i) Christopher Mark Curenton, Commentary, *The Past, Present, and Future of 18 U.S.C. §4: An Exploration of the Federal Misprision Statute,* Alabama Law Review, vol. 55, Issue 1, ℘183–192 (2003–2004); (ii) *U.S. v. Osvaldo Caraballo-rodriguez,* 480 F.3d ℘62–88 (1st Cir. 2007).

A misprision of felony charge is especially appropriate against a person placed in a special position of trust/responsibility (such as a judge), and may be referred to as *"misfeasance/malfeasance in public office."*

In the U.S. today, misprision of felony is uniformly construed to require that the accused take some *"positive/active/affirmative step"* (beyond mere "negative/passive silence") to conceal the felony. In my case that's true of all *reviewing* authorities (appellate panel and higher, individually and/or collectively), all of whom were fully briefed about the district judge's falsification of facts felony (18 USC §1519, ℘2 *supra*), but *deliberately lied by producing (false) documentation* (official court filings), thereby *positively* concealing/refusing-to-recognize/refusing-to-"make-known" the felony.

Anent, *Code of Conduct for United States Judges,* Canon 3(B)(5):

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

Cover-Up[8] (Concealment)

A **cover-up** is an attempt, whether successful or not, to conceal evidence of wrongdoing, error, incompetence or other embarrassing information. In a passive cover-up, information is simply not provided; in an active cover-up, deception is used.

The expression is usually applied to people in positions of authority who abuse power to avoid or silence criticism or to deflect guilt of wrongdoing. Perpetrators of a cover-up (initiators or their allies) may be responsible for a misdeed, a breach of trust or duty, or a crime.

While the terms are often used interchangeably, **cover-up** involves withholding incriminatory evidence, while **whitewash** involves releasing misleading evidence. See also **misprision**.

When a scandal breaks, the discovery of an attempt to cover up is often regarded as even more reprehensible than the original deeds.

Whitewash[9] (Concealment)

To **whitewash** is a metaphor meaning "to gloss over or cover up vices, crimes or scandals or to exonerate by means of a perfunctory investigation or through biased presentation of data".[1] It is especially used in the context of corporations, governments or other organizations.

Misprision[10] (Concealment)

Misprision (from Old French: *mesprendre*, modern French: *se méprendre*, "to misunderstand") is a term of English law used to describe certain kinds of offence. Writers on criminal law usually divide misprision into two kinds, negative or positive.

Negative misprision is the concealment of treason or felony. By the common law of England it was the duty of every liege subject to inform the king's justices and other officers of the law of all treasons and felonies of which the informant had knowledge, and to bring the offender to justice by arrest (see Sheriffs Act 1887, s. 8). The duty fell primarily on the grand jurors of each

Positive misprision is the doing of something which ought not to be done; or the commission of a serious offence falling short of treason or felony, in other words of a misdemeanour of a public character (e.g. maladministration of high officials, contempt of the sovereign or magistrates). To endeavour to dissuade a witness from giving evidence, to disclose an examination before the privy council, or to advise a prisoner to stand mute, used to be described as misprisions (Hawk. P. C. bk. I. c. 20).

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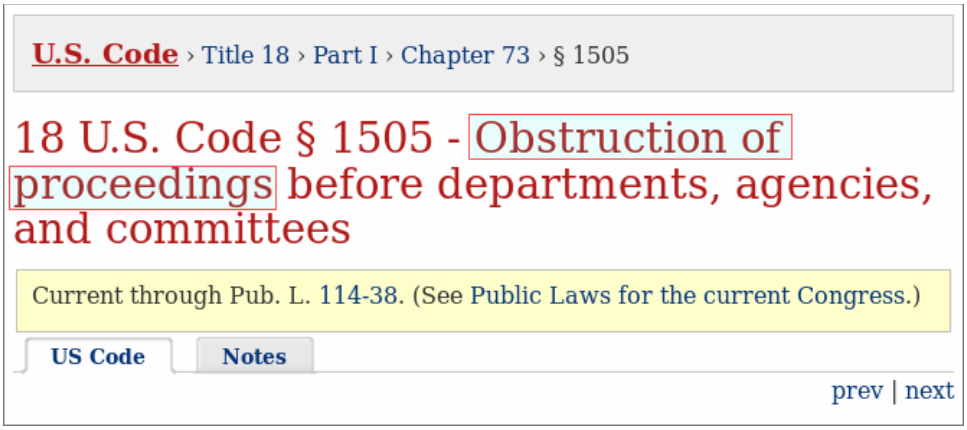
8 • From https://en.wikipedia.org/wiki/Cover-up.

9 • From https://en.wikipedia.org/wiki/Whitewashing_(censorship).

10 • From https://en.wikipedia.org/wiki/Misprision.

18 USC §1505 — Obstruction Of Justice: Obstruction Of Proceedings



U.S. Code › Title 18 › Part I › Chapter 73 › § 1505

18 U.S. Code § 1505 - Obstruction of proceedings before departments, agencies, and committees

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

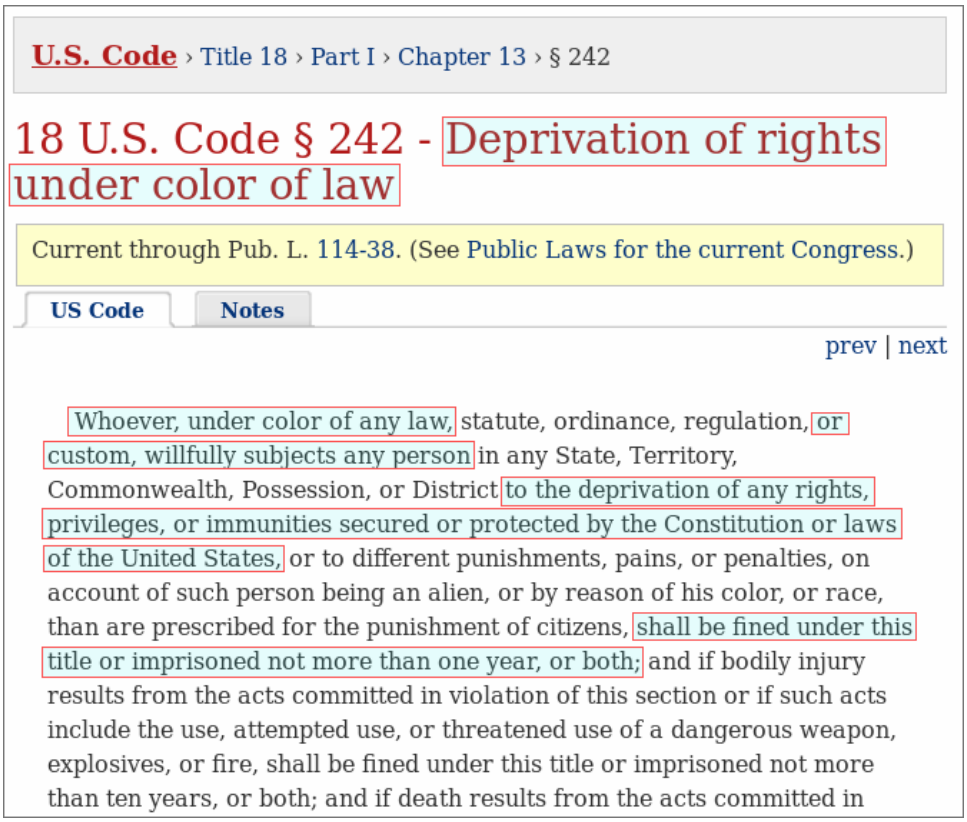
Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Concerning "department or agency," see the discussion of 18 USC §1519 (℘2 *supra,* and my Nov. 20/22 letter).

Concerning "corruptly," 18 USC §1515(b) provides:

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

18 USC §242 — Deprivation Of Rights Under Color Of Law[11]



U.S. Code › Title 18 › Part I › Chapter 13 › § 242

18 U.S. Code § 242 - Deprivation of rights under color of law

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

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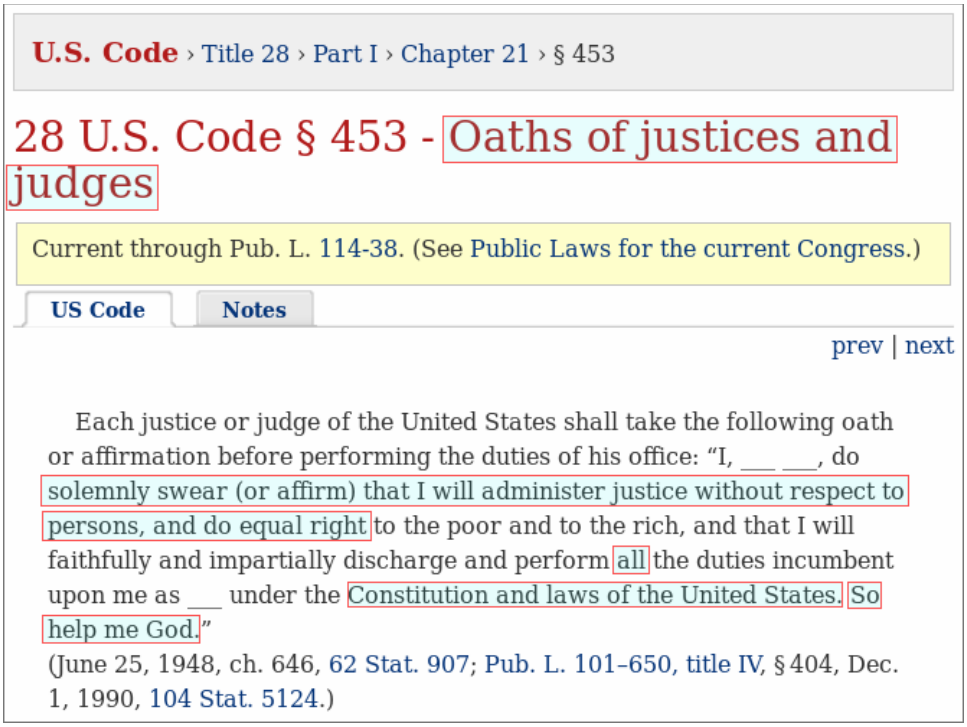
11 • To this *criminal* law (18 USC §242), compare its *civil* counterpart (42 USC §1983, *Civil Action for Deprivation of Rights*), which now (since 1996) includes a special[†] judicial civil immunity clause, as mentioned in my previous letter (Nov. 20/22, ℘1ƒ3). See ℘1ƒ2 *supra*. {† · A few other sporadic special civil immunity exceptions exist, too. E.g.: *Nixon v. Fitzgerald* 457 U.S. ℘731–799 (1982) (but holding that even the President, and judges, are liable for *criminal* wrongdoing); *Butz v. Economou* 438 U.S. ℘478–530 (1978).}

28 USC §453 — Judicial Oath Of Office



U.S. Code › Title 28 › Part I › Chapter 21 › § 453

28 U.S. Code § 453 - Oaths of justices and judges

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) 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 ___ under the Constitution and laws of the United States. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 101–650, title IV, § 404, Dec. 1, 1990, 104 Stat. 5124.)

Anent, we recall two constitutional provisions:[12]

- We the People of the United States, in Order to … **establish Justice** [which includes **Truth**] …

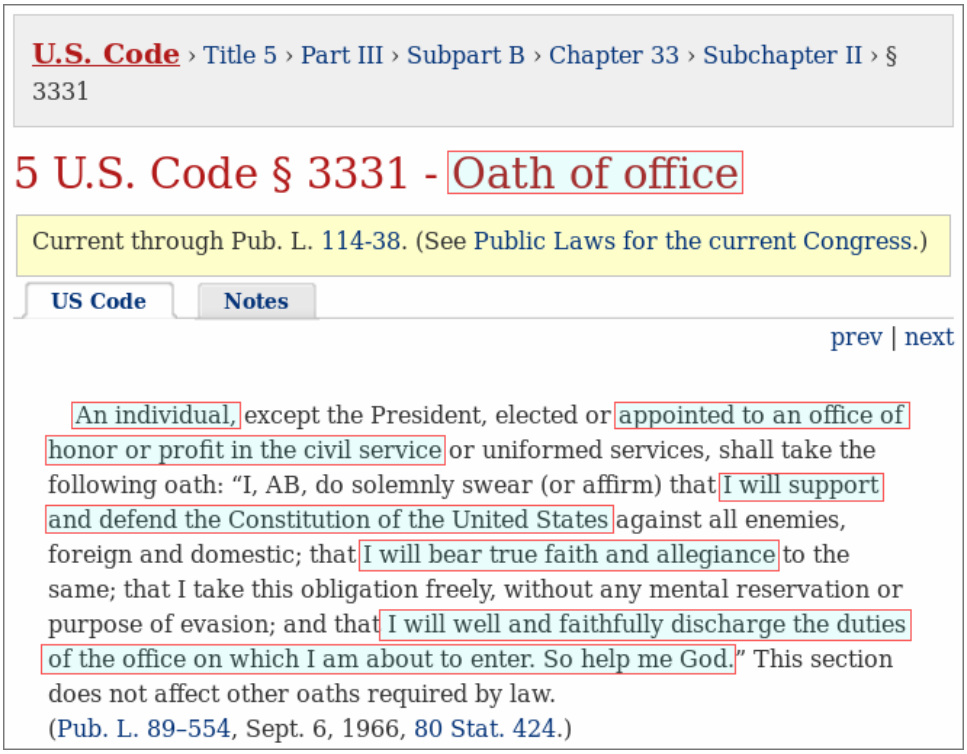
  — U.S. Const Preamble (emphasis added)

- [A]ll executive and **judicial** Officers, both of the United States and of the several States, shall be bound by **Oath** or Affirmation [i.e., **Promise**], to **support this Constitution** [esp. **law** (Art. III), which incorporates the doctrine of *stare decisis*] …

  — U.S. Const Art VI (emphasis added)

12 • Inside front cover of my Petition for Rehearing to the Supreme Court.

5 USC §3331 — Civil Service Oath Of Office



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3331

5 U.S. Code § 3331 - Oath of office

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

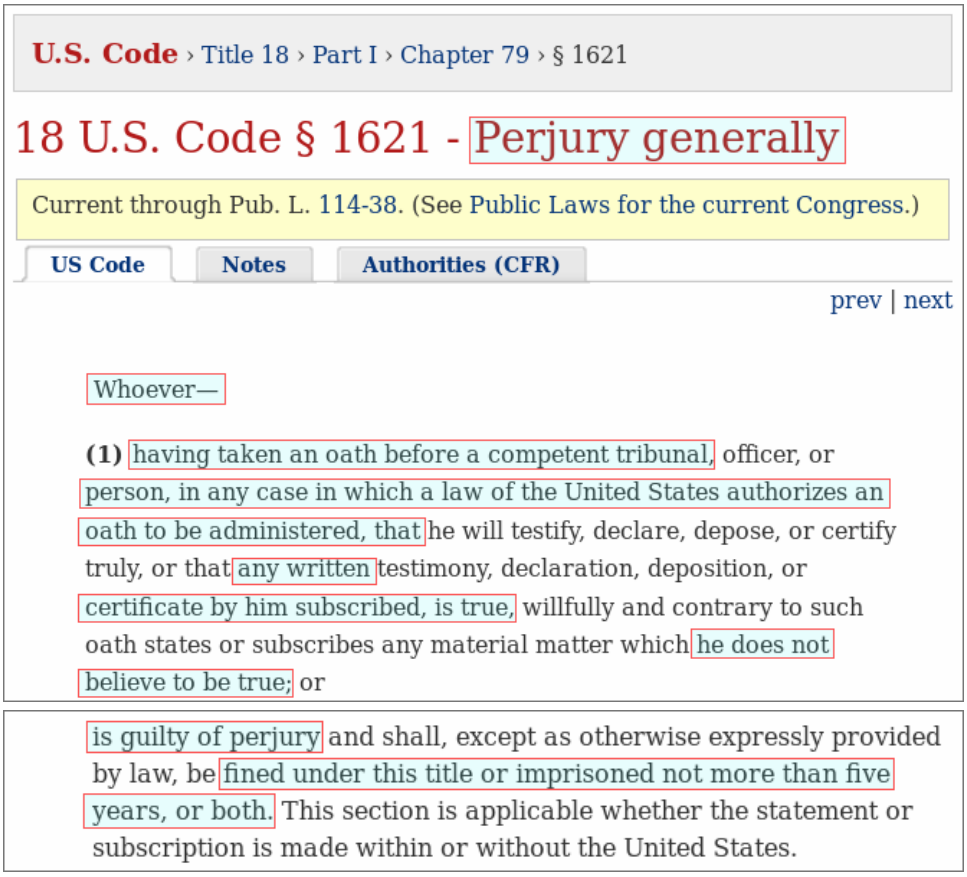
prev | next

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) 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." This section does not affect other oaths required by law.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 424.)

Judges must take *both* the judicial oath (28 USC §453, ℘10 *supra*) and this civil service oath (5 USC §3331).

18 USC §1621–1623 — Perjury (Lying Under Oath)



U.S. Code › Title 18 › Part I › Chapter 79 › § 1621

18 U.S. Code § 1621 - Perjury generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Judges/justices are, of course, ***always* under oath**[13] on the bench — by *both* their oaths of office, 28 USC §453 (℘10 *supra*) and 5 USC §1331 (℘11 *supra*).

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13 • **"Oath"** (or affirmation) = personal promise to deity and government (Constitution), as sacred signs of solemn *veracity,* developed over time by various cultures as a symbolic concept in legal practice — namely, **willful violation of oath (lying about the duties one has promised-to under oath) subjects the false promisor to the crime of perjury.**

18 U.S. Code § 1622 - Subornation of perjury

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 774; Pub. L. 103–322, title XXXIII, § 330016(1)(I), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S. Code § 1623 - False declarations before grand jury or court

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

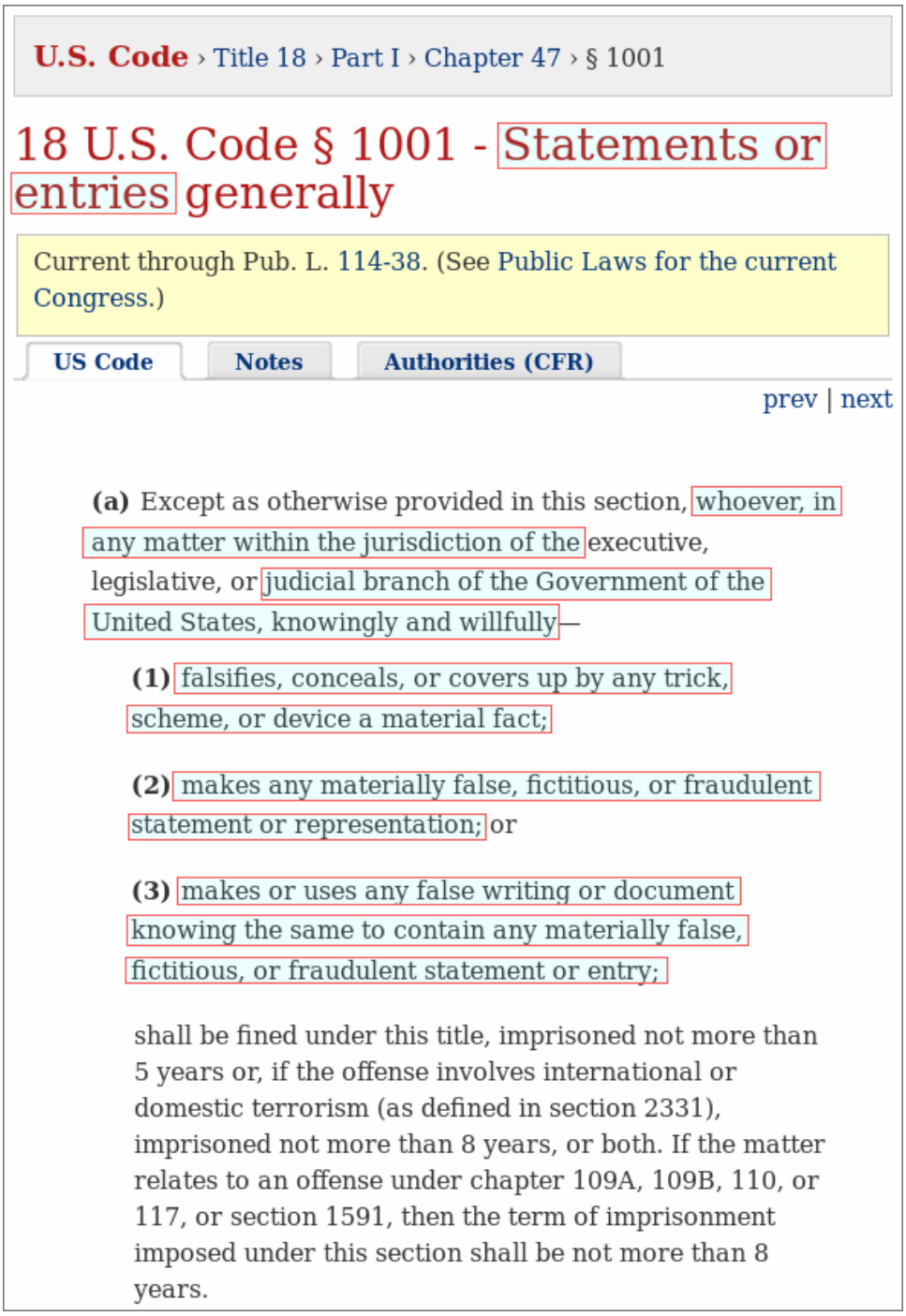
US Code | Notes

prev | next

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 USC §1001 — False Statements Or Entries (Oath Not Required)



U.S. Code › Title 18 › Part I › Chapter 47 › § 1001

18 U.S. Code § 1001 - Statements or entries generally

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes | Authorities (CFR)

prev | next

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

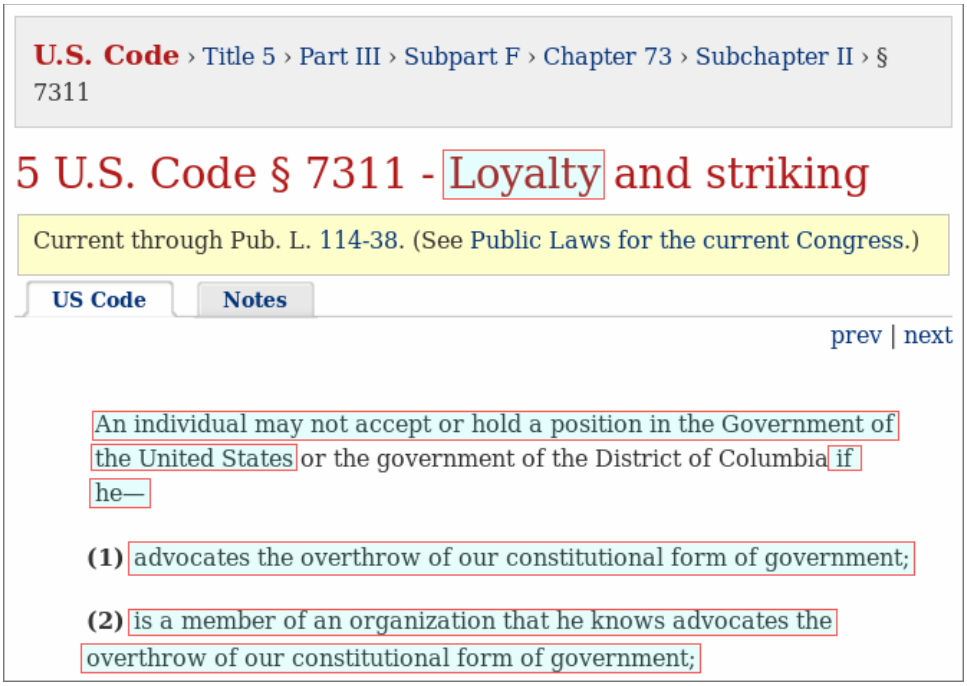
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

5 USC §7311(1–2) — Loyalty



U.S. Code › Title 5 › Part III › Subpart F › Chapter 73 › Subchapter II › § 7311

5 U.S. Code § 7311 - Loyalty and striking

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

The "overthrow of our constitutional form of government" involved in my case refers to "dissing" (disregard/dismiss/disagree/disrespect/dissemble) the Judicial Branch as an institution (corruption of one-third of our constitutional form of government, entrusted by Const. Art. III with the **administration/interpretation of law** in the United States).[14]

The "organization"[15] involved in my case refers to the collection of judges who are like-minded[16] with the judges involved in the case.

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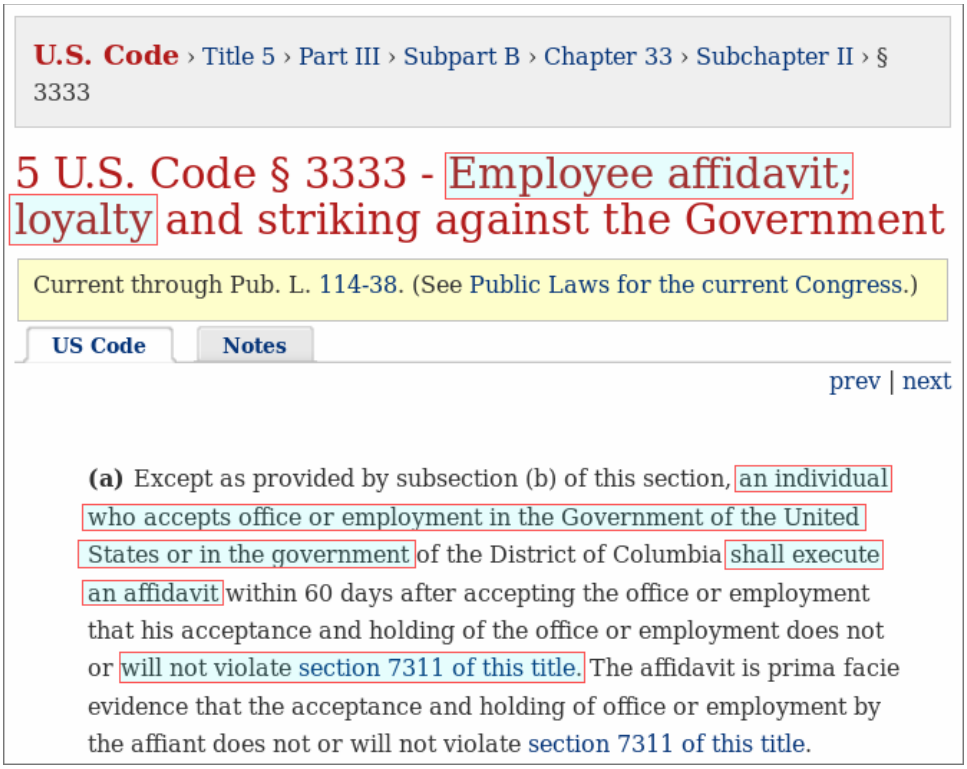
14 • A full(er) philosophical/jurisprudential discussion of the nexus amongst (i) law/justice, (ii) the Constitution, and (iii) the Judicial Branch, has been given in my PetReh (Petition for Rehearing to the Supreme Court).

15 • According to persuasive well-documented "rumors"/reports, this "organization" amounts to a substantial percentage of the federal judiciary. See my Petition for Writ of Certiorari ℘xif7 for a *dozen* recent topical references (and many more references cited therein).

16 • "Like-mindedness" is also the hallmark of conspiracy (see ℘19).

5 USC §3333 — Affidavit[17] Of Loyalty



U.S. Code › Title 5 › Part III › Subpart B › Chapter 33 › Subchapter II › § 3333

5 U.S. Code § 3333 - Employee affidavit; loyalty and striking against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

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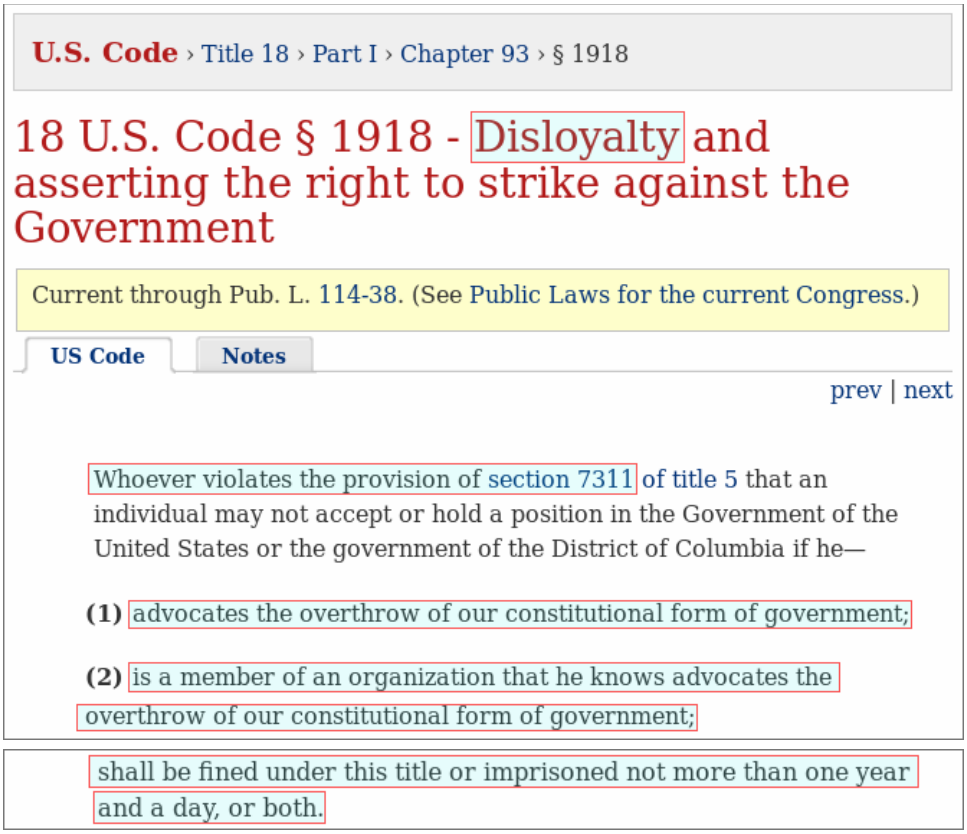
17 • **"Affidavit"** = written/signed version of an **oath.**

18 USC §1918(1–2) — Disloyalty



U.S. Code › Title 18 › Part I › Chapter 93 › § 1918

18 U.S. Code § 1918 - Disloyalty and asserting the right to strike against the Government

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

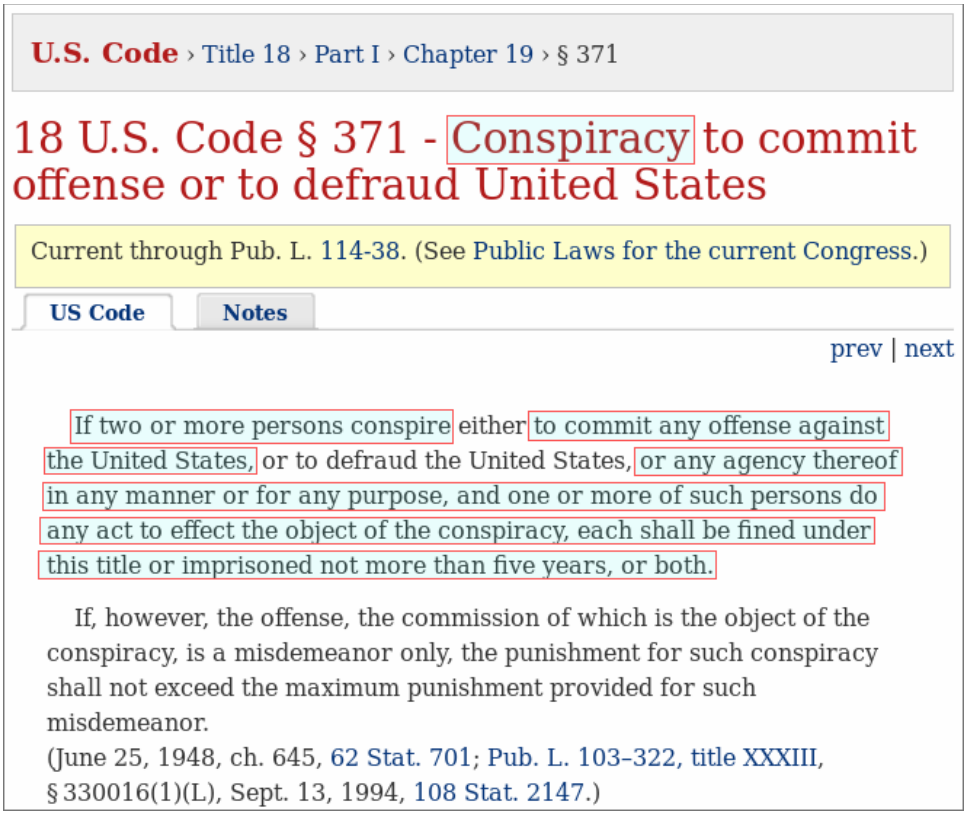
Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

shall be fined under this title or imprisoned not more than one year and a day, or both.

18 USC §371 — Conspiracy[18]



U.S. Code › Title 18 › Part I › Chapter 19 › § 371

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch. 645, 62 Stat. 701; Pub. L. 103–322, title XXXIII, §330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

The appellate panel and *en banc* court clearly satisfy the "two or more" criterion. But so does the district court, according to the next paragraph.

Conspiracy (successful or not) does not require written/spoken/express/formal "agreement." Nor does it require all-to-all ("N×N") consent. Nor does it even require co-conspirators' knowledge of one-another's identity or quantity. *Mere "like-mindedness" suffices:* **"All that is required is that a participant know of the others' existence and their activities to further the conspiracy."**[19] Neither repentance nor restitution limits liability.

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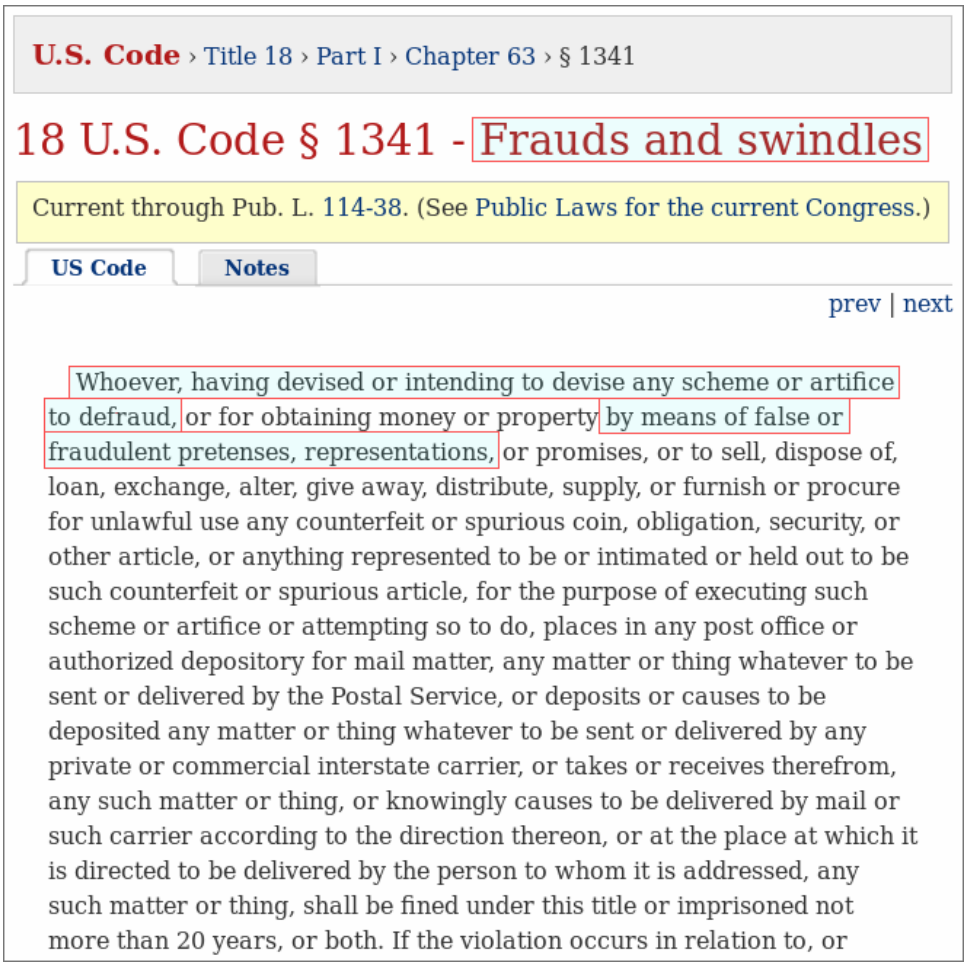
18 • This particular allegation, *"(real) conspiracy,"* is here based upon direct/proven observation/articulation of hard facts/evidence (namely, the district court's inarguable falsification of "undisputed facts" in its Opinion, and the appellate courts' false "blind-eye" attitude towards it) — as opposed to so-called *"(speculative) conspiracy-theory,"* a derogatory term involving extreme/unwarranted hypotheses, chiefly of psychological/socio-political origin, invented by a "fringe" victim of abuse having "secret knowledge," in an attempt to "explain inexplicable evil/dark forces," contradicting the prevailing understanding of history or simple facts. Absent confession, guilt of conspiracy must be decided by a jury at trial.

19 • *U.S. v. Monroe,* 73 F.3d 129 (7th Cir. 1995, emphasis added, internal quotation marks omitted); *aff'd* 124 F.3d 206 (7th Cir. 1997)

18 USC §1341(1346) — Honest-Services Fraud *(Perhaps Not)*



U.S. Code › Title 18 › Part I › Chapter 63 › § 1341

18 U.S. Code § 1341 - Frauds and swindles

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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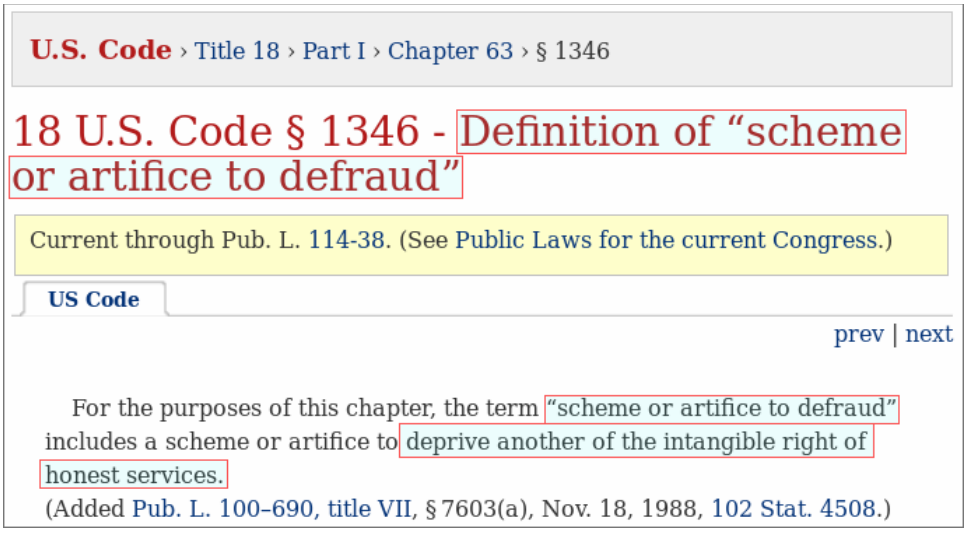
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or



U.S. Code › Title 18 › Part I › Chapter 63 › § 1346

18 U.S. Code § 1346 - Definition of "scheme or artifice to defraud"

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

(Added Pub. L. 100–690, title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.)

While §1341(1346) has been been called federal prosecutors' "weapon of mass discretion" in the war against both white-collar and public-sector corruption,[20] recent narrow interpretation has tended to limit its scope, on the basis of a "void-for-vagueness" due-process doctrine.[21] For that reason (only), this statute may not be applicable to the instant case.[22,23]

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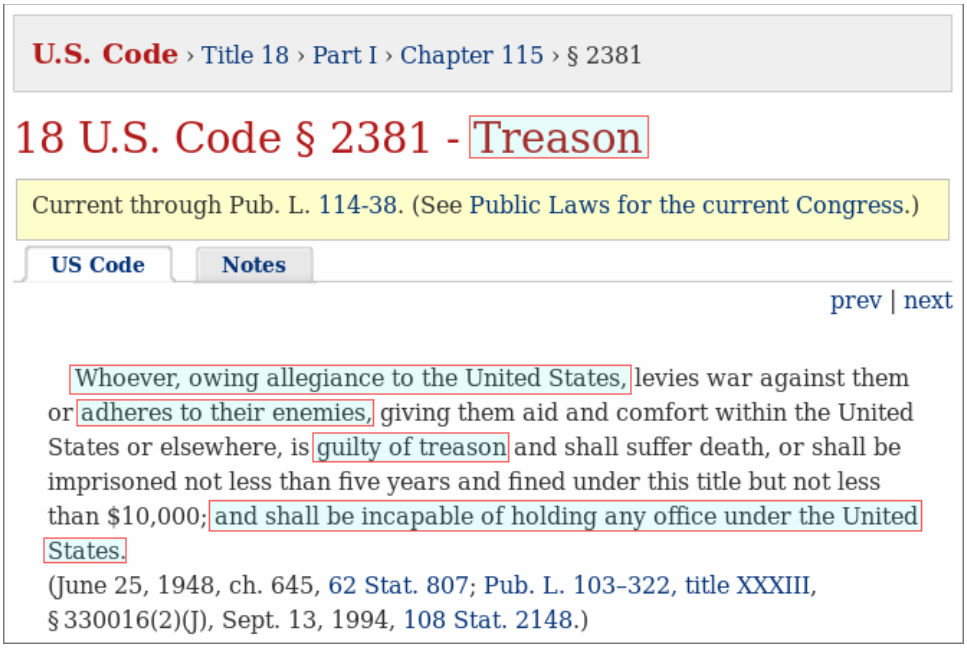
20 • Nicholas J. Wagoner, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in Skilling v. United States,* South Texas Law Review, Vol. 51, №4, ℘1087–1142.

21 • Finding the statute's "intangible right of honest services" to cover only "fraudulent schemes to deprive another of honest services *[where the offender profits by money, property or other valuable resources] through bribes or kickbacks supplied by a third party who ha[s] not been deceived [but not through funneling valuable resources to either himself ('self-dealing'), or to a third party who has not been deceived]*" (*Skilling v. U.S.,* 561 U.S. ℘358–464 (2010), ℘404, emphasis added).

22 • In the instant case, no evidence has yet been uncovered of "valuable resource" profiteering, such as bribery by IBM.

23 • An "Honest-Services Restoration Act," broadening *Skilling's* narrow interpretation back to its (no doubt) originally intended meaning (protecting civil rights, First Amendment personal liberties, equal protection concerns, etc.), has not (yet) been enacted by Congress.

18 USC §2381 — Treason[24]



U.S. Code › Title 18 › Part I › Chapter 115 › § 2381

18 U.S. Code § 2381 - Treason

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, § 330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

Federal (i) judges/justices (trusted agents owing allegiance to the United States), involved in (ii) widespread (iii) conspiracy to (iv) disloyally (v) betray the Constitution, by (vi) obstructing justice, (vii) violating their oaths of office, (viii) committing perjury (falsifying documents), and (ix) depriving innocent citizens of their rights, (x) within the scope of their official duties — all proven beyond shadow of doubt — are *certainly not "friends"* of the United States. They are *"enemies"* to the very concept of America.

But, is a charge of *treason* appropriate, or is it hyperbolical, in the instant case (given that we're not talking here about national security, spying, espionage, sedition, etc.)? Since the Constitution went into effect, fewer than forty federal cases of treason have been prosecuted. The earliest example[25] involved the Whiskey Rebellion of 1797 (resisting taxation on distilled spirits); some were convicted, all were pardoned. The most famous example involved Arron Burr, charged with proposing the idea of stealing land in the Louisiana Purchase; he was acquitted.

Is a widespread conspiracy of false/corrupt judges on a par with these and other historical examples? *Res Ipsa Loquitur.*[26]

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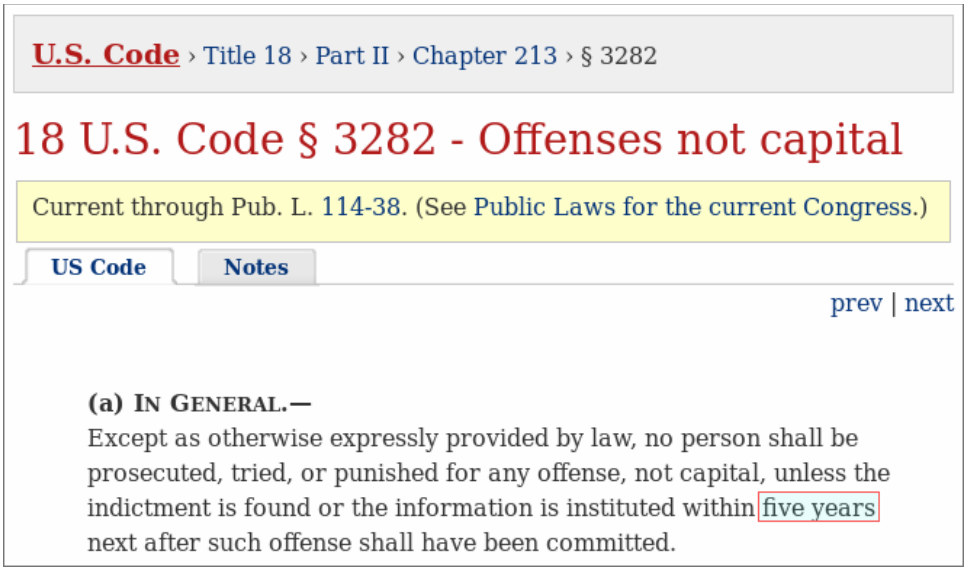
24 • See Const Art III §3.

25 • The case of Benedict Arnold's collaboration with the British occurred during the Revolutionary War, before the Constitution was written.

26 • "The thing speaks for itself."

Statute Of Limitations



U.S. Code › Title 18 › Part II › Chapter 213 › § 3282

18 U.S. Code § 3282 - Offenses not capital

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

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(a) IN GENERAL.—
Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

No Immunity; Strict Liability (*Owen/Thayer* Principle)

Nobody in government (or out) (℘9ƒ11ι† *supra*) enjoys ("as-of-right")-immunity from ***criminal*** liability. This principle is often encountered as a *"strict liability" meme,* attributed to *Owen v. City of Independence,* 445 U.S. ℘622–683 (1980), and articulated "something like" this:

> **Government cannot disavow liability for injuries it has begotten, whether based on bad faith or good. Government actors (individual or collective) enjoy no immunity from liability,**[27] **when violating laws or Constitutional rights. *For they are deemed to know the law* (cannot pretend "ignorance of law").**

This language *per se,* however, does not occur in *Owen;* it is a *paraphrase,* largely based on the following passage from *Owen* ℘641 (and cited therein as "the *Thayer* principle") (emphasis added):

> Yet in the hundreds of cases from that era [colonial times] awarding damages against municipal governments for wrongs committed by them, **one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers [because, they "know the law"].** Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. In the leading case of *Thayer v. Boston,* 36 Mass. 511, 515–516 (1837), for example, Chief Justice Shaw explained:
>
> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, [even] if it was not known and understood to be unlawful at the time, [even] if it was an act done by the **officers having competent authority,** either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially **[even] if** the act was done **with an honest view ["good faith"]** to obtain for the public some lawful benefit or advantage, **reason and justice obviously [nonetheless] require that the city, in its corporate capacity, should be [strictly/absolutely] liable to make good the damage sustained by an individual, in consequence of the acts thus done.**"

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27 • "Strict/absolute liability" = no immunity, regardless of intent, *scienter, mens rea,* "moral blameworthiness," bad/good faith, innocent error, etc. *Owen* involved liability under 42 USC §1983, but at a time (1980) *prior* to that statute's incorporation (in 1996) of Congress's anti-*Owen/Thayer* special judicial civil immunity clause. See ℘9ƒ11 *supra*.

Exhibit X

Email to F. Pagano, Dec. 17, 2016.

This email was illegible in some email clients (as deliberately illustrated here). For a legible version, see Exhibit Y, Exhibit Y.b.

Subject: Some of you still don't "got it".
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 12/17/16 15:01
To: AMICUS AMICUS <AMICUS.GWEST2PO.GWEST2DOM@EEOC.GOV>, Adam Sparrow <Adam_Sparrow@ca1.uscourts.gov>, Allison.Lawrence-Harris@americanbar.org, Alpha.Brady@americanbar.org, Annaliese.Fleming@americanbar.org, "Leonard, Arthur S." <Arthur.Leonard@nyls.edu>, "Amicus, CRT (CRT)" <CRT.Amicus@usdoj.gov>, Dan.Read@cbsradio.com, "Dennis O'Leary" <Dennis_OLeary@ca1.uscourts.gov>, Erin.Gill@americanbar.org, Florence_Pepaco@ca1.uscourts.gov, Foxreport@foxnews.com, Info@aclius.org, Jesse.Eisinger@propublica.org, John Dean <John.Dean@asu.edu>, Joseph.Sexton@propublica.org, MBajor@nelahq.org, Malveaux@law.edu, Margaret Carter <Margaret_Carter@ca1.uscourts.gov>, Mark Bennett <Mark_Bennett@sand.uscourts.gov>, Michael.Gadson@americanbar.org, Michael.Uhlmann@cqa.edu, PValverde@nelahq.org, Rochelle.Evans@americanbar.org, Sarah Koster <Sarah_Koster@ca1.uscourts.gov>, Teresa A Daniel <TeresaAnnDaniel@gmail.com>, Tracy.Weber@propublica.org, USAEO-VictimOmbudsman <USAEO.VictimOmbudsman@usdoj.gov>, Ron Branson <VictoryUSA@jail4judges.org>, Albert W Alschuler <a-alschuler@northwestern.edu>, a.damato@northwestern.edu, Andrei Lary <allarionov@cato.org>, abates@cato.org, abelson@globe.com, acodevil@plymouthca.net, Amy Howe <ahowe@scotusblog.com>, Scott Allen <allen@globe.com>, allhusa@wisc.edu, ann.mcginley@unlv.edu, Alexander Nowrasteh <anowrasteh@cato.org>, agowell@cato.org, aryoxoldt@cato.org, arn@whistleblowers.org, articlexchair@harvardlawreview.org, askvrc@ncjrs.gov, Patricia Barnes <barnespatj@gmail.com>, benjamin@law.duke.edu, bernice_donald@ca6.uscourts.gov, bfriedman@cato.org, blindsey@cato.org, brennancenter@nyu.edu, Ed Brunet <brunet@clark.edu>, bwatson@cato.org, bwatson@stvincent.edu, Carl Malamud <carl@media.org>, caseywork@warren.senate.gov, cedwards@cato.org, cflannery@aps.edu, charles.kesler@cmc.edu, cknappenberger@cato.org, cnhall@seattleu.edu, colemanbj@seattleu.edu, Chris Preble <cpreble@cato.org>, Carolyn Shapiro <cshapiro1@kentlaw.iit.edu>, curt@undercoverlawyer.com, dalocarp@umu.edu, daniel.golden@propublica.org, daniel.rodriguez@law.northwestern.edu, dave@davekopel.org, David Post <david.g.post@gmail.com>, dbasdow@cato.org, dbernste@gmu.edu, dboaz@cato.org, Denny Chin <dchin@fordham.edu>, deisenberg@law.umaryland.edu, Alan Dershowitz <dershi@law.harvard.edu>, dhymand@illinois.edu, diane_wood@law.uchicago.edu, Dan Ikenson <dikenson@cato.org>, David Lat <dlat@abovethelaw.com>, Dan Mitchell <dmitchell@cato.org>, dpearson@cato.org, drosenberg@employeelawnewyork.com, e-kontorovich@law.northwestern.edu, eachford@cato.org, ecitron@goldsteinrussell.com, egomez@cato.org, Elie Mystal <elie@abovethelaw.com>, elizabeth.schneider@nyu.edu, Emma Quinn-Judge <equinn-judge@zalkindlaw.com>, eric.umansky@propublica.org, ersbertz@scotusblog.com, estes@globe.com, Suzanne Lucas <evilhrlady@gmail.com>, Nita Farahany <farahany@duke.edu>, frank_easterbrook@law.uchicago.edu, frtenb@foxnews.com, gsalderm@cato.org, ghesh@cato.org, gj29@andrew.cmu.edu, glenn.greenwald@theintercept.com, glennbeck@foxnews.com, godriscoll@cato.org, greatbreton@wghb.org, gweigan@cato.org, Steve Hanke <hanke@jhu.edu>, hannity@foxnews.com, hellman@pitt.edu, huckmail@foxnews.com, info@claremont.org, info@employeerightsadvocacy.org, info@public-accountability.org, Thurgood Marshall <info@thurgoodmarshallproject.org>, isbapiro@cato.org, isomin@gmu.edu, iwasquez@cato.org, jaw@schlichtmanslaw.com, jbedrick@cato.org, jbonsti@luc.edu, jccc@jfc.gov, jchidalgo@cato.org, jdorr@cato.org, John Eastman <jeastman@chapman.edu>, jeff.gorth@propublica.org, Jeff Bezos <jeff@amazon.com>, jolwood@volaw.com, jonna.russell@globe.com, jpelbach@law.upenn.edu, Jim Harper <jharper@cato.org>, jkuznicki@cato.org, James Lindgren <jlindgren@law.northwestern.edu>, jmartin@unr.edu, jnitzen@cato.org, jnueller@cato.org, Joe Patrice <joe@abovethelaw.com>, johann@cinbro.se, Jon Roland <jon.roland@constitution.org>, Jonathan Adler <jonathan.adler@case.edu>, josatchi@gmail.com, joy.waltmanb@wolterskluwer.com, jsaltzman@globe.com, jsamples@cato.org, Julian Sanchez <jsanchez@cato.org>, jsood@law.berkeley.edu, kanders@wcl.american.edu, katehoward@uga.edu, kelly@foxnews.com, korobkin@law.ucla.edu, Kathryn Rubino <krubino@abovethelaw.com>, krussel@scotusblog.com, lawrence.roberts@propublica.org, ldennison@scotusblog.com, legal@aathact.as, Lawrence Lessig <lessig@pobox.com>, letters@chafeekrauthammer.com, "Greenhouse, Linda" <linda.greenhouse@yale.edu>, Public Citizen Litigation Group <litigation@citizen.org>, liz.schneider@brooklaw.edu, m-redish@law.northwestern.edu, mail@jailpreswatch.org, Marty Baron <martin.baron@washpost.com>, mcalabr@cato.org, "Michael F Cannon" <mcannon@cato.org>, mfeeney@cato.org, michaeldorf@cornell.edu, National Whistleblower Center <nwc@whistleblowers.org>, Lucas Morel <morel@wlu.edu>, mtanner@cato.org, mtupy@cato.org, nathaniel.boyer@hspatriotvells.com, Nola by <nolahq@nelahq.org>, news-tips@nytimes.com, newstips@globe.com, Neal McCluskey <nmccluskey@cato.org>, ngr@law.georgetown.edu, nroseknaust@gmail.com, "nytnews, Readers" <nytnews@nytimes.com>, okerr@law.gwu.edu, orrelly@foxnews.com, parry@clark.edu, paul.cassel@law.utah.edu, peddington@cato.org, pitches@thenarshallproject.org, pmcheeb@cato.org, president@whitehouse.gov, pramdeer@cato.org, "Mollica, Paul W." <pwmollica@outtengolden.com>, rb2@law.georgetown.edu, rhallwin@thenarshallproject.org, rezendes@globe.com, rkoon@ufl.edu, Bob Levy <rlevy@cato.org>, rotnole@cato.org, rpentittto@hillsdale.edu, Roger Pilon <rpilon@cato.org>, rpoet1&m@postkinslawllc.com, rposner@law.uchicago.edu, "Rotunda, Ronald" <rrotunda@chapman.edu>, rsaldon@wtvk.com, Sacha Pfeiffer <sacha.pfeiffer@globe.com>, satyan@cato.org, samuel.issacharoff@nyu.edu, shaker@steptoe.com, shirley@law.georgetown.edu, schwab@cornell.edu, scott.klein@propublica.org, scott.moss@colorado.edu, sfc44@cornell.edu, sgonsier@oa.edu, siegelan@seattleu.edu, slester@cato.org, smelson@citizen.org, stac@abovethelaw.com, staff@davidfrelaw.com, steven.hayward@pepperdine.edu, supremecourt@citizen.org, svladeck@wcl.american.edu, Sacha Volokh <svolokh@gmail.com>, tburrus@cato.org, tcarpenter@cato.org, tfirey@cato.org, tgoldstein@scotusblog.com, tips@boston.com, tips@mail.newsnews.org, tips@thatscorpit.com, tknight@cato.org, tlynch@cato.org, tpalmer@cato.org, Lawrence Tribe <tribe@law.harvard.edu>, Todd Wallack <twallack@globe.com>, tvest@hillsdale.edu, tzywicz2@gmu.edu, volokh@law.ucla.edu, Walter Robinson <walter.robinson@globe.com>, wolsen@cato.org, Bob Woodward <woodward@washpost.com>, wvospil@clarmont.org, xyellam@cato.org
BCC: Walt Tuvell <walt.tuvell@gmail.com>

I've gotten some private feedback from a few of you (original email attached), indicating that some still don't "get it" (or pretend not to). Thank you for engaging! Here are my responses:

- Some say the judge (Casper) did the right thing, because Local Rules for SJ (augmenting the Global Rule FRCP 56) say that "the response to DSOF must rebut point-by-point the numbered paragraphs of the DSOF, otherwise the DSOF is credited, and you didn't do that, so the plaintiff loses." Wrong. LRs differ by locality (that's why they're called "local"), and some LRs do say that (for example, S.D.N.Y., http://www.nysd.uscourts.gov/rules/rules.pdf) N.D.Ill., http://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRILR5.pdf). But I'm in D.Mass., and my Local Rule 56.1 (http://www.mad.uscourts.gov/general/pdf/LCrR56%20(CAL%20Jul13).pdf) (screenshot below) (accord, C.D.Cal., https://www.cacd.uscourts.gov/sites/default/files/documents/LocalRules/Effective%20Jan%2021%2015%20-%20Chapter1.pdf) specifies two REQUIRED briefs at SJ, PSOF and DSOF, WITHOUT "point-by-point rebuttal". By custom in D.Mass., and by practice in my case, additional briefs are also submitted, but they're OPTIONAL; in my case responses were submitted by both parties (RespDSOF, RespPSOF); and my RespDSOF did indeed point-by-point rebut the DSOF, referring to the PSOF 19 times, but the judge didn't follow any of those referrals into the PSOF itself, not even once.

- Some say, "Well, then that's just the way judge Casper personally does SJ/LR, and the lawyers in her court should know that". Wrong. I had good lawyers, and they were flabbergasted (and worse), before they bailed-out due to Fear of Speaking Truth to Power. And, I found 8 explicit examples (more surely exist) of Casper's SJ opinions where she did indeed use the DSOF & PSOF as intended by LR 56.1 (some decided for plaintiff, some for defendant, as appropriate); I submitted that information to the Judicial Council, and to the Sup.Ct (second Supplementary Brief to Pet. for Writ of Cert., in the ZIP archive at http://bit.ly/2gdF2X1).
- Some say, "This is so unbelievable, you must've forged the documents, or misrepresented them." Wrong. The documents are all officially court-docketed, on-the-record. I've made all relevant docs available to you, but you've got PACER, so if you think I've forged them you can download verified copies for yourselves. (The Sup.Ct. doesn't make its filings available electronically, so you'll have to get verified hardcopy directly from them.)
- Some say "it's unethical for a lawyer/judge/citizen to help/intervene/report, especially during an active case". Wrong. Indeed, it's CRIMINALLY ILLEGAL (to within epsilon, see original email, attached), hence certainly UNETHICAL, NOT to help/intervene/report it. 18 USC §4 (see original email, attached). Also (screenshots below), Federal Judicial Code of Conduct (http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf), Canon 3(B)(5); and ABA Model Rules of Professional Conduct for Lawyers (http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html), Rule 8.3(b). Note there are no fewer than SIX active federal judges receiving this (and the original) email.

- Some say, "That's the way it's always been done; we all know that." Wrong. Besides being insipidly cynical, there are zillions of well-documented counter-examples, where things have been done properly/legally.
- Some say, "Well, maybe not 'all the time', but it happens a lot." Wrong. Besides being insipidly cynical, please point me to any single other on-the-record instance where the District Judge totally announces that she's going to, and then does in fact, ignore the nonmovant's well-pled statement of facts. I've searched, I can't find it. I defy you to find one (even one that wasn't appealed would be a good start, bonus points for one that was appealed).
- Some say, "This is no big deal, even if it happens once-in-awhile, rarely." Wrong. Besides being insipidly cynical, the courts have committed lots of criminal laws (original email, attached). And that's not even counting the theft/fraud of >$340,000 (my out-of-pocket expenses). These are Big Deals in anybody's book.
- Some say you're "too busy to help me". Wrong. All I've asked you for is some "Brandeis sunlight" (i.e., publicity, expressed in an appropriate form, e.g., article, blog, amicus curiae to Sup.Ct., etc.), which is a trivial zero-time matter for folks like you, for you are PUBLIC FIGURES, highly-visible self-proclaimed/publicized/advertised experts/savants/servants/commentators on legal matters -- which is after all how I found you. Even if it took some time, it would be pro bono work of the highest order.
- Some say, "What you're claiming is just Not Believable, because such a 'JudgeGate' would be worse than 'WaterGate', so it's impossible." Wrong. WaterGate was also "not believeable", until it actually did happen. This so-called JudgeGate IS certainly/provably happening. And yes, it IS worse than WaterGate (because it directly undermines the whole of the American society).
- Some say this will "go away", and nobody will ever be the wiser. Wrong. In the Internet age, you can be assured I'll eventually find a way to break this story widely (Brandeis sunlight). How do you think you'll look then?
- Some say I'm a crazed conspiracy-theorist nut-case. Wrong. For, everything is verifiable Truth, with valid argumentation. And you know it. Everybody who calls me nasty things first offers false arguments like the above, none of which ever holds the least bit of water, as we've seen. (And where, by the way, did you get your Math PhD from?)

All-in-all, NOBODY, in this forum or elsewhere, has yet come close to scoring even a single valid point rebutting anything I've written (even those who've threatened me with legal action for defamation now admit they don't have a leg stand on). (Period.) But I hope you keep trying. It shows you don't like being called criminals, so I hope you do something truly praise-worthy to become truly above-and-beyond-criminal status.

I can't boil it down any simpler than the following image (first two pages of District Judge's "Opinion", annotated; also attached as PDF). If you still can't "get it" after viewing the image, then you need to go (back) to law school and learn a little Civil Procedure before continuing what you're doing. Take some ethics/philosophy/logic classes while you're at it.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL, **Plaintiff,** **v.** **INTERNATIONAL BUSINESS MACHINES, INC.,** **Defendant.**	**Civil Action No. 13-11292-DJC**

This is at Summary Judgment ("SJ") time. SJ is governed by FRCP (Fed. Rules of Civ. Procedure) #56, augmented by FRCP LR (Local Rule) #56.1.

MEMORANDUM AND ORDER A.k.a. "Opinion."

CASPER, J. **July 6, 2015**

I. Introduction

Plaintiff Walter Tuvell ("Tuvell") filed this lawsuit against Defendant International Business Machines, Inc. ("IBM") alleging that he was unlawfully terminated as a result of discrimination and retaliation in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and Mass. Gen. L. c. 151B, §§ 4(1), 4(16), 4(4) and 4(5). D. 10. IBM has moved for summary judgment. D. 73. For the reasons stated below, the Court ALLOWS the motion.

IBM is "movant" (for this SJ motion, Dkt.#73). Tuvell is "nonmovant".

The REQUIRED DSOF (Def./movant's Statement of Facts, Dkt.#74) is designed to claim there are "no disputed facts". The REQUIRED PSOF (Plf./nonmovant's Statement of Facts, Dkt.#83) is designed to claim there are "lots of disputed facts". [That's how the SJ legal game is played.]

II. Standard of Review

This is CORRECT Standard of Review (at SJ), REQUIRED BY RULE/LAW.

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st C 1996)). The movant bears material fact. Carmona v. To U.S. 317, 323 (1986). If the allegations or denials in her (1986), but "must, with resp trial, demonstrate that a trier rel. S.M.B.W. v. Serrano–Ise the production of evidence tl at 249) (alteration in original nonmovant, drawing reasona 25 (1st Cir. 2009).

III. Factual Background

The facts are as repre by Tuvell, D. 82, unless othe

Tuvell is a white ma disorder ("PTSD")[1] stemmin the Microsoft Corporation ("I

On November 3, 20 Performance Architecture Gr Feldman and reported "on

[1] For the purposes of t 75 at 4 n.3.

RULE 56.1 MOTIONS FOR SUMMARY JUDGMENT DSOF
(Defendant = movant; Plaintiff = nonmovant)

Motions for summary judgment shall include a concise statement of the material facts of record as to which the moving party contends there is no genuine issue to be tried, with page references to affidavits, depositions and other documentation. Failure to include such a statement constitutes grounds for denial of the motion. Opposition to motions for summary judgment must be filed, unless the court orders otherwise, within 21 days after the motion is served. A party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation. Copies of all referenced documentation shall be filed as exhibits to the motion or opposition. Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties. Unless the court orders otherwise, the moving party may file a reply within 14 days after the response is served. PSOF

Effective September 1, 1990, amended effective December 1, 2009.

A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

Exhibit Y

Email to F. Pagano, Dec. 18, 2016 (first).

This is a legible version of Exhibit X.

- **Attachment YouAreACriminal.pdf —** Included in this JCApx at Exhibit Y.a, *infra.*
- **Attachment SomeOfYouStillDontGetIt.pdf —** Included in this JCApx at Exhibit Y.b, *infra.*

Subject: Some of you still don't "get it". -- RESEND
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 12/18/16 08:31
To: AMICUS AMICUS <AMICUS.GWEST2PO.GWEST2DOM@EEOC.GOV>, Adam Sparrow <Adam_Sparrow@ca1.uscourts.gov>, Allison.Lawrence-Harris@americanbar.org, Alpha.Brady@americanbar.org, Annaliese.Fleming@americanbar.org, "Leonard, Arthur S." <Arthur.Leonard@nyls.edu>, "Amicus, CRT (CRT)" <CRT.Amicus@usdoj.gov>, Dan.Rea@cbsradio.com, "Dennis O'Leary" <Dennis_OLeary@ca1.uscourts.gov>, Erin.Gil@americanbar.org, Florence_Pagano@ca1.uscourts.gov, Foxreport@foxnews.com, Info@aclum.org, Jesse.Eisinger@propublica.org, John Dean <John.Dean@asu.edu>, Joseph.Sexton@propublica.org, MRapier@nelahq.org, Malveaux@law.edu, Margaret Carter <Margaret_Carter@ca1.uscourts.gov>, Mark Bennett <Mark_Bennett@iand.uscourts.gov>, Michael.Gadson@americanbar.org, Michael.Uhlmann@cgu.edu, PValverde@nelahq.org, Rochelle.Evans@americanbar.org, Sarah Koster <Sarah_Koster@ca1.uscourts.gov>, Teresa A Daniel <TeresaAnnDaniel@gmail.com>, Tracy.Weber@propublica.org, USAEO-VictimOmbudsman <USAEO.VictimOmbudsman@usdoj.gov>, Ron Branson <VictoryUSA@jail4judges.org>, Albert W Alschuler <a-alschuler@northwestern.edu>, a-damato@northwestern.edu, Andrei Lary <aIllarionov@cato.org>, abates@cato.org, abelson@globe.com, acodevil@plymouthca.net, Amy Howe <ahowe@scotusblog.com>, Scott Allen <allen@globe.com>, althouse@wisc.edu, ann.mcginley@unlv.edu, Alexander Nowrasteh <anowrasteh@cato.org>, apowell@cato.org, areynolds@cato.org, ars@whistleblowers.org, articleschair@harvardlawreview.org, askovc@ncjrs.gov, Patricia Barnes <barnespatg@gmail.com>, benjamin@law.duke.edu, bernice_donald@ca6.uscourts.gov, bfriedman@cato.org, blindsey@cato.org, brennancenter@nyu.edu, Ed Brunet <brunet@lclark.edu>, bwatson@cato.org, bwatson@stvincent.edu, Carl Malamud <carl@media.org>, casework@warren.senate.gov, cedwards@cato.org, cflannery@apu.edu, charles.kesler@cmc.edu, cknappenberger@cato.org, cmhall@seattleu.edu, colemanb@seattleu.edu, Chris Preble <cpreble@cato.org>, Carolyn Shapiro <cshapiro1@kentlaw.iit.edu>, curt@undercoverlawyer.com, dalecarp@umn.edu, daniel.golden@propublica.org, daniel.rodriguez@law.northwestern.edu, dave@davekopel.org, David Post <david.g.post@gmail.com>, dbandow@cato.org, dbernste@gmu.edu, dboaz@cato.org, Denny Chin <dchin@fordham.edu>, deisenberg@law.umaryland.edu, Alan Dershowitz <dersh@law.harvard.edu>, dhyman@illinois.edu, diane_wood@law.uchicago.edu, Dan Ikenson <dikenson@cato.org>, David Lat <dlat@abovethelaw.com>, Dan Mitchell <dmitchell@cato.org>, dpearson@cato.org, drosenberg@employeelawnewyork.com, e-kontorovich@law.northwestern.edu, eashford@cato.org, ecitron@goldsteinrussell.com, egomez@cato.org, Elie Mystal <elie@abovethelaw.com>, elizabeth.schneider@nyu.edu, Emma Quinn-Judge <equinn-judge@zalkindlaw.com>, eric.umansky@propublica.org, eroberts@scotusblog.com, estes@globe.com, Suzanne Lucas <evilhrlady@gmail.com>, Nita Farahany <farahany@duke.edu>, frank_easterbrook@law.uchicago.edu, friends@foxnews.com, gcalderon@cato.org, ghealy@cato.org, gl20@andrew.cmu.edu, glenn.greenwald@theintercept.com, glennbeck@foxnews.com, godriscoll@cato.org, greaterboston@wgbh.org, gselgin@cato.org, Steve Hanke <hanke@jhu.edu>, hannity@foxnews.com, hellman@pitt.edu, huckmail@foxnews.com, info@claremont.org, info@employeerightsadvocacy.org, info@public-accountability.org,

Thurgood Marshall <info@themarshallproject.org>, ishapiro@cato.org, isomin@gmu.edu, ivasquez@cato.org, jan@schlichtmannlaw.com, jbedrick@cato.org, jbronst@luc.edu, jcecil@fjc.gov, jchidalgo@cato.org, jdorn@cato.org, John Eastman <jeastman@chapman.edu>, jeff.gerth@propublica.org, Jeff Bezos <jeff@amazon.com>, jelwood@velaw.com, jenna.russell@globe.com, jgelbach@law.upenn.edu, Jim Harper <jharper@cato.org>, jkuznicki@cato.org, James Lindgren <jlindgren@law.northwestern.edu>, jmarini@unr.edu, jmiron@cato.org, jmueller@cato.org, Joe Patrice <joe@abovethelaw.com>, johann@timbro.se, Jon Roland <jon.roland@constitution.org>, Jonathan Adler <jonathan.adler@case.edu>, joseatchile@gmail.com, joy.waltemath@wolterskluwer.com, jsaltzman@globe.com, jsamples@cato.org, Julian Sanchez <jsanchez@cato.org>, jyoo@law.berkeley.edu, kanders@wcl.american.edu, katehoward@uga.edu, kelly@foxnews.com, korobkin@law.ucla.edu, Kathryn Rubino <krubino@abovethelaw.com>, krussell@scotusblog.com, lawrence.roberts@propublica.org, ldenniston@scotusblog.com, legal@oathact.us, Lawrence Lessig <lessig@pobox.com>, letters@charleskrauthammer.com, "Greenhouse, Linda" <linda.greenhouse@yale.edu>, Public Citizen Litigation Group <litigation@citizen.org>, liz.schneider@brooklaw.edu, m-redish@law.northwestern.edu, mail@judgewatch.org, Marty Baron <martin.baron@washpost.com>, mcalabria@cato.org, "Michael F. Cannon" <mcannon@cato.org>, mfeeney@cato.org, michaeldorf@cornell.edu, National Whistleblower Center <mjw@whistleblowers.org>, Lucas Morel <morell@wlu.edu>, mtanner@cato.org, mtupy@cato.org, nathaniel.boyer@hoganlovells.com, Nela hq <nelahq@nelahq.org>, news-tips@nytimes.com, newstips@globe.com, Neal McCluskey <nmccluskey@cato.org>, nqr@law.georgetown.edu, nrosenkranz@gmail.com, "nytnews, Readers" <nytnews@nytimes.com>, okerr@law.gwu.edu, oreilly@foxnews.com, parry@lclark.edu, paul.cassell@law.utah.edu, peddington@cato.org, pitches@themarshallproject.org, pmichaels@cato.org, president@whitehouse.gov, pvandore@cato.org, "Mollica, Paul W." <pwmollica@outtengolden.com>, rb325@law.georgetown.edu, rbaldwin@themarshallproject.org, rezendes@globe.com, rkozel@nd.edu, Bob Levy <rlevy@cato.org>, rotoole@cato.org, rpestritto@hillsdale.edu, Roger Pilon <rpilon@cato.org>, rpontikes@pontikeslawllc.com, rposner@law.uchicago.edu, "Rotunda, Ronald" <rrotunda@chapman.edu>, ryablon@orrick.com, Sacha Pfeiffer <sacha.pfeiffer@globe.com>, saiyar@cato.org, samuel.issacharoff@nyu.edu, sbaker@steptoe.com, scarle@wcl.american.edu, schwab@cornell.edu, scott.klein@propublica.org, scott.moss@colorado.edu, sfc44@cornell.edu, sgensler@ou.edu, siegelan@seattleu.edu, slester@cato.org, snelson@citizen.org, staci@abovethelaw.com, staff@davidleelaw.com, steven.hayward@pepperdine.edu, supremecourt@citizen.org, svladeck@wcl.american.edu, Sasha Volokh <svolokh@gmail.com>, tburrus@cato.org, tcarpenter@cato.org, tfirey@cato.org, tgoldstein@scotusblog.com, tips@boston.com, tips@mail.newconews.org, tips@theintercept.com, tknight@cato.org, tlynch@cato.org, tpalmer@cato.org, Lawrence Tribe <tribe@law.harvard.edu>, Todd Wallack <twallack@globe.com>, twest@hillsdale.edu, tzywick2@gmu.edu, volokh@law.ucla.edu, Walter Robinson <walter.robinson@globe.com>, wolson@cato.org, Bob Woodward <woodwardb@washpost.com>, wvoegeli@claremont.org, xyeliang@cato.org
BCC: Walt Tuvell <walt.tuvell@gmail.com>

It seems some of you aren't using email clients that can handle inline images properly.

So attached hereto is a PDF version of yesterday's email (and its predecessor).

Attachments:

YouAreACriminal.pdf	957 KB
SomeOfYouStillDontGetIt.pdf	984 KB

Exhibit Y.a

Attachment YouAreACriminal.pdf to email of Dec. 18, 2016 (first) (Exhibit Y, *supra*).

From: Walt Tuvell <walt.tuvell@gmail.com>
Date: Wed, Dec 7, 2016 at 3:37 PM
Subject: **You are a criminal.**
To: Suzanne Lucas <evilhrlady@gmail.com>, Patricia Barnes <barnespatg@gmail.com>, curt@undercoverlawyer.com, Lawrence Lessig <lessig@pobox.com>, Teresa A Daniel <TeresaAnnDaniel@gmail.com>, Info@aclum.org, Adam Sparrow <Adam_Sparrow@ca1.uscourts.gov>, "Mollica, Paul W." <pwmollica@outtengolden.com>, Dennis O'Leary <Dennis_OLeary@ca1.uscourts.gov>, "nytnews, Readers" <nytnews@nytimes.com>, AMICUS AMICUS <AMICUS.GWEST2PO.GWEST2DOM@eeoc.gov>, PValverde@nelahq.org, MRapier@nelahq.org, "Leonard, Arthur S." <Arthur.Leonard@nyls.edu>, Mark Bennett <Mark_Bennett@iand.uscourts.gov>, Alpha.Brady@americanbar.org, Annaliese.Fleming@americanbar.org, daniel.rodriguez@law.northwestern.edu, svladeck@wcl.american.edu, "Amicus, CRT (CRT)" <CRT.Amicus@usdoj.gov>, Albert W Alschuler <a-alschuler@northwestern.edu>, "Rotunda, Ronald" <rrotunda@chapman.edu>, Carl Malamud <carl@media.org>, Florence_Pagano@ca1.uscourts.gov, "Greenhouse, Linda" <linda.greenhouse@yale.edu>, articleschair@harvardlawreview.org, pitches@themarshallproject.org, info@themarshallproject.org, rbaldwin@themarshallproject.org, mjw@whistleblowers.org, ars@whistleblowers.org, president@whitehouse.gov, tips@mail.newconews.org, USAEO-VictimOmbudsman <USAEO.VictimOmbudsman@usdoj.gov>, askovc@ncjrs.gov, katehoward@uga.edu, Amy Howe <ahowe@scotusblog.com>, ldenniston@scotusblog.com, eroberts@scotusblog.com, tgoldstein@scotusblog.com, krussell@scotusblog.com, ecitron@goldsteinrussell.com, tips@boston.com, newstips@globe.com, rposner@law.uchicago.edu, jan@schlichtmannlaw.com, scarle@wcl.american.edu, Sarah Koster <Sarah_Koster@ca1.uscourts.gov>, rpontikes@pontikeslawllc.com, Emma Quinn-Judge <equinn-judge@zalkindlaw.com>, Alan Dershowitz <dersh@law.harvard.edu>, Marty Baron <martin.baron@washpost.com>, Bob Woodward <woodwardb@washpost.com>, Jeff Bezos <jeff@amazon.com>, Scott Allen <allen@globe.com>, abelson@globe.com, estes@globe.com, rezendes@globe.com, jenna.russell@globe.com, jsaltzman@globe.com, Todd Wallack <twallack@globe.com>, Walter Robinson <walter.robinson@globe.com>, Sacha Pfeiffer <sacha.pfeiffer@globe.com>, Denny Chin <dchin@fordham.edu>, news-tips@nytimes.com, Nela hq <nelahq@nelahq.org>, Lawrence Tribe <tribe@law.harvard.edu>, info@employeerightsadvocacy.org, ryablon@orrick.com, Erin.Gil@americanbar.org, Michael.Gadson@americanbar.org, Allison.Lawrence-Harris@americanbar.org, Rochelle.Evans@americanbar.org, info@public-accountability.org, cmhall@seattleu.edu, siegelan@seattleu.edu, supremecourt@citizen.org, snelson@citizen.org, Malveaux@law.edu, bernice_donald@ca6.uscourts.gov, elizabeth.schneider@nyu.edu, liz.schneider@brooklaw.edu, staff@davidleelaw.com, deisenberg@law.umaryland.edu, scott.moss@colorado.edu, ann.mcginley@unlv.edu, schwab@cornell.edu, Margaret Carter <Margaret_Carter@ca1.uscourts.gov>, Jon Roland <jon.roland@constitution.org>, mail@judgewatch.org, Ron Branson

<VictoryUSA@jail4judges.org>, David Lat <dlat@abovethelaw.com>, staci@abovethelaw.com, Joe Patrice <joe@abovethelaw.com>, Kathryn Rubino <krubino@abovethelaw.com>, Elie Mystal <elie@abovethelaw.com>, joy.waltemath@wolterskluwer.com, althouse@wisc.edu, Carolyn Shapiro <cshapiro1@kentlaw.iit.edu>, jelwood@velaw.com, hellman@pitt.edu, sfc44@cornell.edu, John Dean <John.Dean@asu.edu>, brennancenter@nyu.edu, Ed Brunet <brunet@lclark.edu>, m-redish@law.northwestern.edu, parry@lclark.edu, jbronst@luc.edu, jcecil@fjc.gov, jgelbach@law.upenn.edu, samuel.issacharoff@nyu.edu, gl20@andrew.cmu.edu, nathaniel.boyer@hoganlovells.com, colemanb@seattleu.edu, rkozel@nd.edu, drosenberg@employeelawnewyork.com, sgensler@ou.edu, Dan.Rea@cbsradio.com, michaeldorf@cornell.edu, letters@charleskrauthammer.com, legal@oathact.us, greaterboston@wgbh.org, Public Citizen Litigation Group <litigation@citizen.org>, volokh@law.ucla.edu, dalecarp@umn.edu, dave@davekopel.org, dbernste@gmu.edu, dhyman@illinois.edu, David Post <david.g.post@gmail.com>, e-kontorovich@law.northwestern.edu, isomin@gmu.edu, James Lindgren <jlindgren@law.northwestern.edu>, Jonathan Adler <jonathan.adler@case.edu>, kanders@wcl.american.edu, nqr@law.georgetown.edu, Nita Farahany <farahany@duke.edu>, okerr@law.gwu.edu, paul.cassell@law.utah.edu, rb325@law.georgetown.edu, korobkin@law.ucla.edu, Sasha Volokh <svolokh@gmail.com>, sbaker@steptoe.com, benjamin@law.duke.edu, tzywick2@gmu.edu, casework@warren.senate.gov, kelly@foxnews.com, friends@foxnews.com, Foxreport@foxnews.com, hannity@foxnews.com, huckmail@foxnews.com, glennbeck@foxnews.com, oreilly@foxnews.com, glenn.greenwald@theintercept.com, tips@theintercept.com, a-damato@northwestern.edu, scott.klein@propublica.org, eric.umansky@propublica.org, daniel.golden@propublica.org, lawrence.roberts@propublica.org, Joseph.Sexton@propublica.org, Tracy.Weber@propublica.org, Jesse.Eisinger@propublica.org, jeff.gerth@propublica.org, frank_easterbrook@law.uchicago.edu, diane_wood@law.uchicago.edu

Or nearly so. Namely, everyone receiving this note is a felon to within a minor technicality, because you satisfy the criteria below (if you don't, this isn't meant for you). You're certainly guilty of concealment/whitewash/misprision/"cover-up"; and you are within an act-of-silence of actual felony (18 USC §4, see infra).

Slander/libel/defamation? Nope. Fact. The following criteria are true, to the best of my honest belief/understanding. Punch a hole in any of it, if you can.

(I)
The courts have committed clear/obvious criminal felony upon me (Obstruction of Justice, Falsification of Records and Proceedings, 18 USC §1519,1505, see the Pagano Letter p.2–5,8, in the ZIP archive mentioned below). Reminder:

◀ *1* ▶

STATEMENT OF FACTS

What Happened, Where, and When

I hereby accuse Judge Casper of **Judicial Misconduct,** concerning the case *Tuvell v. IBM,* in which I am Plaintiff. Specifically: she wrongfully ***lied***[1] ***(falsifying all the "facts of the case"),*** substantively adversely to me (by dismissing the case at summary judgment) on the basis of her lies.

The complained-of behavior occurred in Casper's **falsified opinion ("Op"),** issued for *Tuvell v. IBM* (July 6, 2015).

Grounds For Complaint

This section summarizes this Complaint ***only briefly/summarily*** (per instructions for filing this Complaint). For reference to ***complete details fully elaborated,*** see the section *Further Information To Aid Investigation, infra.*

A

In her opinion (Op ℘1–2 §II),[2] Judge Casper correctly identified/stated her **Standard of Review** at summary judgment — proving she was *fully aware* of what she was ***bound/promised by oath*** (28 USC §453) to observe. Namely, Casper expressly wrote (Op ℘2): "The Court 'view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor.'" (Tuvell was nonmovant.)

But then she immediately turned around and lied — namely, she refused to do what she just promised to do.

For, Casper then vouchsafed (Op ℘2 §III 1st ¶, referring to case documents by their docket/"D." numbers, emphasis added):

> The facts are as represented in **IBM's statement of material facts, D. 74,** and undisputed by Tuvell, D. 82, unless otherwise noted. ◀ *2* ▶

And this is indeed how she then proceeded to act.

The **problem** is that "D.74" is *Defendant's Statement of Facts* ("**DSOF**") (and "D.82" is *Plaintiff's Response to DSOF* ("RespDSOF")). **THAT WAS FALSE (i.e., Casper lied about her duty/promise to uphold/observe her Standard of Review, *supra*)!** For, in order to "view the record in the light most favorable to the nonmovant," Casper was bound by law to **credit,** not the DSOF (nor RespDSOF) at all, but **instead** *Plaintiff's Statement of*

1 · "Lie" = "known falsehood intended to harm" ~ **"abuse of judicial power."**

2 · Notation used throughout: § = section(s); ¶ = paragraph(s); ℘ = page(s); ℓ = line(s); ƒ = footnote(s); e = endnote(s); ι = inline-note(s) (embedded in footnotes/endnotes).

Facts ("**PSOF**"), "D.83."[3] Yet, the **PSOF** is ***nowhere mentioned/credited*** in Casper's Op. By thus

strenuously excluding (*a fortiori* not crediting) the PSOF

from her "deliberations," Casper committed an *egregious* ***bald-faced-lie***(-of-omission), thereby rendering a ***false opinion***. This is ***MISCONDUCT.***[4] (Period.)

This proves our contention (Judicial Misconduct by Casper). QED.

B

To further emphasize the perversity of Casper's now-proven perfidious **"PSOF-Exclusion"** ploy, we recall that the DSOF and PSOF (and *not* any *other* document, such as RespDSOF[5]) are ***the only*** *two documents required to be submitted* by the parties at a proceeding for summary judgment, according to **FRCP-LR 56.1** (relevant part, emphasis added):

---

3 · And, the PSOF *does indeed* defeat the motion for summary judgment, as the merest cursory perusal trivially reveals.

4 · **More, it is manifestly unconscionable, grave miscarriage of justice, corruption of the judicatory process, subversion of judicial integrity, fraud upon the judicial system (by a judge), etc.**

5 · Noting, however, that the RespDSOF (which Casper's Op *pretends* to rely upon) references to the PSOF fully nineteen (19) times — yet Casper **refused to follow any of those nineteen pointers into the PSOF itself, not even once!**

> **Motions for summary judgment** *shall* include a concise statement of the material facts of record [**DSOF**] as to which the moving party contends there is no genuine issue to be tried[.] … A party opposing the motion *shall* include a concise statement of the material facts of record [**PSOF**] as to which it is contended that there exists a genuine issue to be tried[.] … Material facts of record set forth in the *statement required* [**DSOF**] to be served by the moving party will be deemed for ◀ *3* ▶ purposes of the motion to be admitted by opposing parties *unless* [and *only* unless] *controverted* by the *statement required* [**PSOF**] to be served by opposing parties.

And in fact, **both** (i) the PSOF itself, as well as (ii) the official district court docket sheet, *prominently advertise* **LR 56.1** using "inescapable blazing lights" within their respective "four corners" — thereby ***guaranteeing*** that Casper was ***positively/affirmatively notified*** of the PSOF's signal importance. Thusly (emphasis added):

- **Pursuant to LR 56.1,** Plaintiff hereby submits his Statement of Facts in Material Dispute [**PSOF**], which is being filed to support his Opposition to Defendant's Motion for Summary Judgment. — *PSOF ℘1, unnumbered ¶ preceding ¶1 (the very first substantive words of the PSOF itself).*

- 02/12/2015 | 83 | **Statement of Material Facts L.R. 56.1** re 73 MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015) — *Docket entry for D.83 (= PSOF).*

Finally, to well-and-truly "seal the deal" (of assuring the PSOF received the court's attention it demanded/deserved), Tuvell's counsel (and Tuvell himself, who was present in the courtroom) received this reciprocal solemn assurance from Casper at oral argument:

> I'm going to have to cutoff argument there, counsel, but **I assure you that I will go back and *look at your papers* carefully** [*obviously* referring to **PSOF,** because *that's the only* "paper" that really "matters" (**by Rule, LR 56.1**)] — *Transcript* ℘*2009–11 (emphasis added).*

So: despite every conceivable precaution being thus taken — *none of which Casper could possibly have been "accidentally mistaken" about* — Casper **blithely ignored the PSOF wholly.** Thus: Casper *affirmatively refused to even review/consider* (much less "weigh" [though "weighing" would have been improper, according to the tenets of summary judgment review], or *credit*) the **one-and-only** document (**PSOF**) Plaintiff was **actually required** to submit to her summary judgment proceeding! That is: not only did Casper (i) abridge the duties charged to her **by law** (Standard of Review), but she (ii) doubly

abridged her duties by **ignoring judicial Rule (LR 56.1)**. ◀ *4* ▶

It is ***MISCONDUCT*** for *any* judge, in *any* jurisdiction, to *"dis" (disregard/dismiss/disagree/disrespect/dissemble)* basic Rules of Court. (Period.)

C

The only remaining issue for us to address here is the extent to which Casper's actions(/inactions) do, indeed, satisfy the criteria for "Judicial Misconduct," in the sense of this Complaint.

This Complaint is governed by two authorities:

- **Judicial Conduct & Disability Act ("JCDA") —** *Judicial Councils Reform and Judicial Conduct* and *Disability Act* (28 USC §332(d)(1),351–364, 1980).
- **Judicial Conduct & Disability Rules ("JCDR") —** *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (Judicial Conference of the United States, March 11, 2008).

The JCDA itself *nowhere formally defines* the term "misconduct." Rather, its definition (or, "meaning") is imputed, by the JCDR §3(h)(1), from a certain *phrase* in the leading provision of the JCDA:

> Any person alleging that a judge has engaged in *conduct prejudicial to the effective and expeditious administration of the business of the courts* [**misconduct**] … may file

(II)
I've forwarded the full story/proof of the courts' criminal behavior (I) to you. Reminder: anonymous download ZIP archive file at https://www.dropbox.com/s/v7s4inzzjc06u4v/SupCt%3D16-343.zip?dl=0, or equivalently http://bit.ly/2gFjPx1.

(III)
That story/proof (II) is reliably true. Because, it consists of official court-docketed documents — i.e., "direct" evidence that requires no investigation/interpretation (such as the screenshots supra), hence cannot be doubted.

(IV)
You're sophisticated enough (intelligent, knowledgeable of the law) to understand/know that the story/proof (III) is true, including all the "direct" evidence just mentioned. Either that, or you're willfully/stupidly incompetent in your own field, which is unlikely.

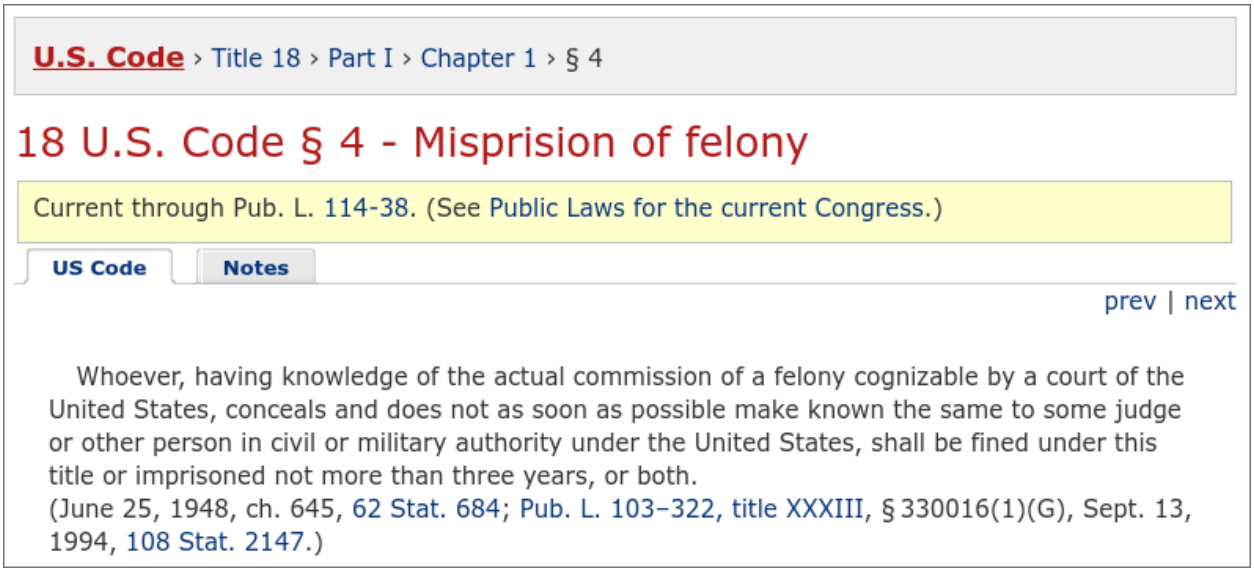
(V)
You're sophisticated enough to know that the courts' activity (I) does indeed comprise "actual commission of a felony," as stated in (I) (and much more besides, as stated in the Pagano letter).

(VI)
You're sophisticated enough to also know that judges have no immunity from criminal law (only from civil, e.g., 42 USC §1983). Pagano letter, p.1 f.2.

(VII)
Hence you know, for a certainty, that the judges' behavior (I) constitutes a "felony cognizable by a court of the United States."

(VIII)
Despite (I–VII), you have refused to help, in any meaningful sense (private discussion with me doesn't count as "meaningful help"). In particular, you have concealed (refused to report) the crime (I) to any "true/responsible authority" (as opposed to false-color-of-authority, i.e., people already complicit in the conspiracy). Else I would have heard about it, but I haven't.

(IX)
Finally, you're sophisticated enough to know that anyone satisfying these criteria (I–VIII) is a felon, unless their only act of "concealment" is the technical escape clause of pure silence (see Pagano letter, p.6):



U.S. Code › Title 18 › Part I › Chapter 1 › § 4

18 U.S. Code § 4 - Misprision of felony

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

US Code | Notes

prev | next

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.
(June 25, 1948, ch. 645, 62 Stat. 684; Pub. L. 103–322, title XXXIII, § 330016(1)(G), Sept. 13, 1994, 108 Stat. 2147.)

And here's the thing: IT IS PRECISELY YOU WHO HAVE EMPOWERED THIS CRIMINAL BEHAVIOR OF THE COURTS IN THE FIRST PLACE. Otherwise, you'd have taken helpful measures previously (e.g., report to responsible authorities); or, you would take helpful measures NOW (if, say, your overlooking of (I–IX) has been inadvertent).

Most likely, you didn't start off "bad" — you were slowly sucked into it, until it was too late (cf. https://en.wikipedia.org/wiki/Boiling_frog metaphor). But you could save your soul/America now. That would be the true measure of a man/woman.

"If you see something, say something." That's the essence of good citizenship, and a fitting remembrance of this 75th Pearl Harbor Day.

Exhibit Y.b

Attachment SomeOfYouStillDontGetIt.pdf to email of Dec. 18, 2016 (first) (Exhibit Y, *supra*).

From: Walt Tuvell <walt.tuvell@gmail.com>
Date: Sat, 17 Dec 2016 15:01:23 -0500
Subject: **Some of you still don't "get it".**
To: AMICUS AMICUS <AMICUS.GWEST2PO.GWEST2DOM@EEOC.GOV>, Adam Sparrow <Adam_Sparrow@ca1.uscourts.gov>, Allison.Lawrence-Harris@americanbar.org, Alpha.Brady@americanbar.org, Annaliese.Fleming@americanbar.org, "Leonard, Arthur S." <Arthur.Leonard@nyls.edu>, "Amicus, CRT (CRT)" <CRT.Amicus@usdoj.gov>, Dan.Rea@cbsradio.com, "Dennis O'Leary" <Dennis_OLeary@ca1.uscourts.gov>, Erin.Gil@americanbar.org, Florence_Pagano@ca1.uscourts.gov, Foxreport@foxnews.com, Info@aclum.org, Jesse.Eisinger@propublica.org, John Dean <John.Dean@asu.edu>, Joseph.Sexton@propublica.org, MRapier@nelahq.org, Malveaux@law.edu, Margaret Carter <Margaret_Carter@ca1.uscourts.gov>, Mark Bennett <Mark_Bennett@iand.uscourts.gov>, Michael.Gadson@americanbar.org, Michael.Uhlmann@cgu.edu, PValverde@nelahq.org, Rochelle.Evans@americanbar.org, Sarah Koster <Sarah_Koster@ca1.uscourts.gov>, Teresa A Daniel <TeresaAnnDaniel@gmail.com>, Tracy.Weber@propublica.org, USAEO-VictimOmbudsman <USAEO.VictimOmbudsman@usdoj.gov>, Ron Branson <VictoryUSA@jail4judges.org>, Albert W Alschuler <a-alschuler@northwestern.edu>, a-damato@northwestern.edu, Andrei Lary <aIllarionov@cato.org>, abates@cato.org, abelson@globe.com, acodevil@plymouthca.net, Amy Howe <ahowe@scotusblog.com>, Scott Allen <allen@globe.com>, althouse@wisc.edu, ann.mcginley@unlv.edu, Alexander Nowrasteh <anowrasteh@cato.org>, apowell@cato.org, areynolds@cato.org, ars@whistleblowers.org, articleschair@harvardlawreview.org, askovc@ncjrs.gov, Patricia Barnes <barnespatg@gmail.com>, benjamin@law.duke.edu, bernice_donald@ca6.uscourts.gov, bfriedman@cato.org, blindsey@cato.org, brennancenter@nyu.edu, Ed Brunet <brunet@lclark.edu>, bwatson@cato.org, bwatson@stvincent.edu, Carl Malamud <carl@media.org>, casework@warren.senate.gov, cedwards@cato.org, cflannery@apu.edu, charles.kesler@cmc.edu, cknappenberger@cato.org, cmhall@seattleu.edu, colemanb@seattleu.edu, Chris Preble <cpreble@cato.org>, Carolyn Shapiro <cshapiro1@kentlaw.iit.edu>, curt@undercoverlawyer.com, dalecarp@umn.edu, daniel.golden@propublica.org, daniel.rodriguez@law.northwestern.edu, dave@davekopel.org, David Post <david.g.post@gmail.com>, dbandow@cato.org, dbernste@gmu.edu, dboaz@cato.org, Denny Chin <dchin@fordham.edu>, deisenberg@law.umaryland.edu, Alan Dershowitz <dersh@law.harvard.edu>, dhyman@illinois.edu, diane_wood@law.uchicago.edu, Dan Ikenson <dikenson@cato.org>, David Lat <dlat@abovethelaw.com>, Dan Mitchell <dmitchell@cato.org>, dpearson@cato.org, drosenberg@employeelawnewyork.com, e-kontorovich@law.northwestern.edu, eashford@cato.org, ecitron@goldsteinrussell.com, egomez@cato.org, Elie Mystal <elie@abovethelaw.com>, elizabeth.schneider@nyu.edu, Emma Quinn-Judge <equinn-judge@zalkindlaw.com>, eric.umansky@propublica.org, eroberts@scotusblog.com, estes@globe.com, Suzanne Lucas <evilhrlady@gmail.com>, Nita Farahany <farahany@duke.edu>,

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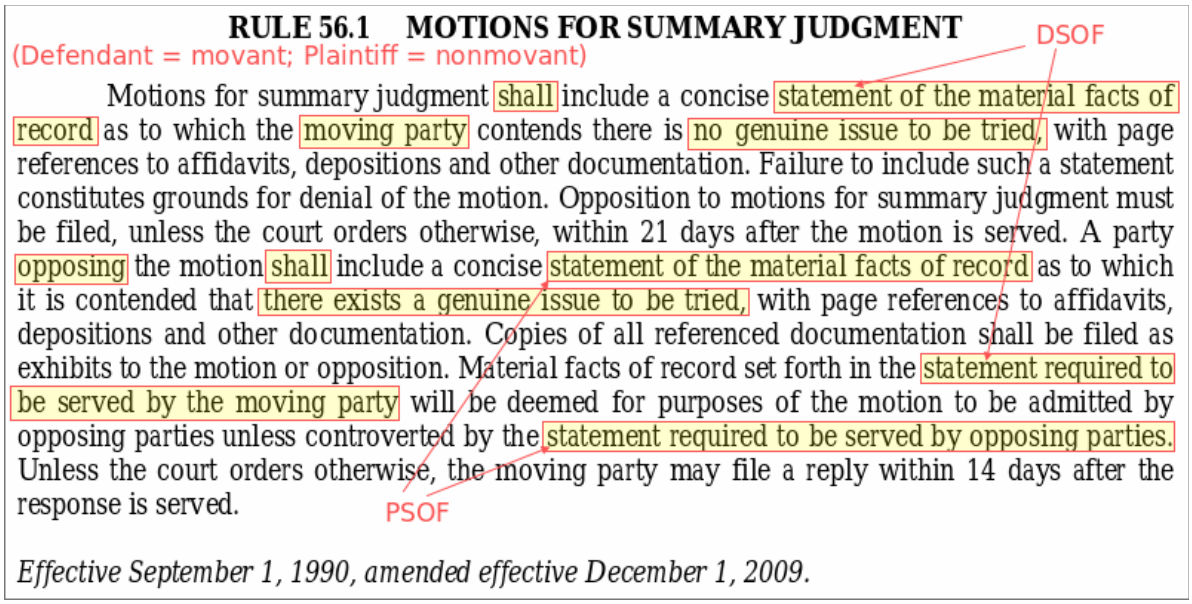
I've gotten some private feedback from a few of you (original email attached, "YouAreACriminal.pdf"), indicating that some still don't "get it" (or pretend not to). Thank you for engaging! Here are my responses:

- Some say the judge (Casper) did the right thing, because Local Rules for SJ (augmenting the Global Rule FRCP 56) say that "the response to DSOF must rebut point-by-point the numbered paragraphs of the DSOF, otherwise the DSOF is credited, and you didn't do that, so the plaintiff loses." **Wrong.** LRs differ by locality (that's why they're called "local"), and some LRs do say that (for example, S.D.N.Y., http://www.nysd.uscourts.gov/rules/rules.pdf; N.D.Ill., http://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRRULES.pdf). But I'm in D.Mass., and my Local Rule 56.1 (http://www.mad.uscourts.gov/general/pdf/LC/2016%20LOCAL%20RULES.pdf) (screenshot below) (accord, C.D.Cal., https://www.cacd.uscourts.gov/sites/default/files/documents/LocalRulesEffectiveJune21-2012-ChapterI.pdf) specifies two REQUIRED briefs at SJ, PSOF and DSOF, WITHOUT "point-by-point rebuttal". By custom in D.Mass., and by practice in my case, additional briefs are also submitted, but they're OPTIONAL; in my case responses were submitted by both parties (RespDSOF, RespPSOF); and my RespDSOF did indeed point-by-point rebut the DSOF, referring to the PSOF 19 times, but the judge didn't follow any of those referrals into the PSOF itself, not even once.



RULE 56.1 MOTIONS FOR SUMMARY JUDGMENT

(Defendant = movant; Plaintiff = nonmovant)

DSOF

Motions for summary judgment shall include a concise statement of the material facts of record as to which the moving party contends there is no genuine issue to be tried, with page references to affidavits, depositions and other documentation. Failure to include such a statement constitutes grounds for denial of the motion. Opposition to motions for summary judgment must be filed, unless the court orders otherwise, within 21 days after the motion is served. A party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation. Copies of all referenced documentation shall be filed as exhibits to the motion or opposition. Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties. Unless the court orders otherwise, the moving party may file a reply within 14 days after the response is served.

PSOF

Effective September 1, 1990, amended effective December 1, 2009.

- Some say, "Well, then that's just the way judge Casper personally does SJ/LR, and the lawyers in her court should know that". **Wrong.** I had good lawyers, and they were flabbergasted (and worse), before they bailed-out due to Fear of Speaking Truth to Power. And, I found 8 explicit examples (more surely exist) of Casper's SJ opinions where she did indeed use the DSOF & PSOF as intended by LR 56.1 (some decided for plaintiff, some for defendant, as appropriate); I submitted that information to the Judicial Council, and to the Sup.Ct (second Supplementary Brief to Pet. for Writ of Cert., in the ZIP archive at http://bit.ly/2gFjPx1).

- Some say, "This is so unbelievable, you must've forged the documents, or misrepresented them." **Wrong.** The documents are all officially court-docketed, on-the-record. I've made all relevant docs available to you, but you've got PACER, so if you think I've forged them you can download verified copies for yourselves. (The Sup.Ct. doesn't make its filings available electronically, so you'll have to get verified hardcopy directly from them.)

- Some say, "It's unethical for a lawyer/judge/citizen to help/intervene/report, especially during an active case". **Wrong.** Indeed, it's CRIMINALLY ILLEGAL (to "within epsilon," see original email, attached), hence certainly UNETHICAL, NOT to help/intervene/report it. 18 USC §4 (see original email, attached). Also (screenshots below), Federal Judicial Code of Conduct (http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf), Canon 3(B)(5); and ABA Model Rules of Professional Conduct for Lawyers (http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html), Rule 8.3(b). Note there are no fewer than SIX active federal judges receiving this (and the original) email.

> A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

- Some say, "That's the way it's always been done; we all know that." **Wrong.** Besides being insipidly cynical, there are zillions of well-documented counter-examples, where things have been done properly/legally.

- Some say, "Well, maybe not 'all the time', but it happens a lot." **Wrong.** Besides being insipidly cynical, please point me to any single other on-the-record instance where the District Judge totally announces that she's going to, and then does in fact, ignore the nonmovant's well-pled statement of facts. I've searched, I can't find it. I defy you to find one (even one that wasn't appealed would be a good start, bonus points for one that was appealed).

- Some say, "This is no big deal, even if it happens once-in-awhile, rarely." **Wrong.** Besides being insipidly cynical, the courts have committed lots of criminal laws (original email, attached). And that's not even counting the theft/fraud of >$340,000 (my out-of-pocket expenses). These are Big Deals in anybody's book.

- Some say they're "too busy to help me". **Wrong.** All I've asked you for is some "Brandeis sunlight" (i.e., pubicity, expressed in an appropriate form, e.g., article, blog, amicus curiae to Sup.Ct., etc.), which is a trivial zero-time matter for folks like you, for you are PUBLIC FIGURES, highly-visible self-proclaimed/publicized/advertised experts/savants/servants/commentators on legal matters — which is after all how I found you. Even if it took some time, it would be pro bono work of the highest order.

- Some say, "What you're claiming is Just Not Believable, because such a 'JudgeGate' would be worse than 'WaterGate', so it's impossible." **Wrong.** WaterGate was also "not believeable", until it actually did happen. This so-called JudgeGate IS certainly/provably happening. And yes, it IS worse than WaterGate (because it directly undermines the whole of the American society).

- Some say this will "go away", and nobody will ever be the wiser. **Wrong.** In the Internet age, you can be assured I'll eventually find a way to break this story widely (Brandeis sunlight). How do you think you'll look then?

● † Some say my court filings have been "too abrasive/rude." **Wrong.** Lawyer-like, I've written truthfully/straightforwardly/candidly/emphatically (never *ad hominem* or uncivilly), none of which is out-of-place. And in fact, viewed in time-sequence and in context, I've been unfailingly polite (but clear/plain/frank) when FIRST BROACHING any of my claims to the courts (and to you people, too). It's only AFTER those first broachings have been falsely ignored — i.e., after the "subtle approach" has proved to be ineffective — that I've been FORCED to be "super-direct." Sometimes the only way to get a donkey's attention is to whack it on the head with a 2-by-4.

A DISCUSSION OF CHANGE

One day a man was leading his donkey down the street. After a short distance, the donkey decided he didn't want to travel any farther. He stopped in his tracks, put his rump on the ground, and wouldn't budge. The man tugged at the donkey's rope and tried to coax him to get up and walk. The coaxing soon turned to name calling and threats involving glue factories. Still the donkey didn't move. A neighbor was passing by and stopped to help the frustrated donkey owner.

"The only way you're going to get that donkey to move is by talking nice to it," the neighbor advised. Indignantly, the donkey owner challenged his neighbor to see if he could do any better with the stubborn critter. The neighbor picked up a two-by-four that was lying by the side of the road and proceeded to give the donkey a swift, hard wallop right between the eyes. Then he pulled on the rope softly and asked the donkey to get up. The donkey immediately stood up and followed the neighbor down the street.

"Didn't you say I should talk nice to the donkey?" the donkey owner protested.

"Of course! And I did," said the neighbor, "but first I had to get his attention."

Sometimes we managers are like donkeys. Sometimes we need to be hit by a two-by-four on the side of the head before we will start paying attention.[12] Often "change" brings out the donkey in all of us.

[12]Some of you may catch this pun on the best-selling book *Whack on the Side of the Head* by von Oech. The book stresses creativity and open-mindedness in our thinking. See von Oech, Roger, *A Whack on the Side of the Head*, Warner Books, New York, 1990.

● Some say I'm a crazed conspiracy-theorist nut-case. **Wrong.** For, everything is verifiable Truth, with valid argumentation. And you know it. Everybody who calls me nasty things first offers false arguments like the above, none of which ever holds the least bit of water, as we've seen. (And where, by the way, did you get your Math PhD from?)

---

† Added in proof (this item was inadvertently omitted from my original email). The quotation is from Gerhard Plenert, *Reinventing Lean: Introducing Lean Management into the Supply Chain* (2010), ℘35.

All-in-all, NOBODY, in this forum or elsewhere, has yet come close to scoring even a single valid point rebutting anything I've written (even those who've threatened me with legal action for defamation now admit they don't have a leg stand on). (Period.) But I hope you keep trying. It shows you don't like being called criminals, so I hope you do something truly praise-worthy to become truly above-and-beyond-criminal status.

I can't boil it down any simpler than the following image (first two pages of District Judge's "Opinion", annotated; also attached as PDF). If you still can't "get it" after viewing the image, then you need to go (back) to law school and learn a little Civil Procedure before continuing what you're doing. Take some ethics/philosophy/logic classes while you're at it.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,	
Plaintiff,	
v.	**Civil Action No. 13-11292-DJC**
INTERNATIONAL BUSINESS MACHINES, INC.,	
Defendant.	

This is at Summary Judgment ("SJ") time. SJ is governed by FRCP (Fed. Rules of Civ. Procedure) #56, augmented by FRCP LR (Local Rule) #56.1.

MEMORANDUM AND ORDER A.k.a. "Opinion."

CASPER, J. **July 6, 2015**

I. Introduction

Plaintiff Walter Tuvell ("Tuvell") filed this lawsuit against Defendant International Business Machines, Inc. ("IBM") alleging that he was unlawfully terminated as a result of discrimination and retaliation in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and Mass. Gen. L. c. 151B, §§ 4(1), 4(16), 4(4) and 4(5). D. 10. IBM has moved for summary judgment. D. 73. For the reasons stated below, the Court ALLOWS the motion.

IBM is "movant" (for this SJ motion, Dkt.#73). Tuvell is "nonmovant".

The REQUIRED DSOF (Def./movant's Statement of Facts, Dkt.#74) is designed to claim there are "no disputed facts". The REQUIRED PSOF (Plf./nonmovant's Statement of Facts, Dkt.#83) is designed to claim there are "lots of disputed facts". [That's how the SJ legal game is played.]

II. Standard of Review

This is CORRECT Standard of Review (at SJ), REQUIRED BY RULE/LAW.

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless

Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

This "Factual Background" (at SJ) is a TOTALY INSANE/ILLEGAL LIE! By SJ RULE/LAW (Rule #56 + LR#56.1 + "Standard of Review" just stated), the court *MUST* CREDIT PSOF (Dkt.#83), *NEVER* DSOF (Dkt.#74)!

The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted.

DSOF(Dkt.#74) & PSOF(Dkt.#83) are REQUIRED (by LR#56.1); RespDSOF (Plf.'s Response to DSOF, Dkt.#82) is OPTIONAL. RespDSOF pointed into PSOF 19 times, but the judge DIDN'T FOLLOW those pointers, not even once.

Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress disorder ("PTSD")[1] stemming from an incident in 1997 when he was allegedly offered a job with the Microsoft Corporation ("Microsoft"), which was subsequently rescinded. D. 82 ¶¶ 1, 2.

On November 3, 2010, Tuvell was hired by Netezza Corporation ("Netezza") in the Performance Architecture Group. Id. ¶ 4. In this position, Tuvell reported directly to Daniel Feldman and reported "on a dotted line" to Fritz Knabe. Id. IBM subsequently acquired

[1] For the purposes of this motion, IBM does not challenge Tuvell's claimed disability. D. 75 at 4 n.3.

Exhibit Z

Email to F. Pagano, Dec. 18, 2016 (second).

- **Attachment YouAreACriminal.pdf —** Identical to Exhibit Y.a, *supra.*
- **Attachment SomeOfYouStillDontGetIt.pdf —** Identical to Exhibit Y.b, *supra.*

Subject: Email submissions
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 12/18/16 09:09
To: Florence_Pagano@ca1.uscourts.gov

Dear Ms. Pagano -

As you know, you have been an addressee on two mass emailings I've sent recently.

This note is to inform you that I am hereby officially filing those two emails with the Judicial Council, in support of both of my two Complaints of Judicial Misconduct. The PDFs of those two emails are attached hereto; and I am also sending formal hardcopies of the two emails to you via U.S. Mail.

- Walter Tuvell

Attachments:

YouAreACriminal.pdf	957 KB
SomeOfYouStillDontGetIt.pdf	984 KB

Exhibit AA

Email to F. Pagano, Dec. 19, 2016.

- **Attachment SomeOfYouStillDontGetIt.pdf —** Identical to Exhibit Y.b, *supra.*

Subject: Re: Email submissions
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 12/19/16 05:39
To: Florence_Pagano@ca1.uscourts.gov

Please be advised I have corrected a typographical error in the attached document. On p.5, in the 3rd bullet item, the phrase "criminal laws" should read "criminal acts". Please substitute this corrected version for the version I sent yesterday. (This correction has been made in the paper version I'm mailing to you, too.)

On 12/18/16 09:09, Walt Tuvell wrote:

> Dear Ms. Pagano -
>
> As you know, you have been an addressee on two mass emailings I've sent recently.
>
> This note is to inform you that I am hereby officially filing those two emails with the Judicial Council, in support of both of my two Complaints of Judicial Misconduct. The PDFs of those two emails are attached hereto; and I am also sending formal hardcopies of the two emails to you via U.S. Mail.
>
> - Walter Tuvell

Attachments:

SomeOfYouStillDontGetIt.pdf	984 KB

Exhibit BB

Email to F. Pagano, Jan. 2, 2017.

- **Attachment PaganoLetter9.pdf —** Included in this JCApx at Exhibit BB.a, *infra*.
- **Attachment JudicialTwilightZone.pdf —** Included in this JCApx in final form at Exhibit BB.b, *infra*.
- **Attachment Tolan-v-Cotton,ANN.pdf —** Included in this JCApx in final form at Exhibit BB.c, *infra*. The version presented there, differs from the original attachment here only to the extent of the adding the note concerning "transsubstantiality" on ℘7 (= JCApx ℘698).
- **Attachment NinthCircuitCommitteeMemo.pdf —** Included in this JCApx at Exhibit BB.d, *infra*.
- **Attachment CcdOrder.pdf —** Included in this JCApx at Exhibit CC.a, *infra*.

Subject: More information to aid Judicial Council
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 01/02/17 10:13
To: "Florence_Pagano@ca1.uscourts.gov" <Florence_Pagano@ca1.uscourts.gov>
BCC: "Linda L. King" <llkforms@aol.com>

Ms. Pagano -

Please see attached "PaganoLetter9.pdf", and additional attachments thereto.

I am also US-mailing you hardcopy, as always.

- Walter Tuvell

Attachments:

JudicialTwilightZone.pdf	1.0 MB
Tolan-v-Cotton,ANN.pdf	121 KB
NinthCircuitCommitteeMemo.pdf	810 KB
CcdOrder.pdf	43.9 KB
PaganoLetter9.pdf	959 KB

Exhibit BB.a

Attachment PaganoLetter9.pdf to email of Jan. 2, 2017 (Exhibit BB, *supra*).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com
Judicial Misconduct Complaints №01-16-90036,01-16-90041

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

January 2, 2017

Dear Ms. Pagano:

This communication (letter and attachments) continues the series I've been sending you (in your role as Asst. Cir. Exec for Legal Affairs for the 1st Circuit), per your instruction to "[i]nclude … any information that would help an investigator check the facts" (original form-letter Complaints of Judicial Misconduct I filed on Sep. 12, 2016). As always, this letter must of course be promptly transmitted to all appropriate members of the Judicial Council.

The **primary content** of this communication is its two attachments:

- **Tolan-v-Cotton,ANN.pdf —** Annotated copy of the case *Tolan v. Cotton,* 572 U.S. ℘____–____, Dkt. No13-551 (2014). The crux of my Complaints (as articulated in my formal Complaints of Judicial Misconduct to the Judicial Council) is of course the failure of the judges presiding over *Tuvell v. IBM* to observe the rock-solid procedural **tenet/command** that "nonmovant-trumps-movant" at summary judgment proceedings. All my judges (and justices) have completely/abjectly **ignored/rejected** that requirement. To emphasize the nonmovant-trumps-movant tenet, I have cited to *Tolan* in documentation I've submitted to the Judicial Council (most notably, my Petition for Writ of Certiorari to the Supreme Court, ℘19f29). The annotated version of *Tolan* submitted herewith guarantees the Council cannot claim it "inadvertently missed *Tolan's* relevance to *Tuvell*"; it is a "last-ditch" effort, imploring the Council to study and observe *Tolan's* teaching.

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1 • Delivered by both email and U.S. mail.

- **JudicialTwilightZone.pdf —** Essay explaining, in an **abstract/neutral** manner, the wrongs that the district and appellate judges have committed. By "abstract/neutral" is meant the positing of a "nameless" case, at summary judgment time, between an anonymous "Plaintiff" (as opposed to "Tuvell") and an anonymous "Defendant" (as opposed to "IBM"), and based upon an "unspecified" set of facts. This allows the procedural aspects (as opposed to the substantive aspects) of the case to be isolated — thus placing the focus more precisely/accurately on the crux (the procedural aspect) of my case.

The **secondary content** of this communication is the following "piece of advice," addressed to the Judicial Council itself:

Smoking Gun Standard Of Evidence/Review

Any Complaint of Judicial Misconduct obviously involves the question of "standard of evidence/review" by the Council itself, for a finding of misconduct. The 9th Cir. has addressed/answered this question, concluding that the standard is "clear and convincing evidence of willfulness" — that is, what we will call a **"smoking gun" standard** (in the popular vernacular). The language used by the 9th Cir. is the following (emphasis added):[2]

> We agree that a judge's … **arbitrarily and deliberately disregarding prevailing legal standards** and thereby causing expense and delay to litigants ***may be*** **misconduct.** However, the characterization of such behavior ***as [actual]*** **misconduct** is fraught with dangers to judicial independence. Therefore, a cognizable misconduct complaint based on allegations of a judge not following prevailing law … in particular cases must identify **clear and convincing evidence [more rigorous than "a preponderance of the evidence", less rigorous than "beyond a reasonable doubt"; see also https://en.wikipedia.org/wiki/Burden_of_proof_(law), and https://en.wikipedia.org/wiki/Smoking_gun] of willfulness [intentional, conscious, and intended to achieve a particular result],** that is clear and convincing evidence of a judge's **arbitrary and intentional** [and not just "inadvertent accident," or "good-faith mistake"] **departure from prevailing law** based on [either] his or her **[expressed] disagreement with,** or **[unexpressed/silent] willful indifference to,** that law.

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2 • NinthCircuitCommitteMemo.pdf ℘8–9 (PDF attached in email, and available at http://www.ce9.uscourts.gov/misconduct/orders/committee_memorandum_89020.pdf). The district judge involved in the memo (who was found guilty of the misconduct of "failing to give reasons for decisions rendered, when required to do so") is not identified in the memo; however his identity has been separately revealed as Manuel L. Real (CcdOrder.pdf ℘1, PDF attached in email, and available at http://www.uscourts.gov/sites/default/files/ccd-10-01order-final-04-12-10p.pdf).

> We have concluded that this **[smoking gun] standard** is necessary to ensure that misconduct proceedings do not intrude upon judicial independence by becoming a method of second-guessing judicial ["merits-related"] decisions. For example, every experienced judge knows of cases where the circumstances [*not* present in *Tuvell v. IBM*] justifiably called for a decision that was superficially at odds with precedent. This is because although prevailing legal standards have large areas of clarity, litigation often involves the borders of those areas. **Breathing room** — something more than a comparison of a judge's ruling with a special committee's or judicial council's view of prevailing legal standards — must therefore be afforded. **This [smoking gun] standard, requiring clear and convincing evidence of an arbitrary and intentional departure from, or willful indifference to prevailing law, provides that breathing room.**

Our point here is that in my Complaints before the Council, the required **smoking gun** evidence ("PSOF-Exclusion") has indeed *already been presented,* in "lawyer-friendly" explicit detail (District Complaint Attachment ℘1–2; Appeals Complaint Attachment ℘1–2 panel, *en banc* ℘3–4).

This point can alternatively be made in a more "layperson(non-lawyer)-friendly" way, via ***annotated screenshots*** *of official formal court filings by the accused judges.* As an illustration, we content ourselves here with supplying only the following **annotated screenshot(s) smoking gun** incriminating the district judge:[3]

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3 • From JudicialTwilightZone.pdf ℘12,13.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant.

Civil Action No. 13-11292-DJC

This is at Summary Judgment ("SJ") time. SJ is governed by FRCP (Fed. Rules of Civ. Procedure) #56, augmented by FRCP LR (Local Rule) #56.1.

MEMORANDUM AND ORDER A.k.a. "Opinion."

CASPER, J. **July 6, 2015**

I. Introduction

Plaintiff Walter Tuvell ("Tuvell") filed this lawsuit against Defendant International Business Machines, Inc. ("IBM") alleging that he was unlawfully terminated as a result of discrimination and retaliation in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and Mass. Gen. L. c. 151B, §§ 4(1), 4(16), 4(4) and 4(5). D. 10. IBM has moved for summary judgment. D. 73. For the reasons stated below, the Court ALLOWS the motion.

IBM is "movant" (for this SJ motion, Dkt.#73). Tuvell is "nonmovant".

The REQUIRED DSOF (Def./movant's Statement of Facts, Dkt.#74) is designed to claim there are "no disputed facts". The REQUIRED PSOF (Plf./nonmovant's Statement of Facts, Dkt.#83) is designed to claim there are "lots of disputed facts". [That's how the SJ legal game is played.]

II. Standard of Review

This is CORRECT Standard of Review (at SJ), REQUIRED BY RULE/LAW.

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless

Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

This "Factual Background" (at SJ) is a TOTALLY INSANE/ILLEGAL LIE! By SJ RULE/LAW (Rule #56 + LR #56.1 + "Standard of Review" just stated), the court "MUST" CREDIT PSOF (Dkt.#83), TRUMPING DSOF (Dkt.#74)!

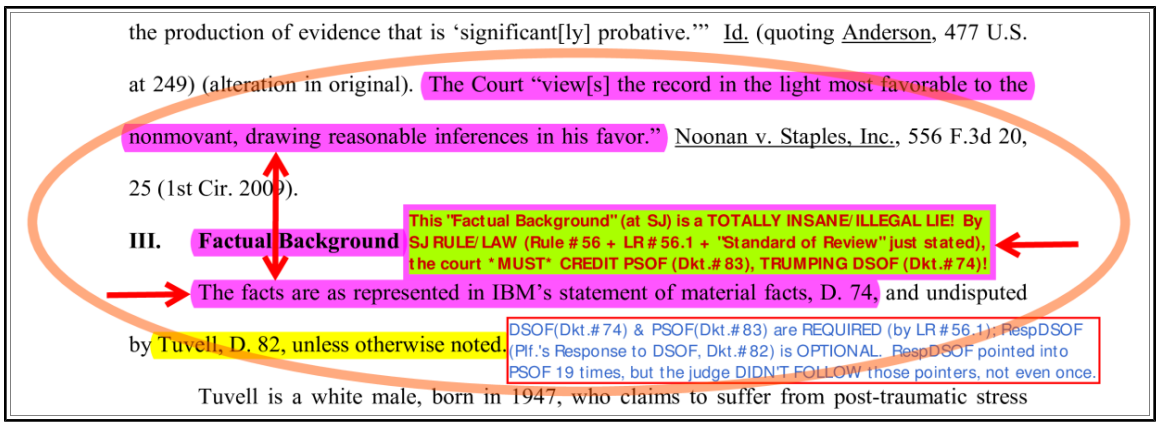
The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted.

DSOF(Dkt.#74) & PSOF(Dkt.#83) are REQUIRED (by LR #56.1); RespDSOF (Plf.'s Response to DSOF, Dkt.#82) is OPTIONAL. RespDSOF pointed into PSOF 19 times, but the judge DIDN'T FOLLOW those pointers, not even once.

Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress disorder ("PTSD")[1] stemming from an incident in 1997 when he was allegedly offered a job with the Microsoft Corporation ("Microsoft"), which was subsequently rescinded. D. 82 ¶¶ 1, 2.

On November 3, 2010, Tuvell was hired by Netezza Corporation ("Netezza") in the Performance Architecture Group. Id. ¶ 4. In this position, Tuvell reported directly to Daniel Feldman and reported "on a dotted line" to Fritz Knabe. Id. IBM subsequently acquired

[1] For the purposes of this motion, IBM does not challenge Tuvell's claimed disability. D. 75 at 4 n.3.



the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

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Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress

Sincerely yours,

WETuvell

Walter E. Tuvell

Exhibit BB.b

Attachment JudicialTwilightZone.pdf (final form) to email of Jan. 2, 2017 (Exhibit BB, *supra*).

Judicial Twilight Zone
Hypothetical Reality Of Judicial Perjury

[I] · Hypothesis

The American Federal judiciary is widely regarded as populated by a powerful and "all-but-infallible" cabal of super-beings — in the sense that they collectively steward the country's legal business professionally and "perfectly" (never making uncorrected mistakes, at least not in the "procedural" sense) — largely due to the judicial system's "due process" protection, and rigorous practice of self-policing via a robust appellate overview program.

Does this view admit of any serious limitations or reservations? What is the "worst-case scenario"?

For the sake of argument let's suppose, hypothetically speaking, that a District Judge sitting in judgment over a civil action (on any topic; the facts are not important), were to grant Defendant's Motion for Summary Judgment (the final pre-trial step before trial), writing her Opinion as follows:

> **At Summary Judgment stage, the Court is strictly <u>required</u>, by law and by judicial rule, to blindly credit ("believe") the Plaintiff/non-movant's "story" as "true": to view <u>all</u> *purported/alleged* "facts" (a.k.a. "events," "transactions," "happenings") in the light most favorable to the Plaintiff, resolving all disagreements and inferences therefrom to Plaintiff's benefit. But arbitrarily, in this case, we completely ignore Plaintiff's story, and inexplicably accept Defendant/movant's biased story as "true." On the basis of that known-falsification, we find no laws were broken, so the case is dismissed.**

Of course such a "smoking gun" would "never, ever" happen in the real world, because it's so wildly self-contradictory and seemingly "illegal" — it would amount to *"judicial falsification of the facts,"* "fraud upon the court" (by a judge), etc. For, as correctly stated in the Opinion's first sentence, courts are indeed absolutely bound (by law and rule) at Summary Judgment to automatically *credit* the non-movant's PSOF (Plaintiff's Statement of Facts) — *never* elevating movant's DSOF (Defendant's Statement of Facts) over PSOF: the PSOF *always* trumps the DSOF. That's because it's the jury's job to "find the facts," not the judge's; the judge's job is instead to make "conclusions of law" based upon the facts found by the jury. And judges would "never, ever" abridge that sacred duty.

Or would they? What's to stop judges from "going rogue"?

In this essay, we hypothesize that the Opinion *supra* is written by the District Judge (perhaps on her "worst day," or perhaps she was bribed by the Defendant, who knows?), and we ask the question: "What recourse would the Plaintiff then have?"

[II] · Appeal

Well, the "natural" reaction is to take an appeal, of course. An appeal, to a panel of three judges, is guaranteed "as-of-right" in the Federal Courts. The Appellate Court's Standard of Review at Summary Judgment is (again by law and rule) *de novo* (also known as "plenary") — that is, the panel looks at the whole case afresh, owing no deference to the District Judge's Opinion. And, the panel must also adhere to the same Summary Judgment tenet as the District Court, of "drawing all disputes of fact in favor of nonmovant, never the movant." Thus, even if such an Opinion were somehow "mistakenly" rendered by the District Judge, the collaborative investigation of three "wise" judges "must obviously" detect the error, and correct it.

But we're exploring worst-case scenarios in this essay. So let's hypothesize that the appellate panel affirms the District Court's dismissal, for the "same reasons" as the District Judge (that is, accepting same falsified facts). Now what?

[III] · Higher Appeals; Constitutional Rights

As opposed to the initial "as-of-right" appeal ([II] *supra*), further appeals are "discretionary" — that is, they must first survive a preliminary "petition for appeal." Our Plaintiff attempts all available paths: (i) Petition for Rehearing by the same panel (which is specifically intended to correct the panel's errors, not to review the case itself again); (ii) Petition for *En Banc* Review before an "entire bench" of appellate judges (not just the panel of three); (iii) Petition for Writ of Certiorari to the Supreme Court (in its "supervisory" capacity, Sup.Ct.R. 10(a):[1] "a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"); (iv) Petition for Rehearing at the Supreme Court (which is designed to raise new issues not available when the original Writ Petition itself was filed). Due Process;[2] Equal Protection.[3]

Continuing with our theme of worst-case scenarios, let's assume that our Plaintiff attempts all available appeal paths, and is rejected at every step — all without any explanation whatsoever. What then?

[IV] · Judicial Misconduct

Independently from the primary judicial appellate process ([II–III] *supra*), there exists also a secondary appellate-like process within the judicial system. This is the process of judicial discipline via Complaints of Judicial Misconduct (and Disability). This (rather shadowy) path proceeds via Judicial Councils and Conferences, 28 USC I 15,[4] as governed by: (i) the JCDA (Judicial Conduct & Disability Act, 28 USC I 16);[5] and (ii) the JCDR (Rules for Judicial-Conduct and Judicial-Disability Proceedings),[6] and their local analogues.[7]

Again, our Plaintiff files his complaints to this process, which at first glance seems very promising. But as with the mainline appellate process ([II–III] *supra*),

this disciplinary process is self-administered by presumptively biased "brethren" judges, hence is *a priori* non-trustworthy (28 USC §144,[8] 28 USC §455[9]). And, the process takes "forever" to run its course. So unsurprisingly, our Plaintiff seeks out alternative parallel paths to pursue while the Judicial Misconduct proceedings silently run their course. Where can our Plaintiff turn next?

[V] · Civil Litigation

Next after appellate(-like) processes ([II–IV] *supra*), the "natural" way to resolve grievances in American society is via new litigation. Sue the District Judge! But that's easier said than done.

The canonical avenue for seeking redress against government officials — 42 USC §1983[10] (§1 of Civil Rights Act of 1871), Civil Action for Deprivation of Rights — turns out to be a dead-end. While this statute is a well-known vehicle taken by victims of governmental abuse (especially police brutality), it was foreclosed for our Plaintiff when Congress amended §1983 in 1996, by specifically granting absolute immunity to judges against any such "harassment" by their "victims": "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, neither damages [*Pierson v. Ray*,[11] 386 U.S. ℘547–566 (1967), ℘553–555] nor injunctive relief shall be granted."

What's left now?

[VI] · Criminal Litigation

As just seen, [V] *supra, civil* action via §1983 is stymied. But to our Plaintiff, it feels as if his rights have actually been violated *criminally,* not just civilly. Is an action for *criminal* public corruption a possibility? As it turns out, this inspirational insight yields remarkably fertile ground yet to be plowed (as-yet-under-explored by case law when applied to judicial misconduct). It is this insight which comprises the core contribution of this essay.

But first, there's a threshold barrier that must be surmounted. Namely, given that §1983 grants judicial civil immunity, the question arises whether any statute exists granting judicial criminal immunity? Fortunately, that answer is "No." *Nobody,* in government or out, enjoys *a priori* immunity against criminal charges (not even the President). See for example: (i) *Nixon v. Fitzgerald*,[12] 457 U.S. ℘731–799 (1982), ℘766: "Even when performing a judicial function, judges and justices are subject to criminal liability;" (ii) *Mireles v. Waco*,[13] 502 U.S. ℘9–15 (1991), ℘10ƒ1: "The Court has recognized that a judge is not absolutely immune from criminal liability."

The underbrush now being cleared for exploration of criminal action, we discover that the following laws *in toto* support more-than-viable causes-of-action in the worst-case scenario we posit.†

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† • For the sake of simplicity and clarity in this essay, the "quotations" are (faithful) paraphrases, supplied with references (internet hyperlinks, "live" in PDF, and in endnotes) to the definitive text.

[VI.i] · 8 USC §1519[14] — Obstruction Of Justice: Falsification Of Records; Concealment; Cover-Up

> **Whoever knowingly conceals, covers up, falsifies, or makes a false entry in any document with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States, or in relation to or contemplation of any such matter, shall be fined under this title, imprisoned not more than 20 years, or both.**

Originally, §1519 was passed by Congress into law as part of the Sarbanes-Oxley Act ("SOX"), enacted in 2002, and incorporated into 18 USC I 73,[15] "Obstruction of Justice." While SOX overall is generally thought-of in terms of corporate wrong-doing (fraud, corruption), §1519 itself is intended to have a broader scope, and has no such restriction.

In our Plaintiff's case, the judges have obviously "falsified/concealed/covered-up the record" (various terms are used widely, more-or-less synonymously, with "concealment," such as cover-up,[16] whitewash,[17] and misprision[18]). Namely: (i) the District Judge falsified the District Court's Opinion (by falsely allowing DSOF to trump PSOF, contrary to law and rule); and then (ii) all subsequent judges blindly swallowed/concealed/covered-up that falsified Opinion, despite knowing full-well its falsity (as Plaintiff pointed out expressly to them!). The District Judge is directly guilty of falsification (namely, she wrote her false Opinion), by virtue of her original jurisdiction; but the panel judges are also directly guilty, by virtue of their own independent *de novo* review. The panel and *en banc* judges are obviously indirectly guilty of falsification via concealment/cover-up.

However, for three of §1519's provisions, it is not immediately obvious whether our Plaintiff's case satisfies them, and so these require further analysis. These are (all considered in the special context of §1519):

- "(Federal) investigation" — Does this mean only "FBI-style" investigations, or does it also apply to "court proceedings"?
- "Jurisdiction" — Does this encompass "judicial jurisdiction" in the sense of the judicial system?
- "Department/agency" — These terms are rather context-sensitive, not hard-coded universally-well-defined terms of art/law. Are the "courts" included within the ambit of "departments/agencies"?

Fortunately for our Plaintiff, these questions were all definitively resolved in Plaintiff's favor by the recent controversial ("a-fish-is-not-a-tangible-object") case of *Yates v. U.S.*,[19] 574 U.S. ____, №13-7451 (2015), Ginsburg's decision ℘18, ℘13ƒ5, Kagan's dissent ℘10:

> **Section 1519 covers conduct intended to impede any federal investigation or proceeding. It is meant to do away with the distinc-**

tions between court proceedings, investigations, and other government inquiries, regardless of their title. The intent of the provision is simple: people should not be destroying, altering, or falsifying documents to obstruct any government function. This includes any proceeding before a judge or court of the United States, and prohibits tampering with evidence in federal litigation between private parties.

[VI.ii] · 18 USC §4[20] — Misprision Of Felony

Whoever, having knowledge of the actual commission of a felony, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

See generally: (i) Christopher Mark Curenton, *The Past, Present, and Future of 18 U.S.C. §4: An Exploration of the Federal Misprision Statute*,[21] Alabama Law Review, vol. 55, Issue 1, ℘183–192 (2003–2004); (ii) *U.S. v. Osvaldo Caraballo-rodriguez*,[22] 480 F.3d ℘62–88 (1st Cir. 2007).

A misprision of felony charge is especially appropriate against a person placed in a special position of trust/responsibility (such as a judge), and may be referred to as "misfeasance/malfeasance in public office."

In the U.S. today, misprision of felony is uniformly construed to require that the accused take some "positive/active/affirmative step" (beyond mere "negative/passive silence") to conceal the felony. In our Plaintiff's case, that's true of all reviewing authorities (appellate panel and higher, individually and/or collectively), all of whom were fully briefed about the District Judge's falsification of facts felony (18 USC §1519, [VI.i] *supra*), but deliberately lied by producing (false) documentation (official court filings), thereby positively concealing/refusing-to-recognize/refusing-to-"make-known" the felony.

Note that judicial ethics even requires judges to report any judicial misconduct (much less criminal activity (*Code of Conduct for United States Judges*,[23] Canon 3(B)(5)):

A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

[VI.iii] · 18 USC §1505[24] — Obstruction Of Justice: Obstruction Of Proceedings

Whoever corruptly influences, obstructs, or impedes the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United

> **States, shall be fined under this title, imprisoned not more than 5 years or, or both.**

For the purposes of §1505, "corruptly" is defined by 18 USC §1515(b):[25] "Acting with an improper purpose, including making a false or misleading statement, concealing or altering information."

For "department or agency," see the discussion of §1519 ([VI.i] *supra*).

[VI.iv] · 18 USC §242[26] — Deprivation Of Rights Under Color Of Law

> **Whoever, under color of any law or custom, willfully subjects any person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, shall be fined under this title or imprisoned not more than one year, or both.**

This law is the criminal counterpart to the civil §1983 ([V] *supra*).

"Color of law" refers to operations taken under the *superficial appearance* of legal power/authority (such as official acts committed by a judge "from the bench" within their jurisdiction), but which may *in fact* be in violation of the law.

[VI.v] · 28 USC §453[27] — Judicial Oath Of Office

> **I, <*name*>, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to everyone, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me under the Constitution and laws of the United States. So help me God.**

Anent, we recall two Constitutional provisions:

> **We the People of the United States, in Order to … establish Justice [which includes Truth] …** — *U.S. Const. Preamble*.[28]

> **All executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation [i.e., Promise], to support this Constitution [esp. law (Art. III), which incorporates the doctrine of *stare decisis*[29]] …** — *U.S. Cons*[30]*t. Art VI*.

[VI.vi] · 5 USC §3331[31] — Civil Service Oath Of Office

> **I, <*name*>, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States; that I will bear true faith and allegiance to the same; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.**

Judges must take *both* the judicial oath (§453, [VI.v] *supra*) and this civil service oath (§3331, [VI.vi] *supra*).

[VI.vii] · 18 USC §1621-1623[32] — Perjury (Lying Under Oath); Subornation; False Declarations Before Court

> **Whoever, having taken an oath that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall be fined under this title or imprisoned not more than five years, or both.**
>
> **Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.**
>
> **Whoever under oath in any proceeding before or ancillary to any court of the United States knowingly makes any false material declaration or makes or uses any other information, including any paper, document or record, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.**

Judges/justices are, of course, always subject to both of their oaths, §453 and §3331 ([VI.v–VI.vi] *supra*), when on the bench (acting in a judicial capacity). By "oath" is meant a personal promise to deity and government/Constitution, as a sacred sign of solemn veracity, developed over time by various cultures as a symbolic concept in legal practice — namely, willful violation of oath (lying about the duties one has promised-to under oath) subjects the false promisor to the crime of perjury.

[VI.viii] · 18 USC §1001[33] — False Statements Or Entries (Oath Not Required)

> **Whoever, in any matter within the jurisdiction of the judicial branch of the Government of the United States, knowingly and willfully — (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry — shall be fined under this title, imprisoned not more than 5 years.**

[VI.ix] · 5 USC §7311(1-2);[34] 5 USC §3333;[35] 18 USC §1918(1-2)[36] — Loyalty; Affidavit Of Loyalty; Disloyalty

> **An individual may not accept or hold a position in the Government**

> **of the United States if he — (1) advocates the overthrow of our constitutional form of government; (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government.**
>
> **An individual who accepts office or employment in the Government of the United States shall execute an affidavit that his acceptance and holding of the office or employment will not violate section 7311 of this title.**
>
> **Whoever violates the provision of section 7311 of title 5, if he — (1) advocates the overthrow of our constitutional form of government; or (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government — shall be fined under this title or imprisoned not more than one year and a day, or both.**

The "overthrow of our constitutional form of government" involved in our Plaintiff's case refers to "dissing" (disregard/dismiss/disagree/disrespect/dissemble) the Judicial Branch as an institution (corruption of one-third of our constitutional form of government, entrusted by Const. Art. III[37] with the administration/interpretation of law in the United States).

The "organization" involved in our Plaintiff's case refers to the collection of judges who are like-minded with the judges involved in the case. ("Like-mindedness" is is also the hallmark of conspiracy, [VI.x] *infra*.)

[VI.x] · 18 USC §371[38] — Conspiracy

> **If two or more persons conspire to commit any offense against the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.**

The appellate panel and *en banc* court clearly satisfy the "two or more" criterion. But so does the district court, according to the next paragraph.

Conspiracy (successful or not) does not require written/spoken/express/formal "agreement." Nor does it require all-to-all consent. Nor does it even require co-conspirators' knowledge of one-another's identity or quantity. Mere "like-mindedness" suffices (*U.S. v. Monroe*,[39] 73 F.3d ℘129–133, 7th Cir. (1995), ℘132): "All that is required is that a participant know of the others' existence and their activities to further the conspiracy." Neither repentance nor restitution limits liability.

[VI.xi] · 18 USC §1341[40](1346[41]) — Honest-Services Fraud (Perhaps Not)

> **Whoever, having devised or intending to devise any scheme or artifice to defraud by means of false or fraudulent pretenses, represen-**

> **tations, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.**
>
> **Here, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.**

While §1341(1346) has been been called federal prosecutors' "weapon of mass discretion" in the war against both white-collar and public-sector corruption (Nicholas J. Wagoner, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in Skilling v. United States*,[42] South Texas Law Review, Vol. 51, №4, ℘1087–1142), recent narrow interpretation has tended to limit its scope, on the basis of a "void-for-vagueness" due-process doctrine (*Skilling v. U.S.*,[43] 561 U.S. ℘358–464 (2010), ℘404). For that reason (only), §1341(1346) may not be applicable to our Plaintiff's case.

[VI.xii] · 18 USC §2381[44] — Treason

> **Whoever, owing allegiance to the United States, adheres to their enemies, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.**

Federal (i) judges/justices (trusted agents owing allegiance to the United States), engaged in (ii) widespread (iii) conspiracy to (iv) disloyally (v) betray the Constitution, by (vi) obstructing justice, (vii) violating their oaths of office, (viii) committing perjury (falsifying documents), and (ix) depriving innocent citizens of their rights, (x) within the scope of their official duties — all proven by our Plaintiff beyond shadow of doubt — are certainly not "friends" of the United States. They are "enemies" to the very concept of America.

But, is a charge of *treason* appropriate, or is it hyperbolical (given that we're not talking here about national security, spying, espionage, sedition, etc.)? Since the Constitution went into effect, fewer than forty federal cases of treason have been prosecuted. The earliest example (the case of Benedict Arnold's collaboration with the British occurred during the Revolutionary War, before the Constitution was written) involved the Whiskey Rebellion[45] (resisting taxation on distilled spirits); some were convicted, all were pardoned. The most famous example involved Arron Burr,[46] charged with proposing the idea of stealing land in the Louisiana Purchase; he was acquitted.

Is a widespread conspiracy of false/corrupt judges on a par with these and other historical examples? *Res Ipsa Loquitur* ("the thing speaks for itself").

[VI.xiii] · 18 USC §3282(a)[47] — Statute Of Limitations

> **No person shall be prosecuted, tried, or punished unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.**

[VI.xiv] · No Immunity; Strict Liability (Owen/Thayer Principle)

As we know ([VI] *supra*), nobody enjoys ("as-of-right")-immunity from criminal liability. This principle is often encountered as a "strict (criminal) liability" meme, attributed to *Owen v. City of Independence*,[48] 445 U.S. ℘622–683 (1980), and articulated "something like" this (paraphrase, based largely on *Owen* ℘641, and cited therein as "the Thayer principle"):

> **Government cannot disavow (criminal) liability for injuries it has begotten, whether based on bad faith or good. Government actors (individual or collective) enjoy no immunity from liability, when violating (criminal) laws or Constitutional rights. For they are deemed to know the law (cannot pretend "ignorance of law").**

"Strict/absolute liability" here means no immunity, regardless of intent, *scienter*, *mens rea*, "moral blameworthiness," bad/good faith, innocent error, etc. *Owen* involved (civil) liability under §1983 ([V] *supra*), but at a time (1980) prior to that statute's incorporation (in 1996) of Congress's anti-Owen/Thayer special judicial (civil) immunity clause.

[VI.xv] · FRCP 60(b)(6)[49] — Relief From Judgment Or Order

So what? Even if wayward judges could to be found officially guilty of any of the preceding criminal acts, how would that redound to the Plaintiff's benefit, given that the Plaintiff's original case had been "deep-sixed" long before (including rejection by the Supreme Court), hence was presumptively beyond resurrection, in the interests of "judicial finality"?

Answer: Life may be good anyway. "Finality," it turns out, is never truly final. As contemplated and accommodated by the Federal Rules of Civil Procedure, FRCP 60(b)(6) ("Grounds for Relief from a Final Judgment, Order, or Proceeding"):

> **On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for any reason that justifies relief.**

"We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules" — *United States v. Ohio Power Co.*,[50] 353 U.S. 98–110 (1957), ℘99. (See also Aaron-Andrew P. Bruhl, *When Is Finality … Final? Rehearing and Resurrection in the Supreme Court*,[51] The Journal of Appellate Practice and Process, Vol. 12, No. I (Spring 2011).)

[VII] · Catch-22: Executive & Legislative Stonewall

But wait! Amazingly enough, we're not done even yet! In any "just world," thanks to the criminal analysis [VI.i–VI.xv] *supra*, the judges would be tried and

convicted, and that would be the end of our story. But given the exigencies of the "real world," there is no justice.

For it turns out that our Plaintiff can't even file criminal charges against the judges!

He *should* be able to, of course. But every responsible authority he turns to (FBI, Department of Justice, U.S. Representatives, Senators, even the President) throws up an impenetrable stonewall, the instant he mentions "criminal charges against judges." For, not only do they refuse to conduct an investigation (even a sham one), they actually refuse to accept receipt of his criminal complaints (never acknowledging written submissions, and even refusing to "hear" him in phone calls or face-to-face discussions)!

In other words, not only the Judicial Branch, but also the Executive and Legislative Branches too, are "in on" the conspiracy ([VI.x] *supra*). So you can forget about separation-of-powers checks-and-balances. You really can't fight city hall.

[VIII] · *Pro Se*

Oh, yes, there's one more little problem that our Plaintiff encounters. As soon as the District Judge files her (false) Opinion, the Plaintiff's lawyers start balking: they refuse to expressly tell the judges they made mistakes (namely, "PSOF-Exclusion," falsely elevating DSOF over PSOF). Their reason? "Fear of speaking truth to power" (retaliation/retribution by the judges).

That means the Plaintiff (who has no legal training) is forced to proceed *"pro se,"* that is, he must self-represent himself in further court proceedings. A distinct disadvantage, since the Courts now know they can "railroad" him (because of the technical difficulty of law, the only people who can understand the case are lawyers and judges, all of whom are already "in on" the conspiracy)!

[IX] · Conclusions

Yes — It's *theoretically* possible to bring corrupt judges to bay, under our *ideal* form of government.

No — It's not *practically* possible, under our current *actual* government in power.

Unless ... The Plaintiff can tap into some new (non-governmental) paradigm. As we've seen recently the world over, the only remaining possibility is "mass insurrection" via "Brandeis sunlight"[‡52] (publicity), focusing widespread attention on the situation, hoping to "shame" the government into upholding the Constitution and its ideals. Internet/social media anyone?

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‡ • "'The Duty of Publicity': I have talked about the wickedness of people shielding wrongdoers and passing them off (or allowing them to pass themselves off) as honest men. If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects. You see my idea; I leave you to straighten out and complete that sentence."

[X] · Reality

This essay is not restricted to any individual case — it applies generally, to American Justice Writ Large. Nevertheless as the reader will have conjectured, "hypothetical" cases as envisioned here do in fact exist in "reality." *Tuvell v. IBM* (D.Mass. №13-11292; 1st Cir. №15-1914; Sup.Ct. №16-343; 1st Cir. Judicial Council №01-16-90036,01-16-90041); full details in ZIP archive file, available for free anonymous download at https://www.dropbox.com/s/v7s4inzzjc06u4v/SupCt%3D16-343.zip?dl=0 (or equivalently, http://bit.ly/2gFjPx1).

SMOKING GUN:

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant.

Civil Action No. 13-11292-DJC

This is at Summary Judgment ("SJ") time. SJ is governed by FRCP (Fed. Rules of Civ. Procedure) #56, augmented by FRCP LR (Local Rule) #56.1.

MEMORANDUM AND ORDER A.k.a. "Opinion."

CASPER, J. July 6, 2015

I. Introduction

Plaintiff Walter Tuvell ("Tuvell") filed this lawsuit against Defendant International Business Machines, Inc. ("IBM") alleging that he was unlawfully terminated as a result of discrimination and retaliation in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and Mass. Gen. L. c. 151B, §§ 4(1), 4(16), 4(4) and 4(5). D. 10. IBM has moved for summary judgment. D. 73. For the reasons stated below, the Court ALLOWS the motion.

IBM is "movant" (for this SJ motion, Dkt.#73). Tuvell is "nonmovant".

The REQUIRED DSOF (Def./movant's Statement of Facts, Dkt.#74) is designed to claim there are "no disputed facts". The REQUIRED PSOF (Plf./nonmovant's Statement of Facts, Dkt.#83) is designed to claim there are "lots of disputed facts". [That's how the SJ legal game is played.]

II. Standard of Review

This is CORRECT Standard of Review (at SJ), REQUIRED BY RULE/LAW.

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless

Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

This "Factual Background" (at SJ) is a TOTALY INSANE/ILLEGAL LIE! By SJ RULE/LAW (Rule #56 + LR #56.1 + "Standard of Review" just stated), the court * MUST* CREDIT PSOF (Dkt.#83), TRUMPING DSOF (Dkt.#74)!

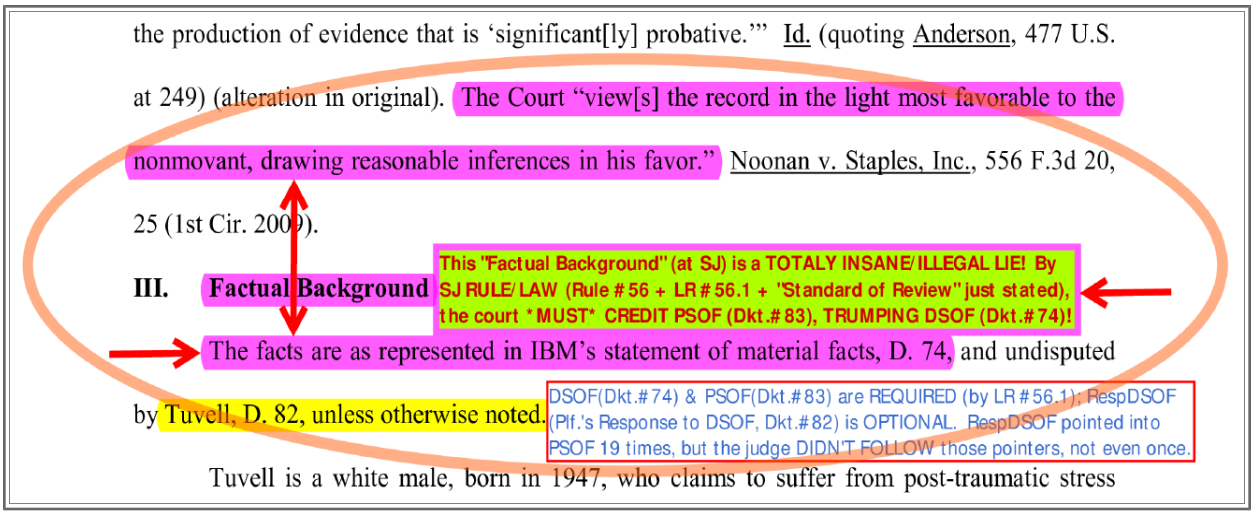
The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted.

DSOF(Dkt.#74) & PSOF(Dkt.#83) are REQUIRED (by LR #56.1). RespDSOF (Plf.'s Response to DSOF, Dkt.#82) is OPTIONAL. RespDSOF pointed into PSOF 19 times, but the judge DIDN'T FOLLOW those pointers, not even once.

Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress disorder ("PTSD")[1] stemming from an incident in 1997 when he was allegedly offered a job with the Microsoft Corporation ("Microsoft"), which was subsequently rescinded. D. 82 ¶¶ 1, 2.

On November 3, 2010, Tuvell was hired by Netezza Corporation ("Netezza") in the Performance Architecture Group. Id. ¶ 4. In this position, Tuvell reported directly to Daniel Feldman and reported "on a dotted line" to Fritz Knabe. Id. IBM subsequently acquired

[1] For the purposes of this motion, IBM does not challenge Tuvell's claimed disability. D. 75 at 4 n.3.



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1 https://www.law.cornell.edu/rules/supct/rule_10.
2 https://www.law.cornell.edu/wex/due_process.
3 https://www.law.cornell.edu/wex/equal_protection.
4 https://www.law.cornell.edu/uscode/text/28/part-I/chapter-15.
5 https://www.law.cornell.edu/uscode/text/28/part-I/chapter-16.
6 http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability.
7 http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability.
8 https://www.law.cornell.edu/uscode/text/28/144.
9 https://www.law.cornell.edu/uscode/text/28/455.
10 https://www.law.cornell.edu/uscode/text/42/1983.
11 https://supreme.justia.com/cases/federal/us/386/547/case.html.
12 http://caselaw.findlaw.com/us-supreme-court/457/731.html.
13 http://caselaw.findlaw.com/us-supreme-court/502/9.html.
14 https://www.law.cornell.edu/uscode/text/18/1519.
15 https://www.law.cornell.edu/uscode/text/18/part-I/chapter-73.
16 https://en.wikipedia.org/wiki/%5BCover-up.
17 https://en.wikipedia.org/wiki/Whitewashing_(censorship).
18 https://en.wikipedia.org/wiki/Misprision.
19 https://www.supremecourt.gov/opinions/14pdf/13-7451_m64o.pdf.
20 https://www.law.cornell.edu/uscode/text/18/4.
21 http://www.law.ua.edu/pubs/lrarticles/Volume%2055/Issue%201/Curenton.pdf.
22 http://openjurist.org/480/f3d/62/united-states-v-caraballo-rodriguez.
23 http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.
24 https://www.law.cornell.edu/uscode/text/18/1505.
25 https://www.law.cornell.edu/uscode/text/18/1515.
26 https://www.law.cornell.edu/uscode/text/18/242.
27 https://www.law.cornell.edu/uscode/text/28/453.
28 https://www.law.cornell.edu/constitution/preamble.

29 https://www.law.cornell.edu/anncon/html/art3frag32_user.html.
30 https://www.law.cornell.edu/constitution/articlevi.
31 https://www.law.cornell.edu/uscode/text/28/3331.
32 https://www.law.cornell.edu/uscode/text/18/part-I/chapter-79.
33 https://www.law.cornell.edu/uscode/text/18/1001.
34 https://www.law.cornell.edu/uscode/text/5/7311.
35 https://www.law.cornell.edu/uscode/text/5/3333.
36 https://www.law.cornell.edu/uscode/text/18/1918.
37 https://www.law.cornell.edu/constitution/articleiii.
38 https://www.law.cornell.edu/uscode/text/18/371.
39 https://casetext.com/case/us-v-monroe-13.
40 https://www.law.cornell.edu/uscode/text/18/1341.
41 https://www.law.cornell.edu/uscode/text/18/1346.
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43 https://www.supremecourt.gov/opinions/09pdf/08-1394.pdf.
44 https://www.law.cornell.edu/uscode/text/18/2381.
45 https://en.wikipedia.org/wiki/Whiskey_Rebellion.
46 https://en.wikipedia.org/wiki/Aaron_Burr.
47 https://www.law.cornell.edu/uscode/text/18/3282.
48 https://supreme.justia.com/cases/federal/us/445/622/case.html.
49 https://www.law.cornell.edu/rules/frcp/rule_60.
50 https://supreme.justia.com/cases/federal/us/353/98/case.html.
51 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026281.
52 *Letters of Louis D. Brandeis, Vol III, 1913–1915: Progressive and Zionist,* David W. Levy and Melvin I Urofsky (1971), ℘100, letter to his fiance Alice Goldmark, Feb. 26, 1891, (https://books.google.com/books?id=Q7bviBd4w18C&pg=PA100&dq=brandeis+letter+feb+26+1891&hl=en&sa=X&ved=0ahUKEwij_bCOmqPRAhXBSyYKHUxjC90Q6AEIHDAA#v=onepage&q=brandeis%20letter%20feb%2026%201891&f=false). Twenty-two years later, Brandeis elaborated upon this idea in Harper's Weekly, Dec. 20, 1913, ℘10–13, *Other People's Money, Chapter V: What Publicity Can Do* (http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf), beginning with the more famous rendition: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

Exhibit BB.c

Attachment Tolan-v-Cotton,ANN.pdf (final form).

See email of Jan. 2, 2017 (Exhibit BB, *supra*).

Per Curiam

SUPREME COURT OF THE UNITED STATES

ROBERT R. TOLAN *v.* JEFFREY WAYNE COTTON

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

No. 13–551. Decided May 5, 2014

PER CURIAM.

During the early morning hours of New Year's Eve, 2008, police sergeant Jeffrey Cotton fired three bullets at Robert Tolan; one of those bullets hit its target and punctured Tolan's right lung. At the time of the shooting, Tolan was unarmed on his parents' front porch about 15 to 20 feet away from Cotton. Tolan sued, alleging that Cotton had exercised excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Cotton, and the Fifth Circuit affirmed, reasoning that regardless of whether Cotton used excessive force, he was entitled to qualified immunity because he did not violate any clearly established right. 713 F. 3d 299 (2013). In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986). For that reason, we vacate its decision and remand the case for further proceedings consistent with this opinion.

I

A

The following facts, which we view in the light most favorable to Tolan, are taken from the record evidence and the opinions below. At around 2:00 on the morning of December 31, 2008, John Edwards, a police officer, was on patrol in Bellaire, Texas, when he noticed a black Nissan

sport utility vehicle turning quickly onto a residential street. The officer watched the vehicle park on the side of the street in front of a house. Two men exited: Tolan and his cousin, Anthony Cooper.

Edwards attempted to enter the license plate number of the vehicle into a computer in his squad car. But he keyed an incorrect character; instead of entering plate number 696BGK, he entered 695BGK. That incorrect number matched a stolen vehicle of the same color and make. This match caused the squad car's computer to send an automatic message to other police units, informing them that Edwards had found a stolen vehicle.

Edwards exited his cruiser, drew his service pistol and ordered Tolan and Cooper to the ground. He accused Tolan and Cooper of having stolen the car. Cooper responded, "That's not true." Record 1295. And Tolan explained, "That's my car." *Ibid.* Tolan then complied with the officer's demand to lie face-down on the home's front porch.

As it turned out, Tolan and Cooper were at the home where Tolan lived with his parents. Hearing the commotion, Tolan's parents exited the front door in their pajamas. In an attempt to keep the misunderstanding from escalating into something more, Tolan's father instructed Cooper to lie down, and instructed Tolan and Cooper to say nothing. Tolan and Cooper then remained facedown.

Edwards told Tolan's parents that he believed Tolan and Cooper had stolen the vehicle. In response, Tolan's father identified Tolan as his son, and Tolan's mother explained that the vehicle belonged to the family and that no crime had been committed. Tolan's father explained, with his hands in the air, "[T]his is my nephew. This is my son. We live here. This is my house." *Id.*, at 2059. Tolan's mother similarly offered, "[S]ir this is a big mistake. This car is not stolen. . . . That's our car." *Id.*, at 2075.

While Tolan and Cooper continued to lie on the ground

in silence, Edwards radioed for assistance. Shortly thereafter, Sergeant Jeffrey Cotton arrived on the scene and drew his pistol. Edwards told Cotton that Cooper and Tolan had exited a stolen vehicle. Tolan's mother reiterated that she and her husband owned both the car Tolan had been driving and the home where these events were unfolding. Cotton then ordered her to stand against the family's garage door. In response to Cotton's order, Tolan's mother asked, "[A]re you kidding me? We've lived her[e] 15 years. We've never had anything like this happen before." *Id.,* at 2077; see also *id.,* at 1465.

The parties disagree as to what happened next. Tolan's mother and Cooper testified during Cotton's criminal trial[1] that Cotton grabbed her arm and slammed her against the garage door with such force that she fell to the ground. *Id.,* at 2035, 2078–2080. Tolan similarly testified that Cotton pushed his mother against the garage door. *Id.,* at 2479. In addition, Tolan offered testimony from his mother and photographic evidence to demonstrate that Cotton used enough force to leave bruises on her arms and back that lasted for days. *Id.,* at 2078–2079, 2089–2091. By contrast, Cotton testified in his deposition that when he was escorting the mother to the garage, she flipped her arm up and told him to get his hands off her. *Id.,* at 1043. He also testified that he did not know whether he left bruises but believed that he had not. *Id.,* at 1044.

The parties also dispute the manner in which Tolan responded. Tolan testified in his deposition and during the criminal trial that upon seeing his mother being pushed, *id.,* at 1249, he rose to his knees, *id.,* at 1928. Edwards and Cotton testified that Tolan rose to his feet.

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[1]The events described here led to Cotton's criminal indictment in Harris County, Texas, for aggravated assault by a public servant. 713 F. 3d 299, 303 (CA5 2013). He was acquitted. *Ibid.* The testimony of Tolan's mother during Cotton's trial is a part of the record in this civil action. Record 2066–2087.

Id., at 1051–1052, 1121.

Both parties agree that Tolan then exclaimed, from roughly 15 to 20 feet away, 713 F. 3d, at 303, "[G]et your fucking hands off my mom." Record 1928. The parties also agree that Cotton then drew his pistol and fired three shots at Tolan. Tolan and his mother testified that these shots came with no verbal warning. *Id.,* at 2019, 2080. One of the bullets entered Tolan's chest, collapsing his right lung and piercing his liver. While Tolan survived, he suffered a life-altering injury that disrupted his budding professional baseball career and causes him to experience pain on a daily basis.

B

In May 2009, Cooper, Tolan, and Tolan's parents filed this suit in the Southern District of Texas, alleging claims under Rev. Stat. §1979, 42 U. S. C. §1983. Tolan claimed, among other things, that Cotton had used excessive force against him in violation of the Fourth Amendment.[2] After discovery, Cotton moved for summary judgment, arguing that the doctrine of qualified immunity barred the suit. That doctrine immunizes government officials from damages suits unless their conduct has violated a clearly established right.

Civil case, not criminal.

Qualified immunity is irrelevant for this decision.

The District Court granted summary judgment to Cotton. 854 F. Supp. 2d 444 (SD Tex. 2012). It reasoned that Cotton's use of force was not unreasonable and therefore did not violate the Fourth Amendment. *Id.,* at 477–478. The Fifth Circuit affirmed, but on a different basis. 713 F. 3d 299. It declined to decide whether Cotton's actions

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[2]The complaint also alleged that the officers' actions violated the Equal Protection Clause to the extent they were motivated by Tolan's and Cooper's race. 854 F. Supp. 2d 444, 465 (SD Tex. 2012). In addition, the complaint alleged that Cotton used excessive force against Tolan's mother. *Id.,* at 468. Those claims, which were dismissed, *id.,* at 465, 470, are not before this Court.

violated the Fourth Amendment. Instead, it held that even if Cotton's conduct did violate the Fourth Amendment, Cotton was entitled to qualified immunity because he did not violate a clearly established right. *Id.,* at 306.

In reaching this conclusion, the Fifth Circuit began by noting that at the time Cotton shot Tolan, "it was . . . clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an 'immediate threat to [his] safety.'" *Id.,* at 306 (quoting *Deville* v. *Marcantel*, 567 F. 3d 156, 167 (CA5 2009)). The Court of Appeals reasoned that Tolan failed to overcome the qualified-immunity bar because "an objectively-reasonable officer in Sergeant Cotton's position could have . . . believed" that Tolan "presented an 'immediate threat to the safety of the officers.'" 713 F. 3d, at 307.[3] In support of this conclusion, the court relied on the following facts: the front porch had been "dimly-lit"; Tolan's mother had "refus[ed] orders to remain quiet and calm"; and Tolan's words had amounted to a "verba[l] threa[t]." *Ibid.* Most critically, the court also relied on the purported fact that Tolan was "moving to intervene in" Cotton's handling of his mother, *id.,* at 305, and that Cotton therefore could reasonably have feared for his life, *id.,* at 307. Accordingly, the court held, Cotton did not violate clearly established law in shooting Tolan.

The Fifth Circuit denied rehearing en banc. 538 Fed. Appx. 374 (2013). Three judges voted to grant rehearing. Judge Dennis filed a dissent, contending that the panel opinion "fail[ed] to address evidence that, when viewed in

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[3]Tolan argues that the Fifth Circuit incorrectly analyzed the reasonableness of Sergeant Cotton's beliefs under the second prong of the qualified-immunity analysis rather than the first. See Pet. for Cert. 12, 20. Because we rule in Tolan's favor on the narrow ground that the Fifth Circuit erred in its application of the summary judgment standard, we express no view as to Tolan's additional argument.

the light most favorable to the plaintiff, creates genuine issues of material fact as to whether an objective officer in Cotton's position could have reasonably and objectively believed that [Tolan] posed an immediate, significant threat of substantial injury to him." *Id.,* at 377.

II

A

In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]" *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Graham* v. *Connor*, 490 U. S. 386, 394 (1989). The inquiry into whether this right was violated requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tennessee* v. *Garner*, 471 U. S. 1, 8 (1985); see *Graham*, *supra*, at 396.

The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ibid.* "[T]he salient question . . . is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id.,* at 741.

Courts have discretion to decide the order in which to

engage these two prongs. *Pearson* v. *Callahan*, 555 U. S. 223, 236 (2009). But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau* v. *Haugen*, 543 U. S. 194, 195, n. 2 (2004) (*per curiam*); *Saucier*, *supra*, at 201; *Hope*, *supra*, at 733, n. 1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U. S., at 249. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157 (1970); see also *Anderson*, *supra*, at 255.

So-called "transsubstantiality" (i.e., applies to all Summary Judgment cases, regardless of underlying set of substantive facts).

The word "only" doesn't appear in FRCP 56(a), but it's clearly implied, as affirmed here.

Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier*, *supra*, at 201; see also *Anderson* v. *Creighton*, 483 U. S. 635, 640–641 (1987). Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions. See *Brosseau*, *supra*, at 195, 198 (inquiring as to whether conduct violated clearly established law "'in light of the specific context of the case'" and construing "facts . . . in a light most favorable to" the nonmovant).

B

In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U. S., at 249.

First, the court relied on its view that at the time of the shooting, the Tolans' front porch was "dimly-lit." 713 F. 3d, at 307. The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was "'fairly dark,'" and lit by a gas lamp that was "'decorative.'" *Id.,* at 302. In his own deposition, however, Tolan's father was asked whether the gas lamp was in fact "more decorative than illuminating." Record 1552. He said that it was not. *Ibid.* Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident, *id.,* at 2496, and Cotton acknowledged that there were two motion-activated lights in front of the house. *Id.,* at 1034. And Tolan confirmed that at the time of the shooting, he was "not in darkness." *Id.,* at 2498–2499.

Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan "presented an immediate threat to the safety of the officers." 713 F. 3d, at 307 (internal quotation marks omitted). But here, too, the court did not credit directly contradictory evidence. Although the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that

Tolan's mother was "very agitated" when she spoke to the officers. Record 1032–1033. By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated." *Id.,* at 2075, 2077.

Third, the Court concluded that Tolan was "shouting," 713 F. 3d, at 306, 308, and "verbally threatening" the officer, *id.,* at 307, in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom." Record 1928. But Tolan testified that he "was not screaming." *Id.,* at 2544. And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. Cf. *United States* v. *White*, 258 F. 3d 374, 383 (CA5 2001) ("A threat imports '[a] communicated intent to inflict physical or other harm'" (quoting Black's Law Dictionary 1480 (6th ed. 1990))); *Morris* v. *Noe*, 672 F. 3d 1185, 1196 (CA10 2012) (inferring that the words "Why was you talking to Mama that way" did not constitute an "overt threa[t]"). Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. Record 2078–2079. A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. 713 F. 3d, at 305; see also *id.,* at 308 (characterizing Tolan's behavior as "abruptly attempting to approach Sergeant Cotton," thereby "inflam[ing] an already tense situation"). The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. Record 1121–1122. Tolan testified at

trial, however, that he was on his knees when Cotton shot him, *id.,* at 1928, a fact corroborated by his mother, *id.,* at 2081. Tolan also testified in his deposition that he "wasn't going anywhere," *id.,* at 2502, and emphasized that he did not "jump up," *id.,* at 2544.

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," *Boag* v. *MacDougall* 454 U. S. 364, 366 (1982) (O'Connor, J., concurring), we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. Cf. *Brosseau*, 543 U. S., at 197–198 (summarily reversing decision in a Fourth Amendment excessive force case "to correct a clear misapprehension of the qualified immunity standard"); see also *Florida Dept. of Health and Rehabilitative Servs.* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 150 (1981) (*per curiam*) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's sovereign immunity jurisprudence).

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning

during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

* * *

The petition for certiorari and the NAACP Legal Defense and Educational Fund's motion to file an *amicus curiae* brief are granted. The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ROBERT R. TOLAN *v.* JEFFREY WAYNE COTTON

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

No. 13–551. Decided May 5, 2014

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring in the judgment.

The Court takes two actions. It grants the petition for a writ of certiorari, and it summarily vacates the judgment of the Court of Appeals.

The granting of a petition for plenary review is not a decision from which Members of this Court have customarily registered dissents, and I do not do so here. I note, however, that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See, *e.g.,* this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice §5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari").

In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. See 713 F. 3d

This is a false/bogus/stupid argument, because the FIRST clause, Rule 10(a) (known as the "Supervisory Power"), states that a major reason the Sup.Ct accepts Petitions is that a Court of Appeals: "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Refusal to EVEN CONSIDER nonmovant's facts at Summary Judgment time is EXACTLY such a "departure".

Reading 713 F.3d 304 shows that the Court of Appeals "INVOKED the correct standard" by CITING to it -- but it failed to APPLY the standard, because it credited movant instead of nonmovant (as in Tuvell v. IBM).

299, 304 (CA5 2013). Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party. In the courts of appeals, cases presenting this question are utterly routine. There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category.

On the merits of the case, while I do not necessarily agree in all respects with the Court's characterization of the evidence, I agree that there are genuine issues of material fact and that this is a case in which summary judgment should not have been granted.

I therefore concur in the judgment.

Yes, such cases are utterly routine. What's non-routine is the courts WRONGLY APPLYING the standard. In Tolan, the lower courts "considered" the facts proffered by both movant and nonmovant, and improperly "weighed" the facts in movant's favor. In Tuvell, the lower courts DIDN'T EVEN "CONSIDER" nonmovant's facts (which is a FAR WORSE breach/falsity than simply "improper weighing").

Exhibit BB.d

Attachment NinthCircuitCommitteeMemo.pdf to email of Jan. 2, 2017 (Exhibit BB, *supra*).

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

Memorandum of Decision

INTRODUCTION

This Memorandum of Decision addresses a petition for review of an order of the Judicial Council of the Ninth Circuit. The Committee's review is based on the delegation to it by the Judicial Conference of the United States of the responsibility to consider petitions addressed to the Judicial Conference for review of circuit council actions under 28 U.S.C. § 357(a). Jurisdictional Statement of the Committee on Judicial Conduct and Disability (As approved by the Executive Committee, effective March 12, 2007), *available at* http://www.uscourts.gov/judconf_jurisdictions.htm#Disability. See also 28 U.S.C. §§ 331 (authorizing the Judicial Conference to establish a standing committee to review petitions), 357(b) ("The Judicial Conference, or the standing committee established under section 331, may grant a petition filed by a complainant or judge under subsection (a).").

In the order in question, dated March 21, 2007, the Judicial Council adopted the findings and recommendations of a special committee. Based on its investigation and an acknowledgment of the district judge, the committee found that the judge had engaged in a pattern and practice of not providing reasons for his decisions when required to do so and that this pattern and practice was misconduct. It recommended a private reprimand.

In a letter dated March 26, 2007, the original complainant sought review by the Judicial Conference of the Judicial

Council's Order, arguing that the sanction of a private reprimand was insufficient. For the reasons stated below, we grant the petition, vacate the Judicial Council's Order, and remand for further consideration.

BACKGROUND

On July 18, 2006, the special committee wrote to the district judge complained against and informed him of the scope of the investigations. The committee interpreted the complaint as alleging that the district judge had engaged in a pattern and practice of abusing his judicial power by (i) refusing to follow, or demonstating recalcitrance in following, court of appeals orders; (ii) improperly taking jurisdiction of cases; and (iii) failing to follow the law. In addition to four cases cited in the original 2004 Complaint, the committee identified twenty-three additional cases -- cases that had been remanded to the district judge multiple times, or reassigned to a different judge on remand -- that it felt might bear on the complaint. On July 25, 2006, the committee advised the district judge that it had identified two additional cases for consideration.

On September 21, 2006, the committee notified the district judge that it had analyzed the twenty-nine cases more thoroughly and refined the issues, reducing the number of cases to be considered to seventeen. The committee informed the district judge that the cases presented the following issues: (i) refusal to follow, or demonstrating recalcitrance in following, court of appeals orders or directives; (ii) improper taking of

jurisdiction over cases, or improper treatment of jurisdiction; (iii) failure to provide reasons when required; (iv) improper reliance on ex parte contact; and (v) abuse of authority.

The special committee held a hearing on November 8 and 9, 2006, at which testimony -- including testimony by the district judge -- was heard, and exhibits were introduced. At the conclusion of the hearing, the committee advised the district judge that it was persuaded that there was no basis for finding judicial misconduct with respect to many aspects of the complaint. The committee, however, also stated that it intended to investigate further whether the district judge had a pattern or practice of "failing to state reasons" when either prevailing law or a direction from the court of appeals in specific cases required him to do so, and whether -- if established -- such a pattern or practice would constitute judicial misconduct. **[Tr. 11/9/06, pp. 92-93.]**

Following the hearing, the committee decided to expand the scope of its investigation of the "reasons" issue and identified seventy-two additional cases that appeared to be relevant to the investigations. In a December 18, 2006 letter to the district judge, the committee described the expanded investigation and the additional cases it would be considering.

After sending this letter, the committee entered discussions with the district judge's counsel about "expediting" the investigation. The discussions resulted in the following acknowledgment from the district judge:

> I realize that my failure in some cases to adequately state my reasons for my decisions when this is required by either prevailing law or direction from the Court of Appeals causes additional expense and delay to the litigants, and, therefore, is a pattern and practice that the Committee has determined is misconduct because it is prejudicial to the effective and expeditious administration of the business of the courts. I hereby commit to use my best efforts to adequately state reasons when required in the future.[1]

Following this acknowledgment, the committee determined that it was appropriate to treat the expanded investigation as a separate complaint and to address it in a separate report. In that February 14, 2007 report, the committee "decided to accept the district judge's acknowledgment [of misconduct]. Based on that acknowledgment and on its own investigation, the Committee unanimously [found] that the district judge had a pattern and practice of not providing reasons when he was required to do so and that this pattern and practice constitutes misconduct." **[Special Committee Report at 7.]** The committee unanimously recommended a private reprimand as an appropriate sanction. **[Id. at 9.]** The committee found that a sanction short of a private reprimand was "not sufficient," because the conduct of the district judge was "manifestly prejudicial to the effective and expeditious administration of the business of the courts, was repeated and continued over a substantial period of time, caused significant harm to litigants, and wasted judicial resources."

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[1] The judge's acknowledgment is not a model of clarity. In particular, it appears to acknowledge only that the special committee has found his pattern and practice of not giving reasons to be misconduct.

[Id. at 9-10.] The committee found that a more severe sanction was not warranted "based on the [Judicial Conduct and Disability Act's] non-punitive, corrective purpose, on the Committee's determination that most of the allegations of the 2004 Complaint did not have merit, and on the district judge's acknowledgment of his misconduct . . . and his commitment to correcting that behavior in the future." **[Id. at 10.]** The Judicial Council's Order adopted the findings and recommendations of the special committee in toto.

DISCUSSION

In a March 26, 2007 letter, the original complainant sought review of the Judicial Council's Order, arguing that the sanction of a private reprimand was insufficient. Because we find that two issues raised by the complaint -- explained more fully below -- require the Judicial Council's Order to be vacated, and the case remanded for further consideration, we grant the petition.

First, we believe that the type of misconduct alleged in the complaint may not be cognizable under the Act and, therefore, requires further examination by the Judicial Council. A complaint alleging only conduct "directly related to the merits of a decision or procedural ruling" does not allege misconduct within the meaning of the Act. 28 U.S.C. § 352(b)(1)(A)(ii). The misconduct procedure is not designed as a substitute for, or supplement to, appeals or motions for reconsideration. Nor is it designed to provide an avenue for collateral attacks or other challenges to judges' rulings. Id.; Implementation of the

Judicial Conduct & Disability Act of 1980, A Report to the Chief Justice, 239 F.R.D. 116, 239-40 (Sept. 2006) ("Breyer Committee Report").

This principle is of critical importance.[2] The Act is intended to further "the effective and expeditious administration of the business of the courts." It would be entirely contrary to that purpose to use a misconduct proceeding to obtain redress for -- or even criticism of -- the merits of a decision with which a litigant or misconduct complainant disagrees. Adjudication is a self-contained process governed by extensive statutory provisions and rules of procedure. Inserting misconduct proceedings into this process would cause these provisions and rules to be far less "effective" and "expeditious." Moreover, allowing judicial decisions to be questioned in misconduct proceedings would inevitably begin to affect the nature of those decisions and would raise serious constitutional issues regarding judicial independence under Article III of the Constitution. Judges should render decisions according to their conscientiously held views of prevailing law without fear of provoking a misconduct investigation. Indeed, for these very reasons, judges have absolute immunity from civil liability for their decisions, Pierson v. Ray, 386 U.S. 547, 553-54 (1967), a principle fully applicable to misconduct proceedings.

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[2] This district judge has not petitioned for review and thus has not argued to the Committee the issues discussed. However, given that the misconduct procedure is largely administrative and inquisitorial, the Committee has discretion to follow the mandates of the Act rather than apply ordinary waiver principles.

The present matter involves a reprimand for decisions rendered without giving a statement of reasons. The failure of a judge to give reasons for a decision is, in our view, a merits issue regarding that decision. The merits of a decision and the reasons given or not given for it are often inseparable. For example, litigants seeking to overturn a decision often argue that the decision violates existing law because inadequate reasons have been given. United States v. Hirliman, 503 F.3d 212, 213 (2d Cir. 2007). If an appellate court finds that claim to be correct, the decision will generally be vacated and the case remanded for further proceedings that may result in a different outcome. Id. at 215. However, it is often the case that even when a statement of reasons is generally required, the reasons for a particular decision are entirely obvious on the record and would not benefit from an explicit recitation by the judge. United States v. Travis, 294 F.3d 837, 841 (7th Cir. 2002) ("[W]e shall uphold a sentence imposed with an incomplete statement, provided that a more than adequate foundation in the record supports the district court's findings.") (internal citation and quotation marks omitted). Given this context, the giving or not giving of reasons for a particular decision, like the reasons themselves, should not be the subject of a misconduct proceeding. We have concluded that misconduct complaints regarding the failure to give adequate reasons for a particular decision are, absent more, not cognizable under the Act.

The Judicial Council appears to have recognized this issue

by restricting its consideration to whether the district judge had engaged in, and had acknowledged, a "pattern and practice" of not giving reasons for his decisions when required to do so by prevailing law or by the direction of the court of appeals in particular cases.

We agree that a judge's pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct. However, the characterization of such behavior as misconduct is fraught with dangers to judicial independence. Therefore, a cognizable misconduct complaint based on allegations of a judge not following prevailing law or the directions of a court of appeals in particular cases must identify clear and convincing evidence of willfulness, that is, clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law.

We have concluded that this standard is necessary to ensure that misconduct proceedings do not intrude upon judicial independence by becoming a method of second-guessing judicial decisions. For example, every experienced judge knows of cases where the circumstances justifiably called for a decision that was superficially at odds with precedent. This is because although prevailing legal standards have large areas of clarity, litigation often involves the borders of those areas. Breathing room -- something more than a comparison of a judge's ruling with

a special committee's or judicial council's view of prevailing legal standards -- must therefore be afforded. This standard, requiring clear and convincing evidence of an arbitrary and intentional departure from, or willful indifference to prevailing law, provides that breathing room.

In the present case, the Judicial Council made no express finding of willfulness, and the district judge's letter also fails to admit willfulness expressly. Therefore, we conclude that we must return this matter to the Judicial Council of the Ninth Circuit for further consideration of the facts of this case under the above-articulated standard. Great care must be taken in finding clear and convincing evidence of willfulness. To the extent that such a finding is based simply on a large number of cases in which reasons were not given when seemingly required by prevailing law, the conduct must be virtually habitual to support the required finding. However, if the judge has failed to give reasons in particular cases after an appellate remand directing that such reasons be given, a substantial number of such cases may well be sufficient to support such a finding. Hirliman, 503 F.3d at 216-17.

The second issue with which we are concerned is the sanction imposed in this matter. The judge in question has very recently been publicly sanctioned by the same Judicial Council in a decision affirmed by this Committee. In affirming that decision, we noted that the judge had persistently denied an impropriety in the face of overwhelming evidence of an ex parte contact. We

find that history to be relevant to the determination of an appropriate sanction. Morever, the conduct alleged here, if found willful, is very serious indeed. A private reprimand for such conduct in the wake of a previous public remand for other misconduct is not a sanction commensurate with the totality of recent misconduct by this judge. Therefore, if the Council finds willfulness, it should consider a more severe sanction, such as a public censure or reprimand and an order that no further cases be assigned to the judge for a particular period of time.

CONCLUSION

For the reasons discussed above, we grant the petition for review.

Respectfully Submitted,

Hon. Ralph K. Winter, Chair
Hon. Pasco M. Bowman II
Hon. Carolyn R. Dimmick*
Hon. Dolores K. Sloviter
Hon. Joseph A. DiClerico, Jr.

* Judge Dimmick has not participated in this proceeding, having concluded, in her discretion, that the circumstances warranted her disqualification. See Rule 25(a) of the Draft Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364, current working draft *available at* http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html.

Exhibit BB.e

Attachment CcdOrder.pdf to email of Jan. 2, 2017 (Exhibit BB, *supra*).

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

_____

C.C.D. No. 10-01

_____

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

_____

PROCEEDING IN REVIEW OF THE MEMORANDUM OPINION
AND ORDER OF THE JUDICIAL COUNCIL OF
THE NINTH CIRCUIT J.C. Nos. 07-89000 and 07-89020

_____

MEMORANDUM OF DECISION

_____

(Filed April 12, 2010)

Present: Judges John M. Walker, Jr., Chair, Joseph A. DiClerico, David M. Ebel, James E. Gritzner, Thomas F. Hogan, Eugene E. Siler, Jr., Dolores K. Sloviter

This matter is before the Judicial Conduct and Disability Committee on the complainant's petition for review of a November 10, 2008, order of the Ninth Circuit Judicial Council dismissing two complaints, 07-89020 and 07-89000, filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364. Complaint 07-89020 alleges that District Judge Manuel L. Real[1] committed misconduct by failing in a number of instances to provide reasons

[1]In its November 10, 2008, order, the Judicial Council determined, under its former rules, that it would disclose the subject judge's name "provided that the . . . Judge consents." On December 12, 2008, it proceeded with that disclosure, inserting Judge Real's name in the order.

for his judicial rulings. Complaint 07-89000 alleges that, in a single civil case, Judge Real committed misconduct by disobeying an appellate mandate. This is the complainant's second petition for review as to complaint 07-89020. *See* 28 U.S.C. § 357(a) and Rule 21(b)(1)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, 248 F.R.D. 674 (U.S. Jud. Conf. 2008). In *In re* Memorandum of Decision, 517 F.3d 558, 559-560 (U.S. Jud. Conf. January 14, 2008), we vacated an earlier Council order on that complaint and remanded the matter to the Council. On remand, the Council reassigned the complaint to the special committee that had originally examined it, and assigned complaint 07-89000 to the same body. The special committee recommended that both complaints be dismissed, and the Council, in the order here at issue, adopted that recommendation. We approve the Council's order.

Earlier developments regarding complaint 07-89020 are chronicled in detail in *Memorandum of Decision*, 517 F.3d at 558-562, and are here summarized only as relevant to our disposition of the present petition. In its original investigation of the complaint, the special committee recommended a finding of misconduct and a private reprimand. The Ninth Circuit Judicial Council concurred, and its March 2007 order imposing that sanction became the subject of the complainant's first petition for review. Although the first petition argued that misconduct had been rightly found (albeit deficiently sanctioned), we

concluded that a failure by a judge to state reasons for the judge's judicial decisions could be misconduct only if the failure was wilful — a finding not evident from the Council's order. *Id.* at 562. Remanding, we apprised the Council that a finding of wilfulness would require "clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or wilful indifference to, that law." *Id.* We further explained as follows:

> To the extent that such a finding is based simply on a large number of cases in which reasons were not given when seemingly required by prevailing law, the conduct must be virtually habitual to support the required finding. However, if the judge has failed to give reasons in particular cases after an appellate remand directing that such reasons be given, a substantial number of such cases may well be sufficient to support such a finding.

517 F.3d at 562 (citation omitted).

On remand, the special committee filed a new report in which it applied the wilfulness standard we had set forth in the remand order. Although the special committee expressed concern about the conduct at issue, it found that the record as to each complaint did not offer clear and convincing evidence of misconduct. Special Committee Report at 39. As to complaint 07-89020, the special committee found no single instance in which Judge Real's failure to state reasons was wilful within the meaning of our instructions. *Id.* at 12-35. In addition, it found neither (1) a "virtually habitual" failure to give reasons,

nor (2) a "substantial" number of cases in which such failure occurred after a remand that had, in the same or a similar case, directed Judge Real to give reasons. *Id.* at 23-25. Regarding the case at issue in complaint 07-89000, the special committee found no failure to state reasons and no other judicial misconduct. *Id.* at 36.

Adopting the special committee's findings and report, the Judicial Council dismissed the complaints. Order at 2. Like the special committee, however, the Council expressed concern about the conduct in question. The Council was "troubled by the District Judge's failure in many cases to give reasons for his rulings where the law requires that reasons be given, and by the District Judge's obduracy in implementing many directives from the appellate court." *Id.* at 3. That such conduct "was not found to be 'virtually habitual' or . . . found in a 'substantial number' of similar cases," the Council concluded, "in no way lessens the importance of and the need to give reasons for a decision when required by law." *Id.*

In his petition challenging the Judicial Council's order, the complainant argues that the Council's application of the terms "substantial" and "habitual" was misguided. He contends, in substance, that the special committee's case-by-case analysis of the record should be disregarded in favor of his own characterizations — for example, that "[t]he enormous number of cases in which the Judge refused to give reasons . . . is proof

of misconduct, and the misconduct is habitual." Also, he asserts that the Council improperly limited the types of failure-to-give-reasons cases that could, if "substantial" in number, establish wilfulness.

DISCUSSION

In reviewing the actions of the Judicial Council, we defer to its findings, overturning them only if they are clearly erroneous. *In re* Memorandum of Decision, 517 F.3d 563, 569 (U.S. Jud. Conf. January 14, 2008). Having reviewed the record and considered the petition, we discern no clear error in the Council's factual findings on remand, and no error in the Council's application of the standard set forth in our previous order. In contrast to the complainant's bare assertions, the special committee made an individualized assessment of 38 cases[2] in which Judge Real arguably had failed to give reasons for his judicial acts. Special Committee Report at 13. In each instance it examined Judge Real's order or opinion, along with any context

[2]The complainant submitted with his petition for review a Ninth Circuit order issued after his complaints were dismissed. Although this order was not presented "in the course of the proceeding before the judicial council or its special committee" and for that reason need not be considered by this Committee, *see* Rule 22(b), we will exercise our discretion to take notice of it because it is a reported court decision of which we could take independent notice. The order in question vacated a sentence imposed by Judge Real and remanded the case for resentencing by a different judge. United States v. Murillo, 548 F.3d 1256 (9th Cir. 2008). It contains nothing that would alter the outcome of our review, and we find no "extraordinary circumstances" that would allow us to conduct our own investigation in this matter. *See* Rule 21(d).

of which he would have been aware, for clear and convincing evidence of a failure that meets our test of wilfulness. The special committee considered not only whether Judge Real had failed to provide reasons, but also whether this failure reflected an arbitrary and deliberate disregard of a requirement rooted in either an appellate mandate or prevailing legal standards. *Id.* at 12-36. And, far from narrowing the range of failure-to-give-reasons cases actionable in "substantial number," the special committee construed this category as broadly as our instructions would allow, assessing not only whether a failure to give reasons occurred in a case that had been remanded for that purpose, but also whether one occurred in later cases *of the same type* as such a case. *Id.* at 7.

In applying our standard to the matters it had previously screened for misconduct, the special committee employed, in essence, three exclusionary criteria: (1) a statement of reasons that is present but inadequate will not, without more, trigger a finding of misconduct for failure to give reasons, *id.* at 19, 28; (2) no finding of misconduct can be made if the prevailing legal standard or appellate directive does not articulate a statement-of-reasons requirement clearly and unambiguously, *id.* at 17, 26; and (3) even where a failure to give reasons is found, it cannot be considered wilful if a justification for the judge's action is discernible in the record, "thus suggesting that [the judge] likely assumed that [the judge's] reason was sufficiently

understood by the parties," *id.* at 23. These criteria, we find, comport with our guidance that evidence of wilfulness must be clear and convincing, and that "great care" must be taken in finding it. See *Memorandum of Decision*, 517 F.3d at 562.

The special committee identified eight criminal cases, spanning twenty years, in which Judge Real failed to give reasons where they were required to be given. It determined that these failures did not individually reflect wilfulness because, in each case, a justification for the judge's action could be discerned in the record. To be sure, the special committee deemed the failures "clearly in violation of an established requirement" and thus "arguably deliberate and arbitrary." *Id.* at 22-24. It concluded, however, that eight criminal cases over a twenty-year period do not amount to "a 'substantial number'" warranting a finding of misconduct. *Id.* The special committee next found that four civil cases it had identified were too few to be "substantial" in number, *id.* at 24-25, and were each distinguished by either a statement of reasons (albeit an insufficient one) or the absence of a clear requirement that reasons be given. *Id.* at 24-34. In sum, then, the special committee — and, likewise, the Council — found no misconduct as to either complaint 07-89020 or 07-89000. Order at 3.

The careful analysis embodied in both the Council order and the special committee report was faithful to our instructions on remand. Approving the Council's order as to both complaints, we

deny the petition. Yet we share the Council's concerns about the conduct at issue. We, too, are troubled by the instances in which Judge Real failed to give reasons where the law requires that they be given, and in which he acted obdurately regarding appellate directives. The Council, unable to find wilfulness as to any one of those instances, rightly proceeded to assess whether wilfulness was inferable from a pattern of them. But if Judge Real were to continue such conduct, a future Council would no longer need to seek a pattern: this Memorandum of Decision places Judge Real on notice that a judge must state reasons for any judicial decision for which the law requires the giving of reasons.[3] In view of this notice, any future instance in which Judge Real fails to give reasons as required by law may be "clear and convincing evidence" of his "arbitrary and intentional departure from prevailing law based on his . . . disagreement with, or wilful indifference to, that law." See *Memorandum of Decision*, 517 F.3d at 562.

[3]Judge Real demonstrated that he knew of this concern when, in a February 8, 2007 letter to the special committee's presiding officer, he pledged to use his best efforts to state reasons when required to do so. See Special Committee Report at 4-5. No such efforts were evident, however, in an order he issued several months later, in which he refused to certify a settlement class. That order, the Ninth Circuit found, offered "almost no analysis" and thus was unentitled to "the traditional deference given to class certification decisions." Narouz v. Charter Communications, LLC, 591 F.3d 1261, 1266-67 (9th Cir. 2010). The court ordered the case reassigned on remand to a different judge.

CONCLUSION

For the reasons set forth above, we deny the petition for review.

Respectfully Submitted,

Hon. John M. Walker, Jr., Chair
Hon. Joseph A. DiClerico
Hon. David M. Ebel
Hon. James E. Gritzner
Hon. Thomas F. Hogan
Hon. Eugene E. Siler, Jr.,
Hon. Dolores K. Sloviter

Exhibit CC

Email to F. Pagano, Jan. 9, 2017.

- **Attachment PaganoLetter10.pdf —** Included in this JCApx at Exhibit CC.a, *infra*.
- **Attachment PetWritTable-Unabridged-JUXTAPOSED.pdf —** Included in this JCApx in final form at Exhibit CC.c, *infra*.

Subject: Yet more information to aid Judicial Council
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 01/09/17 09:00
To: Florence_Pagano@ca1.uscourts.gov, "Linda L. King" <llkforms@aol.com>

Ms. Pagano -

Please see attached "PaganoLetter10.pdf", and additional attachment thereto.

I am also US-mailing you hardcopy, as always.

- Walter Tuvell

Attachments:

PetWritTable-Unabridged-JUXTAPOSED.pdf	509 KB
PaganoLetter10.pdf	218 KB

Exhibit CC.a

Attachment PaganoLetter10.pdf to email of Jan. 9, 2017 (Exhibit CC, *supra*).

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com
Judicial Misconduct Complaints №01-16-90036,01-16-90041

To:[1]
Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

January 9, 2017

Dear Ms. Pagano:

This communication (letter and attachment) continues the series I've been sending you (in your role as Asst. Cir. Exec for Legal Affairs for the 1st Circuit), per your instruction to "[i]nclude … any information that would help an investigator check the facts" (original form-letter Complaints of Judicial Misconduct I filed on Sep. 12, 2016). As always, this letter (and attachment) must of course be promptly transmitted to all appropriate members of the Judicial Council.

The attachment hereto (PetWritTable-Unabridged-JUXTAPOSED.pdf) provides a **visually enhanced parallel juxtaposition of verbatim excerpts** from the three main documents: Opinion ⇄ PSOF ⇄ DSOF. Going forward, this *absolutely guarantees,* even moreso than heretofore (if that can be possible), that nobody can claim they weren't "appropriately/sufficiently notified/educated" about this matter (namely, at Summary Judgment, the District and Appellate joint/shared Opinion falsely/illegally discredited PSOF, and falsely credited DSOF).

Sincerely yours,

Walter E. Tuvell

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1 • Delivered by both email and U.S. mail.

Exhibit CC.b

PSOF-Exclusion Table (Unabridged) (final form) — reproduced from PetWritCert+Apx.pdf PetApx ℘86–90.

Included in this JCApx to aid interpretation of Exhibit CC.c, *infra*.

NOTE: *The tags Ⓐ–Ⓧ defined in this Unabridged PSOF-Exclusion Table (here, ReqApx ℘86–90) provide a cross-correlation with the district court's opinion (ReqApx ℘4–38) and with the PSOF itself (ReqApx ℘48–84), and also with the DSOF (not included in ReqApx).*

PSOF-Exclusion Table (Unabridged)[α]

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓐ Knabe Excel graphics episode	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘1–2 = ReqApx ℘48–50, ¶1–4. Credit DSOF ℘2¶7.
Ⓑ Feldman refuse three-way meeting	Op ℘3 = ReqApx ℘6–8 *(silent)*. **Dis**credit **PSOF** ℘2,5,18 = ReqApx ℘49–50,53–54,70–71, ¶5–6,17,59. *Credit DSOF ℘2 (silent).*
Ⓒ Knabe yelling incident	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘2–3,5,15–16 = ReqApx ℘49–50,53–54,66–69, ¶7,17,50. Credit DSOF ℘2–3¶8.
Ⓓ Feldman demotion	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘3–5,18 = ReqApx ℘50–54,71–71, ¶8,11–16,58–59. Credit DSOF ℘3–4¶9–13.
{ Went to HR — here's where things really "went south." }	

α • Abridged version at main Petition ℘29. *"Warning":* This rather complicated Table almost certainly contains one-or-more (isolated/trivial/inadvertent/immaterial) typographical errors.

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓔ Feldman "Dear Dr. Tuvell" email	Op ℘3 = ReqApx ℘6–8 *(silent)*. **Discredit PSOF** ℘5,16 = ReqApx ℘53–54,67–69, ¶18,51. Credit DSOF ℘4 *(silent)*.
Ⓕ Feldman transition status reports	Op ℘3 = ReqApx ℘6–9. **Discredit PSOF** ℘5–8 = ReqApx ℘53–58, ¶19–23,26. Credit DSOF ℘4¶14–16.
Ⓖ Feldman impossible project planning	Op ℘4 = ReqApx ℘8–9 *(silent)*. **Discredit PSOF** ℘7–8 = ReqApx ℘55–58, ¶24–25. Credit DSOF ℘4¶16.
Ⓗ Due "sham"[β] investigation	Op ℘4 = ReqApx ℘8–9. **Discredit PSOF** ℘25–26 = ReqApx ℘79–82, ¶82–84. Credit DSOF ℘4–5¶17–19.
Ⓘ Refusal to separate Tuvell from Feldman (many times)	Op ℘4,8 = ReqApx ℘8–9,13–14. **Discredit PSOF** ℘3,19–20,23–24 = ReqApx ℘50–52,71–74,77–79, ¶9–10,61–62,64,75. Credit DSOF ℘7¶30–31.

β • Like *everything* else in this case and in this Table, Plaintiff has much *direct evidence* for the "sham" nature of IBM's investigations (items Ⓗ, Ⓚ in this Table). Additionally, Plaintiff plans to present an extensive Expert Report[†] testifying to the investigations' "shamness." {† Not included in the Petition's ReqApx (lack of relevancy to the Question Presented by the Petition).}

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓙ "Bad" emails; e.g., *"ad hominem"* and esp. "lazy" letter	Op ℘3–5 = ReqApx ℘6–10. **Discredit PSOF** ℘14–16 = ReqApx ℘65–69, ¶46,50,52. Credit DSOF ℘5¶22–23.
Ⓚ Mandel C&A; Open Door complaints; "sham"*fβ supra* investigation	Op ℘6 = ReqApx ℘10–12. **Discredit PSOF** ℘8–10,14–17,24–27 = ReqApx ℘57–61,65–70,78–83, ¶28–29,32,55–56,76,78–81,85,87–89. Credit DSOF ℘6–7¶27–29.
Ⓛ Pseudo-yelling; Feldman forbid work-time for complaint	Op ℘4 = ReqApx ℘8–9 *(silent)*. **Discredit PSOF** ℘8,15 = ReqApx ℘57–58,66–67, ¶27,49. Credit DSOF ℘5 *(silent)*.
Ⓜ Feldman Formal Warning Letter	Op ℘5 = ReqApx ℘9–10. **Discredit PSOF** ℘15 = ReqApx ℘66–67, ¶50. Credit DSOF ℘6¶24–25.
Ⓝ Fainting	Op ℘5 = ReqApx ℘9–10 *(silent)*. **Discredit PSOF** ℘8,15,22 = ReqApx ℘57–58,66–67,75–77, ¶28,50,68. Credit DSOF ℘6¶25 *(silent)*.
Ⓞ *"Raison d'être"* (no third-party complaints)*γ*	Op ℘6 = ReqApx ℘10–12 *(silent)*. **Discredit PSOF** ℘24 = ReqApx ℘78–79, ¶77. Credit DSOF ℘6 *(silent)*.

γ • Mandel/IBM's claim that "IBM does not accept third-party complaints" is either (i) *false* or (ii) *illegal* (per ADA, PetAdd ℘5,

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓟ STD leave; Mandel refusal to investigate	Op ℘5,10 = ReqApx ℘9–10,16–17. **Dis**credit **PSOF** ℘8,12–14,16,26–27 = ReqApx ℘57–58,62–66,67–69,81–83, ¶28,41,45,53,86. Credit DSOF ℘6,8,12¶26,34,55.
Ⓠ MTRs; false interpretations[δ]	Op ℘5–9 = ReqApx ℘9–16. **Dis**credit **PSOF** ℘21–23 = ReqApx ℘74–78, ¶66–72. Credit DSOF ℘7–11¶32–33,35–52.
Ⓡ Rescind physical & electronic access	Op ℘6 = ReqApx ℘10–12 *(silent)*. **Dis**credit **PSOF** ℘13–15 = ReqApx ℘63–67, ¶45,47–48. Credit DSOF ℘12¶53–54.
Ⓢ Feldman misclassify work-at-home days	Op ℘7 = ReqApx ℘12–13 *(silent)*. **Dis**credit **PSOF** ℘8–9 = ReqApx ℘57–59, ¶30. Credit DSOF ℘9 *(silent)*.
Ⓣ Feldman & Kime sabotage transfer	Op ℘9–10 = ReqApx ℘14–17. **Dis**credit **PSOF** ℘9–13,16,23 = ReqApx ℘58–65,67–69,77–78, ¶31,33–40,42–44,54,73–74. Credit DSOF ℘12–15¶57–66,68,70.

"oneself or others") — hence, either (i) *pretextual* or (ii) *direct* evidence of wrongdoing. This is one-of-many-*many* items towards which the lower courts *steadfastly maintained a "blind eye."*[†] {† This is not the meaning signified by the blindfold on the classic image of Lady Justice (Latin *iūstitia,* justice/fairness/equality/righteousness) since ancient Roman times!}

δ • See ReqApx ℘12*f*4, ℘15*f*8.

Issues/Facts	Lower Courts' *Faux* "Findings"
ⓤ Fake offer of accommodation (Metzger)	Op ℘9–10 = ReqApx ℘14–17. **Dis**credit **PSOF** ℘18–21 = ReqApx ℘70–74, ¶60,63,65. Credit DSOF ℘14–15¶67,69,71–72.
ⓥ LinkedIn; EMC$^{\varepsilon}$	Op ℘10–11 = ReqApx ℘16–18. **Dis**credit **PSOF** ℘17 = ReqApx ℘69–70, ¶56. Credit DSOF ℘16¶74–77.
ⓦ Imprivata$^{f\varepsilon\ supra}$	Op ℘10–11 = ReqApx ℘16–18. **Dis**credit **PSOF** ℘17,27–28 = ReqApx ℘69–70,82–84, ¶56–57,90–91. Credit DSOF ℘16–17¶73,78–81.
ⓧ Termination$^{\zeta}$	Op ℘11 = ReqApx ℘17–18. **Dis**credit **PSOF** ℘17–18 = ReqApx ℘69–71, ¶57. Credit DSOF ℘17¶79.

ε • These two items (ⓥ, ⓦ) were "made-up" "issues" by IBM, serving no purpose other than *harassment* — hence *falsely* leading *directly* to the termination (item ⓧ, see $f\zeta$ *infra*).

ζ • Besides illicitly employing: (i) their *PSOF-Exclusion* tactic to *wholly avoid* addressing termination (this ⓧ entry); *and* (ii) their *QDI-Exclusion* tactic to wholly avoid the termination issue (see Petition ℘27f41, and PetAdd ℘19); the lower courts *also additionally* (iii) *conflicted* with the Ninth Circuit on ADA *substantive-law* regarding "Manifestation-of-Disability (MOD)" termination (see PetAdd ℘19).

Exhibit CC.c

Attachment PetWritTable-Unabridged-JUXTAPOSED.pdf (final form) to email of Jan. 9, 2017 (Exhibit CC, *supra*).

See Exhibit CC.b, *supra,* to aid interpretation.

PSOF-Exclusion Table (Unabridged) — JUXTAPOSED

The following table is a derivation ("visual enhancement", for improved ease-of-readability) of our original PSOF-Exclusion Table (Unabridged, at PetWritCert ReqApx ℘86–90, already entered into evidence to the Judicial Council). This new, expanded, version of the table is obtained by inserting (and thereby *juxtaposing, in syzygy*) *parallel verbatim excerpts*[†,‡] from the three key documents in question:

- District Court's Opinion (**"Op"**, Dkt №94), also adopted by the Appellate Court.
- Plaintiff's Statement of Facts (**"PSOF"**, Dkt №83).
- Defendant's Statement of Facts (**"DSOF"**, Dkt №74).

Thus, the *substantive content* of this version of the table is identical to that of the original (which already goes *above-and-beyond* the D.Mass. Local Rule LR 56.1, which incorporates *no provision/requirement* for "bilateral numbered page/section/paragraph PSOF ⇄ DSOF rebuttal/reference/comparison;" see also the *Ad Nauseam* section of PetWritCert, ℘36). But the present version has the "friendliness" advantage of **presenting that (same) content in a more direct/"visual" manner:** proving "immediately" **that the Opinion uniformly falsely lies/discredits/ignores PSOF, and falsely lies/credits DSOF — 180° the wrong way around, thereby falsifying all disputed issues of material fact — resulting in blatant/massive abridgment of Constitutional Rights (Due Process, Equal Protection), Judicial Misconduct, Obstruction of Justice and other Criminal Laws, etc.**

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† · Conventions: (i) Page references refer to original court-docketed documents (not to their reformatted versions at PetWritCert ReqApx ℘4–38,48–84). (ii) **Internal references/citations omitted.** (iii) Emphasis added. (iv) Annotations are indicated by curly parentheses/braces with wavy underlining "{"…"}" (square parentheses/brackets "["…"]" occur in the original documents themselves). (v) Paragraph/page breaks are not indicated in the excerpts. (vi) Star-ellipsis "∗∗∗" indicates gaps, which may span paragraphs/pages (dot-ellipsis "…" occurs in the original documents). (vii) **"䷾{…} (I Ching hexagram, standstill/obstruction/decline/disorder) indicates "false/misleading lie/half-lie/omission/'spin' {with comment}".**

‡ · The exercise of producing this enhanced/juxtaposed version of the table has unmasked the following (trivial, bookkeeping/typographical) errors in the original version (as predicted at PetWritCert ReqApx ℘86fα [and these corrections have now been incorporated into the latest versions of the original table]): (i) In Ⓐ: cite PSOF ¶2; don't cite PSOF ¶5. (ii) In Ⓓ: cite PSOF ¶11,59. (iii) In Ⓕ: don't cite Op ℘4. (iv) In Ⓖ: don't cite PSOF ¶26. (v) In Ⓘ: cite Op ℘4; cite PSOF ℘3¶9–10. (vi) In Ⓙ: cite Op ℘3; don't cite DSOF ℘6¶24–25. (vii) In Ⓚ: cite PSOF ¶89. (viii) In Ⓜ: don't cite PSOF ℘8¶28; cite ℘15¶50; cite DSOF ¶24. (ix) In Ⓝ: cite PSOF ℘15¶50. (x) In Ⓞ: cite DSOF ℘6. (xi) In Ⓟ: cite Op ℘10; cite DSOF ℘12¶55. (xii) In Ⓠ: don't cite PSOF ℘9¶31; cite PSOF ℘21–23. (xiii) In Ⓡ: cite PSOF ¶47. (xiv) In Ⓢ: cite DSOF ℘9. (xv) In Ⓦ: cite Op ℘10; cite PSOF ¶56; cite DSOF ℘16¶73,℘17¶80–81. (xvi) In Ⓧ: cite DSOF ¶80–81.

Issues/ Facts	Lower Courts' Op Faux "Findings"	Op Falsely Discredit PSOF (MUST Be Credited)	Op Falsely Credit DSOF (MUST Be Discredited)
Ⓐ Ⓐ **Knabe** Ⓐ **Excel** Ⓐ **graphics** Ⓐ **episode** Ⓐ	Op ℘3: On May 18, 2011, Feldman ▤{falsely} reported to Tuvell that Knabe had ▤{falsely} expressed concern that Tuvell had not completed a work assignment on time.	**PSOF** ℘1–2¶1–4: On or about May 18, 2011, Mr. Knabe **{falsely}** asserted to Mr. Feldman, in Mr. Tuvell's absence, that Mr. Tuvell had failed to produce that day certain Microsoft Excel graphics as instructed. **These assertions were entirely false.** In fact, Mr. Knabe had not instructed Mr. Tuvell to produce any work at all that day, much less produce any Excel graphics. IBM has taken the position that the May 18, 2011 incident was one of the justifications for the demotion/reassignment of June 10, 2011 {see Ⓓ}. The assertion that Plaintiff was even asked to produce Excel graphics is **patently pretextual,** given that **both** Mr. Feldman and Mr. Knabe ***knew*** that Mr. Tuvell did not even use or have a copy of Excel or the Microsoft operating system, but instead he used different more advanced software {Linux-based} tools for all his work at IBM. Defendant's assertions of what happened on May 18, 2011 are **inconsistent,** and therefore **pretextual,** as on other occasions, Plaintiff's alleged misconduct was	DSOF ℘2¶7: On or about May 18, 2011, Mr. Knabe ▤{falsely} advised Mr. Feldman that Plaintiff had failed to complete a work assignment in a timely fashion. Mr. Feldman ▤{falsely} relayed Mr. Knabe's concern to Plaintiff, who ▤{correctly and properly} described Mr. Knabe as a "liar."

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Ⓐ **Knabe** Ⓐ **Excel** Ⓐ **graphics** Ⓐ **episode**		identified as that he was working "too slowly."	

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Ⓑ Ⓑ **Feldman** Ⓑ **refuse** Ⓑ **three-way** Ⓑ **meeting** Ⓑ	Op ℘3: *{silent}*	**PSOF** ℘2,5,18¶5–6,17,59: In response to Mr. Knabe's May 18, 2011 complaints {Ⓐ}, Plaintiff **denied any wrongdoing,** sought more detail concerning his alleged misconduct, and requested a **three-way meeting** amongst the three individuals, **multiple times,** to establish what exactly happened and to clear the air. Mr. Feldman **repeatedly denied** Plaintiff's requests to have a three-way meeting {to clear the air}, **refused to investigate** the **false assertion** about Plaintiff's work performance, and **refused to respond to the requests for more information.** While Mr. Feldman claims he rejected the option of a three-way meeting for the reason that it would create an unhealthy "habit," he had in fact conducted just such a three-way meeting shortly before, in March 2011, concerning a different issue. ∗∗∗ Finally {in the June 12, 2011, email mentioned in ©}, Tuvell noted that his multiple requests for three-way meetings with {Feldman and} Knabe have been refused.	DSOF ℘2: *{silent}*

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© **Knabe** © **yelling** © **incident** ©	Op ℘3: Then, on June 8, 2011, Knabe asked Tuvell ▤{falsely} about an outstanding assignment in front of several other employees. During this conversation, both Tuvell ▤{in self-defense} and Knabe ▤{offensively attacking Tuvell} were heard to raise their voices.	**PSOF** ℘2–3,5,15–16¶7,17,50: On June 8, 2011, Mr. Knabe **{offensively attacked/}yelled loudly** at Mr. Tuvell in front of co-workers, **{falsely}** asserting that Mr. Tuvell failed to produce certain specified work items that day as ordered. **These assertions were entirely false.** In fact, Mr. Knabe had ordered Mr. Tuvell to produce certain **different** specified work items that day, and Mr. Tuvell **had indeed produced** these latter work items that day, as Mr. Knabe was **already fully aware.** On June 10, 2011, Mr. Knabe acknowledged in writing that he had indeed raised his voice at Mr. Tuvell. *** On June 12, 2011, Tuvell complains to Feldman in his weekly report about Mr. Knabe's "harassment and yelling," an "'illegal' adverse job action (in the IBM sense, and perhaps even in the civil sense)." Tuvell further complained about the "public humiliation of unilateral removal from the most excellent high-profile position on Wahoo to what seems … a highly symbolic deportation to Siberia." *** … Mr. Knabe, who had not	DSOF ℘2–3¶8: On June 8, 2011, Mr. Knabe asked Plaintiff ▤{falsely} about an outstanding work assignment in front of other employees and, according to Plaintiff's colleague Steve Lubars, who witnessed the incident, in the ensuing discussion voices were raised by both Plaintiff ▤{in self-defense} and Mr. Knabe ▤{offensively attacking Plaintiff}.

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© **Knabe** © **yelling** © **incident** ©		filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Mr. Tuvell.	

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Ⓓ ⓓ **Feldman** ⓓ **demotion** ⓓ	Op ℘3:	**PSOF** ℘3–5,18¶8,11–16,58–59:	DSOF ℘3–4¶9–13:
	Seemingly as a result of these two incidents {Ⓐ,Ⓒ}, on June 10, 2011, Feldman ▤{falsely} told Tuvell that he did not believe that Knabe and Tuvell could continue to work together effectively ▤{even though he knew Knabe was solely the unprovoked aggressor}. Feldman subsequently {later that same day} ▤{falsely, unilaterally,} switched Tuvell to a different ▤{undesirable} project and, in turn, assigned another employee, Sujatha Mizar, who is Asian, female and younger than Tuvell, to work with Knabe. This transfer ▤{actually, "demotion"} did not result in any change to Tuvell's pay or his {"formal," "band-level"} rank within the company ▤{though it did measurably diminish his role/position}. Nevertheless, Tuvell contends ▤{reasonably} that Knabe's conversation with Feldman on May 18, 2011 ▤{actually, Tuvell was referring to the whole sequence of events, Ⓐ–Ⓓ} constituted discrimination based on age, sex and race ▤{based to its whole-cloth falsity/pretextuality}.	Plaintiff was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Mr. Feldman, and IBM acknowledges a lack of performance issues prior to May 18, 2011. Mr. Feldman regarded Plaintiff's work in the Performance Architecture area as competent and his interactions with others to be professional. ∗∗∗ On June 10, 2011, Plaintiff was subjected to an adverse job action, in that he was reassigned or **demoted** from performing the highest level ("lead") work within the Performance Architecture Group to the lowest. IBM {falsely} asserts that the job action was based on the May 18 and June 8 incidents {both of which were entirely/falsely provoked by Knabe and Feldman}. Mr. Feldman **{falsely}** assigned Mr. Tuvell to switch the **high-level** work role of Mr. Tuvell with the **low-level** work role of Ms. Sujatha Mizar, a **less qualified** female of	On June 9, 2011, Mr. Knabe ▤{falsely} told Mr. Feldman that he did not think he could have a good working relationship with Plaintiff. On June 10, 2011, Mr. Feldman ▤{falsely} advised Plaintiff that he did not believe that Mr. Knabe and Plaintiff could continue working effectively together on the Wahoo project that Mr. Knabe was managing. Therefore, Mr. Feldman ▤{falsely} assigned ▤{demoted} Plaintiff to a different project in place of another employee, Sujatha Mizar, and in turn assigned Ms. Mizar to work with Mr. Knabe on the Wahoo project. The switch did not result in any change in Plaintiff's pay or rank. Plaintiff claims that Mr. Knabe's decision to complain to Mr. Feldman about Plaintiff's work on May 18, 2011, ▤{were false and} constituted discrimination against Plaintiff based on his age, sex, and race because he believes▤{/knows} Mr. Knabe was lying about Plaintiff's work, which meant ▤{by reasonable belief based on pretextuality} that

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ⓓ **Feldman demotion** ⓓ		East Asian heritage. Mr. Tuvell was **decades older** that Ms. Mizar, who was well under forty, and he had **decades more relevant experience** for the position. Ms. Mizar had **no PhD,** while Plaintiff had one in Mathematics. Plaintiff was being paid approximately **$35,000 more** than Ms. Mizar. ∗∗∗ Plaintiff was working at a "Band 8" level, and Ms. Mizar was working at a "Band 7" level, and so the Mizar position was a "**lesser role.**" Plaintiff regarded his {now-former} Performance Architecture position on the "Wahoo" project to be a **very highly valued position.** He wrote, "I truly thought I was extremely fortunate to be in the best possible project at Netezza." Plaintiff noted that Mr. Feldman told him that it was a "plum" position, and that there was "**almost no other job like this** for a performance professional in the country." The June 10, 2011 reassignment {a.k.a. "transfer," **"demotion"**} meant that Plaintiff was **no longer doing highly significant research in an advanced development program that was unique to the industry,** but instead was	"something bigger" was "at play" and "it had to be illegal" ▤{there being no alternative viable reason, especially in view of Feldman/Knabe's adamant refusals of three-way meeting to work things out}. Plaintiff claims that Mr. Feldman's decision to have him and Ms. Mizar switch project responsibilities constituted discrimination based on Plaintiff's disability, age, sex, and race because Plaintiff believes ▤{knows, objectively} that Ms. Mizar, who is Asian, female, and younger than Plaintiff, is "far less qualified" than him. At the time, Plaintiff contended that ▤{if Feldman really needed to be replaced at all (which Plaintiff did not concede),} he instead should have been replaced with a colleague (Ashish Deb), who was male, over 40, and Asian ▤{and had a PhD, so was the only close comparitor in the group to Tuvell himself}.

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Ⓓ **Feldman** Ⓓ **demotion** Ⓓ		assigned **lower level work.** The reassignment to a lower position meant **lesser job opportunities in future,** and also by its {the demotion's} high visibility reflected what Plaintiff considered to be **public humiliation.** IBM's own policies considers an "undesirable reassignment" to be a **tangible adverse employment action.** The June 10, 2011 reassignment meant change of assigned work office from Cambridge to Marlborough, resulting in a much longer commute (15 miles vs. 45 miles), and which Tuvell regarded as a **less preferable location.** *** Before the Massachusetts Commission Against Discrimination, Defendant took the position that Plaintiff's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe." However, that is shown to be **pretextual** by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." *** Moreover, Plaintiff actively opposed	

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ⓓ **Feldman demotion** ⓓ ⓓ ⓓ ⓓ ⓓ ⓓ ⓓ ⓓ ⓓ ⓓ ⓓ ⓓ		the demotion. The May 18 and June 8 incidents were **not the true reasons** for the June 10, 2011 demotion/transfer. Mr. Feldman failed to take action to resolve any alleged difficulties involving Knabe and Tuvell. For example, Mr. Feldman refused to investigate, {refused multiple requests for three-way meetings with Mr. Knabe,} and refused to respond to Mr. Tuvell's repeated inquiries for more detail concerning his alleged misconduct.	

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{ Went to HR — here's where things really "went south." }

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Ⓔ Ⓔ **Feldman** Ⓔ **"Dear Dr. Tuvell"** Ⓔ **email** Ⓔ	Op ℘3: *{silent}*	**PSOF** ℘5,16¶18,51: On June 12, 2011, Feldman responded by email to Tuvell's June 12, 2011 email {see Ⓑ,Ⓒ}. After months of addressing Mr. Tuvell as the familiar "Walt" {solely}, Mr. Feldman addresses his June 12, 2011 e-mail with **stiff formality {indicating retaliation}** to "Dr. Tuvell." In that June 12, 2011 email, Mr. Feldman requires that all of Mr. Tuvell's further written and verbal communications with him must be made in the presence of, or copied to, Human Resources representatives**{"hyper-scrutiny", which is retaliatory}**. Mr. Feldman {falsely} states, "I go down this path regretfully. You have twice {false: Tuvell told him once, but then it was Feldman who proactively "quizzed him down" about it a second time} now made clear to me your history of suing {only by way of telling Feldman, as Feldman well knew, that "Tuvell knew what he was talking about," *not* "threatening to sue you and/IBM in any manner" (though even such a threat is *protected* by the ADA}	DSOF ℘4: *{silent}*

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Ⓔ **Feldman** Ⓔ **"Dear Dr.** Ⓔ **Tuvell"** Ⓔ **email** Ⓔ Ⓔ Ⓔ Ⓔ Ⓔ		{and Feldman in turn told Tuvell about his own history of suing (but Tuvell did not take that as a threat that Feldman/IBM might sue him)} when you feel you've been wronged in the office **{which is protected activity, i.e., cannot be used for retaliatory purposes}** and I see no choice."	

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Ⓕ Ⓕ **Feldman** Ⓕ **transition** Ⓕ **status** Ⓕ **reports** Ⓕ	Op ℘3: On June 14, 2011, Feldman sent Mizar and Tuvell an email asking for daily status reports detailing the transition tasks completed and raising any issues with regard to the shift in responsibilities. Mizar replied to the email with a brief status update, copying Tuvell and adding that Tuvell should "feel free to add anything" that Mizar "might have forgotten." The next day, Feldman clarified 𝌆{falsely} that he expected 𝌆{false/misleading: Feldman said he "asked you to provide [individually]," but that was false} a separate status report from both Tuvell and Mizar.	**PSOF** ℘5–8¶19–23,26: On June 14, 2011, Feldman wrote to Tuvell and Mizar **{jointly, not individually},** asking that they **{jointly, not individually}** provide Feldman with a brief email at the end of every business day detailing the transition of tasks between them that have been completed and providing alerts of any problem. On June 14, 2011, Mizar provided to Feldman a brief but complete status update of the transition, which was copied to Tuvell: 1) Finished transition of the Block IO tracing project. (Sujatha to Walter) 2) Finished transition of the WaltBar performance tool (Walter to Sujatha) Mizar's email further stated, "Walt — please feel free to add anything I might have forgotten.{"} {Tuvell, having nothing to add (because Mizar's report was accurate and complete, hence sufficient for all legitimate management oversight purposes), added nothing.} Despite the fact that the email from Mizar purported to {and did} de-	DSOF ℘4¶14–16: On June 14, 2011, Mr. Feldman sent both Plaintiff and Ms. Mizar an email asking that they submit a daily report on their transition work. While Ms. Mizar submitted a transition report to Mr. Feldman that day, Plaintiff did not. The next day, June 15, 2011, Mr. Feldman sent Plaintiff an email 𝌆{before the beginning of the work day} reiterating his request for a daily report and clarifying 𝌆{falsely} that he required 𝌆{false/misleading: Feldman falsely said he "asked you to provide [individually]"} a report from both Plaintiff and Ms. Mizar. In response, on June 15, 2011, 𝌆{in addition to sending the requested (regurgitated) report to Feldman,} Plaintiff sent several emails to Mr. Feldman, and Human Resources Specialists Kelli-ann McCabe and Diane Adams, complaining that Mr. Feldman's request that Plaintiff file a daily report constituted "blatant" and "snide harassment/retaliation," even though Mr. Feldman was also requiring Ms. Mizar to complete such a report

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Ⓕ **Feldman** Ⓕ **transition** Ⓕ **status** Ⓕ **reports** Ⓕ		scribe the transition status from the point of view of **both** Tuvell and Mizar, and despite the fact that Feldman **had *not* specified** that both Mizar and Tuvell were to each **{individually}** submit a separate (identical) report, Feldman **{falsely}** asserted that he had concluded that Plaintiff's failure to provide him a separate report regurgitating the same information found in Mizar's report to be inappropriate. On June 15, 2011, prior to the beginning of the day's normal work hours {such urgency not being supported by anything happening at work}, Mr. Feldman emailed a demand to Mr. Tuvell to submit a separate individual transition report, **falsely** stating that he had previously "asked you to provide … a report from each of you daily". On June 15, 2011, Tuvell replied to Feldman, and copied Ms. McCabe and Ms. Adams, stating that he did not provide a separate report because it would have been redundant, as he knew Mizar's report already contained everything that he would have reported. In this email, Tuvell complains of age and sex discrimination with respect to his re-	▤{false/misleading: Feldman didn't require Mizar to send individual/ separate reports"}. On June 16, 2011, Plaintiff sent several emails to Ms. Adams and Ms. McCabe complaining of harassment by Mr. Feldman based on Mr. Feldman's decision to change his assignment ▤{demotion} and his ▤{false} request that Plaintiff submit ▤{individual} weekly reports, and told Ms. Adams and Ms. McCabe that he believed it was infeasible for him to work with Mr. Feldman.

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Ⓕ **Feldman** Ⓕ **transition** Ⓕ **status** Ⓕ **reports** Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ Ⓕ		placement by Ms. Mizar, a less qualified, younger, female individual, and Tuvell expresses his opinion Feldman's picky requirements reflect "blatant … harassment/retaliation." ∗∗∗ On June 17, 2011, Mizar provides Feldman with a transition status update for the prior two days, demonstrating that **she missed** the previous day's update. However, Mizar was not disciplined or counselled for missing that update {as Tuvell had been — thus comprising differential/discriminatory **retaliation** by Feldman}.	

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Ⓖ Ⓖ **Feldman** Ⓖ **impossible** Ⓖ **project** Ⓖ **planning** Ⓖ	Op ℘4: ▤ *{silent}*	**PSOF** ℘7–8¶24–25: On June 16, 2011, at 10:25 am, Feldman emailed Tuvell, asking by the next day **{harassingly}** a "detailed (one-day granularity) schedule for your work on the assigned projects between now and the beginning of your medical leave." Tuvell's medical {surgical} leave was scheduled to begin July 7, 2011, three weeks in the future. Mr. Tuvell reports that it "turns my stomach (literally, not figuratively) to contemplate working with him." On June 17, 2011, Mr. Tuvell complains of continuing harassment to Mr. Feldman, Ms. McCabe and Ms. Adams. Tuvell complained, among other things {all of which taken together amounted to an "impossible"/retaliatory task}, that Tuvell was being required to establish an independent {without consulting others about new projects he was unfamiliar with} daily schedule for the next three weeks on all four projects he was taking over from Mizer, based solely on her short one-line descriptions of her projects. Tuvell complained that he	DSOF ℘4¶16: ▤ *{silent}*

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ⓖ **Feldman** ⓖ **impossible** ⓖ **project** ⓖ **planning** ⓖ ⓖ ⓖ ⓖ		was still on a learning curve with respect {to} the new projects, and has never {in his entire career} set a daily schedule for three weeks in the future, let alone for unfamiliar projects. Mr. Tuvell requests an example of such a schedule from Mr. Feldman, but none is forthcoming.	

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Ⓗ Ⓗ **Due** Ⓗ **"sham"** Ⓗ **investiga-** Ⓗ **tion** Ⓗ	Op ℘4: That same day {June 16, 2011}, Adams forwarded Tuvell's email regarding Feldman to a Senior Case Manager in IBM's Human Resources Department, Lisa Due. Due then conducted an 𝌆{sham} investigation into the situation, interviewing five individuals, including Tuvell. In his interview with Due {June 16, 2011}, Tuvell described his experience with Feldman and Knabe as the 𝌆{psychological, not physical} equivalent of "torture" and "rape" 𝌆{= "outrageous violation of fundamental principle or institution" (Webster's Third New International Dictionary).}. On June 29, 2011, Due informed Tuvell of the results of her 𝌆{sham} investigation and her 𝌆{false} conclusion that his concerns were not supported. Due further informed Tuvell of his appeal rights if he was dissatisfied with Due's findings.	**PSOF** ℘25–26¶82–84: Lisa Due conducted the initial investigation of Plaintiff's discrimination allegations in June 2011. When conducting that investigation, Ms. Due knew Plaintiff to be alleging that Mr. Feldman and/or Mr. Knabe to have discriminated against him on the basis of age and/or gender when he was required to switch job functions with Ms. Mizar {®}. Ms. Due considered these allegations of age and sex discrimination to be part of her investigation. As part of her investigation, Ms. Due {contrary to industry standard best practices for discrimination investigations} **did not explore** the qualifications of Ms. Mizar as part of her investigation, **nor did she explore** whether Mr. Feldman or Mr. Knabe had a history of engaging in sexist or ageist behavior or comments in the workplace. Ms. Due **did nothing** to inquire of Tuvell's PTSD, **or** to speak with Feldman about his attitudes towards Plaintiff's PTSD. Prior to {} Ms. Due's completion of the investigation, she met with Mr. Mandel,	DSOF ℘4–5¶17–19: On June 16, 2011, Ms. Adams forwarded an email from Plaintiff stating that he could not work with Mr. Feldman to Lisa Due, a Senior Case Manager in IBM's Human Resources Department. Ms. Due conducted an investigation by interviewing five individuals, including Plaintiff, who described his experience with Mr. Feldman and Mr. Knabe as the 𝌆{psychological, not physical} equivalent of "torture" and "rape". After completing her 𝌆{sham} investigation, Ms. Due 𝌆{falsely} concluded that Plaintiff's concerns were unsupported. Based on Ms. Due's findings, IBM 𝌆{falsely} determined that moving Plaintiff to another supervisor was not warranted. On June 29, 2011, Ms. Due sent Plaintiff an email informing him of the results of her investigation, and advised him of his appeal rights if he was dissatisfied with Ms. Due's findings.

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ⓗ **Due** ⓗ **"sham"** ⓗ **investiga-** ⓗ **tion** ⓗ ⓗ ⓗ ⓗ ⓗ ⓗ ⓗ ⓗ ⓗ ⓗ ⓗ		who **instructed her to inform Plaintiff** that Ms. Due had **no reason** to conclude that Plaintiff had been mistreated. In addition to **never seriously investigating** Mr. Tuvell's complaints of discrimination, Ms. Due also **never investigated,** nor did she come to a determination, of whether Mr. Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. **{All these lapses indicate that Due's "investigation" was nothing but a sham.}**	

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Ⓘ ① **Refusal to** ① **separate** ① **Tuvell from** ① **Feldman** ① **(many** ① **times)** ①	Op ℘4,8: Based upon Due's ▤{sham} findings {ⓗ}, IBM decided not to transfer Tuvell to another supervisor. ∗∗∗ In early November, while Tuvell was out on medical leave, his counsel wrote to Mandel identifying PTSD ▤{which had been known to IBM since May 26, 2011} as a disability and requesting a reasonable accommodation. Specifically, Tuvell's counsel requested that Tuvell no longer be required to report to Feldman. IBM subsequently informed Tuvell that it ▤{falsely} did not consider reassignment to another management team to be a reasonable accommodation ▤{even though reassignment is *required* by the ADA as a reasonable accommodation, as a "last resort"} but indicated that it was receptive to other proposals for possible ▤{false, inadequate} accommodations. IBM also noted that Tuvell was free to look for open positions using IBM's Global Opportunity Marketplace ("GOM") ▤{which was no accommodation at all, because all other employees	**PSOF** ℘3,19–20,23–24¶9–10,61–62,64,75: Plaintiff suffers from Post Traumatic Stress Disorder. Mr. Feldman was aware of Plaintiff's PTSD {a disability recognized/protected by the ADA (Americas with Disabilities Act)} at least as early as May 26, 2011. ∗∗∗ On June 24 and June 28, 2011, Plaintiff requested job modification that he no longer interact with Mr. Feldman {because Feldman's harassment, beginning with the Excel graphics episode (Ⓐ), was strongly triggering/exacerbating his PTSD}, as a **reasonable accommodation {in the sense of the ADA}** to his disability. Plaintiff notes that such accommodation would be a {"infinitely"} preferable reasonable accommodation to the grant of disability leave {which was a faux/temporary accommodation, not a "real"/permanent accommodation}. On October 17, 2011, Mr. Tuvell asserted that he was **not medically capable {because of his PTSD} of continuing to work with Mr. Feldman {solely because of Feldman's false abuse/harassment},** and requested the	DSOF ℘7¶30–31: During Plaintiff's medical leave, on or around November 9, 2011, Plaintiff's counsel wrote Mr. Mandel a letter identifying Plaintiff's PTSD ▤{which had been known to IBM since May 26, 2011} as a disability and requesting, as a reasonable accommodation, that Plaintiff report to a supervisor other than Mr. Feldman. On November 23, 2011, IBM informed Plaintiff that it ▤{falsely} did not consider changing his management team to be a reasonable accommodation, but that it was receptive to hearing Plaintiff's proposals about restructuring his work as a possible ▤{false, inadequate} accommodation and, further, that he was free to look for vacant positions using IBM's Global Opportunity Marketplace ("GOM") ▤{which was no accommodation at all, because all other employees were also free to look for open positions using GOM}.

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① **Refusal to separate Tuvell from Feldman (many times)**	were also free to look for open positions using GOM}.	**reasonable accommodation of no longer working with him.** IBM **{falsely} rejected** these repeated requests. On November 9, 2011, Plaintiff provided a letter to IBM, describing Mr. Tuvell's disability, his need for reasonable accommodation, and seeking the accommodation of transfer and/or new supervisor. On November 28, 2011, Plaintiff wrote, "I will be unable to return to work … In fact, the thought of returning to work under your [Feldman's] supervision is leading me to experience extremely high levels of anxiety and an abnormal measure of fear. I intend absolutely no disrespect or rancor in this statement. It is simply my medical reality. … It is for this reason that I have pressed for transfer of some sort as a reasonable accommodation." *** IBM **repeatedly rejected {falsely, abusively, harassingly}** Plaintiff's requests for reasonable accommodation to provide him with a different supervisor, and/or to transfer him to another position away from Mr. Feldman, including on October 10, 2011, November 23, 2011, January 6, 2012, January 16, 2012, Jan-	

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① **Refusal to separate Tuvell from Feldman (many times)**		uary 24, 2012. ∗∗∗ In this case {i.e., the case at bar}, change of reporting relationship to a different supervisor is **entirely reasonable** under these facts. IBM's **own policies embrace {and ADA guidelines actually *require*, as a "last resort"}** the notion of transferring a supervisor in cases of the supervisor's harassment and misconduct. Plaintiff had amply reported that Feldman had been harassing Plaintiff, and consequently a change of supervisor is reasonable as it is absolutely consistent with IBM's written policy. IBM takes the **{inconsistent (indicating pretextuality)}** position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from being under the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe."	

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Ⓙ Ⓙ **"Bad"** Ⓙ **emails;** Ⓙ **e.g., *"ad*** Ⓙ ***hominem"*** Ⓙ **and esp.** Ⓙ **"lazy"** Ⓙ **letter** Ⓙ	Op ℘3–5: In response ▤{to Feldman's harassment involving transition status reports, see Ⓕ}, Tuvell sent an email {on June 15, 2011} to Feldman, copying Human Resources Specialists Kelli-ann McCabe and Diane Adams, complaining that the request to provide separate status reports ▤{false: Tuvell was complaining, not about the requirement of providing reports, but about the falsity of Feldman's "clarification" he'd asked for separate reports} was "blatant" and "snide harassment/retaliation." Tuvell further complained {in that June 15, 2011, email} that Feldman had "unilaterally forced an adverse job action upon [Tuvell]" and that the transition constituted "a prima facie case (and even stronger) for discrimination on the grounds of both age and sex, and perhaps even race." On June 16, 2011, Tuvell sent additional emails to Adams and McCabe complaining of harassment by Feldman based on Feldman's ▤{lies and other harassment, and his} decision to switch Tuvell's assign-	**PSOF** ℘14–16¶46,50,52: Defendant, on numerous occasions, **expressed {discriminatory, retaliatory} animus** based on Plaintiff's **protected complaints of discrimination and harassment.** Lisa Due, an IBM Senior Case manager, who {sham-}investigated some of Plaintiff's internal complaints of discrimination {Ⓗ} **{falsely}** claimed that the following {protected} passage provided by Tuvell in support of one such complaint, was "inappropriate" {though in fact it was correct and relevant (in addition to being protected)}: > [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reason-	DSOF ℘5¶22–23: In early July of 2010, Plaintiff went on medical leave for an elective cosmetic ▤{not "merely cosmetic," but medically recommended} surgery on his eye-lids, and then took a vacation before returning to work in early August of 2011. On July 11, 2011, ▤{while Tuvell was out on medical leave following his surgery,} Mr. Feldman ▤{falsely, harassingly} informed Plaintiff that Plaintiff's communication style in a July 6, 2011 email {the "lazy" letter} to Mr. Feldman and another colleague, Garth Dickie, was "the sort of thing you want to avoid." Initially ▤{confused and dazed in his post-surgical recovery state}, Plaintiff sent ▤{of his own initiative} an email to Mr. Feldman and Mr. Dickie apologizing for his use of language that could have been interpreted as offensive ▤{by one intent on abuse/harassment}. On July 20, 2011, Plaintiff sent Mr. Feldman and Mr. Dickie another email, retracting ▤{it was not a "retraction," it was an "apology-for-apology"} his earlier apology be-

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ⓙ **"Bad"** ⓙ **emails;** ⓙ **e.g., *"ad* ⓙ ***hominem"*** ⓙ **and esp.** ⓙ **"lazy"** ⓙ **letter** ⓙ	ment. Tuvell told Adams and McCabe {on June 16, 2011} that he believed it was "infeasible" for him to work with Feldman. ∗∗∗ In July 2011, Tuvell took medical leave for elective ≣{that is, non-emergency} surgery {which was performed on July 7, 2011} followed by vacation. Before taking leave, Tuvell sent an email to Feldman and another colleague notifying them that he had completed an assignment regarding a wiki page. In the email {dated July 6, 2011}, Tuvell explained that the update could be found by searching the wiki but he also attached the link, adding ≣{entirely familiarly/colloquially/innocently, implying no lack of energy or defect of personality} "if you're lazy you can just click this link." {In an email dated July 11, 2011,} Feldman thanked Tuvell for the work but ≣{falsely, harassingly} informed Tuvell that his communication style was "the sort of thing that you want to avoid." Tuvell ≣{,who was still on medical leaving, having had surgery just days before, and too weak/confused to "stand up to" Feldman, meekly} apologized ≣{immediately, of his	able accommodation, repeatedly asserted **{falsely, discriminatorily}** that Tuvell complained "too much", as if the length of his {substantive, useful (for IBM's investigations), and detailed} complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." {Another example, of Feldman's **falsely** accusing Plaintiff of writing *ad hominem* comments disparaging another employee, was inadvertently omitted from the PSOF.} In explaining reasons why Plaintiff{} performed in an unsatisfactory manner, IBM has **{falsely}** asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." Yet, IBM has **never {truthfully} identified any job task that Plaintiff neglected** as the result of lodging his internal, protected complaints {or otherwise}. ∗∗∗ On August 3, 2011, Plaintiff was **{falsely}** given a formal discipline {Formal Warning Letter (Ⓜ)}, with threat of termination, for {the *sole* cited reason of} innocently writing, "if you're lazy you can just click this link;" {also cited in Ⓜ} ∗∗∗ Mr. Mandel	cause he had ≣{correctly} concluded that "no apology was necessary" for the July 6, 2011 email.

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Ⓚ Ⓚ **Mandel** Ⓚ **C&A;** Ⓚ **Open Door** Ⓚ **complaints;** Ⓚ **"sham"** Ⓚ **investiga-** Ⓚ **tion** Ⓚ	Op ℘6:	**PSOF** ℘8–10,14–17,24–27¶28–29,32,55–56,76,78–81,85,87–89:	DSOF ℘6–7¶27–29:
	On August 18, 2011, Tuvell filed a {"C&A" (Concerns and Appeals)} "Corporate Open Door Complaint" entitled "Claims of Corporate and Legal Misconduct." The first part of the complaint was titled "Acts of Fr{it}z Knabe" and was 129 pages, including 22 pages written by Tuvell and 107 pages of supporting materials. The second part was titled "Acts of Dan Feldman" and included 31 pages of allegations, plus 122 pages of supporting documents. Tuvell acknowledges that 𝌆{due to temporary "hypomanic" state, brought on by IBM's continuing abusive exacerbation of his PTSD,} he spent 22 hours a day over the course of 2–3 weeks on these complaints. A week later, on August 25, 2011, Tuvell complained that IBM had not finalized its investigation of his Open Door Complaint 𝌆{false: Tuvell merely complained that IBM had *not even acknowledged receipt* of his Open Door Complaint, and later that they refused to progress it during his medical leave}. On September 15,	Based on the **harassment** that Plaintiff experienced, and the **severe PTSD symptoms that resulted, including a fainting episode** {at the Formal Warning Letter meeting, on August 3, 2011; see also Ⓜ,Ⓝ}, Plaintiff went out on sick leave on August 11, 2011. Mr. Tuvell reported to IBM's Russell Mandel that: "**The very REASON I'm on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse** being heaped upon me by Dan Feldman, and yourself … The ONLY way for me to recover sufficient{ly} to return to work from STD is to settle this case. Properly and correctly." Instead, Mandel **initially refused to progress the investigation during the leave {due to the leave itself, which is direct proof of retaliation against Tuvell for availing himself of the STD (reasonable accommodation) itself}.** Though Plaintiff objected, Mandel {continued stalling, and} didn't complete his "investigation" until	On or about August 18, 2011, Plaintiff submitted an {Corporate} Open Door complaint, which is an internal IBM mechanism by which an employee can raise a concern and request an investigation. Plaintiff's Open Door complaint was titled "Claims of Corporate and Legal Misconduct" and was submitted in two parts; the first part of the Complaint was 129 pages long and titled "Acts of Fritz Knabe," the second part of the Complaint was 153 pages long and titled "Acts of Dan Feldman." Plaintiff estimated that he spent over 22 hours per day on these documents over the course of 2-3 weeks, and has spent at least 10 hours per week on his claims in this case ever since. Russell Mandel, the Program Director for IBM's Concerns and Appeals, 𝌆{sham-}investigated Plaintiff's first Open Door complaint. On or around September 15, 2011, Mr. Mandel issued 𝌆{false/misleading: the report was "issued"/delivered to nobody} a 19-page report based on his interviews of nine people, in-

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® **Mandel** ® **C&A;** ® **Open Door** ® **complaints;** ® **"sham"** ® **investiga-** ® **tion** ®	2011, the Program Director for IBM's Concerns and Appeals, Russell Mandel, completed a version ▤{actually, the final version} of the ▤{sham-}investigation report ▤{without informing Tuvell}. Based upon his interviews with nine people, including Tuvell, Mandel concluded ▤{falsely} that Tuvell had not been subject to any adverse employment actions.	four and a half months after initial Plaintiff's request {much longer than such an investigation should have taken}. *** Plaintiff requested Mr. Mandel to conduct an investigation into his allegations of discrimination, retaliation and harassment on or about June 29, 2011. **The harassment Plaintiff experienced caused him to be sick from PTSD symptoms, and Plaintiff was unable to return to work, as of August 11, 2011, to work under Mr. Feldman.** During the time of his medical leave, Plaintiff was hoping {and expressed to IBM} that Mr. Mandel's investigation of his complaint would progress, such that he could resolve Plaintiff's workplace difficulties, and permit Plaintiff, medical condition and all, to return back to work. Instead, Mr. Mandel did not inform Plaintiff of the conclusion of his investigation until November 17, 2011, and the results were {falsely} disfavorable {to Tuvell}. *** On May 8, 2012, Plaintiff submits his Fourth Open Door Complaint alleging unlawful discrimination and retaliation. On May 14, 2012, Plaintiff likewise complained	cluding Plaintiff. The report ▤{falsely} concluded that Plaintiff was not subjected to any adverse or unfair employment actions.

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Ⓛ Ⓛ **Pseudo-** Ⓛ **yelling;** Ⓛ **Feldman** Ⓛ **forbid** Ⓛ **work-time** Ⓛ **for** Ⓛ **complaint** Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ Ⓛ	Op ℘4: *{silent}*	**PSOF** ℘8,15¶27,49: {On August 3, 2011,} Feldman **forbids** Tuvell from spending an **earlier agreed-upon** reasonable working time on his internal complaint of harassment, and then **threatened** Tuvell with termination{, **falsely accusing Tuvell of "pseudo"-yelling,**} when Tuvell responded by {meekly} saying, {in reactive response to the cancellation of the previously agreed-upon time to work on the internal complaint,} "Now wait a minute, Dan." *** On August 3, 2011, Plaintiff was prohibited from using a previously agreed-upon reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request {, **falsely accusing him of "pseudo"-yelling**}.	DSOF ℘5: *{silent}*

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Ⓜ Ⓜ **Feldman** Ⓜ **Formal** Ⓜ **Warning** Ⓜ **Letter** Ⓜ	Op ℘5: When Tuvell returned from leave on August 3, 2011, Feldman met with him to discuss pending and future projects. At this meeting, Feldman also ▤{falsely} talked with Tuvell about the series of emails, which Feldman ▤{falsely} considered to be inappropriate ▤{perhaps among those mentioned in Ⓙ, though Feldman made no specific implications at the time, even though Tuvell asked for examples}, and gave Tuvell a {"formal"} warning letter. The letter instructed Tuvell ▤{in vague, unexplained, non-specific terms, which Tuvell objected to, saying he did not understand it, and refused to "sign" the letter for that reason} to "[i]mmediately cease" "unprofessional, disrespectful, demeaning, disrupted, offensive or rude" behavior and specifically mentioned ▤{*only*} Tuvell's July 20, 2011 {"lazy"} email {Ⓙ}.	**PSOF** ℘15¶50: On August 3, 2011, Plaintiff was **{falsely}** given a formal discipline {Formal Warning Letter}, with threat of termination {**this trauma caused Tuvell to faint;** see also Ⓚ,Ⓝ}, for {the **sole cited transparently false reason** of} innocently writing, "if you're lazy you can just click this link;" {also cited in Ⓙ} ***	DSOF ℘6¶24–25: On August 3, 2011, shortly after Plaintiff returned from medical {surgical} leave, Mr. Feldman met with him to discuss his pending and future work assignments and to discuss Plaintiff's recent behavior, which Mr. Feldman ▤{falsely} characterized as inappropriate ▤{citing *only* the "lazy" email (Ⓙ) as evidence}. During the August 3, 2011 meeting, Mr. Feldman also gave Plaintiff a ▤{previously prepared} {Formal} Warning Letter for his ▤{falsely-characterized} disruptive conduct, including ▤{as *sole* evidence} Plaintiff's July 2011 emails to Mr. Feldman and Mr. Dickie. Plaintiff received no further discipline in connection with that matter ▤{other than continuing abusive harassment in an unhealthy workplace environment, that is}.

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Ⓝ **Fainting** Ⓝ Ⓝ Ⓝ Ⓝ Ⓝ Ⓝ Ⓝ Ⓝ Ⓝ Ⓝ Ⓝ	Op ℘5: *{silent}*	**PSOF** ℘8,15,22¶28,50,68: Based on the **harassment** that Plaintiff experienced, and the **severe PTSD symptoms that resulted, including a fainting episode** {at the Formal Warning Letter meeting, on August 3, 2011; see also Ⓚ,Ⓜ} *** Mr. Tuvell's diagnosis is based on a variety of symptoms, *** He has suffered flashbacks and has **fainted** {see also Ⓠ} ***	DSOF ℘6¶25: *{silent}*

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◎ ◎ ***"Raison d'être"*** **(no third-party complaints)** ◎	Op ℘6: ▤*{silent}*	**PSOF** ℘24¶77: On August 5, 2011, Plaintiff communicated to IBM indicating that a disrespectful statement was made to a non-Caucasian coworker {stating that coworker's very reason for existence (*raison d'être*) was merely to test/debug programs, as against any "human qualities" (such disrespect being contrary to IBM/BCG guidelines, and encouraged to be reported to IBM)}, and indicating that the coworker could be the subject of discrimination. On August 5, 2011, Mr. Mandel replied, **{falsely} stating that IBM does not accept third party complaints,** and that if the coworker is offended, he would have to file a complaint himself. Mr. Mandel's statement to Plaintiff was **false** {hence discriminatory, harassing}, as IBM *would* investigate third party complaints, and IBM documents *encourage* employees to bring third party complaints {as does the law}.	DSOF ℘6: ▤*{silent}*

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Ⓟ Ⓟ **STD leave;** Ⓟ **Mandel** Ⓟ **refusal to** Ⓟ **investigate** Ⓟ	Op ℘5,10: On August 11, 2011, Tuvell told Kathleen Dean, a nurse in IBM's Medical Department, that he wanted to apply for Short Term Disability ("STD") because of a "sudden condition ▤{namely, the sudden re-triggering/exacerbation of his PTSD, due to Knabe/Feldman's abusive harassment}." Dean provided Tuvell with information on how to apply for STD leave and, on August 15, 2011, Tuvell notified Feldman that he would be taking sick days until his STD request was processed. ∗∗∗ On January 25, 2012, Tuvell exhausted his STD benefits but remained on unpaid medical leave. ▤*{silence regarding Mandel's refusal to investigate based on Tuvell's STD reasonable accommodation status}*	**PSOF** ℘8,12–14,16,26–27¶28,41,45,53,86: Based on the **harassment** that Plaintiff experienced, and the **severe PTSD symptoms that resulted, including a fainting episode** {at the Formal Warning Letter meeting, on August 3, 2011; see also Ⓚ,Ⓜ,Ⓝ}, Plaintiff went out on sick leave on August 11, 2011. Mr. Tuvell reported to IBM's Russell Mandel {correctly} that: "The very REASON I'm on STD leave, and will continue to remain so, is due **DIRECTLY AND SOLELY to the psychological abuse** being heaped upon me by Dan Feldman, and yourself … The ONLY way for me to recover sufficient{ly} to return to work from STD is to settle this case. Properly and correctly." {also cited in Ⓚ} ∗∗∗ Plaintiff went out on Short Term Disability effective on or about August 11, 2011. After 13 weeks on STD, or sometime in November 2011, Plaintiff's benefits were reduced to 66⅔% of his usual salary. On or about January 25, 2012, Mr. Tuvell exhausted his STD benefits, and is transitioned to unpaid leave. ∗∗∗	DSOF ℘6,8,12¶26,34,55: On August 11, 2011, Plaintiff advised Kathleen Dean, a nurse in IBM's Medical Department, that he wanted to apply for Short Term Disability ("STD") leave due to a "sudden condition ▤{namely, the sudden re-triggering/exacerbation of his PTSD, due to Knabe/Feldman's abusive harassment, especially the Formal Warning Letter}" and Ms. Dean responded by providing him with information concerning how to apply for STD leave. On August 15, Plaintiff informed Mr. Feldman that he was taking sick days until his request for short term disability was acted on. ∗∗∗ On or about August 17, 2011, IBM approved Plaintiff's STD leave as a reasonable accommodation. ∗∗∗ Plaintiff exhausted his STD leave on January 25, 2012, at which time he remained out of work on an approved, unpaid medical leave. ▤*{silence regarding Mandel's refusal to investigate based on Tuvell's STD reasonable accommodation status}*

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Ⓟ **STD leave;** Ⓟ **Mandel** Ⓟ **refusal to** Ⓟ **investigate** Ⓟ		There was yet additional evidence of **handicap animus,** as Defendant **expressly** ∗∗∗ refused to advance or otherwise delayed finalization of its investigation of Plaintiff's complaints of discrimination and retaliation, **based {illegally} on Plaintiff's {protected} availment of the reasonable accommodation of disability leave.** ∗∗∗ On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you **until you return from Short Term Disability."** ∗∗∗ On January 25, 2012, after exhausting all of his STD benefits, and with no indication that he would ever be provided with reasonable accommodation, IBM transitioned Tuvell to unpaid leave, where he is kept until his termination on May 17, 2012. ∗∗∗ On August 30, 2011, Mr. Mandel wrote Plaintiff, stating, "I am simply not going to discuss with you the concerns raised **while you are out on STD."**	

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Ⓠ Ⓠ **MTRs; false** Ⓠ **interpreta-** Ⓠ **tions** Ⓠ	Op ℘5–9: Tuvell simultaneously {with notifying Feldman on August 15, 2011, that he would be taking sick days, see Ⓟ} submitted a Medical Treatment Report ("MTR"), indicating that he was suffering from a "sleep disorder and stress reaction." Tuvell represented that due to his medical condition he was not "able to function at his job responsibilities." The MTR further indicated that ▤*{due solely to the false abusive harassment being inflicted upon him by Knabe/Feldman, exacerbating his PTSD,}* Tuvell "suffered severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities" and "suffered serious impairment in his ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment." IBM approved Tuvell's STD leave on August 17, 2011. ∗∗∗ Tuvell submitted a second MTR on Sep-	**PSOF** ℘21–23¶66–72: Mr. Tuvell has seen Stephanie Ross, LICSW, professionally since 1993. Ms. Ross has a Masters degree in social work from the University of Pennsylvania, and was licensed to practice social work (LICSW) in Massachusetts continuously since about 1984. Ms. Ross is qualified to diagnose and treat PTSD. Ms. Ross **formally diagnosed Mr. Tuvell as suffering from PTSD** in or about 2001, but understood Mr. Tuvell to be suffering from PTSD for some time before that. Over 10% of Ross' patients in {the} last 24–25 years she has diagnosed with PTSD. Mr. Tuvell's diagnosis is based on a variety of symptoms {typical of PTSD, during his PTSD's "active" (non-dormant, exacerbated) periods, only}, including lost weight, trouble sleeping, difficulty eating, triggered state, and every symptom of stress, including anxiety and depression. He has experienced hyper-vigilance, and has obsessive, recurrent, intrusive thoughts. He has suffered flashbacks and has fainted {see Ⓝ}, has	DSOF ℘7–11¶32–33,35–52: On or about August 15, 2011, Plaintiff provided a Medical Treatment Report ("MTR") to Ms. Dean, which indicated that Plaintiff suffered from a sleep disorder and stress reaction and that he was totally impaired for work ▤{where "total impairment" in this purely medical *(non-ADA) context was meant without any contemplation of "reasonable accommodation in the sense of ADA"* (which was neither mentioned nor offered)}. The August 15, 2011 MTR indicated that Plaintiff suffered severe impairment in his ability to manage conflicts with others ▤{when they were harassing him}, get along well with others without behavioral extremes ▤{when they were harassing him}, and interact and actively participate in group activities ▤{when he was harassed by group members (Knabe and Feldman)}, and that ▤{in the unhealthy/abusive/hostile work environment in which he found himself,} Plaintiff suffered serious impairment in his ability to maintain attention, concentrate on a

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◎ **MTRs; false interpretations**	tember 9, 2011, indicating that ▤{*due solely to the false abusive harassment being inflicted upon him by Knabe/Feldman, exacerbating his PTSD,}* he was "totally impaired for work ▤{absent the reasonable accommodation of being removed from Feldman's abusive harassment}." Upon receiving the second MTR, Dean contacted Tuvell and informed him that given the nature of his diagnosis for a sleep disorder and stress reaction, the MTR form must be completed by a specialist. Tuvell responded that his "family physician is fully competent to diagnose [his ▤{sleep and stress} disorder]." Tuvell added that, if necessary, it would take time to get a psychotherapist and that he would "be forced to enter an abusive situation {under Feldman}" if he had to return to work as his condition was a direct result of Feldman's "direct abusive psychological attack." Dean agreed to accept the MTR completed by his physician for one month. Dean was subsequently informed by Dr. Stewart Snyder, the Physician Program Manager of IBM's Integrated Health Services, that for psychol-	experienced prolonged psychological distress, has experienced an altered sense of surroundings and self, and has engaged in strong efforts to avoid distressing feelings and reminders. In Ms. Ross' {sessions}, he has wept uncontrollably when describing his experiences. Mr. Tuvell is subject to irritability and outbursts. To manage his PTSD, Mr. Tuvell has been treated by Ms. Ross with psychotherapy, as well as Eye Movement Densitization and Reprocessing (EMDR, which is a qualified technique used to treat PTSD patients). Mr. Tuvell has seen Ms. Ross professionally approximately 250 times, alone, and has seen Ms. Ross along with his spouse on many other occasions {not all of these sessions devoted exclusively to PTSD (and none devoted to any topic related to "spousal abuse" or anything like that)}. On October 19, 2011, Kathleen Dean of IBM spoke with Ms. Ross about Mr. Tuvell, and Ms. Dean's notes accurately reflect the conversation {**proving that IBM was well-apprised of Mr. Tuvell PTSD,** a disability well-recognized by the (ADA)}. On January 23,	specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment. Plaintiff submitted another MTR dated September 9, 2011, which again indicated that ▤{under the same abusive conditions, and without any contemplation of reasonable accommodation in the sense of ADA} he was totally impaired for work. After receiving the September 9, 2011 MTR, Ms. Dean emailed Plaintiff and informed him that because the MTR indicated a Sleep Disorder and Acute Stress Reaction, it would have to be completed by a specialist, not his family physician (in Plaintiff's case, a nurse practitioner). In response, Plaintiff sent Ms. Dean three emails within 24 hours, challenging her request that his MTR be completed by a specialist ▤{only because Ms. Dean's language was unfamiliar and confusing to him, but his resistance disappeared immediately upon the miscommunication being cleared up}. Ms. Dean ▤{then backed off her stance, and} informed Plaintiff that she would accept the September MTR by his ▤{non-specialist}

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◎ **MTRs; false interpretations**	ical disorders IBM policy required the MTR forms to be completed by a psychiatrist if the employee is out for more than six weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." Dean contacted Tuvell and told him "that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR" if he remained out for another month. Tuvell responded 𝌆{correctly} that there was nothing that a psychiatrist could do to "help" him because there was nothing "wrong" with him and emphasized 𝌆{correctly} that the only reason that he was out on STD was because of the abuse he faced at work. Tuvell added that IBM's handling of his complaints was "intentionally psychologically abusive." Dean subsequently informed Tuvell that IBM would accept a MTR from his Licensed Social Worker, Stephanie Ross, who was providing him psychotherapy. Tuvell then provided IBM with MTRs completed by Ross for October and No-	2012, Ms. Ross stated {in her MetLife Attending Physician Statement, which was also shared with IBM} that while she advised Tuvell **"not to return to specific job environment {as a reasonable accommodation for his PTSD exacerbation by Feldman's and others' abuse/harassment},"** that also **"Patient has good functioning in the absence of trauma related stimuli."** On January 31, 2012, Ms. Ross reiterated {in her Addendum to MetLife Attending Physician Statement} that "the only course to recovery for Mr. Tuvell **required a reassignment by the company."** On September 28, 2012, Ms. Ross stated {at her deposition}, "in a new setting with different people it was possible that Mr. Tuvell **could function quite well and attend his work.**" Ms. Ross testified that **she believed that Mr. Tuvell could return to work, productively, at IBM, if provided reasonable accommodations.** She reported that Mr. Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did	physician for one month while she consulted with IBM's physician about Plaintiff's questions. Ms. Dean subsequently contacted Dr. Stewart Snyder, the Physician Program Manager of IBM's Integrated Health Services, who explained that IBM's process for psychological disorders required an MTR form to be completed by a psychiatrist if an employee is out for 6–8 weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness" 𝌆{totally ignoring Plaintiff's complaints that the problems were entirely due to Feldman/IBM's continuing abuse/harassment}. Ms. Dean conveyed Dr. Snyder's explanation to Plaintiff and informed him 𝌆{falsely, still ignoring Plaintiff's complaints about abuse,} that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR if he was not able to return to work in the next month. Plaintiff responded to Ms. Dean's request for proper medical certification by insisting 𝌆{correctly}

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◎ **MTRs; false interpretations**	10 years earlier} and indicated that Tuvell was still totally impaired for work {absent reasonable accommodation}. The MTR also noted that Tuvell continued to have serious impairment {absent reasonable accommodation} "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities, and continued to have serious impairment as well with respect to managing conflict with others, negotiating, compromise, setting realistic goals, and having good autonomous judgment {all these symptoms deriving from, not Tuvell himself, but Feldman's abusive exacerbation of Tuvell's PTSD}." Ross noted that "any contact with people from work, any discussion about work, going anywhere near the work facility {it was of course not the 'facility' itself that was at issue, but the harassment Tuvell was receiving at the hands of Feldman and others in that facility} at that time was a circumstance in which [Tuvell] was triggered into a state that involved hyper-reactivity, hy-		ation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety." Ms. Ross also rated Plaintiff as having serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising {all in the presence of ongoing abuse/harassment, absent reasonable accommodation}. In or around that time, Plaintiff was in close proximity to IBM on a weekend and stopped at a gas station with his wife and daughter and proceeded to "blow up" and hit the dashboard, the interior of the roof of the car and door frame as hard as he could and then yelled as loud as he could for as long as he could, describing himself {later to Ms. Ross} as "full-blown crazy" because he was "triggered by being that close to [IBM] and that gas station." The MTR completed by Ms. Ross in November identified for the first time PTSD {this was the first time Ross mentioned it in her MTRs, though she had of course first diagnosed Tuvell's PTSD more than a decade earlier (and, caretakers are re-

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◎ **MTRs; false interpretations**	managing conflicts with ≣{harassing} others, and setting realistic goals and having good autonomous judgment." Ross also noted that the *"only modification ≣{i.e., 'reasonable accommodation'} that would be possible is a change of supervisor and setting ≣{i.e., removal from the harassment of Feldman}."* Ross explained that around that time Tuvell could not "drive within a 50 mile radius — 20 mile radius of where he worked for a period of time without becoming hysterical." ≣{Ross's mention of "50 miles" was obviously a mere tongue-stumble, immediately corrected to "20 miles," but recorded verbatim by the deposition reporter.}		was a circumstance in which [Plaintiff] was triggered into a state that involved ≣{the usual PTSD symptoms of} hyper-reactivity, hyperarousal. He was in a state of very difficult insomnia. He was pressured in his communication style. He had a significant amount of obsessive thinking. He was flooded." Ms. Ross further testified that, at the time ≣{under the prevailing conditions of abuse, absent reasonable accommodation}, she was concerned for his mental health stability and believed that just going into the building where he worked and seeing Mr. Feldman or Mr. Knabe could trigger his obsessive thoughts, depression, or other strong reactions. Plaintiff provided another MTR on December 16, 2011, again completed by Ms. Ross, which stated that Plaintiff was "unable to return to previous setting with current supervisor and setting — PTSD symptoms exacerbate immediately" and continued to rate him "totally impaired for work," adding "for current job assignment ≣{under the hostile work environment fostered by Feldman and others}." In the Decem-

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◎ **MTRs; false interpretations**			ber 16 MTR, Ms. Ross indicated that ≣{under the same abusive conditions, absent reasonable accommodation} Plaintiff had serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, and setting realistic goals and having good autonomous judgment. Ms. Ross did not affirmatively check off the section of the MTR that asked if the employee could work with temporary modifications ≣{because she was prohibited from doing so under the technical conditions printed on the face of the MTR itself,} but did ≣{the next best thing she was unprohibited from doing, namely} write that "only modification that would be possible is a change of supervisor and setting." This was the first time Plaintiff submitted forms from a health care provider specifically requesting a change in supervisor as an accommodation ≣{but noting that these MTRs were all in the service of obtaining (non-ADA) medical leave, to

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MTRs; false interpreta-tions			separate Tuvell from Feldman and others; Tuvell was never advised by anyone that the MTRs could/should/would be used for the purpose of obtaining reasonable accommoda-tion in the sense of ADA)}. Ms. Ross testified that it was only "pos-sible" ≣{which is the appropriate/approved legal standard (for obvi-ously, no medical professional can "guarantee" success of any pa-tient); the MetLife Advisory Report dated March 5/7, 2012, states: "Ms. Ross noted that at the time [Janu-ary 31, 2012], with removal from the work environment, the claimant [Tuvell] was experiencing a signifi-cant decrease of symptoms and was likely to function well in the ab-sence of trauma related stimuli. … The medical information, including verbal information obtained from the therapist, does not support psy-chiatric functional limitations in-cluding any reduction in the ability to work full-time beyond August 11, 2011, and forward. In Ms. Ross's opinion, the claimant was able to do the job with another manager. During the telephonic exchange, Stephanie Ross reiterated her opin-ion that the claimant was capable

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MTRs; false interpretations			of functioning if assigned to a different environment. … In her documentation, the claimant's therapist opined that the only limitation is related to the work environment, specifically to the claimant's conflicts with a manager."} that a new supervisor and setting would enable Plaintiff's return to work. For his part, Plaintiff could not and did not identify anyone who could serve as his manager in place of Mr. Feldman {because Plaintiff was unfamiliar of IBM's promotional practices, or who was available/interested/qualified to be a manager, etc. (Plaintiff was never asked "who he could work for," to which his answer was always "anyone who is non-abusive")}. In or around that time, Ms. Ross explained that Plaintiff was "unable to drive within a 50 mile radius — 20 mile radius of where he worked for a period of time without becoming hysterical," {Ross's mention of "50 miles" was obviously a mere tongue-stumble, immediately corrected to "20 miles," but recorded verbatim by the deposition reporter} a description she included in Plaintiff's appeal of the denial of long term dis-

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◎ **MTRs; false** ◎ **interpreta-** ◎ **tions** ◎ ◎ ◎ ◎ ◎ ◎ ◎			ability benefits from MetLife, specifically writing that Plaintiff's "symptoms would return if [he] had to drive near the facility 𝌆{to which he was assigned to work, absent the reasonable accommodation of cessation of harassment}, and he would have to pull over and manage intense anxiety symptoms and emotional overwhelm."

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® ® **Rescind** ® **physical &** ® **electronic** ® **access** ®	Op ℘6: While Tuvell was out on medical leave, IBM restricted his access to the company's internet and facilities.	**PSOF** ℘13–15¶45,47–48: There was yet additional evidence of **handicap animus,** as Defendant **expressly** curtailed Plaintiff's access to its computer systems, and IBM facilities ∗∗∗ **based on Plaintiff's {protected} availment of the reasonable accommodation of disability leave.** IBM **{falsely}** curtailed Plaintiff's access to Lotus Notes (the IBM email system), given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." ∗∗∗ On September 15, 2011, Plaintiff's badge access to IBM buildings was **{falsely}** curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [because of STD]. It is easy to return access once you return from STD." ∗∗∗ As a **direct response to Plaintiff's March 2, 2012 {protected} Complaints of discrimination, retaliation and failure to accommodate,** which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems,	DSOF ℘12¶53–54: While Plaintiff was on medical leave, IBM {falsely} restricted Plaintiff's VPN access to IBM's internet and Plaintiff's access to IBM facilities for the pendency of his leave given IBM's {false} position that because Plaintiff was on STD leave and not working, there was no need for access to those systems. During this time, Plaintiff also {properly, according to IBM guidelines, and protected by ADA law} continued emailing complaints using IBM's Lotus Notes to Human Resources and other IBM employees and executives, including the CEO of IBM {as specifically authorized by IBM's Corporate Open Door process, of which Tuvell was availing himself}. IBM subsequently restricted Plaintiff's access to Lotus Notes and IBM's internal corporate network based on his misuse of those systems {falsely: Tuvell was using those systems strictly within the guidelines authorized/protected by IBM and law}.

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® **Rescind** ® **physical &** ® **electronic** ® **access** ® ® ® ® ® ® ® ® ®		**{falsely} based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others {which is protected activity}.** On March 13, 2012, Mr. Tuvell was **threatened with termination** for forwarding {by email} his complaints of discrimination and retaliation to agents of IBM, which, again is **protected conduct.**	

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Ⓢ Ⓢ **Feldman** Ⓢ **misclassify** Ⓢ **work-at-** Ⓢ **home days** Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ Ⓢ	Op ℘7: ▤ *{silent}*	**PSOF** ℘8–9¶30: On or about October 19 and 20, 2011, Mr. Tuvell objects to Mr. Feldman **falsely** {i.e., harassingly, retaliatorily} characterizing work at home days as sick days, asks for citation to the policy {which does not exist} that supports the practice, and notes that it is inconsistent with his work-at-home days pre-June 30, 2011 {none of his many work-at-home days during that period had ever been classified as "sick days"}. On November 2, 2011, Mr. Feldman made {further} **knowingly false** statement mischaracterizing Mr. Tuvell's work situation with respect to sick days — casting work-at-home days as refusal to work in the office days.	DSOF ℘9: ▤ *{silent}*

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Ⓣ Ⓣ **Feldman &** Ⓣ **Kime** Ⓣ **sabotage** Ⓣ **transfer** Ⓣ	Op ℘9–10: On December 8, 2011, Tuvell interviewed for an open position in another IBM facility. Despite having submitted MTRs indicating that he was "totally disabled ▤{absent accommodation}," Tuvell told the interviewer, Christopher Kime, that he had a "completely clean bill of health ▤{because removal from Feldman's harassment would provide the needed accommodation, and his PTSD symptoms would disappear; see ◎}." On January 6, 2012, Kime emailed Tuvell and told him that he would not be offering him the open position. Kime explained that he had "underestimated the difficulty of moving forward with bringing [Tuvell] to the team" and that he could not "move forward with taking [Tuvell] directly from being on short term disability." Kime added that "[g]iven the current needs of our group" there was "concern about the work being to [Tuvell's] liking and keeping [Tuvell] as a productive and satisfied member of the team." ∗∗∗ {O}n January 23, 2012, Tuvell's	**PSOF** ℘9–13,16,23¶31,33–40,42–44,54,73–74: On January 6, 2012, Chris Kime sent Plaintiff an email explaining the following was the **primary reason for rejecting Plaintiff's application for transfer {in all, IBM proffered "something like" *eight* different/incompatible "pseudo-reasons" (not all mentioned in the PSOF; it's difficult to count them all, and unnecessary to enumerate them all at Summary Judgment proceedings) for rejecting Plaintiff's transfer}** to a Software Developer position under Kime: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on **short term disability — this will receive very close scrutiny from the operations people in the organization.**" Kime acknowledged that **Feldman's input** {"cat's-paw" theory} was significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman. ∗∗∗ SWG-0436579 was a	DSOF ℘12–15¶57–66,68,70: On December 8, 2011, Plaintiff was interviewed for an open position he had applied for through IBM's Global Opportunity Marketplace ("GOM") with Christopher Kime, one of the decisionmakers tasked with filling the position. Prior to the interview, Plaintiff advised Mr. Kime that he had a "completely clean bill of health" and was "symptom free," ▤{absent abusive/harassing/hostile workplace} notwithstanding the fact that Ms. Ross submitted MTRs which described him as "totally impaired" for work ▤{when subjected abuse/harassment/hostility} in both November and December of 2011. Mr. Kime, for his part, ▤{claims without proof he} had no knowledge of Plaintiff's medical condition nor did he make any inquiry into the circumstances surrounding Plaintiff's STD leave. After the interview, Mr. Kime informed Plaintiff that he had to discuss the interview with his management team and that he would keep Plaintiff posted on any developments. While considering

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ⓣ **Feldman & Kime sabotage transfer**	counsel requested as a reasonable accommodation that IBM transfer Tuvell to Kime's open position, which had been reposted after the posting had expired. IBM denied Tuvell's request for reassignment. *** Tuvell reapplied {on January 21, 2012} for the reposted Kime position, but was not considered for the position.	posted position for a Software Developer in IBM's Littleton office. The position was open, and Tuvell applied for it on or about November 28, 2011. The job requisition for SWG-0436579 contained a list of four minimum qualifications for the position, including [1] a Bachelor's Degree; [2] at least 3 years experience in the "C" programming language, debugging and unit testing; [3] at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements; and [4] fluency in English. Plaintiff satisfied all of the minimum qualification for the SWG-0436579 position. Tuvell had a Bachelor's degree from MIT, and a MS and PhD in mathematics from the University Chicago. He had the required qualification of at least three years experience in the "C" programming language, debugging and unit testing, and in fact he had over twenty years of such experience. He had the required qualification of at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements, because he had over two decades of	Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance review history but was unable to find anything on IBM's internal website and therefore reached out to Mr. Feldman, who explained that Plaintiff's leave had prevented Mr. Feldman from providing Plaintiff with a performance review. When Mr. Kime asked him about Plaintiff's performance, Mr. Feldman informed him that Plaintiff had the technical skills for his position but ▤{falsely, misleadingly ("cat's-paw", failing to mention that Plaintiff's difficulties stemmed solely from Feldman himself and others)} had difficulties working with other people in his group and had been moved from one team to another and still had not found a role that appeared to work for him and the team. Mr. Kime testified that at no point during his telephone conversation with Mr. Feldman did Mr. Feldman mention that Plaintiff had filed any internal complaints with IBM regarding harassment or discrimination and that he was not aware of Plaintiff's complaints at that time ▤{but it seems Kime did learn of such

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Ⓣ **Feldman &** Ⓣ **Kime** Ⓣ **sabotage** Ⓣ **transfer** Ⓣ		such experience. Finally, Tuvell met the required qualification that he be fluent in English. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. Christopher Kime, as of 2010, was Development and Solutions Manager, and he acted as Hiring Manager for the SWG-0436579 position. Kime drafted the posting himself, including what he regarded to be the minimum qualifications. Kime reviewed Tuvell's resume and other documentation, and concluded he had **"little doubt that you [Tuvell] have technical skills that we could use on the project."** On or about December 1, 2011, Kime interviewed Tuvell by phone, which touched upon Tuvell's background and qualifications. At the interview, Kime concluded that **Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team.{"}** As a result of the interview, Kime asked his support lead, and also the next most senior member of the Littleton team, to interview Tuvell. Tuvell was interviewed by these other individuals	things from Feldman at some other time, because of the December 15, 2011, messaging session the two engaged in, where Kime wrote: "I do not envy you having to deal with HR and lawyers {concerning Tuvell's complaints of discrimination/retaliation} at this point."}. Mr. Kime was not aware at the onset of the interviewing process ▤{nor was this even documented anywhere as an IBM operating procedure, apparently} that the fact that Plaintiff was on STD leave would prevent him from providing a performance review, known as a PBC, to present to his management chain for a discussion on Plaintiff's qualifications. On January 6, 2012, Mr. Kime emailed Plaintiff to tell him that he would not be offering him the open position. Mr. Kime testified that he could not move forward with taking Plaintiff directly from short term disability leave based on the difficulty of assessing his work performance without any PBC ▤{this being contradictory with he told Plaintiff at the time of events, which was that it was Plaintiff's being on STD (a reasonable accommodation, as IBM calls it)

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Ⓣ **Feldman &** Ⓣ **Kime** Ⓣ **sabotage** Ⓣ **transfer** Ⓣ		on or about December 8, 2011, and Kime reported that **"the conversations were very positive."** Kime acknowledged that the interviews with the management team did not exclude Tuvell as a candidate. Kime reported that he and his subordinates were **"excited by Walt's evident technical skills."** Kime considered Tuvell's technical knowledge and ability to be a strength. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for the position. Kime believed Tuvell had **"deep technical skills and ability to produce solid documentation."** Mr. Tuvell's December 9, 2011 email to Kime and the other interviewers states, **"You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing."** The posting for the SWG-0436579 position calls for a **"Software Developer,"** and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." IBM now asserts **{falsely, pretextually}** that Plaintiff was rejected for	that was the stumbling block}. Mr. Kime also explained ▤{without foundation, contrary to what Plaintiff had himself explicitly expressed} to Plaintiff that "[g]iven the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." Mr. Kime testified that he concluded that Plaintiff was not an appropriate candidate for the position because Plaintiff appeared to be interested in development work ▤{which is exactly what the advertised job called for}, while the position involved software maintenance for a mature product ▤{as was explained by the interviewers during the interview process, and Tuvell was "fine" with that} and involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in such an environment ▤{though Kime would have had no such concerns unless he himself ran a hostile workplace}. As such ▤{all his concerns deriving from Feldman's "cat's-paw," apparently}, Mr. Kime concluded that Plaintiff

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Ⓣ **Feldman &** Ⓣ **Kime** Ⓣ **sabotage** Ⓣ **transfer** Ⓣ		the position because he had demonstrated difficulty working with team members, based on the input of Mr. Feldman. On or about December 13, 2011, Kime communicated with Feldman, who **{falsely ("cat's-paw" theory)}** recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." Feldman **{falsely}** verbally rated Tuvell a "3", which represents a low ranking, but above those facing termination. On December 13, 2011, Feldman reported **{falsely}** to Kime that Tuvell "had had difficulties working with other people in the group." As of {Feldman's false "cat's-paw" report to Kime on} December 13, 2011, Kime no longer considered hiring Tuvell for the position. On January 6, 2012, Kime formally rejected Tuvell for the position, stating as reasons **primarily the difficulties inherent in "taking you directly from being on short term disability, {which is protected}"** and secondarily "**{false}** concern about the work being to your liking." *** After Plaintiff was rejected for the	would not be a good fit for the position. On January 11, 2012, Plaintiff emailed Mr. Feldman and accused him of retaliation based on his failure to receive an offer for the position with Mr. Kime in Littleton and asked Mr. Feldman to provide him with other ideas for a reasonable accommodation. Plaintiff rejected all of Mr. Feldman's proposed accommodations ≣{which were false, because none of them (see ©) involved cessation of the abuse Feldman/IBM were heaping upon him} and, on January 23, 2012, Plaintiff's counsel requested as a reasonable accommodation that IBM transfer Plaintiff to the position in Littleton with Mr. Kime, for which he had previously applied and been ≣{falsely} rejected, and which had been reposted after the first posting for the position expired. Plaintiff independently applied for the reposted position with Mr. Kime on January 25, 2012, but was not considered for the position for the same ≣{false} reasons he had not been selected for the identical, previously-posted position.

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ⓣ **Feldman &** ⓣ **Kime** ⓣ **sabotage** ⓣ **transfer** ⓣ		Software Developer position, the position remained open, and IBM continued to seek applicants. After Kime decided to not hire Tuvell, and after the posting lapsed, Kime re-posted the identical position for the new year to seek new candidates, this time with the identifying number SWG-0456125. The reposted position also lapsed without being filled. While Kime explained to Plaintiff, on January 6, 2012, that his application for the Software Developer position was due to the inability to take him directly "from being on short term disability," after the fact {now, **pretextually**}, IBM takes the position that this was a false reason, and that indeed, Kime was counselled for identifying a false reason for the rejection. There is sufficient evidence upon which a jury could infer{, and hence this court must accept/credit,} that Mr. Kime knew {from Feldman's "cat's-paw"} of Plaintiff's {protected} internal complaints of handicap discrimination and retaliation as of the time of the January 6, 2012 rejection. For, on or about December 15, 2011, Mr. Kime and Mr. Feldman were mes-	

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ⓣ **Feldman &** ⓣ **Kime** ⓣ **sabotage** ⓣ **transfer** ⓣ		saging each other about Plaintiff's application for the transfer, after having discussed the matter by telephone, and **Kime wrote, "I do not envy you having to deal with HR and lawyers {concerning Tuvell's complaints of discrimination/retaliation} at this point."** ∗∗∗ At about this time, and thereafter, IBM attempted to hire a replacement for Plaintiff's position {hence that Plaintiff's dismissal from the job was not driven by the permissible reason of the "position disappearing"}, asserting that "key investigation necessary to support the correct development of future generations of the Netezza appliance have stopped making progress pending Dr. Tuvell's return to work." ∗∗∗ In December 2011, Mr. Tuvell went to IBM's Littleton facility in order to interview for a transfer that he affirmatively pursued. Mr. Tuvell was not {PTSD-}triggered with respect to his efforts to obtain a new position, and the interview process attending it. Mr. Tuvell reported no psychological difficulty in returning to that IBM building for an interview. Tuvell conducted himself profes-	

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Ⓣ **Feldman &** Ⓣ **Kime** Ⓣ **sabotage** Ⓣ **transfer** Ⓣ Ⓣ Ⓣ Ⓣ Ⓣ Ⓣ Ⓣ		sionally at the December 1, 2011 interview with Kime. Tuvell was interviewed by two other individuals on or about December 8, 2011 {at the Littleton site}, and Kime reported that "the conversations were very positive" and their interactions were congenial. Tuvell's many communications with Mr. Kime concerning the position were "cordial and professional."	

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Ⓤ Ⓤ **Fake offer** Ⓤ **of** Ⓤ **accommo-** Ⓤ **dation** Ⓤ **(Metzger)** Ⓤ	Op ℘9–10: Tuvell subsequently {on January 11, 2012} emailed Feldman accusing IBM of retaliation based upon his failure to receive an offer for the open position. Feldman ▤{falsely} responded {on January 20, 2012} offering Tuvell a ▤{false} variety of other options ▤{none of which responded to Tuvell's medical need to be removed from Feldman's harassment}, including receiving performance feedback from another supervisor, leaving work as necessary to seek medical attention ▤{which he had always been able to do, and did do, all along} and continued access to GOM to look for open positions. Tuvell rejected these ▤{false} proposals ▤{since they didn't respond to his medical need for removal from Feldman's harassment.} *** IBM reiterated {on February 15, 2012} its ▤{false} proposal that Tuvell receive all feedback from a different manager. *** On February 15, 2012, Feldman's supervisor, John Metzger, contacted Tuvell directly and	**PSOF** ℘18–21¶60,63,65: In order to remain a productive employee of IBM, Plaintiff required **{the reasonable accommodation of}** either a new supervisor, or a transfer to a new department, so that he would not have to interact with Mr. Feldman. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." Plaintiff, on a variety of occasions informed IBM that he **could no longer work in any capacity with Mr. Feldman, for medical reasons, and requested that Plaintiff be accorded a new supervisor, or a transfer to a different position.** On June 23, 2011, Plaintiff wrote that the **continuing harassment he experienced exacerbated his medical symptoms, and that he was then nearly incapacitated by PTSD symptoms.** Mr. Tuvell informed IBM, "I am nearly incapacitated now by recurrence of PTSD … I've started seeing my psychological	DSOF ℘14–15¶67,69,71–72: Mr. Feldman ▤{and all others at IBM, after stonewalling Plaintiff's many for many months, reluctantly finally, falsely} responded to Plaintiff's request by offering a ▤{very small} variety of ▤{completely inadequate ▤{because they all still required Plaintiff to report to his main abuser/harasser, Feldman}} accommodations, including having someone other than Mr. Feldman ▤{namely, Feldman's boss, Metzger} provide Plaintiff with performance feedback, allowing Plaintiff to leave work as necessary to attend any doctor's appointments ▤{which was no accommodation at all, since Tuvell (and others) were already doing that anyway}, and ongoing access to GOM to look for open positions under a different supervisor ▤{again not an accommodation, because already available to Tuvell and others}. IBM subsequently ▤{false/misleading: not only "subsequently," rather, this was their stance from the very beginning} denied Plaintiff's request for reassignment, stating its

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ⓤ **Fake offer of accommodation (Metzger)**	▤{falsely} offered to give Tuvell all of his performance evaluations personally. Tuvell ▤{naturally} rejected Metzer's ▤{false} proposal, ▤{correctly} indicating that he was medically incapable of returning to work under Feldman.	health-care professionals again about this problem, including … medication." **Continuing at this point, and many times thereafter, Plaintiff expressly requested the reasonable accommodation of either a new supervisor, or transfer to a new department entirely.** ∗∗∗ On January 18, 2012, Plaintiff informed IBM, "Based on my handicap of PTSD, and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with, or under [Mr. Feldman]." On January 27, 2012, IBM was again informed that Plaintiff was medically incapable of continuing to work under Mr. Feldman. **Plaintiff necessarily rejected IBM's faux proposal of his returning to work under Mr. Feldman, precisely pointing out that it was contrary to Plaintiff's medical limitations as documented by his health care provider, and was contrary to his own reports about what triggers his medical condition.** When Tuvell expressly declined IBM's proposal for this reason,	▤{false} belief that Plaintiff was capable of performing his current position under Mr. Feldman ▤{which was: (i) known-false, given all the competent medical documentation Tuvell had provided; (ii) contrary/pretextual to IBM's argument in ⓞ that Tuvell was "unable to do any work at all"} and again ▤{falsely} proposing ▤{the same inadequate/false} alternative accommodations, including receiving feedback from a different manager. On February 15, 2012, John Metzger, Mr. Feldman's supervisor, wrote to Plaintiff directly and ▤{falsely} offered him as an ▤{inadequate, false} accommodation the ▤{same} possibility of receiving his performance evaluations from Mr. Metzger directly, instead of Mr. Feldman. The next day, February 16, 2012, Plaintiff rejected Mr. Metzger's proposed ▤{false} accommodation, claiming ▤{correctly, as had Ms. Ross} that he was medically incapable of returning to work under Mr. Feldman and opting ▤{this wasn't an "option," it was the only medically acceptable avenue available} instead to remain out on medical leave.

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ⓤ **Fake offer of accommodation (Metzger)** ⓤ		**IBM failed to return with any other dialog for accommodation.** ∗∗∗ Even after IBM repeatedly rejected Plaintiff's requests for reasonable accommodation, **Plaintiff continued to seek interactive dialogue for reasonable accommodation.** On January 11, 2012, after Plaintiff's application for transfer was rejected, he wrote "Is there any other option, any other positions, any other reporting structures, that you can think of that would help me return to IBM as a productive employee?" On January 18, 2012, Plaintiff said, "I am at a loss as to what I can suggest by way of reasonable accommodation that would permit me to work under you. Do you have any ideas?" **IBM did not respond with anything of substance; it was IBM who shut down the interactive process, and not Plaintiff. {Note particularly that IBM's fake offer (not "offers") of accommodation (ⓤ) is incontrovertably inconsistent/pretextual with its false arguments concerning Plaintiff's "inability to do any work at all" (false interpretations of MTRs, ⓞ).}**	

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Ⓥ Ⓥ **LinkedIn;** Ⓥ **EMC** Ⓥ	Op ℘10–11: In May 2012, Human Resources Specialist Adams became ▤{falsely} aware that Tuvell's LinkedIn page ▤{which had been dormant (not updated) for years, incorrectly} listed another company, EMC, as his current employer ▤{which was the case when last updated" years earlier, not currently ("stale" data like this being a well-known staple of the Internet)}. Adams {falsely, without mentioning LinkedIn,} wrote Tuvell asking him to confirm that he was not working for EMC. Adams ▤{falsely} notified Tuvell that working for EMC would be a violation of IBM guidelines and that, if true, he would be terminated. ▤{But that accusation was false, so} Tuvell then ▤{properly} accused IBM of defamation, arguing that he was not violating any guidelines ▤{because he was not}. Adams ▤{finally} responded ▤{falsely} that Tuvell's LinkedIn page listed EMC and asked him again to confirm that he was not working for EMC. Tuvell indicated that he was not working for EMC	**PSOF** ℘17¶56: On May 7, 2012, IBM wrote to Plaintiff, stating {**falsely (i)** IBM knew (as common Internet wisdom) that "stale" information is very common on "social networking" sites such as LinkedIn; **falsely (ii)** IBM had no requirement concerning employees' usage of Internet social networking sites (at least not in the innocuous matter of posting work history information); **falsely (iii)** IBM didn't check other employees' LinkedIn sites as a matter of course, but secret single-out Tuvell specifically for this retaliatory treatment; **falsely (iv)** if IBM had a legitimate (as opposed to retaliatory) reason to inquire of Tuvell's relationship with EMC, it should/would have asked about it in a value-neutral way, rather than aggressively attacking with a false proclamation concerning violation of BCG and threatening his "employment with IBM"} that it believed Plaintiff to be working for EMC, a competitor, and threatening termination. On May 8, 2012, Tuvell responds, and **{truthfully}**	DSOF ℘16¶74–77: On May 7, 2012, while Plaintiff was still out on leave, Ms. Adams wrote Plaintiff asking him to confirm that he was not working for EMC Corporation while on medical leave from his employment with IBM. ▤{Adams wrote (falsely), without mentioning LinkedIn: "This letter is regarding your employment with IBM. IBM believes that you currently are or have been during the course of your employment in violation of one of IBM's Business Conduct Guidelines. Specifically, it appears that you currently are or have been during the course of your employment with IBM working for EMC Corporation in some capacity, such as an employee, consultant or contractor." That was was false, so} Plaintiff responded by accusing IBM of defamation and asking for evidence that he was violating IBM's Guidelines. IBM's Business Conduct Guidelines require employees on leave to inform IBM if they begin working for another company so IBM can run a conflict check and ensure that the company

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ⓥ **LinkedIn;** ⓥ **EMC** ⓥ	and that continuing to ask him if he was working for them was harassment and defamation.	**denies working for EMC.**	is not a competitor ≣{no, the BCG only mentions working for competitors (which Imprivata wasn't), and it says nothing about "running conflict checks" on outside employment; and in any case IBM knew Tuvell took outside employment solely because he was forced to do so, because of IBM's unremitting abuse/harassment without reasonable accommodation}. In response, Ms. Adams wrote to Plaintiff that his LinkedIn page listed EMC as his current employer and asked him to confirm that he was not currently working for EMC. Plaintiff responded by informing Ms. Adams that he was not employed by EMC, and that by continuing to ask him if he was, Ms. Adams was harassing and defaming him. Ms. Adams responded by thanking Plaintiff for his response and asked Plaintiff to advise where he has been working during his leave. Plaintiff responded to Ms. Adams's request by telling her ≣{correctly, per the BCG} that he was in compliance with his contractual obligations and refusing to provide her with the name of the company he began working for while on unpaid leave

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ⓥ **LinkedIn;** ⓥ **EMC** ⓥ ⓥ ⓥ ⓥ ⓥ ⓥ ⓥ ⓥ			from IBM. When Ms. Adams responded ≣{falsely} to Plaintiff that IBM's Personal Leave of Absence Policy required him to tell IBM if he was working while on leave, Plaintiff accused Ms. Adams ≣{correctly} of retaliation and harassment and continued to refuse to provide the name of his new employer.

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Ⓦ **Imprivata**	Op ℘10–11:	**PSOF** ℘17,27–28¶56–57,90–91:	DSOF ℘16,17¶73,78–81:
	Around this time, unbeknownst to IBM, ▤{(i) forced by IBM's insistence that he continue work under Feldman's unhealthy/abusive control and desperate to escape it; as well as (ii) to secure a source of income} Tuvell was interviewing for a full time position with another company, Imprivata, which develops and sells software products ▤{though those products were non-competitive with IBM}. On February 28, 2012, Imprivata made an offer to Tuvell and, on March 12, 2012, Tuvell started working for the software company while still on medical leave from IBM. Tuvell's salary at Imprivata is ▤{very slightly} higher than his salary at IBM. ∗∗∗ Tuvell refused to respond to further inquiries about where he had been working during his leave. On May 15, 2012, Adams wrote to Tuvell that he should "advise IBM where you are currently working by 5pm tomorrow." Adams explained that "IBM ha[d] been attempting for approximately the past two weeks to find out if you	{On May 10, 2012,} Tuvell explains that he does not wish to inform IBM where he is working, as he **fears a retaliatory response.** ∗∗∗ On May 11, 2012, IBM demands to know where Tuvell is working, **{falsely} citing an inapplicable policy,** and its need to confirm that Tuvell is not working for a competitor. On May 15, 2011, IBM demanded to know Tuvell's new employer, based on its duty to confirm that Tuvell is not working for a competitor. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a (non)employee there, and he suggested that {due to his fear of retaliation by IBM against his new employment situation (at Imprivata)} he be permitted to submit the information about his alternate employment, to a confidential, trusted third party who could confirm to IBM that there was no competition. Despite the fact that Tuvell **responded to all of IBM's**	While Plaintiff was communicating with Mr. Feldman and Mr. Metzger about potential accommodations {see ◎}, Plaintiff was also interviewing for a full-time job with Imprivata ▤{out of economic necessity, and his disability leave was nearing its end, and IBM continued refusing him reasonable accommodation}, from whom he received an offer of employment on February 28, 2012, and for whom he began working on March 12, 2012, while still on medical leave from IBM. Plaintiff did not disclose this to IBM ▤{, and he was under no obligation to do so (per the BCG)}. ∗∗∗ On May 15, 2012, Ms. Adams informed Plaintiff that he had to identify the company he was working for by 5:00 PM the following day or IBM would be forced to terminate his employment. Plaintiff continued to refuse to provide IBM with the name of the company he was working for while on medical leave ▤{out of fear, as Tuvell told Adams, that IBM would sabotage his position with his new company (without

Issues/ Facts	Lower Courts' Op Faux "Findings"	Op Falsely Discredit PSOF (MUST Be Credited)	Op Falsely Credit DSOF (MUST Be Discredited)
Imprivata	are engaged in competitive employment {even though Tuvell had assured them he was not}" and that "IBM employees may not work for a competitor in any capacity without obtaining consent {though Tuvell was not working for a competitor}." Tuvell refused to provide IBM with his work information {out of fear, as Tuvell told Adams, that IBM would sabotage his position with his new company (without identifying Imprivata)}.	**concerns and neutralized all asserted reasons to threaten his employment,** Tuvell was **{falsely}** terminated on May 17, 2014. *** Since May 12, 2012, Plaintiff has been working at Imprivata, in a high level, technical capacity. He is **able to perform these functions, despite his PTSD,** because he is not being harassed. **It is denied that Plaintiff's current employer is a competitor of IBM.** In fact {the opposite is true, namely}, Imprivata is part of a "strategic provisioning partnership" with IBM, such that its product is integrated with IBM's corresponding product.	identifying Imprivata)} *** IBM later learned that Plaintiff interviewed for a job with Imprivata, which develops and sells software products, in January of 2012, received an offer of employment on February 28, 2012, and began working for Imprivata on March 12, 2012, while still on medical leave from IBM. Plaintiff's salary at Imprivata is {very slightly} greater than what he was earning at IBM.

Issues/ Facts	Lower Courts' Op Faux "Findings"	Op Falsely Discredit PSOF (MUST Be Credited)	Op Falsely Credit DSOF (MUST Be Discredited)
ⓧ **Termination** ⓧ ⓧ ⓧ ⓧ ⓧ	Op ℘11: On May 17, 2012, IBM ▤{falsely} terminated Tuvell.	**PSOF** ℘17–18¶57: The **{false}** termination occurred within days after Tuvell engaged in **protected conduct.** {See ⓦ; such temporal proximity raises suspicion of **retaliation,** especially in the context of all the other events of this case.}	DSOF ℘17¶79: {O}n May 17, 2012, Plaintiff's employment from IBM was ▤{falsely} terminated based on his refusal to advise IBM of where he was working, despite repeated requests that he do so.

Exhibit DD

Email to F. Pagano, Jan. 29, 2017.

- **Attachment PaganoLetter11.pdf —** Included in this JCApx at Exhibit DD.a, *infra*.

This email-with-attachment was sent on Sun. Jan. 29, and the corresponding U.S. Mail was sent on Mon. Jan. 30, ***before*** Mr. Tuvell received (also on Mon. Jan. 30, via U.S. Mail) Exhibit EE. They "crossed in the mail".

Subject: Criminal charges filed
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 01/29/17 08:25
To: Florence_Pagano@ca1.uscourts.gov
CC: raymond.hulser@usdoj.gov, james.comey@ic.fbi.gov

Ms. Pagano -

The attached letter (also being sent via U.S. Mail) is the latest supplementary filing for my Judicial Misconduct Complaints.

- Walter Tuvell

Attachments:

PaganoLetter11.pdf 2.8 MB

Exhibit DD.a

Attachment PaganoLetter11.pdf to email of Jan. 29, 2017 (Exhibit DD, *supra*) — Formal Criminal Charges (see Exhibit JJ for final from).

See note for Exhibit DD, *supra*.

For FRCP 56, see Exhibit DD.b, *infra.*

For FRCP-LR 56.1, and the file FRCP-LR-DMass_56.1,ANN.pdf (final form) referenced at JCApx ℘787, *infra,* see Exhibit DD.c, *infra.*

From:

Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com
Judicial Misconduct Complaints №01-16-90036,01-16-90041

To:[1]

Florence Pagano
Asst. Cir. Exec. for Legal Affairs
Circuit Executive Office
Moakley Court House, Suite 3700
1 Courthouse Way
Boston, MA 02110
(617)748-9376
Florence_Pagano@ca1.uscourts.gov

Cc:

Raymond Hulser, Chief, PIN
James Comey, Director, FBI

January 29, 2017

Dear Ms. Pagano:

As you know (from the original Judicial Misconduct papers I filed, and the equally important continuing stream of supplemental communications thereto, such as the instant one), I have complained, *informally,* of **criminal** misconduct by the judges (at various levels) involved in my case.

This note hereby informs you that I have filed **formal criminal charges** against the judges. I will not hesitate to join additional charges/parties (judges as well as non-judges) to my criminal complaint, if/when I detect additional criminal behavior (in particular, **continued conspiratorial "cover-up" denial** that the District judge, Casper, falsified the facts of my case).

The pages/exhibits attached hereto supply the relevant information. As always, (updated versions of) the main documents of my case are available in the ZIP file at http://bit.ly/2gFjPx1.

Sincerely yours,

WETuvell

Walter E. Tuvell

---

1 • Delivered by both email and U.S. mail.

Exhibit A

Email to R. Hulser and J. Comey, Jan. 9, 2017.

Subject: Fwd: Request(/demand) for PIN investigation(/action)
Date: Mon, 9 Jan 2017 11:31:39 -0500
From: Walt Tuvell <walt.tuvell@gmail.com>
To: james.comey@ic.fbi.gov

Forwarding, filing the same complaint with you.

-------- Forwarded Message --------

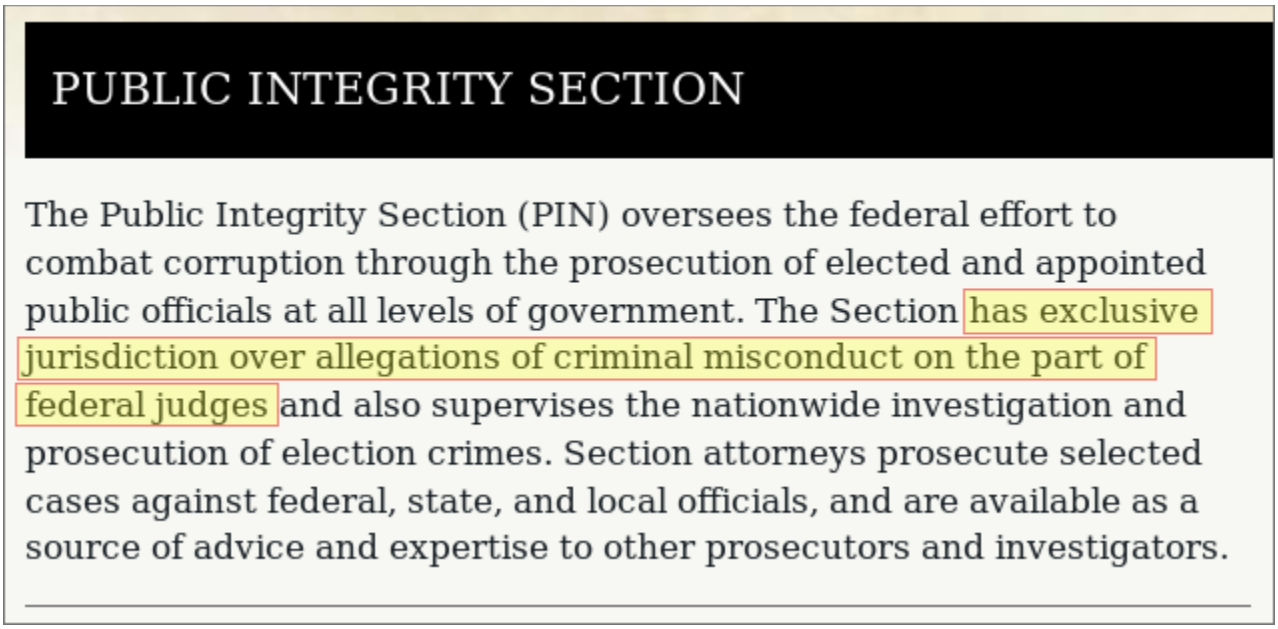
Subject: Request(/demand) for PIN investigation(/action)
Date: Mon, 9 Jan 2017 09:03:03 -0500
From: Walt Tuvell <walt.tuvell@gmail.com>
To: raymond.hulser@usdoj.gov

Directly to Raymond Hulser, Chief of PIN Section of DOJ -

!PLEASE LET ME KNOW WHEN YOU RECEIVE THIS!

I've read about you. You're reputed to be a fearless, very straight shooter. I hope that's not just hype.

According to your website, https://www.justice.gov/criminal/pin:



PUBLIC INTEGRITY SECTION

The Public Integrity Section (PIN) oversees the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government. The Section has exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges and also supervises the nationwide investigation and prosecution of election crimes. Section attorneys prosecute selected cases against federal, state, and local officials, and are available as a source of advice and expertise to other prosecutors and investigators.

I am currently the victim of very serious public corruption (betrayal of public trust), in the form of Judicial Misconduct in the First Circuit. I request(/demand) investigation(/action) by PIN/DOJ.

As is so common, the COVER-UP (by the Appellate Judges) is even worse than the initial incident (by the District Judge). Overall, the story is even bigger than WaterGate. Not exaggerating. Don't believe it? Keep reading, then try to disprove me.

Do you recognize a SMOKING GUN when you see one? (Of course you do; it's in the District Judge's Opinion (attached, SJOpinion.pdf); see below.)

Do you know the Federal Rules for Summary Judgment, FRCP 56? (Of course you do; but as a reminder, see the attached annotated case, 10_Tolan-v-Cotton,SupCt,ANN.pdf.)

Do you know the D.Mass. Local Rules for Summary Judgment? (No, offhand you probably don't; so see attached FRCP-LR-DMass_56.1,ANN.pdf, concerning PSOF and DSOF [Plaintiff's and Defendant's Statements of Facts].)

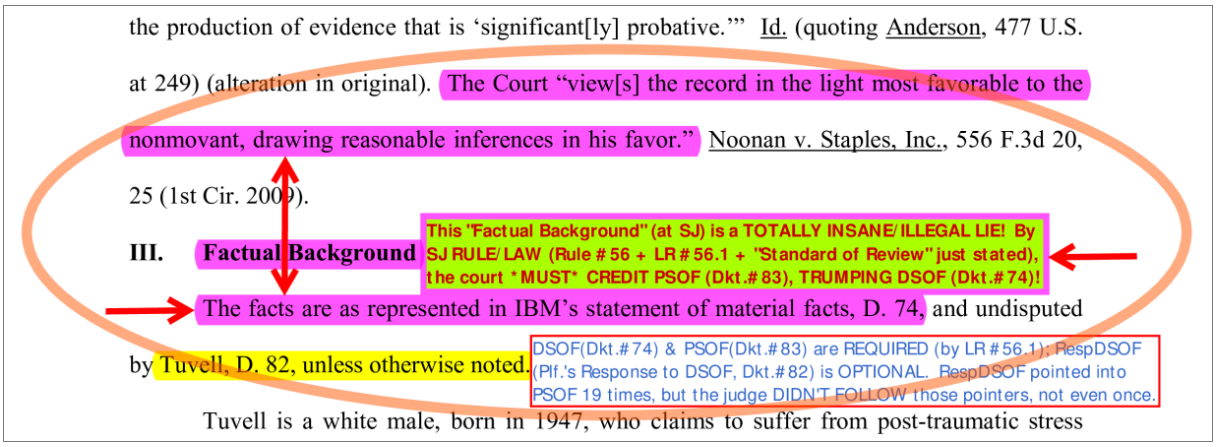
The SMOKING GUN (in SJOpinion.pdf) is as follows (three views of it):

#1. Paraphrase of SMOKING GUN:

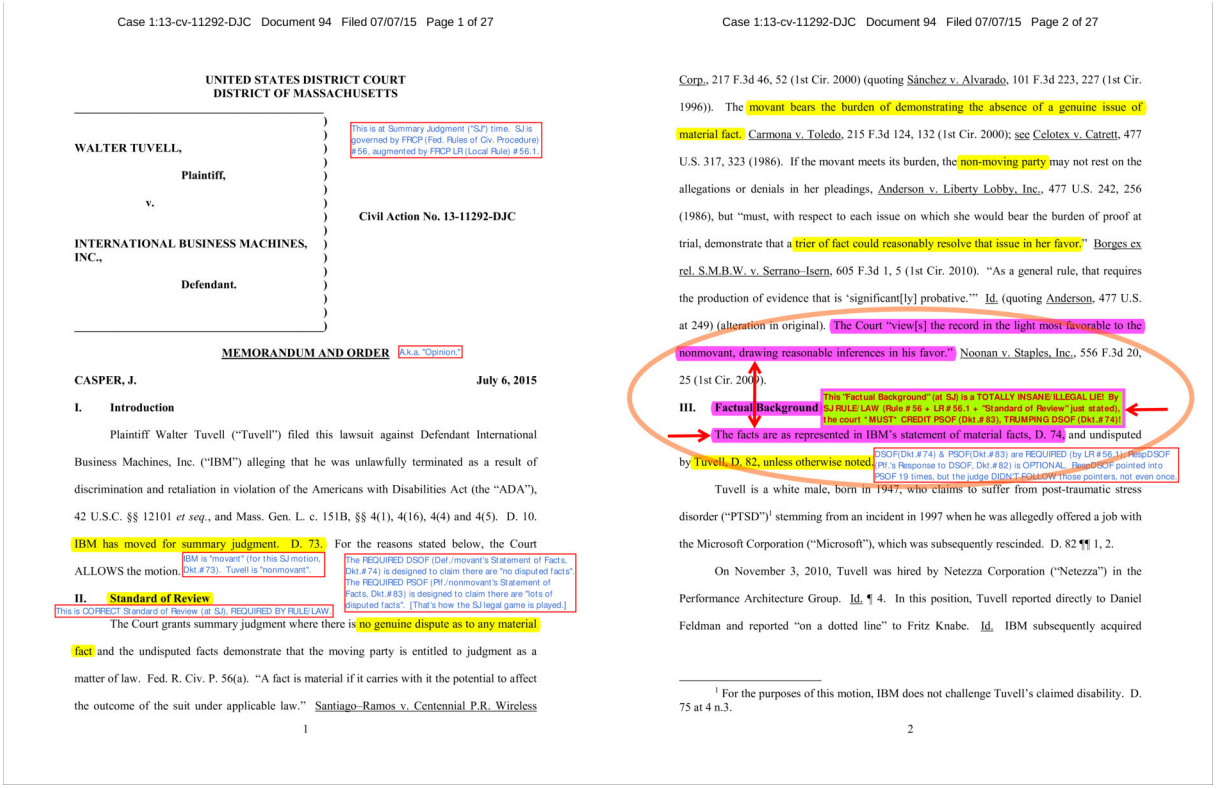
For the sake of argument let's suppose, hypothetically speaking, that a District Judge sitting in judgment over a civil action (on any topic; the facts are not important), were to grant Defendant's Motion for Summary Judgment (the final pre-trial step before trial), writing her Opinion as follows:

> **At Summary Judgment stage, the Court is strictly required, by law and by judicial rule, to blindly credit ("believe") the Plaintiff/non-movant's "story" as "true": to view all *purported/alleged* "facts" (a.k.a. "events," "transactions," "happenings") in the light most favorable to the Plaintiff, resolving all disagreements and inferences therefrom to Plaintiff's benefit. But arbitrarily, in this case, we completely ignore Plaintiff's story, and inexplicably accept Defendant/movant's biased story as "true." On the basis of that known-falsification, we find no laws were broken, so the case is dismissed.**

#2. Actual screenshot of Smoking Gun (p.2 of SJOpinion.pdf, annotated):



#3. Actual screenshot of p.1-2 of Opinion (annotated, including the Smoking Gun):



Case 1:13-cv-11292-DJC Document 94 Filed 07/07/15 Page 1 of 27

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,
Plaintiff,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Defendant.

Civil Action No. 13-11292-DJC

This is at Summary Judgment ("SJ") time. SJ is governed by FRCP (Fed. Rules of Civ. Procedure) #56, augmented by FRCP LR (Local Rule) #56.1.

MEMORANDUM AND ORDER A.k.a. "Opinion:"

CASPER, J. July 6, 2015

I. Introduction

Plaintiff Walter Tuvell ("Tuvell") filed this lawsuit against Defendant International Business Machines, Inc. ("IBM") alleging that he was unlawfully terminated as a result of discrimination and retaliation in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and Mass. Gen. L. c. 151B, §§ 4(1), 4(16), 4(4) and 4(5). D. 10. IBM has moved for summary judgment. D. 73. For the reasons stated below, the Court ALLOWS the motion.

IBM is "movant" (for this SJ motion, Dkt.#73). Tuvell is "nonmovant".

The REQUIRED DSOF (Def./movant's Statement of Facts, Dkt.#74) is designed to claim there are "no disputed facts". The REQUIRED PSOF (Pl./nonmovant's Statement of Facts, Dkt.#83) is designed to claim there are "lots of disputed facts". [That's how the SJ legal game is played.]

II. Standard of Review

This is CORRECT Standard of Review (at SJ), REQUIRED BY RULE/LAW.

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless

1

Case 1:13-cv-11292-DJC Document 94 Filed 07/07/15 Page 2 of 27

Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

This "Factual Background" (at SJ) is a TOTALLY INSANE/ILLEGAL LIE! By SJ RULE/ LAW (Rule # 56 + LR # 56.1 + "Standard of Review" just stated), the court "MUST" CREDIT PSOF (Dkt.# 83), TRUMPING DSOF (Dkt.# 74)!

The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted.

DSOF(Dkt.# 74) & PSOF(Dkt.# 83) are REQUIRED (by LR # 56.1) for DSOF (Pl.'s Response to DSOF, Dkt.# 82) is OPTIONAL. Each DSOF pointed into PSOF 19 times, but the judge DIDN'T FOLLOW those pointers, not even once.

Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress disorder ("PTSD")[1] stemming from an incident in 1997 when he was allegedly offered a job with the Microsoft Corporation ("Microsoft"), which was subsequently rescinded. D. 82 ¶¶ 1, 2.

On November 3, 2010, Tuvell was hired by Netezza Corporation ("Netezza") in the Performance Architecture Group. Id. ¶ 4. In this position, Tuvell reported directly to Daniel Feldman and reported "on a dotted line" to Fritz Knabe. Id. IBM subsequently acquired

[1] For the purposes of this motion, IBM does not challenge Tuvell's claimed disability. D. 75 at 4 n.3.

2

For an extremely detailed 3-way comparison (Opinion ↔ PSOF ↔ DSOF), which PROVES the Smoking Gun actually happened the way the above screenshots indicate, see 11_PetWritTable-Unabridged-JUXTAPOSED.pdf (attached).

Obviously, the District Judge "can't do" what she did. It's illegal (see attached essay, 09_JudicialTwilightZone.pdf). So I appealed. But the Appellate Court blindly COVERED-UP. So I petitioned for Writ of Certiorari to the Supreme Court. They COVERED-UP too. So I'm currently pursuing the case via Judicial Misconduct charges with First Circuit Judicial Council. But I don't trust them, they'll no doubt COVER-UP too (for the obvious reason that "self-policing" doesn't work, otherwise your PIN section wouldn't exist).

So now I'm turning to you for help. What the judges have done to me is not only un-Constitutional (denial of Due Process and Equal Protection), it's actually CRIMINAL by statute (see 09_JudicialTwilightZone.pdf).

At this point, you should/must want the FULL PROOFS/DETAILS (copies of all important docs, such as PSOF, DSOF, etc.). That's all in the ZIP archive file downloadable from https://www.dropbox.com/s/v7s4inzzjc06u4v/SupCt=16-343.zip?dl=0, or equivalently http://bit.ly/2gFjPx1. (And there's more where that came from, such as depositions/exhibits/etc. Just ask.)

You should begin digging-in by reading 01_PetWritCert+Apx.pdf (in the ZIP file), which contains the best over-all explanation of the story.

You'll find that the docs in the ZIP file give a FULLY ELABORATED/PROVEN account of everything you need to know about the case. So there's NO "real investigation" needed by your office (other than cheaply checking that I'm telling the truth, e.g., by retrieving your own versions of the documents from the courts in question, or from PACER). But beyond MY particular case, your investigators should(will) want to expand to the other cases and Circuits, and that will take a very major full-scale investigation (almost certainly a Special Prosecutor). We (the American people) encourage that.

Please contact me concerning anything. I am available at any time/place for any kind of consultation (I'd love to travel to DC to meet you for a face-to-face meeting with any investigators you like, for example).

- Walter Tuvell (PhD, Math, MIT & U.Chicago -- i.e., "not-a-crank")

PS. I have NO partisan/political agenda whatsoever. I just want justice, and to fix a very broken system.

Exhibit B

Email to R. Hulser and J. Comey, Jan. 14, 2017.

Subject: Official filing of Formal Criminal Complaint
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 01/14/17 07:27
To: raymond.hulser@usdoj.gov
CC: james.comey@ic.fbi.gov, Criminal.Division@usdoj.gov

/* The following email content[1] is also attached hereto in PDF format (HulserLetter.pdf). */

Dear Mr. Hulser:

Pursuant to PIN's "exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges" (https://www.justice.gov/criminal/pin), I hereby file this formal Complaint, regarding public corruption in the Federal Judiciary — specifically, in the Federal First Judicial Circuit (both District and Appellate Judges, and potentially others, judges and non-judges, pending your full investigation).

The details of this Complaint are explained in (i) the attached AO91 Criminal Complaint Form, and (ii) the included USB storage drive.

Please **ACKNOWLEDGE RECEIPT** of this Complaint **as soon as possible.**

Thank you.

Sincerely yours,

Walter E. Tuvell

1. Via email, U.S. mail, and telephone. I've actually tried filing this Complaint several times previously (beginning in November, 2016), to several government agencies (including PIN), via email. However, **nobody has yet ACKNOWLEDGED RECEIPT.** So I'm hereby retrying yet again, by all communications mechanisms I know of.

Attachments:

HulserLetter.pdf	216 KB
CriminalComplaint.pdf	330 KB

Exhibit C

Letter to R. Hulser, Jan. 14, 2017.

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

To:[1]
Raymond Hulser
Chief, PIN (Public Integrity Section), Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001
(202)514-1412
raymond.hulser@usdoj.gov

January 14, 2017

Dear Mr. Hulser:

Pursuant to PIN's "exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges" (https://www.justice.gov/criminal/pin), I hereby file this formal Complaint, regarding public corruption in the Federal Judiciary — specifically, in the Federal First Judicial Circuit (both District and Appellate Judges, and potentially others, judges and non-judges, pending your full investigation).

The details of this Complaint are explained in (i) the attached AO91 Criminal Complaint Form, and (ii) the included USB storage drive.

Please **ACKNOWLEDGE RECEIPT** of this Complaint **as soon as possible.**

Thank you.

Sincerely yours,

Walter E. Tuvell

---

1 • Via email, U.S. mail, and telephone. I've actually tried filing this Complaint several times previously (beginning in November, 2016), to several government agencies (including PIN), via email. However, **nobody has yet ACKNOWLEDGED RECEIPT.** So I'm hereby retrying yet again, by all communications mechanisms I know of.

Exhibit D

AO91 Criminal Complaint Form, with Attached Sheet. (Unsigned/undated, pending PIN investigation.)

AO 91 (Rev. 11/11) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

United States of America	)	
v.	)	
Judges/Justices: Casper (1st Cir. District Court, D.Mass.); Torruella, Lynch, Thompson, Howard, Kayatta (1st Cir. Court of Appeals); Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan (U.S. Supreme Court); unnamed/ unknown others (not necessarily all judges)	)	Case No.
Defendant(s)	)	

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of July 6/7, 2015, continuing to present in the county of Suffolk in the (N/A) District of Massachusetts, the defendant(s) violated:

Code Section	*Offense Description*
18 USC §1519,1503,1505	Obstruction of Justice: Falsification of Records and of Proceedings
18 USC §4	Misprision of Felony (Concealment, Cover-Up, Whitewash)
18 USC §242	Deprivation of Rights Under Color Of Law
28 USC §453; 5 USC §1331	Violation of Judicial and Civil Service Oaths of Office
18 USC §1621–1623,1001	Perjury; Subornation of Perjury; False Declarations before Court or Fed. Govt.
5 USC §7311(1–2),3333; 18 USC §1918(1–2)	Disloyalty
18 USC §371	Conspiracy
18 USC §2381	Treason

This criminal complaint is based on these facts:

This concerns the case Tuvell v. IBM (District #13-11292-DJC; Appeal #15-1914; Sup.Ct #16-343; Judicial Misconduct Complaints to Judicial Council #01-16-90036,01-16-90041). Judge Casper LIED, FALSIFYING ALL THE FACTS OF THE CASE. She issued her FALSE Opinion on July 6, 2015 (Judgment issued July 7, 2015), FALSELY dismissing the case at summary judgment stage; the appellate court subsequently FALSELY affirmed and denied rehearing; the Supreme Court subsequently FALSELY denied Petition for Writ of Certiorari and denied rehearing. All these FALSE acts were KNOWN FALSE AT THE TIME to all judges/ justices, thereby violating the laws listed above.

☑ Continued on the attached sheet.

Complainant's signature

Printed name and title

Sworn to before me and signed in my presence.

Date:

Judge's signature

City and state:

Printed name and title

ATTACHED SHEET

From:
Walter Tuvell
836 Main St.
Reading MA, 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

January 14, 2017

To Whom It May Concern:

This "Attached Sheet" accompanies my associated Criminal Complaint form (AO91). The following documents (hereby "included by reference" as part of this "Attached Sheet") support my complaint. They are contained in a ZIP archive file, on a USB storage drive accompanying this Criminal Complaint. Said ZIP file is also available for anonymous Internet download (Dropbox account not required) at: http://bit.ly/2gFjPx1 (or equivalently, https://www.dropbox.com/s/v7s4inzzjc06u4v/SupCt%3D16-343.zip?dl=0).

- **00_README.pdf —** Introductory file. It supplies brief descriptions of the following documents.
- **01_PetWritCert+Apx.pdf**
- **02_PetOptApx.pdf**
- **03_SuppBrief1+Apx.pdf**
- **04_SuppBrief2+Apx.pdf**
- **05_PetReh.pdf**
- **06_PaganoCriminalMisconduct.pdf**
- **07_CriminalComplaint.pdf**
- **08_JudicialTwilightZone.pdf**
- **09_Tolan-v-Cotton,SupCt,ANN.pdf**
- **10_FRCP-LR56.1-DMass,ANN.pdf**
- **11_PetWritTable-Unabridged-JUXTAPOSED.pdf**

Exhibit E

Certified Mail, Sender’s Receipt, Jan. 14, 2017.

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com®.

WASHINGTON, DC 20530

OFFICIAL USE

Postage	$3.30
Certified Fee	$2.70
Return Receipt Fee (Endorsement Required)	$0.00
Restricted Delivery Fee (Endorsement Required)	$0.00
Total Postage & Fees	$0.00
	$1.36
	$7.36

0867
01

Postmark Here

READING, MA 01867-9998
JAN 14 2016
USPS

01/14/2017

Sent To: Raymond Hulser, Chief, PIN DOJ
Street & Apt. No., or PO Box No.: 950 Pennsylvania Ave, NW
City, State, ZIP+4: Washington, DC 20530-0001

PS Form 3800, July 2014 — See Reverse for Instructions

7015 0920 0000 0456 4078

Exhibit F

Certified Mail, USPS Tracking Website, Jan. 29, 2017.

USPS Tracking®

Still Have Questions?
Browse our FAQs ›

Get Easy Tracking Updates ›
Sign up for My USPS.

Tracking Number: 70150920000004564078

Product & Tracking Information

Postal Product:
First-Class Mail®

Features:
Certified Mail™ Return Receipt

See tracking for related item: 9590940220696132379521

DATE & TIME	STATUS OF ITEM	LOCATION
January 23, 2017 , 4:38 am	**Delivered**	**WASHINGTON, DC 20530**
Your item was delivered at 4:38 am on January 23, 2017 in WASHINGTON, DC 20530.		
January 19, 2017 , 2:11 pm	Business Closed	WASHINGTON, DC 20530
January 19, 2017 , 12:41 pm	Arrived at Unit	WASHINGTON, DC 20018
January 16, 2017 , 12:39 am	In Transit to Destination	
January 15, 2017 , 12:39 am	Departed USPS Origin Facility	BOSTON, MA 02205
January 14, 2017 , 10:17 pm	Arrived at USPS Origin Facility	BOSTON, MA 02205
January 14, 2017 , 1:23 pm	Departed Post Office	READING, MA 01867
January 14, 2017 , 10:02 am	Acceptance	READING, MA 01867

Available Actions

Text Updates

Email Updates

Track Another Package

Tracking (or receipt) number

Track It

Manage Incoming Packages

Track all your packages from a dashboard. No tracking numbers necessary.

Sign up for My USPS ›

Exhibit G

Certified Mail, USPS Return Receipt, Jan. 26, 2017.

Help

Product Tracking & Reporting

Home | Search | Reports | Manual Entry | Retail Commitments | PTR / EDW | USPS Corporate Accounts

January 26, 2017

USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7015 0520 0000 0468 4078

This item was delivered on 01/23/2017 at 04:36:00

« Return to Tracking Number View

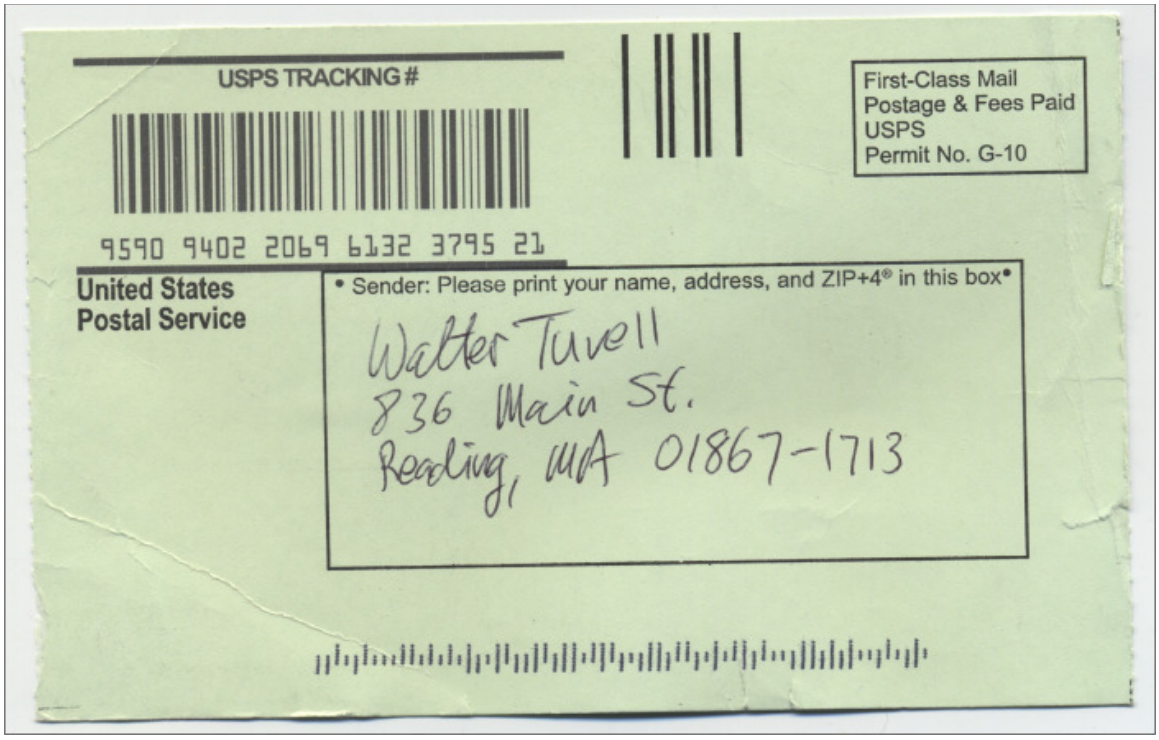
Signature	ture A Prindy ed e
Address	ery ess 20530 JUSTICE

Enter up to 35 items separated by commas.

Select Search Type: Quick Search | Submit

Exhibit H

Certified Mail, Recipient Return Receipt, Jan. 28, 2017.



USPS TRACKING #

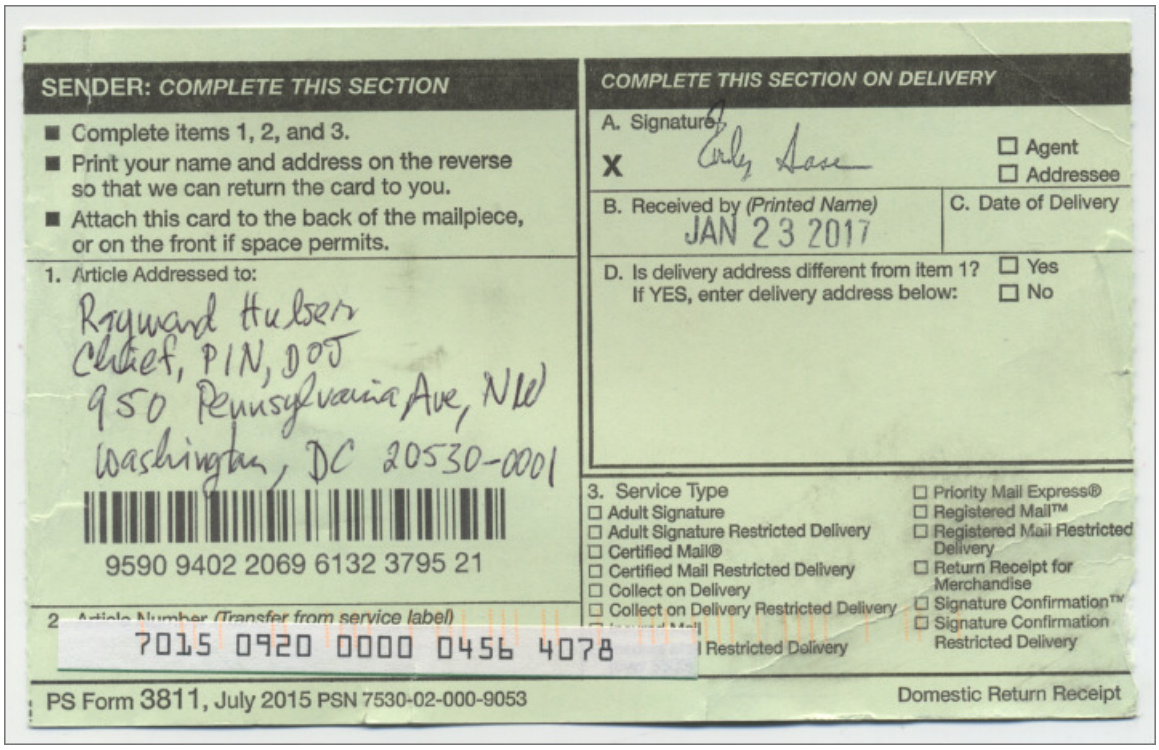
9590 9402 2069 6132 3795 21

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

United States
Postal Service

• Sender: Please print your name, address, and ZIP+4® in this box•

Walter Tuvell
836 Main St.
Reading, MA 01867-1713



SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Rayward Hulser
Chief, PIN, DOJ
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

9590 9402 2069 6132 3795 21

2. Article Number *(Transfer from service label)*

7015 0920 0000 0456 4078

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Emily Hare ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* JAN 23 2017

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

Exhibit DD.b

FRCP Rule 56 (Annotated).

~~(A) conduct an accounting;~~
~~(B) determine the amount of damages;~~
~~(C) establish the truth of any allegation by evidence; or~~
~~(D) investigate any other matter.~~

~~(e) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).~~

~~(d) JUDGMENT AGAINST THE UNITED STATES. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.~~

~~(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 29, 2015, eff. Dec. 1, 2015.)~~

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

"AND ONLY IF", per Tolan v. Cotton p.7 (= JCApx p. 698).

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Not only must the court "consider" BOTH parties' statements, but it MUST ALWAYS CREDIT NONMOVANT (NOT MOVANT). Tolan v. Cotton, p.1 (= JCApx p.692) and passim.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

AND ONLY IF.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

~~**Rule 57. Declaratory Judgment**~~

~~These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgment action.~~

~~(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 2007, eff. Dec. 1, 2007.)~~

~~**Rule 58. Entering Judgment**~~

~~(a) SEPARATE DOCUMENT. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:~~

~~(1) for judgment under Rule 50(b);~~

~~(2) to amend or make additional findings under Rule 52(b);~~

Exhibit DD.c

FRCP Local Rule 56.1 D.Mass., Annotated.

Referenced as FRCP-LR-DMass_56.1,ANN.pdf (final form), at Exhibit DD.a, *supra*.

First Circuit, D.Mass., Local Rule 56.1

DSOF (Defendant's Statement of Facts, assuming Defendant is "movant")

PSOF (Plaintiff's Statement of Facts, assuming Plaintiff is "nonmovant")

RULE 56.1 MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment shall include a concise statement of the material facts of record as to which the moving party contends there is no genuine issue to be tried, with page references to affidavits, depositions and other documentation. Failure to include such a statement constitutes grounds for denial of the motion. Opposition to motions for summary judgment must be filed, unless the court orders otherwise, within 21 days after the motion is served. A party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation. Copies of all referenced documentation shall be filed as exhibits to the motion or opposition. Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties. Unless the court orders otherwise, the moving party may file a reply within 14 days after the response is served.

DSOF

PSOF

Effective September 1, 1990, amended effective December 1, 2009.

This says that DSOF and PSOF are the ONLY two documents REQUIRED to be filed at Summary Judgment time. Additional documents MAY (and typically ARE) submitted, but they are OPTIONAL. In particular, facts in the DSOF will be "deemed admitted" unless rebutted by facts in the PSOF.

Exhibit EE

Judicial Council Opinion(/Order), Jan. 27, 2017.

Though it was dated Fri. Jan 27, this U.S. Mail was received by Mr. Tuvell on Mon. Jan. 30, ***after*** Mr. Tuvell had sent (by email and U.S. Mail) Exhibit DD/Exhibit DD.a. They "crossed in the mail".

An annotated version of this opinion is provided separately.

UNITED STATES COURTS FOR THE FIRST CIRCUIT
OFFICE OF THE CIRCUIT EXECUTIVE
JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE
1 COURTHOUSE WAY - SUITE 3700
BOSTON, MA 02210

SUSAN J. GOLDBERG
CIRCUIT EXECUTIVE
617-748-9614

FLORENCE PAGANO
DEPUTY CIRCUIT EXECUTIVE
617-748-9376

January 27, 2017

Walter Tuvell
836 Main Street
Reading, MA 01867

Re: Complaint Nos. 01-16-90036 - 01-16-90041

Dear Mr. Tuvell:

I have enclosed a copy of Judge Barron's order dismissing your misconduct complaint(s). Pursuant to Rule 11(g)(3) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), you have the right to petition the Judicial Council for review of the enclosed disposition. You have forty-two (42) days from the date of the Judge's order to file a petition for review. See Rules of Judicial-Conduct, Rule 18(b).

Sincerely,

Florence Pagano
Deputy Circuit Executive

Enclosure

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NOS. 01-16-90036, 01-16-90037, 01-16-90038,
01-16-90039, 01-16-90040 and 01-16-90041

BEFORE
Barron, Circuit Judge

ORDER

ENTERED: JANUARY 27, 2017

Complainant, a litigant, has filed complaints of misconduct, under 28 U.S.C. § 351(a), against a district judge and five appellate judges in the First Circuit. Complainant alleges judicial misconduct in connection with a civil proceeding and appeal. The misconduct complaints are baseless and not cognizable.

Complainant asserts that the district judge was biased against him because of his cause of action and, as a result, entered judgment in favor of the defendant. Specifically, complainant alleges that, by accepting facts asserted by the defendant in support of a motion for summary judgment, the district judge "wrongfully lied" and failed to comply with a local rule. Additionally, complainant alleges that the district judge violated various canons of the Code of Conduct for United States Judges (Code of Conduct), as well as numerous federal criminal statutes.

Complainant lodges the same allegations against the subject circuit judges. He further asserts that, by affirming the judgment of the district court, the appellate panel "wrongfully lied" and used abusive language in its written opinion. Further, complainant alleges that, by denying his petition for panel rehearing and rehearing en banc, the circuit judges ignored facts and "blindly" accepted the appellate panel's decision.

A review of the record of the case provides no factual support for complainant's conclusory allegations of judicial wrongdoing. As an initial matter, a violation of the Code of Conduct may inform consideration of a judicial misconduct complaint but does not necessarily constitute judicial misconduct under the statute. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Commentary on Rule 3. In the present matter, there is no evidence that any of the subject judges violated the Code of Conduct, let alone engaged in judicial misconduct.

Complainant offers no facts suggesting that the district judge exhibited bias or engaged in any other wrongdoing in connection with the proceeding. The record demonstrates that the district court heard from both parties in full before issuing a lengthy memorandum and order thoroughly reviewing complainant's substantive claims before granting the defendant's motion for summary judgment and dismissing the complaint. Furthermore, complainant's claim that the district judge violated a local rule would not, absent evidence of improper judicial motive, suggest cognizable misconduct.[1]

[1] Although not necessary to the disposition of the matter, the allegation that the district judge violated a local rule is unsupported by the record and was rejected by the Court of Appeals.

The appellate record is equally devoid of any facts suggesting judicial impropriety. With regard to the claim of abusive language in the per curiam opinion, the Court's wording is not remotely "egregious" or "hostile." See Rules of Judicial-Conduct, Rule 3(h)(1)(D) ("Cognizable misconduct . . . includes . . . treating litigants or attorneys in a demonstrably egregious and hostile manner . . ."). "[J]udges commonly express views based upon the record . . . in written opinions, and they are permitted 'leeway in the crafting of judicial opinions.'" Lynch, C.C.J., Order, In Re Judicial Misconduct Complaint No. 01-12-90015, July 11, 2012, at 5, quoting In Re: Complaint of Jane Doe, 640 F.3d 861, 863 (Judicial Council of the Eighth Circuit, February 24, 2011). The opinion at issue in this matter "do[es] not even approach 'the sort of deep-seated unequivocal antagonism that may constitute misconduct.'" In Re Judicial Misconduct Complaint No. 01-12-90015, supra, at 6, quoting In Re: Jane Doe, 640 F.3d at 863.

As there is no evidence of judicial bias or other wrongdoing by any of the subject judges, the misconduct complaints are dismissed as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Lacking any evidence of improper judicial motive, the misconduct complaints are simply another attempt to reassert complainant's dissatisfaction with the district and appellate courts' rulings in complainant's underlying case. This is not misconduct. See Rules of Judicial-Conduct, Rule 3(h)(3)(A) ("Cognizable misconduct . . . does not include . . . an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling . . .

without more, is merits-related."). Accordingly, the complaints are also dismissed as not cognizable, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

For the reasons stated, Complaint Nos. 01-16-90036, 01-16-90037, 01-16-90038, 01-16-90039, 01-16-90040 and 01-16-90041 are dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B) and Rule 11(c)(1)(D), respectively.

1/27/17
Date

Judge Barron