[Appellant's Appendix 265-288]

Petitioner's February 23, 2004 pre-trial motion for Judge Holeman's disqualification, postponement /continuance of trial, transfer, etc.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA / CRIMINAL DIVISION

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UNITED STATES OF AMERICA

No. M-04113-03

-against-

ELENA RUTH SASSOWER

---------- x

Notice of Motion to Disqualify Judge Brian F. Holeman & for Postponement/Continuance of the March 1, 2004 Trial Date Pending Responsive, Written Adjudication of Defendant's Still-Outstanding October 30, 2003 Motion to Enforce her Discovery Rights, the Prosecution's Disclosure Obligations, and for Sanctions

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PLEASE TAKE NOTICE that upon the annexed affidavit of defendant ELENA RUTH SASSOWER, sworn to February 23, 2004, the exhibits annexed thereto, and upon all the papers and proceedings heretofore had, ELENA RUTH SASSOWER will move this Court at 500 Indiana Avenue, N.W., Washington, D.C. 20001 as soon as can be heard, for an order granting:

(1) Disqualification of Judge Brian F. Holeman, pursuant to Canon 3E of the Code of Judicial Conduct for the District of Columbia Courts;

(2) Postponement/continuance of the scheduled March 1, 2004 trial date, chargeable to the Government or the Court, pursuant to Rule 16(d)(2) of the Superior Court Rules of Criminal Procedure, pending responsive,

written adjudication of defendant's still-outstanding October 30, 2003 motion to enforce her discovery rights, the prosecution's disclosure obligations, and for sanctions -- including responsive, written adjudication of defendant's December 3, 2003 affidavit in reply and in further support of her motion; and

(3) Such other and further relief as may be just and proper, including ensuring the appearance and actuality of fair and impartial justice by transferring this politically-explosive case to a court outside the District of Columbia, whose funding does not come directly from Congress, and, if possible, whose judges are not appointed by the President, with the advice and consent of the Senate or one of its committees.

Dated: February 23, 2004
White Plains, New York

_____s/_____

ELENA RUTH SASSOWER
Defendant *Pro Se*
16 Lake Street, Apt. 2C
White Plains, New York 10603
(914) 949-2169

TO: U.S. Attorney for the District of Columbia
Assistant U.S. Attorney Aaron Mendelsohn
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-7700 / (202) 514-4991

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA / CRIMINAL DIVISION

———— x

UNITED STATES OF AMERICA

No. M-04113-03

-against-

ELENA RUTH SASSOWER

———— x

Affidavit in Support of Defendant's Motion to Disqualify Judge Brian F. Holeman & for Postponement/Continuance of the March 1, 2004 Trial Date Pending Responsive, Written Adjudication of Defendant's Still-Outstanding October 30, 2003 Motion to Enforce her Discovery Rights, the Prosecution's Disclosure Obligations, and for Sanctions

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the above-named defendant, acting *pro se*, criminally charged with "disruption of Congress" and facing punishment of six months in jail and a $500 fine.

2. This affidavit is submitted in support of the relief set forth in the accompanying notice of motion.

3. The facts herein particularized further substantiate my contention, reiterated at the outset of my still-outstanding October 30, 2003 motion to enforce my discovery rights, the prosecution's disclosure obligations, and for sanctions, that:

> "to ensure the appearance and actuality of fair and impartial justice, it is appropriate to transfer this politically-explosive case to a court outside

> the District of Columbia, whose funding does not come directly from Congress, and, if possible, whose judges are not appointed by the President, with the advice and consent of the Senate or one of its committees." (at ¶3)

4. For the convenience of the Court, a Table of Contents follows:

Table of Contents

* * *

The Demonstrated Actual Bias of Judge Brian Holeman, Entitling me to his Disqualification

5. The first branch of relief -- for the disqualification of Judge Brian Holeman – is based upon what was initially the appearance and is now the actuality that he is not fair and impartial.

6. The facts creating this appearance and actuality are reflected in my three letters to the Court, dated January 22, 2004, February 4, 2004, and February 10, 2004 (Exhibits "T-1", "T-2", and "T-3")[1], faxed on those dates and thereupon mailed.

7. Because these letters "speak for themselves" – indeed, because this disqualification motion has been necessitated by the Court's wilful failure to respond to the latter two letters, following its non-responsive response to the first letter -- the contents of all three letters are herein set forth *verbatim*:

Letter #1: January 22, 2004 **(Exhibit "T-1")**

"Dear Judge Holeman:

> This responds to the disturbing phone call I received this morning from your judicial administrative assistant, Sherron Offer, who stated that you had instructed her to tell me that I be requested 'not [to] call chambers' and that my matter is 'under advisement'.

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[1] The exhibits annexed hereto continue the sequence from my moving affidavit in support of my October 30, 2003 discovery/disclosure/sanctions motion ["A"-"O"], my December 3, 2003 reply affidavit ["P"-"R"], and my December 31, 2003 affidavit in opposition to the prosecution's motion *in limine* and in further support of my discovery/disclosure/sanctions motion ["S"].

With all due respect, such instruction does not reflect a fair and impartial tribunal – and I so stated to Ms. Offer, reviewing with her the pertinent facts and circumstances, which she already knew because she had answered the phone yesterday afternoon when I called (202-879-4208).

The purpose of that phone call was entirely proper: (1) to confirm that you were, in fact, the long-awaited new judge assigned to the case; and (2) with regard to my October 30, 2003 motion to enforce my discovery rights and the prosecution's disclosure obligations, to verify whether you had received any submission from the U.S. Attorney to my August 12, 2003 First Discovery Demand – as to which, at the December 3, 2003 oral argument of the motion, Judge Milliken had fixed a January 14, 2004 deadline. I stated to Ms. Offer that I myself had received nothing from the U.S. Attorney.

For Ms. Offer to tell me that you had instructed her to say that the matter is 'under advisement' is to suggest that you believe that I was calling for rulings, which is not the case. Indeed, nothing I said to Ms. Offer in our yesterday's conversation could have remotely given her any such misimpression to communicate to you. Nor is there any basis for a request that I 'not call chambers' – as if there was something inappropriate in my call – or for the Court's refusing – as it apparently has – to respond to my straightforward inquiry as to whether it has received anything from the U.S. Attorney. As I stated to Ms. Offer, I have rights flowing from noncompliance by the U.S. Attorney with the January 14, 2004 deadline. This, in addition to the fact that the Court should want to know – and needs to know -- that I have received nothing

from the U.S. Attorney in connection with that deadline. Such is legitimately brought to the Court's attention, at least initially, by a call to chambers.

It may be noted that prior to your recent entry into this case, I had substantial phone communications with the chambers of predecessor judges. Such is reflected by my faxed correspondence to the various judges and law secretaries, which should be part of the Court's file. To my knowledge, your request that I 'not call chambers' is the first such request I have encountered – and all the more jarring for that reason.

As I understand it, Courts are supposed to be solicitous of *pro se* litigants. However, I am not asking for any special courtesies. Rather, I am asking to be treated in a fashion comparable to attorneys who freely call chambers with questions as to such procedural, non-substantive matters as here at issue.

So that there is no misunderstanding on the subject – and no violation of my rights as a *pro se* criminal defendant -- I respectfully request that the Court respond in writing with respect to the foregoing or that its law clerk telephone to advise.

Thank you."

Letter #2: January 30, 2004 **(Exhibit "T-2")**

"Dear Judge Holeman:

This responds to the phone message left on my voice mail in the hours following the Court's receipt of my January 22, 2004 fax.

I have transcribed that message as follows:

> 'Hello. This message is for Elena Sassower. This is Sara Pagani, I'm the law clerk for Judge Brian Holeman. I'm calling in response to the fax you sent to our chambers regarding your case in Superior Court. I'm calling to let you know that, as a courtesy, we're calling you again, but the judge's position has not changed. If you need information about whether discovery or responses have been provided, you are welcome to go to the Clerk's office, present your identification, and see the file. You can also contact the U.S. Attorney's for information regarding your case. We cannot answer any further questions at this time. But if at some point we need to contact you, we will do so. Thank you.'

Such message only reinforces my belief – expressed at the outset of my January 22nd fax – that the Court is 'not a fair and impartial tribunal'.

So that I may be guided accordingly in protecting my constitutional rights, please advise whether it is your policy to request attorneys and *pro se* litigants not to call chambers with their inquiries regarding *procedural, non-substantive matters* pertaining to cases before you.

If you have no such policy, I intend to make a motion for the Court's disqualification based upon the wholly unwarranted, invidious mistreatment of me reflected by my January 22nd fax and uncontradicted by Ms. Pagani's message. In any event, I call upon you to make disclosure – as is your duty under Canon 3E of the District of

Columbia's Code of Judicial Conduct – of any facts and circumstances bearing adversely upon your ability to be fair and impartial.

Finally, I have been informed by Dan Cipullo, Director of the Superior Court's Criminal Division, that the computerized court records -- which were presumably just as instantaneously accessible to your chambers on January 22nd as they were to him on January 27th -- that on January 14th the government filed an

> 'ex parte in camera submission regarding evidence relative to bias cross-examination of government witness'.

This does not represent compliance with Judge Milliken's direction to Assistant U.S. Attorney Aaron Mendelsohn on December 3, 2003. Such direction required Mr. Mendelsohn to produce more than just personnel records -- the only aspect of production for which 'ex parte in camera' review is appropriate. Moreover, as to such personnel records, the direction was not limited to merely one 'government witness', presumably Sergeant Bignotti. Indeed, even Judge Milliken, who manifested his disqualifying bias and interest by his failure and refusal to 'throw the book' at Mr. Mendelsohn, as any fair and impartial tribunal would have done, recognized that Mr. Mendelsohn had to 'revisit' his responses to my August 12, 2003 First Discovery Demand.

Upon receipt of the transcript of the December 3, 2003 oral argument of my October 30, 2003 motion to enforce my discovery rights and the prosecution's disclosure obligations, *which I ordered on that date with a $30 deposit and for which I made full payment of an additional $99*

nearly a month ago, it is my intention to make an appropriate motion to secure the full relief to which Judge Milliken – and, more importantly, any fair and impartial review of the record of my October 30, 2003 motion shows me to be overwhelmingly entitled.

Thank you."

Letter #3: February 10, 2004 **(Exhibit "T-3")**

"Dear Judge Holeman:

I have received no response – by fax, e-mail, mail, or phone – to my January 30, 2004 letter, faxed and mailed to you.

Such letter asserted my growing belief, born of my most initial contacts with the Court, that you are 'not a fair and impartial tribunal'. To enable me to properly evaluate whether a motion for your disqualification is an appropriate course, my January 30th letter asked that you advise:

> 'whether you have a policy to request attorneys and *pro se* litigants not to call chambers with their inquiries regarding *procedural, non-substantive matters* pertaining to cases before you.' (p. 2, underlining and italics in the original).

Additionally, my January 30th letter called upon you:

> 'to make disclosure – as is your duty under Canon 3E of the District of Columbia's Code of Judicial Conduct – of any facts and circumstances bearing adversely upon your ability to be fair and impartial.' (p. 2).

As I have now received the transcript of the December 3, 2003 oral argument of my October 30, 2003 discovery/disclosure motion, I take this opportunity to add a further inquiry germane to my potential motion for your disqualification: Was it you to whom Judge Milliken referred when he stated that the new judge who would be handling this calendar and this case had 'just stepped out', but had 'heard the bulk of the arguments in the case today' [Tr. 34, lns. 24, 21-22]? If so, at what point did you leave the courtroom?

To prevent prejudice beyond that already caused by your January 22nd blanket directive that I not call chambers, which – if not part of an across-the-board general policy -- served no purpose but to impede me in protecting my legitimate rights with respect to my dispositive October 30, 2003 discovery/disclosure motion, as likewise from clarifying how I am to proceed with such related procedural issues as my subpoenaing of witnesses whose testimony will relate to the documents sought by that motion, please fax (914-428-4994) your response to my foregoing inquiries by Thursday, February 12th at the latest so I that I may decide on an appropriate course without further delay.

Finally, insofar as my January 30th letter reflects your view, enunciated by your law clerk, that I could gain necessary information by contacting the U.S. Attorney's office, enclosed is a copy of my faxed and e-mailed February 4, 2004 letter to Assistant U.S. Attorney Aaron Mendelsohn, requesting that he identify the content of his '*ex parte in camera*' submission to the Court in response to Judge Milliken's January 14, 2004 deadline. Although I asked for his expeditious response, I have yet to receive anything.

Thank you."

8. Thus established is the Court's wilful refusal to respond to the straightforward question as to whether it has a policy of requesting attorneys and *pro se* litigants to not call chambers with their *procedural, non-substantive* inquiries. This, in face of notice that such information was critical to my deciding whether to make this disqualification motion.

9. The reasonable inference is that the Court has no such policy and that it does not wish to identify such fact because doing so would expose its invidious treatment of me, to which it has steadfastly adhered, over my protests and with knowledge of its prejudice to my legitimate rights.

10. As the record herein is totally DEVOID of any basis for the Court's treating me differently from attorneys and other *pro se* litigants, nothing more is needed to establish my entitlement to the Court's disqualification for actual bias.

11. Indeed, prior to my first and only January 21st telephone call to the Court's chambers, resulting in its startling instruction to me not to call again, I had NO interaction with the Court.

12. To the extent that the Court, new to the bench[2] and newly-assigned to the case[3], had any pre-

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[2] This Court's appointment by President George W. Bush was made on May 22, 2003 – the same day as I was arrested at the Senate Judiciary Committee for "disruption of Congress". Its confirmation hearing before the Senate's Committee on Government Affairs was on September 30, 2003. Without a printed report, the appointment was placed on the Senate Executive Calendar on October 22, 2003. Senate confirmation was on October 24, 2003, by voice vote.

[3] At the December 3, 2003 oral argument of my October 30, 2003 motion, Judge Milliken not only described the new judge who

judgment about me, its only legitimate source is the record. Yet, the only judgment possible from objective review of my motion papers, my correspondence to predecessor judges and their law clerks, and the audiotape/transcripts of court conferences is that I am a highly professional, painstaking, and effective advocate in my own defense. My October 30, 2003 discovery/disclosure/sanctions motion is the most stellar representation of this.

13. It is my belief – reflected by my letters – that the reason for the Court's unexplained conduct in instructing me not to call chambers – was to prevent me from safeguarding my rights with respect to my October 30, 2003 discovery/disclosure/sanctions motion and, further, to thwart my ability to properly proceed with such related pre-trial issues as subpoenaing witnesses whose testimony will relate to the documents sought by the motion.

14. The fact that throughout this past month, as the clock has steadily ticked to the March 1, 2004 date which Judge Milliken fixed for trial, the Court has not only wilfully ignored the threshold issues of its disqualification and duty of disclosure, in violation of Canons 3E and F of the Code of Judicial Conduct for the District of Columbia Courts, but, additionally, the issues I have raised with respect to my October 30, 2003 motion, suggests that this biased Court is maneuvering to bring me to trial without the documents and witnesses to which I am entitled and on which my defense rests.

15. That the Court has not even reacted to Mr. Mendelsohn's deliberate failure to provide me with <u>any</u> information that would enable me to evaluate his

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would be assigned to this case as having "heard the bulk of the arguments today", but that he "is going to be so familiar with [my] record that it's going to frighten [me]" (Exhibit "W", p. 34, lns. 18-22). He further stated that it was his "educated guess that the judge would be thoroughly prepared for [my] case." (Exhibit "W", p. 35, lns. 8-10).

compliance with Judge Milliken's January 14, 2004 deadline, such that I am completely in the dark, only reinforces that belief. No fair and impartial tribunal could deem this acceptable based on the record herein.

Background to the Court's Demonstrated Actual Bias and to the December 3, 2003 Oral Argument before Senior Judge Stephen Milliken on my October 30, 2003 Discovery/Disclosure/Sanctions Motion

16. The Court's unexplained, severely prejudicial behavior fits within a pattern of conduct identified by the very first footnote of my October 30, 2003 discovery/disclosure/sanctions motion:

> "The record in this case, as in the 1997 case against me on a trumped-up 'disorderly conduct' charge (D-177-97), suggest a pattern by this Court of rushing criminal cases to trial, without concern for defendants' discovery rights -- at least where the arrests involve U.S. Capitol Police and the U.S. Senate Judiciary Committee." (at fn. 1)

17. As an example, ¶12 of the motion cited what Judge Milliken did on Monday, September 22, 2003, in my absence – the first day the Court was open following a two-day closure on September 18-19, 2003 caused by hurricane Isabel. Although I did not have the September 22nd transcript when I wrote ¶12, I subsequently received it (Exhibit "U-1"). What it shows is that Judge Milliken was informed by the deputy clerk that I did not have counsel and that on September 19th the case had been down for "a status hearing for [me] to ascertain [my] own counsel". Judge Milliken's response, without the slightest prompting from the Assistant U.S. Attorney then present, was *not* to schedule a new "status hearing" for ascertainment of counsel. Rather, he directed that a judicial summons be issued, setting the

case down for an October 21, 2003 trial (Exhibit "U-2"). The surprised deputy clerk responded "A trial?", to which Judge Milliken cavalierly answered, "Yeah. Why not?" (Exhibit "U-1").

18. This shocking transcript was in my possession by December 2, 2003, the day I learned from Judge Hess's chambers that Judge Milliken would be presiding over the next day's oral argument of the motion.

19. Immediately upon learning this, which was late in the afternoon on December 2nd, I telephoned Judge Milliken's chambers to verify whether, in fact, he would be presiding – and to make known my view that he could not fairly and impartially do so based on his conduct on September 22nd. I spoke with Judge Milliken's law clerk, Dan Rosenthal, who knew nothing about my discovery/disclosure/sanctions motion or the next day's oral argument. Indeed, it became clear that Judge Milliken had not seen – let alone studied – the motion whose voluminous and substantial nature I described to Mr. Rosenthal.

20. Because it seemed pointless to make an exhausting and expensive 250-mile trip to Washington for oral argument before a judge who, until then, was wholly unfamiliar with so substantial a motion, I told Mr. Rosenthal that I was willing to waive oral argument. Instead, I would rest on my reply affidavit to Mr. Mendelsohn's opposition which I was just then completing.

21. Mr. Rosenthal called me back after obtaining my motion, which I believe he located not in chambers, but in the file in the Clerk's office. He stated to me, either in that call or in his subsequent call to me, that Judge Milliken had instructed him to tell me that oral argument would proceed the next day, that my appearance was required, that I could not have my attorney, Mark Goldstone, appear on my behalf, which I

offered, and that if I did not appear a warrant for my arrest might be issued.

22. My response to Mr. Rosenthal was that this further demonstrated the improper and biased conduct that Judge Milliken had exhibited on September 22nd – as to which I had read the transcript to Mr. Rosenthal.

23. Solely because of the threat that Judge Milliken might issue a warrant for my arrest, I ultimately decided not to rely on Mr. Goldstone appearing for me at the oral argument. Inasmuch as my final words to Mr. Rosenthal in the early evening of December 2nd had been that I would not be coming – I faxed chambers shortly after midnight on December 3rd, underscoring "I will be present" (Exhibit "V-1"). Enclosed with the fax was my reply affidavit, by then completed and already faxed to Mr. Mendelsohn.

24. I delivered the "hard copy" of this reply affidavit to Judge Milliken's chambers[4] immediately upon arriving at the courthouse about an hour and a half before the oral argument. That done, I sought supervisory oversight from Chief Judge Rufus King, spending a considerable amount of time on the phone outside his Chambers for such purpose. I then went to Mr. Cipullo's office and complained to him about the judicial misconduct in this case – as well as in the predecessor 1997 case. I believe I either showed or read him footnote 1 of my motion about the pattern in both cases of being rushed to trial, without concern for my discovery rights. In any event, I showed him

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[4] It is this reply affidavit to which Judge Milliken referred at the outset of the December 3rd oral argument in stating, "I left the bench not too long ago fully intending to start this hearing at 2 o'clock. I got to my desk and, lo and behold, found a good thick submission that had been dropped off by the defendant so I took pains to review that." (Exhibit "W", p. 2, lns. 9-11).

substantiating transcripts, including the September 22nd transcript involving Judge Milliken[5].

25. With regard to that day's oral argument, I told Mr. Cipullo that I believed the true reason it had been scheduled by Judge Ronald Wertheim in the first place – and then insisted on by an unprepared Judge Milliken -- was so that the motion could be disposed of from the bench, without a written decision, in a fashion that would deprive me of the relief to which I was entitled.

26. Unbeknownst to me, but presumably known by Judge Milliken, Mr. Cipullo was in the courtroom a short time later for the oral argument[6].

27. This is the pertinent background to the December 3rd oral argument (Exhibit "W") and the mishmash of ambiguous, contradictory, insufficient, and factually unsupported rulings and statements that a demonstrably biased Judge Milliken made from the bench with respect to my October 30, 2003 discovery/disclosure/sanctions motion.

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[5] With respect to the 1997 criminal case against me for "disorderly conduct", I not only showed and discussed with Mr. Cipullo the transcript of the April 4, 1997 proceeding before Senior Judge Tim Murphy (Exhibit "X-1"), but my April 2, 1997 affidavit in support of my "Motion for A Continuance" (Exhibit "Y"), disrespectfully referred to by Judge Murphy as my "lengthy motion or whatever" (Exhibit "X-1", ln. 10). Additionally, I showed and discussed with Mr. Cipullo my subsequent exchange of correspondence with Judge Murphy (Exhibit "Z-1" and "Z-2") relating to his April 4, 1997 issuance of a bench warrant against me (Exhibit "X-2") -- culminating in my final May 26, 1997 letter (Exhibit "Z-3") to which Judge Murphy did not respond and as to which, upon requisitioning the file on June 20, 2003, I found a hand-written notation reading "*File-no response.*" (Exhibit "Z-4").

[6] I only learned of this much later during the course of my phone conversation with Mr. Cipullo reflected by my January 30, 2004 letter to the Court (Exhibit "T-2", p. 2).

The Biased Adjudications of Senior Judge Milliken at the December 3, 2003 Oral Argument – Obvious to Any Fair and Impartial Tribunal

28. Whether or not the Court was present at the December 3rd oral argument (Exhibit "W", p. 34, lns. 18-25), it has had more than ample time to hear the audiotape of the proceeding and to compare it with my October 30, 2003 motion. Review of the motion, including my December 3, 2003 reply affidavit, suffices for any fair and impartial tribunal to know that Judge Milliken's from-the-bench dispositions were biased and improper[7].

29. Most glaring was Judge Milliken's pretense that I was not entitled to sanctions against Mr. Mendelsohn, which he accomplished by NOT addressing ANY of the facts or law presented by my motion. Rather, he simply disposed of the sanctions and prosecutorial misconduct issues by falsely characterizing them as more "heat" than "light" and as being "not relevant" and "not pertinent" (Exhibit "W", p. 5, lns. 8-11; p. 9, lns. 21-25; p. 14, lns. 9-11). No objective reading of my motion could support such characterizations -- or remotely justify the forbearing "kid glove" treatment Judge Milliken gave to Mr. Mendelsohn for his demonstrated discovery violations, including when chastising him for his "bold statement" and "glaring omission" (Exhibit "W", p. 3, ln. 3; p. 4, ln. 14) in excising the words "which are material

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[7] At the conclusion of the December 3rd oral argument, Judge Milliken acknowledged having "already read transcripts of [his] earlier touch with this case" and being "absolutely aware of [his] prior presiding over this case" from "reading [my] papers" (Exhibit "W", p. 41). Such statements were in the context of my attempting to hand up to him, off-the-record, a copy of the September 22nd transcript, several copies of which I had brought with me to substantiate the motion I had anticipated making for his disqualification. His announcement that he would not be trying the case and was unlikely to be ruling on subsequent discovery issues (Exhibit "W", p. 34, lns. 8-12) made such disqualification motion unnecessary.

to the preparation of the defendant's defense" from his description of Rule 16(a)(1)(C) in his opposition to my motion[8].

30. Nor could any objective reading of my October 30, 2003 motion permit any conclusion but that I had resoundingly established the "materiality" of ALL 22 requests for "documents and tangible objects" sought by my August 12, 2003 First Discovery Demand[9] – and that I was entitled to a finding to that effect by Judge Milliken, with production ordered for my inspection. Judge Milliken's patient explanations to Mr. Mendelsohn as to why he was going to have to search for my requested records was derived from the arguments as to their "relevance" set forth at pages 7-20 of my motion, thereby recognizing their "materiality" (Exhibit "W", p. 6, lns. 8-25; p. 8, lns. 10 - p. 10, lns. 25; p. 11, lns. 19-25; p. 15, ln. 9 - p. 17, ln. 3; p. 27, lns. 20 – p. 28, ln. 12). Nonetheless, Judge Milliken pretended that "issues of materiality" were yet to be determined, might not be resolved until

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[8] Judge Milliken did not challenge Mr. Mendelsohn's pretense that he was "not aware of the glaring omission" (Exhibit "W", p. 4, lns. 23-24), notwithstanding the showing at ¶¶12-14 of my December 3, 2003 reply affidavit, which I had faxed and e-mailed to Mr. Mendelsohn with a transmitting coverletter just after midnight on December 3rd (Exhibit "V-2"). As I recollect, I provided Judge Milliken with a copy of this transmitting coverletter, along with the fax and e-mail receipts, when I delivered the "hard copy" of my reply affidavit to his chambers. This, so that he would have "proof of service".

Judge Milliken never asked Mr. Mendelsohn whether he had read my reply affidavit prior to the oral argument – and Mr. Mendelsohn did not volunteer that information. Rather, Mr. Mendelsohn's sole reference to it was to request "time to respond to Ms. Sassower's motion that was filed with the Court today" (Exhibit "W", p. 19, lns. 16-18). Although Judge Milliken generously gave him until "the end of December" – in other words, four full weeks – Mr. Mendelsohn filed no response – thereby conceding, *as a matter of law*, the truth of my reply affidavit's demonstration of his on-going deliberate misconduct and the Court's obligations with respect thereto pursuant to its "Disciplinary Responsibilities" under Canon 3D of the Code of Judicial Conduct for the District of Columbia Courts.

[9] My August 12, 2003 First Discovery Demand is Exhibit "A" to my October 30, 2003 discovery/disclosure/sanctions motion.

right before trial, "really on the eve of selection of the jury", possibly at a "further hearing" (p. 5, lns. 6-7; p. 17, lns. 4-6; p. 18, lns. 7-17; p. 36, lns. 3-8), and that "some judge" might then deny me my sought-after documents on grounds of "materiality" (p. 36, lns. 20-22). This, in addition to feigning that I was going to have to "roll up [my] sleeves" (p. 24, ln. 1) and "going to need to articulate a lot on this materiality prong" (p. 24, ln. 23) and had to "demonstrate the materiality of one point or another." (p. 25, lns. 3-4).

31. As to Judge Milliken's direction to Mr. Mendelsohn that he make his production for *in camera* inspection, any fair and impartial tribunal would immediately recognize this as improper.

32. Rule 16(d)(1) provides for "Regulation of discovery" as follows:

> "Protective and modifying orders. Upon a sufficient showing the Court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the Court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone..."

33. Mr. Mendelsohn made NO "showing", let alone a "sufficient showing" -- and NO "motion" that his "showing" be "inspected by the judge alone". In fact, Mr. Mendelsohn did not even ask for *in camera* inspection of anything, although, as Judge Milliken recognized, it was his responsibility to ask:

> "You have the protection of asking that those materials be delivered to the Court for in camera inspection and reviewed to see to any healthy redaction." (Exhibit "W", p. 9, lns. 18-20).

Instead, Judge Milliken simply took it upon himself to announce:

> "So that's my charge on reading the papers to the Government, all right? Talk to the Capitol Police. See what records they maintain on her, see what communications they got about her in this instance, and get any history of complaints of police misconduct [by] this defendant for potential bias cross-examination. And I order that produced for in-camera inspection in chambers..." (Exhibit "W", p. 11, lns. 19-25).

34. Clear to any fair and impartial tribunal was that Judge Milliken's order for *in camera* inspection was not only *sua sponte* – and thereby violative of my rights – but, additionally, that it was overbroad. Only 6 of my 22 requests for "documents and tangible objects" in my August 12, 2003 First Discovery Demand had been the subject of confidentiality objections by Mr. Mendelsohn's October 3, 2003 response – and this, based on alleged "USCP privacy guidelines" whose inadequacy was demonstrated by pages 24-27 of my motion. Consequently, there was no basis for Judge Milliken to bar me from inspection of Mr. Mendelsohn's production as to the 16 other requests. Certainly, as to the issue of "relevance" – objected to 13 times in Mr. Mendelsohn's October 3, 2003 response – there was no necessity for Judge Milliken to order *in camera* inspection of Mr. Mendelsohn's production. Determination of "relevance" and "materiality" rests on evaluation of the uncontested arguments and evidentiary proof presented by pages 7-20 of my October 30, 2003 motion – and no "short-stopping" inspection of documents by the Court is appropriate once such determination is made.

The Court's Disregard of, and Complicity in, Assistant U.S. Attorney Aaron Mendelsohn's Wilful Violation of my Due Process Right to Notice and Opportunity to be Heard as to the Sufficiency of his "*Ex Parte In Camera*" Submission

35. My communications with the Court, beginning with my innocent, non-substantive January 21st phone call to chambers, could only have sharpened its knowledge that my rights were being seriously violated with respect to my October 30, 2003 motion. Although Judge Milliken did not specify what I would be receiving in connection with Mr. Mendelsohn's *in camera* submission to the Court on January 14, 2004, any fair and impartial tribunal would deem it obvious that if Mr. Mendelsohn were going to be complying with Judge Milliken's directive, he would have to accompany his *in camera* production with a coverletter correlating the "documents and tangible objects" he was producing to the 22 itemized requests in my First Discovery Demand. Such coverletter would be comparable to his initial October 3, 2003 coverletter accompanying his production – the same as is Exhibit "B" to my October 30, 2003 motion.

36. My February 10, 2004 letter to the Court (Exhibit "T-3") enclosed a copy of my unresponded-to February 4, 2004 letter to Mr. Mendelsohn, addressed to this subject:

My February 4, 2004 letter **(Exhibit "T-3")**

"Dear Mr. Mendelsohn:

I hereby request that you identify the content of the completely '*ex parte in camera*' submission you made to the Court in response to Judge Milliken's January 14, 2004 deadline – as to

which you did not see fit to even provide me with a copy of your transmitting coverletter.

Unless a coverletter identifying the transmitted documents did not accompany your submission, please furnish me with a copy without delay.

It is my position that whether as a coverletter or otherwise, compliance with Judge Milliken's directive on December 3, 2003 required you to provide a superseding response to the 22 requests for 'documents and tangible objects', enumerated by my August 12, 2003 First Discovery Demand. Further, as to records requested by items #5-10, 12, 16, 17, 22 of my Discovery Demand – which, *without elaboration*, your previous October 3, 2003 response claimed did 'not exist'[fn.1] -- you were required to identify whether, upon completing the search Judge Milliken directed, such records as you were continuing to purport did 'not exist' had been destroyed. As to this issue, Judge Milliken expressly recognized:

> 'The judge is obliged to look into the destruction of discoverable material and then assess its impact under pertinent authorities.' (p. 38, lns. 15-17)

I await your expeditious response.

Thank you."

37. For the Court to take no action, both by not itself identifying to me what Mr. Mendelsohn had submitted *ex parte* AND by not directing Mr. Mendelsohn to respond to my February 4th letter (Exhibit "T-3"),

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fn.1 "*See* my October 30, 2003 motion to enforce my discovery rights and the prosecution's disclosure obligations, pp. 20-24."

reflects an unconscionable disregard for my most fundamental due process right to notice and opportunity to be heard with respect to the sufficiency of Mr. Mendelson's "*ex parte in camera*" submission.

My Entitlement to Postponement/Continuance of the March 1, 2004 Trial Date, Chargeable to the Government or the Court, Pending Responsive, Written Adjudication of my Still-Outstanding October 30, 2003 Discovery/Disclosure/Sanctions Motion

38. At the December 3rd oral argument, Judge Milliken ruled that I had "a 16(D)(2) remedy of Court ordered discovery. That's what has to happen..." (Exhibit "W", p. 10, lns. 1-2), stating further,

> "I do rule that the remedy is Court ordered discovery...look at our local criminal Rule 16(D)(2). You'll see that the very first recommended sanctions are discovery and continuance to allow for lawful discovery and with a recast of the obligation on the Government, that's the road I send you down." (p. 30, lns. 5-11).

39. For this reason, Judge Milliken replaced the January 14, 2004 date that Judge Wertheim had scheduled for the trial – and made it the date by which Mr. Mendelsohn was to turn over for the Court's inspection the "documents and tangible objects" sought by my First Discovery Demand. (Exhibit "W", p. 12, lns. 5-6; 12-13). He then stated,

> "If there is a determination to disclose, it'll go to the defendant early in February if not late January and I'll give notice to the Government after that which is disclosed." (p. 13, lns. 4-8).

40. It is now already the last week in February, with no word whatever from the Court as to its "determination to disclose" any of Mr. Mendelsohn's "*ex parte in camera*" production of "documents and tangibles".

41. Based on my October 30, 2003 motion – and, in particular, pages 7-20, which I expressly identified at the December 3rd oral argument as establishing "materiality" (Exhibit "W", p. 26, lns. 6-15) and whose review Judge Milliken thereafter acknowledged as appropriate for this Court (p. 36, lns. 1-8) -- a fair and impartial tribunal would have promptly made a "determination to disclose" most, if not all, of the "documents and tangible objects" sought by my First Discovery Demand – assuming Mr. Mendelsohn had produced them for *in camera* inspection.

42. As Judge Milliken did not identify any item among my 22 requests for "documents and tangible objects" that Mr. Mendelsohn was relieved of complying with, his production was required as to all 22 such requests. Indeed, Judge Milliken recognized that the Court must evaluate not only what is to be disclosed, but whether Mr. Mendelsohn "has produced in camera what's required" (Exhibit "W", p. 36, lns. 1-3) and, further, to the extent he claims that records do not exist, must state whether it is because they have been destroyed because "[t]he judge is obliged to look into the destruction of discoverable material and then assess its impact under pertinent authorities" (p. 38, lns. 15-17).

43. Rule 16 (a)(1)(C) entitles me to rulings on my requested "documents and tangible objects" – including a ruling as to whether Mr. Mendelsohn produced them for *in camera* inspection and, if not, why not. Such is NOT merely for purposes of my "defense", as for instance, at trial, but for "the preparation of [my] defense". This has not been afforded, with the result that my trial preparations, including issuance of subpoenas to

witnesses pertaining to the events embraced by these records, have been impeded.

44. Pursuant to Rule 16(d)(2), postponement/continuance of the scheduled March 1, 2004 trial date must be ordered. Such is properly chargeable to Mr. Mendelsohn, whose wilful failure to furnish me with any information as to what he transmitted to the Court for *in camera* inspection is inexcusable and, which, from the title description given me by Mr. Cipullo – as recited by my January 30th letter (Exhibit "T-2", p. 2) -- is patently non-compliant with Judge Milliken's directive.

45. Such postponement/continuance would restore my legitimate rights, trampled upon by this biased Court in depriving me of notice and opportunity to be heard as to the sufficiency of Mr. Mendelsohn's *in camera* transmittal and in failing to make the substantive adjudications called for by Judge Milliken -- and compelled by my October 30, 2003 motion.

46. The serious and substantial issues documented by my October 30, 2003 motion, not only as to my discovery rights and the Government's disclosure obligations, but as to the Government's knowledge that it had NO basis in fact or law to prosecute and maintain this criminal case against me for "disruption of Congress", require judicial adjudication that is responsive and written. No trial date is properly set until a reasoned adjudication is rendered by a fair and impartial tribunal, addressed to the clearly dispositive, evidentiarily-established facts in the record and the law pertaining thereto. This includes adjudication with respect to my uncontested sworn statement, obscured by Judge Milliken (Exhibit "W", p. 15, lns. 11-15), that the videotape of the Senate Judiciary Committee's May 22, 2003 "hearing" does NOT support the underlying prosecution documents and, specifically, does NOT

support the recitation of "events and acts" in the amended "Gerstein"[10].

WHEREFORE, it is respectfully prayed that the relief requested in the accompanying notice of motion be granted.

_____s/_____
ELENA RUTH SASSOWER

Sworn to before me this
23rd day of February 2004

_____s/_____
Notary Public

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[10] *See, inter alia*, my affidavit in support of my October 30, 2003 motion (¶¶17-18, 29) and my December 31, 2003 affidavit in opposition to the prosecution's motion *in limine* (¶¶11-19).