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and research of John Greenewald, Jr., creator of:

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U.S. Department of Justice

**Federal Bureau of Investigation**  
*Washington, D.C. 20535*

August 31, 2017

MR. JOHN GREENEWALD JR.  
SUITE 1203  
27305 WEST LIVE OAK ROAD  
CASTAIC, CA 91384-4520

FOIPA Request No.: 1380149-000  
Subject: PALFREY, DEBORAH JEANE

Dear Mr. Greenewald:

Records responsive to your request were previously processed under the provisions of the Freedom of Information Act. Enclosed is one CD containing 54 pages of previously processed documents and a copy of the Explanation of Exemptions. This release is being provided to you at no charge.

Please be advised that additional records potentially responsive to your subject may exist. If this release of previously processed material does not satisfy your information needs for the requested subject, you may request an additional search for records. Submit your request by mail or fax to – Work Process Unit, 170 Marcel Drive, Winchester, VA 22602, fax number (540) 868-4997. Please cite the FOIPA Request Number in your correspondence.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under “Contact Us.” The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.” Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS) at 877-684-6448, or by emailing [ogis@nara.gov](mailto:ogis@nara.gov). Alternatively, you may contact the FBI's FOIA Public Liaison by emailing [foipaquestions@fbi.gov](mailto:foipaquestions@fbi.gov). If you submit your dispute resolution correspondence by email, the subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so that it may be easily identified.

Sincerely,

A handwritten signature in black ink, appearing to read "D Hardy", with a stylized flourish at the end.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

## EXPLANATION OF EXEMPTIONS

### SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

### SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.



b7E

Filing and Security

Primary Case: 333-WF-235579-S

Case Title: (U) SUBPOENAS (FBI RELATED)

Serial Number: 23

Serialized: 01/10/2008



Details:

Serial #: 23

Type: EC

Document Title: REPORT SUBPOENA MATTER TO SUB FILE.

Approval Date: 01/10/2008

Classification: U

Contents:

Precedence: ROUTINE Date: 1/10/2008

To: Washington Field

From: Washington Field

Approved By: [Redacted]

Drafted By: [Redacted]

Case ID #: 333-WF-235579 Sub S (Pending)

Title: U.S. v. DEBORAH JEANE PALFREY;  
CRIMINAL CASE # CR-07-046GK;  
U.S. DISTRICT COURT - DISTRICT OF COLUMBIA;  
SUBPOENA MATTER;  
OO: WF

Synopsis: Report subpoena matter to sub file.

Details: On 12/11/07 the attached subpoena and Court Order, signed by Judge Kessler on 11/13/07, which requires production of documents in the above captioned criminal matter, was served upon an Agent in CTOC by the U.S. Marshal's Service (USMS). The subpoena included a return date of 12/15/07. It is to be noted that the FBI is not one of the investigative agencies involved in this prosecution. On 12/12/07, ADC [Redacted] contacted Assistant United States Attorney (AUSA), Civil Chief [Redacted] in order to attempt to litigate

the propriety of the subpoena. Later that day, ADC [Redacted] was contacted by AUSA [Redacted] who advised that he would include the FBI in a Motion to Quash that he was filing on behalf of other federal agencies. These other agencies had been served by the USMS a few days prior to the service on the FBI. AUSA [Redacted] advised the FBI not to produce any documents pursuant to the subpoena until further notice.

On 1/11/08, ADC [Redacted] spoke again with AUSA [Redacted] AUSA [Redacted] advised that he had filed a Motion to Quash before Judge Robertson. Judge Robertson stayed the subpoenas until after his resolution of the Motion to Quash. AUSA [Redacted] advised that he would inform the FBI when Judge Robertson issues and Order and that the FBI should not produce any documents in the interim.

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Indexing

Display Name	Enterprise Role	Entity Role	Entity Type	US Person
No Entities to display				

Page  of 1 No data to display

Routing

Drafted by:

FEDERAL BUREAU OF INVESTIGATION  
FOI/PA  
DELETED PAGE INFORMATION SHEET  
FOI/PA# 1380149-0

Total Deleted Page(s) = 6

- Page 4 ~ OTHER - Sealed Pursuant to Court Order;
- Page 5 ~ OTHER - Sealed Pursuant to Court Order;
- Page 6 ~ OTHER - Sealed Pursuant to Court Order;
- Page 7 ~ OTHER - Sealed Pursuant to Court Order;
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- Page 9 ~ OTHER - Sealed Pursuant to Court Order;

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- Page 9 ~ OTHER - Sealed Pursuant to Court Order;

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# FEDERAL BUREAU OF INVESTIGATION

**Precedence:** ROUTINE

**Date:** 1/10/2008

**To:** Washington Field

**From:** Washington Field

**Approved By:** [Redacted]

b6  
b7C

**Drafted By:** [Redacted]

**Case ID #:** 333-WF-235579 Sub S (Pending)

**Title:** U.S. v. DEBORAH JEANE RALFREY;  
CRIMINAL CASE # CR-07-046GK;  
U.S. DISTRICT COURT - DISTRICT OF COLUMBIA;  
SUBPOENA MATTER;  
OO: WF

23

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♦♦ Motion to Quash granted  
1/18/08. See attached  
Motion, briefs & Order

[Redacted]

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# UNITED STATES DISTRICT COURT

DISTRICT OF

Columbia

UNITED STATES OF AMERICA

V.

Deborah Jeane Palfrey

## DEPOSITION SUBPOENA IN A CRIMINAL CASE

Case Number: CR-07-046-GK

TO:

FBI Washington  
Washington Metropolitan Field Office  
601 4th Street, N.W.  
Washington, D.C. 20535-0002

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE

DATE AND TIME

Law Office of Montgomery Blair Sibley  
Counsel for Defendant  
1629 K Street, Suite 300  
Washington, D.C. 20006 (202-508-3699)

~~11/15/2007~~ 10:00 am  
12/15/2007

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

b3

[Redacted box]

RECEIVED  
2007 NOV 14 A 11  
U.S. MARSHALS OF  
DISTRICT OF COLUMBIA

Served by  
U.S. Marshal's Service  
12/11/07 @ 12:35 pm  
on SA [Redacted]

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

JUDGE OR CLERK OF COURT

DATE

NOV 13 2007

(By) Deputy Clerk

[Redacted signature box]

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ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Law Office of [Redacted]  
Counsel for Defendant

[Redacted address box]

[redacted] (WFO)

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b7C

From: [redacted] (WFO)

Sent: Wednesday, December 12, 2007 10:17 AM

To: [redacted]

Subject: Court Order/Subpoena - US v. Palfrey

[redacted] - I wasn't sure if this subpoena matter should be brought to the criminal side, or civil, which is where we usually go....but this one is a little unique. Yesterday afternoon the USMS served on the office a subpoena from defense counsel and a court order signed by Judge Kessler on November 13<sup>th</sup> in US v. Deborah Jeane Palfrey, Docket # CR-07-046GK. I guess this is better known as the DC Madam case, which was investigated by Postal and IRS, I believe.

The defense requested the court to order law enforcement to produce "all records relating to the investigation of Jeane Palfrey and Pamela Martin and Associates, as well as all records relating to investigations of escort services in general from 2000 to 2007." The Judge struck the latter clause, so as I read it, we must produce "all records relating to the investigation of Palfrey and Martin Assoc.

[Large redacted area]

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Can you have the appropriate person give me a call??? Thanks.

[redacted] Acting Chief Division Counsel, FBI-WFO [redacted]

b6  
b7C

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

DEBORAH JEANE PALFREY,

Defendant.

Criminal No. 07-46 (GK)

**FILED**

NOV 13 2007

WANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

ORDER

This matter is before the Court on Defendant's *Ex Parte* Application for Issuance of Subpoenas and Payment of Costs and Fees. Upon consideration of all materials submitted and relevant precedent, the Court directs the U.S. Marshals Service to serve Subpoenas, returnable December 15, 2007, at defense counsel's office, upon the below-listed parties.

**WHEREFORE** it is this 13<sup>th</sup> day of November, 2007, hereby

**ORDERED** that Defendant's *Ex Parte* Application for Issuance of Subpoenas and Payment of Costs and Fees is **denied in part** and **granted in part**; it is further

**ORDERED** that the U.S. Marshals Service effect service of subpoenas upon the following parties:

1. Verizon Legal Compliance, 99 Shawan Rd., Rm. 133, Cockeysville, MD 21030;
2. AT&T Mobility, 1506 Wisconsin Ave., NW, Washington, DC 20007-2738;

3. Sprint, 2001 M St., NW, Washington, DC 20036;
4. T-Mobile, 3225 14th St., NW, Washington, DC 20010;
5. Verizon Wireless, 1331 Pennsylvania Ave., NW, Washington, DC 20004;
6. Alltel, 601 Pennsylvania Ave., NW, Washington, DC 20004;
7. Metropolitan Police Department of the District of Columbia, 1215 3rd St., NE, Washington, DC 20002;
8. Maryland State Police, 108 Carroll Dr., Annapolis, MD 21403;
9. Anne Arundel County Police Department, 80 West St., Annapolis, MD 21401;
10. Anne Arundel County Sheriff's Office, 7 Church Circle, PO Box 507, Annapolis, MD 21401;
11. Baltimore County Police Department, 700 E. Joppa Rd., Towson, MD 21286;
12. Baltimore County Sheriff's Office, Courts Bldg., 401 Bosley Ave., Towson, MD 21204;
13. Howard County Police Department, 3410 Courthouse Dr., Ellicott City, MD 21043;
14. Howard County Sheriff's Department, 8360 Court Ave., Ellicott City, MD 21043;
15. Montgomery County Police Department, 1451 Seven Locks Rd., Rockville, MD 20854;

16. Prince George's County Police Department, 7600 Barlowe Rd., Landover, MD 20785;
17. Baltimore Police Department, 500 East Baltimore St., Baltimore, MD 21202;
18. Arlington County Police Department, 1425 N. Courthouse Rd., Arlington, VA 22201;
19. Arlington County Sheriff's Department, 1425 N. Courthouse Rd., Arlington, VA 22201;
20. Fairfax County Police Department, 4100 Chain Bridge Rd., Fairfax, VA 22030;
21. Fairfax County Sheriff's Office, 10459 Main St., Fairfax, VA 22030;
22. Alexandria City Police Department, 2003 Mill Rd., Alexandria, VA 22314;
23. Internal Revenue Service, Criminal Investigations Division, 500 N. Capitol St., NW, Washington, DC 20221;
24. FBI Washington, Washington Metropolitan Field Office, 601 4th St., NW, Washington, DC 20535-0002;
25. Department of State, Bureau of Diplomatic Security, U.S. Department of State, Washington, DC 20522-2008;
26. Department of State, Bureau of Intelligence and Research, 2201 C St., NW, Washington, DC 20520;
27. United States Postal Inspection Service, 10500 Little Patuxent Pkwy., Ste. 200, Columbia, MD 21044-3509;

28. Office of the Director of National Intelligence, Washington, DC 20511;
29. Central Intelligence Agency, Washington, DC 20505;
30. Defense Intelligence Agency, 200 Macdill Blvd., Bolling Air Force Base, Washington, DC 20340;
31. National Security Agency, 9800 Savage Rd., Fort George G Meade, MD 20755-6000;
32. Record Custodian, ABC News, 7 West 66th St., New York, NY 10023;
33. Record Custodian, LFP, Inc., 8484 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90211-3227;
34. H&R Block, Ken Nofkahr, 4003 Sonoma Blvd., Ste. 116, Vallejo, CA 94591;
35. Randaijl L. Tobias, 1111 23rd St., NW, South 3A, Washington, DC;
36. Harlan Ullman, 1245 29th St., NW, Washington, DC 20007-3352; and
37. Hon. David Vitter, 516 Hart Senate Office Bldg., Washington, DC 20510.

Nov. 13, 2007  
Date

Gladys Kessler  
Gladys Kessler  
United States District Judge

FEDERAL BUREAU OF INVESTIGATION  
FOI/PA  
DELETED PAGE INFORMATION SHEET  
FOI/PA# 1380149-0

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- Page 10 ~ b7E;
- Page 11 ~ b7E;
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FEDERAL BUREAU OF INVESTIGATION  
FOI/PA  
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# FBI FACSIMILE COVER SHEET

### PRECEDENCE

Immediate  
Priority  
 Routine

### CLASSIFICATION

~~Top Secret~~  
~~Secret~~  
~~Confidential~~  
~~Sensitive~~  
 Unclassified

Time Transmitted:  
Sender's Initials: ELW  
Number of Pages: 7  
(including cover sheet)

To: United States Attorney - DDC  
Name of Office

Date: 12/17/2007

Facsimile Number:

Attn: AUSA   
Name

Room   
Telephone

b6  
b7C

From: FBI-WFO  
Name of Office

Subject: FBI documents re:US v. Palfrey

Please hand carry to

Special Handling Instructions:

Originator's Name:

Telephone:

Originator's Facsimile Number:

Approved:

Brief Description of Communication Faxed: **Enclosed material may contain attorney/client privileged material and/or attorney work product.**

### WARNING

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U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to  
File No. SD 9B-1650

880 Front Street  
Suite 6-S-31  
San Diego, California 92188-0050  
February 9, 1987

Mr. R.T. Grudek  
Inspector in Charge  
Postal Inspection Service  
Post Office Box 2110  
San Diego, California 92112

Dear Mr. Grudek:

Enclosed is a matter referred to our office from the Richmond Division of the Postal Inspection Service via the San Bruno Regional Office.

The victim in this matter, [redacted] of Virginia Beach, Virginia, was contacted telephonically and stated that none of the letters had contained threats to harm him physically.

*CAF*

On January 30, 1987, this matter was discussed with Assistant United States Attorney (AUSA) [redacted] who advised that Title 18, Section 876 of the United States Code gives the U.S. Postal Inspector exclusive jurisdiction over cases involving the use of the mail to communicate any threat to injure the reputation of the addressee. Accordingly, this matter is referred for whatever action you deem appropriate.

Very truly yours,

THOMAS A. HUGHES  
Special Agent in Charge

1-Addressee  
①-SD9B-1650  
CAF: jmp  
(2) *jmp*

By:

*[Handwritten Signature]*

[redacted]  
Supervisory Special Agent

Enclosure-1



SEARCHED \_\_\_\_\_ INDEXED \_\_\_\_\_  
SERIALIZED \_\_\_\_\_ FILED \_\_\_\_\_  
2/9/87  
AR-1650-1



SD 9B-1650

CAF: jmp  
*CAF*

-1-

[redacted] victim in referenced case, of Virginia Beach, Virginia, was contacted telephonically on February 3, 1987, by Special Agent (SA) [redacted] and was advised that the case has been referred to the San Diego Division of the Postal Inspection Service.

9B-1650-5



In Reply, Please Refer to

File No. 9B-1650

FBI CASE STATUS FORM

Date: 2/5/87

To: [Redacted] San Diego, CA 92189  
(Name and Address of USA)

From: [Redacted] SAC San Diego  
(Name of Official in Charge and Field Division) (Signature of Official in Charge)

RE: DEBORAH JEAN PALFREY Unknown Female  
(Name of Subject) Age Sex

You are hereby advised of action authorized by AUSA [Redacted]  
(Name of USA or AUSA)

on information submitted by Special Agent [Redacted] on 1/30/87  
(Name) (Date)

(Check One)

- Request further investigation
- Immediate declination
- Filing of complaint
- Presentation to Federal Grand Jury
- Filing of information

*(Handwritten marks)*  
CAC

For violation of Title 18, USC, Section(s) 876

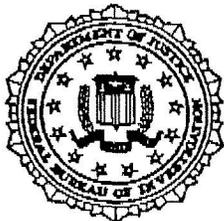
Synopsis of case: On 1/14/87, [Redacted] advised this office from Virginia Beach, VA, that he had been receiving slanderous letters from PALFREY who lives at San Diego. [Redacted] stated that he had forwarded the letters to the Postal Inspector in Virginia beach, who had sent them to the Regional Office at San Bruno, CA. [Redacted] received a letter from the San Bruno Regional Office on 1/7/87, which stated they were referring the matter to this office for investigation.

On 1/26/87, SA [Redacted] contacted [Redacted] who advised him that PALFREY had never made any direct threats to harm him physically. This matter was then discussed with AUSA [Redacted] who advised SA [Redacted] that letters threatening to harm one's reputation are exclusively within the jurisdiction of the Postal Inspection Service.

1 - Addressee  
1 - San Diego  
CAF:jj  
(2)

*Virginia  
Advised  
of above*

SERIALIZED  
*will close on communication to Postal Inspector*  
2/5/87  
91B-1650-3



# FBI FACSIMILE COVER SHEET

### PRECEDENCE

- Immediate
- Priority
- Routine

### CLASSIFICATION

- Top Secret
- Secret
- Confidential
- Sensitive
- Unclassified

Time Transmitted: 2:35  
 Sender's Initials: DEP  
 Number of Pages: 8  
 (including cover sheet)

To: WFO  
 Name of Office

Date: 12/12/07

Facsimile Number: [Redacted]  
 Attn: [Redacted]  
 Name Room Telephone

From: PITC  
 Name of Office

Subject: San Diego file 9-1650

Special Handling Instructions: \_\_\_\_\_

Originator's Name: [Redacted] Telephone: [Redacted]

Originator's Facsimile Number [Redacted]

Approved: [Signature]

Brief Description of Communication Faxed: \_\_\_\_\_

### WARNING

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3/16/98

[redacted] white male, DOB: [redacted] SSN: [redacted]  
[redacted] home address [redacted]

b6  
b7c

[redacted] was interviewed at the United States Attorney's Office, 555 4th Street, N.W., Washington, D.C. Also present at the interview were MPD Detective [redacted] and Assistant United States Attorney [redacted]. After being advised of the identities of the interviewing officials and the nature of the interview, [redacted] provided the following information:

[redacted] was an employee of the Bell Atlantic Yellow Pages (BA) from September, 1989 until March 3, 1998. [redacted] explained that until September, 1988, a company named Donnelly owned the Yellow Pages and was a separate entity from the then-named telephone company, C & P. After C & P dropped Donnelly as a contractor, they contacted GTE to start a "sales force" and produce their own Yellow Pages. GTE maintained this position with C & P, (who subsequently changed to Bell Atlantic) until approximately five years ago. BA then utilized Chesapeake Directory Sales (CDSC) as their independent contractor for the Yellow Pages. [redacted] advised that he received all of his benefits from BA but received his pay from CDSC. [redacted] stated that from September, 1996 to the present, his regional manager was [redacted] and from September, 1997 to the present, his immediate supervisor was [redacted]. BA's main corporate office is at 6404 Ivy Lane, Greenbelt, MD, and CDSC's satellite office is located at Parliament Place, Lanham, MD.

[redacted] said he was asked to leave BA because his "error percentage" had gotten too high and it was felt to be unacceptable. [redacted] indicated that he believes BA is trying to phase out the older workers to bring in new, younger employees, and that is why he was fired. [redacted] stated he was making over \$100,000 per year at BA as a Senior Account Executive. [redacted] explained that he handled three types of accounts: 1) "Complex" (i.e. Smithsonian Institute, Georgetown University, etc.); 2) "Big Money Accounts" (i.e. plumbers, contractors-those who advertise in several areas of the book because of competition and geographic area-can pay from \$20,000 to \$40,000 per month) and 3) "Sensitive Headings" (i.e. escort agencies, massages services, etc. [redacted] advised that clients in the "sensitive headings" category had to pay a portion of the money up front and then had to pay the monthly rate for the ads. [redacted] stated that BA had standards for the clients to meet in their ads that were outlined in "BASE" - "Bell Atlantic Standards and Ethics." [redacted] said these standards used to be quite strict, but they have "relaxed" somewhat since BA's merger with Nynex. [redacted] added that the credit restrictions on potential clients were relaxed as well.

[redacted] stated that he began working with "sensitive heading" clients in September, 1991, but he was only one of seven individuals responsible for these types of clients in the geographic region from Baltimore, MD to Richmond, VA. [redacted]

added that two to three individuals handled these ads in the WDC metropolitan area. [ ] indicated that he initially took over existing accounts and obtained new business through phone calls to him. [ ] found that it was difficult to solicit these types of clients because they found it cheaper and less restrictive to advertise in the City Paper or the Washingtonian. In addition, most of these types of businesses (escort agencies) do not have a business phone number, which is a requirement of BA.

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[ ] was shown a WDC Yellow Pages book and he made note of the following escort agencies that were clients of his: "A Private Affair", "Rio Connection", "Black Fantasy", "D.C. Playmates", "Bewitching", "Silk Stockings" and "Pamela Martin and Associates." When asked if he knew the actual activities being performed by these escort agencies, [ ] said it was never said and he never asked. [ ] stated that all he wanted to do was to sell as much as he could and make money. [ ] indicated that he treated everyone he met with equally and regarded all clients as "business people." [ ] said he never asked his clients what the girls in the escort agencies were actually doing on the calls but he would "hear" things from escort agency competitors, such as some companies were "rip-offs" or were just "pimping girls." In reference to escort agencies, [ ] stated that in his opinion, "They're all prostitution rings." [ ] added that it is also his opinion that the upper management at BA was aware that the escort agencies were actually prostitution businesses, but it was never specifically stated by anyone.

[ ] stated that memos were sent to the employees from management at BA instructing the employees to change the wording in some of the ads, mainly due to the Dick Morris scandal.

[ ] said he "fought" a great deal with BA over the "sensitive headings" clients and suggested they not even run the ads if they were such a problem. [ ] admitted that he did make money from the sales of such ads, but he would just as well not run them.

[ ] reiterated that he never actually "knew" that prostitution was going on, nor did he ask his clients if it were true.

[ ] said he had no casual conversation with his clients about any sexual services, and if his clients did start to mention it, he would "steer" the conversation away from that topic.

When it was brought to [ ] attention that many of the ads had similar terms (i.e. "one-price policy"), [ ] was asked if he suggested the wording to his clients so that their message could be better conveyed. [ ] denied suggesting any language and said it was rare to meet with a client who did not already know what they wanted their ad to say. However, [ ] did agree that the phrasing of the words in many of the ads are provocative. [ ] added that many of the clients refer to other existing ads when deciding how to design their own.

[ ] was informed that a former escort agency operator had indicated that [ ] was aware that the escort agencies he was dealing with were actually fronts for prostitution, and that he and [ ] had discussed the actual business that took place. [ ] was also informed that this escort agency operator had implied that [ ] had used the

prostitution services for his own sexual gratification. [redacted] strongly denied both allegations and said that "while he was employed by BA", he never specifically discussed any sexual activities that may have taken place in the escort agency operator's business. In fact, [redacted] offered to take a polygraph at the time of the interview to prove his statements. [redacted] indicated he was aware of the CW who had called him about placing new ads in the Yellow Pages and re-emphasized that he was not an employee of BA during his conversation with the CW. When asked if the CW discussed the actual nature of his business with [redacted] said he did not recall. [redacted] terminated the interview at this point.

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# FBI FACSIMILE COVER SHEET

### PRECEDENCE

Immediate  
Priority  
 Routine

### CLASSIFICATION

~~Top Secret~~  
~~Secret~~  
~~Confidential~~  
~~Sensitive~~  
 Unclassified

Time Transmitted:  
Sender's Initials: ELW  
Number of Pages: 2  
(including cover sheet)

To: United States Attorney - DDC  
Name of Office

Date: 12/12/2007

Facsimile Number:

Attn: AUSA   
Name

Room

Telephone

b6  
b7C

From: FBI - WFO  
Name of Office

Subject: Subpoena served on FBI US v. Palfrey

Please hand carry to  - Just let me know if I need to do anything other than continue gathering the documents.  
Special Handling Instructions:

Originator's Name:

Telephone:

Originator's Facsimile Number:

Approved:

Brief Description of Communication Faxed: **Enclosed material may contain attorney/client privileged material and/or attorney work product.**

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TRANSMISSION VERIFICATION REPORT

TIME : 12/12/2007 00:37  
NAME : FBI  
FAX :   
TEL :   
SER.# : BROB7J612821

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b7c

DATE, TIME	12/12 00:37
FAX NO./NAME	 
DURATION	00:00:25
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM

Complaint Form  
FD-71 (Rev. 4-16-82)

NOTE: Hand print names legibly; handwriting satisfactory for remainder.

Indices:  Negative  See below

Subject's name and aliases

DEBORAH JEAN PALFREY; *EX-107014*

[Redacted] - Victim

*EX-107014*  
*010158*

Character of case

9-0

Complainant  Protect Source

Complaint received

Personal  Telephonic Date 1/14/87 Time approx. 2:pm

Address of subject

Complainant's address and telephone number

Tel. (wk) [Redacted] - (hm) [Redacted]

Subject's Description	Race	Sex <input type="checkbox"/> Male <input type="checkbox"/> Female	Height	Hair	Build	Birth date and Birthplace
	Age		Weight	Eyes	Complexion	Social Security Number
	Scars, marks or other data					

Facts of complaint

On 1/14/87, [Redacted] telephonically advised that he was calling from Virginia Beach, VA., and that he had been receiving slanderous letters from a female in San Diego, DEBORAH JEAN PALFREY.

[Redacted] stated that he forwarded the letter to the Postal Inspector in Virginia Beach, who in turn, forwarded them to the Regional Office in San Bruno, Ca. [Redacted] stated he received a letter from the San Bruno Regional Office on 1/7/87, which stated they were sending the information to the FBI in San Diego as the violation was the FBI's jurisdiction.

[Redacted] stated that Palfrey wrote him numerous letters one of which stated, "If ever we meet again in this life, the Navy will have one less fighter jock to contend with."

On 1/15/87, [Redacted] was contacted and advised that a search of our indices was negative. He was also advised that the supervisor stated because the threat was a veiled threat, it did not meet the requirements for an investigation.

[Redacted] stated that his attorney was preparing a civil suit against Palfrey for slander. At this time, [Redacted] stated he had received an anonymous call some time ago from a male who said, do you know where your children are, kidnaping is always a threat or possibility. He could not remember which he said. [Redacted] thought it was a long distance call. He stated that Palfrey sent letters to his wife, his Company Wing Commander and his Wing Admiral. She also was charging him with adultery.

*Person 9-0  
from office  
w/ 1/2/87*

*OCA  
1/22/87*

Do not write in this space.

*913-1650-211*  
*913-2-504*

SEARCHED  INDEXED   
SERIALIZED  FILED

JAN 15 1987

FBI - SAN BRUNO

Action Recommended

*IA* [Redacted] (Agent)

*Char -  
1/30/87 (2) refer to  
1/22/87*

*1/15/87*

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**FILED**

**JAN 18 2008**

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA,	:	
	:	
v.	:	Crim. Action No. 07-0046 (JR)
	:	
DEBORAH JEANE PALFREY,	:	
	:	
Defendant.	:	

**MEMORANDUM ORDER**

On November 13, 2007, Judge Kessler issued a sealed Memorandum Order, granting the defendant's *Ex Parte* Application for Issuance of Subpoenas and Payment of Costs and Fees. Judge Kessler's order is subject to amendment under Fed. R. Crim. P. 17(c)(2). That provision permits the quashing or amendment of a subpoena ordering the production of documents and other potential evidence when "compliance would be unreasonable or oppressive." Judge Kessler was not presented with a Rule 17(c)(2) motion and there is thus no "law of the case" relating to defendant's actual use of the authority she was given. It now appears that the subpoenas defendant has issued have been used - misused - as tools for discovery.

In its Omnibus Motion to Quash Subpoenas Issued Pursuant to Defendant's *Ex Parte* Application,<sup>1</sup> the government

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<sup>1</sup> The government's motion was filed under seal but the defendant responded on the public record. The matters discussed in this memorandum have thus been made public. In any case, the defendant's own tactic of issuing scattershot subpoenas to some 26 federal, state, and local governmental agencies is the reason why her "theory of defense" is now, for all practical purposes,

moves to quash all the subpoenas served on federal agencies and the White House and asks the Court to reconsider the issuance of subpoenas on local law enforcement agencies, telephone companies, and Randall Tobias, Senator David Vitter, and Harlan Ullman. When seen in light of the way that these subpoenas have actually been pursued, it is clear that the showing originally put forward by the defendant for specificity, relevance, and admissibility, did not contemplate and will not support what is obviously a discovery effort - a "fishing expedition." See United States v. Nixon, 418 U.S. 683, 698-700 (1974).

For the subpoenas addressed to Verizon and other cellular telephone companies, the defendant seeks the telephone records of her own escort service and its contact with clients who "could be" witnesses for her defense. The term "fishing expedition" has become a cliché, but it is the most accurate way to characterize this request.

As for the phone records of other escort services, it appears that they are only sought to support defendant's theory that the indictment in this case is selective prosecution as well as her quite different theory that "there exists a segment of the escort industry that does not violate the law." Neither of these

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in the public domain.

propositions is material, and evidence to support them will not be admissible.

The subpoenas addressed to 17 D.C. Metro-area vice squads, for evidence that the defendant was investigated numerous times and that her staff was not once arrested while the escorts of other services were arrested, seeks material of very doubtful admissibility, but even if such evidence existed and were ruled admissible, the issuance of 17 subpoenas seeking the same information from 17 different police departments is unreasonable on its face. These subpoenas will all be quashed except one -- a single subpoena sought addressed to a specific vice officer at a specific police department. That subpoena will not be quashed.

The issuance of subpoenas issued to nine agencies of the United States government was based on the wholly speculative propositions 1) that "these agencies both condoned and benefitted from the operation of defendant's escorts services"; 2) that such agencies "could have" given assurances to escorts that they could engage in behavior now charged as illegal; and 3) that these agencies "may well have had" an interest in intelligence information gleaned for foreign nationals. These are discovery subpoenas.

The White House subpoena, which was not authorized by Judge Kessler's order, will also be quashed. All the documents it

seeks appear to relate to the defendant's political prosecution theory. Immaterial; inadmissible.

It does not appear that the government's motion offers any protection for Larry Flynt Productions, Inc. While the showing defendant made for that subpoena was the same as for the now-quashed ABC News subpoena, the subpoena will not be disturbed in the absence of a motion specifically addressing it. Neither does the government object to the subpoena for defendant's own records from H&R Block, and, although it is not clear why the defendant cannot simply demand those records without a subpoena, it will not be disturbed in the absence of a motion.

The subpoena served on the IRS will be quashed. The defendant is entitled to obtain copies of her own tax filings (which she can do without a subpoena), but not those of "each of the escorts" of the service.

The subpoenas to Senator Vitter, and to Messrs. Tobias and Ullman, were properly supported, and no showing of burden or unreasonableness has been made.

The only subpoenas not quashed by this order are those addressed to a single named vice officer in a metropolitan area police department, to Larry Flynt Productions, Inc., to H&R Block, and to Senator Vitter, Mr. Tobias, and Mr. Ullman.

So ordered.

A handwritten signature in black ink, appearing to read "James Robertson", written in a cursive style.

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JAMES ROBERTSON  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA : CRIMINAL NO. 07-046 (JR)  
 :  
 v. :  
 :  
 DEBORAH JEANE PALFREY, :  
 :  
 Defendant. :

GOVERNMENT’S REPLY TO DEFENDANT’S OPPOSITION  
TO ITS OMNIBUS MOTION TO QUASH SUBPOENAS  
AND MOTION FOR RECONSIDERATION (DKT. NO. 234)

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this reply to defendant’s opposition to its omnibus motion to quash subpoenas and motion for reconsideration.<sup>1</sup> For the reasons stated below, as well as those set forth in the government’s omnibus motion, the United States respectfully submits that the Court should quash the subpoenas issued to the federal<sup>2</sup> and local agencies listed in the government’s omnibus motion, reconsider Judge Gladys Kessler’s November 13, 2007 Memorandum Order granting defendant’s application to issue subpoenas *duces tecum* to the federal and local agencies, and individuals, and quash the subpoena issued to the White House.

**A. Discussion**

1. Judge Kessler’s Orders

Defendant’s first argument is that Judge Kessler’s “Orders” should not be disturbed, asserting that Judge Kessler “enjoyed a broad understanding of the various issues in this matter, its

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<sup>1</sup> The government’s omnibus motion was filed under seal. However, defendant’s opposition was not. As such, the government is not filing this reply under seal.

<sup>2</sup> In her opposition defendant asserts that the Central Intelligence Agency “refused to accept service” of the subpoenas. Dkt. No. 234 at n.4. Defendant offers no evidence supporting this claim, and according to the Central Intelligence Agency, the CIA did not refuse to accept service of defendant’s subpoena.

extensive history, and the resident equities as a result.” Dkt. No. 234 at 4-5. She claims further that, “[p]lainly put, Judge Kessler enjoyed a perspective this Court cannot quickly match absent a full understanding of the two hundred plus (200+) pleadings and the four related civil matters.” *Id.* at 5. The government finds this assertion puzzling, as twenty days prior to making this statement, defendant urged this Court to reconsider Judge Kessler’s denial of a hearing regarding the government’s application for temporary restraining orders. *See* Dkt. No. 217 at 5 (“Plainly, this Court has the authority to reconsider the orders of a pre-transfer judge.”) (footnotes omitted). Apparently when it is in the defendant’s best interest to ask this Court to reconsider one of Judge Kessler’s rulings, defendant is willing to do so, but when it is not in her best interest, she implies that this Court is somehow unqualified to do so. Indeed, defendant goes so far as to make an unfounded claim that an “appearance of bias” might exist if this Court “over-ruled Judge Kessler’s orders”. *Id.* at 5. Yet defendant had no such concerns about any alleged appearance of bias when she previously requested this Court to reconsider Judge Kessler’s rulings.<sup>3</sup>

2. The *ex parte* nature of the subpoenas

As the government discussed in its motion to quash, the granting of the *ex parte* application for subpoenas was inappropriate. Omnibus Mot. to Quash at 7 - 10. Accordingly, the Order is

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<sup>3</sup> Further evidence of defendant’s inconsistent and unsupportable positions is found in defendant’s attempt to create suspicion regarding the reassignment of this case from Judge Kessler to the present judge. Dkt. 234 at 3 and n.5. It seems odd, at best, that defendant complains about the transfer of the case from Judge Kessler since she filed a motion to recuse Judge Kessler in which she stated that she “believe[d] that Judge Kessler has a personal bias against me and my counsel, Montgomery Blair Sibley or in favor of any adverse party[,]” and then listed six alleged grounds for this claim. Dkt. No. 113 at 1-3. Having obtained what she requested, that is, a new judge on her case, the defendant now complains about the reassignment of the case. The United States is unaware of any impropriety in the reassignment of this case and believes that defendant’s speculations to the contrary are completely unfounded. Defendant’s argument here, as in other places, has no logical consistency other than her own self-interest at the time she makes the specific argument.

clearly something that should be reconsidered and the subpoenas quashed for the reasons set forth in the government's omnibus motion.

In response to the government's motion, defendant attempts to compare the grand jury process with Rule 17, claiming that since the defendant does not have access to documents obtained by grand jury subpoenas issued by the government, she should not have to concern herself with Rule 17's provision for simultaneous inspection by the opposing party. There are at least two problems with this argument. First, as defendant is well aware, she has received thousands of pages of documents obtained by the government through grand jury subpoenas. This, along with the fact that the defendant has been provided with a detailed indictment, makes defendant's repetitive claims that she is not privy to the government's trial theories or evidence ludicrous. Secondly, the grand jury process is governed by an entirely separate body of rules. See Fed. R. Crim. P. 6.

Defendant's arguments are further premised on the idea that she has the right to the element of surprise in trial. See Dkt. No. 234 at 7-8. However, that theory is not supported by the caselaw in this jurisdiction. Daingerfield Island Protective Soc. v. Babbitt, 40 F.3d 442, 449 (D.C. Cir. 1994) (court should not countenance or encourage "gotcha" tactics); Time Warner Entertainment Co., L.P. v. F.C.C., 144 F.3d 75, 82 (D.C. Cir. 1998) (court does not look sympathetically on parties playing "gotcha"); United States v. Fogel, 829 F.2d 77, 91 (D.C. Cir. 1987) ("sentencing by ambush should be avoided even more studiously than trial by ambush") (citation and internal quotation marks omitted).

3. The IRS - CID and USPIS subpoenas

Defendant offers no explanation as to why the subpoenas issued to IRS-CID and USPIS do not violate the discovery rules. See Dkt. No. 234 at 9-10. As such, the government reiterates its prior assertion that permitting the defendant to subpoena copies of "all records relating to the

investigation of Jeane Palfrey and Pamela Martin & Associates” in the possession of IRS - CID and USPIA violates both the Jencks Act and Roviaro v. United States, 353 U.S. 53, 62 (1957).

4. Unreasonable nature of subpoenas

Defendant further argues that the government has failed to meet its burden of showing the Court that the subpoenas are “unreasonable, unduly burdensome and oppressive.” Dkt. No. 234 at 10-12. In so doing, defendant attempts to shift the burden regarding the propriety of the subpoenas to the government. However, as the government previously noted, “in order to require production prior to trial, the moving party must show . . . that the documents are evidentiary and relevant; . . . and . . . that the application is made in good faith and is not intended as a general ‘fishing expedition.’” United States v. Nixon, 418 U.S. 683, 699 (1974). Moreover, in terms of showing the Court that the subpoenas were unreasonable, unduly burdensome, and oppressive, the Court need only to consider the scope and volume of the subpoenas to come to that conclusion. The defendant has subpoenaed *twenty-five* federal and local agencies, some of which are not even law enforcement or investigative agencies, for irrelevant information.

5. White House subpoena and political prosecution argument

The defendant provides information in her opposition which she claims supports the proposition that the White House subpoena was “relevant, admissible, and specific.” Dkt. No. 234 at 12. The information provided by the defendant, in addition to being false, is irrelevant and inadmissible. In fact, the government has already filed a motion to preclude evidence, comments, and arguments to the jury regarding defendant’s claim of selective prosecution. See Dkt. No. 222. Defendant failed to respond to that motion in a timely manner, so now apparently seeks to respond

in her opposition to the government's omnibus motion to quash.<sup>4</sup> That opposition is not the appropriate venue for such a response, so the government will not address her arguments on that issue here.

The government will, however, respond to defendant's claims regarding jury nullification, as they are both completely factually unfounded and legally incorrect. No juror has a right to engage in nullification. It is a violation of a juror's sworn duty if it does not follow the law as instructed by the court - trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition. Indeed, the D.C. Circuit adheres to the almost universal rule disapproving arguments that ask the jury to decide a criminal case on extraneous matters, that is, to engage in jury nullification. In United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983), the court, in holding that a defendant has no right to a jury instruction informing the jury as to its power to engage in jury nullification, stated:

A jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.

Id. at 494; see also United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972) ("An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure

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<sup>4</sup> Defendant seems to be under the mistaken impression that the Court does not have the power to preclude any argument regarding her claims of "political prosecution." See Dkt. No. 234 at 13 ("The Court cannot exclude defendant's evidence of political prosecution from the jury.") (emphasis in original). Indeed, defendant makes it very clear that she plans to defy the Court should it fail to rule in her favor. See id. ("Accordingly, Defendant has the right - and intends upon pain of contempt of court - to raise the defense of political prosecution in her defense.")

requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny”).<sup>5</sup> Indeed, since the Supreme Court’s decision in Sparf and Hansen v. United States, 156 U.S. 51 (1895), “federal courts have uniformly recognized the right and the duty of the judge to instruct the jury on the law and the jury’s obligation to apply the law to the facts, and that nullification instructions should not be allowed.” United States v. Drefka, 707 F.2d 978, 982 (8<sup>th</sup> Cir. 1983). See also United States v. Carr, 424 F.3d 213, 220 (2<sup>nd</sup> Cir. 2005) (“We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.”); United States v. Bruce, 109 F.3d 323, 327 (7<sup>th</sup> Cir. 1997) (jury nullification is not to be sanctioned by instructions, but is to be viewed as an aberration under our system); United States v. Sepulveda, 15 F.3d 1161, 1190 (1<sup>st</sup> Cir. 1993) (“A trial judge . . . may block defense attorneys’ attempts to serenade a jury with the siren song of nullification, . . . and, indeed, may instruct the jury on the dimensions of their duty to the exclusion of jury nullification . . . .”); United States v. Desmarais, 938 F.2d 347, 350 (1<sup>st</sup> Cir. 1991) (it is “improper to urge the jury to nullify applicable law.”); United States v. Trujillo, 714 F.2d 102, 105-06 (11<sup>th</sup> Cir. 1983) (“We therefore join with those courts which hold that defense counsel may not argue jury nullification during closing argument.”); United States v. Childress, 746 F. Supp. 1122,

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<sup>5</sup> Although defendant cites Dougherty in her opposition, it doesn’t support the proposition for which she cites it. In Dougherty, the court upheld the district court’s refusal to provide the jury with a jury nullification instruction. Indeed, despite citing to “then-chief Judge Bazelon’s argument,” Dkt. No. 234 at 18, defendant neglects to advise the Court that Judge Bazelon wrote the dissent in this opinion as to the failure to give the requested jury instruction. Defendant makes a similar mis-representation when she cites United States v. Moylan, 417 F.2d. 1002 (4<sup>th</sup> Cir. 1969) as a case that “affirm[ed] the right of jury nullification . . . .” Dkt. No. 234 at 17. In fact, in Moylan the court held that the defendants were not entitled to an instruction that the jury had the power to acquit even if the defendants were clearly guilty of the charged offenses. 417 F.2d. at 1006-07.

1140 (D.D.C. 1990) (a defendant has no right to have the court inform the jury of its inherent power to acquit nor may counsel argue jury nullification in closing argument). Thus, defendant's assertion that the jury must be "advised by the Court of its power if not duty to nullify" is utterly false.

**B. Conclusion**

For the foregoing reasons, as well as those articulated in its omnibus motion to quash, the United States respectfully requests that the Court quash the subpoenas issued to the federal and local agencies listed in the government's omnibus motion to quash, reconsider Judge Kessler's November 13, 2007 Memorandum Order granting defendant's application to issue subpoenas *duces tecum* to the federal and local agencies, and individuals, and quash the subpoena issued to the White House.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

DEBORAH JEANE PALFREY,

DEFENDANT.

CRIMINAL CASE NUMBER: 07-046-JR

**DEFENDANT'S OPPOSITION TO  
GOVERNMENT'S OMNIBUS MOTION TO  
QUASH SUBPOENAS AND  
MOTION FOR RECONSIDERATION**

Defendant Deborah Jeane Palfrey, by and through her undersigned counsel, opposes the Government's Omnibus Motion to Quash Subpoenas Issued Pursuant to Defendant's *Ex Parte* Application and Motion for Reconsideration of the Court's November 13, 2007, Memorandum Opinion Granting In Part the Application and states:

**I. BACKGROUND**

On October 28, 2007, pursuant to the Due Process Clause of the Fifth Amendment, the Compulsory Process Clause of the Sixth Amendment, and Federal Rules of Criminal Procedure Rule 17, Defendant filed her "*Ex Parte* Application for Issuance of Subpoenas and Payment of Costs and Fees." ("*Ex Parte* Application").

That *Ex Parte* Application sought issuance and service of *ex-parte*, pre-trial subpoenas *duces tecum* returnable to Defendant's counsel's law office from seven categories of individuals or entities:

(i) Verizon and Cellular Telephone Companies<sup>1</sup>, (ii) Metro-D.C. Vice Squads<sup>2</sup>, (iii) Federal

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<sup>1</sup> AT&T Mobility, Sprint Nextel, T-Mobile USA, Verizon Wireless and Alltel.

<sup>2</sup> 1. Metropolitan Police Department of the District of Columbia, 2. Maryland State Police, 3. Anne Arundel County Police Department, 4. Anne Arundel County Sheriff's Office, 5. Baltimore County Police Department, 6. Baltimore County Sheriff's Office, 7. Howard County

Agencies<sup>3</sup>, (iv) ABC News and Larry Flynt Productions, Inc., (v) H&R Block, (vi) Messrs. Tobias, Vitter, and Ullman and (vii) the Internal Revenue Service (for copies of Defendant's tax records and Form 1099s issued to each of the escorts of the service).

Importantly, for each category, Defendant proffered evidence sufficient to meet the requirement that such subpoenas be relevant, admissible, and specific as required by *United States v. Libby*, 432 F. Supp. 2d 26, 31 (D.D.C. 2006)(adopting the standard set out by *United States v. Nixon*, 418 U.S. 683, 700 (1974)).

Concurrently, Defendant moved pursuant to LCrR 49.1(h) for an order sealing her *Ex Parte* Application from the government and public view and for grounds in support thereof stated:

To disclose to the government or the public Defendant's request for *Ex Parte* Application for Issuance of Subpoenas and Payment of Costs and Fees would disclose Defendant's trial strategy to her detriment and violate Rule 17(b). In so much as this Court has recognized the inappropriateness of allowing the Defendant to "preview the government's theories or evidence", [D.E. #89, p. 35], the same respect should be accorded to the Defendant's theories or evidence.

On November 13, 2007, Judge Kessler – who had lived with this case since its inception –

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Police Department, 8. Howard County Sheriff's Department, 9. Montgomery County Police Department, 10. Prince George's County Police Department, 12. Prince George's County Sheriff's Department, 13. Baltimore Police Department, 14. Arlington County Police Department, 15. Arlington County Sheriff's Office, 16. Fairfax County Police Department, 17. Fairfax County Sheriff's Office, 18. Prince George County Sheriff's Office, and 19. Alexandria City Police Department.

<sup>3</sup> 1. Federal Bureau of Investigation, 2. Department of State - Diplomatic Security Service, 3. Internal Revenue Service Criminal Investigations Division, 4. United States Postal Inspection Service, 5. Office of the Director of National Intelligence, 6. Central Intelligence Agency, 7. Defense Intelligence Agency, 8. National Security Agency, 9. United States Department of State - Bureau of Intelligence and Research.

granted both motions.

On November 20, 2007, the National Security Agency was served by the U.S. Marshal's Service with one of the subpoena *duces tecum* issued by Judge Kessler.<sup>4</sup> Curiously, eight (8) days later on November 28, 2007, this matter was transferred from Judge Kessler to Judge Robinson by Judge Huvelle in her capacity as Chair of the Calendar Committee.<sup>5</sup> A copy of that transfer order is attached.

Pursuant to Rule 17(a), Defendant's counsel had issued in blank trial subpoenas by the Clerk for the first of the two trial dates set by Judge Kessler – February 19, 2008. On November 29, 2007, Defendant properly served the Records Custodian of the White House with a trial subpoena *duces tecum* for a variety of documents relevant to Defendant's defense of political and selective prosecution.

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<sup>4</sup> Subsequently, according to the U.S. Marshal's Service, thirty-nine (39) subpoenas were served. Apparently continuing a pattern of believing they are beyond the reach of the law, both the Central Intelligence Agency and the Defense Intelligence Agency refused to accept service of the subpoenas by the U.S. Marshal's Service.

<sup>5</sup> This transfer was apparently made without any granted authority found in the Local Rules which require: (i) random assignment of cases (LCvR 40.3(a)), (ii) that all proceedings in a case after its assignment shall be conducted by the judge to whom the case is assigned ( LCvR 40.3(f) and (iii) limits the Calendar Committee to determine and indicate by order the frequency with which each judge's name shall appear in each designated deck to effectuate an even distribution of cases among the active judges. (LCrR 57.10(a)(1)).

Notably here, after inquiry by Defendant's counsel and two journalists, the Clerk was unable to produce any documentation related to the transfer of this Case other than the order of November 28, 2007, thereby ruling out: (i) a LCrR 57.13(a) "Transfers by Consent" or (ii) a LCrR 57.13(c) transfer pursuant to LCrR 45.1 considerations – either of which should have produced memorandum documenting the basis for the transfer to avoid – if only for the sake of appearances – the *vitiating* of the random assignment system. *Accord: Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987)(While parties do not have a due process right to the random assignment of cases, a judge may not assign a case in order to affect its outcome.)

On December 13, 2007, two (2) days before the return date on the subpoenas, the government filed its “Omnibus Motion to Quash Subpoenas Issued Pursuant to Defendant’s *Ex Parte* Application and Motion for Reconsideration of the Court’s November 13, 2007, Memorandum Opinion Granting In Part the Application” (“Omnibus Motion”).

In the Omnibus Motion, the government requests that this Court:

- (i) reconsider Judge Kessler’s order granting Defendant’s *Ex Parte* Application;
- (ii) quash the Judge Kessler-issued subpoenas to the IRS - CID and USPIS as an “abuse of the Court’s legal process” by Judge Kessler;
- (iii) quash the remaining federal agencies, local law enforcement agencies, and the three individuals’ subpoenas as “unreasonable, unduly burdensome and oppressive”; and
- (iv) quash the trial subpoena served upon the White House as it seeks information that is neither relevant nor admissible and provides for an inappropriate return date.

For the reasons stated *infra*, each of these requests must be denied and Defendant accorded her Sixth Amendment right “to have compulsory process for obtaining witnesses in [her] favor”.

## **II. JUDGE KESSLER’S ORDERS SHOULD NOT BE DISTURBED**

“Under the doctrine of the law of the case, courts generally will not revisit issues that have already been adjudicated.” *U.S. v. Perry*, 111 F.3d 963 (D.C. Cir. 1997).

Here, Judge Kessler has already adjudicated Defendant’s “*Ex Parte* Application for Issuance of Subpoenas” after due consideration of the reasons advance by Defendant in support of that *Ex Parte* Application. Moreover, this adjudication was done by Judge Kessler who enjoyed a broad understanding of the various issues in this matter, its extensive history and the resident equities as

a result. Plainly put, Judge Kessler's enjoyed a perspective this Court cannot quickly match absent a full understanding of the two hundred plus (200+) pleadings and the four related civil matters.

Thus, the government's assertion that Defendant has not produce a "scintilla of evidence"<sup>6</sup> was made without knowledge of exactly what Defendant did proffer to Judge Kessler as Defendant's application was made *ex parte* as expressly permitted by Rule 17.

Accordingly, it would be *unseemly* for this Court – particularly given the curious timing and lack of documentation for the reassignment of this matter – to re-visit Judge Kessler's determination as to the sufficiency of Defendant's "Ex Parte Application for Issuance of Subpoenas" as the government specifically requests.

### III. DEFENDANT'S *EX PARTE* REQUEST WAS APPROPRIATE

Regrettably assuming that this Court would engage in second-guessing Judge Kessler – thereby raising an "appearance of bias"<sup>7</sup> if the Court over-ruled Judge Kessler's orders – Defendant is forced to address the government's arguments.

First, the law of *ex parte*, pre-trial subpoena *duces tecum* is not as settled as the government argues. Some courts have extended the express authority in Rule 17(b) to permit the *ex parte* issuance of trial subpoenas *duces tecum* under Rule 17(c). See: *United States v. Hang*, 75 F.3d 1275, 1282 (8th Cir. 1996)("Consequently, we conclude that an indigent defendant may, pursuant to Rule

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<sup>6</sup> "To date, defendant has provided not a scintilla of evidence to support a good faith belief that the NSA is in possession of any material that is relevant and admissible under the Rule 17(c) standards. Given the broad description of materials sought by defendant, this appears to be merely a fishing expedition"

<sup>7</sup> *Peters v. Kiff*, 407 U.S. 493, 502 (1972)("Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias").

17(c), make an *ex parte* request to the district court for issuance of a subpoena *duces tecum*. See 2 Wright, *supra*, § 272 (2d ed. 1982 & Supp.1995) (“A district court seems clearly right in construing Rule 17(b) as applying to a subpoena *duces tecum* as well as to a subpoena to testify.”). This result, which is supported by principles of fundamental fairness and equality, is consistent with the objectives of the 1966 amendments to Rule 17.”); *United States v. Jenkins*, 895 F.Supp. 1389, 1395-97 (D. Hawaii 1995) (finding that *ex parte* procedure applies to indigents' applications for subpoenas *duces tecum*).

The compelling logic of these holdings is best stated in *United States v. Florack*, 838 F.Supp. 77, 79 (W.D.N.Y.1993):

The word "also" suggests that the subpoena described above, that is in Rule 17(a) and Rule 17(b), in addition to requiring the person to attend, may also require that person to produce books, records, and documents. Therefore, Rule 17(c) should be interpreted in accordance with the provisions of Rule 17(a) and (b).... It is, of course, true that Rule 17(c) does not specifically discuss a process for obtaining [document] subpoenas by an *ex parte* application. It is also true, however, that the section does not describe any process for obtaining the subpoena. Nothing in Rule 17(c) suggests that the initial application should be any different from the application for a subpoena which does not happen to require that the subpoenaed witness produce documents.

Moreover, there is no question that exculpatory evidence in the possession of third parties is subject to a subpoena *duces tecum*. See e.g. *United States v. Cuthbertson*, 651 F2d 189, 195 (3rd Cir.), *cert denied*, 454 US 1056 (1981). “A subpoena *duces tecum* is the vehicle for securing production of documents and things at a specified time and place either before or after the time of trial.” *United States v. Beckford*, 964 F.Supp 1010, 1017 (E.D. Va. 1997). Documents may be produced at court proceedings other than trials. 2 Wright, *Federal Practice and Procedure: Criminal*

2d § 271 at 134 (“[Rule 17] is not limited to subpoena for the trial. A subpoena may be issued for a preliminary examination, a grand jury investigation, a deposition, for determination of an issue of fact raised by a pretrial motion, or for post-trial motions.”).

Second, what could be more disingenuous than the government arguing that “most significant, however, is that to allow pretrial inspection of documents on an *ex parte* basis would be completely inconsistent with the Rule's provision for simultaneous inspection by the opposing party.” Does Defendant enjoy the right to inspect the government’s documents obtained by its *ex parte* grand jury subpoenas? Obviously not. “Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser.” *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Here, those balancing of forces speaks directly to the need for the Defendant to have access to information that the government does not have. Indeed, for over forty years indigent defendants have not had to disclose defense strategy in order to subpoena witnesses and documents:

Prior to the 1966 amendment to Rule 17(b), for an indigent defendant to secure at government expense the issuance of a subpoena the defendant was required to make a motion supported by an affidavit, stating; the name and address of the witness, the testimony expected to be elicited from the witness, and the materiality of the witness’ testimony. This procedure was not conducted *ex parte*, and consequently, while the government and wealthy defendants were able to have subpoenas issued in blank, indigent defendants were required to disclose their defense theory to the government. Recognizing that requiring an indigent defendant to disclose his defense strategy to his government adversary may be constitutionally objectionable, Rule 17(b) was amended in 1966. “That amendment removed the constitutionally objectionable procedure from the provisions of Rule 17(b) ... and substituted the constitutionally unobjectionable procedure of permitting such disclosure to be made to the court *ex parte*. Thus, since 1966 indigent defendants, in requesting the issuance of a subpoena and the payment of witness

expenses, need reveal their defense theory only to an impartial court  
**and not to their government adversary.**

*United States v. Gaddis*, 891 F.3d 152, 154 (7 Cir. 1989).

Practically speaking, this case will turn on the testimony of witnesses whom the Defendant can only identify through documentary discovery and the proof resident in this documents. The government has already obtained statements under the duress of the threat of criminal prosecution from a number of witnesses and coerced such testimony from others only under a grant of immunity. Moreover, Judge Kessler has already recognized the inappropriateness of allowing the Defendant to “preview the government’s theories or evidence”, [D.E. #89, p. 35].

Yet now, the government argues its should have the right to “preview the [Defendant]’s theories or evidence”. Plainly, this tilts the already grossly uneven field of play in federal criminal law to the point of absurdity. Moreover, to reveal the documents Defendant obtains through the subpoenas *duces tecum* would upset the mandatory balance between state and individual. Constitutional law manifests a vital legal tradition of ensuring a level playing field between the government and defendant in a criminal case. The Supreme Court long ago recognized that impartiality in criminal cases requires that “[b]etween [the accused] and the state the scales are to be evenly held.” *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). Such a policy dates back to the Bill of Rights, which was "designed to level the playing field between the defendant and the state," Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L.Rev. 361, 402 (1996).

Finally, even if the government’s arguments that Rule 17 does not contemplate the *ex parte*, pre-trial subpoenas *duces tecum* that Judge Kessler has authorized, a higher, and controlling, authority does. Importantly, Defendant sought those subpoenas not only under Rule 17, but also the

Fifth and Sixth Amendment to the Constitution. It is axiomatic that any conflict between Rule 17 and Defendant's Constitutional rights must be resolved against Rule 17.

Even though the Sixth Amendment speaks only of the right to compel the production of witnesses, rather than documents, it has been long and repeatedly held that "this constitutional mandate extends to documentary as well as oral evidence." *United States v. Schneiderman*, 106 F.Supp. 731, 735 (S.D.Cal.1952), *aff'd sub nom., Yates v. United States*, 225 F.2d 146 (9th Cir. 1955). *See also, Myers v. Frye*, 401 F.2d 18, 21 (7th Cir. 1968); *United States v. Burr*, 25 Fed.Cas. p. 187 (No. 14,694) (CCD Va.1807). Hence, Defendant's has two rights: (i) to execute her trial strategy without advance notice to the government and (ii) compel production of documents for her defense. To adopt the government position of forcing Defendant to reveal the documents obtained *ex parte* would obliterate those rights.

Simply stated, the government cannot have its cake and eat it too without doing violence to Fifth and Sixth Amendment guarantees.

### **III. THE IRS - CID AND USPIS SUBPOENAS WERE NOT AN "ABUSE OF THE COURT'S LEGAL PROCESS"**

The government argues in relation to the IRS-CID and USPIS subpoenas that such subpoenas violate the "the Jencks Act and *Roviaro v. United States*, 353 U.S. 53, 62 (1957)".<sup>8</sup> This characterization seeks to mis-state the scope of the subpoenas to find law favorable to the government to premise its objects to the subpoenas.

What Judge Kessler authorized in the subpoenas was as follows: "Defendant is entitled to

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<sup>8</sup> The government's ancillary argument – the October 18, 2007, order of Judge Kessler prohibits these subpoenas – is simply inane as Judge Kessler knew perfectly well what she was doing when she issued the November 13, 2007, order authorizing the subject subpoenas. Accordingly, the government's Rule 16 estoppel argument must fail.

records relating to the investigation of Jeane Palfrey and Pamela Martin & Associates that are in the custody of the [IRS-CID and USPIS].” (November 13, 2007, Order, p. 8). This determination was made after Judge Kessler had the benefit of Defendant’s *ex parte* “highly specific showing” of the relevancy, admissibility, and specificity.

Hence, the subpoenas of the IRS-CID and USPIS were properly issued and should not be quashed by this Court.

**IV. THE OTHER AUTHORIZED SUBPOENAS WERE NOT "UNREASONABLE, UNDULY BURDENSOME AND OPPRESSIVE"**

As to the other subpoenas, the government argues that : “the defendant has improperly used a Rule 17 subpoena as a discovery device. Further, the defendant has not complied with the fundamental requirements of Rule 17 because she has failed to make any showing of relevancy and materiality.”

What the government continues to ignore is that Defendant has made that showing, albeit *ex parte*, but that Judge Kessler determined that the government was not to be privy to that showing as it would unfairly reveal Defendant’s tactics, witnesses and defense theories. Hence, that argument is moot.

Of course, what the government fails to do in its Omnibus Motion is discharge its burden to convince the Court that the subpoenas are in fact “unreasonable, unduly burdensome and oppressive”. Indeed, the government proffers no evidence as to the actual burden complying with the subpoena will cause. The “burden of proving that a subpoena is oppressive is on the party moving to quash.” *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C.Cir.1984). Whether a burdensome subpoena is reasonable “must be determined according to the facts of the

case," such as the party's need for the documents and the nature and importance of the litigation." *Id.* at 407. Compare: *Linder v. Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998) ("The FBI submitted an affidavit estimating that the additional search would require up to 2142 person-hours.)

Moreover, while the government attempts to raise the "law enforcement privilege" as a bar to compliance with the subpoenas, the Omnibus Motion is *incompetent* for failing to make the slightest factual showing of how responding to the subpoenas would implicate the privilege. While the government's citation to *In re Sealed Case*, 856 F.2d 268,272 (D.C. Cir. 1988) is accurate on the law, it fails the evidentiary burden that case imposed on the government.

Notably, in *In re Sealed Case*, "The Commission further explained that disclosure of the information would jeopardize on-going investigations by prematurely revealing facts and investigatory materials to potential subjects of those investigations. *Id.* at 120. In support of this contention, **the SEC submitted a lengthy declaration detailing the effect disclosure would have on its ongoing Wall Street investigation.** Declaration of John H. Sturc, Associate Director of the SEC Division of Enforcement, August 20, 1987, App. 73, 85-6. In view of appellant's broadly-worded deposition questions, the SEC has asserted the privilege with sufficient specificity and particularity." *Id.* at 272.

Here, the government has failed to submit such an affidavit detailing why the privilege should be recognized. Moreover, by failing to submit such evidence, the Defendant is precluded from arguing counter-facts to overcome the qualified law enforcement privilege. "The public interest in non-disclosure must be balanced against the need of a particular litigant for access to the privileged information." *Id.* at 272.

Simply stated, the government has failed to meet its burden and it is not this Court's job to

backstop the United States Attorney's office in its prosecution failures.

**V. THE WHITE HOUSE SUBPOENA WAS PROPER**

Defendant recognizes that, if challenged by the recipient of a subpoena, in order to meet her initial burden to sustain the issuance of the trial subpoena *duces tecum*, she must proffered evidence sufficient to meet the requirement that such a subpoena be relevant, admissible, and specific as required by *United States v. Libby*, 432 F. Supp. 2d 26, 31 (D.D.C. 2006)(adopting the standard set out by *United States v. Nixon*, 418 U.S. 683, 700 (1974)). Second, the government's sole objection to the subpoena is that Defendant may not offer such evidence at her trial in her defense. Notably, the government on behalf of the White House does not raise a single issue as to the subpoena being "unreasonable, unduly burdensome and oppressive", thereby waiving those claims completely.

**A. THE DEFENDANT HAS MET HER BURDEN**

To the end of demonstrating that the White House subpoena was "relevant, admissible, and specific", Defendant states that she has learned from a reliable, independently credited, confidential source that the highest levels of the White House administration were involved in the decision to pursue a search warrant of Defendant's home in October 2006, a few short weeks before the national elections in November 2006 and subsequently prosecute her. That source's credibility is confirmed by the fact that his/her sealed testimony was taken by the U.S. Congress committee investigating political prosecutions by the Bush Department of Justice. In particular, the confidential source had related that there is good reason to believe that were telephone conference calls and emails between Karl Rove and Department of Justice employees including, but not limited to Monica Goodling and Mary Beth Buchanan, relating to the desirability of obtaining the proverbial "black book" of Defendant's escort service before the November 2006 elections.

This assertion is supported by circumstantial evidence of such behavior by the Bush Administration as demonstrated by the chronology of relevant events detailed in the Appendix to this Opposition. That chronology, accompanied by the House Judiciary Subcommittees on Crime, Terrorism and Homeland Security and Commercial and Administrative Law Chairman John Conyers's statement made after the Committee held hearings concerning "Allegations of Selective Prosecution: The Erosion of Public Confidence in Our Federal Justice System" also contained in the Appendix hereto, confirms that the Constitutionally-prohibited politicization of the Department of Justice is now simply beyond dispute.

Thus, if true, and the documentary evidence reportedly residing upon White House email servers and records which are the subject of pending litigation to prevent erasure of those emails and records<sup>9</sup>, Defendant would have a valid defense to the prosecution of her. As such, Defendant has discharged her burden to demonstrate that the evidence that she seeks from the White House is "relevant, admissible, and specific".

**B. THE COURT CANNOT EXCLUDE DEFENDANT'S EVIDENCE OF POLITICAL PROSECUTION FROM THE JURY**

Clearly, the Bush Department of Justice is desperate not to allow Defendant to surface the truth of the unprecedented and peculiar prosecution of her – as the only one of eighty-three (83) escort services operating in the Metro-DC area. Notwithstanding the modern case law cited by the government for the assertion that a judge can usurp the jury's province to determine both the law and the facts, the Sixth Amendment holds otherwise. Accordingly, Defendant has the right – and intends upon pain of contempt of court – to raise the defense of political prosecution in her defense.

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<sup>9</sup> White House Ordered to Keep E-Mails With Suits Pending Over Missing Messages, Judge Issues Directive on Backup Tapes. Washington Post, November 13, 2007; Page A04.

While Defendant will more fully detail her objection to the government's attempt to deny to Defendant the right to gather and present evidence of her political prosecution in her Opposition to the government's motion in Limine to that end, certain points are made here also.

As to the government's citations, they are both distinguishable and inapposite. In *United States v. Abboud*, 438 F.3d 554, 579-80 (6<sup>th</sup> Cir.), this issue was one of waiver, not the validity of a selective prosecution defense, though in non-binding *dicta*, the Court did address that issue. "Here, Defendants did not make a 12(b)(1) motion based on selective prosecution before trial and thus waived the issue. Therefore, the district court did not err in preventing Defendants from presenting evidence of this waived defense at trial." *Id.* at 579. Likewise, in *United States v. Renan*, 103 F.3d 1072, 1082 (2<sup>nd</sup> Cir. 1997), the issue was a claim that the defendant has been called "before the grand jury solely to elicit perjured testimony" as a "perjury trap" by the government. *Id.* at 1082. Here, Defendant has made the Rule 12(b)(1) motion and a "perjury trap" is not at issue.

However directly on point is *United States v. Armstrong*, 517 U.S. 456 (1996) where the Court stated:

Of course, a prosecutor's discretion is "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles*, 368 U.S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

Clearly, the Sixth Amendment secures: "In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury . . .". Hence, the phrase "trial by an impartial jury" had a specific meaning when grafted onto the Constitution.

That meaning was not mis-understood at the time of its writing. In *Stettinius v. United States*, Federal Case No. 13,387 (C.Ct. D.C. 1839), the Court exhaustively considered the question of whether the Jury decided questions of law such as political prosecution. In concluding that the Jury, and not the Judge was the ultimate arbiter of both the facts and the law, the Court noted:

- "The objection to the judge's giving any instruction to the jury as to the law seems to be founded upon the idea that the jurors are the sole judges of the law, and are under no obligation to respect the decisions of the judge upon the questions of law arising in a criminal cause."
- "In the trial of the impeachment of Judge Chase, Mr. Randolph, one of the managers of the prosecution, in speaking of this right of juries to decide the law, calls it "their undeniable right of deciding upon the law as well as the fact necessarily involved in a general verdict."
- "The court generally hear the counsel at large on the law; and they are permitted to address the jury on the law and the fact; after which the counsel for the state concludes. The court then states the evidence to the jury, and their opinion of the law, **but leaves the decision of both law and fact to the jury.**"
- "In *Croswell's Case*, 3 Johns. Cas. 346, the counsel for the defendant admitted it "to be the duty of the court to direct the jury as to the law; and it is advisable for the jury, in most cases, to receive the law from the court, and in all cases they ought to pay respectful attention to the opinion of the court; but it is also their duty to exercise their judgments upon the law as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions."
- "And in the opinion which the court had prepared in the Case of John Fries [Case No. 5,126], they said: "It is the duty of the court, in all criminal cases, to state to the jury their opinion of the law

arising on the facts; but the jury are to decide in this, and in all criminal cases, both the law and the facts, on their consideration of the whole case.”

- “But, in practice, it is allowed in the courts of England, and of some of these states; and it is upon this ground, namely, that as the jury may find a conclusive general verdict in favor of the defendant, upon the general issue, which involves both law and fact, they have a right to hear from the defendant, or his counsel, the defendant's construction of the law, and his reasons for such construction.”

Thus, notwithstanding the recent usurpation of the courts to take away from the jury their “right” to determine both facts and law, the Sixth Amendment drafters fully understood that the phrase “trial by an impartial jury” included a jury determining both the law and the facts.

In addition, almost from the beginning of the jury in England, juries have been engaged in “nullification” where the jury exercises its discretion “in favor of a defendant whom the jury nonetheless believes to have committed the act with which he is charged.” Thomas Andrew Green, *Verdict According to Conscience: Perspective on the English Criminal Trial Jury, 1200-1800* (1985) at pp 200-264. “Jury nullification occurs when guilt is established but the jury decides to acquit on its own sense of fairness, propriety, prejudice, or any other sentiment or concern,” Randall Kennedy, *Race, Crime and the Law*, 1997.

In summary, jury nullification refers to a rendering of a not guilty verdict by a trial jury, effectively disagreeing with the instructions given by the judge concerning what the law is, or whether such law is applicable to the case, taking into account all of the evidence presented. It is for this reason that Thomas Jefferson in a letter to Tomas Paine in 1789, stated, “I consider the trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution.”

The first landmark decisions since the adoption of the U.S. Constitution which confirmed the right of the defense in a criminal case to not have the bench make a decision on motions until all legal arguments had been made by both sides before the jury, was in this Circuit in *United States v. Fenwick*, 25 F. Cas. 1062; 4 Cranch C.C. 675 (1836); and, 22 F. Cas. 1322; 5 Cranch C.C. 573 (1839) (“In criminal cases, the jury has a right to give a general verdict, and, in doing so, must, of necessity, decide upon the law as well as upon the facts of the case.”)

Later the Fourth Circuit in *U.S. v. Moylan*, 417 F.2d 1002, 1006 (1969) affirmed the right of jury nullification, stated:

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge, and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. If the jury feels that the law under which the defendant is accused, is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

In *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), the court issued a ruling similar to *Moylan* that affirmed the *de facto* power of a jury to nullify the law, stating: “The existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law. . . . The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court . . . The totality of input generally convey adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says.”

*Id.* at 1132-1135. Furthermore, then-chief judge David L. Bazelon argued that the jury should be instructed about their power to render the verdict according to their conscience if the law was unjust. He wrote that refusal to allow the jury to be instructed constitutes a “deliberate lack of candor”. *Id.* at 1132.

The question then is given that the jury has the power to nullify, should they not be given information of government's prosecutorial misconduct, and be told of the juries power?

In Clay S. Conrar's 1998 book, *Jury Nullification: The Evolution of a Doctrine*, he defines jury nullification a the way that jurors in a criminal trials have the right to refuse to convict if they believe that a conviction would be unjust in some way.

The instant action is a case where the Defendant must be permitted to present evidence of political prosecution to the jury and the jury advised by the Court of its power if not duty to nullify, not only because there an abuse of a bad law, but to a valid claim of selective and/or political prosecution. See David C. Brody, Sparf and Dougherty Revisited: *Why the Court Should Instruct the Jury of its Nullification Right*, 33 Am. Crim.L.Rev. 89 (1995).

Hence, as indubitably a politically-motivated prosecution violates equal protection of the law guarantees, Defendant has the right to (i) compel evidence to prove this defense and (ii) argue to the Jury this law in her defense.

To hold otherwise would be to reduce the Jury to a mere fact finder which was never the contemplation of the framers of the Sixth Amendment.

**C. THE GOVERNMENT'S POSITION AFFORDS DEFENDANT A RIGHT WITHOUT A REMEDY**

To credit the government's position, Defendant has the right to be free of politically-

motivated prosecution, but has no right to obtain evidence to demonstrate of such politically-motivated prosecution. Even if the Court alone was allowed the sole ability to judge both the facts and the law merits of such a factually intensive question, depriving the Defendant the means – through subpoenas – to obtain that evidence affords to Defendant a right without a remedy to secure that right.

As such, Defendant's subpoena of the White House must be permitted to stand if only to allow access to information to present this Court that her prosecution is politically-motivated and thus prohibited by the Constitution.

**V. CONCLUSION**

For the reasons aforesaid, the Omnibus Motion must be denied, a new date for the subpoenas returns set and the government ordered forthwith to respond.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served pursuant to CM/ECF upon Daniel Pearce Butler, Catherine K. Connelly and William Rakestraw Cowden, Assistant United States Attorneys, Criminal Division, 555 4th St., N.W., Room 4818, Washington, D.C. 20530 this December 28, 2007.

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**APPENDIX**

**CASE CHRONOLOGY**

- June 2004 Joint Investigation by US Postal Inspection Service and IRS Criminal Investigation Division commences of Defendant. (Couvillion Affidavit, ¶12).
- Early 2005 Thomas M. DiBiagio forced out as U.S. Attorney for Maryland because of political pressure stemming from his public corruption investigations involving associates of the state's governor, a Republican. (N.Y. Times, March 5, 2007)
- January 2006 Brandi Britton, a former escort with Defendant's service, arrested in Maryland for running an escort service from her home. (Baltimore Sun, January 30, 2007, attached hereto).
- August 2006 Defendant closes Escort Service. (Amended Civil Forfeiture Complaint, ¶9).
- September 10, 2006 Jeffrey Taylor appointed U.S. Attorney for the District of Columbia. Prior to the appointment, Mr. Taylor Serve as senior advisor to Attorneys General John D. Ashcroft and Alberto R Gonzales on national security, terrorism, criminal law, and death penalty matters. Oversee Department law enforcement operations conducted by U.S. Attorneys, the Criminal Division, the Office of Intelligence Policy and Review, the Federal Bureau of Investigation, and the Drug Enforcement Administration, Represent the Attorney General in interagency deliberations led by the National Security and Homeland Security Councils. Additionally, advised Chairman Orrin G. Hatch and Republican majority on criminal law, terrorism, and national security issues. Drafted provisions of the "Civil Asset Forfeiture Reform Act" and the "USA PATRIOT Act." (Resume of Jeffrey Taylor, attached hereto).
- September 29, 2006 Jeffrey Taylor sworn-in as U.S. Attorney for the District of Columbia. Seizure Warrant for Defendant's Bank Accounts issued by D.C. District Court.
- October 4, 2006 Search Warrant Executed on Defendant's home.
- January 29, 2007 Brandi Britton found dead, an apparent suicide one week before her trial is to commence. (Baltimore Sun, January 30, 2007).

**POLITICAL PROSECUTION BACKGROUND**

On October 22, 2007, the House Judiciary Subcommittees on Crime, Terrorism and

Homeland Security and Commercial and Administrative Law held hearings concerning “Allegations of Selective Prosecution: The Erosion of Public Confidence in Our Federal Justice System.”

At the hearing, former Attorney General Dick Thornburgh testified that he believes the Department of Justice sought to prosecute a Pennsylvania Democrat for political reasons.

Upon the conclusion of Mr. Thornburgh’s testimony and after receiving other evidence, the Judiciary Committee Chairman John Conyers made the following statement:

Today we heard compelling testimony from a Republican former Attorney General of the United States **describing his deep concern that the Department of Justice has misused its prosecutorial power for political reasons.** We also heard a former U.S. attorney recount disturbing facts suggesting that **DoJ officials may have overridden the judgments of local career prosecutors for political reasons.** Witnesses described investigators who seem to have targeted individuals to find crimes, rather than investigating the crimes initially. **And we heard mention of numerous cases from Wisconsin to Mississippi and elsewhere, where individuals have stepped forward to present facts giving rise to fears that justice itself has been compromised - for political reasons.** Behind it all, we heard **data from a Ph.D. professor showing a massive disparity in investigations and prosecutions of Democrats over Republicans during the Bush Administration . . .** We have learned that U.S. Attorneys were ranked by high level Department of Justice officials on their political loyalty. We have learned that White House officials, including Karl Rove and even the President himself, passed criticisms of U.S. Attorneys to the Department, including criticisms from local political operatives. And we know that **the Administration changed longstanding policies so that hundreds of White House officials were free to speak about criminal cases to dozens of Department managers.** With those facts on the table, the Committee finds itself compelled to take a serious look at the serious charges of selective and **politically-based prosecution that have been made, not just in the cases we will hear about today, but in numerous cases across the country . . .** All people in this country must be able to trust that criminal prosecutions are based on an unbiased prosecutor’s estimation of the strength of the evidence and the application of the law, and not on someone’s political portfolio. (Emphasis added).

Additionally, among the other evidence presented at the hearing was a statistic analysis prepared by Donald Shields and John Cragan, two professors of communication studying the prosecution patterns of this administration. Shields and Cagan compiled a database of investigations and/or indictments of candidates and elected officials by U.S. attorneys since the Bush administration came to power. Their study entitled *The Political Profiling of Elected Democratic Officials: When Rhetorical Vision Participation Runs Amok* examined 375 cases and found that 10 involved independents, 67 involved Republicans, and 298 involved Democrats. The authors opine that the main source of this partisan tilt was the huge disparity in investigations of local politicians, in which *Democrats were seven times as likely as Republicans to face Justice Department scrutiny.*

Defendant's escort service – which serviced the powerful of Washington's elite for over thirteen (13) years – presented a double edge sword to the Bush Department of Justice. To pursue her meant potentially embarrassing a large stable of Republican who had been clients. To allow her to close her business was a risk the Bush Department of Justice simply couldn't afford. Moreover, the temptation to seize the "black book" and then have embarrassing details of Democrats which could prove useful to an increasingly desperate Republican party immediately before fateful elections was a temptation the Bush Department of Justice simply could not resist.

This matter which could have been prosecuted in June 2004 but wasn't until October 2006, finds its genesis not in legitimate prosecutorial restraint, but in a Department of Justice which has been perverted to (i) persecution of political enemies and (ii) protection of friends of the Bush Administration.