

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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| CITIZENS FOR RESPONSIBILITY |) | |
| AND ETHICS IN WASHINGTON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 18-cv-1766 (RBW) |
| |) | |
| U.S. DEPARTMENT OF JUSTICE, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO
EXCUSE U.S. ATTORNEY’S OFFICE OFFICIAL**

A significant portion of this Freedom of Information Act (“FOIA”) lawsuit, filed nearly 15 months ago, has been on hold because of the Department of Justice’s (“DOJ”) invocation of FOIA Exemption 7(A) based on a sealed declaration that purportedly explains how disclosure of the requested records of DOJ’s Inspector General (“IG”) would cause harm to an ongoing law enforcement proceeding. On three separate occasions—July 9, September 9, and September 30, 2019—DOJ has represented to this Court *in camera* that the need for the protection of Exemption 7(A) continues. At the most recent status conference, the Court expressed its “dismay” that a further continuance was necessary to protect “the interest that both the government and Mr. McCabe have in reference to the dissemination of information about his [McCabe’s] situation before a determination of how the underlying matter is going to proceed.” Transcript of Status Conference, Sept. 30, 2019, at 7 (“Trans.”).¹ The Court made clear it was reluctantly continuing the case until mid-November after considering “what the government’s represented.” *Id.* at 10. The Court also made clear, however, that “the government will have to

¹ For the Court’s convenience a copy of this transcript is attached as Exhibit A.

make a call. If it doesn't, I'm going to start ordering the release of information on the next occasion." *Id.* at 11.

The government apparently has now made that call. By notice filed on November 13, 2019 (ECF No. 36), DOJ advised the Court "that it is withdrawing its invocation of Exemption 7(A) over information related to the proceeding described in the Lyons Declaration." Notice of Withdrawal of Exemption 7(A) and Motion to Excuse U.S. Attorney's Office Official, at 1 ("DOJ's Notice"). DOJ offered no further explanation for its withdrawal and also requested that the Court "eliminate any obligation for a U.S. Attorney's Office official to appear at the November 14, 2019, hearing." *Id.* Significantly, in response to questions from plaintiff's counsel about whether in the absence of an appearance by an official from the U.S. Attorney's Office DOJ will be in a position to answer any questions that may arise, including questions about the status of the investigation, DOJ responded that "[q]uestions about the status of the enforcement proceeding are irrelevant to this FOIA case in light of Defendant's withdrawal of its invocation of Exemption 7(A)." D's Notice at 2.

To the contrary, serious questions remain about whether DOJ has been acting in good faith and the extent to which any declaration DOJ may file in the future to defend its withholdings under FOIA Exemption 7 is entitled to a presumption of good faith. As the Court is well aware, since the outset of this litigation plaintiff has questioned the basis for DOJ's withholdings and its concern that with DOJ was relying on FOIA Exemption 7(A) to prevent the disclosure of exculpatory evidence gathered by the IG. This fear recently was confirmed by Mr. McCabe's civil lawsuit,² which identifies that evidence, including an interview the IG conducted

² See *McCabe v. Barr*, Civil Action No. 19-2399 RDM (D.D.C.) ("*McCabe v. Barr*").

with the FBI's Michael Kortan. *See* Trans. at 8-9; *McCabe v. Barr*, Complaint ¶ 111 (ECF No. 1).

Further, DOJ's motion to dismiss that lawsuit raises additional questions about DOJ's motivation behind its invocation of Exemption 7(A). DOJ justified its departure from the 30-day response time Mr. McCabe should have been afforded to respond to his proposed removal by reference to an FBI SES Policy, which DOJ described as allowing the FBI to curtail that notice to "as little as seven days" "if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment can be imposed[.]" *McCabe v. Barr*, Memorandum in Support of Motion to Dismiss and for Summary Judgment (ECF No. 23) at 2-3, citing FBI SES Policy at 16. In its motion DOJ argued it had "a sound basis for affording Mr. McCabe seven days to respond" "[g]iven the Inspector General's findings that Mr. McCabe lacked candor under oath . . . there was reasonable cause to believe that Mr. McCabe had committed a crime for which a sentence could be imposed[.]" *Id.* at 3. In other words, not only did DOJ's invocation of FOIA Exemption 7(A) in this case provide the government with a justification for withholding critical documents for months, but it also buttresses DOJ's defense in a civil lawsuit that it properly afforded Mr. McCabe only seven days to respond to his proposed termination—a shortened period that would ensure Mr. McCabe would be terminated before he could collect a government pension he had earned with decades of government service.

In sum, the government's conduct and its months-long insistence that disclosing documents from the long-closed IG investigation would harm an ongoing investigation raise serious questions about the government's conduct and the extent to which it may have abused court processes to advance its own interests over those of the public. In light of these questions, the Court, the plaintiff, and the public are entitled to an explanation for DOJ's sudden and

unexplained reversal. Accordingly, plaintiff respectfully requests that the attendance of an official from the U.S. Attorney's Office at the upcoming status conference on November 14, 2019 not be excused without assurances from DOJ that it will be able to answer any questions that arise at the hearing on November 14 concerning, *inter alia*, the status of the law enforcement investigation at issue here.

Respectfully submitted,

/s/ Anne L. Weismann

Anne L. Weismann

(D.C. Bar No. 298190)

Adam J. Rappaport

(D.C. Bar No. 479866)

Citizens for Responsibility and Ethics

in Washington

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Phone: (202) 408-5565

Facsimile: (202) 588-5020

Dated: November 13, 2019

Attorneys for Plaintiff

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY .
AND ETHICS IN WASHINGTON, .
Plaintiff, .
vs. . Docket No. CV18-1766-RBW
. .
U.S. DEPARTMENT OF JUSTICE . Washington, D.C.
. Monday, September 30, 2019
Defendant. .
.x 9:35 a.m.

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE SENIOR JUDGE REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Anne L. Weismann, Chief FOIA Counsel
CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON
455 Massachusetts Avenue, NW
Washington, DC 20001

For the Defendant: Justin M. Sandberg, Attorney-at-Law
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW - Room 11004
Washington, DC 20005

Court Reporter: Cathryn J. Jones, RPR
Official Court Reporter
Room 6521, U.S. District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Proceedings recorded by machine shorthand, transcript
produced by computer-aided transcription.

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this morning this is In re: Citizens For Responsibility and Ethics In Washington versus the U.S. Department of Justice. This is Civil Action Number 18-1766.

Ask the parties to step forward and identify yourselves for the record, please.

MS. WEISMANN: Good morning, Your Honor, Anne Weismann on behalf of the plaintiffs, Citizens For Responsibility and Ethics In Washington.

THE COURT: Good morning.

MR. SANDBERG: Good morning, Your Honor, Justin Sandberg on behalf of the defendants. With me at counsel is Madeleine Hensler from U.S. Department of Justice Office of Inspector General and Assistant United States Attorney, J.P. Cooney.

THE COURT: The decision as to what the government intends to do in reference to Mr. McCabe has that determination been made, and do we need to have further discussions ex parte in reference to that?

MR. SANDBERG: Ex parte, Your Honor.

THE COURT: Very well. I'll have to ask counsel for the plaintiff to leave the courtroom while I have discussions with government counsel. And anybody else in the courtroom not associated with the case will also have to

1 wait outside.

2 [Thereupon, plaintiff's counsel exits the
3 courtroom.]

4 THE COURT:

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7 MR. COONEY:

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MR. COONEY:

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MR. SANDBERG:

THE COURT:

[Thereupon, plaintiff's counsel enters the

1 courtroom.]

2 THE COURT: Unfortunately, this matter will have
3 to be continued. I have for the benefit of the plaintiff
4 expressed my dismay with the fact that this matter has to be
5 continued further, but under the circumstances I don't think
6 I have any alternatives. Because obviously, I've got to
7 weigh the plaintiff's and society's right to have access to
8 information about what its government is doing on the one
9 hand. But on the other hand, I have to obviously weigh a
10 lot of other factors that come into play including the
11 interest that both the government and Mr. McCabe have in
12 reference to the dissemination of information about his
13 situation before a determination of how the underlying
14 matter is going to proceed.

15 So balancing those prospectives and fully
16 appreciative of the public's right to know and the
17 plaintiff's right to access to the information, I have
18 concluded that a continuance is necessary, but not to the
19 extent that the government has requested. So if counsel is
20 available will continue this matter until November 15th at
21 9:30, if that's good. Hopefully some movement --

22 MS. WEISMANN: Your Honor, may I be heard?

23 THE COURT: You may.

24 MS. WEISMANN: Thank you, Your Honor. Your Honor,
25 I realize that we are not privy to the information that's

1 been shared with you in camera. I know you know this, but
2 the government's promised deadlines have come and go, gone,
3 and in the mean time this situation is not static.

4 As you may know, Mr. McCabe has filed his own
5 lawsuit, and that complaint reveals exactly what we had
6 feared, which is, that there is, in fact, evidence that was
7 shared with Mr. McCabe by the IG that is exculpatory.
8 That's referenced in his complaint, but it is not referenced
9 at all in the Inspector General report, so that verifies the
10 concern we had that that report does not fully reflect the
11 outcome of that investigation.

12 In the mean time there's been a lot of public
13 reporting about the fact that a Grand Jury was released,
14 called back, no indictment is forthcoming. Mr. McCabe and
15 his lawyers have publicly and with the Department of Justice
16 pleaded to know the status. This is like the sword of
17 Damocles over his head.

18 There's also, and I say this, you know, as a
19 20-plus some year veteran of the Justice Department, but
20 sadly we're in dark times where there's growing evidence
21 that the president aided by the attorney general is using
22 the power of his office to go after perceived political
23 enemies. He's going after the intelligence community. He's
24 going after the law enforcement community. And we believe
25 that Mr. McCabe was swept up in that.

1 THE COURT: Going after the courts too.

2 MS. WEISMANN: And he's going after the courts,
3 the press. It's hard to find someone who isn't a victim of
4 his abuse of powers. And at the same time I submit it's
5 more critical than ever that the public have information.
6 We need to be able to restore our faith in the law
7 enforcement community, in the FBI.

8 I know you're aware of this, but I just feel
9 compelled to put it on the record that we feel that more
10 than ever the kind of evidence we're seeking here is
11 critical. And it's very hard to understand how, for
12 example, withholding the transcript of Michael Kortan, who's
13 the person identified in Mr. McCabe's complaint as having
14 offered exculpatory evidence, how that could possibly
15 interfere with a pending investigation.

16 I mean again, I realize I'm not in the position to
17 have inside knowledge, but it appears that the active
18 investigatory stage of whatever is going on with the U.S.
19 Attorney's office is over. And so I think the bar is
20 especially high here to continue to withhold this based on
21 some it sounds like mad effort to find some way to indict
22 Mr. McCabe to appease the president. That certainly from
23 the public what looks like, what it looks like is going on
24 here.

25 And so, you know, I understand that you are

1 weighing factors that we don't have access to, but I would
2 submit that the public interest here really could not be
3 higher. And it is time we believe for the public to get
4 access to what's going on. Thank you.

5 THE COURT: I totally appreciate what you just
6 said and share many of the same concerns that you have
7 expressed. And it's not an easy decision for me because
8 having myself been a member of the Justice Department for a
9 period of time, and having had to as the number three in the
10 U.S. Attorney's office, make some of these hard decisions as
11 to whether a prosecution should go forward. And I fully
12 appreciate having been a defense lawyer also the difficulty
13 that the government puts someone who's under investigation
14 on, under, when somebody is under the cloud of potential
15 prosecution I am fully sympathetic to that prospective.

16 As I said I considered what the government's
17 represented. And I would send this message to those in
18 positions of authority in the U.S. Attorney's office and the
19 Justice Department that on the next occasion if the
20 government has not made a call I'm going to make a ruling.
21 And I am going to at that point, because I do think it's
22 been a long time and this is just dragging too long. And
23 those who have to make these hard decisions need to do it.
24 And if they don't, I'm going to start ordering the release
25 of information. That's just the reality.

1 So hopefully you're under, you're -- not being
2 critical of current counsel, but those in positions need to
3 understand that I will not condone further delay. So you
4 all have got to cut and make your decision. It's not a hard
5 decision, and I think it needs to be made. If it's not made
6 I'm going to start ordering the release of information
7 because I think our society, our public does have a right to
8 know what's going on.

9 This matter is a high profile matter. And I think
10 it does while the matter hangs in limbo it does undermine
11 the credibility, not only of the Justice Department because
12 it's not making these hard decisions, but also the Court.
13 Because Congress enacted this legislation for the purpose of
14 the American public being made aware of what its government
15 is doing. And if the Court continues to not accord society
16 that interest which the Congress decided was appropriate, I
17 think it undermines the integrity of the court process and I
18 will not condone that.

19 So the government will have to make a call. If it
20 doesn't, I'm going to start ordering the release of
21 information on the next occasion. Thank you.

22 MS. WEISMANN: Thank you, your Honor.

23 [Thereupon, the proceedings adjourned at 9:50
24 a.m.] 9:50 a.m.

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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 11 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 30th day of September, 2019.

/s/_Cathryn J. Jones
Cathryn J. Jones, RPR
Official Court Reporter

MR. COONEY: [7] 3/6 4/1 4/19 6/2
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MR. SANDBERG: [3] 2/11 2/20 6/21
MS. WEISMANN: [5] 2/7 7/21 7/23
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THE COURT: [16]
THE DEPUTY CLERK: [1] 2/1

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access [4] 7/7 7/17 10/1 10/4
accord [1] 11/15
Action [1] 2/5
actions [1] 5/21
active [1] 9/17
actual [1] 6/10
adduced [1] 12/5
adjourned [1] 11/23
adjudication [1] 5/5
advisory [1] 3/17
after [5] 8/22 8/23 8/24 9/1 9/2
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anticipated [1] 3/12
any [4] 3/19 4/16 6/17 7/6
anybody [1] 2/24
APPEARANCES [1] 1/12
appears [1] 9/17
appease [1] 9/22
appreciate [3] 4/25 10/5 10/12
appreciative [1] 7/16
appropriate [1] 11/16
are [5] 4/23 5/11 5/12 7/25 9/25
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assessment [2] 3/22 5/1
Assistant [1] 2/15
associated [1] 2/25
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attorney [3] 1/16 2/15 8/21
Attorney's [5] 4/8 6/19 9/19 10/10
10/18
Attorney-at-Law [1] 1/16
authority [1] 10/18
available [1] 7/20
Avenue [2] 1/14 1/22
aware [2] 9/8 11/14

B

back [4] 4/17 4/21 6/3 8/14
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case [3] 2/25 3/25 12/6
Cathryn [4] 1/20 12/2 12/13 12/14
certainly [2] 6/3 9/22
CERTIFICATE [1] 12/1
certify [2] 12/4 12/7

check [1] 6/22
Chief [2] 9/13 8/17
circumstances [1] 7/5
CITIZENS [4] 1/3 1/13 2/3 2/9
Civil [2] 1/17 2/5
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COLUMBIA [2] 1/2 12/4
come [4] 4/17 4/21 7/10 8/2
comments [1] 5/21
community [3] 8/23 8/24 9/7
compelled [1] 9/9
complaint [3] 8/5 8/8 9/13
completely [2] 6/7 6/13
complexity [1] 5/1
complicate [1] 5/4
computer [1] 1/24
computer-aided [1] 1/24
conceivably [1] 5/11
concern [1] 8/10
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CONFERENCE [1] 1/9
Congress [2] 11/13 11/16
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constitute [1] 12/8
Constitution [1] 1/22
continuance [1] 7/18
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CV18 [1] 1/4
CV18-1766-RBW [1] 1/4

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| Case 1:18-cv-01766-RBW Document 37-1 Filed 11/13/19 Page 15 of 17 | | |
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| <p>D</p> <p>difficulty [1] 10/12</p> <p>discuss [1] 3/4</p> <p>discussions [2] 2/20 2/24</p> <p>dismay [1] 7/4</p> <p>dissemination [1] 7/12</p> <p>DISTRICT [6] 1/1 1/2 1/11 1/21 12/3 12/3</p> <p>disturbing [1] 5/16</p> <p>Division [1] 1/17</p> <p>do [8] 2/18 2/19 3/19 6/1 6/4 10/21 10/23 12/4</p> <p>Docket [1] 1/4</p> <p>does [5] 5/4 8/10 11/7 11/10 11/10</p> <p>doesn't [1] 11/20</p> <p>doing [3] 5/3 7/8 11/15</p> <p>don't [11] 3/9 3/24 4/1 4/23 4/23 5/3 5/7 6/17 7/5 10/1 10/24</p> <p>down [1] 5/10</p> <p>dragging [1] 10/22</p> <hr/> <p>E</p> <p>easy [1] 10/7</p> <p>effort [1] 9/21</p> <p>either [2] 3/25 6/10</p> <p>else [1] 2/24</p> <p>enacted [1] 11/13</p> <p>endure [1] 6/12</p> <p>enemies [1] 8/23</p> <p>enforcement [2] 8/24 9/7</p> <p>enters [1] 6/25</p> <p>entitled [1] 4/12</p> <p>especially [2] 5/1 9/20</p> <p>ETHICS [4] 1/3 1/14 2/3 2/10</p> <p>even [1] 5/11</p> <p>ever [2] 9/5 9/10</p> <p>evidence [4] 8/6 8/20 9/10 9/14</p> <p>ex [2] 2/20 2/21</p> <p>exactly [1] 8/5</p> <p>example [1] 9/12</p> <p>exceedingly [1] 4/4</p> <p>exculpatory [2] 8/7 9/14</p> <p>executive [1] 5/3</p> <p>exits [1] 3/2</p> <p>expeditiously [1] 4/9</p> <p>expressed [2] 7/4 10/7</p> <p>extent [1] 7/19</p> <hr/> <p>F</p> <p>fact [4] 5/7 7/4 8/6 8/13</p> <p>factors [2] 7/10 10/1</p> <p>fair [1] 5/4</p> <p>fairly [1] 3/22</p> <p>faith [1] 9/6</p> <p>FBI [1] 9/7</p> <p>feared [1] 8/6</p> <p>Federal [1] 1/17</p> <p>feel [2] 9/8 9/9</p> <p>filed [1] 8/4</p> <p>find [2] 9/3 9/21</p> <p>FOIA [1] 1/13</p> <p>foregoing [1] 12/7</p> <p>forthcoming [1] 8/14</p> <p>forward [4] 2/6 3/21 4/25 10/11</p> <p>fully [5] 4/25 7/15 8/10 10/11 10/15</p> <p>further [5] 2/19 3/5 7/5 11/3 12/7</p> | <p>G</p> <p>general [3] 2/15 8/9 8/21</p> <p>get [5] 3/10 4/23 5/4 6/2 10/3</p> <p>go [6] 3/21 4/25 5/10 8/2 8/22 10/11</p> <p>going [20]</p> <p>gone [1] 8/2</p> <p>good [5] 2/8 2/11 2/12 3/7 7/21</p> <p>got [5] 4/8 5/7 6/1 7/6 11/4</p> <p>government [15]</p> <p>government's [3] 5/5 8/2 10/16</p> <p>Grand [2] 3/15 8/13</p> <p>growing [1] 8/20</p> <hr/> <p>H</p> <p>had [7] 3/12 4/7 6/12 8/5 8/10 10/9 12/5</p> <p>hand [2] 7/9 7/9</p> <p>hangs [1] 11/10</p> <p>happen [1] 4/15</p> <p>happy [2] 6/8 6/12</p> <p>hard [6] 9/3 9/11 10/10 10/23 11/4 11/12</p> <p>has [7] 2/18 4/13 6/1 7/4 7/19 8/4 10/20</p> <p>have [33]</p> <p>having [5] 5/17 9/13 10/8 10/9 10/12</p> <p>he [1] 4/13</p> <p>he's [3] 8/23 8/23 9/2</p> <p>head [1] 8/17</p> <p>hear [1] 3/23</p> <p>heard [1] 7/22</p> <p>Hensler [1] 2/14</p> <p>here [6] 3/12 6/4 9/10 9/20 9/24 10/2</p> <p>hereby [1] 12/4</p> <p>hereto [1] 12/10</p> <p>high [2] 9/20 11/9</p> <p>higher [1] 10/3</p> <p>his [8] 4/14 7/12 8/4 8/8 8/15 8/17 8/22 9/4</p> <p>hold [1] 4/14</p> <p>Honor [11] 2/2 2/8 2/12 2/21 3/7 4/4 4/20 7/22 7/24 7/24 11/22</p> <p>HONORABLE [1] 1/10</p> <p>hope [2] 4/9 5/15</p> <p>hopefully [3] 4/18 7/21 11/1</p> <p>House [1] 5/2</p> <p>how [5] 3/19 4/16 7/13 9/11 9/14</p> <hr/> <p>I</p> <p>I'll [3] 2/22 3/10 5/25</p> <p>I'm [10] 3/8 3/14 6/6 6/8 6/12 9/16 10/20 10/24 11/6 11/20</p> <p>I've [1] 7/6</p> <p>idea [2] 3/19 4/16</p> <p>identified [1] 9/13</p> <p>identify [1] 2/6</p> <p>IG [1] 8/7</p> <p>implications [2] 4/24 4/24</p> <p>impression [1] 4/2</p> <p>inappropriate [2] 5/14 5/20</p> <p>including [1] 7/10</p> <p>incorrect [1] 3/14</p> <p>indict [1] 9/21</p> <p>indictment [1] 8/14</p> <p>influencing [1] 5/12</p> <p>information [9] 4/12 7/8 7/12 7/17 7/25 9/5 10/25 11/6 11/21</p> | <p>inside [1] 9/17</p> <p>inspected [2] 2/15 8/9</p> <p>integrity [2] 5/19 11/17</p> <p>intelligence [1] 8/23</p> <p>intend [1] 3/10</p> <p>intends [1] 2/18</p> <p>interest [3] 7/11 10/2 11/16</p> <p>interfere [1] 9/15</p> <p>investigation [3] 8/11 9/15 10/13</p> <p>investigatory [1] 9/18</p> <p>involved [2] 4/24 6/14</p> <p>involving [1] 3/6</p> <p>is [32]</p> <p>isn't [1] 9/3</p> <p>it [18]</p> <p>it's [15]</p> <p>its [2] 7/8 11/14</p> <hr/> <p>J</p> <p>J.P [2] 2/15 3/7</p> <p>Jones [4] 1/20 12/2 12/13 12/14</p> <p>JUDGE [3] 1/10 1/11 3/17</p> <p>Jury [2] 3/16 8/13</p> <p>just [16]</p> <p>JUSTICE [12] 1/5 1/17 2/4 2/14 6/9 6/16 6/18 8/15 8/19 10/8 10/19 11/11</p> <p>Justin [2] 1/16 2/12</p> <hr/> <p>K</p> <p>kind [1] 9/10</p> <p>know [11] 3/24 6/5 7/16 8/1 8/1 8/4 8/16 8/18 9/8 9/25 11/8</p> <p>knowledge [1] 9/17</p> <p>knows [1] 3/23</p> <p>Kortan [1] 9/12</p> <hr/> <p>L</p> <p>law [3] 1/16 8/24 9/6</p> <p>lawsuit [1] 8/5</p> <p>lawyer [1] 10/12</p> <p>lawyers [1] 8/15</p> <p>least [1] 3/23</p> <p>leave [1] 2/23</p> <p>legislation [1] 11/13</p> <p>life [1] 4/14</p> <p>light [1] 5/2</p> <p>like [6] 4/22 5/7 8/16 9/21 9/23 9/23</p> <p>limbo [2] 4/15 11/10</p> <p>listening [1] 5/6</p> <p>little [1] 3/20</p> <p>long [6] 3/19 4/16 4/22 5/18 10/22 10/22</p> <p>looks [2] 9/23 9/23</p> <p>lot [5] 4/6 4/7 5/12 7/10 8/12</p> <hr/> <p>M</p> <p>machine [3] 1/24 12/4 12/9</p> <p>mad [1] 9/21</p> <p>made [9] 2/19 3/25 4/17 4/19 5/11 10/20 11/5 11/5 11/14</p> <p>Madeleine [1] 2/14</p> <p>make [8] 4/7 4/8 4/14 10/10 10/20 10/23 11/4 11/19</p> <p>making [1] 11/12</p> <p>many [1] 10/6</p> <p>Massachusetts [1] 1/14</p> <p>matter [14]</p> |

M Case 1:18-cv-01766-RBW Document 37-1 Filed 11/13/19 Page 16 of 17
may [3] 7/22 7/23 8/4
McCabe [9] 2/18 3/6 4/13 7/11 8/4 8/7
8/14 8/25 9/22
McCabe's [1] 9/13
me [7] 2/13 3/20 3/21 3/22 4/12 4/23
10/7
mean [4] 3/22 8/3 8/12 9/16
media [1] 3/23
member [1] 10/8
mess [1] 5/16
message [1] 10/17
Michael [1] 9/12
Monday [1] 1/6
months [1] 4/21
more [2] 9/5 9/9
morning [5] 2/2 2/8 2/11 2/12 3/7
move [1] 4/10
movement [1] 7/21
moving [1] 6/2
Mr [3] 8/4 8/25 9/13
Mr. [7] 2/18 3/6 4/13 7/11 8/7 8/14
9/22
Mr. McCabe [7] 2/18 3/6 4/13 7/11 8/7
8/14 9/22
my [4] 6/5 7/4 12/9 12/10
myself [1] 10/8

N
N.W [1] 1/22
name [1] 12/11
necessary [1] 7/18
need [4] 2/19 9/6 10/23 11/2
needs [1] 11/5
never [1] 6/12
next [2] 10/19 11/21
no [4] 1/4 6/7 6/13 8/14
not [23]
notes [1] 12/9
November [2] 6/21 7/20
November 15th [1] 7/20
number [3] 2/5 4/7 10/9
NW [2] 1/14 1/18

O
obviously [4] 3/14 4/10 7/6 7/9
occasion [2] 10/19 11/21
offense [1] 6/12
offered [1] 9/14
office [10] 2/14 4/6 4/8 6/4 6/11 6/19
8/22 9/19 10/10 10/18
officers [1] 5/3
official [4] 1/21 12/2 12/8 12/14
Okay [2] 3/4 6/21
one [1] 7/8
only [1] 11/11
order [1] 3/5
ordering [3] 10/24 11/6 11/20
other [3] 4/24 7/9 7/10
others [1] 6/14
our [5] 5/21 6/15 9/6 11/7 11/7
outcome [1] 8/11
outside [2] 3/1 5/13
outskirts [1] 3/9
over [2] 8/17 9/19
own [1] 8/4

P Document 37-1 Filed 11/13/19 Page 16 of 17
pages [1] 12/7
part [2] 5/17 5/21
parte [2] 2/20 2/21
parties [1] 2/6
pay [1] 5/23
pending [2] 4/15 9/15
people [4] 5/7 5/13 5/21 6/18
perceive [1] 5/13
perceived [2] 6/10 8/22
period [2] 4/20 10/9
person [1] 9/13
place [2] 3/24 6/10
placed [1] 3/4
plaintiff [4] 1/4 1/13 2/23 7/3
plaintiff's [5] 3/2 6/22 6/25 7/7 7/17
plaintiffs [2] 2/9 4/10
play [2] 5/19 7/10
pleaded [1] 8/16
please [1] 2/7
plus [1] 8/19
point [3] 4/18 5/24 10/21
political [2] 4/24 8/22
position [1] 9/16
positions [2] 10/18 11/2
possibly [1] 9/14
potential [1] 10/14
power [1] 8/22
powers [1] 9/4
prediction [1] 3/14
preface [2] 3/8 3/11
presentation [1] 3/16
presented [1] 3/15
president [2] 8/21 9/22
press [1] 9/3
pressure [2] 5/14 6/10
price [1] 5/23
privy [1] 7/25
proceed [1] 7/14
proceedings [4] 1/24 11/23 12/5 12/8
process [2] 5/20 11/17
produced [1] 1/24
profile [1] 11/9
Programs [1] 1/17
promised [1] 8/2
prosecute [1] 6/11
prosecuted [1] 5/9
prosecution [3] 5/18 10/11 10/15
prosecutor [1] 4/4
prosecutors [1] 5/19
prospective [2] 5/5 10/15
prospectives [1] 7/15
protracted [1] 3/20
public [9] 3/13 5/6 8/12 9/5 9/23 10/2
10/3 11/7 11/14
public's [1] 7/16
publicly [1] 8/15
purpose [1] 11/13
put [1] 9/9
puts [1] 10/13
putting [1] 6/10

Q
question [1] 6/17
questions [1] 3/11

R Page 16 of 17
RBW [1] 1/4
re [1] 2/3
reality [1] 10/25
realize [2] 7/25 9/16
really [2] 5/4 10/2
reasonable [1] 4/18
receive [2] 4/11 4/12
record [2] 2/7 9/9
recorded [1] 1/24
reference [4] 2/18 2/20 4/25 7/12
referenced [2] 8/8 8/8
reflect [1] 8/10
regard [1] 5/17
REGGIE [1] 1/10
release [3] 10/24 11/6 11/20
released [1] 8/13
report [3] 6/3 8/9 8/10
reported [2] 3/16 12/4
Reporter [4] 1/20 1/21 12/2 12/14
reporting [1] 8/13
representation [1] 6/15
represented [1] 10/17
republic [1] 5/10
requested [1] 7/19
respect [1] 6/18
respecting [1] 5/18
RESPONSIBILITY [4] 1/3 1/13 2/3
2/10
restore [1] 9/6
result [1] 3/16
reveals [1] 8/5
right [6] 4/11 4/13 7/7 7/16 7/17 11/7
road [1] 5/10
role [2] 5/18 6/5
Room [2] 1/18 1/21
RPR [2] 1/20 12/14
Rule [1] 3/9
ruling [1] 10/20

S
sadly [1] 8/20
said [4] 6/4 10/6 10/16 12/8
same [2] 9/4 10/6
Sandberg [2] 1/16 2/13
say [2] 3/9 8/18
seal [1] 3/5
see [1] 6/23
seeking [1] 9/10
seems [5] 3/20 3/21 3/22 4/12 4/22
send [1] 10/17
SENIOR [1] 1/10
September [2] 1/6 12/11
seriously [1] 6/16
Shall [1] 6/22
share [1] 10/6
shared [2] 8/1 8/7
shorthand [3] 1/24 12/5 12/9
should [3] 5/3 5/9 10/11
simplistic [1] 3/22
sincerely [1] 4/3
Sir [1] 6/3
situation [3] 4/5 7/13 8/3
six [1] 6/1
so [11] 3/24 4/16 4/17 7/15 7/19 8/9
9/19 9/25 11/1 11/3 11/19
society [3] 5/23 11/7 11/15

S
Case 1:18-cv-01766-RBW Document 37-1 Filed 11/13/19 Page 17 of 17
society's [1] 7/7
some [7] 4/18 5/24 7/21 8/19 9/21 9/21 10/10
somebody [4] 5/8 5/9 6/11 10/14
someone [2] 9/3 10/13
something [1] 6/2
Sometimes [1] 4/8
sounds [1] 9/21
spent [1] 4/6
stage [1] 9/18
standpoint [1] 4/13
start [3] 10/24 11/6 11/20
statements [1] 5/11
STATES [7] 1/1 1/11 2/15 3/8 6/15 6/19 12/3
static [1] 8/3
status [4] 1/9 3/6 3/13 8/16
statute [1] 4/11
step [1] 2/6
Street [1] 1/18
submit [2] 9/4 10/2
subscribed [1] 12/10
substance [1] 3/10
swept [1] 8/25
sword [1] 8/16
sympathetic [1] 10/15
system [1] 5/19

T
take [3] 3/10 6/5 6/15
taking [1] 6/9
tell [3] 3/15 4/3 4/3
testimony [1] 12/5
than [2] 9/5 9/10
Thank [5] 6/20 7/24 10/4 11/21 11/22
that [64]
that's [5] 5/25 7/21 7/25 8/8 10/25
there [4] 4/23 5/12 5/13 8/6
there's [3] 8/12 8/18 8/20
Thereupon [3] 3/2 6/25 11/23
these [3] 10/10 10/23 11/12
they [1] 10/24
they're [1] 4/12
things [1] 6/9
think [18]
this [25]
those [6] 5/10 6/9 7/15 10/17 10/23 11/2
three [4] 3/12 4/7 4/21 10/9
time [10] 3/18 4/6 4/22 5/18 8/3 8/12 9/4 10/3 10/9 10/22
times [1] 8/20
too [3] 5/25 9/1 10/22
took [1] 3/24
top [3] 5/3 5/8 5/21
totally [1] 10/5
transcribed [1] 12/9
transcript [4] 1/9 1/24 9/12 12/8
transcription [1] 1/24
trying [1] 5/8
type [2] 5/10 6/9

U
U.S [9] 1/5 1/17 1/21 2/4 2/14 4/8 9/18 10/10 10/18
ultimate [1] 5/12

under [8] 3/5 3/17 4/11 7/5 10/13 10/14 10/15
underlying [2] 3/6 7/13
undermine [1] 11/10
undermined [1] 5/20
undermines [1] 11/17
understand [7] 4/2 4/23 6/7 6/13 9/11 9/25 11/3
undo [1] 5/13
unduly [1] 5/20
unfortunate [1] 5/22
unfortunately [2] 5/1 7/2
UNITED [7] 1/1 1/11 2/15 3/8 6/15 6/19 12/3
until [2] 3/5 7/20
up [1] 8/25
using [1] 8/21
utmost [1] 6/18

V
verifies [1] 8/9
versus [1] 2/4
very [5] 2/22 5/15 5/22 6/16 9/11
veteran [1] 8/19
victim [1] 9/3

W
wait [1] 3/1
WALTON [1] 1/10
want [4] 3/8 3/11 6/4 6/14
was [10] 3/12 3/14 3/15 3/16 6/4 6/8 8/6 8/13 8/25 11/16
WASHINGTON [8] 1/3 1/5 1/14 1/15 1/18 1/22 2/4 2/10
way [2] 5/2 9/21
we [14]
we're [5] 5/16 5/16 5/23 8/20 9/10
weeks [2] 3/12 6/1
weigh [2] 7/7 7/9
weighing [1] 10/1
Weismann [2] 1/13 2/9
well [1] 2/22
were [2] 6/9 6/10
what [16]
what's [5] 3/5 4/15 5/6 10/4 11/8
whatever [3] 3/10 4/11 9/18
when [4] 3/12 5/10 6/8 10/14
where [2] 4/18 8/20
whereof [1] 12/10
whether [5] 3/21 4/25 5/8 6/11 10/11
which [3] 5/2 8/6 11/16
while [2] 2/23 11/10
White [1] 5/2
who [3] 5/13 9/3 10/23
who's [2] 9/12 10/13
why [1] 3/24
will [9] 2/25 3/4 4/18 6/3 7/2 7/20 11/3 11/18 11/19
withhold [1] 9/20
withholding [1] 9/12
within [2] 3/17 6/4
witness [1] 12/10
would [7] 3/13 4/9 4/9 4/20 5/15 10/1 10/17

Y
year [1] 8/19

Yes [1] 6/24
you [28]
you're [4] 3/21 9/8 11/1 11/1
your [13]
yourselves [1] 2/7